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**THE SECOND AMENDMENT IN THE NEW
SUPREME COURT**

THE FEDERALIST SOCIETY—2019

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PREFACE

The Second Amendment of the United States Constitution states: “A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.” In this Issue of the *Harvard Journal of Law & Public Policy* we have the privilege of publishing an Essay in which Professor Renée Lettow Lerner describes this right as most reflecting the spirit of a free people—the spirit of self-reliance and resistance to oppression. The Supreme Court too has recognized the importance of the right to keep and bear arms in *District of Columbia v. Heller*, holding that the Second Amendment protects the right to possess handguns within the home, and *McDonald v. City of Chicago*, applying the Second Amendment to the States. The Court however has left many questions open regarding the scope of the right. The Federalist Society hosted an event called “The Second Amendment in the New Supreme Court” in January 2019 to provide guidance on a few of these remaining questions.

In addition to Professor Lerner’s Essay based on her keynote address, we have the honor of presenting four Essays from the event in this Issue. In the first two, Dr. Stephen Halbrook and Jonathan Taylor debate the question: “Does the right to bear arms include a right to carry handguns in public?” In the second two, Mark Smith and Jonathan Lowy debate the question: “Are semiautomatic rifles, aka ‘assault weapons,’ protected by the Second Amendment?” Special thanks are due to the editors from other law schools who volunteered to stay on for another issue to edit these Essays. We could not have published this event without their exceptional work.

These Essays are followed by three excellent Articles on current legal issues. The first Article we present in this Issue, by Ryan T. Anderson, considers the cases *Bostock v. Clayton County* and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC* currently pending before the Supreme Court. He argues that the Supreme Court should not redefine the word “sex” in Title VII of the Civil Rights Act to extend to discrimination on the basis of sexual orientation and transgender status. Next, Professor Nicholas Kahn-Fogel takes an in-depth look at Justice Gorsuch’s dissent

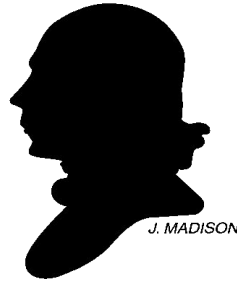
in *Carpenter v. United States*, analyzing his approach to Fourth Amendment searches. He argues that Justice Gorsuch's traditional property-based approach may ultimately be broad and flexible enough to implicate the same concerns as the Court's method in *Katz v. United States* that Justice Gorsuch rejects. Finally, Professor Michal Lavi considers the question of whether online intermediaries should bear liability for use of their platforms by terrorists. She argues for criminal and civil law approaches which balance free speech and the harms of terrorist attacks.

We are always delighted to publish one of our own. We close this Issue with a Note from Eli Nachmany who argues that laws imposing qualifications on whom the President is able to nominate to executive branch officials violate the Appointments Clause of the Constitution. He cautions against complete disregard of such laws, but provides factors the President and Senate should consider in deciding whether to contravene one.

I am continually grateful for the hard work and dedication of the *Journal* editors. This Issue would not have been possible without them. In particular, Deputy Editor-in-Chief R.J. McVeigh rewrote our editing competition and provided wise counsel. Articles Chair Jacob Thackston worked tirelessly managing our submissions and article selection process, often on short deadlines. Hugh Danilack coordinated our outside editors on top of doing fantastic editing as a Managing Editor. Aaron Gyde, also a Managing Editor, put in countless hours of exceptional and thoughtful editing work. Dylan Soares, our Chief Financial Officer, generously undertook the time-consuming work of managing the *Journal's* business affairs. Aaron Hsu answered all my tricky editing questions and helped out any way he could. And Dallin Earl was always around to listen and provide encouragement. These individuals—and all those who worked on this Issue—exemplify the *Journal's* excellence.

Nicole M. Baade
Editor-in-Chief

THE FEDERALIST SOCIETY



presents

The Second Amendment in the New Supreme Court

January 15, 2019

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THE SECOND AMENDMENT AND THE SPIRIT OF THE PEOPLE

RENÉE LETTOW LERNER*

Of all the rights in the U.S. Constitution, the right to keep and bear arms most reflects the spirit of a free people. It is the spirit of resisting oppression. That oppression can come in different forms: oppression by the government, and oppression by private thugs. As we'll see, the United States is not the only place where that spirit exists. It's growing in other places around the world.

Jordan Peterson reminds us—if we needed reminding—that some persons are genuinely malevolent.¹ They wish us harm. We must say “no,” early in the cycle of oppression, and mean what we say. To do that, he says, takes aggression.²

That is true, but a better word for the quality that's needed is “spirit” or “spiritedness.” This is the quality that the ancient Greeks called *thumos*.³ Good *thumos* is the emotion that drives virtue. It is indispensable to having and keeping virtue. It is the spirit that resists oppression, that causes one to stand up for oneself, one's family, and one's community. It is the spirit of courage. And it is the spirit of self-reliance.

Self-reliance was famously a classic characteristic of the American people. The American people settled a continent in the face of staggering dangers. There are many great accounts of this. One of the best, in my opinion, is Laura Ingalls Wilder's *Little House* books. Wilder has a long description of Pa carefully

* Donald Phillip Rothschild Research Professor of Law, George Washington University Law School. This Essay is a lightly edited version of Professor Lerner's keynote address at the Federalist Society's event, “The Second Amendment in the New Supreme Court,” held on January 15, 2019.

1. JORDAN B. PETERSON, 12 RULES FOR LIFE: AN ANTIDOTE TO CHAOS 24 (2018).

2. *Id.* at 23–24.

3. THE REPUBLIC OF PLATO 119–22 (Allan Bloom trans., 2nd ed. 1991) (439d–442c). Bloom translates *thumos* as “spirit” or “spirited part.”

cleaning his rifle.⁴ She helped him, as a six-year-old girl. She also describes Pa at the hearth in their log cabin, casting bullets. And again, she helped him. She even helped him load the rifle. That rifle, she makes clear, was absolutely essential to feeding the family, because of hunting, and to protecting the family. When Pa wasn't carrying it, they kept it, fully loaded, on hooks on the wall of their cabin⁵—a cabin that was full of young children. There is never a hint, in Wilder's books, that there was the least danger of accidental use. The past tells us a lot about the present.

In certain circles these days, self-reliance is not a popular virtue. The argument goes, we no longer live on the frontier. We have a specialized police force. It will keep us safe.

Really? Violent crime has not disappeared. But in America, it is localized.

The fear of violent crime doesn't affect me personally much at all. I don't live in a high-crime neighborhood. I never have. Most other suburban soccer moms haven't either. I grew up, and I currently live in, McLean, Virginia. A place that I sometimes call "the mean streets of McLean." (My family roll their eyes.)

But mean streets, and mean places, are not a joke for many persons. A friend of mine became interested in carrying a gun for self-defense because of a new job. That job was being a clerk on the graveyard shift at a motel on Route 1 in Howard County, Maryland. After my friend had quit his previous job and started work at the motel, he found out the reason for the job opening. The previous night clerk had been shot dead by a person robbing the motel. A police officer who stopped by from time to time suggested that he get a permit and a gun. Such permits were very hard to get. The police approved his application, though, maybe because they felt bad about never solving the murder at the hotel. He got a gun right away after that and carried it.

4. LAURA INGALLS WILDER, *LITTLE HOUSE IN THE BIG WOODS* 45–53 (Harper Trophy 1971) (1932).

5. *Id.* at 51 ("The gun was always loaded, and always above the door so that Pa could get it quickly and easily, any time he needed a gun.").

Of course for persons who live in high-crime neighborhoods, these sorts of problems are routine. There's a considerable risk, if you're walking alone at night, that you will be robbed. That is something it's easy to forget when you're a suburban soccer mom, or otherwise upper-middle class. Suburban soccer moms are not likely to hear much about the many times that firearms are used in self-defense—over 67,000 times per year, according to a study by a pro-gun-control group using data compiled by the FBI.⁶ That's considered a low estimate.⁷

But what a suburban soccer mom is likely to hear about, a great deal, are mass shootings. These mass shootings play on the fears of an already quivering and anxious society. And so the call goes out: Do something about it! And here's where complete irrationality sets in. Because the shooter used this particular gun or this particular part, we must ban them.⁸

What really creates the danger is not the legality of this or that part. What really creates the danger is so-called "gun-free zones." Every major recent mass shooting was in a "gun-free zone."⁹ Gun-free zones are death traps. Mass shooters know it. We sometimes think of mass shooters as totally crazy, but they're not. They are rational, in that they deliberately target gun-free zones, because they know the persons in them are sitting ducks. They can't fire back. They can't defend themselves. Mass shooters know they'll be able to kill a lot more persons that way.

6. VIOLENCE POLICY CTR., FIREARM JUSTIFIABLE HOMICIDES AND NON-FATAL SELF-DEFENSE GUN USE: AN ANALYSIS OF FEDERAL BUREAU OF INVESTIGATION AND NATIONAL CRIME VICTIMIZATION SURVEY DATA 6 (2015), <http://vpc.org/studies/justifiable15.pdf> [https://perma.cc/9UKR-TWXP].

7. Mark W. Smith, *More People Use a Gun in Self-Defense Each Year Than Die in Car Accidents*, FEE (July 12, 2018), <https://fee.org/articles/more-people-use-a-gun-in-self-defense-each-year-than-die-in-car-accidents/> [https://perma.cc/LW6R-D3XP] (noting 67,740 is a "very conservative" estimate and some studies estimate up to 2.5 million defensive firearm uses per year).

8. See, e.g., Martin Kaste, *The Politics Of Bump Stocks, 1 Year After Las Vegas Shooting*, NPR (Sept. 26, 2018, 5:14 AM), <https://www.npr.org/2018/09/26/650454299/the-politics-of-bump-stocks-one-year-after-las-vegas-shooting> [https://perma.cc/Q7LK-UETL].

9. NELSON LUND, THE RIGHT TO ARMS AND THE AMERICAN PHILOSOPHY OF FREEDOM 16–17 (Heritage Found., First Principles No. 62, 2016), <http://thf-reports.s3.amazonaws.com/2016/FP-62.pdf> [https://perma.cc/B3JZ-XDPB]; see also CRIME PREVENTION RESEARCH CTR., THE MYTHS ABOUT MASS PUBLIC SHOOTINGS: ANALYSIS 10–11 (2014), <https://crimeresearch.org/wp-content/uploads/2014/10/CPRC-Mass-Shooting-Analysis-Bloomberg2.pdf> [https://perma.cc/5H3G-PGSW].

But instead of realizing that “gun-free zones” are the danger, politicians rush to say that they want to ban this or that device that was used.¹⁰ How effective is that? Let’s take a look. In 1764, the Italian enlightenment criminologist Cesare Beccaria had something to say about gun control.¹¹ He is much beloved of Progressives these days because he opposed the death penalty.¹² In his own time, he was famous throughout Europe, and also influential with the Founders of this country.¹³ Let’s hear what he wrote about gun control:

False is the idea of utility that sacrifices a thousand real advantages for one imaginary or trifling inconvenience; that would take fire from men because it burns, and water because one may drown in it; that has no remedy for evils, except destruction. *The laws that forbid the carrying of arms are of such a nature.* They disarm those only who are neither inclined nor determined to commit crimes.¹⁴

He goes on to say that anyone who’s prepared to violate laws against robbery and murder would also violate laws against carrying arms. And he says that a ban on carrying arms “would put an end to personal liberty.”¹⁵

Two and a half centuries ago, Beccaria nailed it. With gun control laws, criminals find a way to get firearms, while law-abiding citizens are disabled. The best example of this is the United Kingdom. The U.K. government boasts that it has some of the strictest gun control laws in the world.¹⁶ Since 1997, following a mass shooting at a school, handguns were confiscated.¹⁷ It’s virtually impossible to get a license to keep or carry a

10. See, e.g., Kaste, *supra* note 8.

11. CESARE BECCARIA, ON CRIMES AND PUNISHMENTS 87–88 (Henry Paolucci trans., Bobbs-Merrill Educ. Publ’g 1963) (1764).

12. *Id.* at 45–52.

13. JOHN D. BESSLER, THE CELEBRATED MARQUIS: AN ITALIAN NOBLE AND THE MAKING OF THE MODERN WORLD (2018).

14. BECCARIA, *supra* note 11, at 87–88 (emphasis added).

15. *Id.* at 88.

16. See LUND, *supra* note 9, at 15.

17. *Id.*; see also Richard Williams, *Why Britain’s shooters should stop whinging about pistol ban*, GUARDIAN (Jan. 16, 2006, 9:53 PM), <https://www.theguardian.com/sport/2006/jan/17/comment.gdnsport3> [<https://perma.cc/774D-2JEH>].

handgun. The U.K. international pistol shooting team has to go to Switzerland to practice.¹⁸

What happened next? Crimes involving handguns increased by nearly 40 percent in the next two years, and had doubled by 2009.¹⁹ Just in late December 2018 there was an article in the *Guardian* about how floods of illegal firearms are entering the United Kingdom, smuggled by organized crime rings.²⁰ The U.K. police have made seizing illegal firearms a top priority, but they admit they can't keep up. Among the most popular of these illegal firearms? Handguns.²¹ And that's exactly the sort of ban that gun control advocates in the United States desire.

Conversely, what do we see when the population is—legally—armed? In 1987, Florida became the first state with major urban populations to ensure that almost all law-abiding adults can get a concealed carry permit.²² Gun control advocates hysterically predicted murder and mayhem on Florida streets. In fact, violent crime went down. License holders almost never misused their weapons.²³ Florida's successful law prompted other states to do the same. Social scientists have yet to find any adverse effect on public safety.²⁴

The evidence is overwhelming that gun control not only does not promote public safety, it affirmatively endangers us. So why does this impulse persist? In part, it's the usual human irrationality and foolishness. But there is also another component that is deeper. That is, distrust of the people and the desire to make the people dependent on the government. Ultimately, this leads to the end of government by the people.

To see that, we need to take a look at the rationales and history of the right to keep and bear arms. The best exploration of the liberal philosophic basis of the right to keep and bear arms

18. Williams, *supra* note 17.

19. LUND, *supra* note 9, at 15.

20. Vikram Dodd, *Police struggle to stop flood of firearms into UK*, *GUARDIAN* (Dec. 27, 2018, 1:00 PM), <https://www.theguardian.com/world/2018/dec/27/police-struggle-to-stop-flood-of-firearms-into-uk> [<https://perma.cc/2TCT-E56Q>].

21. *Id.*

22. LUND, *supra* note 9, at 3.

23. *See id.*

24. *See id.*; *see also* JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (3d ed. 2010).

that I know of is in an article by Nelson Lund.²⁵ Liberal thinkers such as John Locke, William Blackstone, Beccaria, and Adam Smith all linked freedom from political oppression with self-defense and personal safety.²⁶ The right to bear arms, they said, was necessary for both.

Blackstone was central to the U.S. Founders' understanding of law. He wrote that the right to keep and bear arms was indispensable to protect what he called "the three great and primary rights, of personal security, personal liberty, and private property."²⁷ He wrote that this right is the "right of resistance and self-preservation, when the sanctions of society and laws are found insufficient to restrain the violence of oppression."²⁸

And so it was for the Framers of the U.S. Constitution. The Second Amendment has a preface about the militia because the new Constitution gave the federal government power over the state militias.²⁹ The militia in those days consisted of all able-bodied men. Some Americans were concerned that the federal government would use this power over the militia to disarm the people.

That was the origin of the right: to protect personal security, personal liberty, and private property. Unfortunately, ruling classes over time have taken away the right to keep and bear arms from disfavored groups. The English did this right away, when Parliament passed the English Bill of Rights in 1689.³⁰ The right to arms in the English Bill of Rights was limited to Protestants only.³¹ Catholics, a suspect and disfavored group, could be disarmed.

The English decided they needed control over not only Catholics, but over the lower orders. The so-called "Game Laws" restricted ownership and use of weapons by servants and

25. See LUND, *supra* note 9.

26. *Id.* at 4, 8–10, 13.

27. 1 WILLIAM BLACKSTONE, COMMENTARIES *136.

28. *Id.* at *139.

29. LUND, *supra* note 9, at 4–5.

30. An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1689, 1 W. & M. 2 c. 2, 143, para. 14 ("That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.").

31. *Id.*; see also JOYCE LEE MALCOLM, TO KEEP AND BEAR ARMS: THE ORIGINS OF AN ANGLO-AMERICAN RIGHT 122–23 (1994).

laborers.³² Ostensibly, the laws limited hunting, which the upper classes wanted to keep as their own preserve. But Blackstone and American commentators wrote that in fact this was a means of political control.³³

Americans had their own disfavored groups. After the Civil War, these included African-American freedmen.³⁴ In the former Confederate states, groups were going around confiscating the firearms of freedmen.³⁵ Thanks to Stephen Halbrook for highlighting this history. In response to these confiscations, Congress passed the Civil Rights Act of 1866, guaranteeing to freedmen the right to keep and bear arms. The Fourteenth Amendment, ratified two years later, is widely understood to have, at a minimum, constitutionalized the Civil Rights Act of 1866.³⁶

In the twentieth century, along with the expansion of regulatory government generally, the regulation of firearms expanded.³⁷ State and federal governments imposed heavy taxes. They prohibited or limited sale of certain types of firearms. And yes, they created “gun-free zones.” Some of them imposed complete bans on possession of handguns. And made it almost impossible for law-abiding citizens to carry a gun for self-protection.³⁸

These regulations affected primarily ordinary persons. Not persons who are upper-middle class. This was—and is—so for two reasons. First, upper-middle-class persons are usually safe. They live in safe neighborhoods, work in safe offices, and have safe means of transport.³⁹ They are insulated from the types of dangers that many ordinary persons have to face. Gun control regulations don’t make much difference in their lives.

32. C. Kevin Marshall, *Why Can't Martha Stewart Have a Gun?*, 32 HARV. J.L. & PUB. POL'Y 695, 719–23 (2009).

33. *Id.* at 719–28.

34. STEPHEN P. HALBROOK, FREEDMEN, THE FOURTEENTH AMENDMENT, AND THE RIGHT TO BEAR ARMS, 1866–1876, at 27, 146 (1998).

35. *Id.*

36. *Id.* at 33–38.

37. LUND, *supra* note 9, at 5.

38. *Id.*

39. *Id.* at 14.

And, if such regulations ever do begin to bite, the upper-middle class and above can create exceptions. It was telling that William F. Buckley, Laurence Rockefeller, and Arthur Ochs (“Punch”) Sulzberger, the publisher of the gun-control-crusading *New York Times*, all had a permit to carry a firearm in New York City.⁴⁰ Bernie Goetz, after he had been assaulted and beaten on the subway, was denied one.⁴¹

This brings us to an interesting point about gun control advocates. They are not exclusively progressive Democrats. They include prominent conservatives, such as George Will, the late Charles Krauthammer, and George W. Bush.⁴² What do these persons have in common? They are or were upper-middle class at least, and they are or were safe.

It’s appropriate to analogize gun control today with the English game laws. In other words, it’s designed by the ruling class to keep control of ordinary persons.

Judges and lawyers are very much members of this ruling class, the upper-middle class. They are safe. Not only that, judges are well-protected in their workplaces. Threats against judges are taken very seriously by law enforcement. That might help explain why—apart from the slim majorities and limited holdings of *District of Columbia v. Heller*⁴³ and *McDonald v. City of Chicago*⁴⁴—judges have been reluctant to enforce rights to firearms. *They don’t see the need*. Justice Thomas has highlighted the point about judges being safe and not understanding the situation of ordinary persons.⁴⁵ He is one of the few justices who has lived in a poor and high-crime neighborhood.

40. Clayton E. Cramer & David B. Kopel, “Shall Issue”: *The New Wave of Concealed Handgun Permit Laws*, 62 TENN. L. REV. 679, 684 (1995).

41. Richard Stengel, *A Troubled and Troubling Life*, TIME (Apr. 8, 1985), <https://web.archive.org/web/20130602033237/http://www.time.com/time/magazine/article/0,9171,965495,00.html?iid=chix-sphere> [<https://perma.cc/8N35-U4N6>].

42. LUND, *supra* note 9, at 2, 14.

43. 554 U.S. 570, 635 (2008).

44. 561 U.S. 742, 791 (2010).

45. *Peruta v. California*, 137 S. Ct. 1995, 1999–2000 (2017) (Thomas, J., dissenting from the denial of certiorari) (“For those of us who work in marbled halls, guarded constantly by a vigilant and dedicated police force, the guarantees of the Second Amendment might seem antiquated and superfluous. But the Framers made a clear choice: They reserved to all Americans the right to bear arms for self-defense. I do not think we should stand by idly while a State denies its citizens that right, particularly when their very lives may depend on it. I respectfully dissent.”).

There are signs that the ordinary people of other countries are getting fed up with being told by the safe ruling class that they can't have guns. In 2006, I wrote about the clash between the people and elites on gun control and self-defense laws in the United Kingdom and Belgium.⁴⁶ Populist movements now have made relaxing restrictions on guns a central policy.

In Italy, there's been a sharp jump in the number of persons who say gun restrictions should be relaxed.⁴⁷ This is especially true among the less educated and the elderly—the most vulnerable persons. Matteo Salvini, a powerful figure in Italy's populist government, made a campaign pledge to loosen gun control restrictions.⁴⁸ In September, the government did just that, and made it possible to own firearms such as the AR-15. A few years ago, the mayor of a town in the Piedmont, in north-west Italy, promised to pay citizens €250 toward the purchase of a firearm.⁴⁹ The mayor of Florence, who is pro-gun-control, is upset. He said, "We've simplified the way to buy yourself a gun . . . This is an idea of do-it-yourself security."⁵⁰ Exactly. And that's what he can't stand. He wants the government to have a monopoly on legitimate force. I need hardly point out that the extensive and immensely powerful crime organizations in Italy are heavily armed with automatic weapons and do not bother with licenses.⁵¹

Brazil is an even more dramatic case. Brazil is undergoing an epidemic of criminal violence.⁵² Brazil has the lowest rates of

46. Renée Lettow Lerner, *The Worldwide Popular Revolt Against Proportionality in Self-Defense Law*, 2 J.L. ECON. & POL'Y 331, 344–53 (2006).

47. *Sharp rise in Italians in favour of loosening gun control*, LOCAL (June 27, 2018, 3:52 PM), <https://www.thelocal.it/20180627/italy-gun-control-survey> [<https://perma.cc/KYN4-K38Q>].

48. Emma Johanningsmeier, *Italy Loosens Gun Laws as Matteo Salvini Polishes His Tough Guy Image*, N.Y. TIMES (Nov. 7, 2018), <https://nyti.ms/2z5EgeH> [<https://perma.cc/93EE-85DL>].

49. *Italian mayor offers 'gun bonus' to citizens*, LOCAL (Oct. 21, 2015, 11:14 AM), <https://www.thelocal.it/20151021/italian-mayor-offers-bonus-to-gun-buying-citizens> [<https://perma.cc/6TMU-JPMM>].

50. Johanningsmeier, *supra* note 48 (internal quotation marks omitted).

51. Monica Massari, *Guns in the Family: Mafia Violence in Italy*, in SMALL ARMS SURVEY 2013: EVERYDAY DANGERS 75, 75–101 (2013).

52. Shasta Darlington, *Brazil's New Leader Wants to Ease Gun Laws. Supporters Are Ready, and Training.*, N.Y. TIMES (Dec. 1, 2018), <https://nyti.ms/2zzofxA> [<https://perma.cc/3X8G-78NT>] [hereinafter *Brazil's New Leader*]; see also Shasta Darlington,

legitimate gun ownership in the region and huge numbers of firearms in the hands of criminals.⁵³ In February 2018, the Brazilian government sent the army to deal with a wave of violent crime in Rio de Janeiro.⁵⁴ Ordinary persons are wearing bullet-proof vests, and trying to bullet-proof their homes and cars.⁵⁵ School children in poor neighborhoods have become used to lying on the floor during shootouts. Rates of armed robbery are astronomical. Criminals raid courthouses, where large amounts of firearms are stored as evidence in criminal cases.⁵⁶

In 2003, Brazil's Congress enacted a gun-control law that is appropriately called the Disarmament Statute.⁵⁷ Faced with an onerous registration process, many Brazilians surrendered their firearms. It's no wonder that Jair Bolsonaro's campaign promises to relax firearms restrictions proved popular.⁵⁸ In anticipation of a change, ordinary Brazilians are training at gun ranges.⁵⁹ One of them, Natalia Ortega in São Paulo, said this: "Right now, only the criminals have guns . . . I'm not going to run around the streets with a gun in my hand, but a criminal might think twice if normal citizens could be armed."⁶⁰

Bolsonaro Signs Decree Making It Easier for Brazilians to Buy Guns, N.Y. TIMES (Jan. 15, 2019), <https://nyti.ms/2Hd8YsH> [<https://perma.cc/6866-FHGT>] [hereinafter *Bolsonaro Signs Decree*].

53. *Eye for an Eye: Brazil's Bolsonaro Loosens Gun Control to Limit Gun Violence*, SPUTNIK (Jan. 6, 2019, 10:09 PM), <https://sputniknews.com/latam/201901061071264030-brazil-gun-violence-control/> [<https://perma.cc/MWC3-UBB2>]; Samantha Pearson & Luciana Magalhães, *Brazil's New Leader Eases Gun Restrictions in Bid to Combat Violence*, WALL STREET J. (Jan. 15, 2019, 12:43 PM), <https://www.wsj.com/articles/brazils-new-leader-eases-gun-restrictions-in-bid-to-combat-violence-11547568308> [<https://perma.cc/V5TB-D4JZ>].

54. Ciara Nugent, *How Far-Right Presidential Candidate Jair Bolsonaro Could Transform Brazil*, TIME (Oct. 25, 2018), <https://time.com/5433379/brazil-bolsonaro-policies/> [<https://perma.cc/7R5W-S6NC>].

55. *Eye for an Eye*, *supra* note 53.

56. *Id.*

57. Darlington, *Brazil's New Leader*, *supra* note 52.

58. Darlington, *Bolsonaro Signs Decree*, *supra* note 52; Paulo Trevisani, *Bolsonaro Further Eases Brazilians' Access to Guns*, WALL STREET J. (May 8, 2019, 3:46 PM), <https://www.wsj.com/articles/bolsonaro-further-eases-brazilians-access-to-guns-11557344770> [<https://perma.cc/2S4B-K9C6>].

59. Darlington, *Bolsonaro Signs Decree*, *supra* note 52.

60. Darlington, *Brazil's New Leader*, *supra* note 52 (internal quotation marks omitted).

Sometimes these populist movements are derided as fascist. The motive to allow ordinary citizens to have firearms is not fascist. How do we know that? What fascist movements do when they come to power is to confiscate the firearms of disfavored groups and political opponents. That is exactly what the National Socialist Party did in Germany, when it seized power.⁶¹ They confiscated the guns of Jews and of Social Democrats. Again, thanks to Stephen Halbrook for writing about this. The National Socialists did not want armed resistance to their violent plans.

What we're seeing in the United States, in Italy, and in Brazil is a response to ordinary citizens' genuine concerns about safety. This movement is in the liberal tradition. This is the tradition I described of Locke, Beccaria, Blackstone, and Adam Smith.

In contrast, the gun control movement is rooted in an illiberal tradition. We've seen that it's impervious to facts. What then is driving it? Distrust of the people. And a desire to make the people totally dependent on the government. Unable to think or act for themselves.

The people—especially minorities, women, and the elderly—will increasingly be prey to criminal men.⁶² This breakdown will cause the victims to turn to the government even more. The government, in response to this “crisis” of its own making, will continue to expand its already vast powers and personnel. The people will be devoid of self-reliance. And devoid of *thumos*, spiritedness.

The problem is deep. Spiritedness is necessary for self-government. Without it, we will become a nation of meek persons dictated to by the ruling class. Fortunately, through their devotion to the right to keep and bear arms, many Americans are demonstrating that they have spirit.

61. See STEPHEN P. HALBROOK, *GUN CONTROL IN THE THIRD REICH: DISARMING THE JEWS AND “ENEMIES OF THE STATE”* (2014).

62. See MARK W. SMITH, #DUPED: HOW THE ANTI-GUN LOBBY EXPLOITS THE PARKLAND SCHOOL SHOOTING—AND HOW GUN OWNERS CAN FIGHT BACK 43–44 (2018); Robert J. Cottrol & Raymond T. Diamond, *In the Civic Republic: Crime, the Inner City, and the Democracy of Arms—Being a Disquisition on the Revival of the Militia at Large*, 45 CONN. L. REV. 1605, 1611–16 (2013).

THE RIGHT TO BEAR ARMS: FOR ME, BUT NOT FOR THEE?

DR. STEPHEN P. HALBROOK*

I am going to talk about the right to bear arms, which seems like it would be a simple topic. The Second Amendment provides that “the right of the people to keep and bear Arms, shall not be infringed.”¹ The question being hotly litigated in the minority of states that have enacted so-called discretionary license issuance for carrying handguns² is whether “bear arms” means that you have a constitutional right to carry a firearm outside your home. The words of the Second Amendment alone seem to be conclusive about that—a right to keep arms and a right to bear arms. These are two distinct rights: keeping arms would obviously include keeping them at home.³ “Bear” means nothing if it means you can only carry arms in your home.⁴ It has to mean something more than that. When the Bill of Rights restricts some element of the subject to the home, it says so very clearly. In the Third Amendment, for example, soldiers will not be “quartered in any house” without the consent of the owner, unless in times of war.⁵ The word “houses” appears in the Fourth Amendment in terms of search and seizure issues.⁶ So, when restricting an activity to the home, the Bill of Rights plainly says so.

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1. U.S. CONST. amend. II.
2. See MASS. GEN. LAWS ch. 140, § 131 (2018); N.Y. PENAL LAW § 400.00 (McKinney 2008 & Supp. 2020).
3. See *District of Columbia v. Heller*, 554 U.S. 570, 582–84 (2008).
4. See *id.* at 582–92.
5. U.S. CONST. amend. III.
6. U.S. CONST. amend. IV.

So, really, the word “bear” does nothing unless it means you can carry a firearm. And when reference is made to the right of the people, one would think that includes society at large—individuals at large—and not those who would be chosen by government to exercise a given right.⁷ You cannot imagine regarding the right of the people to assemble in the First Amendment, that the government gets to decide who has that right and that you can get a license to exercise the right only “for good cause” that differs from the situation of the people at large.

That’s the text of the Bill of Rights, and then we move on to *District of Columbia v. Heller*.⁸ The complaint in the case alleged a right to keep arms in the home, and therefore that the D.C. handgun ban was unconstitutional.⁹ And, of course, the Court so held.¹⁰ The decision discusses the right to bear arms as a right to carry arms.¹¹ In fact, Justice Scalia’s opinion goes into great detail in the course of refuting the idea that bearing arms only refers to bearing arms in the militia and about the fact that carrying arms is what bearing arms means.¹² A good quote in the opinion comes from Justice Ginsburg’s decision in an 18 U.S.C. § 924(c) case about what it means to bear arms; she states that bear arms means carrying, for example, a gun in the pocket or otherwise on the person.¹³

The *Heller* decision also refers to restrictions on the Second Amendment right generally.¹⁴ One of those is that you cannot carry in sensitive places, such as schools and government buildings.¹⁵ This seems to imply that, “Aha! Nonsensitive places are places where you *can* carry.” So in addition to that, the decisions that the Court relies on in *Heller* talk about the right actually to carry arms—handguns, for example—and the Court

7. See Robert A. Sedler, *The Enduring Constitution of the People and the Protection of Individual Rights*, 66 MICH. B.J. 1108, 1108–09 (1987).

8. 554 U.S. 570.

9. *Id.* at 575–76.

10. *Id.* at 635.

11. *Id.* at 582–95, 600–03.

12. *Id.* at 580–603, 605–19.

13. *Id.* at 584 (quoting *Muscarello v. United States*, 524 U.S. 125, 143 (1998) (Ginsburg, J., dissenting)).

14. *Id.* at 626–28.

15. *Id.* at 626.

refers to some of the nineteenth-century cases: *Nunn v. State*¹⁶ from Georgia and *Andrews v. State*¹⁷ from Tennessee.¹⁸ In those two states, there were times when the legislature declared a prohibition on carrying handguns, either openly or concealed, and those laws were invalidated.¹⁹ And *Heller*, towards the end of the decision, states that the D.C. law is somewhat like these nineteenth-century laws.²⁰ Such nineteenth-century laws were so extreme in terms of prohibiting the right to bear arms altogether.²¹ By the same token, the District of Columbia was prohibiting the right merely to possess handguns altogether.²²

One more part of *Heller* makes clear that under the Court's decision, although the issue wasn't squarely before the Court, there is a right to carry outside the home. The Court refers to the fact that the Second Amendment has the militia clause, but for the people who lived at the time of the Founding, even more important to them was the right to carry arms for self-defense and for hunting.²³ You don't go hunting in your home, you may or may not have to defend yourself in the home, and certainly militia activities do not take place in the home. So there's a lot in *Heller* to go on here in terms of predicting what might happen in the future in the Court.

If we move on to *McDonald v. City of Chicago*,²⁴ which applied the Second Amendment to the states through the Fourteenth Amendment,²⁵ the very first carry law that the Court refers to in terms of what the Fourteenth Amendment was intended to invalidate was the Mississippi Black Code from 1865, which provided that no African American, no freedman, no freed slave could carry a firearm without some kind of permit from the authorities.²⁶ In fact, those types of statutes pervaded both the slave codes and then later the Black Codes from the early Reconstruction period, requiring a permit that is solely at the

16. 1 Ga. 243 (1846).

17. 50 Tenn. (3 Heisk.) 165 (1871).

18. *Id.* at 608, 612, 614, 629.

19. See *Andrews*, 50 Tenn. (3 Heisk) at 186–87; *Nunn*, 1 Ga. at 243, 246–47, 251.

20. *Heller*, 554 U.S. at 628–29.

21. *Id.* at 629.

22. *Id.* at 628.

23. *Id.* at 599.

24. 561 U.S. 742 (2010).

25. *Id.* at 791.

26. *Id.* at 771.

discretion of the issuing authority in terms of whether the person could have a right to bear arms.²⁷ So, there were a lot of African Americans who were arrested and prosecuted and their guns seized and confiscated under these laws.²⁸ You'll see speeches in Congress about the purpose of the Second Amendment in terms of wanting to get rid of these laws and invalidate them.²⁹

You also have the passage of the Freedman's Bureau Act in 1866, which was enacted by two-thirds of the same Congress that passed the Fourteenth Amendment and sent it to the states for ratification.³⁰ The Freedman's Bureau Act explicitly declared that the rights to personal security and personal liberty include the right to bear arms.³¹ They were referring to the right of African Americans to have the rights of full citizenship, which included the right to carry arms outside the home.³²

Now, there is a third Supreme Court case that suggested *Heller's* demise was like when Mark Twain said, "The reports of my death have been greatly exaggerated."³³ If you remember after *Heller* and *McDonald*, the Supreme Court was not granting certiorari in any Second Amendment cases.³⁴ It was like maybe they are never going to take another one. And then all of a sudden they took a case based solely on the cert petition and the opposition to it from the State of Massachusetts involving a stun gun ban.³⁵

There was a woman who had been threatened and beat up by her ex-boyfriend, and she had a stun gun.³⁶ She had it with her and then was busted in a parking lot with the stun gun, which

27. See *id.* at 771–72.

28. See *id.*

29. See, e.g., *id.* at 775–76.

30. See *id.* at 773, 775–76.

31. *Id.* at 773.

32. *Id.*

33. See Stephen P. Halbrook, *Taking Heller Seriously: Where has the Roberts Court Been, and Where is it Headed, on the Second Amendment?*, 13 CHARLESTON L. REV. 175, 196 (2018).

34. Jonathan H. Adler, *Supreme Court declines to hear Second Amendment case over dissent of two justices*, WASH. POST (June 9, 2015, 10:28 AM), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/06/09/supreme-court-declines-to-hear-second-amendment-case-over-dissent-of-two-justices/> [<https://perma.cc/N6GY-MD4K>].

35. *Caetano v. Massachusetts*, 136 S. Ct. 1027 (2016) (per curiam).

36. *Id.* at 1028 (Alito, J., concurring).

was prohibited under Massachusetts law.³⁷ The Massachusetts Supreme Judicial Court upheld that law,³⁸ and it went to the Supremes, and they said, “Hold on. Your reasoning is totally out of whack with what we held in *Heller*.” The weapon does not have to be a type that existed at the time of the Founding, just as *Heller* made clear regarding modern communications and the exercise of free speech and a free press, even though there was no internet at the time of the Founding.³⁹ But under the Speech and Press Clauses, the internet is still protected.⁴⁰ By the same token, types of weapons, if they’re commonly possessed by law-abiding people for lawful purposes, or typically possessed for lawful purposes, are protected by the Second Amendment.⁴¹

And so, the Supreme Court, simply on the basis of the petition in opposition, reversed and remanded to the Massachusetts court and said, “Go back and look at this again under our precedent. You have not been consistent with what we’ve ruled.”⁴² The interesting part about that case, about which there is more detail in Justice Alito’s concurring opinion, is that it took place outside the home.⁴³ So, had the Court thought that there was no right to carry any kind of arm outside the home as guaranteed by the Second Amendment, the Court could have dealt with the case that way. There was no reason to go into the analysis of the type of weapon. So, yes, the Court didn’t make that proposition explicit, but rather seemed to assume that there is a right to carry some kinds of arms outside the home.⁴⁴ That was a 8-0 per curiam opinion assuming that there’s a right to carry outside the home.⁴⁵

As Judge Katsas mentioned, the *Gould v. Morgan*⁴⁶ case out of the First Circuit is one that my colleague Jonathan Taylor and I participated in in different roles. He got to argue. I didn’t get to

37. *Id.* at 1029.

38. *Id.* at 1027 (per curiam).

39. *See id.* at 1030–31 (Alito, J., concurring).

40. *See id.* at 1030.

41. *Id.* at 1030.

42. *See id.* at 1028.

43. *Id.* at 1029 (Alito, J., concurring).

44. *See id.* at 1027–28.

45. *Id.*

46. 907 F.3d 659 (1st Cir. 2018).

do that. But what's funny about these cases, or interesting, is how the turn into ancient history becomes a big part of the case. Specifically, you'll see a lot of briefs about the Statute of Northampton⁴⁷ from the 1300s in England.⁴⁸ And that was 50 years before Chaucer wrote *The Canterbury Tales*.⁴⁹

How many of you remember reading that in high school, *The Canterbury Tales*? We were just high school kids. We thought it was really funny. I remember the phrase, somebody called somebody else a "merry knave"⁵⁰ and a "saucy bumpkin[],"⁵¹ and we thought that was just hilarious.

But the argument seems to be that the statute overrides the Second Amendment because it was passed by a monarch in Medieval England. And that becomes a big part of the briefing.⁵² And it's really fun to do that kind of briefing, but like the D.C. Circuit said in *Wrenn v. District of Columbia*⁵³ that overturned D.C.'s discretionary license issuance regime, that we're not turning the clock back to the time of Chaucer, and that's not what the Second Amendment talks about.⁵⁴ It talks about the right to bear arms.⁵⁵ Look at the text and the structure, and look at the different decisions. Look at the *Heller* and *McDonald* cases. We're not going to be bound by those old laws.⁵⁶

47. 1328, 2 Edw. 3 c. 3.

48. See e.g., Brief of *Amicus Curiae* Patrick J. Charles in Support of Neither Party at 22–30, *N.Y. State Rifle & Pistol Ass'n v. City of New York*, No. 18-280 (U.S. May 14, 2019); Brief of the Cato Institute and History Professor Joyce Lee Malcolm as *Amici Curiae* in Support of Respondent at 16–19, *District of Columbia v. Heller*, 554 U.S. 570 (2008) (No. 07-290).

49. Nevill Coghill, *Introduction to GEOFFREY CHAUCER, THE CANTERBURY TALES*, at xi, xvi (Nevill Coghill trans. & ed., Penguin Books 2003) (1476) (noting that Chaucer began writing *The Canterbury Tales* in 1386 or 1387).

50. CHAUCER, *supra* note 49, at 92.

51. *Id.* at 230.

52. See *supra* note 48.

53. 864 F.3d 650 (D.C. Cir. 2017).

54. See *id.* at 660.

55. See *id.*

56. See *District of Columbia v. Heller*, 554 U.S. 570, 603 (2008) ("It is dubious to rely on such history to interpret a text that was widely understood to codify a pre-existing right, rather than to fashion a new one."); see also *McDonald v. City of Chicago*, 561 U.S. 742, 817–18 (2010) (Thomas, J., concurring in part and concurring in the judgment) (discussing the colonists view of certain inalienable rights that transcended English laws).

What the Statute of Northampton did was to prohibit riding or going armed.⁵⁷ And it also had language about doing so to the terror of the King's subjects.⁵⁸ And the way the English courts ended up construing that statute was it was an offense to go armed only if you did so in a manner that terrified other people.⁵⁹ So if you were carrying concealed, obviously, you wouldn't be doing that. Or if you were simply peacefully going about your business, you wouldn't be doing that.

But anyway, in that debate there's *Sir John Knight's Case*⁶⁰ from 1686.⁶¹ The court agreed with the construction of the Statute of Northampton that it only precluded going armed to the terror of other people.⁶² Then you get to William Hawkins and Blackstone, and all of these people.⁶³ So you'll have a lot of arguments. It's really fun arguing these really old authorities, but they don't count as much when you look at the text of the amendment and the fact that we have *Heller* and *McDonald* giving a lot of guidance in terms of what the amendment protects.⁶⁴

And we also have to look at the unique situation here in the United States. What parts of the common law did the colonists carry over? The first declaration of rights to mention the right to bear arms was that of Pennsylvania in 1776.⁶⁵ And it referred to the right of the people to bear arms for defense of themselves and the state—clearly an individual right.⁶⁶ You had different variations of that being adopted before the Second Amendment

57. Stephen P. Halbrook, *The Right of "The People" to "Bear Arms": The Common Law, the Second Amendment, and the Carrying of Firearms Outside the Home 7–8* (March 19, 2019) (unpublished manuscript), <https://ssrn.com/abstract=3355601> [<https://perma.cc/ZQ5E-G2TZ>].

58. *Id.*

59. *Id.*

60. (1686) 87 Eng. Rep. 75; 3 Mod. 117.

61. *Wrenn v. District of Columbia*, 864 F.3d 650, 660 (D.C. Cir. 2017) (citing *Knight's Case*, 87 Eng. Rep. 75; 3 Mod. 117).

62. *Id.*

63. See 4 WILLIAM BLACKSTONE, *COMMENTARIES* *149; 1 WILLIAM HAWKINS, *A TREATISE OF THE PLEAS OF THE CROWN* 135 (London, Eliz. Nutt 1716).

64. See *McDonald v. City of Chicago*, 561 U.S. 742 (2010); *District of Columbia v. Heller*, 554 U.S. 570 (2008).

65. PA. DECLARATION OF RIGHTS art. XIII (1776); see also Stephen P. Halbrook, *The Right to Bear Arms in the First State Bills of Rights: Pennsylvania, North Carolina, Vermont, and Massachusetts*, 10 VT. L. REV. 255, 267–68 (1985).

66. PA. DECLARATION OF RIGHTS art. XIII (1776); see also Halbrook, *supra* note 65, at 268.

by other states.⁶⁷ And then, finally, you have the Second Amendment itself.⁶⁸ And we used to debate whether the Second Amendment referred to a “collective right” of basically nobody to keep and bear arms, the National Guard, or whoever it would be, and that argument became abandoned by the time of *Heller*. You’ll see even in Justice Stevens’s dissent, which talks about an individual right to bear arms in the militia, and that’s the exclusive protection that the amendment provides.⁶⁹

In any case, there’s no question that under these state guarantees there’s a right to bear arms outside the home.⁷⁰ And, in fact, most states do provide for what are called shall-issue license regimes under which, if you meet certain qualifications, like if you pass your background check, have certain training and otherwise, then you can get a permit to carry and that you can carry for self-defense other than in certain places where carrying is banned.⁷¹ And that’s the law in almost all states, but there’s maybe seven or eight states that have discretionary issuance.⁷²

Anyway, what’s the Supreme Court going to do? That’s fun always to speculate about, and we never really know what might happen with that. In the *Wrenn v. District of Columbia* case, D.C.’s law was overturned,⁷³ and the D.C. attorney general reviewed whether to petition the Supreme Court.⁷⁴ And this was in the newspapers.⁷⁵ The attorneys general from other

67. Halbrook, *supra* note 65, at 282–83, 290–92, 301–03 (discussing North Carolina’s, Vermont’s, and Massachusetts’s incorporation of the right to bear arms into their state constitutions and bills of rights).

68. U.S. CONST. amend. II.

69. *Heller*, 554 U.S. at 636–37 (Stevens, J., dissenting).

70. See Halbrook, *supra* note 65, at 314–20.

71. Shawn E. Fields, *Guns, Knives, and Swords: Policing a Heavily Armed Arizona*, 51 ARIZ. ST. L.J. 505, 517–18 (2019); see also *id.* at 518 n.59 (compiling statutes).

72. *Id.* at 518 n.59 (compiling statutes to find that only ten states have discretionary issuance and two of those ten states have the practical equivalent of a shall-issue scheme).

73. 864 F.3d 650, 668 (D.C. Cir. 2017).

74. See Press Release, Office of the Attorney General for the District of Columbia, Attorney General Racine’s Statement on Decision Not to Appeal in *Wrenn v. D.C. and Grace v. D.C. Gun Cases* (Oct. 5, 2017), <https://oag.dc.gov/release/attorney-general-racines-statement-decision-not> [<https://perma.cc/H5QD-LQZN>].

75. See, e.g., Ann E. Marimow, *Appeals court blocks enforcement of District’s strict concealed-carry law*, WASH. POST (July 25, 2017, 4:40 PM), <https://www.washingtonpost.com/local/public-safety/appeals-court-blocks-enforcement->

states where may-issue license laws existed and circuits that have upheld these laws—the First,⁷⁶ Second,⁷⁷ Third,⁷⁸ and Fourth⁷⁹—bore down on the D.C. attorney general, like, “Don’t go there. D.C. you made this mistake once before when you insisted on taking the handgun ban case to the Supreme Court. That ruined everything to start with. That did away with the Second Amendment as only a collective militia right theory. And the Second Amendment does mean something. So don’t do it again.” And the D.C. attorney general, therefore, did not petition the Supreme Court.⁸⁰

So we have three circuits, basically, in agreement that the right extends beyond the home, and that would be the D.C. Circuit,⁸¹ the Seventh Circuit,⁸² and the—well, this is kind of weird: the Ninth Circuit.⁸³ The Ninth Circuit has gone in different directions. First, there was a case called *Peruta v. County of San Diego*,⁸⁴ where the Ninth Circuit, sitting en banc, upheld discretionary license issuance for concealed weapons.⁸⁵ California, during that litigation, also banned open carry of handguns.⁸⁶ But the court refused to deal with that issue.⁸⁷ It started out that the policy of discretionary issuance was invalidated by a panel

of-districts-strict-concealed-carry-law/2017/07/25/29bcbdfc-7146-11e7-9eac-d56bd5568db8_story.html [https://perma.cc/8KKE-DF8U].

76. *Gould v. Morgan*, 907 F.3d 659, 672, 676–77 (1st Cir. 2018) (holding a good-cause statute constitutional under intermediate scrutiny).

77. *Kachalsky v. County of Westchester*, 701 F.3d 81, 101 (2d Cir. 2012) (rejecting the plaintiff’s arguments that New York’s proper cause requirement is facially unconstitutional for overbreadth and unconstitutional as applied).

78. *Drake v. Filko*, 724 F.3d 426, 429 (3rd Cir. 2013) (“[W]e conclude that the requirement that applicants demonstrate a ‘justifiable need’ to publicly carry a handgun for self-defense qualifies as a ‘presumptively lawful,’ ‘longstanding’ regulation and therefore does not burden conduct within the scope of the Second Amendment’s guarantee.”).

79. *Woollard v. Gallagher*, 712 F.3d 865, 876 (4th Cir. 2013) (assuming that a “good-and-substantial reason requirement” is constitutional because it survives intermediate scrutiny).

80. See Press Release, *supra* note 74.

81. *Wrenn v. District of Columbia*, 864 F.3d 650, 661, 668 (D.C. Cir. 2017).

82. *Moore v. Madigan*, 702 F.3d 933, 942 (7th Cir. 2012).

83. *Young v. Hawaii*, 896 F.3d 1044, 1068 (9th Cir. 2018), *reh’g en banc granted*, 915 F.3d 681 (9th Cir. 2019).

84. 824 F.3d 919 (9th Cir. 2016) (en banc).

85. *Id.* at 939.

86. *Id.* at 950 (Callahan, J., dissenting).

87. *Id.* at 942 (majority opinion).

decision, 2-1.⁸⁸ And then, en banc, though, the Ninth Circuit reversed and said that discretionary issuance on concealed weapons is okay, but we're going to close our eyes to whether you can carry firearms openly under the Second Amendment.⁸⁹ And so you have some strong dissents to that.⁹⁰

But then the same issue came up again.⁹¹ The State of Hawaii doesn't issue general licenses to individuals permitting them to carry a firearm outside of their "place of business, residence, or sojourn."⁹² The only license you can get is an open-carry license if you're a security guard.⁹³ And a three-judge panel, with one judge dissenting, held in *Young v. Hawaii*⁹⁴ that can't be the meaning of the Second Amendment.⁹⁵ It's not limited to security guards. And so that panel said that policy was invalid.⁹⁶ And of all things—that was a preliminary injunction case.⁹⁷ It went up to the Ninth Circuit and the Ninth Circuit affirmed at that level under the preliminary injunction standard that the case was sent back for further proceedings.⁹⁸ So as of that decision, the Ninth Circuit is on the record saying that you can carry openly,

88. *Peruta v. County of San Diego*, 742 F.3d 1144, 1179 (9th Cir. 2014), *rev'd*, 824 F.3d 919.

89. *Peruta*, 824 F.3d at 942.

90. *Id.* at 950 (Callahan, J., dissenting) ("In the context of California's choice to prohibit open carry, the counties' policies regarding the licensing of concealed carry are tantamount to complete bans on the Second Amendment right to bear arms outside the home for self-defense, and are therefore unconstitutional."); *id.* at 959–60 (Smith, J., dissenting).

91. See *Young v. Hawaii*, 896 F.3d 1044, 1048, 1068 (9th Cir. 2018).

92. *Id.* at 1048 (quoting HAW. REV. STAT. §§ 134-23, 134-24, 134-25 (LexisNexis 2013)) (internal quotation marks omitted).

93. *Id.* at 1070. To qualify for an exception to the general prohibition against carrying a firearm outside of a residence or place of business, an applicant must show sufficient reason to "fear injury to the applicant's person or property." *Id.* at 1048 (quoting HAW. REV. STAT. § 134-9 (LexisNexis 2013)) (internal quotation marks omitted). Upon a showing of sufficient reason, a police chief may only grant a license where a person "is engaged in the protection of life and property," effectively limiting concealed carry to security guards. *Id.* at 1048 (quoting HAW. REV. STAT. § 134-9 (LexisNexis 2013)) (internal quotation marks omitted).

94. 896 F.3d 1044. The Ninth Circuit decided to rehear the case en banc; therefore, the 2018 decision has no precedential weight. *Young v. Hawaii*, 915 F.3d 681, 682 (9th Cir. 2019) (mem.). The Ninth Circuit has not released the en banc decision yet.

95. See *Young*, 896 F.3d at 1074.

96. *Id.*

97. *Id.* at 1049.

98. *Id.* at 1074.

and that's guaranteed by the Second Amendment,⁹⁹ but not concealed under the en banc *Peruta* decision.¹⁰⁰

So then-Judge Gorsuch on the Tenth Circuit made some comments about Second Amendment issues, but more in terms of felon-in-possession issues,¹⁰¹ and you might have noticed the Court's grant of cert in a case involving whether it's an element of the offense that the government has to prove a felon knew of that status as a prohibited person.¹⁰²

Judge Gorsuch concurred in the judgment in a case where the state court judge caused a defendant to believe that he wasn't a convicted felon because the case was going to be somehow nullified at the end of the probationary period.¹⁰³ The defendant subsequently possessed a firearm, and was prosecuted for it despite that advice.¹⁰⁴ While that was not a carry case, the opinion rendered did involve Second Amendment issues.

As discussed later in this Essay, then-Judge Kavanaugh, who dissented in the *Heller II*¹⁰⁵ case,¹⁰⁶ would have held not only that the D.C. ban on semiautomatic rifles was contrary to the Second Amendment, but also that the D.C. gun registration

99. *Id.* ("But, for better or for worse, the Second Amendment does protect a right to carry a firearm in public for self-defense.").

100. *Peruta v. County of San Diego*, 824 F.3d 919, 924 (9th Cir. 2016) (en banc) ("[T]he Second Amendment does not preserve or protect a right of a member of the general public to carry concealed firearms in public.").

101. *See, e.g., United States v. Fraser*, 647 F.3d 1242, 1246 (10th Cir. 2011) (holding that defendant did not lack reasonable lawful alternative to taking possession of firearm that defendant used as required to establish necessity defense to being a felon in unlawful possession of a firearm).

102. *Rehaif v. United States*, 139 S. Ct. 914 (2019) (mem.). Since this speech was given, the Court decided *Rehaif*. *Rehaif v. United States*, 139 S. Ct. 2191, 2194 (2019) (holding that knowledge of one's status as a prohibited person is an element of the offense that must be proven).

103. *United States v. Games-Perez*, 667 F.3d 1136, 1142–46 (10th Cir. 2012) (Gorsuch, J., concurring in the judgment); *see also id.* at 1138 (majority opinion) ("This is such a really good offer, I would hate to see you throw this away, because eventually, if you come back to this courtroom on July 21, 2011, if you have done everything we have asked you to do, we are going to dismiss this case; but more importantly, you can have this removed from your record." (citation omitted) (internal quotation marks omitted)).

104. *Id.* at 1139. *But see United States v. Games-Perez*, 695 F.3d 1104, 1117–18 (10th Cir. 2012) (Gorsuch, J., dissenting from denial of rehearing en banc) (opining that knowledge of one's status as a prohibited person is an element of the offense).

105. *See Heller v. District of Columbia (Heller II)*, 670 F.3d 1244 (D.C. Cir. 2011).

106. *See id.* at 1269–96 (Kavanaugh, J., dissenting).

system was not justified under the Second Amendment.¹⁰⁷ He used the methodology of text, history, and tradition, as opposed to levels of scrutiny like strict scrutiny or intermediate scrutiny.¹⁰⁸

So there you have an understanding of the Second Amendment that I think would be potentially favorable to hearing the issue of the right to carry, if the Supreme Court does grant cert. We've got some new kids on the block, if I can use that term, in the Court, and so we'll see what the Court does next. But that's what makes this subject so much fun, and I think Jonathan Taylor will have something to say about that too.

[Rebuttal to Jonathan Taylor:] First, I want to start with the standard of review. In *Heller*, what did the Court do? It looked at the text.¹⁰⁹ It looked at history and tradition.¹¹⁰ While not exactly how the *Heller* Court phrased its reasoning, that is how Judge Kavanaugh described it in *Heller II*.¹¹¹ But that's what the Court did. It looked at the English tradition, saying that the right was fundamental for the original settlers who took the English traditions.¹¹² The Court also specifically used the word

107. *Id.* at 1269.

108. *Id.* at 1271.

109. See *District of Columbia v. Heller*, 554 U.S. 570, 576 (2008) ("In interpreting [the text of the Second Amendment], we are guided by the principle that '[t]he Constitution was written to be understood by the voters; its words and phrases were used in their normal and ordinary as distinguished from technical meaning.'" (second alteration in original) (first quoting *United States v. Sprague*, 282 U.S. 716, 731 (1931); then citing *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 188 (1824))).

110. *Id.* at 592 ("Putting all of these textual elements together, we find that they guarantee the individual right to possess and carry weapons in case of confrontation. This meaning is strongly confirmed by the historical background of the Second Amendment."); *id.* at 627 ("We also recognize another important limitation on the right to keep and carry arms. *Miller* said, as we have explained, that the sorts of weapons protected were those 'in common use at the time.' We think that limitation is fairly supported by the historical tradition of prohibiting the carrying 'of dangerous and unusual weapons.'" (citations omitted)).

111. See *Heller II*, 670 F.3d at 1271 (Kavanaugh, J., dissenting) ("To be sure, the Court never said something as succinct as 'Courts should not apply strict or intermediate scrutiny but should instead look to text, history, and tradition to define the scope of the right and assess gun bans and regulation.' But that is the clear message I take away from the Court's holdings and reasonings in [*Heller* and *McDonald*].").

112. See *Heller*, 554 U.S. at 592–94; see also *id.* at 594 ("In the tumultuous decades of the 1760's and 1770's, the Crown began to disarm the inhabitants of the most rebellious areas. That provoked polemical reactions by Americans invoking their rights as Englishmen to keep arms.").

“fundamental” to describe the right twice.¹¹³ When *Heller II* was litigated in the district court, the opinion denied all claims saying, “Well, the Court didn’t say the word ‘fundamental right’ enough. It only said it twice, so we’re not going to treat this as a fundamental right,” because we were arguing strict scrutiny at the time.¹¹⁴ Subsequently when *McDonald* came down, it used the word “fundamental” to describe the right over a dozen times.¹¹⁵

Justice Breyer’s dissenting opinion in *Heller* was akin to intermediate scrutiny.¹¹⁶ He relied on the same cases that were soundly rejected in the majority opinion.¹¹⁷ Following Justice Breyer’s dissent, lower courts have gone to intermediate scrutiny, using a two-part balancing test that concludes carrying outside the home can be banned.¹¹⁸ We can also ban semiautomatic rifles because the government says that that’s necessary to prevent crime.¹¹⁹ If you look at *Heller*, though, Justice Breyer’s dissent would rely on committee reports, and statistics, and criminological data.¹²⁰ And the majority said “no, we don’t go

113. *Id.* at 593–94. (“By the time of the founding, the right to have arms had become fundamental for English subjects. Blackstone, whose works, we have said, ‘constituted the preeminent authority on English law for the founding generation,’ cited the arms provision of the Bill of Rights as one of the fundamental rights of Englishmen.” (citations omitted)).

114. See *Heller v. District of Columbia*, 698 F. Supp. 2d 179, 187 (D.D.C. 2010) (“If the Supreme Court had wanted to declare the Second Amendment right a fundamental right, it would have done so explicitly. The court will not infer such a significant holding based only on the *Heller* majority’s oblique references to the gun ownership rights of eighteenth-century English subjects.” (citing *United States v. Miller*, 604 F. Supp. 2d 1162, 1170 n.10 (W.D. Tenn. 2009))), *aff’d in part, vacated in part, Heller II*, 670 F.3d 1244.

115. See *McDonald v. City of Chicago*, 561 U.S. 742, 754, 767–69, 773, 775–76, 778, 784, 788–89, 791 (2010).

116. See *Heller*, 554 U.S. at 681–723 (Breyer, J., dissenting).

117. Compare *id.* at 634 (majority opinion) (rejecting interest-balancing test), with *id.* at 690, 704–05 (Breyer, J., dissenting) (citing *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195–96 (1997)) (advocating interest-balancing test).

118. See, e.g., *Woollard v. Gallagher*, 712 F.3d 865, 874–82 (4th Cir. 2013) (adopting two-part test asking whether a law imposes a burden on conduct falling within the scope of the Second Amendment and, if so, whether it passes intermediate scrutiny, and upholding discretionary issuance of carry licenses).

119. SARAH HERMAN PECK, CONG. RESEARCH SERV., R44618, POST-HELLER SECOND AMENDMENT JURISPRUDENCE 26–29 (2019).

120. *Heller*, 554 U.S. at 704 (Breyer, J., dissenting) (noting the empirical evidence presented is “sufficient to allow a judge to reach a firm *legal* conclusion”).

there.”¹²¹ The guarantee in the Second Amendment is off the table. So that’s where I think the Supreme Court needs to step in and clarify this standard of review.

Looking at the history and tradition in the United States, in the nineteenth century, actually, the Southern states, by and large, enacted concealed weapon laws,¹²² which implied that there was no going-armed prohibition, because you would not need to ban concealed weapons if it was already illegal. However, the Northern states did not.¹²³ The Massachusetts law from 1836¹²⁴ did not provide that it was a crime to be armed in public. It said that if you are armed, if someone is feeling threatened, that person can bring a petition, and if that person can reasonably show that he or she is threatened by you or that you are threatening a breach of the peace, that person can basically get a peace bond where you have to get sureties to guarantee your good behavior.¹²⁵ That was not a ban at all, as it required actually threatening people. And everybody could agree with that. That is fully consistent with a constitutional right to bear arms—that if you bear arms and you threaten other people, or if you are likely to commit a breach of the peace, we do not want people like that going around, being armed, engaging in that kind of disruptive behavior.

So there were basically no carry restrictions in the Northern states as long as it was peaceable.¹²⁶ And, in fact, in New Jersey, which today has some of the most stringent restrictions on the bearing of arms, open carry was legal until 1966, which sounds

121. *Id.* at 634–35 (majority opinion).

122. CLAYTON E. CRAMER, *CONCEALED WEAPON LAWS OF THE EARLY REPUBLIC: DUELING, SOUTHERN VIOLENCE, AND MORAL REFORM* 1–3 (1999).

123. *Id.* at 4.

124. 1836 Mass. Acts 748, 750, ch. 134, § 16 (“If any person shall go armed with a dirk, dagger, sword, pistol, or other offensive and dangerous weapon, without reasonable cause to fear an assault or other injury, or violence to his person, or to his family or property, he may, on complaint of any person having reasonable cause to fear an injury, or breach of the peace, be required to find sureties for keeping the peace, for a term not exceeding six months, with the right of appealing as before provided.”).

125. Halbrook, *supra* note 57, at 38 (citing 1836 Mass. Acts 748, 750, ch. 134, § 16).

126. Michael P. O’Shea, *Modeling the Second Amendment Right to Carry Arms (I): Judicial Tradition and the Scope of “Bearing Arms” for Self-Defense*, 61 AM. U. L. REV. 585, 653 (2012) (noting that Northern states tended to adhere to the “tradition of presumptive carry”).

incredible.¹²⁷ And open carry, by the way, is still lawful, and never has been restricted since colonial times in most states.¹²⁸ The Commonwealth of Virginia is a good example¹²⁹ and Delaware too.¹³⁰ You can go down the list. There is no longstanding tradition of saying that we are going to delegate to the authorities a decision about whether you need to carry a gun as long as you are doing so peaceably. The good-cause restrictions basically delegate an arbitrary power to law enforcement authorities to decide whether you have given good enough reasons.¹³¹ It is kind of weird for a constitutional right to be in a status like that.

Now, it's true in *Gould v. Morgan*,¹³² Mr. Gould had a limited license where he could carry at different places, but he could not generally carry in nonsensitive places for self-defense,¹³³ and that is really what the issue is here. In many jurisdictions where you have discretionary issuance, you do not get any kind of carry license, even to carry in the course of business or to carry it at certain places like hiking as in the *Gould* case.¹³⁴ These laws are enforced in different ways. Some law enforcement authorities give out a license fairly readily and others do not.¹³⁵ California is a good example. San Diego changed its pol-

127. *Drake v. Filko*, 724 F.3d 426, 448 (3d Cir. 2013) (Hardiman, J., dissenting).

128. Joshua Gillin, *There are 45 states that allow open carry for firearms, former NRA president says*, POLITIFACT (Nov. 18, 2015), <https://www.politifact.com/florida/statements/2015/nov/18/marion-hammer/there-are-45-states-allow-open-carry-handguns-form/> [<https://perma.cc/3HY7Z5B>] (confirming as “Mostly True” statement by former NRA president that 45 states allow the open carry of handguns).

129. *Firearms/Concealed Handguns Frequently Asked Questions*, VA. ST. POLICE, <https://www.vsp.virginia.gov/Firearms.shtm> [<https://perma.cc/Z49A-QGHZ>] (last visited Jan. 18, 2020) (noting that only machine guns are registered in Virginia and that a firearm may be carried openly in Virginia except where prohibited by statute).

130. *Bridgeville Rifle & Pistol Club, Ltd. v. Small*, 176 A.3d 632, 644 (Del. 2017) (“Delaware is—and always has been—an ‘open carry’ state.” (citing *Doe v. Wilmington Hous. Auth.*, 88 A.3d 654, 663 (2014))).

131. Halbrook, *supra* note 33, at 177.

132. 907 F.3d 659 (1st Cir. 2018).

133. *Id.* at 662 (“[The licenses] allowed the plaintiffs to carry firearms only in relation to certain specified activities but denied them the right to carry firearms more generally.”).

134. *Id.* at 664 (discussing the different types of license restrictions).

135. *See, e.g., Peruta v. County of San Diego*, 824 F.3d 919, 958 (9th Cir. 2016) (en banc) (Silverman, J., dissenting) (noting that sheriffs arbitrarily apply the good-cause requirement without any explanation for the differences); Richard A. Oppel, Jr. & Tim Arango, *Guns Across Borders: California Has Strict Laws, but Nevada*

icy in the *Peruta* case, as the sheriff changed the policy to a more permissive issuance.¹³⁶ The bottom line is this is what the Supreme Court needs to decide because there is a circuit conflict on whether there is a constitutional right to carry per se. And then after that, the scope of the regulations become an issue, whether they're consistent with Second Amendment rights.

Doesn't, N.Y. TIMES (July 30, 2019), <https://nyti.ms/2Yuf0Hf> [<https://perma.cc/HSD9-SYQQ>] (noting the patchwork of state laws).

136. See *Peruta*, 824 F.3d at 925 (after his policy was ruled contrary to the Second Amendment, San Diego County's sheriff announced that he would not petition for rehearing en banc; the effect was to adopt a shall-issue license policy); see also Matt Drange, *Want to carry a concealed gun? Live in Sacramento, not San Francisco*, REVEAL (June 12, 2015), <https://www.revealnews.org/article/want-to-carry-a-concealed-gun-live-in-sacramento-not-san-francisco/> [<https://perma.cc/83TZ-SURW>] (observing that the outgoing sheriff reversed his longstanding policy limiting the number of concealed weapon permits).

THE SUPRISINGLY STRONG ORIGINALIST CASE FOR PUBLIC CARRY LAWS

JONATHAN E. TAYLOR*

Before I jump in, I want to lay out a roadmap for my remarks, which will begin with a discussion of *District of Columbia v. Heller*.¹ Any discussion of the Second Amendment must now begin with *Heller*. I want to focus both on what the Court said the Second Amendment protects and what the Court said the Second Amendment does not protect—understanding both categories is crucially important. And then I’ll turn to how *Heller* is being applied in the lower courts. When it comes to applying *Heller*, the courts of appeals have coalesced around a two-step framework.² The first step is to determine whether the law at issue burdens conduct that is protected by the Second Amendment as historically understood.³ If it does, courts proceed to the second step and analyze the law under some form of scrutiny⁴—typically intermediate scrutiny.⁵

Admittedly, there have been some dissenters from this two-step approach, including, most notably, then-Judge Kavanaugh.⁶

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1. 554 U.S. 570 (2008).

2. *See, e.g.*, *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 254 & n.49 (2d Cir. 2015) (listing circuit court of appeals cases that apply this two-step framework); *Powell v. Tompkins*, 783 F.3d 332, 347 n.9 (1st Cir. 2015) (same); *see also* *Ezell v. City of Chicago*, 651 F.3d 684, 701 (7th Cir. 2011) (“The [Supreme] Court resolved the Second Amendment challenge in *Heller* without specifying any doctrinal ‘test’ for resolving future claims.”).

3. *See, e.g.*, *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018); *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016).

4. *Jimenez*, 895 F.3d at 232; *Silvester*, 843 F.3d at 821.

5. *See, e.g.*, *Jimenez*, 895 F.3d at 234, 236 (citing cases that have applied intermediate scrutiny and applying intermediate scrutiny); *Silvester*, 843 F.3d at 822–23, 827 (same).

6. *See* *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1269–96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

But for the most part, that is the accepted framework. When the courts of appeals analyze public carry restrictions of the sort we're discussing today, in particular the good-cause requirement, they typically apply this approach and have upheld such laws under intermediate scrutiny.⁷ While that's a fine approach, today I want to offer a different defense for why I think these laws are constitutional—one that is fully consistent with Judge Kavanaugh's interpretation of *Heller*, and which some of the folks in this room might find appealing. It's rooted in history, tradition, federalism, and respect for *Heller*.

So let's begin with *Heller*, because I think, as I mentioned, that's where we have to begin. The Court's opinion in *Heller* is four parts.⁸ The first part, a discussion of the background in that case and the procedural section,⁹ is not relevant to today's discussion. But parts two, three, and four are critically important, and I'll just walk through each of them.

Part two outlines the parameters of Second Amendment protections.¹⁰ In *Heller*, the Court is resolving whether the right protected is an individual right to keep and bear arms, or a collective right.¹¹ And the Court resolves that disagreement in favor of the individual rights approach.¹² But in doing so, it looks not only to the text of the Second Amendment, but also to history and tradition, and for that reason has been regarded by many as a kind of high-water mark of originalism.¹³

The Court's approach began by canvassing the antecedent English history, which Justice Scalia seemed to find highly relevant.¹⁴ He did so because the Second Amendment, by speaking of *the* right to keep and bear arms, assumes a preexisting right inherited from our predecessors in England.¹⁵ But the Court then also looked to the early American tradition to in-

7. See, e.g., Nat'l Rifle Ass'n of Am. v. ATF, 700 F.3d 185, 195 (5th Cir. 2012) (identifying a form of intermediate scrutiny as the most appropriate level of scrutiny post-*Heller*).

8. See District of Columbia v. Heller, 554 U.S. 570 (2008).

9. *Id.* at 574–76.

10. *Id.* at 576–626.

11. *Id.* at 579–95.

12. *Id.* at 595.

13. *Id.* at 576–626; see also Jamal Greene, *Heller High Water? The Future of Originalism*, 3 HARV. L. & POL'Y REV. 325 (2009).

14. *Heller*, 554 U.S. at 592–95.

15. *Heller*, 554 U.S. at 592.

form the shape and the scope of the right.¹⁶ And the Court did not limit its consultation of historical materials to documents from the Founding Era, but also reviewed historical documentation all the way up through the late nineteenth century, illustrating that all of that time period is important to the constitutional analysis.¹⁷ After consulting all this historical material, the Court came to the conclusion that the Second Amendment protects “the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹⁸ So the core of the right is self-defense in the home. To be clear, that is not necessarily the *only* right the Second Amendment protects, but it is the core of the right.

Then, the Court proceeded to the third part of its opinion, which is equally important: the overview of what the Second Amendment *doesn't* protect.¹⁹ Here, the Court said explicitly that, just like many other constitutional rights, the Second Amendment right is “not unlimited.”²⁰ So how do we know what those limitations are? The text of the Second Amendment does not tell us. It simply says that “the right of the people to keep and bear Arms shall not be infringed.”²¹ You will not find answers to the difficult questions by staring hard at that text all day. Instead, we must look again to history and tradition—the same touchstones that led the Court to conclude that the Second Amendment right is an individual right and guided the Court in determining the contours of that individual right.

The Court said explicitly: “[W]e do not read the Second Amendment to protect the right of citizens to carry arms for *any sort* of confrontation,”²² or to “keep and carry any weapon whatsoever in any manner . . . and for [any] purpose.”²³ Instead, as the Court explained, these “longstanding prohibitions” are seen as tradition-based “exceptions” to the Second Amendment, and are thus constitutional by virtue of their “his-

16. *Id.* at 600–19.

17. *Id.* at 614–19.

18. *Id.* at 635.

19. *Id.* at 626–28.

20. *Id.* at 626.

21. U.S. CONST. amend. II.

22. *Heller*, 554 U.S. at 595.

23. *Id.* at 626.

torical justifications.”²⁴ Some examples that the Court gave of these lawful, longstanding regulations are the prohibitions on the possession of firearms by felons and the mentally ill.²⁵ These examples are notable because such prohibitions, while longstanding in the Court’s eyes, had been around for only a hundred years or so at the time of *Heller*.²⁶ So the Court says that we don’t simply look to the time of the Founding to see if a law is longstanding; we also consult the full tradition of this country.

In the last part of its opinion, the Court turned to the application of the Second Amendment as interpreted to the law at issue in the case.²⁷ The law in *Heller* was a total prohibition on owning any handguns in the home.²⁸ The Court concluded that this amounted to a destruction of the right, and it notably chose not to apply any of the levels of scrutiny typically applied when assessing a challenge based on an enumerated constitutional right.²⁹ However, while not applying any of the levels of scrutiny, the Court said that the challenged law would nonetheless fail under any of them.³⁰ It also refused to apply rational

24. *Id.* at 626–27, 635.

25. *Id.* at 626 (“[N]othing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill . . .”).

26. *See, e.g.*, *Friedman v. City of Highland Park*, 784 F.3d 406, 408 (7th Cir. 2015) (observing that “*Heller* deemed a ban on private possession of machine guns to be obviously valid”—even though “states didn’t begin to regulate private use of machine guns until 1927,” and Congress didn’t begin “regulating machine guns at the federal level” until 1934 (citations omitted)); *Fyock v. City of Sunnyvale*, 779 F.3d 991, 997 (9th Cir. 2015) (noting that, because of these examples, “early twentieth century regulations” may qualify as longstanding under *Heller*); *United States v. Booker*, 644 F.3d 12, 23–24 (1st Cir. 2011) (explaining that *Heller* illustrates that even laws “firmly rooted in the twentieth century” can be longstanding); *United States v. Skoien*, 614 F.3d 638, 640–41 (7th Cir. 2010) (en banc) (observing that *Heller* also considered prohibitions on firearm possession by felons and the mentally ill to be sufficiently longstanding, despite being “of 20th Century vintage”); Carlton F.W. Lawson, *Four Exceptions in Search of a Theory*: District of Columbia v. Heller and Judicial Ipse Dixit, 60 HASTINGS L.J. 1371, 1374–78 (2009) (noting the absence of felon and mental illness prohibitions on firearm ownership before the twentieth century).

27. *Heller*, 554 U.S. at 628–35.

28. *Id.* at 628.

29. *Id.* at 628–29.

30. *Id.*

basis and refused to apply Justice Breyer's freestanding balancing test.³¹

Now, as I mentioned at the outset, when it comes to interpreting *Heller*, the lower courts have coalesced around this two-step approach that starts with consulting the history and asking whether the law is longstanding.³² If the answer is yes, the analysis ends there.³³ But if the answer is no, the courts proceed to apply some form of scrutiny.³⁴ Typically, courts of appeals have applied intermediate scrutiny,³⁵ but there are some notable dissenters on that front as well.³⁶ In *Heller II*,³⁷ which Dr. Halbrook argued, then-Judge Kavanaugh dissented from this approach. In his view, *Heller* mandates a history-and-tradition-based test only.³⁸ If a law is longstanding, it's constitutional. If it's not, it's not. That's the end of the analysis.

Now, most courts of appeals that have addressed good-cause restrictions have assessed the law by assuming that it burdens conduct protected by the Second Amendment.³⁹ Then, moving on to step two, the courts of appeals apply intermediate scrutiny because the law does not infringe on the core of the right, which is armed self-defense in the home.⁴⁰ Therefore, they uphold the law under intermediate scrutiny.⁴¹ That's a fine approach, but I want to instead make the argument that I believe Justice Kavanaugh and some of the folks here might find appealing, which is that these good-cause laws are longstanding and should be upheld at step one because they are consistent with our historical tradition. This is an argument that my firm and I have made on behalf of Everytown for Gun Safety, after Everytown uncovered a number of old, historical laws. We've

31. *Id.* at 628 n.27, 634–35.

32. *See, e.g.,* *United States v. Jimenez*, 895 F.3d 228, 232 (2d Cir. 2018); *Silvester v. Harris*, 843 F.3d 816, 820–21 (9th Cir. 2016).

33. *Jimenez*, 895 F.3d at 232; *Silvester*, 843 F.3d at 821.

34. *Jimenez*, 895 F.3d at 232; *Silvester*, 843 F.3d at 821.

35. *See, e.g., Jimenez*, 895 F.3d at 234, 236 (citing cases that applied intermediate scrutiny and applying intermediate scrutiny); *Silvester*, 843 F.3d at 822–23, 827 (same).

36. *See Heller II*, 670 F.3d 1244, 1269–96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).
37. 670 F.3d 1244.

38. *Id.* at 1271 (Kavanaugh, J., dissenting).

39. *See, e.g.,* *Gould v. Morgan*, 907 F.3d 659, 672–73 (1st Cir. 2018).

40. *See, e.g., id.*

41. *See, e.g., id.* at 673–77.

brought them to courts' attention in the last few years.⁴² I've also made the argument in *Gould v. Morgan*,⁴³ which we discussed at the outset.

Now, in framing the historical question, the inquiry of whether these laws are longstanding, first, one must have a handle on how these laws operate on the ground. I'm speaking about good-cause laws, and Dr. Stephen Halbrook has characterized the question as whether a total prohibition on carrying firearms outside the home is constitutional.⁴⁴ That's actually not what these laws do in practice. If you look at the *Gould* case, which I argued, the plaintiff in that case had requested an unrestricted license to carry a firearm in public from the town in Brookline, and he was denied that license.⁴⁵ He was, however, given the ability to carry a firearm in his home, at work, while traveling to and from work (even late at night), while hiking—which was a purpose he articulated as being particularly important to him—while target shooting, and under a number of other circumstances.⁴⁶

Now, in circumstances beyond those, he was restricted from carrying a firearm. I think the question of whether the Second Amendment has any purchase outside the home is a fine one, but it's not ultimately going to answer the question whether a regime like that is constitutional. I think instead, one must ask whether the imposed restrictions find sufficient support in our history and tradition to be deemed longstanding and constitutional under *Heller*.

I think that these laws are longstanding for a few reasons. The first is you look to the English tradition that Dr. Halbrook mentioned,⁴⁷ which dates back all the way to 1328 in the Statute

42. See, e.g., Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellants and Reversal at 3–21, *Wrenn v. District of Columbia*, 864 F.3d 650 (D.C. Cir. 2017) (No. 15-7057) [hereinafter *Everytown Wrenn* Brief]; Brief of Amicus Curiae Everytown for Gun Safety in Support of Appellees and Affirmance at 4–21, *Peruta v. County of San Diego*, 824 F.3d 919 (9th Cir. 2016) (Nos. 10-56971 & 11-16255) [hereinafter *Everytown Peruta* Brief].

43. 907 F.3d 659; Brief of Defendant-Appellee Mark Morgan, in his Official Capacity as Acting Chief of the Brookline Police Department at 20–42, *Gould*, 907 F.3d 659 (No. 17-2202) [hereinafter *Gould* Defendant-Appellee Brief].

44. Stephen P. Halbrook, *The Right to Bear Arms: For Me, But Not for Thee?*, 43 HARV. J.L. & PUB. POL'Y 331, 331 (2020).

45. *Gould*, 907 F.3d at 662–66.

46. *Id.* at 664–65.

47. Halbrook, *supra* note 44, at 336–37.

of Northampton.⁴⁸ That statute, which admits of no menacing-behavior requirement in its text,⁴⁹ was in effect for hundreds of years up to and past the English Declaration of Rights,⁵⁰ which recognized the right to keep and bear arms⁵¹ and is the predecessor to our Second Amendment as the Court said in *Heller*.⁵² The Statute of Northampton was a broad prohibition on carrying firearms in fairs, marketplaces, and any place where people congregated in public.⁵³ There's a decision from the King's Bench in the seventeenth century that interpreted that law to have no exception for people who just peacefully carried a firearm.⁵⁴ The very act of carrying a firearm was considered to be in terror of the people and was therefore prohibited by that statute.⁵⁵

That tradition then took root in early colonial America where a lot of the colonies and states passed mirror images of that statute.⁵⁶ A few decades later in the early nineteenth century, beginning with Massachusetts in 1836,⁵⁷ some states started to take a more permissive approach to public carry, allowing some form of public carry if someone had a good cause for doing so.⁵⁸ These are kind of the early predecessors to the regimes

48. 1328, 2 Edw. 3 c. 3.

49. *Id.*

50. Patrick J. Charles, *The Faces of the Second Amendment Outside the Home: History Versus Ahistorical Standards of Review*, 60 CLEVELAND ST. L. REV. 1, 7–41 (2012).

51. An Act declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown, 1 W. & M. 2 c. 2, 143, para. 14 (“That the Subjects which are Protestants may have Arms for their Defence suitable to their Conditions and as allowed by Law.”).

52. See *District of Columbia v. Heller*, 554 U.S. 570, 593 (2008).

53. 2 Edw. 3 c. 3.

54. See *Chune v. Piott* (1615) 80 Eng. Rep. 1161, 1162; 2 Bulstrode 328, 329 (“Without all question, the sheriffe hath power to commit . . . if contrary to the Statute of Northampton, he sees any one to carry weapons in the high-way, in terrorem populi Regis; he ought to take him, and arrest him, notwithstanding he doth not break the peace in his presence.”).

55. Charles, *supra* note 50, at 20. *But see* David B. Kopel & Joseph G.S. Greenlee, *The “Sensitive Places” Doctrine: Locational Limits on the Right to Bear Arms*, 13 CHARLESTON L. REV. 205, 219–20 (2018).

56. See, e.g., 1692 Mass. Acts 10, 11–12; 1699 N.H. Laws 1, 1–2; 1686 N.J. Laws 289, ch. 9; 1786 Va. Acts 33, ch. 21; A COLLECTION OF THE STATUTES OF THE PARLIAMENT OF ENGLAND IN FORCE IN THE STATE OF NORTH CAROLINA 60–61 (Newbern, Francois-Xavier Martin 1792).

57. See 1836 Mass. Acts 748, 750, ch. 134, § 16.

58. See, e.g., 1841 Me. Laws 707, 709, ch. 169, § 16; 1846 Mich. Pub. Acts 690, 692, ch. 162, § 16; 1851 Minn. Laws 526, 528, ch. 112, § 18; 1853 Or. Laws 218, 220, ch.

that you see in a number of states today that cover a quarter of the American people.⁵⁹

Then, immediately before and after the Civil War, which is a highly relevant time period when discussing the scope of the right to keep and bear arms as applied to the states through the Fourteenth Amendment,⁶⁰ over a dozen states and over a dozen municipalities enacted laws⁶¹ that—on any understanding—were at least as restrictive as the good-cause laws that you see today. They either broadly prohibited public carry in populated, urban places, or they required a good cause for doing that.

However you want to read the English history, however you want to read the early good-cause laws, you cannot deny that these laws, which are older than the laws recognized by the Supreme Court in *Heller* as longstanding, broadly prohibited public carry, and therefore form a sufficient basis for upholding good-cause laws today.

Now, that's not to say that this was the only approach taken by states in this country. There was another approach, primarily taken in the South, that was a lot more permissive of public carry.⁶² In this sense, it mirrors the policy debate you see today—where one half of the country takes a certain view of firearm ownership and the other half takes a different view. That is what you would expect in a federalist system. The question now is whether you end that longstanding debate, that policy debate, and constitutionalize it, declaring one side right for all time on the interpretation of gun policy, which now must govern every state in America. I submit to you that that's not the right approach. It's not the approach that *Heller* requires. The better approach is to recognize that both traditions in this country are fully consistent with the Second Amendment and constitutional.

16, § 17; PA. CRIM. PROC. § 6 (Kay & Bro. 1862); 1838 Wis. Sess. Laws 378, 381, § 16; 1847 Va. Acts 127, 129, ch. 14, § 16.

59. Everytown *Wrenn* Brief, *supra* note 42, at 1; Everytown *Peruta* Brief, *supra* note 42, at 1–2; *see also* Gould Defendant-Appellee Brief, *supra* note 43, at 17–20.

60. *See* Gould v. Morgan, 907 F.3d 659, 669 (1st Cir. 2018) (“Because the challenge here is directed at a state law, the pertinent point in time would be 1868 (when the Fourteenth Amendment was ratified).”).

61. *See supra* note 59.

62. *See, e.g.*, ALA. CODE § 4-1-3274 (Britan & De’Wolf 1852); GA. CODE § 4-1-4413 (John H. Seals 1861).

[Rebuttal to Dr. Stephen Halbrook:] I have just a couple of quick points in response on the methodological question of how you assess a constitutional challenge to a gun law. It is true that *Heller* eschewed at least express application of some level of scrutiny. But Justice Scalia, in referring to Justice Breyer's dissent, said:

[Justice Breyer] proposes, explicitly at least, none of the traditionally expressed levels (strict scrutiny, intermediate scrutiny, rational basis), but rather a judge-empowering "interest-balancing inquiry" that "asks whether the statute burdens a protected interest in a way or to an extent that is out of proportion to the statute's salutary effects upon other important governmental interests."⁶³

I don't read that language to be rejecting the application of some level of scrutiny but, if anything, quite the opposite. And that's the way the lower courts have uniformly read that language, with the exception of some dissenters, like Justice Kavanaugh, who have taken a tradition-and-history-based approach only—an approach that I think actually squares very nicely with the defense that I just laid out.

Now, just briefly on the nineteenth-century and early twentieth-century laws. Dr. Halbrook looks to these early good-cause laws, beginning with Massachusetts in the 1830s and then carrying through to the end of the nineteenth century.⁶⁴ That's fine, and I could quibble with the way that he's characterized it, but I think the broader point, which he cannot deny, is that a number of states, both before and after the ratification of the Fourteenth Amendment, clearly prohibited the carrying of a firearm without good cause or beyond.⁶⁵ I'll give you a couple examples so you know I'm not just making this up.

West Virginia passed a law that made clear that "If any person go armed with a deadly or dangerous weapon, without reasonable cause to fear violence to his person, family, or property," he may be required to face criminal penalties.⁶⁶ Courts

63. *District of Columbia v. Heller*, 554 U.S. 570, 634 (2008) (quoting *id.* at 689–90 (Breyer J., dissenting)).

64. Halbrook, *supra* note 44, at 344–45.

65. *See, e.g.*, 1869 N.M. Laws ch. 32, § 1; PA. CRIM. PROC. § 6 (Kay & Bro. 1862); 10 TEX. CRIM. CODE § 6512–6513 (George W. Paschal 1874); W. VA. CODE § 153-8 (John Frew 1870).

66. W. VA. CODE § 153-8 (John Frew 1870).

construed the self-defense exception quite narrowly to require specific evidence of a concrete, serious threat.⁶⁷

In the early twentieth century, over a hundred years ago, Massachusetts passed a law prohibiting public carry, unless you could demonstrate a good reason.⁶⁸ That is effectively unchanged from its law today.

Then, I would also say look at some of the state court cases. The Texas Supreme Court, for instance, twice upheld that state's good-cause requirement—once in 1871,⁶⁹ three years after the Fourteenth Amendment was ratified, and then again in 1874.⁷⁰ The court explained that the law thus made “all necessary exceptions,” and noted that it would be “little short of ridiculous”—their words, not mine—for a citizen to claim the right to carry a pistol in places “where ladies and gentlemen are congregated together.”⁷¹ Further, the court observed, the good-cause requirement was “not peculiar to our own state,” for nearly “every one of the states of this Union [had] a similar law upon their statute books” and many have laws that are “more rigorous than the act under consideration.”⁷² The only point, the modest point I'm making now, is that these nearly a dozen states that have continued this tradition today are not violating our Constitution by doing so.

67. See *State v. Workman*, 14 S.E. 9, 12 (W. Va. 1891).

68. See 1906 Mass. Acts 150, ch. 172, § 1.

69. See *State v. Duke*, 42 Tex. 455, 459 (1874).

70. See *English v. State*, 35 Tex. 473, 477 (1871).

71. *English*, 35 Tex. at 477–79.

72. *Id.* at 479.

“ASSAULT WEAPON” BANS: UNCONSTITUTIONAL LAWS FOR A MADE-UP CATEGORY OF FIREARMS

MARK W. SMITH*

I’m especially excited to talk about whether commonly owned semiautomatic rifles, which happen to have a handful of incidental features built in or attached to them, are protected by the Second Amendment. Spoiler alert: the answer is yes. Ordinary semiautomatic rifles, just like ordinary semiautomatic handguns, are protected by the Second Amendment’s right to keep and bear arms. The U.S. Supreme Court’s legal precedents confirm the same. These constitutional protections do not disappear merely because the anti-gun lobby chooses to label—or perhaps, more accurately, mislabel—these ordinary firearms as “assault weapons.” Indeed, as Justice Thomas astutely recognized, the term “assault weapon” is “a political term, developed by anti-gun publicists.”¹

To make sure we’re all on the same page about what is a supposed “assault weapon,” I’d like to start with a key point: America’s gun grabbers do not define “assault weapons” by how the firearms actually function. The banned so-called “assault weapons” are not the fully automatic rifles used by the

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1. See *Stenberg v. Carhart*, 530 U.S. 914, 1001 n.16 (2000) (Thomas, J., dissenting) (quoting Bruce H. Kobayashi & Joseph E. Olsen, In Re 101 California Street: *A Legal and Economic Analysis of Strict Liability for the Manufacture and Sale of “Assault Weapons,”* STAN. L. & POL’Y REV., Winter 1997, at 41, 43) (internal quotation marks omitted) (“Prior to 1989, the term ‘assault weapon’ did not exist in the lexicon of firearms. It is a political term, developed by anti-gun publicists to expand the category of ‘assault rifles’ so as to allow an attack on as many additional firearms as possible on the basis of undefined ‘evil’ appearance” (internal quotation marks omitted)).

military to fight the Taliban in Afghanistan. So-called “assault weapons,” when discussed within America’s gun control debate, constitute nothing more than ordinary semiautomatic rifles; a type of firearm, which civilians have used in the United States for well over a century.²

Semiautomatic firearms are “semiautomatic” because, when you pull the trigger once, the gun fires one bullet and automatically reloads, and that’s it.³ To fire another bullet requires the user to pull the trigger again.⁴ But these ordinary firearms might look different than other firearms because modern day, yet very ordinary, semiautomatic rifles are often painted *black*;⁵ they are not made in the brown wood stock you see on classic American hunting rifles.⁶ This is relevant because it makes modern-style firearms *look like* or *appear to* be fully automatic M16 military rifles, when in reality they are not the same firearm as M16s.

Nevertheless, because of the rifle’s appearance, coupled with certain features that are arbitrarily included in some “assault weapon” ban statutes, an ordinary rifle gets converted *definitionally* into an “assault weapon.”⁷ Some of the features that allegedly convert an ordinary rifle into a prohibited “assault weapon” include muzzle brakes, pistol grips, and adjustable shoulder stocks that enhance the utility of the firearm for self-defense.⁸ These features make it easier for law-abiding Americans to shoot the firearms and shoot them accurately. Certain state legislatures assert that these features, either when added onto,

2. See David B. Kopel, *Defining “Assault Weapons,”* REG. REV. (Nov. 14, 2018), <https://www.theregreview.org/2018/11/14/kopel-defining-assault-weapons/> [https://perma.cc/6T8T-KD9F]. Some semiautomatic pistols and some shotguns are frequently included in the statutory definitions of “assault weapons” but, in terms of the number of firearms in circulation, the overwhelming majority of the banned “assault weapon” firearms are rifles. *Id.*

3. *Semiautomatic*, MERRIAM WEBSTER’S DICTIONARY, <https://www.merriam-webster.com/dictionary/semiautomatic> [https://perma.cc/8XKY-EA37] (last visited Jan. 18, 2019) (“able to fire repeatedly through an automatic reloading process but requiring release and another pressure of the trigger for each successive shot”).

4. *Id.*

5. Technically, AR rifle platforms are not painted black but instead have a black finish applied to them.

6. See Kopel, *supra* note 2 (describing the strategy of targeting guns that “look[] like . . . machine gun[s]” (internal quotation marks omitted)).

7. See *supra* note 2.

8. See Kopel, *supra* note 2.

or made an inherent part of, semiautomatic rifles, make these ordinary firearms “assault weapons.”⁹ These features, when added to or included with a semiautomatic rifle, somehow magically transform ordinary guns into an object that the anti-gunners have successfully banned in six states, plus the District of Columbia.¹⁰

Yet, semiautomatic rifles have been part of the American landscape for over 100 years.¹¹ From the anti-gun lobby’s point of view, the scariest semiautomatic rifle is the AR-15 platform. This rifle platform is what the anti-gun movement and their handmaidens in the urban-based mainstream media like to display on television and in news articles because the rifle can appear scary looking to people unfamiliar with firearms, especially those living in the major media centers of Washington, D.C., New York City, Los Angeles, and Chicago. In reality, the AR-15 is not more powerful than any other centerfire semiautomatic rifle and, in fact, in typical calibers is *less* powerful than the rifles used to hunt deer.

9. *Id.*

10. The six states are California, Connecticut, Maryland, Massachusetts, New Jersey, and New York. CAL. PENAL CODE §§ 30510, 30515, 30605 (West 2012 & Supp. 2020); CONN. GEN. STAT. §§ 53-202a to -202c (2019); MD. CODE ANN., CRIM. LAW §§ 4-301 to -303 (LexisNexis 2012 & Supp. 2019); MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2018 & Supp. 2019); MASS. ANN. LAWS ch. 140, §§ 121, 131M (LexisNexis 2016 & Supp. 2019); N.J. STAT. ANN. §§ 2C:39-1(w), 2C:39-5(f) (West 2016 & Supp. 2019); N.Y. PENAL LAW §§ 265.00(22), 265.01 (McKinney 2017 & Supp. 2020). The District of Columbia’s ban is at D.C. CODE §§ 7-2501.01(3A)(A), 7-2502.02(a)(6) (2018). Hawaii bans semiautomatic “assault pistols” but the statute does not apply to long guns. HAW. REV. STAT. ANN. § 134-8(a) (LexisNexis 2013). It bears mentioning that some statutes ban firearms by the name of the make and the model, as well as by features. *See, e.g.*, CAL. PENAL CODE § 30510; MD. CODE ANN., PUB. SAFETY § 5-101(r)(2); MD. CODE ANN., CRIM. LAW § 4-301(c).

11. Rifles and pistols with detachable magazines came into wide use toward the end of the nineteenth century. Winchester began making semiautomatic rifles with detachable magazines beginning with the Model 1905. *See* HAROLD F. WILLIAMSON, *WINCHESTER: THE GUN THAT WON THE WEST* 434 (1952); *Historical Timeline 1900–1949, WINCHESTER REPEATING ARMS*, <http://www.winchesterguns.com/news/historical-timeline/historical-timeline-1900-1949.html> [https://perma.cc/Q93D-4DGR] (last visited Mar. 15, 2020). Then-Judge Kavanaugh wrote in a case known as *Heller II*: “The first commercially available semi-automatic rifles, the Winchester Models 1903 and 1905 and the Remington Model 8, entered the market between 1903 and 1906.” *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1287 (D.C. Cir. 2011) (Kavanaugh, J., dissenting) (citations omitted). Significantly, he added: “Many of the early semi-automatic rifles were available with pistol grips. These semi-automatic rifles were designed and marketed primarily for use as hunting rifles . . .” *Id.* (citations omitted).

The AR-15 platform was designed in the 1950s.¹² By the 1960s, the rifle was being sold in the U.S. civilian marketplace.¹³ The AR in the name stands for Armalite, and not “assault rifle.”¹⁴ Armalite is the name of the company that first developed the AR-15.¹⁵

So, we’ve had the AR-15 platform itself being bought and sold in the United States for over fifty years. Unfortunately, for those millions of Americans who reside today in the six anti-gun states plus the District of Columbia, these ordinary firearms cannot be possessed, owned, or used by them.¹⁶ An individual caught possessing an AR-15 in one of these few jurisdictions will become a felon and go to prison for a nonviolent, victimless, *malum prohibitum* crime.¹⁷ That’s right. Mere possession of an object that is commonplace and perfectly legal under federal law and in forty-four states will land you in prison, result in the loss of your rights including likely the right to vote, and probably cause you irreparable monetary and reputational damages, as well as your personal liberty. All of this despite the absence of even a single victim. And unfortunately, the federal courts are largely failing to do anything about this travesty.

To date, each court of appeals that has heard a so-called “assault weapon” case has ultimately decided against the citizen and in favor of the government. These legal challenges to “assault weapon” bans have been considered and rejected by the Second Circuit in New York,¹⁸ by the D.C. Circuit,¹⁹ by the Seventh Circuit in Chicago,²⁰ and by the Fourth Circuit in Maryland.²¹

12. *A Brief History Of The AR-15*, NPR (Feb. 28, 2018, 12:07 PM), <https://www.npr.org/2018/02/28/588861820/a-brief-history-of-the-ar-15> [<https://perma.cc/7P5T-S25T>].

13. Glen Zediker, *The AR-15: A Brief History*, NRA SHOOTING SPORTS USA (Oct. 16, 2019), <https://www.ssusa.org/articles/2019/10/16/the-ar-15-a-brief-history/> [<https://perma.cc/Y5CB-FXHQ>].

14. *A Brief History Of The AR-15*, *supra* note 12.

15. *Id.*

16. *See supra* note 10.

17. *Id.*

18. *N.Y. State Rifle & Pistol Ass’n v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015).

19. *Heller II*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

20. *Friedman v. City of Highland Park*, 784 F.3d 406, 407, 412 (7th Cir. 2015).

21. *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc). A suit challenging the California ban was filed in August 2019. *See Complaint, Miller v. Becerra*, No. 3:19-cv-01537 (C.D. Cal. Aug. 15, 2019).

So, given this dismal track record in court for an enumerated, fundamental constitutional right, why are we talking today about the U.S. Supreme Court and the rights of individuals to own ordinary firearms with certain features that some political partisans wrongly label “assault weapons”? Well, it’s because of Judge Kavanaugh’s elevation to the U.S. Supreme Court. You see, Justice Kavanaugh was the author of an approximately fifty-five-page opinion that applied the “text, history, and tradition” constitutional test to the technology of these semi-automatic firearms,²² which were declared by legislative fiat to be “assault weapons” by the Council of the District of Columbia.²³ The name of this case was *Heller II*.

In Justice Kavanaugh’s dissent in *Heller II*, he concluded that the Second Amendment protects an individual’s right to keep and bear (that is, own, use, possess) these so-called “assault weapons.”²⁴ This dissent is particularly significant because the *Heller II* majority opinion, which upheld the banning of these weapons, has become a super-legal precedent followed by other lower, or inferior,²⁵ courts when they uphold other gun bans.²⁶ *Heller II* is the foundational case that subsequent lower courts presiding over legal challenges to anti-gun measures rely on to say: “Sure. The state can ban them.” And yet, the dissent to that view was written by now-Justice Kavanaugh.

So, will the Supreme Court address the question of “assault weapon” bans soon? I suspect that they will, and they should. After all, the individual right to self-defense is not only a fundamental *constitutional* right that all of us have—Democrats, Republicans, Independents, Libertarians. It’s a human right. And it is also the central component of the Second Amendment, a right that is not given to us by any government. It is not given to us by any politician. It is bestowed upon us by our very existence as humans or, if you will, by God. And the Second

22. *Heller II*, 670 F.3d at 1269–96 (D.C. Cir. 2011) (Kavanaugh, J., dissenting).

23. *Id.* at 1271.

24. *Id.* at 1296.

25. Article III of the Constitution provides that, “The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.” U.S. CONST. art. III, § 1. Thus, all federal courts of appeals are inferior courts, as a matter of constitutional law.

26. See, e.g., *Kolbe*, 849 F.3d at 139, 121 (citing *Heller II* to say that intermediate scrutiny applies to “assault weapon” ban and upholding ban under that standard).

Amendment doesn't give us that right; it simply recognizes this preexisting human right.

And the U.S. Supreme Court agrees with me. They agreed with me in *District of Columbia v. Heller*,²⁷ which by the way, was reaffirmed by the case of *McDonald v. City of Chicago*²⁸ and then reaffirmed in *Caetano v. Massachusetts*.²⁹ In *Caetano*, which I think applies to the question of so-called "assault weapon" bans, the Supreme Court held that any firearm that is bearable—bearable arms—is protected by the Second Amendment.³⁰ There, the Court dealt with a stun gun,³¹ and I can assure you that the number of people in the United States that own semi-automatic rifles labeled "assault weapons" far outnumber the number of Americans that own stun guns. The U.S. Supreme Court found the Massachusetts Supreme Court applied the wrong test and remanded the case back to Massachusetts requiring a decision on whether stun guns were, in fact, protected weapons, or protected *arms* under the Second Amendment.³² The Massachusetts Supreme Court got the message and struck down the commonwealth's stun gun ban using the common use test,³³ and a year later, the Illinois Supreme Court followed suit and struck down Illinois's stun gun ban.³⁴ Since AR-15s far outnumber stun guns, it follows then that AR-15s should be equally protected by the Second Amendment.

Now, in fairness, the *Heller* Court said there are certain types of weapons that can be banned if they are unusual, and if they are not typically owned by Americans for lawful purposes.³⁵ If they're not in common use by Americans for lawful purposes, the Supreme Court said, certain weapons are presumptively capable of being banned.³⁶ One of the examples they gave is a machine gun—which unlike the semiautomatic gun, which is one pull of the trigger, one bullet fired—will fire bullets for as

27. 554 U.S. 570, 581, 591–92 (2008).

28. 561 U.S. 742, 791 (2010).

29. 136 S. Ct. 1027, 1028 (2016) (per curiam).

30. *Id.* at 1027.

31. *Id.*

32. *Id.* at 1028.

33. *Ramirez v. Commonwealth*, 94 N.E.3d 809, 818–19 (Mass. 2018).

34. *People v. Webb*, 131 N.E.3d 93, 98 (Ill. 2019).

35. *District of Columbia v. Heller*, 554 U.S. 570, 623–25 (2008).

36. *Id.* at 625.

long as the operator is depressing the trigger, until the gun becomes empty of bullets or the operator releases the trigger.³⁷ This is much different than a semiautomatic firearm, and the law recognizes this difference.

So, the question is, “What do these Supreme Court cases mean for so-called ‘assault weapon’ bans today?” Well, before I answer that question, I want to talk for a couple minutes about what exactly is an “assault weapon.” If you take away only one thing from today, please remember this: when you see the words “assault weapon,” this is not a factual, denotative definition or term. This is a political propaganda label used by people who want to ban or severely restrict civilian ownership of firearms.

You see, thirty years ago—and this is well known; this is not new information—there was a gentleman by the name of Josh Sugarmann, who worked for a group called the Violence Policy Center.³⁸ He recognized that large numbers of the general public did not know much about various types of firearms. Give him great credit, because he saw an opportunity and seized it.³⁹ He encouraged the gun control movement to take advantage of the fact that most people could not tell the difference between an ordinary, semiautomatic rifle, which happens *to look* like an M16 military firearm, and an actual M16 military firearm. He suggested that all of these rifles should be labeled “assault weapons,” thereby blending ordinary rifles together with M16s, and ultimately accomplishing more gun control.⁴⁰ The term “assault weapons” was based not on how the guns operated, but on how the guns looked. After all, semiautomatic guns operate much differently than fully automatic machine guns, which is why in 1994 the U.S. Supreme Court ruled in *Staples v. United States*⁴¹ that semiautomatic rifles are different from military weapons.⁴² And yet, because they look alike,

37. *Id.* at 624.

38. *About the VPC*, VIOLENCE POL’Y CTR., <http://vpc.org/about-the-vpc/> [<https://perma.cc/V6DY-JFB6>] (last visited Mar. 16, 2020).

39. *Id.*

40. See VIOLENCE POL’Y CTR., KEY POINTS ABOUT ASSAULT WEAPONS 1, 6–11, <http://vpc.org/wp-content/uploads/2018/06/Assault-weapon-primer-2017-VPC.pdf> [<https://perma.cc/MVR5-HQLW>].

41. 511 U.S. 600 (1994).

42. *Id.* at 602–03.

many people conclude that they all essentially fall under the rubric of “assault weapons.”

Just because something looks like something else doesn’t make it that thing, right? It’s common sense. Think about it. Just because something may look like a Rembrandt painting, doesn’t make it an authentic Rembrandt. Go spend some time in Times Square in New York City. There are a lot of people in Times Square who dress in superhero costumes. If we apply the logic of those who want to ban guns, then the fact that these actors *look* like superheroes, would necessarily mean that they have superhero powers like super strength and x-ray vision. But that’s absurd. In no other context would we say that because something looks like something, it is that thing. Otherwise, you could be arrested for possessing a weed that looks like marijuana but is not. That is precisely the type of warped reasoning that the gun grabbers employ in the political debate over “assault weapon” bans.

I previously mentioned some of the features that convert an ordinary gun into an “assault weapon.” Before I discuss some of those features further, it is important to understand how the statutes that ban “assault weapons” actually work.⁴³ To constitute an “assault weapon,” a semiautomatic rifle must be able to accept or use a detachable magazine.⁴⁴ A detachable magazine is simply that piece of metal or plastic that you put your bullets in, and which you then put into the gun.⁴⁵ Plus, the statutes provide, on top of that, in order to qualify as an “assault weapon,” the semiautomatic rifle with a detachable magazine must have one or more features.⁴⁶

What are the features that elevate an ordinary gun into an “assault weapon”? One such feature is a pistol grip. The addition of a pistol grip to a rifle supposedly converts an ordinary

43. Some statutes ban firearms by the name of the make and the model, as well as by features. *See, e.g.*, MD. CODE ANN., PUB. SAFETY § 5-101(r)(2) (LexisNexis 2018 & Supp. 2019); MD. CODE ANN., CRIM. LAW § 4-301(h)(1) (LexisNexis 2012 & Supp. 2019).

44. CAL. PENAL CODE § 30515(a)(1) (West 2012 & Supp. 2020); N.Y. PENAL LAW § 265.00(22)(a) (McKinney 2017 & Supp. 2020).

45. *Clip vs. Magazine: A Lesson in Firearm Terminology*, MINUTEMAN REV. (Jan. 22, 2020), <https://www.minutemanreview.com/clip-vs-magazine-lesson-in-firearm/> [<https://perma.cc/8ZAY-QE49>].

46. *See, e.g.*, CAL. PENAL CODE § 30515(a)(1)(A)–(F); N.Y. PENAL LAW § 265.00(22).

semiautomatic rifle into an “assault weapon.”⁴⁷ This is both practically and constitutionally absurd. Keep this in mind. A pistol grip comes from a pistol; that’s why it is called a pistol grip. In *District of Columbia v. Heller*, the Supreme Court said that pistols and handguns are protected “arms” under the Second Amendment.⁴⁸ So if a manufacturer designs a rifle with a pistol grip, then how does that convert a constitutionally protected rifle into something that is constitutionally unprotected, that is, an ordinary rifle with a pistol grip? It shouldn’t, and I don’t think it does.

A second feature that will make an ordinary rifle an “assault weapon” is a shoulder stock, an adjustable shoulder stock, or a telescoping shoulder stock.⁴⁹ What do these words mean if you’re not already familiar with firearms? Have you ever gone shoe shopping? You may see twelve pairs of the same style and color of shoes, except they are different *sizes*! Sizes. Well, all a shoulder stock does is it shortens or lengthens the rifle so that if you’re a tall, big guy, you can have it one length, and if you’re a short person, you can shorten it.⁵⁰ Every reference to these adjustable stocks is talking about adjusting a rifle to the operator’s size,⁵¹ no different than buying the correct shoe size. How does the addition of such a convenient feature turn an ordinary rifle into an “assault weapon”?

And there are other so-called “scary” features. I love this one. Most of the statutes that ban semiautomatic rifles focus on whether your rifle can accept a bayonet with what’s called a bayonet lug.⁵² A bayonet lug allows you to attach a bayonet on the end of a rifle. The mere presence of the lug itself supposedly converts an ordinary semiautomatic rifle into a menacing “as-

47. See, e.g., CAL. PENAL CODE § 30515(a)(1)(A); N.Y. PENAL LAW § 265.00(22)(a)(ii).

48. *District of Columbia v. Heller*, 554 U.S. 570, 629, 636 (2008).

49. See, e.g., Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 110102(b), § 921(a)(30)(B)(i), 108 Stat. 1796, 1997–98 (codified as amended in scattered sections of 42 U.S.C.) (expired 2004) (including telescopic shoulder stocks as one of five possible modifications that turn a semiautomatic rifle into an “assault weapon”); CAL. PENAL CODE § 30515(a)(1)(C); N.Y. PENAL LAW § 265.00(22)(a)(i).

50. THE ULTIMATE GUIDE TO U.S. ARMY COMBAT: SKILLS, TACTICS, AND TECHNIQUES 260–61 (Jay McCullough ed., 2012).

51. See, e.g., Mark Overstreet, *Top 10 Reasons You Should Own An AR-15*, FEDERALIST (Dec. 12, 2018), <https://thefederalist.com/2018/12/12/top-10-reasons-ar-15/> [<https://perma.cc/63C6-3QWW>].

52. See, e.g., N.Y. PENAL LAW § 265.00(22)(a)(v).

sault weapon.” Now, I read a lot of news stories every day, and I’m sure you do, too. I don’t know about you, but it’s been a long time since I have read any stories about people getting killed with a bayonet attached to the end of a gun. But that’s just me. Maybe I’m not reading the right papers.

The point is that the features that transform an ordinary firearm into an “assault weapon” are entirely arbitrary. These features, at most, make ordinary rifles more reliable and better for users to shoot accurately and more safely.⁵³ These features improve the safety of the firearm. They don’t reduce the safety of the gun. They make them safer to use for the gun owner and for bystanders. But because of definitional games, the legislators in six states and the District of Columbia have been able to ban these types of firearms.⁵⁴

What is the argument in favor of these gun ban laws? Well, it’s really quite simple. The gun grabbers argue that, “criminals will use these guns to do bad things, so therefore we want to deprive all Americans of their right to have them.”

Let’s think about that logic. Or, as I like to say, let’s think about that illogic for a moment. Our right to keep and bear arms is a natural right recognized by the Second Amendment—this is not a made-up right based on “penumbras” and “emanations,” is it?⁵⁵ It’s actually in the text of the Bill of Rights.⁵⁶ The people’s right to keep and bear arms is found in the Second Amendment of the Bill of Rights, our first freedom.⁵⁷ Yet, there are people out there who say that, because someone, somewhere, may use one of these firearms at some time to engage in criminality, *you and I* must lose our Second Amendment rights to own, use or even possess them.

There’s something perverse about having our fundamental rights shrunk and sacrificed by virtue of the conduct—or pos-

53. Overstreet, *supra* note 51.

54. Julius Wachtel, Opinion, *Want an assault weapons ban that works? Focus on ballistics.*, WASH. POST (Sept. 6, 2019, 11:50 AM), <https://www.washingtonpost.com/opinions/2019/09/06/heres-how-make-an-assault-weapons-ban-that-actually-works/> [<https://perma.cc/TJK5-Z89Z>].

55. Compare *District of Columbia v. Heller*, 554 U.S. 570, 581, 592 (2008) (stating the right to keep and bear arms is a preexisting right recognized by the Second Amendment) with *Griswold v. Connecticut*, 381 U.S. 479, 484–85 (1965) (finding a “right to privacy” in the “emanations” and “penumbras” of the Bill of Rights).

56. U.S. CONST. amend II.

57. *Id.*

sible conduct—of criminals and psychopaths. We should not lose our *fundamental* constitutional rights because of the acts of criminals and people who should be in mental institutions. The Supreme Court agrees with me.

In *Heller*, the Court acknowledged the social dangers associated with firearms, and declared in the concluding paragraph that it understood the arguments about gun control, but there are certain policies that—and I’m quoting the Supreme Court here—are “off the table,” that is, removed from the democratic process because these rights are recognized in the Constitution.⁵⁸ And the banning of firearms protected by the Second Amendment is, and should be, off the table. For people who want more gun restrictions, I have a suggestion for them. Follow the advice of the late Justice Stevens, and try to amend the Constitution using Article V procedures.⁵⁹ Don’t try to subvert the Second Amendment or read it out of the Constitution in other ways.

So, how should courts apply the *Heller* test of common use to “assault weapon” bans? It’s very simple. Today, there are somewhere between five and eight million AR-15s owned by civilians in the United States.⁶⁰ There’s a debate about it, but there is no debate that there are millions of AR-15s owned by millions of Americans.⁶¹ And the number is growing.⁶² When you compare that number to the number of people who engage in other lawful activities like swimming and jogging, you find that the number of AR-15s in civilian hands far exceeds many

58. *Heller*, 554 U.S. at 636.

59. John Paul Stevens, Opinion, *John Paul Stevens: Repeal the Second Amendment*, N.Y. TIMES (Mar. 27, 2018), <https://nyti.ms/2p1aPuh> [<https://perma.cc/S4U6-2RB4>].

60. Not Quite All “The Facts” About the AR-15, NRA-ILA (Nov. 8, 2013), <https://www.nra.org/articles/20131108/not-quite-all-the-facts-about-the-ar-15> [<https://perma.cc/QM5D-LZNM>]; John W. Schoen, *Owned by 5 million Americans, AR-15 under renewed fire after Orlando massacre*, CNBC (June 13, 2016, 2:31 PM), <https://www.cnbc.com/2016/06/13/owned-by-5-million-americans-ar-15-under-renewed-fire-after-orlando-massacre.html> [<https://perma.cc/N5CC-VU69>].

61. *Are AR-15 Rifles a Public Safety Threat? Here’s What the Data Say*, FEE (Jan. 11, 2019), <https://fee.org/articles/are-ar-15-rifles-a-public-safety-threat-heres-what-the-data-say/> [<https://perma.cc/399B-E5AA>].

62. Heath Druzin, *From Banned to Beloved: The Rise Of The AR-15*, KERA NEWS (Mar. 13, 2019), <https://www.keranews.org/post/banned-beloved-rise-ar-15> [<https://perma.cc/R9EY-B7QV>]; Ali Watkins, John Ismay & Thomas Gibbons-Neff, *Once Banned, Now Loved and Loathed: How the AR-15 Became ‘America’s Rifle,’* N.Y. TIMES (Mar. 3, 2018), <https://nyti.ms/2F8sMI9> [<https://perma.cc/RPL4-5ZAF>].

of those other common activities in terms of participants. The AR-15 is widely used by millions of Americans for hunting, target competitions, and self-defense.⁶³ Under *Heller's* standard of common use for lawful purposes, the right to possess these firearms is protected under the Constitution.

But then how do we explain why four court of appeals cases have upheld “assault weapon” bans,⁶⁴ essentially ignoring *Heller*? First, we should consider the states from where these gun ban cases arose: New York, Maryland, California, Connecticut, New Jersey, and Illinois.⁶⁵ Politically, these states are all deep blue states; and when you appeal a case to appellate judges in these blue states, it is likely being decided by judges who were blessed for the federal bench by blue-state Senators (even where those local judges may have been appointed by Republican Presidents). Bear in mind that, you don’t see “assault weapon” bans being enacted in the red states of Texas, Georgia, or South Carolina. So, courts in those jurisdictions never get the opportunity to weigh in on the constitutionality of “assault weapon” bans. I think that’s part of the reason why most of the gun ban cases ultimately uphold “assault weapon” bans as constitutional, that is, there is a jurisdictional bias. Gun bans do not get enacted in jurisdictions where these bans would likely be overturned. Although there are cases that have ruled in favor of the Second Amendment, usually these cases have ultimately been overturned *en banc* by a particular circuit. This happened in the Fourth Circuit and in the Ninth Circuit, for example.⁶⁶

Beyond that, courts that uphold these bans engage in an improper balancing of social interests. They essentially embrace the dissent by Justice Breyer in *Heller* that suggests that courts should weigh the good against the bad of guns, shake it all up,

63. *Understanding America's Rifle*, NSSF, <https://www.nssf.org/mstr/> [<https://perma.cc/743C-W8BN>] (last visited Mar. 16, 2020).

64. *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc); *New York State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 407 (7th Cir. 2015); *Heller II*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

65. N.J. STAT. ANN. §§ 2C:39-1(w), 2C:39-5(f) (West 2016 & Supp. 2019); *Kolbe*, 849 F.3d at 120 (Maryland); *Cuomo*, 804 F.3d at 247 (New York and Connecticut); *Friedman*, 784 F.3d at 407 (Highland Park, Illinois); Complaint, *Miller v. Becerra*, No. 3:19-cv-01537 (C.D. Cal. Aug. 15, 2019).

66. *Kolbe*, 849 F.3d at 121; *Peruta v. San Diego County*, 824 F.3d 919, 942 (9th Cir. 2016) (en banc).

and then rule for the government.⁶⁷ That's really what they do. The courts keep repeating the phrase "assault weapons" over and over in their opinions as if this is some sort of talisman for good constitutional reasoning.⁶⁸ In reality, it's not good legal reasoning. And it is not consistent with the Supreme Court's decision in *Heller*.

I should also mention that Justice Kavanaugh is not alone in his views on the Second Amendment. Other judges agree with Justice Kavanaugh's rationale in *Heller II* that "assault weapon" bans are unconstitutional. That includes a President Clinton appointee, Judge Traxler of the Fourth Circuit, as well as Judge Manion, a well-respected judge in the Seventh Circuit.⁶⁹ So Justice Kavanaugh is not out there by himself, by any means, in terms of where this jurisprudence stands.

I want to address two more points. The first is, many people like to argue that, given the alleged social consequences of widespread gun ownership in the United States, AR-15s and other "assault weapons" should not be protected by the courts because to do so would hurt law enforcement's efforts to thwart criminals and would lead to more murders and crime.⁷⁰ Of course, this is false—there is little, if any, evidence that "assault weapon" bans advance public safety in any way. At any rate, we know there are countless examples of other rights in the Bill of Rights that have, arguably, potentially negative social consequences. For example, the Fourth Amendment.

The Fourth Amendment says you are free from unreasonable searches and seizures, warrantless searches, and the like.⁷¹ There are many times when the police arrest a known violent murderer and rapist—they arrest the bad guy—and yet, be-

67. *District of Columbia v. Heller*, 554 U.S. 570, 681 (2008) (Breyer, J., dissenting); see also Allen Rostron, *Justice Breyer's Triumph in the Third Battle over the Second Amendment*, 80 GEO. WASH. L. REV. 703, 706–07 (2012) (noting that the federal courts have "effectively embraced the sort of interest-balancing approach" that the Supreme Court "condemned" in *Heller*).

68. *Kolbe*, 849 F.3d 114 (mentioned "assault weapon" over 100 times); *Cuomo*, 804 F.3d 242 (mention "assault weapon" over 50 times).

69. See *Kolbe*, 849 F.3d at 151–52 (Traxler, J., dissenting); *Friedman*, 784 F.3d at 412–13 (Manion, J., dissenting).

70. William Cummings & Bart Jansen, *Why the AR-15 Keeps appearing at America's deadliest mass shootings*, USA TODAY (Feb. 15, 2018, 6:59 PM), <https://www.usatoday.com/story/news/nation/2018/02/14/ar-15-mass-shootings/339519002/> [<https://perma.cc/825Q-SHF4>].

71. U.S. CONST. amend. IV.

cause the cops screwed up the arrest process, that is, how they procured evidence or put their information together, well, guess what happens? The known violent criminal walks free under the exclusionary rule.⁷² That is a social cost because he's not punished, and he's walking the streets where he can commit more rapes and murders. We do not ignore the Bill of Rights and throw the Fourth Amendment out just because some criminal may walk free. That's not how constitutional law works.

And my final point is this: many of the federal courts that uphold "assault weapon" bans and other firearms restrictions say, look, you don't need firearms, Americans. Don't be silly. We, the government, have you covered. We've got the guns. We'll take care of you. You don't need the gun of your choice. You don't need guns at all, for that matter. We've got your back. My response: queue the laugh track. As a matter of political theory, maybe the government has some legal or moral duty to protect us. But as a matter of American law—and you lawyers know this—as a matter of American law, there is no duty on the part of the federal, state, or local governments to protect any of us in any respect⁷³ unless, narrowly, you're in their custody as a prisoner.⁷⁴

Regardless of the law, the reality is that police are not usually around when we encounter a criminal. I make this point in my 2018 book *#Duped*; police are not first responders.⁷⁵ That is a myth. The real first responders in American life are you and me. We are the people who first encounter the criminal. We first encounter the fire. We first encounter the sick person. We first encounter the problem. And we either dial 911, or we address the threat right there. If you don't believe me, consider that 1.2 million Americans every year are murdered, raped, or violently assaulted because the police do *not* arrive in time.⁷⁶

72. Paul H. Rubin, *The Exclusionary Rule's Hidden Costs*, WALL STREET J. (Feb. 28, 2009, 12:01 AM), <https://www.wsj.com/articles/SB123578433303098429> [<https://perma.cc/6C6D-WRY9>].

73. See, e.g., *DeShaney v. Winnebago Cty. Dep't of Soc. Servs.*, 489 U.S. 189, 191, 203 (1989).

74. See, e.g., *Farmer v. Brennan*, 511 U.S. 825, 833–34 (1994).

75. MARK W. SMITH, *#DUPED: HOW THE ANTI-GUN LOBBY EXPLOITS THE PARKLAND SCHOOL SHOOTING—AND HOW GUN OWNERS CAN FIGHT BACK* 58 (2018).

76. See *2016 Crime Statistics Released*, FBI (Sept. 25, 2017), <https://www.fbi.gov/news/stories/2016-crime-statistics-released> [<https://perma.cc/MQ7T-UZVK>].

This is not because the police are bad. They simply cannot be everywhere at all times.

So, in the end, folks, whether one likes it or not, the reality is that we are our own first responders. I would say that we, thus, have the right to access and own the same protections and fire-power as any law enforcement officer, including the right to the firearms of our choice.

The U.S. Supreme Court should use its authority—remember the Supreme Court is the *one* Supreme Court under the Constitution⁷⁷—to monitor and police the lower courts, that is, the *inferior* federal courts,⁷⁸ that fail to recognize and protect the constitutional right of *all* Americans to keep and bear arms. This protection should extend to those Americans who have been deprived of their fundamental rights in certain states, and the District of Columbia, where the ownership of an ordinary firearm in the form of a semiautomatic rifle, with a few user-friendly features, is outlawed. It is wrong that only those law-abiding Americans residing in forty-four states have the right to these firearms. It is also morally wrong and constitutionally flawed to turn law-abiding Americans into felons because they choose to possess an ordinary semiautomatic rifle while living in or crossing into the wrong state. The U.S. Supreme Court ought to step in and fix it.

[Rebuttal to Jonathan Lowy]: I’ll just make a few quick points. First, Jonathan Lowy eloquently points out that there is a right to life, a right not to be shot, and a right to safety.⁷⁹ That is all generally true. Except the question today is not “do you have that right,” but “how do you effectuate and make that right real in the real world”? I ask this: Do you want to depend upon the government to protect your lives, and the lives of the people you love? Consider Parkland, Florida, where, the guard on duty refused to go into the school building and confront the shooter.⁸⁰ Should we stake our lives on the other security

77. U.S. CONST. art. III, § 1.

78. *Id.*

79. Jonathan E. Lowy, *Comments on Assault Weapons, the Right to Arms, and the Right to Live*, 43 HARV. J.L. & PUB. POL’Y 375, 385 (2020).

80. See Nicholas Bogel-Burroughs, *Why Four Officers Were Fired for Their Response to the Parkland Shooting*, N.Y. TIMES (June 26, 2019), <https://nyti.ms/2LknvDf> [<https://perma.cc/ZH4U-JUDH>] (explaining that Officer Scot Peterson was fired because he did “not really do[] anything” during the shooting (internal quotation marks omitted)); Richard A. Oppel, Jr. & Shreeya Sinha, *What Officials Say Scot*

guards at Parkland who, when the shooting broke out, hid in a closet or jumped on a golf cart and drove away? Do we want our lives to be protected by the eight police officers of the Broward County Sherriff's Department—who set up a perimeter outside the school, never tried to confront the shooter, and didn't go in essentially until the shooter left the school, walked down the street and ordered a sandwich at a local store?⁸¹ Really? I agree we have a right to life. However, the way to effectuate that right is by letting private citizens own firearms.

Second, the majority in *Heller* held that there are certain policy choices that the Bill of Rights takes off the table because they are fundamental, constitutional rights.⁸² One such fundamental, constitutional right is the right to bear arms. One can debate the merits of gun control, but the truth is that the debate that should take place is in the context of amending the Constitution, using Article V procedures to repeal the Second Amendment, like the late Justice Stevens recommended.⁸³ But the gun grabbers do not want to do that. It is too hard, and they do not have the support for it. Instead, they try to subvert the process by enacting gun-grabbing legislation and creating bad precedent in the courts that denies law-abiding Americans their Second Amendment rights.

Third, it is not about mass shooters; it's about mass killers. Did you know that the greatest number of school children killed in a murderous attack was done with a bomb in Bath, Michigan, close to the turn of the century?⁸⁴ Not a gun, but a bomb. That is consistent with the people who used a truck bomb at the Oklahoma City federal building.⁸⁵ Not to mention

Peterson Did Not Do During the Parkland School Shooting, N.Y. TIMES (June 4, 2019), <https://nyti.ms/2jX6a3m> [<https://perma.cc/RS3Y-YQ8X>] (explaining Officer Scot Peterson's failure to act during the Parkland shooting).

81. See Patricia Mazzei, *Slow Police Response and Chaos Contributed to Parkland Massacre, Report Finds*, N.Y. TIMES (Dec. 12, 2018), <https://nyti.ms/2zXPBh2> [<https://perma.cc/B47D-63UJ>].

82. See *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

83. See Stevens, *supra* note 59.

84. Lorraine Boissoneault, *The 1927 Bombing That Remains America's Deadliest School Massacre*, SMITHSONIAN MAG. (May 18, 2017), <https://www.smithsonianmag.com/history/1927-bombing-remains-americas-deadliest-school-massacre-180963355/> [<https://perma.cc/SV5B-GPBE>].

85. See *Oklahoma City Bombing*, FBI, <https://www.fbi.gov/history/famous-cases/oklahoma-city-bombing> [<https://perma.cc/S2EH-W5UR>] (last visited Nov. 18, 2019).

the German pilot who killed 150 people by crashing his plane,⁸⁶ the arsonist who killed thirty-two people when he set afire the Upstairs Lounge in New Orleans in 1973,⁸⁷ or the person who killed 87 people at the Happy Land Social Club in 1990 by starting a gasoline fire at the only exit.⁸⁸ There are lots of ways to engage in mass killing without guns. In 2018, the RAND Corporation, which is based in Santa Monica, California,⁸⁹ did a major study on the impact and effect of “assault weapon” bans on public safety. They concluded there was no reliable evidence that these bans positively impacted (reduced) crime rates.⁹⁰ That’s the RAND Corporation in 2018. I think that says enough.

86. Josh Levs, Laura Smith-Spark & Holly Yan, *Germanwings Flight 9525 co-pilot deliberately crashed plane, officials say*, CNN (Mar. 26, 2015, 9:38 PM), <https://www.cnn.com/2015/03/26/europe/france-germanwings-plane-crash-main/index.html> [https://perma.cc/9AC9-DDVT].

87. See Elizabeth Dias, *The Upstairs Lounge Fire: When Dozens of Gay People Were Killed in 1973*, TIME (June 21, 2013), <https://time.com/4365476/orlando-shooting-upstairs-lounge-fire/> [https://perma.cc/YR8J-WJFM] (explaining that, although police believed the fire to be arson, the arsonist was never caught).

88. Sam Roberts, *Julio Gonzalez, Arsonist Who Killed 87 at New York Club in '90, Dies at 61*, N.Y. TIMES (Sept. 14, 2016), <https://nyti.ms/2cOWmEZ> [https://perma.cc/KH8P-CW6N].

89. RAND *Office Locations and Addresses*, RAND CORP., <https://www.rand.org/about/locations.html> [https://perma.cc/5SPQ-DGDJ] (last visited Nov. 18, 2019).

90. See ANDREW R. MORRAL, TERRY L. SCHELL & MARGARET TANKARD, THE MAGNITUDE AND SOURCES OF DISAGREEMENT AMONG GUN POLICY EXPERTS 31, 63 (RAND Corp. 2018) (explaining the need for further research because the evidence for or against most major gun policy proposals—including “assault weapon” bans—is inconclusive, contradictory, or nonexistent).

COMMENTS ON ASSAULT WEAPONS, THE RIGHT TO ARMS, AND THE RIGHT TO LIVE

JONATHAN E. LOWY*

Before delving into the issue of the constitutionality of restrictions on assault weapons, an overview of the state of gun laws in America is warranted. Assault weapons are generally permitted in the United States today.¹ They were banned under federal law between 1994 and 2004, but Congress allowed that ban to lapse.² Now, they are prohibited in several states and are allowed in the others.³

Under current federal law, there are no limits on how many guns one can purchase.⁴ A person can purchase 50, 100, or even

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1. See John J. Phelan IV, *The Assault Weapons Ban—Politics, the Second Amendment, and the Country's Continued Willingness to Sacrifice Innocent Lives for "Freedom,"* 77 ALB. L. REV. 579, 597 (2014) (noting the lack of uniform laws regarding assault weapons and that "only seven states have adopted some kind of an assault weapon ban").

2. Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 110102(a), § 921(v)(1), 108 Stat. 1796, 1997 (codified as amended in scattered sections of 42 U.S.C.) (expired 2004).

3. Only seven states currently have laws banning assault weapons. These include California, Connecticut, Hawaii, Maryland, Massachusetts, New Jersey, and New York. See CAL. PENAL CODE § 30510, 30515, 30605 (West 2012 & Supp. 2020); CONN. GEN. STAT. §§ 53-202a to -202c (2019); HAW. REV. STAT. ANN. § 134-8(a) (LexisNexis 2013) (only applies to "assault pistols" not long guns); MD. CODE ANN., CRIM. LAW §§ 4-301 to -303 (LexisNexis 2012 & Supp. 2019); MD. CODE ANN., PUB. SAFETY § 5-101 (LexisNexis 2018 & Supp. 2019); MASS. ANN. LAWS ch. 140, §§ 121, 131M (LexisNexis 2016 & Supp. 2019); N.J. STAT. ANN. §§ 2C:39-1(w), 2C:39-5(f) (West 2016 & Supp. 2019); N.Y. PENAL LAW §§ 265.00(22), 265.01 (McKinney 2017 & Supp. 2020).

4. See *Registration*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/gun-owner-responsibilities/registration/> [<https://perma.cc/9LTV-7VPC>] (last visited Mar. 16, 2020) (noting that there is no comprehensive national system of gun registration).

1,000 guns at one time.⁵ There are also no limits on how many guns an individual can possess—theoretically, a person can possess all the guns that could fit into his or her home. Along with the lack of ownership limits under federal law, there are hundreds of models of conventional semiautomatic handguns, hunting rifles, and shotguns that are available under state laws.⁶ The result is that in every state, Americans can buy and possess thousands of semiautomatic handguns, rifles, and shotguns.

To provide some additional context, it is important to note that Congress has given the gun industry special protections under federal law that no other product or industry has been provided. For example, guns are exempt from the Consumer Product Safety Act.⁷ So even if there are safety devices that would save the lives of children and others and are completely feasible—and would not affect the functionality of the gun in any way—the law does not give the federal government the authority to require gun manufacturers to make guns with these safety devices.⁸ But with any other product, the government would require that such safety devices be put in.⁹ This posture is thanks to the National Rifle Association's influence on Congress when the Consumer Product Safety Act was enacted.¹⁰

The gun industry also has special protection from civil liability. Traditionally, a company that negligently provides a product to a criminal can be held civilly liable.¹¹ But some courts have

5. See *Bulk Gun Purchases*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/crime-guns/bulk-gun-purchases/> [<https://perma.cc/3P96-2KUA>] (last visited Mar. 16, 2020).

6. See, e.g., James B. Jacobs & Zoe Fuhr, *The Safe Act: New York's Ban on Assault Weapons & Large Capacity Magazines*, 53 CRIM. L. BULL. 4 (2017) (noting that despite New York's "ban" on assault weapons, residents in the state can still purchase various types of semiautomatic weapons that are not "unusually dangerous").

7. See 15 U.S.C. § 2052 (2018) (containing no references to weapons).

8. See *id.*

9. 15 U.S.C. § 2058 (2018).

10. See James L. Daniels, Comment, *Violating the Inviolable: Firearm Industry Retroactive Exemptions and the Need for a New Test for Overreaching Federal Prohibitions*, 38 J. MARSHALL L. REV. 955, 956–57 (2005).

11. For example, a vendor who furnishes alcohol can be held liable for foreseeable alcohol-related injuries arising out of the intoxication. See *Brannigan v. Raybuck*, 667 P.2d 213, 221 (Ariz. 1983).

held that when a licensed gun dealer negligently supplies guns to criminals, the dealer may not be held liable.¹²

Gun rights activists argue that getting more guns in people's hands leads to less crime.¹³ If this were true, the United States would be a perfect model for it, given that Americans possess such a vast number of guns.¹⁴ Yet the facts prove just the opposite. The gun homicide rate in the United States is twenty-five times higher than in other high-income nations,¹⁵ and Americans are over fifty times more likely to die from a gun than those in the United Kingdom.¹⁶

The crime rate in the United States is actually comparable to, and in some cases lower than, the rate in other high-income nations.¹⁷ Crime, as Professors Franklin Zimring and Gordon Hawkins found years ago, is not the problem behind gun deaths in America.¹⁸ Rather, the problem is that—because of the lax gun laws summarized above—criminals have easy access to guns.¹⁹ One cause of this ease of access is that federal law allows unlicensed people to sell guns without background

12. See *Jefferies v. District of Columbia*, 916 F. Supp. 2d 42, 47 (D.D.C. 2013) (barring tort claims against a weapons manufacturer); *Rosenbeck v. Sportsmen's Outpost, Inc.*, 2013, No. X04CV095032765S, 2011 WL 2479693, at *16, *23 (Conn. Super. Ct. 2011) (barring tort claims against gun dealer); see also Protection of Lawful Commerce in Arms Act, 15 U.S.C. § 7901–7903 (2018) (prohibiting civil actions against firearm manufacturers or sellers for criminal or unlawful use of firearm products).

13. See JOHN R. LOTT, JR., *MORE GUNS, LESS CRIME: UNDERSTANDING CRIME AND GUN-CONTROL LAWS* (3d ed. 2010).

14. *America's gun culture in charts*, BBC NEWS (Aug. 5, 2019), <https://www.bbc.com/news/world-us-canada-41488081> [<https://perma.cc/25TL-4UQ5>].

15. See *id.* (showing that 73 percent of all homicides in the United States are gun-related compared with 3 percent for England and Wales).

16. See Nurith Aizenman, *Deaths From Gun Violence: How The U.S. Compares With the Rest of the World*, NPR (Nov. 9, 2018, 3:14 PM), <https://www.npr.org/sections/goatsandsoda/2018/11/09/666209430/deaths-from-gun-violence-how-the-u-s-compares-with-the-rest-of-the-world> [<https://perma.cc/SX8V-BLDV>] (showing the rate of violent gun deaths per 100,000 people to be 4.43 for the United States and 0.06 for the United Kingdom).

17. *Total crimes per 1000: Countries Compared*, NATIONMASTER, <https://www.nationmaster.com/country-info/stats/Crime/Total-crimes-per-1000> [<https://perma.cc/S3J9-9ULT>] (last visited Mar. 16, 2020).

18. See FRANKLIN E. ZIMRING & GORDON HAWKINS, *CRIME IS NOT THE PROBLEM: LETHAL VIOLENCE IN AMERICA* (1997).

19. See Aaron Edward Brown, *The Guns Aren't Illegal. But Sometimes the Owners Are: Understanding Minnesota's private-transfer exception suggests the best path to reducing gun violence*, BENCH & B. MINN., May–June 2019, at 22, 23.

checks. If someone who has been convicted of murder is released from prison, he can visit a gun show, go online, or read the classified ads and find an unlicensed person—an ordinary person who does not have a federal firearms license—and that person can sell the convicted murderer all the guns he wants without a background check, unless in one of the states that require universal background checks.²⁰ Brady is trying to address this problem by advocating for a requirement for background checks for all gun sales.²¹

Even though America's crime rate is similar to those of comparable nations, because criminals and other dangerous people have such easy access to guns, the gun violence rate in the United States is completely out of line with the rest of the world. Every day in America, approximately 310 people are shot and 100 are killed by a gun, including twenty-one children and teens who are shot and four of whom are killed.²² States with the most guns have far higher gun death rates than states with lower amounts of guns.²³ Homes with firearms have a risk of homicide and suicide that is several times higher than in a home without firearms.²⁴ And while guns can be and sometimes are used in self-defense, it is much more likely that guns will be used against family members, visitors, or innocent people, or in suicides, unintentional shootings, or assaults and homicides.²⁵

Most Americans choose not to own firearms,²⁶ even though they have a right to do so under the Second Amendment under

20. 18 U.S.C. §§ 922(a)(5), (d) (2018); 27 C.F.R. 478.30, 478.32(d) (2019).

21. *Expanding Brady Background Checks (H.R. 8 and S. 42)*, BRADY, <https://www.bradyunited.org/legislation/expanding-brady-background-checks-hr-8-and-s-42> [<https://perma.cc/7EHC-EB2W>] (last visited Mar. 17, 2020); see also Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, 107 Stat. 1536 (1993).

22. *The Facts That Make Us Act*, BRADY, <https://www.bradyunited.org/key-statistics> [<https://perma.cc/NTU8-2WEM>] (last visited Jan. 18, 2020).

23. See Aaron J. Kivisto et al., *Firearm Ownership and Domestic Versus Nondomestic Homicide in the U.S.*, 57 AM. J. PREVENTIVE MED. 311, 313–17 (2019) (finding firearm ownership increased the rate of domestic but not nondomestic homicide); Michael C. Monuteaux et al., *Firearm Ownership and Violent Crime in the U.S.: An Ecologic Study*, 49 AM. J. PREVENTIVE MED. 207, 210 (2015).

24. *Gun Violence in America*, EVERYTOWN FOR GUN SAFETY (Feb. 20, 2020), <https://everytownresearch.org/gun-violence-america/2/> [<https://perma.cc/HS7V-QFBH>].

25. See *id.*

26. Ruth Igielnik & Anna Brown, *Key takeaways on Americans' views of guns and gun ownership*, PEW RES. CTR. (June 22, 2017), <https://www.pewresearch.org/fact->

the Supreme Court's holding in *District of Columbia v. Heller*.²⁷ However, many of these people are victimized as a result of guns that others choose to own.²⁸

There is also some constitutional significance to the fact that America's lack of gun regulation is not a product of the public will. For example, over ninety-five percent of Americans support background checks for all gun sales.²⁹ That may be the most popular legislative proposal in America.³⁰ I do not know of any legislative proposal for any issue that has the popularity of simply requiring Brady criminal background checks for all gun sales.³¹ Nearly everyone in America supports background checks for all gun sales—except the gun manufacturers, who want to sell more guns, and the politicians and lobbies that support the gun industry.³² That matters because this extreme

tank/2017/06/22/key-takeaways-on-americans-views-of-guns-and-gun-ownership/ [https://perma.cc/L9DA-KUC8] (reporting that 57 percent of Americans live in a household without guns).

27. 554 U.S. 570, 636 (2008).

28. See *Gun Violence in America*, *supra* note 24.

29. See, e.g., Domenico Montanaro, *Americans Largely Support Gun Restrictions To Do Something About Gun Violence*, NPR (Aug. 10, 2019, 7:00 AM), <https://www.npr.org/2019/08/10/749792493/americans-largely-support-gun-restrictions-to-do-something-about-gun-violence> [https://perma.cc/BTD8-BC2Q]; *Universal Background Checks*, GIFFORDS: COURAGE TO FIGHT GUN VIOLENCE, <https://giffords.org/issue/background-checks/> [https://perma.cc/WQ7J-HMYJ] (last visited Jan. 18, 2020). But see *"Universal" Background Checks Aren't as Universally Popular as You've Been Led to Believe*, NRA-ILA (Aug. 13, 2019), <https://www.nraila.org/articles/20190813/universal-background-checks-aren-t-as-universally-popular-as-you-ve-been-led-to-believe> [https://perma.cc/6BVS-C9TY] [hereinafter "*Universal" Background Checks*].

30. Compare *Universal Background Checks*, *supra* note 29 (stating that 97 percent of Americans support universal background checks), with Andrew Daniller, *Two-thirds of Americans support marijuana legalization*, PEW RES. CTR. (Nov. 14, 2019), <https://www.pewresearch.org/fact-tank/2019/11/14/americans-support-marijuana-legalization/> [https://perma.cc/JS6H-WT88] (stating that 91 percent of Americans support marijuana legalization for medical use).

31. A Brady criminal background check requires a firearm seller to contact the FBI to run a background check. See *Background Check Procedures*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/background-checks/background-check-procedures/> [https://perma.cc/U4RN-3W6Q] (last visited Mar. 17, 2020). The FBI checks the National Instant Criminal Background Check System (NICS) which "contains information about individuals' criminal and mental health histories and any civil orders entered against them that might affect their eligibility to purchase or possess a gun, such as domestic violence restraining orders." *Id.*

32. See Montanaro, *supra* note 29. But see "*Universal" Background Checks*, *supra* note 29.

expansive view of gun rights is not wildly popular but does have undue influence in Congress.

This Essay is about assault weapons. It is not about whether Americans can or should choose to own firearms if they want to, and it is not about whether Americans can or should choose to stockpile an arsenal of semiautomatic handguns, rifles, and shotguns. They can do so under current federal and state law. The question is whether it is constitutional for states, and perhaps the federal government, to restrict or prohibit the civilian purchase and possession of certain types of semiautomatic weapons which, as Mark Smith just discussed, have certain attributes like rear pistol grips, barrel shrouds, and the ability to accept large-capacity magazines.³³ The question is really whether the Constitution provides an individual right to these design attributes.

Every single court that has considered this issue has rejected the legal position that Mark Smith so eloquently made.³⁴ There are a number of reasons for that. One is that, despite Mark Smith's argument that the features that make an assault weapon an assault weapon are cosmetic,³⁵ that is simply not the case. They are functional aspects of the gun that make it easier to kill large amounts of people in a short amount of time.³⁶ This is not a matter of opinion but is instead demonstrated by the demand for these features in the relevant market, which has spoken on this issue. That relevant market is the market of mass killers.

33. See Mark W. Smith, *Assault Weapon Bans: Unconstitutional Laws for a Made-up Category of Firearms*, 43 HARV. J.L. & PUB. POL'Y 356, 358, 364 (2020).

34. See, e.g., *Wilson v. Cook County*, 937 F.3d 1028, 1029 (7th Cir. 2019) (upholding ban on assault rifles and large-capacity magazines); *Worman v. Healey*, 922 F.3d 26, 30–31, 41 (1st Cir. 2019) (upholding ban on assault rifles and large-capacity magazines); *Ass'n of N.J. Rifle & Pistol Clubs v. Att'y Gen. N.J.*, 910 F.3d 106, 122 (3d Cir. 2018) (upholding ban on large-capacity magazines); *Kolbe v. Hogan*, 849 F.3d 114, 137–38 (4th Cir. 2017) (en banc) (upholding ban on assault weapons); *N.Y. State Rifle & Pistol Ass'n v. Cuomo*, 804 F.3d 242, 269 (2d Cir. 2015) (upholding ban on assault rifles and large-capacity magazines).

35. Smith, *supra* note 33, at 364–66.

36. See, e.g., *Assault Weapons*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/assault-weapons/> [https://perma.cc/XY8-C5DZ] (last visited Jan. 18, 2020); *Large Capacity Magazines*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/gun-laws/policy-areas/hardware-ammunition/large-capacity-magazines/> [https://perma.cc/82WP-2JDS] (last visited Jan. 18, 2020).

Murderers who want to kill as many people in as short an amount of time as possible overwhelmingly choose assault weapons and large-capacity magazines. The mass shooters at the high school in Parkland, Florida,³⁷ the church in Sutherland Springs, Texas,³⁸ the music festival in Las Vegas,³⁹ the terror attack in San Bernardino, California,⁴⁰ the elementary school at Sandy Hook in Newtown, Connecticut,⁴¹ and the movie theater in Aurora, Colorado⁴² all chose AR-15-style assault weapons and large-capacity magazines. That is not because they liked the way they looked—it is because they knew that they were effective in accomplishing their mission, which was to kill as many people as efficiently as possible. And the fact is that they were correct,⁴³ and courts have recognized this.⁴⁴

There are differences between a semiautomatic assault weapon and a fully automatic gun. A fully automatic gun fires rounds so long as the trigger is held and rounds are available,

37. Will Drabold & Alex Fitzpatrick, *The Florida School Shooter Used an AR-15 Rifle. Here's What to Know About the Gun*, TIME (Jan. 15, 2019, 11:38 AM), <https://time.com/5160267/gun-used-florida-school-shooting-ar-15/> [<https://perma.cc/UXH9-447M>].

38. Tom Vanden Brook, *Air Force failed four times to prevent Sutherland Springs church killer from buying guns*, USA TODAY (Dec. 7, 2018, 4:37 PM), <https://www.usatoday.com/story/news/politics/2018/12/07/air-force-failed-four-times-prevent-sutherland-springs-shooter-gun-purchase/2237400002/> [<https://perma.cc/Y2QW-K5RE>].

39. Alex Horton, *The Las Vegas shooter modified a dozen rifles to shoot like automatic weapons*, WASH. POST (Oct. 3, 2017, 10:37 PM), <https://www.washingtonpost.com/news/checkpoint/wp/2017/10/02/video-from-las-vegas-suggests-automatic-gunfire-heres-what-makes-machine-guns-different/> [<https://perma.cc/EG53-P98S>].

40. Chris Keller, *San Bernardino Shooting update: Rifles used in attack were modified to be illegal*, 89.3 KPPC (Dec. 4, 2015), <https://www.scpr.org/news/2015/12/04/56040/san-bernardino-shooting-update-rifles-used-in-atta/> [<https://perma.cc/F4XG-C9BW>].

41. Press Release, Conn. Dep't of Emergency Servs. & Pub. Protect., State Police Identify Weapons Used in Sandy Hook Investigation; Investigation Continues (Jan. 18, 2013), <https://web.archive.org/web/20160517175905/http://www.ct.gov/despp/cwp/view.asp?A=4226&Q=517284> [<https://perma.cc/M2UP-E5RL>].

42. James Dao, *Aurora Gunman's Arsenal: Shotgun, Semiautomatic Rifle and, at the End, a Pistol*, N.Y. TIMES (July 23, 2012), <https://nyti.ms/2k4iTjk> [<https://perma.cc/2BP8-FNYX>].

43. William Cummings & Bart Jansen, *Why the AR-15 keeps appearing at America's deadliest mass shootings*, USA TODAY (Feb. 15, 2018, 6:59 PM), <https://www.usatoday.com/story/news/nation/2018/02/14/ar-15-mass-shootings/339519002/> [<https://perma.cc/DCH4-DGAQ>].

44. See Ryan Sit, *Court Rules Second Amendment Doesn't Protect AR-15, Assault Rifles and Large-Capacity Magazines*, NEWSWEEK (Apr. 6, 2018, 2:10 PM), <https://www.newsweek.com/massachusetts-federal-court-second-amendment-doesnt-protect-ar-15-assault-875779> [<https://perma.cc/BEF2-CSVQ>]; *supra* note 34.

while a semiautomatic gun only fires a single round each time the trigger is pulled.⁴⁵ But the difference between these two capabilities is not great. A shooter can empty a thirty-round magazine in about five seconds with a semiautomatic assault weapon,⁴⁶ while a comparable fully automatic gun can be emptied in two seconds, which is a three-second difference.⁴⁷ Courts have recognized that is not much of a difference.⁴⁸

As discussed above, there was a federal ban on assault weapons from 1994 to 2004,⁴⁹ and the results show that the ban saved lives.⁵⁰ There are people who are alive today who probably would be dead if the United States did not have that ban. The ban resulted in a thirty-seven percent decline in incidences of gun massacres,⁵¹ according to one study.⁵² That is a forty-three percent reduction in people killed in those gun massacres.⁵³ In the decade of the federal ban, there were fifteen gun

45. John Haltiwanger, *A breakdown of gun terminology to help you in discussions on mass shootings and debates over gun control*, BUS. INSIDER (Aug. 12, 2019, 10:06 AM), <https://www.businessinsider.com/terms-to-know-about-guns-when-discussing-mass-shootings-2019-8> [<https://perma.cc/JDY5-UTKH>].

46. *Kolbe v. Hogan*, 849 F.3d 114, 125 (4th Cir. 2017) (en banc) (“The difference between the fully automatic and semiautomatic versions of those firearms is slight. That is, the automatic firing of all the ammunition in a large-capacity thirty-round magazine takes about two seconds, whereas a semiautomatic rifle can empty the same magazine in as little as five seconds.”).

47. *Id.*

48. *See, e.g., id.*

49. *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, sec. 110102(a), § 921(v)(1), 108 Stat. 1796, 1997 (codified as amended in scattered sections of 42 U.S.C.) (expired 2004).

50. *See* Christopher Ingraham, *It’s time to bring back the assault weapons ban, gun violence experts say*, WASH. POST (Feb. 15, 2018, 1:23 PM), <https://www.washingtonpost.com/news/wonk/wp/2018/02/15/its-time-to-bring-back-the-assault-weapons-ban-gun-violence-experts-say/> [<https://perma.cc/T4L8-U8LR>]. *But see* CHRISTOPHER S. KOPER, UPDATED ASSESSMENT OF THE FEDERAL ASSAULT WEAPONS BAN: IMPACTS ON GUN MARKETS AND GUN VIOLENCE, 1994–2003, at 2–3 (2004), <https://www.ncjrs.gov/pdffiles1/nij/grants/204431.pdf> [<https://perma.cc/8JJK-DZTE>] (concluding that the effects of the ban are inconclusive).

51. Classified as six or more people being killed. Ingraham, *supra* note 50.

52. *Id.*

53. *Id.* Another study found that “Mass-shooting fatalities [defined as four or more people shot] were 70% less likely to occur during the federal ban period . . .” Charles DiMaggio et al., *Changes in US mass shooting deaths associated with the 1994–2004 federal assault weapons ban: Analysis of open-source data*, 86 J. TRAUMA & ACUTE CARE SURGERY 11, 12–13 (2019).

massacres that resulted in a total of ninety-six deaths.⁵⁴ The decade after the ban, there were more than two times the number of gun massacres and more than three times the number of people killed in those massacres.⁵⁵ Also consider that over eighty percent of the gun massacres took place in areas where guns are allowed, not the supposedly more susceptible “gun-free” zones.⁵⁶

The constitutional question here is not whether one should support an assault weapon ban. The question is whether legislatures should be allowed to make the judgment that civilians should not be allowed to own the sort of guns that these mass killers have chosen, such as the AR-15. Note, however, that this narrow ban would still allow civilians to amass arsenals of conventional handguns, rifles, and shotguns.

And to be clear, the Supreme Court in *Heller* did not suggest in any way that assault weapons are constitutionally protected. In fact, just the opposite. The majority opinion by Justice Scalia recognized that guns like M16 rifles are not constitutionally protected.⁵⁷ Mark Smith argued that the Supreme Court held in *Staples v. United States*⁵⁸ that the assault weapons available to civilians are totally different from military M16s and other similar guns.⁵⁹ That is not true at all. *Staples* held, “The AR-15 is the civilian version of the military’s M-16 rifle”⁶⁰ The AR-15 and the M16 are very similar, and courts have recognized this.⁶¹

54. Mark Follman, Gavin Aronsen & Deanna Pan, *US Mass Shootings, 1982–2020: Data From Mother Jones’ Investigation*, MOTHER JONES (Feb. 26, 2020, 4:15 PM), <https://www.motherjones.com/politics/2012/12/mass-shootings-mother-jones-full-data/> [https://perma.cc/E8DJ-NYLT] (using 4 or more deaths as a mass shooting).

55. *Id.*

56. See *Ten Years of Mass Shootings in the United States*, EVERYTOWN FOR GUN SAFETY (Nov. 21, 2019), <https://everytownresearch.org/massshootingsreports/mass-shootings-in-america-2009-2019/> [https://perma.cc/9WCJ-HDTA].

57. *District of Columbia v. Heller*, 554 U.S. 570, 627–28 (2008).

58. 511 U.S. 600 (1994).

59. Smith, *supra* note 33, at 363–64 (“The term ‘assault weapons’ was based not on how the guns operated, but on how the guns looked. After all, semiautomatic guns operate much differently than fully automatic machine guns, which is why in 1994 the U.S. Supreme Court ruled in *Staples v. United States* that semiautomatic rifles are different from military weapons. And yet, because they look alike, many people conclude that they all essentially fall under the rubric of ‘assault weapons.’” (footnotes omitted)).

60. *Staples*, 511 U.S. at 603.

61. See, e.g., *id.*

The only major difference is the AR-15 does not enable automatic fire.⁶² But the other attributes are very similar.

And that is why every court that has considered the issue has correctly ruled that bans on civilian possession or purchase of assault weapons can be and should be held as constitutional.⁶³ Judge Wilkinson, a leading conservative jurist who has been on Supreme Court shortlists for Republican presidents, makes this point much better than I could. He wrote this in a concurrence to an en banc decision upholding Maryland's ban on assault weapons and high-capacity magazines:⁶⁴

Disenfranchising the American people on this life and death subject would be the gravest and most serious of steps. It is their community, not ours. It is their safety, not ours. It is their lives, not ours. To say in the wake of so many mass shootings in so many localities across the country that the people themselves are now to be rendered newly powerless, that all they can do is stand by and watch as federal courts design their destiny—this would deliver a body blow to democracy as we have known it since the very founding of this nation.

....

Providing for the safety of citizens within their borders has long been state government's most basic task. In establishing the "right of law-abiding, responsible citizens to use arms in defense of hearth and home," *Heller* did not abrogate that core responsibility. Indeed, *Heller* stopped far short of the kind of absolute protection of assault weapons that appellants urge on us today.⁶⁵

Let me close by pointing out another key point that I think we should all consider when addressing not just the constitutionality of assault weapon bans, but any Second Amendment issue. That is that the Second Amendment cannot be viewed in a vacuum. Mark Smith referred to the Second Amendment as

62. *See id.* ("The AR-15 . . . is, unless modified, a semiautomatic weapon.").

63. *See, e.g.,* *Kolbe v. Hogan*, 849 F.3d 114, 121 (4th Cir. 2017) (en banc); *N.Y. State Rifle & Pistol Ass'n, Inc. v. Cuomo*, 804 F.3d 242, 247 (2d Cir. 2015); *Friedman v. City of Highland Park*, 784 F.3d 406, 407 (7th Cir. 2015); *Heller v. District of Columbia (Heller II)*, 670 F.3d 1244, 1247–48 (D.C. Cir. 2011).

64. *Kolbe*, 849 F.3d at 137.

65. *Id.* at 150 (Wilkinson, J., concurring) (citations omitted) (first citing *Boston Beer Co. v. Massachusetts*, 97 U.S. 25, 32 (1877); then quoting *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008)).

our first freedom.⁶⁶ I would disagree with that. Our first freedom is our right to live, our right to safety. A right, if you will, not to be shot. And an extreme expansive version of the Second Amendment infringes on that most fundamental right.

We have a gun violence epidemic in this country, which we should not tolerate.⁶⁷ Mass shootings are a mere part of that, but an important part because today many of us do not feel safe sending our children to high schools or even elementary schools, nor do we feel safe in workplaces, shopping malls, synagogues, churches, and many more places where there have been gun massacres mostly using assault weapons and high-capacity magazines.⁶⁸

There are common sense solutions which most Americans agree on that can reduce gun violence.⁶⁹ These include banning assault weapons and requiring background checks for all gun sales.⁷⁰ We should focus on those solutions, not on extreme readings of the Second Amendment which claim a constitutional right to pistol grips, barrel shrouds, and high-capacity magazines. And we should all work together to try to save lives.

Finally, most of what Mark Smith discussed is whether private citizens should be allowed to own guns.⁷¹ This is the law of the land under *Heller*, which held that law-abiding, responsible citizens have a right to have a gun in the home for self-defense.⁷² And we can argue about whether the *Heller* holding

66. Smith, *supra* note 33, at 366 (“The people’s right to keep and bear arms is found in the Second Amendment of the Bill of Rights, our first freedom.”).

67. *Gun Violence Statistics*, GIFFORDS L. CTR. TO PREVENT GUN VIOLENCE, <https://lawcenter.giffords.org/facts/gun-violence-statistics/> [https://perma.cc/5EEF-6779] (last visited Jan. 18, 2020).

68. *See, e.g.*, STEPHEN WU, 2013 HAMILTON COLLEGE YOUTH POLL: ATTITUDES TOWARDS GUN CONTROL AND SCHOOL VIOLENCE 1 (2013), <https://www.hamilton.edu/documents/HamiltonReportGunControlandSchoolViolence.pdf> [https://perma.cc/P2W6-6TSS] (asked about “the possibility of a mass shooting in their school or community . . . nearly 60% [of high school students] [we]re either somewhat concerned, fairly concerned or very concerned”).

69. *See* Frank Newport, Opinion, *Analyzing Surveys on Banning Assault Weapons*, GALLUP NEWS (Nov. 14, 2019), <https://news.gallup.com/opinion/polling-matters/268340/analyzing-surveys-banning-assault-weapons.aspx> [https://perma.cc/7Q78-M78N] (“[O]ur summary conclusion is that a clear majority of about six in 10 Americans currently support . . . a ban [on assault weapons].”).

70. *Id.*

71. Smith, *supra* note 33, at 372.

72. *District of Columbia v. Heller*, 554 U.S. 570, 636 (2008).

should be expanded in some ways. None of that, however, addresses Mark Smith's argument for a right to pistol grips, barrel shrouds, high-capacity magazines, and assault weapons, which is what the question at hand is about. It really is a red herring to discuss whether there should be a right to guns in some way. That is an interesting topic worth debating, but that is not what is up for debate here.

ON THE BASIS OF IDENTITY: REDEFINING “SEX” IN CIVIL RIGHTS LAW AND FAULTY ACCOUNTS OF “DISCRIMINATION”

RYAN T. ANDERSON*

In October 2019, the Supreme Court heard oral arguments in cases that ask whether Title VII of the Civil Rights Act of 1964,¹ which bans employment discrimination on the basis of sex, among other things,² extends to discrimination on the basis of sexual orientation and transgender status.³ It was an odd legal argument, given that the public meaning of the word “sex” in 1964—and today, for that matter—refers to our status as male or female rather than our sexual attractions, desires, actions, or identities.⁴

Because the original public meaning of the word “sex” did not refer to sexual orientation or gender identity, progressive activists have been trying for the past forty years to get Congress to pass laws that would add “sexual orientation” as a protected class, and have been doing the same for “gender identity” for the past dozen years.⁵ Because their attempts to work through

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1. 42 U.S.C. § 2000e (2018).

2. *Id.* § 2000e-2(a).

3. *Bostock*, No. 17-1618 (U.S. argued Oct. 8, 2019); *Harris Homes*, No. 18-107 (U.S. argued Oct. 8, 2019).

4. See Ryan T. Anderson, *A Brave New World of Transgender Policy*, 41 HARV. J.L. & PUB. POL’Y 309, 309–10 (2018).

5. The first such bill was introduced in the House of Representatives on January 15, 1975. H.R. 166, 94th Cong.; 121 CONG. REC. 188 (1975). It added “affectional or sexual preference” after “sex.” *Id.* Other bills have since added “sexual orientation” and “gender identity.” See Anderson, *supra* note 4, at 342–43. Congress knows how to reject “sexual orientation and gender identity” provisions and has done so on many occasions. See Equality Act, H.R. 2282, 115th Cong. (2017); Student Non-Discrimination Act of 2015, S. 439, 114th Cong. (2015); Employment Non-Discrimination Act of 2013, S. 815, 113th Cong. (2013).

the legislative process failed, activists took their arguments to court. And they failed there, too—at least until April 2017. That marked the first time ever that a federal appellate court ruled that the Civil Rights Act prohibits employment discrimination on the basis of sexual orientation.⁶ Before that ruling, “all eleven courts of appeals that had addressed the issue” had ruled that “sex” does not mean “sexual orientation.”⁷ And it was not until March 2018 that, for the first time ever, an appellate court ruled that Title VII banned discrimination based on transgender status.⁸

Of the three cases before the Supreme Court, two involve claims about sexual orientation and the third deals with gender identity. In the two sexual orientation cases,⁹ two employees who identify as gay (Donald Zarda and Gerald Bostock) argue they were fired from their jobs because they disclosed their sexual orientation.¹⁰ Their employers deny this, arguing that the employees were fired for job-related misconduct.¹¹ Regardless of the question of fact, the question of law is whether dismissing someone because of their sexual orientation constitutes sex discrimination.¹² In the gender identity case,¹³ the facts are somewhat clearer: A male employee who desired to transition and present at work as a woman (Aimee Stephens) was dismissed

6. *Hively v. Ivy Tech Cmty. Coll.*, 853 F.3d 339, 341 (7th Cir. 2017).

7. Brief for the United States as Amicus Curiae Supporting Affirmance in No. 17-1618 and Reversal in No. 17-1623 at 4, *Bostock*, No. 17-1618 (U.S. Aug. 23, 2019); see also *Evans v. Ga. Reg'l Hosp.*, 850 F.3d 1248, 1255 (11th Cir. 2017); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Hamm v. Weyauwega Milk Prods., Inc.*, 332 F.3d 1058, 1062 (7th Cir. 2003); *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1063 (9th Cir. 2002); *Bibby v. Phila. Coca Cola Bottling Co.*, 260 F.3d 257, 261 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 36 (2d Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999); *Wrightson v. Pizza Hut of Am., Inc.*, 99 F.3d 138, 143 (4th Cir. 1996); *Ruth v. Children's Med. Ctr.*, No. 90-4069, 1991 WL 151158, at *5 (6th Cir. 1991) (per curiam); *Williamson v. A.G. Edwards & Sons, Inc.*, 876 F.2d 69, 70 (8th Cir. 1989) (per curiam); *Blum v. Gulf Oil Corp.*, 597 F.2d 936, 938 (5th Cir. 1979) (per curiam).

8. *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 571 (6th Cir. 2018).

9. *Bostock*, No. 17-1618 (U.S. argued October 8, 2019), consolidated with *Altitude Express, Inc. v. Zarda*, No. 17-1623 (U.S. argued October 8, 2019).

10. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108–09 (2d Cir. 2018) (en banc); *Bostock v. Clayton County*, No. 1:16-CV-001460-ODE-WEJ, 2016 U.S. Dist. LEXIS 192898, at *4 (N.D. Ga. Nov. 3, 2016).

11. *Zarda*, 883 F.3d at 108–09; *Bostock*, 2016 U.S. Dist. LEXIS 192898, at *4.

12. *Zarda*, 883 F.3d at 110; *Bostock*, 2016 U.S. Dist. LEXIS 192898, at *5.

13. *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (U.S. argued Oct. 8, 2019).

from employment as a funeral home director.¹⁴ Stephens argues the dismissal was because of transgender status, which is a form of sex discrimination.¹⁵ The employer, Harris Funeral Homes, argues it was because Stephens would no longer follow the appropriate sex-specific dress code or use the appropriate single-sex bathroom—and thus there was no sex discrimination.¹⁶

The lawyers for the employees in *Zarda* and *Harris* asked the Supreme Court to affirm the novel—indeed, activist—appellate court rulings.¹⁷ Doing so would in effect redefine the term “sex” in the Civil Rights Act and simultaneously require a simplistic account of “discrimination.” To see how and why it would entail this, it is worth examining the various arguments they put forth.

The lawyers for the employees and their amici contend that any policy that *adverts* to sex must *discriminate* because of sex.¹⁸ Only in this way are they able to give Title VII a scope that for decades no one would have ascribed to it. And in the process, they are forced to rely on confused theories of discrimination and of sex. Over and over, the employees and their amici offer crucially flawed analogies, comparators, and analyses that effectively read the words “discrimination,” “disadvantageous,” and “comparable terms” out of the law altogether. This distorted reading leads to implausible and costly results that cut against the balance Congress struck in crafting Title VII. This Article aims to clarify the philosophical issues behind that costly distortion.

As the Supreme Court unanimously held in *Oncale v. Sundowner Offshore Services, Inc.*,¹⁹ Title VII requires “neither asexuality nor androgyny.”²⁰ What it requires is equality and

14. EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 566 (6th Cir. 2018).

15. *Id.*

16. *Id.* at 569; 6 Questions with the Attorney Arguing the Harris Funeral Homes Case at the Supreme Court, ALLIANCE DEFENDING FREEDOM (Aug. 20, 2019), <https://adfflegal.org/detailspages/blog-details/allianceedge/2019/08/20/6-questions-with-the-attorney-arguing-the-harris-funeral-homes-case-at-the-supreme-court> [<https://perma.cc/5L9R-KFTV>].

17. Opening Brief for Respondents at 14, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (U.S. June 26, 2019) [hereinafter *Zarda* Brief]; Brief for Respondent Aimee Stephens at 19, *Harris Homes*, No. 18-107 (U.S. June 26, 2019) [hereinafter *Stephens* Brief].

18. *Zarda* Brief, *supra* note 17, at 10–14; *Stephens* Brief, *supra* note 17, at 3.

19. 523 U.S. 75 (1998).

20. *Id.* at 81.

neutrality. It forbids double standards for men and women—policies that disfavor at least some individuals of one sex compared with similarly situated members of the other. The Court in *Oncale* quoted Justice Ginsburg to explain: “The critical issue, Title VII’s text indicates, is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”²¹ This reading by Justice Ginsburg, embraced by the unanimous Court, remains valid. Yet the employees and their amici explicitly reject it, as their position requires. The Supreme Court should hold fast to Justice Ginsburg’s reading wherein Title VII violations consist of double standards for women and men.

In *Price Waterhouse v. Hopkins*,²² the plurality opinion of the Supreme Court observed that under Title VII, sex “must be irrelevant to employment decisions.”²³ This requires, as the plurality opinion in *Price Waterhouse* also said, that sex not be used to create “disparate treatment of men and women.”²⁴ Expanding on this point, Justice O’Connor’s concurrence pointed out that an employee’s sex may “always ‘play a role’ in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion.”²⁵ Title VII does not require blindness to sex; it requires “neither asexuality nor androgyny.”²⁶

Title VII forbids unfairness because of sex. It excludes not just any sex-conscious standards, but double standards. Yet the lawyers for the employees and their amici urge the Court to adopt a theory of sex discrimination that would rule out (as discriminatory) any policies that advert to sex, rather than only those sex-related policies that result in “disparate treatment of men and women,”²⁷ where members of one sex suffer under

21. *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

22. 490 U.S. 228 (1989).

23. *Id.* at 240 (plurality opinion).

24. *Id.* at 251 (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (internal quotation marks omitted).

25. *Id.* at 277 (O’Connor, J., concurring in the judgment).

26. *Oncale*, 523 U.S. at 81.

27. *Id.* at 78 (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)) (internal quotation marks omitted).

“disadvantageous terms” that the other does not.²⁸ Embracing the employees’ theory would lead to asexuality and androgyny.

Indeed, adopting the employees’ theory would not simply distort the statutory text and flout the Supreme Court’s unanimous precedent in *Oncale*. It would also work serious practical harms—and unsurprisingly so. After all, the Court would be rewriting the law Congress passed but with no opportunity for legislators to add to the definitions, qualifications, and limits they might have included if they had actually decided to address sexual orientation and gender identity. For instance, the employees’ position—where any policy that adverts to sex discriminates because of sex—would require either the elimination of all sex-specific programs and facilities or allow access based on an individual’s subjective identity rather than their objective biology. That the advocates for this theory are evasive about which of these outcomes is required by their theory is telling. Making its implications explicit would prove decisively that their reading is unsound.

It would also highlight the severe consequences for privacy, safety, and equality. Employers would be prevented from protecting their employees’ privacy and would be exposed to significant liability. For example, they would have to cover objectionable medical treatments in their employer-sponsored healthcare plans. And the consequences would not be limited to the employment context: if this new theory of sex and of discrimination is imposed on Title VII, then why not Title IX? Such a reading of sex discrimination would spell the end of girls’ and women’s athletics, along with private facilities at school.²⁹

In short, the lawyers for the employees ask the Supreme Court to rewrite our nation’s civil rights laws in a way that would directly undermine one of their main purposes: protecting the equal rights of girls and women. Congress did not legislate such an outcome, and the Court should not usurp Congress’s authority by imposing such an extreme policy on the nation. Biology is not bigotry, and the Court should not conclude otherwise. Only Congress, not the Court, can craft policy to address

28. *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

29. See Anderson, *supra* note 4, at 310.

sexual orientation and gender identity—concepts distinct from sex—with attention to all the competing considerations.³⁰

I. SEX, SEXUAL ORIENTATION, AND GENDER IDENTITY ARE ANALYTICALLY DISTINCT CONCEPTS

The lawyers for the employees and their amici seek to bypass Justice Ginsburg’s reading of Title VII—embraced unanimously by the Supreme Court in *Oncale*—by arguing that sex, sexual orientation, and gender identity are analytically inseparable. For instance, Stephens argues “it is impossible to discriminate against a person for being transgender *without* their sex assigned at birth being a cause of the decision.”³¹ And amici philosophy professors argue: “If an employer decides to terminate an employee on the basis of same-sex sexual attraction (i.e., a particular sexual orientation) or gender nonconformity (e.g., being transgender), the employer must first presume the employee’s specific sex”³² None of this is true.

Harris Homes did not “first presume the employee’s specific sex.” Rather, every document that Stephens presented during the first six years of employment stated that Stephens was a male.³³ During the entirety of those six years, Stephens abided by the male dress code.³⁴ It was only when Stephens declared to be a woman and desired to start dressing according to the female dress code that Harris Homes learned that Stephens identified as transgender.³⁵ Even so, the philosophy professors write:

It is simply not possible to identify an individual as being attracted to the same sex without knowing or presuming that

30. On how best to craft such policy, see Ryan T. Anderson, *Challenges to True Fairness for All: How SOGI Laws Are Unlike Civil Liberties and Other Nondiscrimination Laws and How to Craft Better Policy and Get Nondiscrimination Laws Right*, in RELIGIOUS FREEDOM, LGBT RIGHTS, AND THE PROSPECTS FOR COMMON GROUND (William Eskridge, Jr. & Robin Fretwell Wilson eds., 2019).

31. Stephens Brief, *supra* note 17, at 25.

32. Brief of Philosophy Professors as *Amici Curiae* in Support of the Employees at 2, *Bostock v. Clayton County*, No. 17-1618, and *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, No. 18-107 (U.S. July 3, 2019) [hereinafter Philosophy Professors Brief].

33. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018).

34. *Id.*

35. See *id.* at 567–69.

person's sex. Likewise, it is not possible to identify someone as gender nonconforming (including being transgender) without reference to that person's known or presumed sex and the associated social meanings.³⁶

But is it really true that individuals cannot be identified as gay or trans "without knowing or presuming that person's sex"? Consider: Kim just came out as trans. Or, Kim just came out as gay. So far, all we know is that Kim is trans or gay. We have no idea if Kim is a man or a woman. We do not know the sex of Kim at all. But because we know the sexual orientation and gender identity, we could act based on that without being motivated by—let alone even knowing—Kim's sex.

Nevertheless, Professors William Eskridge and Andrew Koppelman declare that "You can't say gay without classifying Kim by his sex."³⁷ Of course you can. "Kim is gay." What we now know is that Kim is attracted to people of the same sex. We do not know if that sex is male or female, and so knowing that Kim is gay does not classify Kim by sex.

To best illustrate the problems with this aspect of the legal theory advanced by the lawyers for the employees and their amici, consider three distinct types of motivation in employment decisions. First, consider an employer who will not employ women but will employ men, or who will not employ women with kids but will employ men with kids. This would be discrimination on the basis of sex, because "members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."³⁸ It is a double standard for men and women.

By contrast, consider an employer who will hire straight men and women, but not men and women who identify as gay. Men and women are exposed to the same exact terms and conditions, so this would not be discrimination based on sex. The employment action does not hinge on male or female, but on gay or straight.

36. Philosophy Professors Brief, *supra* note 32, at 1.

37. Brief of William N. Eskridge Jr. & Andrew M. Koppelman as *Amici Curiae* in Support of Employees at 6, *Bostock*, No. 17-1618, and *Harris Homes*, No. 18-107 (U.S. July 3, 2019) [hereinafter Eskridge & Koppelman Brief].

38. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

And lastly, consider an employer who will hire cisgender³⁹ men and women, but not transgender men and women. Here, too, men and women are exposed to the same exact terms and conditions, so this would not be discrimination based on sex. The employment action here is not concerned with male or female, but with cisgender or transgender.

Now, whatever one may think about these three cases as a matter of ethics or public policy, Congress acted in 1964 to address only the first case—and it has explicitly rejected policies to address the latter two. The first such bill was introduced in the House of Representatives on January 15, 1975.⁴⁰ It would have prohibited discrimination based on “affectional or sexual preference.”⁴¹ Other bills have since added “sexual orientation” and “gender identity.”⁴²

People can debate whether Congress’s decision not to pass sexual orientation and gender identity laws is or is not a good thing, but as a legal matter the issue is clear. Discrimination on the basis of sex is prohibited, but discrimination on the basis of sexual orientation and gender identity is not. Of course, there is good reason why Congress has rejected calls to legally prohibit “discrimination” on the basis of “sexual orientation and gender identity.”⁴³ Much of what the activists contend is “discrimination” is simply disagreement about human sexuality, where acting based on true beliefs about human sexuality is re-described as discriminatory.⁴⁴

Congress knows how to make policy on the basis of “gender identity” when it wants to do so. Congress has specifically included “gender identity”—as distinct from “sex” and listed

39. The word “cisgender” is an ideological term that I would not ordinarily use, but I use it here and throughout this Article to highlight that *even on the LGBT activists’ own theory*, their argument fails.

40. H.R. 166, 94th Cong. (1975); 121 CONG. REC. 188 (1975).

41. H.R. 166.

42. See Anderson, *supra* note 4, at 341–43 (citing the Employment Non-Discrimination Act, *e.g.*, S. 815, 113th Cong. (2013), introduced in almost every Congress since 1994; the so-called Equality Act, H.R. 2282, 115th Cong. (2007); and the Student Non-Discrimination Act, S. 439, 114th Cong. (2015); H.R. 846, 114th Cong. (2015), as examples of bills attempting to add protection for sexual orientation and gender identity that did not pass).

43. See Ryan T. Anderson, *Shields, Not Swords*, NAT’L AFF., Spring 2018, at 74, 75.

44. See Ryan T. Anderson, *Disagreement Is Not Always Discrimination: On Masterpiece Cakeshop and the Analogy to Interracial Marriage*, 16 GEO. J.L. & PUB. POL’Y 123, 141–43 (2018).

alongside “sex” or “gender”—in two laws: the Violence Against Women Reauthorization Act of 2013⁴⁵ and the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act of 2009.⁴⁶ The distinct inclusion of both gender identity and sex protections highlights that gender identity was never intended to fall within the definition of sex. If Congress had intended to include gender identity protections within the scope of Title VII, it could have specified their inclusion, but it did no such thing.

The executive branch likewise knows how to add categories. President Barack Obama showed that he understood “sex,” “sexual orientation,” and “gender identity” to be different categories. In his executive order barring federal contractors from “discrimination” on the basis of “sexual orientation and gender identity,” he replaced existing protections on the basis of “sex” with protections on the basis of “sex, sexual orientation, gender identity.”⁴⁷ In adding “sexual orientation” and “gender identity” alongside and in addition to “sex,” President Obama showed that he did not consider sexual orientation and gender identity protections to be legally included in the existing protections on the basis of sex.

So, too, multiple cities and states have amended their civil rights codes over the years to add “sexual orientation” and “gender identity” to their existing bans on sex discrimination.⁴⁸ The cities and states understand that these are three separate concepts. Some cities and states have decided to protect all three;⁴⁹ some two;⁵⁰ and many have opted for protections on the

45. Pub. L. No. 113-4, sec. 3(b)(4), § 40002(b)(13)(A), 127 Stat. 54, 61 (to be codified in scattered sections of the U.S. Code).

46. Pub. L. No. 111-84, §§ 4703(a), 4704(a)(1)(c), 4707(a), 4708(a), 4710(2), 123 Stat. 2190, 2836–37, 2839, 2841 (codified in scattered sections of 18, 28, and 42 U.S.C.).

47. Exec. Order No. 13,672, 79 Fed. Reg. 42,971 (July 21, 2014).

48. *See, e.g.*, 2003 Cal. Legis. Serv. ch. 164 (West) (adding protection for discrimination on the basis of “gender identity” to existing housing and employment laws); 1999 Cal. Legis. Serv. ch. 592 (West) (adding protection for discrimination on the basis of “sexual orientation” to existing housing and employment laws); The City of Birmingham Non-Discrimination Ordinance, Birmingham, Ala., Ordinance 17-121(c)(3) (Sept. 29, 2017).

49. *See, e.g.*, NEV. REV. STAT. § 613.330 (2019); MIAMI, FLA., CODE OF ORDINANCES § 11A-2(8) (2020).

50. *See, e.g.*, WIS. STAT. § 111.36(1)(d) (West 2018); FORT WAYNE, IND., CODE OF ORDINANCES § 93.001 (2019).

basis of sex but not on the bases of sexual orientation and gender identity.⁵¹

The language LGBT advocates use reflects these distinctions. Consider these three forms of discrimination: sexism, cissexism, and heterosexism.⁵² In their focal cases, these forms of discrimination have the following targets: women, people who identify as transgender, and people who identify as gay, respectively. When these three forms of discrimination occur against their focal targets they can be described as acts of misogyny, transphobia, and homophobia.⁵³ The three sets of terms naming three different social phenomena reveal something important about the chain of decisionmaking. Sexism, with its typical target of women, manifesting in the focal case as misogyny, entails treating at least some individuals of one sex (women) worse than individuals of the other sex (men). Cissexism, with its typical target of people who identify as transgender, manifesting in the focal case as transphobia, entails treating at least some individuals of a certain gender identity (transgender) worse than individuals of another (cisgender). Heterosexism, with its typical target of people who identify as gay, manifesting in the focal case as homophobia, entails treating at least some individuals of a certain sexual orientation (gay) worse than individuals of another (straight). No one outside this legal dispute would seriously refer to transphobia and homophobia as sexism.⁵⁴

51. See, e.g., TEX. LAB. CODE ANN. § 21.051 (West 2015); see also *Cities and Counties with Non-Discrimination Ordinances that Include Gender Identity*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/resources/cities-and-counties-with-non-discrimination-ordinances-that-include-gender> [https://perma.cc/YQC8-NWTQ]; *Sex and Gender Discrimination in the Workplace*, NAT'L CONF. ST. LEGISLATURES (Mar. 28, 2019), <http://www.ncsl.org/research/labor-and-employment/-gender-and-sex-discrimination.aspx> [https://perma.cc/M6FX-MK4W] (last visited Mar. 2, 2020); *State Maps of Laws & Policies: Employment*, HUM. RTS. CAMPAIGN, <https://www.hrc.org/state-maps/employment> [https://perma.cc/KR4E-CQLT] (last visited Jan. 3, 2020).

52. The words "cissexism" and "heterosexism" are ideological terms that I would not ordinarily use, but I use them here and throughout this Article to highlight that *even on the LGBT activists' own theory*, their argument fails.

53. The words "transphobia" and "homophobia" are ideological terms that I would not ordinarily use, but I use them here and throughout this Article to highlight that *even on the LGBT activists' own theory*, their argument fails.

54. To illustrate how LGBT activists use their own ideological terms, see, for example, Lauren Munro, Robb Travers & Michael R. Woodford, *Overlooked and Invisible: Everyday Experiences of Microaggressions for LGBTQ Adolescents*, 66 J. HOMOSEXUALITY 1439 (2019). The first line of the abstract from this 2019 article

Not only are the concepts “sexual orientation” and “gender identity” analytically separate from sex, the underlying realities are also different. Sex is a stable, binary, biological phenomenon, determined by how an organism is organized with respect to sexual reproduction.⁵⁵ By contrast, sexual orientation and gender identity refer to a person’s attractions, desires, actions, and identities; they are fluid, exist along spectra, and are subjective.⁵⁶ This contrast highlights another flaw with the theory advanced by the lawyers and amici of the employees: They assert that gender identity can only be known in reference to sex.⁵⁷ But that assumes the very gender binary that contemporary gender theorists reject.⁵⁸ A gender-fluid or gender-ambidextrous identity makes no reference to biological sex at all. The entire point is to define one’s gender identity independently from the body. That said, if all of these identities are protected under “sex” discrimination, what does an employer do for employees who identify as nonbinary? Which locker room or dress code should they use? What about employees who are gender fluid, identifying as men at some times and women at others? Treating employees in accord with their biological sex could violate a gender identity nondiscrimination norm while acting on the basis of gender identity could violate a sex nondiscrimination norm. Consequently, employers are forced into a Catch-22.

II. NO ONE IS EXCLUDED FROM TITLE VII’S SEX PROTECTIONS, BUT TITLE VII DOES NOT PROTECT SEXUAL ORIENTATION OR GENDER IDENTITY

Another argument advanced to the Court was that failure to redefine the word “sex” to mean “sexual orientation” and

reads: “Lesbian, gay, bisexual, transgender, and queer (LGBTQ) adolescents face a number of challenges in their lives related to heterosexism and cissexism.” *Id.* at 1439. Throughout the article, the word “heterosexism” appears seventeen times. *Id.* at 1439–40, 1443, 1445–46, 1459, 1470–71. “Cissexism” appears four times. *Id.* at 1439–40, 1456. “Transphobia” appears eleven times. *Id.* at 1445–46, 1451, 1456, 1459, 1467–68. “Homophobia” appears nine times. *Id.* at 1443, 1446, 1451, 1456, 1458, 1467–69. The word “sexism” never appears. *Id.* at 1439–71.

55. See RYAN T. ANDERSON, *WHEN HARRY BECAME SALLY: RESPONDING TO THE TRANSGENDER MOMENT* 79–81 (1st paperback ed. 2019).

56. See *id.* at 31–33.

57. See Philosophy Professors Brief, *supra* note 32, at 1.

58. See ANDERSON, *supra* note 55, at 29–33.

“gender identity” will result in excluding from Title VII’s protections people who identify as gay and transgender. For instance, Stephens contends that “Harris Homes and the United States effectively ask this Court to write an exclusion into Title VII to deny transgender people the protection from sex discrimination that the statute provides to *all* employees.”⁵⁹

Nothing like this is true. Title VII protects all employees from sex discrimination, not purported discrimination on some other basis. Employees who identify as transgender have the same Title VII protection as employees identified as cisgender: protection from sex discrimination. But neither cisgender nor transgender employees have Title VII protection from gender identity discrimination.

To see this, consider an employer who refuses to hire Caitlyn Jenner because the employer refuses to hire women (believing only men can do the work) and believes Jenner is a woman. In this case, Jenner would have a perfectly valid Title VII case. Likewise, if an employer refuses to hire Jenner because the employer believes Jenner is a man and refuses to hire men (thinking only women can do the work), Jenner would have a perfectly valid Title VII case. But if the employer thinks both men and women can do the task, but people who transition cannot (whether male or female), and refuses to hire Jenner on those grounds, then there is no Title VII case. The employment decision was not discrimination because of sex.

Zarda raises a similar point, “Federal courts have consistently and properly recognized that Title VII does not exempt any class of employees from its protection, and therefore gay employees have the same ability as heterosexual employees to bring sex stereotyping claims that involve their nonconformity to masculine or feminine sex stereotypes.”⁶⁰ To be sure, gay employees have the right to bring sex discrimination claims, including in cases where sex stereotypes are evidence of that discrimination. But homosexuality and heterosexuality themselves rest on no masculine or feminine sex stereotypes. Both concepts are defined by same-sex or opposite-sex relations, not by masculine or feminine sex stereotypes. And, as explained

59. Stephens Brief, *supra* note 17, at 17.

60. Zarda Brief, *supra* note 17, at 28–29.

below, support for male-female marriage rests on no masculine or feminine sex stereotypes.

In all events, no one is being excluded from the protections of Title VII. Everyone, regardless of sexual orientation and gender identity, is protected from being discriminated against because of their sex. Whether they identify as gay or straight, cisgender or transgender, all people have the legal right not to be discriminated against because of their sex. But no one has the legal right to redefine the word sex in federal law to mean something other than sex. Thus, no one has Title VII protections based on sexual orientation or gender identity.

III. THE EMPLOYEES IGNORE THAT DOUBLE
STANDARDS BASED ON SEX WERE AT THE HEART
OF *PHILLIPS V. MARTIN MARIETTA*

The lawyers for the employees and their amici also misapply the Supreme Court's ruling in *Phillips v. Martin Marietta Corp.*⁶¹ by ignoring the double standard that drove the judgment in that case.⁶² For starters, Stephens contends: "Much as Ms. Phillips was discriminated against for being a woman *and* for having young children, so Ms. Stephens was fired for having a male sex assigned at birth *and* for living openly as a woman. That is sex discrimination . . ." ⁶³

But this assertion ignores the actual structure of the discrimination in *Phillips*. Ms. Phillips was discriminated against on the basis of sex because men with young children were not held to the same terms and conditions as women with young children.⁶⁴ Had both men and women been held to the same standard, there would have been no disparate impact on men and women and no double standard on terms and conditions based on sex. Because there is no male-female double standard in the *Harris Homes* case, *Phillips* is not on point. Stephens was fired for not complying with the company's sex-specific dress code, which was compliant with the Equal Employment

61. 400 U.S. 542 (1971).

62. *Id.* at 544.

63. Stephens Brief, *supra* note 17, at 25 (citation omitted).

64. See *Phillips*, 400 U.S. at 544.

Opportunity Commission (EEOC).⁶⁵ Both males and females have to equally follow this dress code; it does not impose more of a burden on one or the other. The EEOC-compliant dress code does not create “disparate treatment of men and women”⁶⁶ nor does it create conditions in which “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”⁶⁷ The “sex plus” theory simply does not apply in Stephens’s case. Nor does it apply in Zarda’s case. Zarda argues:

Had Martin Marietta articulated its policy as a refusal to hire “mothers,” rather than not hiring “women with young children,” the result would have been the same. Phillips’s sex (plus her parental status) is why she did not get the job The same logic applies to Zarda. Were he not a man, he would not have been fired for his attraction to men. Conversely, persons who shared his attraction to men but not his sex (i.e., “heterosexual women”) were not denied job opportunities. Saying he was fired for being “gay” does not change the analysis. Thus, Zarda has properly alleged discrimination “because of [his] sex.”⁶⁸

But the reason Martin Marietta was guilty of discrimination based on sex was not that it used certain magical words (“women with young children,” rather than “mothers”) but rather that it did not apply the same terms and conditions to “men with young children” and “fathers” as it did to “women with young children” and “mothers.”⁶⁹ If it had an evenhanded policy against “people with young children” and “parents,” then there would have been no sex discrimination. So, too, an evenhanded policy against same-sex relationships does not discriminate on the basis of sex.

The lawyers for Zarda obscure this dispositive point by picking an inapposite comparator. Comparing Zarda with “persons

65. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018).

66. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion) (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (internal quotation marks omitted).

67. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

68. Zarda Brief, *supra* note 17, at 21 (alteration in original).

69. See *Phillips*, 400 U.S. at 544.

who shared his attraction to men but not his sex (i.e., ‘heterosexual women’)⁷⁰ changes two factors—sex and sexual orientation—and so fails to ferret out the basis for the employment decision. Comparing a homosexual man to a heterosexual woman will not tell us if the employment decision was driven by sex or by sexual orientation. The question is whether men and women attracted to their own sex are treated differently from each other.

This reasoning is why Zarda’s appeal to *Oncale* fails: “Only *men* who are attracted to men are fired for that attraction; women attracted to men can keep their jobs. In other words, men have been ‘exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.’”⁷¹ But in such a situation, men would be exposed to exactly the same terms and conditions as women: no same-sex attraction. There is no double standard—no greater burden on women than men or vice versa.

Zarda’s lawyers answer that:

The fact that the employer has another, parallel policy that it applies to women—namely, that it fires them if they are attracted to women—cannot insulate the employer from liability. That simply means that women as well are exposed to a disadvantageous term or condition of employment to which members of the other sex are not exposed⁷²

But this flatfooted, rule-counting test sidesteps the crucial question—whether men and women face unequal burdens under the policies at issue. The answer is clear: they do not. Under such policies, both men and women are prohibited from same-sex relationships.

Stephens’s comparison, too, changes two factors—sex and transgender status. Stephens argues that Harris Homes “would not have fired Ms. Stephens for identifying and living openly as a woman if she were assigned a female sex at birth.”⁷³ Well, yes, Harris Homes would not fire a woman who followed the women’s dress code. But that is not an apt comparison to Stephens—a man who sought to follow the women’s dress

70. Zarda Brief, *supra* note 17, at 21.

71. *Id.* at 37 (quoting *Oncale*, 523 U.S. at 80).

72. *Id.*

73. Stephens Brief, *supra* note 17, at 20.

code. Comparing Stephens to a cisgender woman changes two factors—sex and transgender status—and thus fails to hold constant all factors but sex. The proper comparison would be a woman who sought to dress according to the men’s dress code. That way both employees identify as transgender, and all that is changed is their sex. Comparing a transgender male to a cisgender female will not tell us whether the employment decision was driven by sex or by transgender status. The relevant comparison is whether men who identify as the opposite sex are treated differently from women who identify as the opposite sex. That is, whether trans men and trans women are treated the same. Harris Homes reports they would dismiss a female employee who sought to abide by the male dress code.⁷⁴ In other words, there is no double standard for men and women, so there is no discrimination on the basis of sex. Both males and females who refuse to follow the dress code for their sex are held to the same standard.

IV. TITLE VII DOES NOT SIMPLY FORBID ANY ACTION “CAUSALLY LINKED” TO SEX

The baseline theory of sex discrimination that activists advanced at the Court was that any action that even adverts to sex is discrimination on the basis of sex. Stephens contends, “Any time the same decision would not have been made had the employee’s sex been different, an employer discriminates ‘because of sex.’”⁷⁵ Professors Eskridge and Koppelman argue that “an employer violates the law if it (1) takes negative employment action (2) that is causally linked to (3) the sex of the employee.”⁷⁶

These theories focus simply on “negative” treatment—not disadvantages to which individual women but not men are exposed and vice versa. So neither of these theories identifies discrimination. Both flout the Justice Ginsburg reading—on which Title VII forbids double standards. In contravention of *Oncale*, both require asexuality and androgyny.

74. See *EEOC v. R.G. & G.R. Harris Funeral Homes, Inc.*, 884 F.3d 560, 567 (6th Cir. 2018).

75. Stephens Brief, *supra* note 17, at 21 (citing *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

76. Eskridge & Koppelman Brief, *supra* note 37, at 5.

To see the problem with such an approach, just look at what embracing such theories would require: Suppose a male employee at a fitness center repeatedly goes into the woman's locker room and is fired. Had his "sex been different" he would not have been fired; the decision to fire him was "causally linked" to his sex. But the negative treatment the employee faced was not sex discrimination, because the employer imposed no double standard for men and women. It enforced a bathroom policy that imposed the same burden on men and women.

Or suppose a female lifeguard is fired because she wears swimsuit bottoms but refuses to wear tops. Had her "sex been different," she would not have been fired; the decision to fire her was "causally linked" to her sex. Yet her termination was not sex discrimination under Title VII because a male lifeguard who exposed his private parts would have similarly been fired. The attire policy thus was no more burdensome for women than for men.

The employees' proposed test is too simplistic. It does not test for sex-based discrimination. In both of the above examples, the employees were fired because they acted in ways that violated benign company privacy policies—that is, policies that do not impose "disadvantageous terms or conditions of employment" on anyone, much less impose disadvantages on some "to which members of the other sex are not exposed."⁷⁷ To be a meritorious case of sex discrimination, sex must not only be a "but-for" cause of differential treatment, but that differential treatment must entail disadvantageous terms or conditions to which members of only one sex are subjected. The simplistic test the employees offer just looks for the but-for cause and "negative" treatment, not discrimination and disadvantages imposed on members of only one sex.

Far from being an instance of sex discrimination, preventing males from entering women-only private facilities is actually required to avoid sex discrimination. And thus, using sex as a but-for cause for differential treatment in some cases is not only permitted but required. Justice Ginsburg took this point for

77. *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998) (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

granted in her majority opinion in *United States v. Virginia*,⁷⁸ when she explained that, for the all-male Virginia Military Institute to become coed, it “would undoubtedly require alterations necessary to afford members of each sex privacy from the other sex in living arrangements.”⁷⁹ Moreover, in 1975, when critics argued that the Equal Rights Amendment would require unisex intimate facilities, then-Professor Ruth Bader Ginsburg explained that a ban on sex discrimination would not require such an outcome: “Separate places to disrobe, sleep, perform personal bodily functions are permitted, in some situations required, by regard for individual privacy.”⁸⁰ An employer who allowed males to enter private women-only facilities could expect a Title VII lawsuit asserting it fostered a hostile work environment for women by allowing their privacy to be violated.

Yet the theory advanced by the lawyers for the employees and their amici would hold such an employer guilty if he prevented males from entering. Their theory requires asexuality and androgyny, but Title VII does not—it forbids double standards and protects sensible workplace privacy policies. In practice, of course, the employees and their amici would have no objection if an employer fired a male employee who identified as a man from entering a women’s locker room. Consider the example above: A male employee at a fitness center who repeatedly goes into the women’s locker rooms should be fired if he identifies as a man, but not if he identifies as a woman. A female lifeguard who goes topless should be fired if she identifies as a woman, but not if she identifies as a man. So their proposed outcome forces employees to treat men and women differently *based on their gender identity*. A business would have to grant and deny access to its showers and lockers according to this table:⁸¹

78. 518 U.S. 515 (1996).

79. *Id.* at 550 n.19.

80. Ruth Bader Ginsburg, *The Fear of the Equal Rights Amendment*, WASH. POST, Apr. 7, 1975, at A21, <https://www.washingtonpost.com/news/volokh-conspiracy/wp-content/uploads/sites/14/2016/05/ginsburg.jpg> [<https://perma.cc/K667-9TTQ>].

81. RYAN T. ANDERSON & MELODY WOOD, GENDER IDENTITY POLICIES IN SCHOOLS: WHAT CONGRESS, THE COURTS, AND THE TRUMP ADMINISTRATION SHOULD DO 14 (Heritage Found., Backgrounder No. 3201, 2017), <https://www.heritage.org/sites/default/files/2017-03/BG3201.pdf> [<https://perma.cc/3SRS-BJYL>].

Access to Lockers and Showers Under Obama Administration Guidance

ACCESS TO GIRLS' LOCKERS AND SHOWERS			ACCESS TO BOYS' LOCKERS AND SHOWERS		
Sex	Gender Identity	Access	Sex	Gender Identity	Access
Female	Female	Allowed	Male	Male	Allowed
Female	Male	Allowed	Male	Female	Allowed
Male	Female	Allowed	Female	Male	Allowed
Male	Male	Denied	Female	Female	Denied

BG3201 heritage.org

The table illustrates that the only employees who must be denied access are those who identify with their biological sex—that is, cisgender employees—which is a clear example of irrational gender identity discrimination under the employees' own logic.

V. NO SEX STEREOTYPING IS TAKING PLACE IN THESE CASES

Another argument advanced at the Court by the lawyers for the employees is that purported discrimination based on sexual orientation and gender identity involved sex stereotyping.⁸² The employees and amici tried to evade Justice Ginsburg's reading of Title VII by expanding *Price Waterhouse* beyond its holding or logic. In their view, any policies that advert to sex or sexual conduct are "sex stereotypes" and thus constitute "discrimination" because of sex.⁸³ As Justice Ginsburg explained in *United States v. Virginia*, sex stereotyping takes place when there are "overbroad generalizations about the different talents, capacities, or preferences of males and females."⁸⁴ And although the *Price Waterhouse* plurality said sex stereotyping may be used as evidence of sex discrimination, it did not refer to just any belief or norm (for example, dress codes) that somehow touches on sex.⁸⁵ Rather, it refers to beliefs, norms, or expectations that disadvantage women (at least some women relative to some men) or disadvantage men (at least some men relative to some women).⁸⁶

After all, the *Price Waterhouse* Court was interpreting Title VII, which is about discrimination.⁸⁷ The *Price Waterhouse* plu-

82. See, e.g., Stephens Brief, *supra* note 17, at 4.

83. *Id.* at 17.

84. 518 U.S. at 533.

85. See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

86. See *id.* at 250–51.

87. See *id.* at 251.

rality simply held that discrimination against women can take the form of expectations that disadvantage them by imposing on them special burdens: “An employer who objects to aggressiveness in women but whose positions require this trait places women in an intolerable and impermissible catch 22: out of a job if they behave aggressively and out of a job if they do not. Title VII lifts women out of this bind.”⁸⁸ In other words, Title VII lifts women (and men) out of the bind of a double standard by forbidding employers to impose on men and women unequal burdens.

By contrast, the lawyers for the employees and their amici object to neutral policies that make no generalizations at all about the “talents, capacities, or preferences of males and females”⁸⁹ and that place no greater burden on any women compared with men (or vice versa). For instance, the lawyers for Stephens argue that Stephens was fired by Harris Homes “for failing to conform to its sex-based stereotypes about how men and women should identify, appear, and behave.”⁹⁰ But Harris Homes asked all employees—male and female—to abide by an EEOC-compliant, sex-specific dress code and to use single-sex private facilities that match their sex.⁹¹ This being so, the only way Stephens could prevail is if all sex-specific dress codes and single-sex facilities stem from discriminatory sex stereotyping. They do not.

Nonetheless, the lawyers for Stephens at the Supreme Court contend Harris Homes engaged in discriminatory sex stereotyping by not treating Stephens as a woman: “Just as Price Waterhouse discriminated against Ms. Hopkins because it deemed her insufficiently feminine for a woman, so Harris Homes fired Ms. Stephens because it considered her insufficiently feminine for a woman.”⁹² But Harris Homes did not consider Stephens’s femininity at all—as that is not what determines whether someone is a man or woman. In fact, Harris Homes refused to go along with the stereotype-based determination of sex that Stephens proposed and instead treated Stephens

88. *Id.*

89. *Virginia*, 518 U.S. at 533.

90. Stephens Brief, *supra* note 17, at 16.

91. Brief for the Petitioner at 6–7, R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, No. 18-107 (U.S. Aug. 16, 2019).

92. Stephens Brief, *supra* note 17, at 31.

in accordance with objective biological realities. It is not that Stephens was “insufficiently feminine”; it is that Stephens is not a woman, and being a woman is not a stereotype.

Stephens argues that any policy that treats sex as a biological matter rather than a self-declared identity is somehow based on a stereotype: “The notion that someone assigned a male sex at birth will identify, look, and behave ‘as a man’ is undeniably a sex-based stereotype.”⁹³ But Harris Homes makes no assertion about whether Stephens behaves “as” a man; it contends that Stephens is a man, and thus should abide by the EEOC-compliant dress code for men.⁹⁴

The only parties trading in sex stereotypes in these cases are the employees. Stephens tries to drive a wedge between “male” and “man,” between “sex assigned at birth” and “gender identity.” But it is these distinctions that ultimately rest on stereotypes—according to which gender identity is determined by how one fits or does not fit into prevailing sex stereotypes.⁹⁵

Harris Homes has a simple policy: It treats all males—however they identify, and regardless of their masculinity or femininity—the same way. Likewise, it treats all females the same—however they identify, and regardless of their masculinity or femininity. Nowhere did Harris Homes “generaliz[e] about the different talents, capacities, or preferences of males and females.”⁹⁶

Zarda raises a similar argument about sex stereotypes, contending that normative commitments to conjugal sexuality rely on sex stereotypes. Zarda argues, “The notion that men should be attracted only to women and women should be attracted only to men is a normative sex-based stereotype.”⁹⁷ This is false. Although petitioner Altitude Express denies being motivated by Zarda’s sex or sexual orientation at all—it dismissed Zarda for inappropriate conduct with customers⁹⁸—the ques-

93. *Id.* at 32.

94. See EEOC v. R.G. & G.R. Harris Funeral Homes, Inc., 884 F.3d 560, 568 (6th Cir. 2018).

95. See ANDERSON, *supra* note 55, at 29–33, 45–48; see also Ryan T. Anderson, *The Philosophical Contradictions of the Transgender Worldview*, PUB. DISCOURSE (Feb. 1, 2018), <https://www.thepublicdiscourse.com/2018/02/20971/> [<https://perma.cc/6LQC-U7HD>].

96. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

97. Zarda Brief, *supra* note 17, at 25.

98. See *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018).

tion of law is straightforward. The conviction that sex belongs in marriage, understood as the conjugal union of spouses who can engage in an act that unites them as one flesh, does not rely on any stereotypes about men and women.⁹⁹ It makes no “generalizations about the different talents, capacities, or preferences of males and females” at all.¹⁰⁰ It holds that all male-female couples, regardless of stereotypical attributes of masculinity and femininity, can unite as one flesh. That all male-female couples, regardless of having or not having stereotypical personality traits, can so unite. And that there is intrinsic value in such conjugal marital union.¹⁰¹

Because Zarda’s employer denies being motivated at all by Zarda’s sex or sexual orientation, consider a case where the facts are clear: A Catholic school that dismisses any teacher who has sex outside of marriage, where marriage is understood as the union of husband and wife. Such a policy against sex outside marriage relies on no stereotypes and no double standards. Far from imposing separate standards for “proper female behavior” and “proper male behavior,” it imposes exactly the same terms and conditions on members of both sexes. The rationale has nothing to do with male expectations or female expectations, of masculine traits or feminine traits. Rather, it flows from convictions about the good of marriage as a one-flesh union and the role that sexual activity plays in instantiating or impairing that good. In these cases—unlike in *Price Waterhouse*—no expectation particular to one sex (but not the other) is being used to disadvantage one sex (but not the other).

The Supreme Court has been presented with the argument that male-female marriage laws constituted discrimination based on sex in several cases.¹⁰² Not one Justice in any of those cases has ever endorsed this theory, even when it was fully briefed and presented.¹⁰³ If the Court repeatedly refused to say

99. See RYAN T. ANDERSON, TRUTH OVERRULED: THE FUTURE OF MARRIAGE AND RELIGIOUS FREEDOM 13–35 (2015); SHERIF GIRGIS, RYAN T. ANDERSON & ROBERT P. GEORGE, WHAT IS MARRIAGE? MAN AND WOMAN: A DEFENSE 23–36 (2012).

100. *Virginia*, 518 U.S. at 533.

101. See GIRGIS ET AL., *supra* note 99, at 34–36.

102. See, e.g., Brief for Petitioners at 48–49, *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) (No. 14-556); Brief for *Amici Curiae* William N. Eskridge, Jr. et al. in Support of Respondents at 20 n.16, *Hollingsworth v. Perry*, 570 U.S. 693 (2013) (No. 12-144).

103. See, e.g., *Obergefell*, 135 S. Ct. 2584; *United States v. Windsor*, 570 U.S. 744 (2013); *Hollingsworth*, 570 U.S. 693.

male-female public marriage laws discriminate on the basis of sex, it should not say that private employment practices based on this understanding of marriage and human sexuality discriminate either. The Court should not now adopt and apply this misguided notion of sex discrimination to private actors based on their “decent and honorable religious or philosophical” convictions about marriage.¹⁰⁴

Yet, Zarda argues, “Beliefs about sexual orientation are themselves inextricably interrelated to, and indeed premised upon, views about appropriate sex roles and the sexism that often underlies those views.”¹⁰⁵ This is a mistake. The core conviction about a man and a woman’s ability to unite as one flesh is not premised—in any way, shape or fashion—on social expectations about sex roles.

Professors Eskridge and Koppelman attempt what appears to be a more nuanced argument, noting “the many ways that anti-gay feelings are linked to rigid assumptions about proper sex roles.”¹⁰⁶ No doubt there are many ways in which anti-gay bigotry is based on false beliefs about sex roles and sex stereotypes. But the focal case of support for marriage as the union of husband and wife is not anti-gay, entails no bigotry, and is not based on any beliefs about sex roles or sex stereotyping. In every case in which public marriage laws were directly at issue, the Supreme Court refused to say otherwise.¹⁰⁷ Accordingly, it would be a gross mistake for the Court now to pronounce that private citizens’ convictions about marriage are, after all, motivated by bigotry.

VI. NO “NEUTRAL” SEX STEREOTYPES ARE TAKING PLACE

The lawyers for the employees and their amici also responded to a defense of sex stereotyping that no one in the cases advanced. According to this hypothetical defense, sex stereotyping is okay provided you make men conform to masculine stereotypes and women conform to feminine stereotypes. But no one made this argument, because no stereotyping at all was taking place. Nevertheless, the lawyers for the employees and their

104. *Obergefell*, 135 S. Ct. at 2602.

105. Zarda Brief, *supra* note 17, at 35–36.

106. Eskridge & Koppelman Brief, *supra* note 37, at 11.

107. See *Obergefell*, 135 S. Ct. 2584; *Windsor*, 570 U.S. 744; *Hollingsworth*, 570 U.S. 693.

amici thought this line of argument dispositive. For example, Zarda contends:

[A] company that imposes female sex stereotypes on women and male sex stereotypes on men does not thereby insulate itself from liability under Title VII. Consider an employer who has a policy that “All employees shall conform to the stereotypes appropriate to their sex” and fires both a woman like Hopkins for being too “macho” and a man for not being sufficiently “manly.” At an artificially high level of abstraction, the conform-to-your-own-sex’s-stereotype policy might be said to govern both men and women. Nonetheless, actions pursuant to the policy are both “because of sex”—indeed, explicitly so—and discriminatory.¹⁰⁸

But no stereotyping at all is taking place in these cases. It is not as if an employer said female (but not male) employees must be docile. Or that men alone are suited for physically demanding jobs. Or that economics is appropriate for boys and home economics appropriate for girls. No, the rule has nothing to do with the relative strengths, weaknesses, character traits, or proper social, economic, or political roles of women as opposed to men. The rule makes no reference to “generalizations about the different talents, capacities, or preferences of males and females.”¹⁰⁹ The rule is not that males should abide by stereotypical notions of masculinity and females by stereotypical notions of femininity. Rather, it is that all employees should abide by EEOC-compliant, sex-specific dress codes and use the private facilities that correspond to their sex.¹¹⁰ This entails no stereotypes, no unequal burdens, no double standards—and as a result, no discrimination. How could it, after all, when Justice Ginsburg stated in her majority opinion that private facilities for each sex are required?¹¹¹

The comparison cases prove the point. Women fired for being too “macho” and men fired for being insufficiently “manly” have been held to two standards: a standard of what women ought to be and a standard of what men ought to be. It can be

108. Zarda Brief, *supra* note 17, at 38–39.

109. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

110. Altitude Express denies taking any action at all about Zarda’s sex or orientation. But if an employer did have a marital sex policy, it would not be based on stereotypes—neutral or otherwise—as noted above.

111. *See Virginia*, 518 U.S. at 550 n.19.

redescribed as “conform-to-your-own-sex’s-stereotype policy.” But that redescription hides what is important for the analysis: two separate standards, based on “generalizations about the different talents, capacities, or preferences of males and females,”¹¹² which create “disparate treatment of men and women”¹¹³ because “members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed.”¹¹⁴

By contrast, EEOC-compliant dress codes, single-sex private facilities, and marital sexuality provide a single standard for all people. They are not based on any generalizations of talents, capacities, or preferences. To be sure, they can be redescribed as two separate policies—males use the men’s room, females use the women’s room, males reserve sexual activity for their wives, females reserve sexual activity for their husbands—but those redescriptions hide what is important for the analysis. What is important for the analysis is a single standard equally applied to people of both sexes based on no stereotypes or generalizations at all, and creating no disparate treatment or disadvantageous terms for members of one sex over the other.

The philosophy professors also misunderstand this point:

Every sex-specific stereotype can be pitched at a higher level of abstraction and achieve the same seemingly “gender-neutral” character. Consider the stereotypes that women ought not be aggressive, or that men ought not be empathetic. Both can be pitched as the single imperative that people ought to be gender conforming.¹¹⁵

The relevant question is which level of abstraction brings into focus the true motivating factor of the employment decision. Again, the offered examples prove the opposite point. “Women ought not be aggressive (but men should)” and “men ought not be empathetic (but women should)” highlight two different standards, two different expectations, based on generalizations about the sexes. By contrast: All people should use the restroom

112. *Id.* at 533.

113. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)) (internal quotation marks omitted).

114. *Id.* at 80 (quoting *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 25 (1993) (Ginsburg, J., concurring)) (internal quotation marks omitted).

115. Philosophy Professors Brief, *supra* note 32, at 22–23.

and follow the dress code that corresponds with their sex and reserve sexual activity for conjugal marriage. These do not flow from any generalizations about the sexes; they provide one standard for all people, and they do not create a burden for a particular sex while exempting the other. Note that one could not say that with the expectations to be aggressive and to be empathetic. Each of those is based on generalizations about a particular sex and applies to only one of the two sexes.

The employees and their amici assert that a single policy has sex-specific applications—men use the men’s room and women use the women’s room—and then contend this sex-specific application of a single standard is discriminatory. But that is fallacious. Provided the standard is applied equally, and the facilities and dress codes are comparable, policies that take our sex differences seriously need not entail any discrimination in the relevant sense. When sex differences are relevant, a single standard can have different applications. Only if there is no difference between male and female, or if that difference can never make a policy difference, could the employees’ theory succeed. That theory would threaten many people’s privacy, safety, and equality. Fortunately, this Court has unanimously ruled that Title VII “requires neither asexuality nor androgyny.”¹¹⁶

This is why bans on sex discrimination did not abolish sex-specific private facilities (like bathrooms), sex-specific fitness standards (for police and firefighters, for example), or sex-specific athletic competitions (like the NBA and the WNBA). After all, sex-specific bathrooms, fitness standards, and sports leagues do not create disadvantageous conditions. On the contrary, they prevent disadvantageous treatment. That is because they take sex differences seriously where they make a difference, for the sake of privacy and equality.

The simple reality is that just because a policy refers to sex does not mean that it discriminates because of sex. Sex-specific private facilities and dress codes rest on no generalizations about the talents, capacities, or preferences of males and females. They set up no double standard. Nor do they provide disadvantageous terms or conditions to one sex but not the other.

Sex-specific policies do not violate Title VII at all. Although they do distinguish based on sex in their application of a single

116. *Oncale*, 523 U.S. at 81.

policy, they do not “discriminate” provided that they offer comparable programs and facilities to members of each sex.¹¹⁷ As then-Professor Ginsburg pointed out, taking the demands of privacy and equality seriously does not constitute discrimination.¹¹⁸ And, as Justice O’Connor reminded us, sex may “always ‘play a role’ in an employment decision in the benign sense that these are human characteristics of which decisionmakers are aware and about which they may comment in a perfectly neutral and nondiscriminatory fashion.”¹¹⁹

The philosophy professors show where their theory leads—to asexuality and androgyny:

Of course, all gender stereotype enforcement could be described as “sex-neutral” . . . if the stated basis for such enforcement were sufficiently abstract. Suppose an employer terminates *anyone* who violates presentational sex stereotypes This policy is not sex-neutral even though it can be applied to individuals of all sexes because the only way to apply it is to reference an employee’s presumed sex.¹²⁰

Their theory would have the Court strike down as a violation of Title VII all sex-specific dress codes, even those that comply with the EEOC guidelines, simply because they “reference” sex. Again, the theory offered by the employees and amici is simplistic. Not just any reference to sex constitutes discrimination because of sex. Indeed, Justice Kennedy warned the Court not to treat every sexual difference as a stereotype: “To fail to acknowledge even our most basic biological differences . . . risks making the guarantee of equal protection superficial, and so disserving it. Mechanistic classification of all our differences as stereotypes would operate to obscure those misconceptions and prejudices that are real.”¹²¹

117. As we saw above, *see supra* Part IV, to have a meritorious claim of sex discrimination, sex must serve as the “but-for” cause of differential treatment, and that differential treatment must entail disadvantageous terms or conditions imposed on members of only one sex.

118. *See* Ginsburg, *supra* note 80, at A21.

119. *Price Waterhouse v. Hopkins*, 490 U.S. 228, 277 (1989) (O’Connor, J., concurring in the judgment).

120. Philosophy Professors Brief, *supra* note 32, at 11.

121. *Tuan Anh Nguyen v. INS*, 533 U.S. 53, 73 (2001).

VII. ANALOGY BETWEEN RELIGIOUS CONVERSION AND
SEX REASSIGNMENT IS LITTLE MORE THAN WORDPLAY

Stephens and amici make another misguided philosophical move when they compare sex reassignment to religious conversions. On a superficial level, both can be described as changes: changing religions and changing sexes. But Stephens goes further: “Just as firing someone for wanting to change religion is religious discrimination, so too firing a person for wanting to change sex is sex discrimination. In either case, the protected characteristic is a but-for cause of the employment decision.”¹²²

This superficial parallel—wordplay, really—hides a fundamental difference: religious conversion is an aspect of religion, under the plain meaning of “religion”; but sex reassignment is not an aspect of sex, under the plain meaning of “sex.” Consider how the Virginia Declaration of Rights describes religion: “religion, or the duty which we owe to our Creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence.”¹²³ Where religion is understood as a perceived duty to the Creator and the manner of discharging that duty, it can be directed only by convictions. Those convictions might change, which would then change the manner of discharge. Religious conversion—“changing religions”—is thus an aspect of religion. And the definitions section of Title VII explicitly defines “religion” in an expansive way: “The term ‘religion’ includes all aspects of religious observance and practice, as well as belief.”¹²⁴ To convert or to “change” religions are themselves acts of religion. That is, being baptized (converting to Christianity) is a religious act, an aspect of religion.¹²⁵

Sex reassignment procedures, be they social, hormonal, or surgical (“changing sexes”), are not an aspect of sex. In its focal sense, “sex” refers to one’s biological organization with respect to sexual reproduction.¹²⁶ In a more extended sense, it refers to how one gives expression to that biological organization.¹²⁷ But

122. Stephens Brief, *supra* note 17, at 26.

123. VA. DECLARATION OF RIGHTS § 16 (1776).

124. 42 U.S.C. § 2000e(j) (2018).

125. See JOHN CORVINO, RYAN T. ANDERSON & SHERIF GIRGIS, *DEBATING RELIGIOUS LIBERTY AND DISCRIMINATION* 131 (2017).

126. See ANDERSON, *supra* note 55, at 79–81.

127. See *id.* at 145–73.

nowhere is changing sexes an aspect of sex. So, although being baptized is an aspect of religion for Title VII, engaging in hormone therapy is not an aspect of sex.

Professors Eskridge and Koppelman make a linguistic point but miss the larger, uniquely relevant point. They contend that “Just as it makes no legal difference that ‘convert’ does not appear in Title VII’s text, so it makes no legal difference that ‘transgender’ does not appear in the statute.”¹²⁸ But “convert” was understood in 1964 when the Civil Rights Act was passed—as it is today—to be an aspect of religion, and Title VII explicitly defines the protections for religion to include all aspects of religious practice and observance.¹²⁹ On the other hand, neither in 1964, nor in 1991 (when the Act was amended),¹³⁰ nor today is sex change or transition understood to be an aspect of sex.

In fact, each of those terms is understood in contradistinction to sex. According to the most recent gender theory, sex is merely biological, gender is a social construct, and gender identity is how someone internally perceives their gender.¹³¹ Transitioning and transgender identity are explicitly distinct from sex. This is particularly evident when one considers gender nonbinary identities that have no relation to bodily sex at all.¹³² Transitioning and gender identity cannot fairly be described as aspects of sex.

128. Eskridge & Koppelman Brief, *supra* note 37, at 7.

129. 42 U.S.C. § 2000e(j).

130. See Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1074.

131. Planned Parenthood, for example, explains this theory on their website, in a section specifically dedicated “For Teens”:

Sex is a label that’s usually first given by a doctor based upon the genes, hormones, and body parts (like genitals) you’re born with. It goes on your birth certificate and describes your body as female or male. Some people’s sex doesn’t fit into male or female, called intersex.

Gender is how society thinks we should look, think, and act as girls and women and boys and men. Each culture has beliefs and informal rules about how people should act based on their gender. For example, many cultures expect and encourage men to be more aggressive than women.

Gender identity is how you feel inside and how you show your gender through clothing, behavior, and personal appearance. It’s a feeling that begins early in life.

All About Sex, Gender, and Gender Identity, PLANNED PARENTHOOD, <https://www.plannedparenthood.org/learn/teens/all-about-sex-gender-and-gender-identity> [<https://perma.cc/A8AL-24GF>] (last visited Nov. 7, 2019) (bullets omitted); see also ANDERSON, *supra* note 55, at 29–33.

132. See, e.g., Brittany J. Allen, Mandy S. Coles & Gerard T. Montano, *A Call to Improve Guidelines for Transgender Health and Well-being: Promoting Youth-Centered*

VIII. OPPOSITION TO INTERRACIAL MARRIAGE WAS
RACE DISCRIMINATION, SUPPORT FOR CONJUGAL MARRIAGE
IS NOT SEX DISCRIMINATION

The employees and amici also make a philosophical mistake when they argue that support for conjugal marriage is sex discrimination in the same way that opposition to interracial marriage is race discrimination. For example, Zarda argues:

This Court has already established that discriminating against someone of a particular race for dating or marrying persons of a different race constitutes discrimination because of race. . . . Discriminating against someone of a particular sex for dating or marrying someone of the same sex constitutes discrimination because of sex.¹³³

Yet, when the question of public marriage law was fully briefed and argued in front of the Supreme Court, and this same exact argument was advanced,¹³⁴ not one Justice endorsed it.¹³⁵

Zarda phrases the argument with its focal case: “Just as firing a white employee for being married to an African American person constitutes discrimination because of race, so firing a male employee for being married to another man constitutes sex discrimination.”¹³⁶ But this stops the analysis too soon to determine if discrimination has taken place. One must ask why, in the focal case, people opposed “a white employee for being married to an African American person.” The answer has nothing to do with marriage, and everything to do with race: racism and white supremacy.¹³⁷ But opposition to same-sex

and *Gender-Inclusive Care*, 65 J. ADOLESCENT HEALTH 443, 444 (2019) (“With approximately one-third of TGD [transgender and gender diverse] adults and 40% of TGD youth identifying as nonbinary, care guidelines that reinforce binary systems of gender identity may limit access to clinical services and restrict the ability of nonbinary people to navigate medical systems. Framing gender as solely binary defines therapeutic options and outcomes only in reference to two gender experiences, which impacts access . . .”).

133. Zarda Brief, *supra* note 17, at 12.

134. See, e.g., Brief for Petitioners, *supra* note 102, at 48–49.

135. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); *United States v. Windsor*, 570 U.S. 774 (2013); *Hollingsworth v. Perry*, 570 U.S. 693 (2013).

136. Zarda Brief, *supra* note 17, at 31.

137. See Anderson, *supra* note 44, at 132–37.

marriage has nothing to do with sexism or male (or female) supremacy.

When the Supreme Court struck down bans on interracial marriage, it did not praise the motives of those opposed to interracial marriage. It did not, because it could not. Instead, the Court explained that opposition to interracial marriage was part of a larger project of white supremacy.¹³⁸ But when the Supreme Court redefined marriage to include same-sex relationships it went out of its way not to cast traditionalists as bigots. Justice Kennedy highlighted, “Many who deem same-sex marriage to be wrong reach that conclusion based on decent and honorable religious or philosophical premises, and neither they nor their beliefs are disparaged here.”¹³⁹ Justice Kennedy further noted that that the traditional understanding of marriage “long has been held—and continues to be held—in good faith by reasonable and sincere people here and throughout the world.”¹⁴⁰ Nothing remotely similar could be written about antimiscegenation.

The conjugal understanding of marriage could not form a sharper contrast with antimiscegenation. Marriage as the union of male and female has been present throughout human history, shared by the great thinkers and religions and by cultures with diverse viewpoints about homosexuality. Great thinkers—ancient and modern, of both East and West, from Plato and Aristotle, Musonius Rufus and Plutarch, Augustine and Thomas Aquinas, Maimonides and al-Farabi, to Martin Luther and John Calvin, John Locke and Immanuel Kant, Gandhi and Martin Luther King—held the honest and reasoned conviction that male-female sexual bonds had distinctive value for individuals and society.¹⁴¹ Nothing even remotely similar is true of antimiscegenation.

138. See *Loving v. Virginia*, 388 U.S. 1, 7 (1967).

139. *Obergefell*, 135 S. Ct. at 2602.

140. *Id.* at 2594.

141. ANDERSON *supra* note 99, at 22, 136; CORVINO ET AL., *supra* note 125, at 196–97; GIRGIS ET AL., *supra* note 99, at 49, 66; see also 2 ARISTOTLE, *Nicomachean Ethics* bk. VIII, in THE COMPLETE WORKS OF ARISTOTLE 1825, 1836 (Jonathan Barnes ed., Princeton Univ. Press rev. Oxford trans. 1984); 3 PLATO, *The Republic* bk. IV, in THE DIALOGUES OF PLATO 107, 112 (B. Jowett trans. & ed., London, Oxford Univ. Press 3d ed. 1892); 1 PLUTARCH, *Solon*, in LIVES 405, 459 (Jeffrey Henderson ed., Bernadotte Perrin trans., Harvard Univ. Press, 1914) (c. 75); 9 PLUTARCH, *The Dialogue On Love (Amatorius)*, in MORALIA 301, 427 (Jeffrey Henderson ed., Edwin L. Minar, Jr., F.H.

Professors Eskridge and Koppelman disagree. They assume people who enact policies supporting conjugal marriage are really discriminating against homosexuals, which, they assert, is a form of sex discrimination.¹⁴² They accordingly compare those people with an employer who “does not want to hire ‘interracial-sexuals’”—meaning “people attracted to persons of another race.”¹⁴³ Such an employer, they contend, “discriminates because of race in a but-for manner, and it would be no defense . . . to claim it was merely discriminating because of the employee’s ‘sexual orientation,’ namely, the employee’s romantic preference for persons of another race.”¹⁴⁴ Again, this stops the analysis too soon. And the category “interracial-sexuals” reveals just that. Assuming someone redescribed their opposition to interracial marriage as an objection to “interracial-sexuals,” one would have to ask “why” to evaluate it. As a matter of historical reality, opposition to interracial marriage was opposition to equality for blacks.¹⁴⁵ Proponents sought to keep whites and blacks apart, to preserve white purity.¹⁴⁶ It was about racial superiority, not about the nature of marriage or convictions about human sexuality.¹⁴⁷ Indeed, marriage was redefined from its original color-blind reality to exclude interracial couples precisely because of racial bigotry.¹⁴⁸

By contrast, any reasonable opposition to same-sex sexual activity is grounded in opposition to all nonmarital sexual activity.¹⁴⁹ And here too, Professors Eskridge and Koppelman cut short their analysis. Support for marriage as the conjugal union of husband and wife is not founded on any beliefs about heterosupremacy or male (or female) supremacy. Nor is opposition on

Sandbach & W.C. Helmbold trans., Harvard Univ. Press, 1961) (c. 100); MUSONIUS RUFUS, *What is the Chief End of Marriage*, in MUSONIUS RUFUS: “THE ROMAN SOCRATES” 89, 89 (Cora E. Lutz ed. & trans., Yale Univ. Press 1947); Alberto Maffi, *Family and Property Law*, in THE CAMBRIDGE COMPANION TO ANCIENT GREEK LAW 254, 254 (Michael Gagarin & David Cohen eds., 2005).

142. Eskridge & Koppelman Brief, *supra* note 37, at 4–6.

143. *Id.* at 6.

144. *Id.* (citing *Loving v. Virginia*, 388 U.S. 1, 11 (1967); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964); *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 124–25 (2d. Cir. 2018) (en banc)).

145. Anderson, *supra* note 44, at 132–37.

146. *See id.* at 135–37.

147. *Id.* at 132–33, 135.

148. *Id.* at 132–33.

149. *See* ANDERSON, *supra* note 99, at 17–35.

the basis of sex or sexual orientation. Rather, it is founded on the capacity that a man and a woman have to unite as one flesh.¹⁵⁰

IX. "RACE" AND "SEX" ARE NOT INTERCHANGEABLE IN
OUR NATION'S NONDISCRIMINATION LAWS

The preceding section highlights why it is a mistake to treat "race" and "sex" interchangeably in our nation's nondiscrimination laws. As a result of laws banning discrimination because of race, "whites only" water fountains and bathrooms were eliminated.¹⁵¹ "Negro league" sports teams ceased to exist.¹⁵² No one suggests that race-specific athletic programming or private facilities are appropriate, because race is irrelevant to what we do on the athletic field and in the bathroom. Race-based policies came into practice solely as part of a larger project of white supremacy, where blacks were viewed first as subhuman and then as second class citizens,¹⁵³ and where their drinking from the same water fountain and using the same toilet could "pollute" the space.¹⁵⁴ Thus, the separation of the races was premised to keep one race in subjugation. Separate but equal when it came to race was inherently unequal.¹⁵⁵

A similar argument does not apply when it comes to sex. One aspect of women's equality in the workforce required creating private facilities for women.¹⁵⁶ As a result of laws banning discrimination because of sex, sex-specific restrooms were not eliminated in the workplace.¹⁵⁷ Likewise, bans on sex discrimination in education did not lead to the elimination of women's athletics, but often required creating additional teams and ad-

150. See *id.*; GIRGIS ET AL., *supra* note 99, at 23–36.

151. J.E. Hansan, *Jim Crow Laws and Racial Segregation*, SOC. WELFARE HIST. PROJECT (2011), <https://socialwelfare.library.vcu.edu/eras/civil-war-reconstruction/jim-crow-laws-and-racial-segregation/> [<https://perma.cc/FZM4-NWWP>].

152. Robert W. Peterson, *Negro League*, ENCYCLOPEDIA BRITANNICA (May 10, 2018), <https://www.britannica.com/sports/Negro-league> [<https://perma.cc/85R9-3YZS>].

153. Anderson, *supra* note 44, at 133–34.

154. Cf. Niraj Chokshi, *Racism at American Pools Isn't New: A Look at a Long History*, N.Y. TIMES (Aug. 1, 2018), <https://www.nytimes.com/2018/08/01/sports/black-people-pools-racism.html> [<https://perma.cc/P78X-ZWT4>].

155. See Hansan, *supra* note 151.

156. See 29 C.F.R. § 1910.141(c)(1)(i) (2012) (requiring employers to maintain restroom facilities for both men and women).

157. *Id.*

ditional sports for women.¹⁵⁸ The bodily differences between males and females make a difference when it comes to bodily privacy and athletic competition, and so laws banning discrimination on the basis of sex did not require the elimination of female-only programs and facilities, but their creation.

Analogies to race-based discrimination are misleading because they obscure the questions that the Court needs to address. The deeper reason for “whites only” water fountains was white supremacy, just as the deeper reason for bans on interracial marriage was white supremacy. In stark contrast, the deeper reason for women’s bathrooms and sports teams is not male supremacy. Nor is the deeper reason for conjugal marriage—here and across the globe, today and throughout human history—hetero-supremacy. The deeper reason is based on biological reality and “decent and honorable religious or philosophical premises.”¹⁵⁹

X. THERE WILL BE SEVERE PUBLIC CONSEQUENCES IF
THE COURT REDEFINES “SEX” AND EMBRACES A SIMPLISTIC
ACCOUNT OF DISCRIMINATION

There will be severe public consequences if the Supreme Court embraces a simplistic theory of “discrimination” and redefines the word “sex” to include “sexual orientation” and “gender identity.” Not only would it violate the separation of powers, it would impose enormous liability on employers and unconscionable outcomes on citizens. Enacting a reasonable policy that addresses the needs of all is the responsibility of federal, state, and local legislatures responding to the voice of the people.¹⁶⁰ At any rate, the Civil Rights Act of 1964 does not provide answers to today’s questions about sexuality and gender identity. And the Court should not update it, usurping the authority of Congress to provide its own answers. If a simplistic theory of discrimination is embraced and sex is redefined, what else might result?

158. See *Title IX and the Rise of Female Athletes in America*, WOMEN’S SPORTS FOUND. (Sept. 2, 2016), <https://www.womenssportsfoundation.org/education/title-ix-and-the-rise-of-female-athletes-in-america/> [https://perma.cc/V9TD-939E].

159. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

160. On how these policies should be crafted, see Anderson, *supra* note 30, at 361.

Employers would no longer be allowed to protect their employees' privacy and safety by offering single-sex private facilities. Instead, single-sex facilities would either have to be eliminated because they treat a person's sex as a "but-for" cause to why they cannot enter. Or an employee's entrance would have to be governed based on subjective identity instead of objective biology. Either way, an employer would no longer be able to ensure that a female employee would not be exposed to a male body—which, in its own way, would open employers up to Title VII liability.

Employers would also have to offer benefit plans that would violate their sincerely held religious beliefs. For example, if an employer covers testosterone therapy for men with low testosterone, but declines to cover it for women who want to transition; or if the employer covers mastectomies and hysterectomies in the case of cancer, but not for sex reassignment purposes, such an employer would be liable for discrimination because of sex. Likewise, if an employer offers marriage benefits to employees in conjugal marriages but not to employees in other domestic relationships, this would be viewed as discrimination because of sex. In short, support for the conjugal understanding of marriage would now be viewed as unlawful sex discrimination.¹⁶¹

Nor would such a view of sex discrimination be limited to the employment context. After all, how could a new theory of discrimination and a new meaning of the word "sex" be embraced for Title VII but not for other areas of the law, such as Title IX? This view will have consequences for school bathrooms, locker rooms, athletic competitions, dorm rooms, and hotel rooms for overnight field trips. These consequences raise a host of privacy, safety, and equality concerns. The reason we have separate sex-specific private facilities in the first place is not because of "gender identity" but because of the bodily differences between males and females. This privacy concern is particularly acute for victims of sexual assault, who testify that seeing nude male bodies can function as a trigger.¹⁶² As for equality, female athletes are already losing athletic competi-

161. See generally ANDERSON, *supra* note 99; CORVINO ET AL., *supra* note 125.

162. See Brief of *Amicus Curiae* Safe Spaces for Women Supporting Neither Party at 2, *Gloucester Cty. Sch. Bd. v. G.G. ex rel. Grimm*, 137 S. Ct. 1239 (2017) (No. 16-273).

tions, championships, and recruitment and scholarship opportunities to males identifying as female.¹⁶³ And a complaint has already been filed with the Department of Education because a female student was sexually assaulted by a male student in the girls' bathroom.¹⁶⁴ An adverse ruling by the Supreme Court would impose these policies on the entire nation.¹⁶⁵

Such a ruling would also create particular challenges for faith-based employers and institutions. Faith-based schools would have to provide married student housing to same-sex couples or risk liability for sex discrimination. If they have single-sex dorms, then they would have to allow males who identify as women to live in the women's dorm and vice versa. Faith-based adoption agencies would have to place children with same-sex couples rather than with married mothers and fathers. And although the Ministerial Exception would provide some protection for faith-based institutions to hire for mission,¹⁶⁶ there would be new—endless—litigation challenging adverse employment decisions where staffers do not share the convictions about sexuality.¹⁶⁷ This would also extend to the healthcare domain. Not just about the healthcare benefits that faith-based employers offer their employees, but also what healthcare procedures physicians and hospitals must offer and what insurance must cover.

Redefining “sex” and forming a new approach to discrimination would not be limited to Title VII but would also apply to similar federal laws (such as Title IX as discussed above) and regulations that incorporate or refer to them (such as certain

163. See Samantha Pell, *Girls say Connecticut's transgender athlete policy violates Title IX, file federal complaint*, WASH. POST (June 19, 2019, 7:44 PM), <https://www.washingtonpost.com/sports/2019/06/19/girls-say-connecticuts-transgender-athlete-policy-violates-title-ix-file-federal-complaint/> [<https://perma.cc/FES2-N2PN>].

164. Moriah Balingit, *After alleged sexual assault, officials open investigation of transgender bathroom policy*, WASH. POST (Oct. 9, 2018, 6:43 PM), https://www.washingtonpost.com/local/education/after-alleged-sexual-assault-officials-open-investigation-of-transgender-bathroom-policy/2018/10/09/431e7024-c7fd-11e8-9b1c-a90f1daae309_story.html [<https://perma.cc/G2QL-AAA6>].

165. See Anderson, *supra* note 4, at 318–20.

166. See *Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC*, 565 U.S. 171, 188–90 (2012).

167. See, e.g., John Riley, *Third LGBTQ Catholic school teacher sues Indianapolis Archdiocese for anti-gay discrimination* (Oct. 24, 2019), <https://www.metroweekly.com/2019/10/third-catholic-school-teacher-sues-indianapolis-archdiocese-discrimination/> [<https://perma.cc/3N3H-T6HJ>]; see also CORVINO ET AL., *supra* note 125, at 111–21.

Department of Health and Human Services regulations under the Affordable Care Act). To be sure, this new approach would not require all physicians to perform transitions; but a surgeon who performs hysterectomies for cancer would also be required to perform them for sex reassignment purposes, and an endocrinologist who administers testosterone for men with low testosterone would also have to do so for women who want to identify as men.

And because the Court would formulate this approach and not Congress, individual rights and ethics-based professions would immediately come under attack. Without a legislative body that could craft a law that balances competing interests, there would be no exemptions for religious liberty or protections for conscience. Nor would best medical judgments be taken into account. Many doctors, after all, think hormonal and surgical transition procedures are bad medicine.¹⁶⁸ Indeed, many doctors consider the appropriate medical response to gender dysphoria to be one directed at the mind and the emotions, not at the body.¹⁶⁹

In general, embracing the employees' theory would weaponize the *Obergefell* decision to treat "decent and honorable" disagreement about marriage as sex discrimination.¹⁷⁰ It would treat disagreement about human embodiment as male and female as sex discrimination. And it would turn our nation's cherished civil rights statutes into swords to persecute people with the "wrong" beliefs about human sexuality. Antidiscrimination laws should be understood as shields to protect citizens from unjust discrimination, not as swords to impose a sexual orthodoxy on the nation.¹⁷¹ The Court should not treat biology as bigotry.

168. See *The Medical Harms of Hormonal and Surgical Interventions for Gender Dysphoric Children*, HERITAGE FOUND. (Mar. 28, 2019), <https://www.heritage.org/gender/event/the-medical-harms-hormonal-and-surgical-interventions-gender-dysphoric-children> [<https://perma.cc/FZK6-KVBV>].

169. See Anderson, *supra* note 4, at 309–14, 349–51; see also ANDERSON, *supra* note 55, at 132–44.

170. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2602 (2015).

171. See Anderson, *supra* note 43.

PROPERTY, PRIVACY, AND JUSTICE GORSUCH'S EXPANSIVE FOURTH AMENDMENT ORIGINALISM

NICHOLAS A. KAHN-FOGEL*

In Carpenter v. United States, the Supreme Court reaffirmed the continuing vitality of the privacy framework Katz v. United States established in 1967 for identifying Fourth Amendment searches. Justice Gorsuch, in dissent, critiqued Katz as indeterminate and inconsistent with democratic values. In this Article, I analyze Justice Gorsuch's proposed alternative framework, which he described as the "traditional approach" to determining Fourth Amendment interests. Instead of grappling with the indefinite and textually and historically unfounded "reasonable expectations of privacy" framework of Katz, Justice Gorsuch asserted, this traditional test would require judges to focus on whether a "house, paper, or effect was yours under law." Although Justice Gorsuch offered preliminary thoughts on this rubric, his opinion left open important questions, including the sources of law to which the Court should look in identifying property interests; the breadth of the definitions of "papers" and "effects" and the kinds of property closely enough associated with the person for potential implication of Fourth Amendment rights; and the ways in which government conduct impinging on such property interests might trigger Fourth Amendment protection. Several passages in Justice Gorsuch's opinion suggest that he would take a broad, flexible approach to each of these issues. Overall, whatever ambiguities exist in Justice Gorsuch's dissent, it is certain that his property model would be more expansive than the pre-Katz trespass test that the Court rehabilitated in 2012. If that is the case, however, then the results that courts would be likely to reach under this framework might closely resemble outcomes under a prin-

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ciplined privacy-based analysis. Additionally, because a broad property rubric would involve a significant degree of judicial discretion, it would replicate Katz's indeterminacy. Thus, while Justice Gorsuch's approach might carry forward the benefits associated with Katz's flexibility, it would also reproduce Katz's associated flaws, including manipulability and democratic illegitimacy. Nonetheless, Justice Gorsuch might favor a flexible "traditional approach" over Katz because its explicit attention to the language of the Fourth Amendment is more conceptually elegant and, at least aesthetically, more consistent with Justice Gorsuch's originalist sympathies.

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INTRODUCTION

In *Carpenter v. United States*,¹ the Supreme Court reaffirmed the continuing vitality of the privacy framework *Katz v. United States*² established in 1967 for identifying Fourth Amendment searches.³ At the same time, the Court dramatically qualified a line of cases under *Katz* that had established the so-called third-party doctrine, which left government action to acquire information an individual has shared with corporations and other third parties entirely unregulated by the Constitution.⁴ Instead, the Court held that use of a court order to obtain a customer's historical cell-site location information (CSLI) from a cellular

1. 138 S. Ct. 2206 (2018).

2. 389 U.S. 347 (1967).

3. *Carpenter*, 138 S. Ct. at 2213–14 (citing *Katz*, 389 U.S. at 351).

4. *Id.* at 2216–20 (discussing *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976)).

service provider, at least for seven days of data or more, constitutes a search subject to the Fourth Amendment's presumptive warrant requirement.⁵ While asserting that the decision would not affect "conventional" forms of surveillance,⁶ the Court declared that the dramatic enhancement of the government's ability to surveil the citizenry wrought by advancements in digital technology,⁷ the deeply revealing nature of CSLI,⁸ and the essentially involuntary nature of the communication of that data from customers to service providers⁹ necessitated its conclusion.

Between the early twentieth century and the 1960s, the Court determined whether a Fourth Amendment search had occurred by using a trespass test: in the absence of a physical intrusion into a constitutionally protected area ("persons, houses, papers, and effects"¹⁰) to gather information, surveillance by the state would not implicate the Fourth Amendment.¹¹ The Court's opinion in *Olmstead v. United States*¹² was the quintessential expression of this model.¹³ In that case, because government agents wiretapped the defendants' phone lines without physical intrusion into their homes or offices, the Court held the surveillance to be a non-search.¹⁴ In *Katz*, the Court decisively repudiated the *Olmstead* framework.¹⁵ Instead, Justice Harlan's concurring opinion in *Katz*, which the Court later accepted as the holding of the case,¹⁶ established that a search occurs when

5. *Id.* at 2217 & n.3, 2220–21.

6. *Id.* at 2220.

7. *See id.* at 2219.

8. *Id.* at 2217–18.

9. *See id.* at 2220.

10. U.S. CONST. amend. IV.

11. *See Carpenter*, 138 S. Ct. at 2213 (citing *United States v. Jones*, 565 U.S. 400, 405, 406 n.3 (2012)). *But cf.* Orin S. Kerr, *The Curious History of Fourth Amendment Searches*, 2012 SUP. CT. REV. 67, 69 (observing that the Court's emphasis on physical intrusions between the 1920s and the 1960s "eschewed reliance on the technicalities of trespass law").

12. 277 U.S. 438 (1928), *overruled by Katz v. United States*, 389 U.S. 347 (1967).

13. *See id.* at 464.

14. *Id.*

15. *Katz*, 389 U.S. at 353 (asserting that the "premise that property interests control the right of the Government to search and seize has been discredited" (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)) (internal quotations marks omitted)).

16. *See Smith v. Maryland*, 442 U.S. 735, 740 (1979) (citing *Katz*, 389 U.S. at 361 (Harlan, J., concurring)).

the government intrudes on an expectation of privacy that “society is prepared to recognize as ‘reasonable.’”¹⁷

In 2012, in *United States v. Jones*,¹⁸ the Court resuscitated the old trespass test, insisting, contrary to common understandings, that *Katz* had supplemented rather than supplanted *Olmstead*.¹⁹ Thus, in *Jones*, because the government had placed a GPS monitor on the underside of the defendant’s Jeep to track its movements (a physical intrusion on an effect to gather information), a search had occurred.²⁰ Although the Court concluded that a benefit of this trespass test was that it avoided the “vexing” problems of *Katz*’s indeterminate privacy standard, it also insisted that *Katz* remained available as an alternative in cases in which the government engages in investigatory activity without a physical intrusion.²¹ Overall, although every Justice on the Court at the time of *Carpenter* had signed or authored an opinion acknowledging *Katz*’s shortcomings, a majority of those Justices have also signaled their continuing commitment to the *Katz* standard (at least as a second-line test), most recently in *Carpenter* itself.²²

Nonetheless, Justice Thomas expressed the view in his *Carpenter* dissent that *Katz* should be overturned,²³ and Justice Gorsuch, dissenting separately, also critiqued *Katz* as indeterminate,²⁴ insufficiently protective,²⁵ and inconsistent with democratic values.²⁶

In this article, I will analyze Justice Gorsuch’s dissent in *Carpenter*, in which he urged the Court to employ a “traditional approach” to determining Fourth Amendment interests.²⁷ Instead of grappling with the indefinite and textually and his-

17. *Katz*, 389 U.S. at 361 (Harlan, J., concurring).

18. 565 U.S. 400 (2012).

19. *Id.* at 409.

20. *Id.* at 406 n.3.

21. *Id.* at 411.

22. Nicholas A. Kahn-Fogel, *Katz, Carpenter, and Classical Conservatism*, 29 CORNELL J.L. & PUB. POL’Y (forthcoming 2020) (manuscript at 14–15), <https://ssrn.com/abstract=3279871> [<https://perma.cc/C925-BZZ2>].

23. *Carpenter v. United States*, 138 S. Ct. 2206, 2236 (2018) (Thomas, J., dissenting).

24. *Id.* at 2265–66 (Gorsuch, J., dissenting).

25. *See id.* at 2261–62.

26. *See id.* at 2268.

27. *Id.* at 2267–68.

torically unfounded “reasonable expectation of privacy” framework of *Katz*, Justice Gorsuch asserted, this traditional test would require judges to focus on whether “a house, paper, or effect was *yours* under law.”²⁸ Although Justice Gorsuch offered preliminary thoughts on this rubric, his opinion left open important questions, including the sources of law to which the Court should look in identifying property interests; the breadth of the definitions of “papers” and “effects” and the kinds of property associated closely enough with the person for potential implication of Fourth Amendment rights; and the ways in which government conduct impinging on such property interests might trigger Fourth Amendment protection. Several passages in Justice Gorsuch’s opinion suggest that he would take a broad, flexible approach to each of these issues. Overall, whatever ambiguities exist in Justice Gorsuch’s dissent, it is certain that his property model would be more expansive than the pre-*Katz* trespass test that the Court rehabilitated in 2012. If that is the case, however, then the results that courts would be likely to reach under this framework might closely resemble outcomes under a principled privacy-based analysis. Moreover, in situations in which his proposed approach fails to protect asserted Fourth Amendment rights, Justice Gorsuch might be willing to rely on *Katz* despite its shortcomings.²⁹ Finally, because a broad property rubric would involve a significant degree of judicial discretion, such a model could negate its own ostensible virtues, such as greater determinacy and democratic legitimacy. Thus, although this “traditional approach” would, like *Katz*, be flexible enough to allow the Court to adjust Fourth Amendment rules in the face of emerging threats to individual liberty or collective security, it would also perpetuate *Katz*’s putative flaws. Nonetheless, Justice Gorsuch might prefer a flexible property framework over *Katz* because its explicit attention to the language of the Fourth Amendment is more conceptually elegant and, at least aesthetically, more consistent with Justice Gorsuch’s originalist sympathies.

This Article will track the organization of Justice Gorsuch’s dissent. Part I will discuss Justice Gorsuch’s critique of the

28. *Id.*

29. *See id.* at 2272.

Court's cases implementing third-party doctrine and *Katz* more broadly and his consideration of the desirability of revisiting these flawed decisions using the *Katz* standard. Part II will evaluate Justice Gorsuch's proposed model and will compare that approach with the use of property in Justice Kennedy's and Justice Thomas's dissenting opinions. Part III will discuss potential lessons from scholarly proposals for expansive property frameworks.

I. JUSTICE GORSUCH'S CRITIQUE OF *KATZ*

Justice Gorsuch began his assessment of *Katz* with a discussion of *Smith v. Maryland*³⁰ and *United States v. Miller*,³¹ a pair of decisions from the 1970s establishing that one lacks any reasonable expectation of privacy in information shared with third parties, including, in those cases, the dialed numbers that telephone users convey to telephone companies and bank records, respectively.³² *Smith* and *Miller* provided the basis for the Sixth Circuit's determination in *Carpenter* that law enforcement obtainment of Carpenter's CSLI from his cellular carriers was not a Fourth Amendment search.³³ Those cases also seemingly led inexorably to the conclusion that "[e]ven our most private documents—those that, in other eras, we would have locked safely in a desk drawer or destroyed," which "now reside on third party servers," lack any Fourth Amendment protection because "no one reasonably expects any of it will be kept private."³⁴ As Justice Gorsuch aptly observed, however, "no one believes that, if they ever did."³⁵

First, Justice Gorsuch examined the possibility of living with the holdings of *Smith* and *Miller* despite the incompatibility of their implications with common intuitions about the kinds of information that will or should be kept private.³⁶ Justice Gorsuch concluded that this option was both normatively "unattractive"

30. 442 U.S. 735 (1979).

31. 425 U.S. 435 (1976).

32. *Smith*, 442 U.S. at 742; *Miller*, 425 U.S. at 442.

33. See *United States v. Carpenter*, 819 F.3d 880, 888–89 (6th Cir. 2016).

34. *Carpenter*, 138 S. Ct. at 2262 (Gorsuch, J., dissenting).

35. *Id.*

36. *Id.* at 2262–64.

and doctrinally dubious.³⁷ Doctrinally, the Court's justification of the third-party doctrine as a reflection of voluntary assumption of the risk that information that one shares with a third party will reach the government represented a distortion of that principle as developed in tort law.³⁸ Under traditional conceptions of the doctrine, it applies only when one has explicitly or implicitly agreed to absolve another for harms resulting from risks the other person has created, not solely based on one's recognition that such risks exist.³⁹ Thus, the mere fact that a pedestrian realizes there is a risk that a car might veer off the street and onto the sidewalk where he is walking is insufficient to support a conclusion that the pedestrian has agreed to absolve the negligent driver of liability for the resulting harm.⁴⁰ Likewise, one's recognition of the possibility that a person or corporation with whom one has shared sensitive information will betray one's confidence by giving it to the government does not mean one has agreed to accept that risk, let alone the risk that the government will "pry the document" from the third party's hands and "read it *without* his consent."⁴¹ Furthermore, the clarity of the rule that such information is never protected is insufficient to justify it; the opposite rule, that such information is always protected, would be just as clear.⁴² Ultimately, Justice Gorsuch concluded that *Smith* and *Miller* represented a "doubtful application of *Katz* that lets the government search almost whatever it wants whenever it wants."⁴³

Second, Justice Gorsuch considered the possibility of revisiting the holdings of *Smith* and *Miller* using the *Katz* framework. Initially, Justice Gorsuch feared that "[r]ather than solve the problem with the third party doctrine . . . this option only risks returning us to its source: After all, it was *Katz* that produced *Smith* and *Miller* in the first place."⁴⁴ If *Smith* and *Miller* are problematic, however, Justice Gorsuch's fear makes *Katz* the

37. *Id.*

38. *Id.* at 2263.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.* at 2263–64.

43. *Id.* at 2264.

44. *Id.*

wrong vehicle for revisiting third-party doctrine only if the historical manipulation of the *Katz* standard to produce unprincipled results suggests that *Katz*'s privacy test is unsusceptible to principled application and if Justice Gorsuch's proposed alternative would be resilient to similar manipulation. As I will discuss, there is reason for skepticism of both of these potential contentions.

Justice Gorsuch then argued, in line with Justice Thomas,⁴⁵ that *Katz*'s privacy standard is inconsistent with the text and original understanding of the Fourth Amendment.⁴⁶ The Amendment's reference to "persons, houses, papers, and effects" demonstrated, for Justice Gorsuch, that the Framers intended not to protect some abstract notion of privacy rights, dependent on "whether a judge happens to agree that your subjective expectation [of] privacy is a 'reasonable' one," but to guard against specific, enumerated intrusions.⁴⁷ Likewise, the cases that inspired the Fourth Amendment involved intrusions on homes and papers, further demonstrating the Framers' intention to safeguard against particularized threats to privacy rather than "to protect privacy in some ethereal way dependent on judicial intuitions."⁴⁸

Aside from his textualist and originalist objections to *Katz*, Justice Gorsuch argued that the test had failed even on its own terms.⁴⁹ He asserted that, after over fifty years, it was still un-

45. *Id.* at 2237–44 (Thomas, J., dissenting).

46. *Id.* at 2264 (Gorsuch, J., dissenting). This line of criticism began with Justice Black's dissent in *Katz*. See *infra* notes 98–102 and accompanying text. It has been a common critique since then. See, e.g., *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring) (arguing that when *Katz* is applied "to determine whether a 'search or seizure' within the meaning of the Constitution has occurred (as opposed to whether that 'search or seizure' is an 'unreasonable' one), it has no plausible foundation in the text of the Fourth Amendment"); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 769 (1994) ("These word games are unconvincing and unworthy."); Ricardo J. Bascuas, *The Fourth Amendment in the Information Age*, 1 VA. J. CRIM. L. 481, 499 (2013) ("The Court's notion that the law could protect abstract privacy directly was a doomed exercise in 'perfectionist' or 'noninterpretivist' constitutional interpretation with little connection to the Fourth Amendment's wording." (footnotes omitted)); David Gray, *The Fourth Amendment Categorical Imperative*, 116 MICH. L. REV. ONLINE 14, 15 (2017) (asserting that *Katz* "has no footing in the text or history of the Fourth Amendment").

47. *Carpenter*, 138 S. Ct. at 2264 (Gorsuch, J., dissenting).

48. *Id.*

49. *Id.* at 2265.

clear whether the standard was meant to be empirical or normative.⁵⁰ If *Katz* requires a normative inquiry about “whether society *should* be prepared to recognize an expectation of privacy as legitimate,” Justice Gorsuch contended, then judges are ill suited to undertake it.⁵¹ Rather, according to Justice Gorsuch, such an inquiry “often calls for a pure policy choice,” which “calls for the exercise of raw political will belonging to legislatures, not the legal judgment proper to courts.”⁵² Likewise, if the essential function of judges applying *Katz* were to ascertain society’s actual expectations of privacy, then, according to Justice Gorsuch, legislators, with their greater institutional resources and responsiveness to constituent concerns, would be better suited to conduct the inquiry and implement majoritarian preferences.⁵³

As I have recently argued, if *Katz*’s empirical imperative is to assess society’s immediate, fleeting preferences, then Justice Gorsuch’s argument would be well taken.⁵⁴ Not only would legislatures be better situated to evaluate the existence of such commitments, but constitutionalization of such preferences

50. *Id.* *Katz*’s indeterminacy and the related idea that the test is doctrinally circular have been sources of widespread, longstanding criticism of the standard. See *Carter*, 525 U.S. at 97 (Scalia, J., concurring) (“In my view, the only thing the past three decades have established about the *Katz* test . . . is that, unsurprisingly, those ‘actual (subjective) expectation[s] of privacy’ ‘that society is prepared to recognize as “reasonable”’ bear an uncanny resemblance to those expectations of privacy that this Court considers reasonable.” (quoting *Katz v. United States*, 389 U.S. 347, 361 (1967) (Harlan, J., concurring))). For a summary of similar scholarly critiques, see Kahn-Fogel, *supra* note 22 (manuscript at 5–15).

51. *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

52. *Id.* It is, nonetheless, possible to see the Fourth Amendment’s prohibition of “unreasonable” searches and seizures, taken in the “intellectual context” in which the Amendment was adopted, as a mandate for judges to use moral reasoning in interpreting the Amendment. Richard M. Re, *Fourth Amendment Fairness*, 116 MICH. L. REV. 1409, 1415–17 (2018). Additionally, given the deontological character of the Bill of Rights, judges might use something like contractualist principles as the basis for a normative model, as opposed to the utilitarian balancing that has often characterized Fourth Amendment decisionmaking, and which Justice Gorsuch seemed to envision as the only potential normative approach to *Katz* with his reference to a policy choice “between incommensurable goods—between the value of privacy in a particular setting and society’s interest in combating crime.” *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting). Yet, if the normative framework were deontological rather than consequentialist, courts might be best tasked with implementing it, given their “traditional rights-enforcing role distinct from the political branches’ frequent pursuit of aggregate interests.” Re, *supra* at 1425.

53. *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

54. Kahn-Fogel, *supra* note 22 (manuscript at 30–31).

would be inconsistent with an essential function of constitutional decisionmaking; at the very least, a constitution must reflect some idea of constraint of majoritarian whim and a reconciliation of popular preferences with society's core values.⁵⁵ As even proponents of the use of surveys to guide Fourth Amendment adjudication have conceded, the technique seems to run "against the constitutional grain."⁵⁶ On the other hand, if one views *Katz* as a command to assess not popular whim but society's deeper, enduring commitments, reflected in national tradition, then the standard would be both consistent with constitutional imperatives and well suited for judicial implementation. Traditionalist models, which require reference to the past, but which allow for incremental reform using a process associated with common law methodology, including reliance on analogy and precedent, represent a "distinctly legal form of reasoning" in which "it makes sense for courts to have a prominent role."⁵⁷

Justice Gorsuch accepted, "*Sometimes . . . judges may be able to discern and describe existing societal norms.*"⁵⁸ He observed that this is particularly likely to be feasible when a judge can draw on positive law rather than intuition in identifying such norms.⁵⁹ Nonetheless, Justice Gorsuch mused that applying *Katz* in this manner might end up resembling the "traditional approach" he ultimately preferred in any case.⁶⁰

Yet, as I will discuss below, if Justice Gorsuch's model were tied to a narrow conception of property rights, this would be likely to be true only in some cases. Sometimes, for example, property law deals with kinds of property that cannot reasonably be classified as papers or effects. Moreover, in cases where some source of positive law other than property law delineates a societal norm, using the law to determine *Katz's* reach would

55. Barry Friedman & Scott B. Smith, *The Sedimentary Constitution*, 147 U. PA. L. REV. 1, 78 (1998) ("Constitutionalism may be much more, but it cannot be less.").

56. Christopher Slobogin, *Proportionality, Privacy, and Public Opinion: A Reply to Kerr and Swire*, 94 MINN. L. REV. 1588, 1602 (2010).

57. Ernest Young, *Rediscovering Conservatism: Burkean Political Theory and Constitutional Interpretation*, 72 N.C. L. REV. 619, 680–81 (1994).

58. *Carpenter*, 138 S. Ct. at 2265 (Gorsuch, J., dissenting).

59. *Id.*

60. *Id.* at 2265–66.

not approximate Justice Gorsuch's model, unless, that is, Justice Gorsuch were willing to view "papers," "effects," and property rights more generally in an expansive sense.

Justice Thomas, in his own dissent in *Carpenter*, revealed a potentially narrower perspective in his textualist critique of a broad positive law model, noting that:

To come within the text of the Fourth Amendment, *Carpenter* must prove that the cell-site records are *his*; positive law is potentially relevant only insofar as it answers that question. The text of the Fourth Amendment cannot plausibly be read to mean "any violation of positive law" any more than it can plausibly be read to mean "any violation of a reasonable expectation of privacy."⁶¹

In any case, if the task is to evaluate *Katz* on its own terms, which Justices Thomas and Gorsuch each did in their respective dissents, then positive law other than property law could be a valuable guide. As has long been recognized, positive law in general is often the best evidence of deep-seated societal norms.⁶² Nonetheless, sociologists have also long understood that informal norms often play a more significant role in social life than formally enacted law.⁶³ As I have argued elsewhere, it is often possible to identify established social norms even when those norms are not codified in positive law.⁶⁴ Justice Gorsuch's own analysis reveals this to be true. Toward the end of his evaluation of *Katz*, he critiqued two additional opinions decided using the *Katz* rubric, *Florida v. Riley*⁶⁵ and *California v. Greenwood*.⁶⁶ In *Riley*, the Court held that a homeowner has no

61. *Id.* at 2242 (Thomas, J., dissenting).

62. EMILE DURKHEIM, *THE DIVISION OF LABOR IN SOCIETY* 24 (The Free Press 1st paperback ed. 1997) (1933) ("[S]ocial solidarity is a wholly moral phenomenon which by itself is not amenable to exact observation and especially not to measurement. To arrive at this classification, as well as this comparison, we must therefore substitute for this internal datum, which escapes us, an external one which symbolises it, and then study the former through the latter. That visible symbol is the law."); cf. *Stanford v. Kentucky*, 492 U.S. 361, 373 (1989) ("[T]he primary and most reliable indication of [a national] consensus is . . . the pattern of enacted laws . . .").

63. See WILLIAM GRAHAM SUMNER, *FOLKWAYS: A STUDY OF THE SOCIOLOGICAL IMPORTANCE OF USAGES, MANNERS, CUSTOMS, MORES, AND MORALS* 75–81 (1906).

64. Kahn-Fogel, *supra* note 22 (manuscript at 47).

65. 488 U.S. 445 (1989).

66. 486 U.S. 35 (1988); *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting).

reasonable expectation of privacy against naked-eye surveillance of his curtilage from a helicopter hovering over the property at 400 feet.⁶⁷ In *Greenwood*, the Court held that people have no reasonable expectation of privacy in garbage they put out for collection, even if they seal it in opaque plastic bags.⁶⁸ Yet, Justice Gorsuch's criticism of *Riley* and *Greenwood* hinged on his conclusion that the holdings were contrary to clear societal conventions, not that such conventions were indecipherable.⁶⁹ "Try that one out on your neighbors," Justice Gorsuch quipped in response to the *Riley* holding.⁷⁰ Similarly, Justice Gorsuch doubted "that most people spotting a neighbor rummaging through their garbage would think they lacked reasonable grounds to confront the rummager."⁷¹

Finally, Justice Gorsuch mused that using *Katz* in data privacy cases will prove just as problematic as its use in other realms, as the majority opinion in *Carpenter* itself demonstrated.⁷² Although the majority stated that "no single rubric" could definitively delineate reasonable expectations of privacy under *Katz* in every case, it emphasized the imperative of guarding against "arbitrary power"⁷³ and a "too permeating police surveillance."⁷⁴ Justice Gorsuch found this guidance insufficient. Responding to the majority's determination that collection of CSLI would be a search at least when the government requests seven days of data or more, Justice Gorsuch wondered how these principles would help lower courts determine how long is too long.⁷⁵ Responding to the majority's reassurance that its

67. 488 U.S. at 447–48, 452 (plurality opinion).

68. 486 U.S. at 37, 39.

69. *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting). *Greenwood* did involve a violation of positive law. *Id.* As Justice Gorsuch noted, California law at the time of the conduct in question protected a homeowner's rights in discarded trash. *Id.* Nonetheless, California's constitutional protection of discarded refuse would be insufficient on its own to establish the kind of national consensus I have proposed should be required under *Katz*. See Kahn-Fogel, *supra* note 22 (manuscript at 46).

70. *Carpenter*, 138 S. Ct. at 2266 (Gorsuch, J., dissenting).

71. *Id.*

72. *Id.* at 2266–67.

73. *Id.* at 2213–14 (majority opinion) (quoting *Boyd v. United States*, 116 U.S. 616, 630 (1886)) (internal quotation marks omitted).

74. *Id.* at 2213–14 (quoting *United States v. Di Re*, 332 U.S. 581, 595 (1948)) (internal quotation marks omitted).

75. *Id.* at 2266–67 (Gorsuch, J., dissenting).

holding would not affect conventional surveillance, Justice Gorsuch wondered what differentiates conventional surveillance from nonconventional surveillance and why courts should distinguish between the two if the former might lead to a “too permeating police surveillance” as well.⁷⁶ Certainly, these are reasonable questions under the majority’s specialized application of *Katz* in *Carpenter*. Other authors have begun attempting to address some of these quandaries.⁷⁷ Alternatively, as I have suggested elsewhere, the Court could achieve principled results by retreating from the *Carpenter* majority’s refinement of *Katz* for the digital age and applying, instead, a Burkean approach that would draw on firmly rooted societal commitments reflected in national tradition as expressed through positive law, informal practices, or both.⁷⁸

Thus, despite Justice Gorsuch’s contention that *Katz* “inevitably leads” to unprincipled decisionmaking based on largely unfettered judicial intuition,⁷⁹ the Court might rededicate itself to applying *Katz* in a manner more consistent with established conventions. Furthermore, an expansive property model like that which Justice Gorsuch ultimately favors would also be susceptible to manipulation. In the next section, I will describe and evaluate that model and the relationship between property and privacy evinced in the other dissenting opinions in *Carpenter*.

II. JUSTICE GORSUCH’S “TRADITIONAL APPROACH” AND ITS RELATIONSHIP TO PRECEDENT, HISTORICAL UNDERSTANDINGS, AND THE OTHER *CARPENTER* OPINIONS

Having considered and rejected living with the implications of *Miller* and *Smith* and revisiting those decisions using the *Katz* framework, Justice Gorsuch offered a third possibility: to use the “traditional approach” to Fourth Amendment interpreta-

76. *Id.* at 2267.

77. See, e.g., ORIN S. KERR, *Implementing Carpenter*, in *THE DIGITAL FOURTH AMENDMENT* (forthcoming), https://papers.ssrn.com/abstract_id=3301257 [<https://perma.cc/FVT4-C2G4>]; Paul Ohm, *The Many Revolutions of Carpenter*, 32 *HARV. J.L. & TECH* 357 (2019).

78. See Kahn-Fogel, *supra* note 22 (manuscript at 46).

79. See *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting).

tion.⁸⁰ This approach, Justice Gorsuch stated, asked whether “a house, paper or effect was *yours* under law. No more was needed to trigger the Fourth Amendment.”⁸¹ Yet, the seemingly straightforward elegance of this formula belies critical ambiguities Justice Gorsuch left unresolved. These ambiguities include the sources of law that might determine whether someone has a sufficient property interest to invoke Fourth Amendment protection; whether those sources should narrowly confine judicial decisionmaking or, instead, should serve as broad, flexible guides; the degree of liberality permissible in construing the textual limitation of Fourth Amendment protection to “persons, houses, papers, and effects”; and the kinds of government conduct that could impinge sufficiently on one’s property interests to implicate the Fourth Amendment. Overall, however, Justice Gorsuch’s dissent suggests that he would take a broad, flexible approach to these issues. Although such a framework would allow courts to adapt Fourth Amendment doctrine to address emerging threats to individual liberty or, on the other hand, to societal security, it would also preserve some of *Katz*’s putative flaws, including its indeterminacy and ostensible lack of democratic legitimacy.

First, Justice Gorsuch left open the potential sources of law that might confer a sufficient property interest to trigger Fourth Amendment protection. Although he invoked both current positive law and eighteenth-century common law as possibilities, Justice Gorsuch declined to elaborate on the precise contours of the framework, instead suggesting that both sources might be relevant and acknowledging that “[m]uch work is needed to revitalize this area and answer these questions.”⁸² Additionally, although Justice Gorsuch was somewhat coy about the issue, several passages in his dissent suggest that whatever concatenation of common law and contemporary property rules might inform the analysis, such law might serve as a loose guide to assessment of Fourth Amendment interests rather than as a rigid, literalistic set of marching orders. Initially, one might note that Justice Gorsuch cited *Jones* and *Florida v.*

80. *Id.* at 2267–68.

81. *Id.* at 2268.

82. *Id.*

*Jardines*⁸³ for the proposition that the traditional understanding of the Fourth Amendment survived *Katz*.⁸⁴ As I will explain below, Justice Gorsuch's dissent implies that he would favor a significantly more expansive use of property concepts than that found in *Jones* and *Jardines*. Nonetheless, in at least one sense these cases deviated from the narrowest potential approach to using property law to identify Fourth Amendment rights. As Professors William Baude and James Stern have observed, the *Jones* and *Jardines* Courts relied on a sort of Platonic conception of property law rather than on the actual positive law of any particular jurisdiction.⁸⁵

Justice Gorsuch further hinted that, under his model, positive property law might provide only a rough framework for Fourth Amendment analysis in his suggestion that in drawing on common law norms from 1791, judges might "extend[] [such rules] by analogy to modern times" as they assess Fourth Amendment claims.⁸⁶ Likewise, Justice Gorsuch's dissent indicates that the language of the Fourth Amendment might confine judicial decisionmaking only within broad limits, as evidenced by his assertion that judges should rely on "democratically legitimate sources of law," including "positive law or *analogies* to items protected by the enacted Constitution—rather than their own biases or personal policy preferences."⁸⁷ Together, these statements imply Justice Gorsuch's openness to a model in which the text of the Fourth Amendment would confine judicial discretion regarding the kinds of property eligible for constitutional protection only within broad limits, and in which positive property law would serve only as a loose guide in determining whether a person asserting a Fourth Amendment claim had a property interest sufficient for potential implication of his or her Fourth Amendment rights.

83. 569 U.S. 1 (2013).

84. *Carpenter*, 138 S. Ct. at 2267 (Gorsuch, J., dissenting) (citing *Jardines*, 569 U.S. at 11; *United States v. Jones*, 565 U.S. 400, 405 (2012)).

85. See William Baude & James Y. Stern, *The Positive Law Model of the Fourth Amendment*, 129 HARV. L. REV. 1821, 1835–36 (2016).

86. *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting).

87. *Id.* (emphasis added) (quoting Todd E. Pettys, *Judicial Discretion in Constitutional Cases*, 26 J.L. & POL. 123, 127 (2011)) (internal quotation marks omitted).

With regard to the constraints of the Fourth Amendment's text, which limits protection to "persons, houses, papers, and effects," Justice Gorsuch even more clearly communicated his willingness to interpret the language expansively as he entertained the possibility that cell-site location information might qualify as a person's papers or effects.⁸⁸ Justice Gorsuch preceded this suggestion with the observation that state and federal law often create "rights in both tangible and intangible things."⁸⁹ Moreover, according to Justice Gorsuch, because federal law restricts telephone company use of CSLI and disclosure of CSLI to third parties, gives customers a right of access to such information, and confers a private cause of action against carriers who violate the federal law, customers might have interests that rise to the level of a property right in the information.⁹⁰

Of course, that one might identify a property interest is not automatically tantamount to a determination that the property in question is a "paper" or an "effect." Thus, as Justice Thomas aptly pointed out in his separate *Carpenter* dissent, one of the few revisions the House Committee of Eleven made to James Madison's first draft of the Fourth Amendment was to substitute in the word "effects" for "other property."⁹¹ Although this change might have extended the scope of the Fourth Amendment's coverage by "clarifying that it protects commercial goods, not just personal possessions," it also may have narrowed its scope by suggesting it would not apply to real property other than houses.⁹² Accordingly, the Court in *Hester v. United States*⁹³ declined to use the Fourth Amendment to regulate government intrusion into an open field because such property was not a person, house, paper, or effect.⁹⁴ Sixty years later, after the ostensible ascendance of privacy as the organizing rubric for Fourth Amendment interpretation, the Court reaffirmed the

88. *Id.* at 2272.

89. *Id.* at 2270 (quoting a statute defining "property" as including "property held in any digital or electronic medium" and cases referring to an email account and a web account as a "form of property" and "intangible property," respectively (citations omitted) (internal quotation marks omitted)).

90. *Id.* at 2272 (citing 47 U.S.C. § 222 (2018)).

91. *Id.* at 2241 (Thomas, J., dissenting) (citations omitted).

92. *Id.* (citations omitted).

93. 265 U.S. 57 (1924).

94. *Id.* at 59.

open fields doctrine based in part on its conclusion that an open field could not be described as an effect.⁹⁵

The Court adhered to this sort of narrow, textualist, property-based approach most famously in a line of cases beginning in the early twentieth century with *Olmstead*, in which the majority declined to apply the Amendment to government wiretapping of phone lines without any physical intrusion into the defendants' homes or offices.⁹⁶ Writing for the Court, Chief Justice Taft argued that the language of the Fourth Amendment "shows that the search is to be of material things—the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized."⁹⁷ Echoing this sentiment, Justice Black protested in his *Katz* dissent against the majority's putative abandonment of property rights as a Fourth Amendment lodestar,⁹⁸ and against the *Katz* Court's apparent abandonment of principled adherence to the Amendment's text.⁹⁹ Acknowledging that "an argument based on the meaning of words lacks the scope, and no doubt the appeal, of broad policy discussions and philosophical discourses on such nebulous subjects as privacy," Justice Black nonetheless felt constrained by the language of the Fourth Amendment to conclude that the Constitution had

95. *Oliver v. United States*, 466 U.S. 170, 176–77 (1984).

96. *Olmstead v. United States*, 277 U.S. 438, 464 (1928) ("The Amendment does not forbid what was done here. There was no searching. There was no seizure.").

97. *Id.*

98. *Katz*, 389 U.S. at 353 (1967) (stating that "property interests control the right of the Government to search and seize has been discredited" (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)) (internal quotation marks omitted)). Despite the common conception that *Katz* rejected property principles to determine Fourth Amendment interests, property concepts have remained important in assessing Fourth Amendment claims. See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 807 (2004) ("The *Katz* 'reasonable expectation of privacy' test has proven more a revolution on paper than in practice; *Katz* has had a surprisingly limited effect on the largely property-based contours of traditional Fourth Amendment law. As a result, courts rarely accept claims to Fourth Amendment protection in new technologies that do not involve interference with property rights, and have rejected broad claims to privacy in developing technologies with surprising consistency.").

99. *Katz*, 389 U.S. at 364–65 (Black, J., dissenting).

nothing to say about electronic eavesdropping.¹⁰⁰ Rather, Justice Black opined, the Amendment's reference to persons, houses, papers, and effects signified "the idea of tangible things with size, form, and weight, things capable of being searched, seized, or both."¹⁰¹ Although *Katz's* flexible, privacy-based framework, equipped for adaptation of Fourth Amendment rules to address emerging technologies, seemed to be a potential bulwark against pervasive government surveillance of the citizenry, Justice Black saw in the abandonment of more disciplined reliance on text and history a potential threat to liberty as well; his reading of history convinced him that judges endowed with lawmaking discretion are not always apt to use it to advance individual rights.¹⁰²

Since *Katz*, most scholars have, in fact, agreed that the Court generally failed to use the new test to enhance protection of individual privacy against government intrusion. Instead, the Court regularly reaffirmed under *Katz* government-friendly rules from the earlier property regime and, in some cases, further tipped the balance of power between government and citizen in the government's favor.¹⁰³ Occasionally, the Court explicitly reinforced its privacy analysis with reference to the textual limitations *Katz* had supposedly transcended. Thus, the Court in *Oliver v. United States*,¹⁰⁴ in rejecting the notion that an open field could qualify as an effect, defined the term as referring to

100. *Id.* at 365.

101. *Id.*

102. *Id.* at 374 ("Certainly the Framers, well acquainted as they were with the excesses of governmental power, did not intend to grant this Court such omnipotent lawmaking authority as that. The history of governments proves that it is dangerous to freedom to repose such powers in courts.").

103. See, e.g., Bascuas, *supra* note 46, at 481; Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 537-38 (2011); Ira Mickenberg, *Fourth Amendment Standing After Rakas v. Illinois: From Property to Privacy and Back*, 16 NEW ENG. L. REV. 197, 226 (1981) (stating that *Katz's* amorphous standard "has proved just as useful for restricting constitutional protections late in the 1970's [sic] as it was for expanding those protections a decade ago"); Luke M. Milligan, *Concreteness Drift and the Fourth Amendment*, 82 MISS. L.J. 891, 891-92 (2013).

104. 466 U.S. 170 (1984).

personal property, as opposed to real property.¹⁰⁵ This is consistent with Founding-era sources.¹⁰⁶

Today, the term “personal property” includes “[a]ny moveable or intangible thing that is subject to ownership and not classified as real property.”¹⁰⁷ Yet, “effects” generally connotes tangible personal property, as evidenced by the primary entry in *Black’s Law Dictionary*, which defines the term as “[m]ovable property; goods.”¹⁰⁸ The Framers also would have understood “effects” in this way, as Founding-era debates revealed the connection between “protection for effects” and “the law prohibiting interferences with another’s possession of personal property, including dispossession, damage, and unwanted manipulation.”¹⁰⁹

Despite this evidence that the original understanding of the text reflected the Framers’ focus on material things, Justice Gorsuch moved seamlessly from his unremarkable observation that people can have property interests in both tangible and intangible things to his assertion, two pages later, that digital information held by a telephone company concerning the historical location of a customer’s cell phone might constitute the customer’s papers or effects.¹¹⁰ Thus, having already established the propriety under his model of applying constitutional norms based on “analogies to items protected by the enacted Constitution,”¹¹¹ Justice Gorsuch, through an act of linguistic legerdemain, abandoned reliance on analogy and posited that this digital information held by cellular carriers might simply *be* the customer’s papers or effects.

In *Carpenter* itself, Justice Gorsuch at least believed that actual positive law might confer a property interest in CSLI on cellular telephone customers;¹¹² his dissent ultimately turned on his

105. *Id.* at 177 n.7.

106. See *Doe v. Dring* (1814) 105 Eng. Rep. 447, 449; 2 M. & S. 448, 452–54; 2 WILLIAM BLACKSTONE, COMMENTARIES *16, *384–85.

107. *Property*, BLACK’S LAW DICTIONARY (11th ed. 2019).

108. *Effects*, BLACK’S LAW DICTIONARY (11th ed. 2019).

109. Maureen E. Brady, *The Lost “Effects” of the Fourth Amendment: Giving Personal Property Due Protection*, 125 YALE L.J. 946, 951 (2016).

110. See *Carpenter v. United States*, 138 S. Ct. 2206, 2270, 2272 (2018) (Gorsuch, J., dissenting).

111. *Id.* at 2268.

112. *Id.* at 2272.

conclusion that, in failing to assert property-based arguments below, the petitioner had forfeited them.¹¹³ Yet, as I have briefly discussed,¹¹⁴ Justice Gorsuch suggested that, in addition to his willingness to give a broad construction to terms like “papers” and “effects,” he would also be open to finding property rights in such things based on sources other than actual positive law. As I have noted, like his apparent willingness to use analogy to identify what qualifies as a paper or effect, Justice Gorsuch’s willingness to rely again on analogy rather than actual law to determine whether such “papers” or “effects” were the property of a Fourth Amendment claimant is a sign of the potentially loose constraints positive law would impose on analysis under the “traditional approach” he propounded. Thus, after speculating that analogies to common law rules might provide a basis for finding constitutionally significant property interests,¹¹⁵ Justice Gorsuch declared that Carpenter’s forfeiture of potentially winning traditional arguments involved a failure to invoke “the law of property or any analogies to the common law.”¹¹⁶

Of course, analogical reasoning forms the core of common law analysis.¹¹⁷ Nonetheless, the most rigid forms of originalism would minimize the significance of the evolutionary, analogical developments reflected in Supreme Court precedent in favor of interpretive models that prioritize fine-grained, eighteenth-century common law rules as the ultimate and definitive source of constitutional authority.¹¹⁸ In the Fourth Amendment

113. *Id.*

114. *See supra* note 87 and accompanying text.

115. *Carpenter*, 138 S. Ct. at 2268 (Gorsuch, J., dissenting).

116. *Id.* at 2272.

117. *See, e.g.*, J. Lyn Entrikin, *The Death of Common Law*, 42 HARV. J.L. & PUB. POL’Y 351, 434–35 (2019) (“Common law reasoning relies primarily on analogizing from caselaw . . .”); Christopher Serkin & Nelson Tebbe, *Is the Constitution Special?*, 101 CORNELL L. REV. 701, 748 (2016) (“[A]s any lawyer knows, the process of common-law reasoning involves analogizing and distinguishing . . . prior decisions . . .”).

118. *See, e.g.*, Donald A. Dripps, *Responding to the Challenges of Contextual Change and Legal Dynamism in Interpreting the Fourth Amendment*, 81 MISS. L.J. 1085, 1090–91 (2012); David A. Sklansky, *The Fourth Amendment and Common Law*, 100 COLUM. L. REV. 1739, 1744 (2000). Outside the Fourth Amendment context, originalists such as Justices Scalia and Thomas have also supported this sort of originalism in Eighth Amendment decisionmaking. *See, e.g.*, *Graham v. Florida*, 560 U.S. 48, 99 (2010) (Thomas, J., dissenting); *Harmelin v. Michigan*, 501 U.S. 957, 966–85 (1991)

context, Professor David Sklansky has referred to this approach as “the new Fourth Amendment originalism.”¹¹⁹ Likewise, Professor Donald Dripps has described the approach as “specific-practice originalism.”¹²⁰

In *Wyoming v. Houghton*,¹²¹ the first Fourth Amendment case to adopt this approach, Justice Scalia explained that, to determine the reasonableness of a Fourth Amendment search or seizure, the Court should look first to “whether the action was regarded as an unlawful search or seizure under the common law when the Amendment was framed.”¹²² Only if that inquiry yielded no clear answer would the Court resort to balancing the significance of the intrusion on individual privacy against the extent of the need to engage in the conduct for “legitimate governmental interests.”¹²³ As I and others have chronicled,¹²⁴ the lack of sufficiently developed common law rules on most aspects of search and seizure has resulted in the Court’s resorting to balancing in each of the cases it has decided under this

(opinion of Scalia, J.); see also Craig S. Lerner, *Originalism and the Common Law Infancy Defense*, 67 AM. U. L. REV. 1577, 1582 (2018) (“Justice Thomas and the late Justice Scalia consistently argued that the original meaning of the Eighth Amendment was to foreclose only those modes or acts of punishment that were considered cruel and unusual at the time the Bill of Rights was enacted.”). This is not to say that proponents of this sort of specific-practice originalism would uniformly give no weight to precedent. For Justice Scalia, for example, some deference to precedent would be appropriate in spite of contrary common law norms, but Justice Scalia would have given very little weight, at least, to recent precedent inconsistent with the common law. See, e.g., *South Carolina v. Gathers*, 490 U.S. 805, 824 (1989) (Scalia, J., dissenting) (“The freshness of error not only deprives [precedent] of the respect to which long-established practice is entitled, but also counsels that the opportunity of correction be seized at once, before state and federal laws and practices have been adjusted to embody it.”). Justice Thomas, on the other hand, is widely viewed as according less significance to precedent. See, e.g., Eric R. Claeys, Raich and *Judicial Conservatism at the Close of the Rehnquist Court*, 9 LEWIS & CLARK L. REV. 791, 797 (2005).

119. Sklansky, *supra* note 118, at 1744.

120. Dripps, *supra* note 118, at 1089–91.

121. 526 U.S. 295 (1999).

122. *Id.* at 299 (citing *Wilson v. Arkansas*, 514 U.S. 927, 931 (1995); *California v. Hodari D.*, 499 U.S. 621, 624 (1991)).

123. *Id.* at 300.

124. See Dripps, *supra* note 118, at 1091–92; Nicholas Kahn-Fogel, *An Examination of the Coherence of Fourth Amendment Jurisprudence*, 26 CORNELL J.L. & PUB. POL’Y 275, 324–25 (2016); Kahn-Fogel, *supra* note 22 (manuscript at 1).

rubric since *Houghton*,¹²⁵ thus negating the primary theoretical virtues of narrow forms of originalism—restriction of judicial discretion and achievement of determinacy in the law.¹²⁶ Moreover, the impossibility of ascertaining how the Framers would have viewed common law rules in the extraordinarily different context of twenty-first century professionalized police forces and modern technology vitiates the supposed democratic legitimacy of the approach even in cases in which it is possible to identify a well-established common law norm.¹²⁷ Likewise, even if the Framers understood the Fourth Amendment to incorporate common law rules, they also understood that the common law is not static; rather, new circumstances lead judges to distinguish and, on occasion, overrule precedent, resulting in an evolutionary process in which society's changing needs lead gradually to new rules of law.¹²⁸

In any case, Justice Gorsuch's openness to analogical reasoning represents a straightforward rejection of this sort of specific-practice originalism. Justice Gorsuch most clearly articulated this rejection in his suggestion that there may be circumstances in which a person could successfully assert a Fourth Amendment claim despite the absence of an identifiable property right reflected in contemporary positive law or in eighteenth-century common law.¹²⁹ Justice Gorsuch mused that legislatures could not, for example, destroy Fourth Amendment interests in papers or houses by "declaring your house or papers to be your property except to the extent the police wish to search them without cause."¹³⁰ Instead, Justice Gorsuch argued that, in such circumstances, the Court should refer to Founding-era values to "assur[e] preservation of that degree of privacy against government that existed when the Fourth Amendment was

125. See *Riley v. California*, 573 U.S. 373, 385–86 (2014); *Virginia v. Moore*, 553 U.S. 164, 171–76 (2008); *Atwater v. City of Lago Vista*, 532 U.S. 318, 345–54 (2001).

126. See Sklansky, *supra* note 118, at 1739 ("[A]nchoring the Fourth Amendment in common law will do little to make it more principled or predictable, in part because common-law limits on searches and seizures were thinner, vaguer, and far more varied than the Court seems to suppose.").

127. See Dripps, *supra* note 118, at 1107–16.

128. Sklansky, *supra* note 118, at 1788.

129. *Carpenter v. United States*, 138 S. Ct. 2206, 2270–71 (2018) (Gorsuch, J., dissenting).

130. *Id.*

adopted.”¹³¹ Further elaborating on this point, Justice Gorsuch clarified that such an exercise would go beyond enshrinement of “only the specific rights known at the founding; it means protecting their modern analogues too.”¹³² In one fell swoop, therefore, Justice Gorsuch endorsed a “traditional approach” in which a person might have sufficient property interests to invoke Fourth Amendment protection despite having no property right reflected in any sort of actual positive law, ancient or contemporary.

Justice Gorsuch’s assertion of the imperative of preserving the degree of privacy against government intrusion that existed at the time of the framing of the Fourth Amendment drew directly on the majority opinion in *Kyllo v. United States*.¹³³ Thus, Justice Gorsuch, referring to the facts of *Kyllo*, noted that although “thermal imaging was unknown in 1791, this Court has recognized that using that technology to look inside a home constitutes a Fourth Amendment ‘search’ of that ‘home’ no less than a physical inspection might.”¹³⁴ Significantly, *Kyllo*’s focus on maintaining the eighteenth-century balance of power between government and citizen, rather than on freezing specific common law rules in “amber”¹³⁵ represented a far more flexible, values-based form of originalism than the Court’s approach in *Houghton* and its progeny.¹³⁶

Several features of this approach are worth highlighting. First, although one might characterize *Kyllo*’s focus on preservation of the Framing-era “balance of advantage” between government and citizen as a kind of originalism,¹³⁷ the allowance for evolution of the precise rules regulating that relationship

131. *Id.* at 2271 (alteration in original) (quoting *United States v. Jones*, 565 U.S. 400, 406 (2012)) (internal quotation marks omitted).

132. *Id.*

133. 533 U.S. 27 (2001).

134. *Carpenter*, 138 S. Ct. at 2271 (Gorsuch, J., dissenting) (citing *Kyllo*, 533 U.S. at 40).

135. Amar, *supra* note 46, at 818.

136. See, e.g., David A. Sklansky, *Back to the Future: Kyllo, Katz, and Common Law*, 72 *MISS. L.J.* 143, 146 (2002) (“And the originalism in *Kyllo* is not the originalism the Court has applied in other recent Fourth Amendment cases. The use of history in *Kyllo* is looser, and it has a different focus: the Court has shifted its attention, if only temporarily, from the *content* of eighteenth-century rules of search and seizure to what those rules *accomplished*.”).

137. Dripps, *supra* note 118, at 1126–31.

blurs the line between originalism and the living constitutionalism epitomized by decisions like *Katz*.¹³⁸ In that regard, it is also significant that Justice Scalia, writing for the *Kyllo* majority, considered the opinion to represent a refinement of *Katz*'s privacy rubric rather than a return to the strict property framework epitomized by *Olmstead*.¹³⁹ This was true despite *Kyllo*'s explicit elevation of property concerns in its declaration that the use of sense-enhancing technology to gather information about the interior of a home that would otherwise have been unavailable without a *physical intrusion into a constitutionally protected area* would constitute a search, at least in cases in which the technology in question was not in general public use.¹⁴⁰

The potential relationship between privacy and property was evident in *Katz* itself. Justice Stewart's majority opinion rejected the formulation of the issue as whether a public telephone booth is a constitutionally protected area,¹⁴¹ declared that "the Fourth Amendment protects people, not places,"¹⁴² and proclaimed that the notion that "property interests control the right of the Government to search and seize has been discredited."¹⁴³ Instead, while purporting also to reject the idea that the Fourth Amendment enshrines any generalized right of privacy, Justice Stewart, without offering a workable standard for future cases, concluded that the government's electronic eavesdropping on *Katz*'s conversation "violated the privacy upon which he justifiably relied while using the telephone booth."¹⁴⁴ Despite Justice

138. See Donald A. Dripps, Perspectives on the Fourth Amendment *Forty Years Later: Toward the Realization of an Inclusive Regulatory Model*, 100 MINN. L. REV. 1885, 1904, 1905 n.76 (2016) (discussing *Kyllo* and positing that "the more sophisticated the originalism the more closely it resembles openly normative accounts").

139. *Kyllo*, 533 U.S. at 34 ("While it may be difficult to refine *Katz* when the search of areas such as telephone booths, automobiles, or even the curtilage and uncovered portions of residences is at issue, in the case of the search of the interior of homes—the prototypical and hence most commonly litigated area of protected privacy—there is a ready criterion, with roots deep in the common law, of the minimal expectation of privacy that *exists*, and that is acknowledged to be *reasonable*.").

140. *Id.* (citing *Silverman v. United States*, 365 U.S. 505, 512 (1961)).

141. *Katz v. United States*, 389 U.S. 347, 350–53 (1967).

142. *Id.* at 351.

143. *Id.* at 353 (quoting *Warden v. Hayden*, 387 U.S. 294, 304 (1967)) (internal quotation marks omitted).

144. *Id.*

Stewart's protestations, Justice Harlan's much more influential concurrence embraced the concept of "constitutionally protected area[s]" and observed that the question of what protection the Fourth Amendment provides to people often "requires reference to a 'place.'"¹⁴⁵

This is not to say that Justice Harlan endorsed a strict focus on tangible property or physical intrusions. As Justice Harlan made clear, he approved of the holding in *Silverman v. United States*¹⁴⁶ that "examination or taking of physical property [is] not required" to trigger Fourth Amendment protection.¹⁴⁷ He also agreed with the majority that *Goldman v. United States*¹⁴⁸—which held that electronic surveillance without physical penetration of the premises with a tangible object could not implicate the Fourth Amendment¹⁴⁹—should be overruled.¹⁵⁰ Nonetheless, Justice Harlan's self-conscious tethering of expectations of privacy to electronic or physical intrusion into a constitutionally protected area evokes the property concerns the *Katz* Court putatively rejected.¹⁵¹

On numerous subsequent occasions, the Court has recognized the connection between *Katz*'s privacy framework and property rights. Perhaps most famously, in *Rakas v. Illinois*,¹⁵² the Court stated that assessment of the expectations of privacy that society is prepared to recognize as reasonable must be made with reference either to "concepts of real or personal property law or to understandings that are recognized and permitted by society."¹⁵³ Although the *Rakas* Court accepted that *Katz* had rejected the notion that Fourth Amendment claims depend on "a common-law interest in real or personal property, or on the invasion of such an interest," the Court also averred that the elevation of privacy as the lodestar of Fourth Amendment decisionmaking was not a wholesale abandon-

145. *Id.* at 360–61 (Harlan, J., concurring).

146. 365 U.S. 505 (1961).

147. *Katz*, 389 U.S. at 361–62 (Harlan, J., concurring).

148. 316 U.S. 129 (1942).

149. *Id.* at 134–35.

150. *Katz*, 389 U.S. at 362 (Harlan, J., concurring).

151. *See id.* at 360–61.

152. 439 U.S. 128 (1978).

153. *Id.* at 144 n.12.

ment of the use of property concepts.¹⁵⁴ Rather, “One of the main rights attaching to property is the right to exclude others and one who owns or lawfully possesses or controls property will in all likelihood have a legitimate expectation of privacy by virtue of this right to exclude.”¹⁵⁵ Ultimately, the *Rakas* Court held that the petitioners had no reasonable expectation of privacy against a search of a car in which they were passengers because they “asserted neither a property nor a possessory interest in the automobile, nor an interest in the property seized.”¹⁵⁶

In *Oliver*, the majority downplayed the significance of property rights in a post-*Katz* world. Dismissing the idea that police trespass into an open field could infringe on an expectation of privacy that society would be prepared to recognize as reasonable, the Court cited *Katz* for the proposition that property rights no longer control Fourth Amendment interests,¹⁵⁷ asserted that existence of a property right is merely “one element” in assessing Fourth Amendment claims,¹⁵⁸ and concluded that “in the case of open fields, the general rights of property protected by the common law of trespass have little or no relevance to the applicability of the Fourth Amendment.”¹⁵⁹ Justice Marshall responded in his dissent by emphasizing that, whatever other interests property rights protect, one indisputable function of property law “is to define and enforce privacy interests—to empower some people to make whatever use they wish of certain tracts of land without fear that other people will intrude upon their activities.”¹⁶⁰

In 2012, in *United States v. Jones*, the Court rehabilitated the *Olmstead*-era property framework, holding that a physical intrusion into a constitutionally protected area to gather information constitutes a search,¹⁶¹ and asserting that *Katz* had sup-

154. *Id.*

155. *Id.* at 143–44 n.12 (citation omitted).

156. *Id.* at 148.

157. *Oliver v. United States*, 466 U.S. 170, 183 (1984) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967); *Rakas*, 439 U.S. at 144 n.12)).

158. *Id.*

159. *Id.* at 183–84.

160. *Id.* at 190 n.10 (Marshall, J., dissenting).

161. 565 U.S. 400, 406 n.3 (2012).

plemented *Olmstead* rather than supplanted it.¹⁶² Under this new regime, *Katz* and *Olmstead* would provide alternative mechanisms for identifying Fourth Amendment searches.¹⁶³ One year later in *Florida v. Jardines*, the Court would again use property principles to characterize government conduct as a search: the government’s unlicensed use of a drug-sniffing dog on a person’s curtilage qualified as a physical intrusion into a constitutionally protected area to obtain evidence and thus was a search.¹⁶⁴ In a concurrence joined by Justices Ginsburg and Sotomayor, Justice Kagan endorsed the majority’s property analysis and asserted that evaluation of privacy concepts under *Katz* led inexorably to the same result.¹⁶⁵ For Justice Kagan, the alignment of property law and privacy concepts was unsurprising, for “[t]he law of property ‘naturally enough influence[s]’ our ‘shared social expectations’ of what places should be free from governmental incursions.”¹⁶⁶ Likewise, despite the origin in property law of the notion that “my home is my own,” the sentiment also reflects “a common understanding—extending even beyond that law’s formal protections—about an especially private sphere. *Jardines*’ home was his property; it was also his most intimate and familiar space.”¹⁶⁷

The *Carpenter* majority also acknowledged that “property rights are often informative” in identifying legitimate privacy interests,¹⁶⁸ but the Court declared that “no single rubric definitively resolves which expectations of privacy are entitled to

162. *Id.* at 409.

163. *Id.* at 411 (“The concurrence faults our approach for ‘present[ing] particularly vexing problems’ in cases that do not involve physical contact, such as those that involve the transmission of electronic signals. We entirely fail to understand that point. For unlike the concurrence, which would make *Katz* the *exclusive* test, we do not make trespass the *exclusive* test. Situations involving merely the transmission of electronic signals without trespass would *remain* subject to *Katz* analysis.” (alteration in original) (quoting *id.* at 426 (Alito, J., concurring in the judgment))).

164. 569 U.S. 1, 11–12 (2013).

165. *Id.* at 12–13 (Kagan, J., concurring).

166. *Id.* at 13 (second alteration in original) (first quoting *Georgia v. Randolph*, 547 U.S. 103, 111 (2006); and then citing *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)).

167. *Id.* at 14.

168. *Carpenter v. United States*, 138 S. Ct. 2206, 2214 n.1 (2018).

protection.”¹⁶⁹ Moreover, the Court denied that property law is “fundamental” or “dispositive” to the *Katz* inquiry.¹⁷⁰ Ultimately, as I have noted, the Court’s determination that government collection of CSLI implicates the Fourth Amendment turned not on identification of any property interest telephone users might have in the data but on the “seismic shifts in digital technology” that have made long-term, pervasive tracking of the citizenry feasible,¹⁷¹ the potentially deeply revealing nature of the data,¹⁷² and the effectively involuntary nature of the exposure of such data to cell phone carriers.¹⁷³ Critically, just as Justice Gorsuch relied on *Kyllo* to delineate the contours of his property test, the *Carpenter* majority drew explicitly on *Kyllo*’s imperative of maintaining the balance of power between citizen and government that existed in the late eighteenth century, adjusting Fourth Amendment rules to protect individuals against threats posed by “advancing technology.”¹⁷⁴ Thus, the Court at once insisted that “conventional surveillance techniques and tools” remained unregulated by the Constitution,¹⁷⁵ and differentiated collection of CSLI as a product of “seismic shifts in digital technology that made possible the tracking of not only Carpenter’s location but also everyone else’s, not for a short period but for years and years.”¹⁷⁶

In contrast to the majority’s description of property law as merely a factor in a constellation of considerations regarding constitutionally significant privacy interests, Justice Kennedy’s *Carpenter* dissent described property concepts as critical to the Court’s analysis under *Katz*.¹⁷⁷ Although Justice Kennedy acknowledged that *Katz* “sought to look beyond the ‘arcane distinctions developed in property and tort law,’” he insisted

169. *Id.* at 2213–14.

170. *Id.* at 2214 n.1 (quoting *id.* at 2227–28 (Kennedy, J., dissenting)) (internal quotation marks omitted).

171. *Id.* at 2219.

172. *Id.* at 2217.

173. *Id.* at 2220.

174. *Id.* at 2214 (quoting *Kyllo v. United States*, 533 U.S. 27, 35 (2001)) (internal quotation marks omitted).

175. *Id.* at 2220.

176. *Id.* at 2219.

177. *Id.* at 2227–28 (Kennedy, J., dissenting) (citing *Rakas v. Illinois*, 439 U.S. 128, 143 n.12 (1978)).

that “‘property concepts’ are, nonetheless, fundamental” to the Court’s assessment of legitimate privacy interests.¹⁷⁸ In fact, Justice Kennedy viewed the *Katz* majority opinion itself as reflecting that focus.¹⁷⁹ Drawing on the *Katz* Court’s analogy of the phone booth to “a friend’s apartment, a taxicab, and a hotel room,”¹⁸⁰ Justice Kennedy concluded that when Katz “‘shu[t] the door behind him’ and ‘pa[id] the toll,’ he had a temporary interest in the space and a legitimate expectation that others would not intrude, much like the interest a hotel guest has in a hotel room.”¹⁸¹ Ultimately, Justice Kennedy’s dissent depended on his conclusion that, under federal law, cell-site location information belongs to cellular carriers rather than customers.¹⁸² According to Justice Kennedy, because Carpenter had no property interest in the records, he could “not claim a reasonable expectation of privacy in them.”¹⁸³

Similarly, Justice Alito’s *Carpenter* dissent concluded that the Telecommunications Act’s confidentiality provisions could not be construed as creating a property right, given the Act’s “express exception for any disclosure of records that is ‘required by law.’”¹⁸⁴ For Justice Alito, Carpenter’s lack of a property right in the records was established by the facts that he lacked “the right to use the property to the exclusion of others” and

178. *Id.* at 2227 (quoting *Rakas*, 439 U.S. at 143, 144 n.12); see also Kerr, *supra* note 98, at 807.

179. *Carpenter*, 138 S. Ct. at 2227–28 (Kennedy, J., dissenting).

180. *Id.* at 2227 (citing *Katz v. United States*, 389 U.S. 347, 352, 359 (1967)).

181. *Id.* (alterations in original) (first quoting *Katz*, 389 U.S. at 352; and then citing *Stoner v. California*, 376 U.S. 483 (1964)).

182. *Id.* at 2229–30; see also Brief of Professor Orin S. Kerr as Amicus Curiae in Support of Respondent at 29–30, *Carpenter*, 138 S. Ct. 2206 (No. 16-402) [hereinafter Kerr *Carpenter* Brief] (“The cell-site records collected in this case were the ‘papers’ of the phone companies, not Carpenter. Cell-site records are information that a company creates, and a company then decides to store on its computers, about how the company’s network was used. . . . Carpenter’s argument to the contrary is based on 47 U.S.C. § 222, which imposes certain limitations on the disclosure of customer-related records. The problem is that rules regulating disclosure do not create a property right in the regulated facts that belong to the subject of the disclosure. Confidentiality is not property. The fact that information concerns someone does not make that information his stuff. If the law limits when Alice can tell the world about what she saw Bob do, Alice’s recollection does not become Bob’s ‘papers’ or ‘effects.’ Alice’s recollections belong to Alice, not Bob.”).

183. *Carpenter*, 138 S. Ct. at 2230 (Kennedy, J., dissenting).

184. *Id.* at 2258–59 (Alito, J., dissenting) (quoting 47 U.S.C. § 222(c)(1) (2018)).

that he could not “even exclude the party he would most like to keep out, namely, the Government.”¹⁸⁵

Even Justice Thomas, in his separate dissent in *Carpenter*, acknowledged the connection between property and privacy, though he advocated a return to a property rubric for deciding what government conduct qualifies as a search.¹⁸⁶ Justice Thomas began his critique of *Katz* by observing, “The most glaring problem with [the] test is that it has ‘no plausible foundation in the text’” or original understanding of the Fourth Amendment.¹⁸⁷ First, Justice Thomas noted that the *Katz* Court, in categorizing any government conduct that “violates someone’s ‘reasonable expectation of privacy’” as a search, defined the term in a manner inconsistent with ordinary understandings of the word, either in the late eighteenth century or today.¹⁸⁸ In fact, Justice Thomas asserted, the ordinary meaning of the word is the same today as it was then: “[t]o look over or through for the purpose of finding something; to explore; to examine by inspection; as, to *search* the house for a book; to *search* the wood for a thief.”¹⁸⁹ Only with the publication of Justice Harlan’s *Katz* concurrence in 1967 did the word transform into a term of art associated with “reasonable” expectations of privacy.¹⁹⁰ Moreover, Justice Thomas argued, *Katz*’s focus on “privacy,” a word that appears nowhere in the Constitution, let alone the Fourth Amendment, distorts the original meaning of the Amendment, the language of which reflects the Framers’ concern with property rights.¹⁹¹ On the other hand, privacy “was not part of the political vocabulary of the [founding]. Instead, liberty and privacy rights were understood largely in

185. *Id.* at 2259.

186. *Id.* at 2238–43, 2246 (Thomas, J., dissenting).

187. *Id.* at 2238 (quoting *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring)).

188. *Id.*

189. *Id.* (alteration in original) (quoting *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001) (quoting NOAH WEBSTER, AN AMERICAN DICTIONARY OF THE ENGLISH LANGUAGE 66 (reprt. 6th ed. 1989) (1828))).

190. *Id.*

191. *Id.* at 2239.

terms of property rights.”¹⁹² Ultimately, although Justice Thomas acknowledged that the Framers “understood that, by securing their property [rights], the Fourth Amendment would often protect their privacy as well,” he critiqued *Katz* for making privacy the dispositive test for determining Fourth Amendment interests.¹⁹³ As Justice Thomas observed, even the *Katz* majority accepted that the Fourth Amendment “cannot be translated into a general constitutional ‘right to privacy,’ as its protections ‘often have nothing to do with privacy at all.’”¹⁹⁴

Like Justice Kennedy, Justice Thomas would have disposed of the case based on Carpenter’s lack of any property interest in the cell-site records. Justice Thomas viewed the federal Telecommunications Act’s restrictions on disclosure of the information as insufficient to create a property right,¹⁹⁵ and he further noted that Carpenter had failed to “explain how he has a property right in the companies’ records under the law of any jurisdiction at any point in American history.”¹⁹⁶ In explaining why federal law was insufficient to aid Carpenter, Justice Thomas also rejected Carpenter’s argument that identification of any positive law that protects against public access to the relevant data without consent would be adequate to trigger Fourth Amendment protection.¹⁹⁷ Rather, Justice Thomas argued, “To come within the text of the Fourth Amendment, Carpenter must prove that the cell-site records are *his*; positive law is potentially relevant only insofar as it answers that question.”¹⁹⁸

It is noteworthy, then, that Justice Gorsuch mused that a potentially principled way to apply *Katz* would be to look to positive law to discern “existing societal norms.”¹⁹⁹ As I have discussed, Justice Gorsuch then suggested that such an approach would look much like the “traditional” model he ulti-

192. *Id.* (alteration in original) (quoting Morgan Cloud, *Property is Privacy: Locke and Brandeis in the Twenty-First Century*, 55 AM. CRIM. L. REV. 37, 42 (2018)) (internal quotation marks omitted).

193. *Id.* at 2240.

194. *Id.* (quoting *Katz v. United States*, 389 U.S. 347, 350 (1967)) (internal quotation marks omitted).

195. *Id.* at 2242–43.

196. *Id.* at 2242.

197. *Id.*

198. *Id.*

199. *Id.* at 2265 (Gorsuch, J., dissenting).

mately preferred.²⁰⁰ Yet, this would be true only if the relevant positive law under *Katz* were limited to property law or, on the other hand, if positive law under the “traditional approach” might actually include norms derived from sources other than property law in its strictest sense. In that regard, it is significant that Justice Gorsuch, in introducing his “traditional approach,” cited with approval Professors Baude and Stern’s article advocating for a positive law model for identifying Fourth Amendment searches.²⁰¹ That model would draw not only on property law, but also on a wide variety of other sources of law, including “privacy torts, consumer laws, eavesdropping and wiretapping legislation, anti-stalking statutes, and other provisions of law generally applicable to private actors.”²⁰²

Thus, the three dissenting opinions of Justices Kennedy, Thomas, and Gorsuch represent subtly varying visions of the relationship between property and privacy in identifying Fourth Amendment interests. Justice Kennedy would retain *Katz*’s privacy test, but he would apply it primarily with reference to property concepts. Furthermore, in at least some respects, he would apply those property concepts in a fairly rigid, literalistic manner, as reflected in his refusal to entertain the notion that Carpenter’s federal statutory rights against disclosure of his CSLI could create a sufficient interest in the data to make it his papers or effects for Fourth Amendment purposes.²⁰³ Justice Thomas proposed an abandonment of any explicit focus on privacy in favor of a rededication to the property-based origins of the Fourth Amendment. Additionally, like Justice Kennedy, he betrayed a relatively narrow perspective on the identification of constitutionally significant property rights in his conclusion that the Telecommunications Act could not make the CSLI Carpenter’s papers. Justice Gorsuch, like Justice Thomas, largely favored an abandonment of *Katz*’s privacy test in favor of a property model, but several aspects of his opinion, including his apparent willingness to consider CSLI as a customer’s papers or effects, reveal that his test might, at least in some re-

200. *Id.* at 2265–66.

201. *Id.* at 2268 (citing Baude & Stern, *supra* note 85, at 1852).

202. Baude & Stern, *supra* note 85, at 1823.

203. *Carpenter*, 138 S. Ct. at 2229–30 (Kennedy, J., dissenting).

spects, be looser and more open textured even than Justice Kennedy's approach to *Katz*.

In at least one respect, Justice Kennedy, like Justice Gorsuch, endorsed a more flexible approach to incorporation of property concepts into Fourth Amendment decisionmaking than that of the *Olmstead* regime's narrow focus on material things. Like Justice Gorsuch,²⁰⁴ Justice Kennedy was willing to entertain the notion that intangible property, like a person's emails held by an internet service provider, might constitute "the modern-day equivalents of an individual's own 'papers' or 'effects,' even when those papers or effects are held by a third party."²⁰⁵ Even Justice Thomas's opinion, which rejected Carpenter's assertion that the cell-site records were his "papers" based on his conclusion that Carpenter had no property interest in the data,²⁰⁶ suggested a potential openness to construing "papers" and "effects" as encompassing intangible property.²⁰⁷

In that regard, it is evident that Justice Gorsuch's citations to *Jones* and *Jardines* at the outset of his description of the "traditional approach" belie a more liberal property test than that reflected in those cases.²⁰⁸ Although *Jones* essentially resurrected *Olmstead*'s trespass test in concluding that a search occurs when the government physically intrudes into a constitutionally protected area to gather information,²⁰⁹ Justice Gorsuch's willingness to protect intangible property necessarily entails an implicit rejection of any requirement of physical intrusion to bring government conduct within the scope of the Fourth Amendment. Although Justice Gorsuch did not elaborate on the kinds of government conduct that might implicate a person's rights in

204. *Id.* at 2269 (Gorsuch, J., dissenting) ("Just because you entrust your data—in some cases, your modern-day papers and effects—to a third party may not mean you lose any Fourth Amendment interest in its contents. Whatever may be left of *Smith* and *Miller*, few doubt that e-mail should be treated much like the traditional mail it has largely supplanted—as a bailment in which the owner retains a vital and protected legal interest." (citing *id.* at 2230 (Kennedy, J., dissenting))).

205. *Id.* at 2229–30 (Kennedy, J., dissenting) (citing *United States v. Warshak*, 631 F.3d 266, 283–88 (6th Cir. 2010)).

206. *Id.* at 2242–43 (Thomas, J., dissenting).

207. *See id.* at 2241–42.

208. *See id.* at 2267–68 (Gorsuch, J., dissenting) (citing *Florida v. Jardines*, 569 U.S. 1, 11 (2013); *United States v. Jones*, 565 U.S. 400, 405 (2012)).

209. *Jones*, 565 U.S. at 406 n.3.

digital property, the thrust of his opinion is more consistent with Justice Thomas's commonsense conception of a Fourth Amendment search as congruent with colloquial usage, including "examin[ing] by inspection" or "look[ing] over or through for the purpose of finding something."²¹⁰ Thus, despite the lack of any trespass, one might conclude that government analysis of Carpenter's CSLI, an examination of his digital papers or effects, was a search. Likewise, one might conclude that government assessment of such data was a search because it was an attempt to locate a person, Carpenter himself, and one of his effects, his cell phone.²¹¹

III. POTENTIAL LESSONS FROM SCHOLARLY PROPOSALS FOR EXPANSIVE PROPERTY FRAMEWORKS

That a property framework might be far more flexible than that of the *Olmstead* regime has long been apparent. As Professor Morgan Cloud has observed, the Framers were familiar with a broad, Lockean conception of property that included not only material things, but also "a person's rights, ideas, beliefs, and the creative products of her labor."²¹² As Locke articulated the issue, people abandoned the state of nature to form societies and governments "for the mutual *preservation* of their lives, liberties and estates, which I call by the general name, *property*."²¹³ Professor Cloud has chronicled the consistency of James Madison's expansive theory of property with that of Locke.²¹⁴ For example, in an essay Madison published three months after the ratification of the Bill of Rights, he declared that "a man has a property in his opinions and the free communication of them";²¹⁵ that the "'safety and liberty of his person' is 'property

210. *Carpenter*, 138 S. Ct. at 2238 (Thomas, J., dissenting) (quoting *Kyllo v. United States*, 533 U.S. 27, 32 n.1 (2001)).

211. Brief of Scholars of the History and Original Meaning of the Fourth Amendment as *Amici Curiae* in Support of Petitioner at 12, *Carpenter*, 138 S. Ct. 2206 (No. 16-402) [hereinafter *Scholars Carpenter Brief*].

212. Cloud, *supra* note 192, at 37.

213. JOHN LOCKE, *SECOND TREATISE OF GOVERNMENT* 75 (Richard H. Cox ed., Harlan Davidson, Inc. 1982) (1690).

214. See Cloud, *supra* note 192, at 47–50.

215. *Id.* at 48 (quoting 6 JAMES MADISON, *Property*, in *THE WRITINGS OF JAMES MADISON* 101, 101 (Gaillard Hunt ed., 1906)) (internal quotation marks omitted).

very dear to him”;²¹⁶ and that just as “man is said to have a right to his property, he may be equally said to have a property in his rights.”²¹⁷ Furthermore, Locke’s theory of property rights arising by virtue of “productive labor” gave rise to “Whig theories of liberty” in the late eighteenth century that influenced the Framers and that emphasized that papers were a form of expressive property, including protection not merely of the physical papers themselves, but also of their contents.²¹⁸

In support of the notion that the Framers sought to protect a broad conception of property rights, Professor Cloud evaluates Lord Camden’s 1765 opinion in *Entick v. Carrington*,²¹⁹ which the United States Supreme Court has repeatedly described as a “‘monument of English freedom’ ‘undoubtedly familiar’ to ‘every American statesman’ at the time the Constitution was adopted, and considered to be ‘the true and ultimate expression of constitutional law’ with regard to search and seizure.”²²⁰ Professor Cloud observes that the *Entick* court, in holding that the British secretary of state lacked authority to order the search of a dwelling house for the publishers of a dissident publication and their papers, emphasized that reading the papers was a greater offense than the necessarily antecedent physical trespass.²²¹ As the *Entick* court put it:

Papers are the owner’s goods and chattels: they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed and carried away, the secret nature of those goods will be an aggravation of the trespass, and demand more considerable damages in that respect. Where is the written law that gives any magistrate such a power? I can safely answer, there is none; and therefore it is too much for us without such authority to pronounce a prac-

216. *Id.*

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

218. *Id.* at 47.

219. (1765) 19 How. St. Tr. 1029; (1765) 95 Eng. Rep. 807; 2 Wils. K.B. 275.

220. *United States v. Jones*, 565 U.S. 400, 405 (2012) (quoting *Brower v. County of Inyo*, 489 U.S. 593, 596 (1989) (quoting *Boyd v. United States*, 116 U.S. 616, 626 (1886))).

221. Cloud, *supra* note 192, at 54–55.

tice legal, which would be subversive of all the comforts of society.²²²

For Professor Cloud, the preceding passage demonstrates that the essence of the court's concern was the invasion of the writer's mind. As Professor Cloud argues, "Value attached not to the physical paper but to the intangible thoughts expressed in written language."²²³ Although this analysis aptly recognizes that the reasons the Framers cared about physical intrusions included the protection of more ethereal forms of property, it neglects the passage's concomitant revelation that tangible intrusion remained a *sine qua non* for a successful action; the eye cannot be guilty of a trespass, but if one *does* carry away another's papers, the private nature of the contents enhances the injury. And, as Justice Scalia noted for the *Jones* majority, Lord Camden's opinion in the case emphasized the significance of unauthorized physical intrusions, asserting that property rights were "so sacred, that no man can set his foot upon his neighbour's close without his leave; if he does he is a trespasser, though he does no damage at all; if he will tread upon his neighbour's ground, he must justify it by law."²²⁴ Analogously, Justice Thomas accepted in his *Carpenter* dissent that "the founding generation understood that, by securing their property, the Fourth Amendment would often protect their privacy as well," but that did not justify the "elevation of privacy as the *sine qua non* of the Amendment."²²⁵

Ultimately, however, Professor Cloud does not quite assert that the Framers actually contemplated that the Fourth Amendment would apply to nontrespassory activity. Rather, he argues that the Amendment "embodied . . . an attempt to protect property in both its narrow and broad meanings"²²⁶ and that the Court has, at times, espoused an expansive property rubric to instantiate the Framers' core values.²²⁷ Finally, Professor Cloud views Justice Harlan's *Katz* test as a misstep and con-

222. *Entick*, 19 How. St. Tr. at 1066.

223. Cloud, *supra* note 192, at 55.

224. *See Jones*, 565 U.S. at 405 (quoting *Entick*, 95 Eng. Rep. at 817; 2 Wils. K.B. at 291).

225. *Carpenter v. United States*, 138 S. Ct. 2206, 2240 (2018) (Thomas, J., dissenting) (citations omitted).

226. Cloud, *supra* note 192, at 50.

227. *See id.* at 50–52.

tends that “the Court could have avoided this error by reclaiming prominent seventeenth, eighteenth, and nineteenth century theories” consistent with those values.²²⁸

For Professor Cloud, the Court’s seminal treatment of Fourth Amendment theory in *Boyd v. United States*²²⁹ embodies this values-based property framework.²³⁰ In *Boyd*, as Professor Cloud notes, the Court established the close connection between property interests and Fourth Amendment rights.²³¹ Yet, drawing on *Entick*, the Court also clarified that the crucial principle to be vindicated involved the protection of the contents of private papers,²³² as opposed to the *Olmstead* regime’s elevation of a form of “constricted materialism” almost forty years later,²³³ with its focus on tangible things and physical intrusions. In holding that the use of a subpoena to obtain Boyd’s papers violated the Fourth Amendment, the Court “acknowledged that ‘certain aggravating incidents of actual search and seizure, such as forcible entry into a man’s house and searching amongst his papers, are wanting’ when the Government relies on compulsory process.”²³⁴ Nonetheless, the Court insisted that “the Fourth Amendment ought to be ‘liberally construed,’ and further reasoned that compulsory process ‘effects the sole object and purpose of search and seizure’ by ‘forcing from a party evidence against himself.’”²³⁵ Perhaps even more revealingly, the *Boyd* Court declared that the Fourth Amendment applies:

to all invasions on the part of the government and its employes of the sanctity of a man’s home and the privacies of life. It is not the breaking of his doors, and the rummaging of his drawers, that constitutes the essence of the offense; but it is the invasion of his indefeasible right of personal security, personal liberty and private property²³⁶

228. *See id.* at 42.

229. 116 U.S. 616 (1886).

230. Cloud, *supra* note 192, at 52.

231. *Id.* at 51 (citing *Boyd*, 116 U.S. at 630).

232. *Boyd*, 116 U.S. at 630.

233. Cloud, *supra* note 192, at 71.

234. *Carpenter v. United States*, 138 S. Ct. 2206, 2253 (2018) (Alito, J., dissenting) (quoting *Boyd*, 116 U.S. at 622).

235. *Id.* (first quoting *Boyd*, 116 U.S. at 635; and then quoting *id.* at 622).

236. *Boyd*, 116 U.S. at 630.

Likewise, in the years leading up to *Katz*, the Court, while retaining a focus on property, began to retreat from *Olmstead*'s rigid approach.²³⁷ Thus, in *Silverman v. United States*, the Court held that the government's use of a "spike mike" to eavesdrop on conversations inside a home implicated the Fourth Amendment.²³⁸ Although the Court predicated its decision on the physical intrusion of the microphone into a constitutionally protected area, it glossed over the *Olmstead* Court's conclusion that "intangible conversations are not 'persons, houses, papers, [or] effects.'"²³⁹ Two years later, in *Wong Sun v. United States*,²⁴⁰ the Court confirmed what was implicit in *Silverman*, that "the Fourth Amendment may protect against the overhearing of verbal statements as well as against the more traditional seizure of 'papers and effects.'"²⁴¹ In the term before *Katz*, in *Berger v. New York*,²⁴² the Court even more clearly explained its reconciliation of a broad, values-based property framework with the Amendment's text in declaring that *Olmstead*'s holding that "a conversation passing over a telephone wire cannot be said to come within the Fourth Amendment's enumeration of 'persons, houses, papers, and effects' ha[s] been negated by our subsequent cases."²⁴³ Finally, of course, in *Katz*, the Court, in shifting toward a privacy regime, eliminated the requirement of any physical intrusion to activate the Fourth Amendment's protection.²⁴⁴

Like several other authors who have searched for solutions to the widespread perception that Justice Harlan's *Katz* test was flawed from the outset, Professor Cloud proposes rededication to a framework based on expansive property concepts for assessing the applicability of the Fourth Amendment. For Professor Cloud, such an approach would entail recognition that "a person's ideas are protected against uninvited intrusions" and that

237. See *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting).

238. 365 U.S. 505, 512 (1961).

239. *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting).

240. 371 U.S. 471 (1963).

241. *Carpenter*, 138 S. Ct. at 2236 (Thomas, J., dissenting) (quoting *Wong Sun*, 371 U.S. at 485) (internal quotation marks omitted).

242. 388 U.S. 41 (1967).

243. *Id.* at 51.

244. *Carpenter*, 138 S. Ct. at 2237 (Thomas, J., dissenting) (citing *Katz v. United States*, 389 U.S. 347, 353 (1967)).

such “protections are strongest when private ideas are memorialized in an expressive form, whether written on paper or recorded on a digital device.”²⁴⁵ Likewise, it might draw on Justice Scalia’s majority opinion in *Kyllo*, which “melded property theory and nontrespassory technological surveillance” by using “physical trespass as an objective measure of an intrusion triggering constitutional scrutiny, while extending this protection to analogous nontrespassory technological intrusions.”²⁴⁶

Similarly, Professor Ricardo Bascuas has proposed a rejuvenated focus on property concepts to evaluate the Fourth Amendment’s scope.²⁴⁷ Professor Bascuas laments *Katz*’s abandonment of property for the amorphous “expectations of privacy” test as enabling the Court to erode dramatically the Fourth Amendment’s safeguards.²⁴⁸ Specifically, Professor Bascuas argues that *Katz* set the stage for the withdrawal of Fourth Amendment protection “from virtually all modern records and communications and from contraband—two types of property that the Fourth Amendment was most certainly meant to protect.”²⁴⁹ Yet, Professor Bascuas sees promise not in the *Jones* and *Jardines* Courts’ rehabilitation of *Olmstead*’s narrow materialist perspective, but rather in a return to what he views as the “pragmatic, flexible understanding of ‘papers’ and ‘effects’” evident in cases like *Silverman*, *Wong Sun*, and *Berger*, which accepted that “technological innovation yields new forms of property entitled to full Fourth Amendment protection.”²⁵⁰ Professor Bascuas recommends that the Court delineate constitutionally relevant property rights by drawing on the Court’s flexible approach to interpretation of federal fraud statutes, including recognition of rights in intangible property and acceptance of the significance of any deprivation of the right holder’s exclusive use of the property,²⁵¹ as compared with the Court’s current, parsimonious definition of a Fourth

245. See Cloud, *supra* note 192, at 73.

246. *Id.* at 69–70.

247. See Bascuas, *supra* note 46.

248. See *id.* at 490.

249. *Id.*

250. *Id.*

251. *Id.* at 529–30.

Amendment seizure as requiring “meaningful interference” with one’s possessory interest in property.²⁵²

Thus, Professor Bascuas notes, in an insider trading case in which a *Wall Street Journal* reporter traded on information published in his “Heard on the Street” column, the Court recognized the newspaper’s property rights in the intangible information the journalist had expropriated, and it accepted that there had been fraud despite the newspaper having been able “to use the information exactly as it would have in the absence of any scheme.”²⁵³ What mattered was that the *Journal* had “been deprived of its right to exclusive use of the information, for exclusivity is an important aspect of confidential business information and most private property for that matter.”²⁵⁴

Among other benefits, Professor Bascuas views adoption of this sort of broad, flexible, property-based approach as having the potential to reverse the harms to individual liberty wrought by the development of the third-party doctrine under *Katz*.²⁵⁵ As Professor Bascuas observes, the Court’s fraud analysis imposed no penalty on the *Journal* for sharing its informational property with another and did not suggest that the newspaper had “assumed the risk” that its employee would use the information for his own purposes.²⁵⁶ Instead, the Court focused on the employee’s breach of his “fiduciary obligation to protect confidential information obtained during the course of his employment.”²⁵⁷ Using this mode of analysis, Professor Bascuas suggests, would have avoided, for example, the holding in *United States v. Miller* that a bank customer has no reasonable expectation of privacy against government acquisition of records of his transactions from the bank.²⁵⁸ Ultimately, for Professor Bascuas, determination of relevant property rights would depend not on any sterile reference to state or federal positive law, for just as “whether an interest constitutes property in a federal fraud case is a matter of federal common law, whether

252. *Id.* at 520–21.

253. *Id.* at 530–31.

254. *Carpenter v. United States*, 484 U.S. 19, 26–27 (1987).

255. Bascuas, *supra* note 46, at 531.

256. *Id.*

257. *Id.* (quoting *Carpenter*, 484 U.S. at 27) (internal quotation marks omitted).

258. *Id.* (discussing *United States v. Miller*, 425 U.S. 435 (1976)).

a tangible or intangible thing constitutes a ‘paper’ or an ‘effect’ has been, since at least the time of *Olmstead*, a matter of federal constitutional law.”²⁵⁹

Professor Christian Halliburton has also proposed an expansive property rubric, which would allow for Fourth Amendment protection of intangible property and that would “differentiate informational interests based on the extent to which the information is ‘closely bound up with personhood’ or otherwise forms ‘part of the way we constitute ourselves as continuing entities in the world.’”²⁶⁰ Recognizing that “the right to convey or withhold information is . . . a matter affecting the development of a full person,” Professor Halliburton would provide the greatest protection to categories of information “closely bound up with identity, or necessary to the development of the fully realized person.”²⁶¹ On the other hand, property not closely bound up with identity, which would be dubbed “fungible . . . property,” would merit lesser protection or, in some cases, no protection at all.²⁶²

Within the category of tangible and informational property that would qualify as “personal,” Professor Halliburton would make further distinctions. Thus, personal property would receive absolute protection “when the individual cannot tolerate any interference with such property without experiencing severe harm or loss of aspects of her personhood, or disruption of her development as a full person.”²⁶³ On the other hand, the Fourth Amendment would protect, but not absolutely, personal property “with which the government might interfere without causing severe hardship to or loss of aspects of the individual’s personhood, or where the risk of harm or loss is substantially outweighed by overriding law enforcement obligations to engage in the challenged behavior.”²⁶⁴ Likewise, on the other end of the spectrum, some information would be so disconnected

259. *Id.* at 534.

260. Christian M. Halliburton, *How Privacy Killed Katz: A Tale of Cognitive Freedom and the Property of Personhood as Fourth Amendment Norm*, 42 AKRON L. REV. 803, 863 (2009) (footnotes omitted).

261. *Id.* at 864.

262. *Id.*

263. *Id.* at 865.

264. *Id.*

from personal identity that it would give rise to no property interest whatsoever, and some would qualify as fungible property, which might merit weak protection.²⁶⁵

For Professors Bascuas and Halliburton, it is evident that a person's conversations could qualify as a form of property and that government eavesdropping, as occurred in *Katz* itself, could implicate the Fourth Amendment. As noted, Professor Bascuas views cases like *Silverman*, *Wong Sun*, and *Berger*, which recognized that conversations were a form of property capable of being "seized," as a reflection of the Court's conversion of its older trespass test "into a highly flexible but principled tool for applying the Fourth Amendment to new forms of property without risking diminution of its traditional protection."²⁶⁶ Professor Halliburton also asserts that, under his framework, conversations could constitute a kind of "intangible property of personhood."²⁶⁷ For Professor Halliburton, *Katz*'s conversations merited Fourth Amendment protection because they "contained sensitive information."²⁶⁸

It is somewhat less clear under what circumstances Professor Cloud's property model might protect conversations. Although Professor Cloud emphasizes the importance of protecting the expression of ideas, and although he references *Kyllo*'s functional-equivalent-of-trespass test as emblematic of recent decisions that an expansive property framework might explain better than a privacy rubric, he also avers that "protections are strongest when private ideas are memorialized in an expressive form, whether written on paper or recorded on a digital device."²⁶⁹ Ultimately, somewhat mysteriously, Professor Cloud also suggests that use of privacy principles, rather than property concepts, might still be appropriate in cases "like *Katz* itself, where government agents did not trespass upon property to install and use an electronic eavesdropping device."²⁷⁰

Although he had no occasion to address the issue in *Carpenter*, it seems plausible that Justice Gorsuch himself would be will-

265. *Id.* at 866.

266. Bascuas, *supra* note 46, at 516–17.

267. Halliburton, *supra* note 260, at 861.

268. *Id.* at 862 (emphasis omitted).

269. Cloud, *supra* note 192, at 73.

270. *Id.* at 38–39.

ing to classify conversations as a kind of expressive property capable of being searched or seized for Fourth Amendment purposes. Justice Gorsuch's unequivocal amenability to safeguarding intangible property, his openness to the use of analogy rather than actual positive law to determine both the existence of a property right and whether the property in question qualifies as a paper or an effect, and his invocation of *Kyllo's* imperative to maintain the balance of power between government and citizen that existed at the time of the framing all suggest this possibility. With regard to the latter point, one might note that contemporary technology makes it feasible to listen in on conversations using nontrespassory intrusions in circumstances in which eighteenth-century interlocutors would have been free from prying ears. Thus, maintaining the level of security Framing-era citizens had against government eavesdropping would necessitate constitutional regulation of electronic surveillance.

Ultimately, examination of the broad property models proffered by Professors Cloud, Bascuas, and Halliburton reveals the potential to reproduce some of the same critical flaws widely attributed to *Katz*, including its indeterminacy and lack of democratic legitimacy. The very flexibility that Professor Bascuas lauds in the Court's approach to interpreting federal fraud statutes creates the possibility that the Court, using his recommended framework, might arrive at results antithetical to Professor Bascuas's commitments. It is unclear, for example, that the Court would view information shared by customers with banks or telephone companies as giving rise to the same sorts of informational property rights as the "[c]onfidential information acquired or compiled by a corporation in the course and conduct of its business" that the Court found to be a "species of property" in the insider trading case.²⁷¹ For one thing, the Court might not consider data such as CSLI to be "information acquired or compiled" by cellular customers. Moreover, if the inquiry were to hinge on the characterization of information as confidential or nonconfidential, this could generate the same potential for manipulation and imposition of the subjective preferences of individual Justices that has been possible

271. *Carpenter v. United States*, 484 U.S. 19, 26 (1987) (citation omitted) (internal quotation marks omitted).

with the ostensible assessment of “society’s” expectations of privacy under *Katz*. There would also be no ready-made criterion to which the Court could look in every case under Professor Bascuas’s proposal. The focus on confidentiality in the insider trading case was intertwined with the Court’s conclusion that the *Wall Street Journal* employee owed fiduciary duties to his employer.²⁷² Yet, despite Professor Bascuas’s assertion that these principles apply equally to telephone companies and banks,²⁷³ these are not the kinds of contractual relationships that have been traditionally characterized as fiduciary.²⁷⁴ Additionally, recognition of the possibility of intangible “papers” and “effects” would not, in and of itself, lead inexorably to the conclusion that customer information held by banks and telephone companies is customer property, as evidenced by the apparent openness of Justices Kennedy and Thomas to recognizing Fourth Amendment protection of intangible property and simultaneous rejection of the idea that Timothy Carpenter had any property interest in his cell-site data.

Similarly, Professor Halliburton’s taxonomy for characterizing property interests is susceptible to the same sort of manipulation attributed to the *Katz* framework. Just as it is possible for judges to “confuse their own expectations of privacy with those of the hypothetical reasonable person to which the *Katz* test looks,”²⁷⁵ it is also highly likely that inquiries about the extent to which tangible and informational property are “closely bound up with identity, or necessary to the development of the fully realized person”²⁷⁶ would be inflected with the Justices’ subjective value judgments. As an illustration of how his property-based approach would produce superior results to

272. *Id.* at 27.

273. Bascuas, *supra* note 46, at 531.

274. See, e.g., *Existence of fiduciary relationship between bank and depositor or customer so as to impose special duty of disclosure upon bank*, 70 A.L.R. 3d 1344, *2[a] (2020) (“The courts have traditionally viewed the relationship between a bank and a depositor to be one of debtor-creditor, the bank’s obligation being merely to return the sum deposited, upon demand properly made by the depositor. And this relationship, it has been further recognized, does not ordinarily impose a fiduciary duty of disclosure upon the bank.” (footnote omitted)).

275. *United States v. Jones*, 565 U.S. 400, 427 (2012) (Alito, J., concurring in the judgment) (citing *Minnesota v. Carter*, 525 U.S. 83, 97 (1998) (Scalia, J., concurring)).

276. Halliburton, *supra* note 260, at 864.

Katz, Professor Halliburton discusses the Court's holding in *Oliver* that open fields merit no Fourth Amendment protection.²⁷⁷ First, Professor Halliburton asserts that the Court's strict textualist analysis, which was "irreconcilable with *Katz* and all *Katz*-based precedent," demonstrated "the weakness of the privacy rationale by its inability to overcome or displace a form of textualism antithetical to privacy norms."²⁷⁸ Yet, Professor Halliburton's contention here refutes itself. If the Court's mode of analysis in *Oliver* was antithetical to privacy norms and inconsistent with *Katz*, then the Court's assessment evinces its infidelity to *Katz*'s privacy test rather than problems inherent to *Katz*. Likewise, the Court could apply Professor Halliburton's property test unfaithfully and arrive at results inconsistent with Professor Halliburton's commitments.

Professor Halliburton also attributes the Court's "arbitrary and unsupported conclusion" that open fields are not often settings of the kinds of intimate activity worthy of Fourth Amendment protection to flaws intrinsic to *Katz*'s privacy framework, which "allow[s] the Court to define societal norms and values without any reference to established objective standards or actual public opinion."²⁷⁹ Yet, many authors, myself included, have proposed mechanisms for disciplining the *Katz* analysis by requiring reference to objective societal norms.²⁸⁰ Furthermore, Professor Halliburton himself would recognize forms of property not reflected in positive law, including a person's conversations.²⁸¹ In delineating property interests under such a rubric, the Court might well be tempted to stray from the use of objective guideposts, and, even if it did not, it would be free to choose among often competing norms,

277. *Id.* at 870–76.

278. *Id.* at 872.

279. *Id.*

280. See, e.g., CHRISTOPHER SLOBOGIN, *PRIVACY AT RISK: THE NEW GOVERNMENT SURVEILLANCE AND THE FOURTH AMENDMENT* 33 (2007); Kahn-Fogel, *supra* note 22; Matthew B. Kugler & Lior Jacob Strahilevitz, *Actual Expectations of Privacy, Fourth Amendment Doctrine, and the Mosaic Theory*, 2015 SUP. CT. REV. 205, 212; Christine S. Scott-Hayward, Henry F. Fradella & Ryan G. Fischer, *Does Privacy Require Secrecy? Societal Expectations of Privacy in the Digital Age*, 43 AM. J. CRIM. L. 19, 58 (2015); Jonathan Simon, *Katz at Forty: A Sociological Jurisprudence Whose Time Has Come*, 41 U.C. DAVIS L. REV. 935 (2008).

281. See Halliburton, *supra* note 260, at 861.

thus enabling the Justices to impose their own values on the analysis. This would be all the more the case when, under Professor Halliburton's model, the Court undertook to determine not the existence of the property interest, but its character as either fungible or, on the other hand, sufficiently bound up with personhood to merit strong Fourth Amendment protection.

Professor Halliburton additionally critiques the *Oliver* Court for its rejection of the significance of fences and "no trespassing" signs around open fields based on the majority's conclusion that such measures are often ineffective at deterring trespassers.²⁸² As Professor Halliburton puts it, "by premising the propriety of law enforcement conduct upon the possibility of anti-social and unlawful private behavior, the Court uses privacy to facilitate complete disregard for well established social moral beliefs even when they are clearly expressed in the positive law."²⁸³ This critique is reminiscent of Justice Gorsuch's observation in *Carpenter* that the Court disregarded well-established social norms in cases like *Riley* and *Greenwood* in finding that helicopter surveillance of the curtilage from 400 feet and collection and examination of a person's sealed garbage bags, respectively, were not Fourth Amendment searches.²⁸⁴ In each of those cases, however, the existence of clear norms suggests the Court applied *Katz* poorly, not that *Katz* is impervious to principled application.

Professor Halliburton also faults the *Oliver* Court for categorically excluding open fields from constitutional regulation instead of examining the issue on a case-by-case basis.²⁸⁵ For Professor Halliburton, some open fields would qualify only as fungible property, including, like the open fields in the consolidated cases in *Oliver* itself, land being used to grow commercial crops.²⁸⁶ On the other hand, land used to meet lovers would deserve greater protection, based on its status as more

282. *Id.* at 873.

283. *Id.*

284. *Carpenter v. United States*, 138 S. Ct. 2206, 2266 (2018) (Gorsuch, J., dissenting) (discussing *Florida v. Riley*, 488 U.S. 445 (1989), and *California v. Greenwood*, 486 U.S. 35 (1988)).

285. Halliburton, *supra* note 260, at 875.

286. *See id.*

“proximate to personhood.”²⁸⁷ Once again, however, categorical exclusion of open fields from Fourth Amendment regulation was not an inevitable result of the *Katz* framework. Indeed, Justice Marshall, in dissent in *Oliver*, scolded the majority for eschewing a case-by-case approach.²⁸⁸ Likewise, however, the level of generality at which the Court might examine difficult issues under a property framework such as the one Professor Halliburton proposes would be susceptible to manipulation.

Professor Cloud’s explanation that an essential function of a privacy or property theory of Fourth Amendment interpretation is the protection of ideas against uninvited intrusions leaves numerous details to later development.²⁸⁹ His assertion that such protection is “strongest when private ideas are memorialized in an expressive form, whether written on paper or recorded on a digital device,”²⁹⁰ also raises as many questions as it answers. What sorts of factors would guide judicial determination of whether an idea should be classified as private? For example, would a person’s bank records, which are also the business records of the bank, be considered private? Would such records qualify as the expression of an idea at all? If memorializing an idea in an expressive form merits greater protection, how much weight should be assigned to that factor? Should it matter whether the individual whose ideas the government hopes to gather as evidence chose to memorialize the ideas herself, as opposed to the government or some third party recording them? Whatever the answers to these questions, it is likely that judges would be invested with significant discretion in addressing them; the crux of Professor Cloud’s thesis is that a broad, flexible property framework could be reconciled with privacy theories and that such a property model might better explain the Court’s recent decisions.²⁹¹ Additionally, as noted, Professor Cloud would retain a privacy rubric for situations

287. *Id.*

288. *Oliver v. United States*, 466 U.S. 170, 193–95 (1984) (Marshall, J., dissenting).

289. See Cloud, *supra* note 192, at 73.

290. *Id.*

291. *Id.* at 38.

like *Katz* itself,²⁹² although he rejects Justice Harlan's *Katz* test as flawed.²⁹³

None of this is to suggest that it would be impossible to formulate predictable rules to protect intangible property under the Fourth Amendment. Professor Laura Donohue, for example, has offered a property-based theory of Fourth Amendment interpretation drawing in part on insights from Justice Gorsuch's opinion in *Carpenter*.²⁹⁴ Like Justice Gorsuch, Professor Donohue would rely on positive law to help determine constitutionally relevant property rights.²⁹⁵ Additionally, like Justice Gorsuch, she refers to the law of bailment to suggest that, even if a person has entrusted property, including informational property, to a third-party bailee, the property remains the bailor's papers or effects.²⁹⁶ But, even in the absence of state or federal law explicitly conferring a property interest, Professor Donohue would find customer information to be the customer's property based on a straightforward but-for causation test: "where the underlying data arise from the actions of an individual, and that person has the original legal right to determine whether and with whom it is shared, they hold an ownership interest in it."²⁹⁷

In the context of CSLI, Professor Donohue observes that cellular customers generate location data by exercising their freedom of movement, and the data "would not exist *but for* the individual's actions: purchasing a mobile device, charging it, turning it on, carrying it, and going to particular places at particular times."²⁹⁸ Professor Donohue then states, "If the individual did not have an original right to the information, he or she could not contract to share it However, it clearly *is* hers to provide."²⁹⁹ Likewise, Professor Donohue would apparently

292. *Id.* at 38–39.

293. *Id.* at 42.

294. Laura K. Donohue, *Functional Equivalence and Residual Rights Post-Carpenter: Framing a Test Consistent with Precedent and Original Meaning*, 2018 SUP. CT. REV. 347.

295. *Id.* at 410.

296. *Id.* at 353–54, 392–400 (discussing *Carpenter v. United States*, 138 S. Ct. 2206, 2268–69 (2018) (Gorsuch, J., dissenting)).

297. *Id.* at 409.

298. *Id.* at 392.

299. *Id.*

conclude that bank records like those at issue in *Miller* were customer property because, unlike “confiding illegal behavior in (supposed) coconspirators,” the records resulted from the customer’s exercise of a right to share information in the context of an “entirely legal, contractual relationship to conduct business.”³⁰⁰

Like pre-*Carpenter* third-party doctrine, Professor Donohue’s rule has the benefit of clarity.³⁰¹ Equally, however, clarity alone cannot justify the rule.³⁰² Crucially, Professor Donohue’s proposed rule is inconsistent with mainstream conceptions of how property rights are created,³⁰³ and consistent application of the rule as articulated would lead to results that most people would likely consider odd. Imagine, for example, that I hire a plumber to fix a broken toilet in my home. The plumber arrives and fixes the toilet. A security camera at my home records the plumber’s image. I pay him, and he leaves. Eventually, the plumber becomes a suspect in a murder committed on the same evening that he was at my home. His alibi is that he was in another state on the day in question. The plumber had the right to choose with whom to share his location, and I learned of his location only in the course of a legitimate contractual relationship. Alternatively, imagine that the plumber used an unusual and distinctive tool to fix my toilet. After the plumber leaves, I draw a sketch of the tool. That tool becomes the suspected murder weapon. That I have this information arose from the plumber’s actions. He had the right to choose whether to share with me that he possessed such a tool, and my knowledge of his possession arose in the course of a legitimate contractual relationship. Under Professor Donohue’s test, it would seemingly be a search implicating the plumber’s rights if the government took steps to obtain my security footage, the sketch I drew, or perhaps even my testimony.

300. See *id.* at 362.

301. See *Carpenter*, 138 S. Ct. at 2263–64 (Gorsuch, J., dissenting) (“Another justification sometimes offered for third party doctrine is clarity. You (and the police) know exactly how much protection you have in information confided to others: none. As rules go, ‘the king always wins’ is admirably clear. But the opposite rule would be clear too So clarity alone cannot justify the third party doctrine.”).

302. See *id.* at 2264.

303. See, e.g., *id.* at 2230 (Kennedy, J., dissenting); *id.* at 2242–43 (Thomas, J., dissenting); *id.* at 2258–59 (Alito, J., dissenting); Kerr *Carpenter* Brief, *supra* note 182.

To be sure, there are other circumstances in which property-based theories that focus on the plain meaning of the Fourth Amendment's text could provide greater clarity and predictability with regard to the threshold question of what sorts of conduct constitute searches than is possible under *Katz*. Such theories would often lead courts to characterize conduct as a search despite the conclusion under either *Katz* or *Olmstead* that it would be a non-search. For example, in an amicus brief in *Carpenter* coauthored by Professor Cloud, a group of scholars cited with approval the idea that even visual observation of the exterior of a home should be considered a search.³⁰⁴ The most obvious justification for allowing such surveillance without a warrant, these scholars suggested, is not that it does not constitute a search, but, rather, that this kind of visual observation is not an "'unreasonable' one."³⁰⁵ Using this sort of plain meaning approach, these scholars contended, would free the Court from the "fruitless quest" of identifying societal norms and would allow the Court instead to focus on the more "straightforward question" of whether giving law enforcement "unfettered discretion" to engage in the relevant conduct constitutes an "unreasonable" search.³⁰⁶ Although this sort of argument has some appeal, it ignores that *Katz* asks essentially the same question: should the government be permitted to engage in the conduct at issue without constraint?³⁰⁷ Shifting the focus of the inquiry to the reasonableness of a search rather than to whether a search has occurred at all may be more conceptually elegant, but it does not relieve the Court of its obligation to examine societal norms to determine the limits of government power.

304. Scholars *Carpenter* Brief, *supra* note 211, at 13 (citing *Kyllo v. United States*, 533 U.S. 27, 32 (2001)).

305. *Id.*

306. *See id.* at 13–14.

307. Professor Anthony Amsterdam famously summarized the essential question underlying the *Katz* test as "whether, if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society." Anthony G. Amsterdam, *Perspectives on the Fourth Amendment*, 58 MINN. L. REV. 349, 403 (1974).

CONCLUSION

This brings us back to Justice Gorsuch's "traditional approach." Justice Gorsuch favored his approach because, unlike *Katz*, the traditional approach "was tied to the law."³⁰⁸ Yet, a principled application of *Katz* would require examination of law broadly construed: either positive law reflecting longstanding national tradition or traditional norms that regulate intrusions on people's security in their persons, houses, papers, and effects, but not formally enshrined in positive law.³⁰⁹ Justice Gorsuch himself acknowledged that using law as a guide to implementation of the *Katz* standard would approximate his "traditional" model.³¹⁰ Ultimately, moreover, Justice Gorsuch's willingness to use analogy rather than positive law to determine the limits of what might qualify as "papers" or "effects" and to establish the existence of a property right sufficient to legitimate a Fourth Amendment claim demonstrates the expansive scope of the "law" that would undergird his preferred model.

That expansive property concepts might lead to similar outcomes to those one would expect under a privacy regime has been evident since future-Justice Louis Brandeis and his law partner, Samuel Warren, introduced the legal concept of privacy in their seminal article on the topic in 1890.³¹¹ Warren and Brandeis developed their broad "right to be let alone" from common law decisions that had used the terminology of property rights, and they acknowledged that their new theory, based on a reformulation of these decisions as instantiating a right to privacy, could produce the same results.³¹² This result

308. *Carpenter v. United States*, 138 S. Ct. 2206, 2267–68 (2018) (Gorsuch, J., dissenting).

309. See Kahn-Fogel, *supra* note 22; see also Michael J. Zydney Mannheimer, *Decentralizing Fourth Amendment Search Doctrine*, 107 KY. L.J. 169, 170 (2018) (arguing that under either a trespass test or *Katz*, a search occurs when, "for the purpose of gathering information, government agents act contrary to law, broadly conceived").

310. *Carpenter*, 138 S. Ct. at 2265–66 (Gorsuch, J., dissenting).

311. Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

312. *Id.* at 193, 213; see also Cloud, *supra* note 192, at 60 (describing the Warren and Brandeis article as espousing values "redolent of Madison's essay, published ninety-eight years earlier, expounding a very Lockean theory of broad property rights that encompassed tangible property and the expressions of a person's ideas").

might be even more likely under Justice Gorsuch's proposed regime, given his contemplation that "*Katz* may still supply one way to prove a Fourth Amendment interest."³¹³ Perhaps that would be the case when the property rules Justice Gorsuch envisioned would seem to allow the sorts of government surveillance that he believes merit some measure of constitutional regulation in a free and open society.

Overall, however, because a relatively constrained privacy model and a broad property approach would give judges similar levels of flexibility and discretion, each would implicate the same concerns about democratic legitimacy Justice Gorsuch expressed in his dissent.³¹⁴ Under neither framework would judges be mere umpires, mechanically deciding cases by calling balls and strikes using rules developed by the Framers or by legislative bodies.

Perhaps, then, the primary appeal of a property model of Fourth Amendment interpretation for Justice Gorsuch is aesthetic. Because privacy was not part of the political vocabulary of the Framers, reverting to the language of property with which they were familiar appears, at least superficially, more consistent with the originalist imperative of "enforcing the will of the enduring and fundamental democratic majority that ratified" the Fourth Amendment.³¹⁵ In any case, Justice Gorsuch's model, if adopted, would likely provide the flexibility to protect the people against emerging threats to their right to be secure in their persons, houses, papers, and effects. Necessarily, however, that flexibility would perpetuate the indeterminacy Justice Gorsuch and others have equated with the *Katz* regime. In the final analysis, if "indeterminacy is both the strength and weakness of the *Katz* test,"³¹⁶ the same can be said of the model Justice Gorsuch has promoted to supplement or replace it.

313. *Carpenter*, 138 S. Ct. at 2272 (Gorsuch, J., dissenting).

314. *Id.* at 2268.

315. Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5, 10 (1988).

316. Dripps, *supra* note 138, at 1908 (citing Amsterdam, *supra* note 307, at 385).

DO PLATFORMS KILL?

MICHAL LAVI*

*“So we connect more people[.] That can be bad if they make it negative. Maybe it costs a life by exposing someone to bullies. Maybe somebody dies in a terrorist attack coordinated on our tools. And still we connect people. The ugly truth is that we believe in connecting people so deeply that anything that allows us to connect more people more often is *de facto* good. It is perhaps the only area where the metrics do tell the true story as far as we are concerned.”¹*

Terror kills, inciting words can kill, but what about online platforms? In recent years, social networks have turned into a new arena for incitement. Terror organizations operate active accounts on social networks. They incite, recruit, and plan terror attacks by using online platforms. These activities pose a serious threat to public safety and security.

Online intermediaries, such as Facebook, Twitter, YouTube, and others provide online platforms that make it easier for terrorists to meet and proliferate in ways that were not dreamed of before. Thus, terrorists are able to cluster, exchange ideas, and promote extremism and polarization. In such an environment, do platforms that host in-

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1. Ryan Mac, Charlie Warzel & Alex Kantrowitz, Growth At Any Cost: Top Facebook Executive Defended Data Collection In 2016 Memo—And Warned That Facebook Could Get People Killed, BUZZFEED NEWS (Mar. 29, 2018, 6:36 PM), <https://www.buzzfeednews.com/article/ryanmac/growth-at-any-cost-top-facebook-executive-defended-data> [<https://perma.cc/LQ4G-MXFA>] (quoting memo by Andrew Bosworth, Vice President of Facebook).

citing content bear any liability? What about intermediaries operating internet platforms that direct extremist and unlawful content at susceptible users, who, in turn, engage in terrorist activities? Should intermediaries bear civil liability for algorithm-based recommendations on content, connections, and advertisements? Should algorithmic targeting enjoy the same protections as traditional speech?

This Article analyzes intermediaries' civil liability for terror attacks under the anti-terror statutes and other doctrines in tort law. It aims to contribute to the literature in several ways. First, it outlines the way intermediaries aid terrorist activities either willingly or unwittingly. By identifying the role online intermediaries play in terrorist activities, one may lay down the first step towards creating a legal policy that would mitigate the harm caused by terrorists' incitement over the internet. Second, this Article outlines a minimum standard of civil liability that should be imposed on intermediaries for speech made by terrorists on their platforms. Third, it highlights the contradictions between intermediaries' policies regarding harmful content and the technologies that create personalized experiences for users, which can sometimes recommend unlawful content and connections.

This Article proposes the imposition of a duty on intermediaries that would incentivize them to avoid the creation of unreasonable risks caused by personalized algorithmic targeting of unlawful messages. This goal can be achieved by implementing effective measures at the design stage of a platform's algorithmic code.

Subsequently, this Article proposes remedies and sanctions under tort, criminal, and civil law while balancing freedom of speech, efficiency, and the promotion of innovation. The Article concludes with a discussion of complementary approaches that intermediaries may take for voluntarily mitigating terrorists' harm.

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INTRODUCTION

On June 12, 2016, Omar Mateen committed an attack at an LGBT nightclub in Orlando, Florida.² Forty-nine people died along with Mateen.³ Fifty-three others were injured.⁴ On the day of the attack, Mateen posted on Facebook his allegiance to ISIS and demanded that the United States and Russia “stop bombing the Islamic state [sic].”⁵ He also warned that further attacks would come: “The real muslims [sic] will never accept the filthy ways of the west . . . In the next few days, you will see attacks from the Islamic state [sic] in the usa [sic].”⁶

2. *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 567 (E.D. Mich. 2018), *aff’d*, 921 F.3d 61 (6th Cir. 2019).

3. *Id.*

4. *Id.*

5. David Smith & Spencer Ackerman, *Orlando gunman searched for Facebook reaction during Pulse nightclub attack*, GUARDIAN (June 16, 2016, 1:02 PM), <https://www.theguardian.com/us-news/2016/jun/16/orlando-attack-facebook-post-pulse-nightclub-shooting> [<https://perma.cc/9L5T-PJ2F>] (internal quotation marks omitted).

6. *Id.*

ISIS claimed responsibility for the shootings shortly thereafter.⁷ According to a complaint filed by the victims of the attack, “FBI analysts found that Mateen watched online jihadist sermons since at least 2012 and more recently had downloaded jihadist material to his laptop”⁸ Though there was no evidence he had ever been in contact with ISIS directly, it appears that ISIS was able, at least in part, to radicalize Mateen through the internet.⁹

In November 2015, Anwar Abu Zaid, Jordanian police captain, “shot and killed two government contractors on an American base in Jordan.”¹⁰ According to Abu Zaid’s brother, Abu Zaid turned to terrorism after watching a video ISIS posted in February 2015, which showed the execution of a Jordanian pilot.¹¹ ISIS claimed responsibility for the attack.¹² A few months earlier, on December 2, 2015, Syed Rizwan Farook and Tashfeen Malik, a married couple, fired more than 100 rounds into a staff meeting of the environmental health department in San Bernardino, California, murdering fourteen and injuring twenty-two.¹³ During the shooting, Tashfeen Malik pledged her loyalty on Facebook to Abu Bakr al-Baghdadi, the leader of ISIS.¹⁴ A couple of days later, ISIS endorsed their acts of terrorism.¹⁵ The FBI investigation of this terror attack revealed that Farook and

7. Complaint at 43, *Crosby*, 303 F. Supp. 3d 564 (No. 16-14406) [hereinafter *Crosby* Complaint]. Please note that there are no pleaded facts that Mateen carried out the act under express directions from ISIS. *See id.* at 40–46.

8. *Id.* at 44–45 (“The FBI believes that the Orlando shooter Omar Mateen was self-radicalized on the Internet and social media.”).

9. *See id.* at 44; Ed Pilkington & Dan Roberts, *FBI and Obama confirm Omar Mateen was radicalized on the internet*, *GUARDIAN* (June 14, 2016, 2:06 PM), <https://www.theguardian.com/us-news/2016/jun/13/pulse-nightclub-attack-shooter-radicalized-internet-orlando> [<https://perma.cc/AC74-Y9US>].

10. Jaime M. Freilich, Note, *Section 230’s Liability Shield in the Age of Online Terrorist Recruitment*, 83 *BROOK. L. REV.* 675, 676–77, 685 (2018).

11. *Fields v. Twitter, Inc.*, 200 F. Supp. 3d 964, 967 (N.D. Cal. 2016).

12. *Fields v. Twitter, Inc.*, 881 F.3d 739, 742 (9th Cir. 2018).

13. *Clayborn. v. Twitter, Inc.*, Nos. 17-cv-06894-LB & 18-cv-00543-LB, 2018 WL 6839754, at *1, *3 (N.D. Cal. Dec. 31, 2018).

14. *Id.* at *2. Al-Baghdadi died recently during a raid conducted by U.S. military forces in northwest Syria. Eliza Mackintosh, *ISIS leader Abu Bakr al-Baghdadi is dead. Here are 6 things you need to know*, *CNN* (Oct. 29, 2019, 12:30 PM), <https://edition.cnn.com/2019/10/28/middleeast/baghdadi-isis-leader-dead-explainer-intl/index.html> [<https://perma.cc/AN94-WQ7R>].

15. *Clayborn*, 2018 WL 6839754, at *2.

Malik were radicalized by social media platforms several years before the attack.¹⁶

Social media platforms allow anyone to post content online. In recent years, social media has become a common venue for the dissemination of terrorist propaganda, as well as the radicalization, glorification, and incitement of terrorism.¹⁷ Terror organizations, such as ISIS, Al-Qaeda, Hamas, and white supremacist terrorists,¹⁸ exploit social media to solicit funds for

16. *Id.* at *3.

17. Susan Klein & Crystal Flinn, *Social Media Compliance Programs and the War Against Terrorism*, 8 HARV. NAT'L SECURITY J. 53, 65 & n.55 (2017) (referring to the statement of Nicholas J. Rasmussen, Director of the National Counterterrorism Center: "This online environment is likely to play a critical role in the foreseeable future in radicalizing and mobilizing [Homegrown Violent Extremists] towards violence." (alteration in original) (internal quotation marks omitted)); see also Alexander Tsesis, *Social Media Accountability for Terrorist Propaganda*, 86 FORDHAM L. REV. 605, 608 (2017).

18. White supremacist terrorists commit mass murder hate attacks against Muslims, immigrants, Jews, and other groups that they perceive as a threat to their race. As the recent white supremacist terror attacks in Pittsburgh, Pennsylvania; Christchurch, New Zealand; San Diego, California; and El Paso, Texas demonstrate, these terrorists are no less deadly. See, e.g., Kristen Gelineau & Jon Gambrell, *New Zealand mosque shooter is a white nationalist who hates immigrants, documents and video reveal*, CHICAGO TRIBUNE (Mar. 15, 2019, 8:45 PM), <https://www.chicagotribune.com/nation-world/ct-mosque-killer-white-supremacy-20190315-story.html> [<https://perma.cc/T4RK-Q9KS>]; Campbell Robertson, Christopher Mele & Sabrina Tavernise, *11 Killed in Synagogue Massacre; Suspect Charged With 29 Counts*, N.Y. TIMES (Oct. 27, 2018), <https://nyti.ms/2JlIq5U> [<https://perma.cc/8VLJ-884C>]. Brenton Tarrant, the alleged shooter in the Christchurch mosque attacks, praised prominent Australian far-right nationalist Blair Cottrell on Facebook and referred to him as "Emperor." Alex Mann et al., *Christchurch shooting accused Brenton Tarrant supports Australian far-right figure Blair Cottrell*, ABC NEWS (Mar. 23, 2019, 4:21 AM), <https://www.abc.net.au/news/2019-03-23/christchurch-shooting-accused-praised-blair-cottrell/10930632> [<https://perma.cc/3K3D-9TVD>]. Before committing a deadly attack, John Earnest published a racist open letter on an online forum 8chan, a racist alt-right message board. Michael McGowan, *San Diego shooting suspect posted 'open letter' online*, GUARDIAN (Apr. 28, 2019, 3:25 PM), <https://www.theguardian.com/us-news/2019/apr/28/john-earnest-san-diego-shooting-suspect-posted-open-letter-online> [<https://perma.cc/7S3A-VJVC>]. Earnest was inspired by the shooter in New Zealand. *Id.* Tarrant and Earnest are not the only terrorists who were radicalized and posted on 8chan. See, e.g., Robert Evans, *Ignore The Poway Synagogue Shooter's Manifesto: Pay Attention To 8chan's /pol/ Board*, BELLINGCAT (Apr. 28, 2019), <https://www.bellingcat.com/news/americas/2019/04/28/ignore-the-poway-synagogue-shooters-manifesto-pay-attention-to-8chans-pol-board/> [<https://perma.cc/J6VZ-ZVM7>]; Brianna Sacks & Adolfo Flores, *The Suspected El Paso Terrorist Said He Was Motivated By A Hatred Of Immigrants*, BUZZFEED NEWS (Aug. 4, 2019, 7:49 PM), <https://www.buzzfeednews.com/article/briannasacks/el-paso-shooting-suspect-immigrants-hate-manifesto> [<https://perma.cc/K72Z-6CCJ>].

their activities.¹⁹ They upload photos and videos of terror attacks in real time, including livestreaming deadly terror attacks that gamify massacring,²⁰ which reach sympathizers and send propaganda to draw in people who are inclined to radicalization.²¹ The recent Walmart terror attack in El Paso, Texas serves as a good example. The killer, Patrick Crusius, announced the start of his rampage on 8chan's board through a post that included a four-page manifesto.²² The manifesto and posts on 8chan demonstrate Crusius's radicalization and turn towards white supremacy.²³ Based on a review and analysis of 8chan posts, Bellingcat, an investigative journalism website, concluded that an earlier manifesto of the Christchurch's shooter in New Zealand and the video of his attack, likely had a profound influence on Crusius.²⁴

Social media allows terrorist groups to reach potential recruits²⁵ and inspire loners to commit attacks.²⁶ This use of social

19. For example, the Twitter account @Jahd_bmalk solicited donations for weapons with the slogan "Participate in Jihad with your Money." Corrected Complaint at 21, *Clayborn*, No. 17-cv-06894-LB [hereinafter *Clayborn* Corrected Complaint].

20. See, e.g., Freilich, *supra* note 10, at 693 n.140; Lizzie Dearden, *Germany synagogue shooting: Suspect 'broadcast attack livestream on Twitch' and ranted about Holocaust, Jews and immigration*, INDEPENDENT (Oct. 9, 2019, 6:12 PM), <https://www.independent.co.uk/news/world/europe/germany-shooting-synagogue-attack-latest-twitch-livestream-gunman-holocaust-jews-a9149381.html> [https://perma.cc/S46Y-WBQ5]; Robert Evans, *The El Paso Shooting and the Gamification of Terror*, BELLINGCAT (Aug. 4, 2019), <https://www.bellingcat.com/news/americas/2019/08/04/the-el-paso-shooting-and-the-gamification-of-terror/> [https://perma.cc/C94C-SDBG] ("Brenton Tarrant livestreamed his massacre from a helmet cam in a way that made the shooting look almost exactly like a First Person Shooter video game. This was a conscious choice, as was his decision to pick a sound-track for the spree that would entertain and inspire his viewers."); Meagan Flynn, *No one who watched New Zealand shooter's video live reported it to Facebook, company says*, WASH. POST (Mar. 19, 2019, 5:04 AM), <https://www.washingtonpost.com/nation/2019/03/19/new-zealand-mosque-shooters-facebook-live-stream-was-viewed-thousands-times-before-being-removed/> [https://perma.cc/M4ZK-8933].

21. See, e.g., J.M. Berger, *How terrorists recruit online (and how to stop it)*, BROOKINGS (Nov. 9, 2015), <https://www.brookings.edu/blog/markaz/2015/11/09/how-terrorists-recruit-online-and-how-to-stop-it/> [https://perma.cc/K7CX-L68H].

22. Tim Arrango, Nicholas Bogel-Burroughs & Katie Benner, *Minutes Before El Paso Killing, Hate-Filled Manifesto Appears Online*, N.Y. TIMES (Aug. 3, 2019), <https://nyti.ms/2OEIGDs> [https://perma.cc/VH2Y-AZQG].

23. See *id.*

24. See Evans, *supra* note 20.

25. Tthesis, *supra* note 17, at 617 ("The French interior minister recently asserted that 90 percent of people who are recruited to terrorism are indoctrinated by internet content."); see also Paul Gill et al., *Terrorist Use of the Internet by the Numbers:*

media allows terrorists to shock, threaten, communicate ideology, and affect the conduct of millions of viewers. It opens the gateway to violent extremism and incites individuals and groups to commit violence and hate crimes,²⁷ even if they are not part of a traditional terrorist cell. Incitement on social media has consequences in the physical world, as terrorists increasingly rely on social media to plan and execute attacks.²⁸ Social media platforms allow terror organizations to operate accounts in their own names, although many of them have been officially dubbed as terrorists.²⁹

Clustering like-minded people online accelerates interpersonal dynamics of incitement across the network and enhances polarization and extremism. It increases the likelihood for more people to be engaged in terror attacks.³⁰ Yet, online intermediaries fail to remove inciting posts in many cases and fail to keep inciting content down.³¹

Quantifying Behaviors, Patterns, and Processes, 16 CRIMINOLOGY & PUB. POL'Y 99, 107–09 (2017).

26. Jade Hutchinson, *Far-Right Terrorism: The Christchurch Attack and Potential Implications on the Asia Pacific Landscape*, 11 COUNTER TERRORIST TRENDS & ANALYSES, June 2019, at 19, 19 (“[I]t is found that the assailant’s relationship with the far-right virtual community and attitude towards venerating the online sub-culture, along with his proficiency with Internet technology and mass-violence weaponry, is significant for far-right terrorist behaviour in the Asia Pacific region . . .”); Martin Rudner, “*Electronic Jihad: The Internet as Al Qaeda’s Catalyst for Global Terror*,” 40 STUD. CONFLICT & TERRORISM 10, 15 (2017) (“The Internet has been noticeably instrumental for Al Qaeda in its ongoing efforts to foster locally homegrown terrorist activities directed against British, European, and North American targets.”).

27. Thane Rosenbaum, *The Internet as Marketplace of Madness—And A Terrorist’s Best Friend*, 86 FORDHAM L. REV. 591, 594 (2017) (“Without the internet, terrorist cells had as much visibility as actual microorganisms. Without cyberspace, learning how to make a bomb from household detergents had the same degree of difficulty as traveling to outer space. . . . YouTube turned them into genocidal reality TV stars. It was the Wild West of terrorism . . .”).

28. Zachary Leibowitz, Note, *Terror on Your Timeline: Criminalizing Terrorist Incitement on Social Media through Doctrinal Shift*, 86 FORDHAM L. REV. 795, 797 (2017).

29. *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 147 (E.D.N.Y. 2017).

30. See CASS R. SUNSTEIN: #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 238, 241 (2017).

31. See, e.g., Yitzhak Benhorin, *20,000 Israelis sue Facebook*, YNET NEWS (Oct. 27, 2015, 8:47 PM), <https://www.ynetnews.com/articles/0,7340,L-4716980,00.html> [<https://perma.cc/EN7C-RRPP>]; see also Freilich, *supra* note 10, at 676 (“[S]ocial media companies have generally taken a ‘laissez-faire approach’ to preventing terrorists from using their platforms to promote their illegal agendas . . .”); Klein & Flinn, *supra* note 17, at 71–72 (“Continued failure to address terror activity online will undoubtedly lead to increased vigilante justice by independent hack-

In addition to terrorists' "bottom-up" social dynamics on social networks, intermediaries enable terrorists' activities from the "top down." Recently, at the Anti-Defamation League, actor and comedian Sacha Baron Cohen criticized social media companies, aptly describing Facebook as "the greatest propaganda machine in history."³²

Intermediaries profit from terrorists, as they strategically target specific organic content and advertisements based on viewers and content.³³ Some intermediaries share revenues earned from targeted ads with those who posted the content, or with webpage owners.³⁴ The posters and owners might be terror organizations, and as a result, the shared revenues could fund terrorist activities.³⁵

Moreover, in their quest to enhance profits from content and advertisement, intermediaries personalize content by automatic algorithms that recommend additional content to users.³⁶ These recommendation systems do not "know" what a particular user might prefer, but rather draw conclusions based on past interactions of similar users.³⁷ Thus, they direct users to new content, which might be terrorist oriented. Intermediaries use these algorithms to connect users with others who might have

ers, pulling control and ability to monitor from the government and creating uncertainty in the current methodology used to combat terrorism online.").

32. See Sacha Baron Cohen, *Read Sacha Baron Cohen's scathing attack on Facebook in full: 'greatest propaganda machine in history'*, GUARDIAN (Nov. 22, 2019, 1:10 PM), <https://www.theguardian.com/technology/2019/nov/22/sacha-baron-cohen-facebook-propaganda> [<https://perma.cc/XC3H-J2ZW>].

33. David Patrikarakos, *Social Media Networks Are the Handmaidens to Dangerous Propaganda*, TIME (Nov. 2, 2017), <https://time.com/5008076/nyc-terror-attack-isis-facebook-russia/> [<https://perma.cc/B6BS-H2TZ>].

34. See e.g., *YouTube channel monetization policies*, YOUTUBE (Jan. 2019), <https://support.google.com/youtube/answer/1311392?hl=en> [<https://perma.cc/GQ49-HHAP>].

35. Freilich, *supra* note 10, at 678 ("Though Twitter, Facebook, and Google may not be giving money to terrorist groups, per se, they are giving terrorist groups a platform to spread their violent rhetoric and they are profiting from those groups' presence on their websites.").

36. Derek O'Callaghan et al., *Down the (White) Rabbit Hole: The Extreme Right and Online Recommender Systems*, 33 SOC. SCI. COMPUTER REV. 459, 460 (2015); see also Kevin Roose, *The Making of a YouTube Radical*, N.Y. TIMES (June 8, 2019), <https://nyti.ms/2wygCsx> [<https://perma.cc/ZBV2-XS77>]; Joan E. Solsman, *YouTube's AI is the puppet master over most of what you watch*, CNET (Jan. 10, 2018, 10:05 AM), <https://www.cnet.com/news/youtube-ces-2018-neal-mohan> [<https://perma.cc/7XTS-7RA9>].

37. VIKTOR MAYER-SCHÖNBERGER & THOMAS RAMGE, *REINVENTING CAPITALISM IN THE AGE OF BIG DATA* 78 (2018). "These systems don't understand the data in any human sense; they only identify the patterns they are 'seeing' . . ." See *id.*

shared interests, even if the results of these match-ups go against the websites' content moderation policies.³⁸ This practice can play a vital role in spreading inciting content to those users most susceptible to that incitement.

The practice of targeted recommendation by the "AI propaganda machine"³⁹ may encourage susceptible social network members to consume extreme and even inciting content.⁴⁰ Targeted algorithmic-based recommendations increase the likelihood of influencing users because they seek the recommended content and are more susceptible to it.⁴¹ Inciting content can thus radicalize susceptible social network users, and they are more likely to disseminate the inciting content and even act upon it. This may result in more victims of terror.

Terror victims and their families have brought suits against intermediaries, arguing that the offensive content, the practice of revenue sharing with terror organizations, and the personalization of recommendations to susceptible social network members materially supports terrorism in violation of federal antiterrorism laws.⁴² In other words, the plaintiffs asserted that intermediaries were responsible for the physical harm and death caused by terrorists.

Should the law impose civil liability on intermediaries for terror attacks and allow victims to get redress? And if so, what should be the appropriate scope of intermediaries' civil liability

38. For example, an intermediary can block specific types of content and simultaneously recommend them by using automatic algorithms. See Ysabel Gerrard, *Beyond the hashtag: Circumventing content moderation on social media*, 20 *NEW MEDIA & SOC'Y* 4492, 4505 (2018). See generally Karl Manheim & Lyric Kaplan, *Artificial Intelligence: Risks to Privacy and Democracy*, 21 *YALE J.L. & TECH* 106 (2019).

39. Berit Anderson & Brett Horvath, *The Rise of the Weaponized AI Propaganda Machine*, *MEDIUM* (Feb. 12, 2017), <https://medium.com/join-scout/the-rise-of-the-weaponized-ai-propaganda-machine-86dac61668b> [<https://perma.cc/7AQF-SKQK>]; see also MILES BRUNDAGE ET AL., *THE MALICIOUS USE OF ARTIFICIAL INTELLIGENCE: FORECASTING, PREVENTION, AND MITIGATION* 3–11, <https://arxiv.org/ftp/arxiv/papers/1802/1802.07228.pdf> [<https://perma.cc/WUY6-MNJE>].

40. See O'Callaghan et al., *supra* note 36, at 460; Zeynep Tufekci, *Opinion, YouTube, the Great Radicalizer*, *N.Y. TIMES* (Mar. 10, 2018), <https://nyti.ms/2GeTMa6> [<https://perma.cc/E53F-LTQB>].

41. See MAX TEGMARK, *LIFE 3.0: BEING HUMAN IN THE AGE OF ARTIFICIAL INTELLIGENCE* 18 (2017) (describing "'persuasion sequences' of videos where insight from each one would both update someone's views and motivate them to watch another video about a related topic where they were likely to be further convinced").

42. See, e.g., *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 567–68 (E.D. Mich. 2018); *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 147 (E.D.N.Y. 2017).

and legal duty of care? This Article answers these questions and others. The Article defines terrorism as “the deliberate killing of innocent people, at random, in order to spread fear through a whole population and force the hand of its political leaders.”⁴³ It explores the question of intermediaries’ liability for incitement to terrorism on social media websites⁴⁴ and focuses on online social networks in particular.⁴⁵

Part I of the Article focuses on the evolution of modern terrorism in the wake of social networks. It describes the influence of terror organization on social dynamics within social networks, which enhances inciting speech that can push participants to commit terror attacks. Part II outlines the different roles intermediaries take in facilitating networks that promote terrorist attacks. Part III explores the civil liability of intermediaries under the federal antiterrorism laws and section 230 of the Communications Decency Act.⁴⁶ Following this analysis, this Part deals with normative considerations for imposing liability on intermediaries. Part IV discusses the possibility of imposing liability on online intermediaries for material support of terrorist activities. It proposes a minimum standard for mandatory removal of unlawful content. It also argues that social media platforms can no longer hide behind the notion that they are neutral platforms when their moderation and algorithmic recommendation systems determine what content is seen and heard.⁴⁷

43. See Michael Walzer, *Five Questions About Terrorism*, DISSENT MAG. (2002), <https://www.dissentmagazine.org/article/five-questions-about-terrorism> [https://perma.cc/9785-S64V].

44. See Jan H. Kietzmann et al., *Social media? Get serious! Understanding the functional building blocks of social media*, 54 BUS. HORIZONS 241, 241 (2011) (“Social media employ mobile and web-based technologies to create highly interactive platforms via which individuals and communities share, co-create, discuss, and modify user-generated content.”).

45. See danah m. boyd & Nicole B. Ellison, *Social Network Sites: Definition, History, and Scholarship*, 13 J. COMPUTER-MEDIATED COMM. 210, 211 (2008) (defining social network sites as “web-based services that allow individuals to (1) construct a public or semi-public profile within a bounded system, (2) articulate a list of other users with whom they share a connection, and (3) view and traverse their list of connections and those made by others within the system”).

46. 47 U.S.C. § 230 (2018).

47. See TARLETON GILLESPIE, *CUSTODIANS OF THE INTERNET: PLATFORMS, CONTENT MODERATION AND THE HIDDEN DECISIONS THAT SHAPE SOCIAL MEDIA* 24–45 (2018); Danielle Keats Citron, *Section 230’s Challenge to Civil Rights and Civil Liberties*, KNIGHT FIRST AMENDMENT INST. COLUM. U. (Apr. 6, 2018), <https://>

This Article proposes imposing duties on intermediaries that would disincentivize them from taking unreasonable risks and manipulating users by targeting susceptible users with content that radicalizes and incites them to terror. These duties focus on the design stage of the platform, thus creating a regime of “safety by design.” This Article also proposes remedies and sanctions under the loss of chance doctrine in tort, criminal, and civil law. In doing so, it accounts for freedom of speech, economic efficiency, and innovation promotion. The Article concludes with complementary tools that intermediaries may voluntarily use to mitigate the harm caused by terrorists’ speech.

I. THE EVOLUTION OF NETWORKED TERROR

A. *From Localities to Online Social Networks*

“Social networks seem to organize social life today.”⁴⁸ These sets of relationships⁴⁹ spread happiness, generosity, and love. They are always there, exerting dramatic influence over choices, actions, thoughts, feelings, and even desires. Social networks may affect the full spectrum of human experience.

Networks have always been the leading force behind terror, even before the internet age. “Social dynamics—not poverty, poor education and disadvantage”—have played and continue to play a central role in the development and diffusion of terrorism.⁵⁰ How did terrorists gather before the advent of social media? Where did they meet? In his book, *Understanding Terror*, Marc Sageman, a forensic psychiatrist, former CIA agent, and government counterterrorism consultant, tries to answer these questions.⁵¹ Based on the collection and analysis of data on 400 Islamic terrorists who lived during the 1990s, he demonstrates that many terrorists had families and distinguished jobs.⁵² Some were not very religious at the time they joined the Salafi

[knightcolumbia.org/content/section-230s-challenge-civil-rights-and-civil-liberties](https://perma.cc/B9BQ-YMAJ) [https://perma.cc/B9BQ-YMAJ].

48. Michal Lavi, *Content Providers’ Secondary Liability: A Social Network Perspective*, 26 *FORDHAM INTELL. PROP. MEDIA & ENT. L.J.* 855, 889 (2016).

49. CHARLES KADUSHIN, *UNDERSTANDING SOCIAL NETWORKS: THEORIES, CONCEPTS AND FINDINGS* 14 (2012) (explaining that social networks are sets of relationships).

50. SUNSTEIN, *supra* note 30, at 234.

51. MARC SAGEMAN, *UNDERSTANDING TERROR NETWORKS* 61–98 (2004).

52. *Id.* at 78–80.

jihād, the violent, revivalist social movement including al Qaeda.⁵³ Seventy percent joined the jihād while they were living away from their country of origin.⁵⁴ They sometimes met each other in mosques, not necessarily for religious reasons, but rather to seek friends with similar cultural backgrounds.⁵⁵ Some who met at mosque also moved into apartments together and developed a microculture.⁵⁶ Their life developed a group dynamic that ultimately transformed them into terrorists.⁵⁷ They were not recruited for terror missions but rather volunteered to act.⁵⁸ The network was self-organized from the bottom up and the dynamics within it enforced the motivation of the members of the group to engage in terror.⁵⁹ The network grew as it gathered more members, who met each other in person.⁶⁰ Yet, before the age of social media, the possibility to engage with like-minded people anytime and anywhere was limited, thus reducing the scale of polarization and extremism. Technology and new media weaponized terrorism, and that is what made “terrorism and the internet such a toxic, incitement-spiked brew.”⁶¹

B. *Terror-Networks.Com*

Networks have always existed, but online networks operate in a different environment. The internet revolution, mobile phones, and social networks enhanced the ability of users to stay in touch with one another constantly and immediately.⁶² This revolution afforded new opportunities to form social ties, share ideas, form communities, and engage in diverse social dynamics anywhere, anytime.⁶³ Technology creates different

53. *Id.* at 61–62, 76–77, 97.

54. *Id.* at 92.

55. *Id.* at 96, 143.

56. *Id.* at 101.

57. *Id.* at 115.

58. *Id.* at 110, 122.

59. *Id.* at 110–12.

60. *See id.* at 99–111.

61. Rosenbaum, *supra* note 27, at 600.

62. *See* NICHOLAS A. CHRISTAKIS & JAMES H. FOWLER, *CONNECTED: THE SURPRISING POWER OF OUR SOCIAL NETWORKS AND HOW THEY SHAPE OUR LIVES* 275 (2009).

63. *See* GILLESPIE, *supra* note 47, at 5 (“Social media platforms put more people in direct contact with one another, afford them new opportunities to speak and interact with a wider range of people, and organize them into networked publics.”).

tools that influence beliefs, preferences, and capabilities in society.⁶⁴ “The medium matters because it shapes, structures, and controls the scale, scope, reach, pace, and patterns of human communications”⁶⁵

Before the terror attacks on September 11, 2001, terror organizations radicalized through face-to-face interactions. These interactions have been “replaced by online radicalization.”⁶⁶ The internet has made it easier than ever to overcome geographical barriers and establish contacts among terrorist groups that are far apart in the physical world.⁶⁷

Social media now enables terrorist organizations to expand and amplify their presence on the world stage.⁶⁸ Online platforms provide terrorists “the means to collaborate, share membership lists, recruit new members, and advise each other.”⁶⁹ As research demonstrates, social media allows self-organized groups that have probably never met in person before to increase their numbers and inspire others to carry out attacks.⁷⁰ Today, there is no doubt that communication by online networks dramatically influences “how the message of extremism is conveyed.”⁷¹ Social media takes terrorism to a different scale,

64. BRETT FRISCHMANN & EVAN SELINGER, RE-ENGINEERING HUMANITY 47, 106 (2018).

65. *Id.* at 107; see also Michael J. Sherman, *Brandenburg v. Twitter*, 28 GEO. MASON U. C.R. L.J. 127, 131 (2018) (“[T]here are at least two significant characteristics that make online recruitment of terrorists different: the ability to reach mass audiences is vastly greater than it was a generation or two ago, and there may be greater violence tied to the speech in question.”).

66. *Violent Islamist Extremism: Hearing Before the S. Comm. on Homeland Sec. & Governmental Affairs*, 110th Cong. 473 (2007) (written statement of Dr. Marc Sageman, Principal, Sageman Consulting, LLC) [hereinafter *Violent Islamist Extremism Hearing*].

67. See Sherman, *supra* note 65, at 131–32.

68. Lauren C. O’Leary, Note, *Targeting Detached Corporate Intermediaries in the Terrorist Supply Chain: Dial 2339/13224 for Assistance*, 103 VA. L. REV. 525, 561 (2017).

69. Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 654 (2017).

70. See *Tracking, analyzing how ISIS recruits through social media*, HOMELAND SECURITY NEWS WIRE (June 20, 2016), <http://www.homelandsecuritynewswire.com/dr20160620-tracking-analyzing-how-isis-recruits-through-social-media> [https://perma.cc/AQ73-MCZ6].

71. Amos N. Guiora, *Inciting Terrorism on the Internet: The Limits of Tolerating Intolerance*, in *INCITEMENT TO TERRORISM* 137, 138 (Anne F. Bayefsky & Laurie R. Blank eds., 2018); see also Julie E. Cohen, *The emergent limbic media system*, in *LIFE AND THE LAW IN THE ERA OF DATA-DRIVEN AGENCY* 60, 74 (Mireille Hildebrandt & Kieron O’Hara eds., 2020) (“The increasingly unreasoning and often vicious char-

as demonstrated in recent terror attacks in the United States, France, New Zealand, Israel and many other countries.⁷²

New patterns of social connections unique to online culture play a role in spreading modern terrorism. Terror organizations create social structures that regenerate themselves and do not depend on a single leader. Online activists can connect with each other despite being scattered around the globe.⁷³ As a new study confirms, activists can start spreading their word on ideological social media websites, such as the far alt right websites Gab⁷⁴ and 8chan.⁷⁵ As more people follow others and repeat their inciting messages, they allow such content to penetrate mainstream social media, gain influence, incite more people, and shape pathways to violence on larger, general platforms.⁷⁶

acter of interaction in online, platform-based digital environments complicates accounts of the democratizing potential of information networks.”); Lyriisa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH L. REV. 147, 149 (2011) (explaining that the anonymity of inciting communication online “fosters a sense of disinhibition in those contemplating violence”).

72. See, e.g., *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 567–68 (E.D. Mich. 2018) (describing the terror attack at an LGBT nightclub in Orlando); *Gonzalez v. Google, Inc.*, 282 F. Supp. 3d 1150, 1154 (N.D. Cal. 2017) (describing the ISIS attack in Paris, France); Mann, *supra* note 18; Siobhán O’Grady, *Families of Americans Killed in Israel Sue Facebook For \$1 Billion*, FP (July 11, 2016, 4:37 PM), <https://foreignpolicy.com/2016/07/11/families-of-americans-killed-in-israel-sue-facebook-for-1-billion/> [<https://perma.cc/X3AQ-E38R>].

73. SUNSTEIN, *supra* note 30, at 242.

74. See Emma Grey Ellis, *Gab, the Alt-Right’s Very Own Twitter, Is the Ultimate Filter Bubble*, WIRED (Sept. 14, 2016, 7:00 AM), <https://www.wired.com/2016/09/gab-alt-rights-twitter-ultimate-filter-bubble/> [<https://perma.cc/VWR3-WX5M>]; David Gilbert, *Here’s How Big Far Right Social Network Gab Has Actually Gotten*, VICE NEWS (Aug. 16, 2019, 2:35 PM), https://www.vice.com/en_us/article/pa7dwg/heres-how-big-far-right-social-network-gab-has-actually-gotten [<https://perma.cc/MTZ3-L5XT>].

75. 8chan is an image board site popular with extremists. See Ian Sherr & Daniel Van Boom, *8chan is struggling to stay online after El Paso massacre*, CNET (Aug. 7, 2019, 6:21 AM), <https://www.cnet.com/news/8chan-is-struggling-to-stay-online-in-wake-of-el-paso-massacre/> [<https://perma.cc/EXM9-MV5B>].

76. See NETWORK CONTAGION RESEARCH INST. & ADL’S CTR. ON EXTREMISM, *Gab and 8chan: Home to Terrorist Plots Hiding in Plain Sight*, ADL (2019), <https://www.adl.org/resources/reports/gab-and-8chan-home-to-terrorist-plots-hiding-in-plain-sight> [<https://perma.cc/77X6-FDBM>]. This research shows that online propaganda can inspire terror, and violent terror attacks can perpetuate online propaganda. *Id.* It is in line with known principles of network theory and the concept of “threshold” to explain how ideas spread. See Mark Granovetter, *Threshold Models of Collective Behavior*, 83 AM. J. SOC. 1420, 1422 (1978) (explaining that different individuals require different levels of safety for joining an activity, such as entering a riot, and vary in the benefits they derive from the activity).

Terrorist leaders and activists also connect with users, impose psychological pressure on them, and amplify their preexisting inclinations. Consequently, users hear louder echoes of their own voices, and their confirmation bias is amplified as their beliefs are enforced.⁷⁷ These users are likely to circulate stories and messages that they agree with and thereby become more extreme.⁷⁸ Polarization of groups causes a cascade effect that flares up terrorism, which feeds the dissemination of ideas and attracts more users in social networks.⁷⁹ After joining a terror organization like ISIS, new recruits spread propaganda themselves through their social media accounts. A marketplace for extremist ideas becomes “the virtual ‘invisible hand’ organizing terrorist activities worldwide.”⁸⁰

Since 2009, the use of the Internet for terror recruitment and radicalization has increased exponentially.⁸¹ Terrorists make initial contact, profile the potential recruit, and develop a relationship with him online. Afterwards, they isolate him from his community and keep in regular touch with him.⁸² Recruitment can focus on unlikely candidates. For example, a 23-year-old Sunday school teacher was recruited via Twitter, email, and Skype.⁸³ ISIS answered her questions politely while slowly

77. SUNSTEIN, *supra* note 30, at 123.

78. *Id.* at 155 (“[P]eople are biased to like and to publicize opinions and information (real or apparent) that support what they think. Falsehoods spread rapidly, and to the extent that people are reading and speaking to like-minded others, group polarization is inevitable. It is a fact of life in the networked public sphere.”); *see also* AN XIAO MINA, MEMES TO MOVEMENTS: HOW THE WORLD’S MOST VIRAL MEDIA IS CHANGING SOCIAL PROTEST AND POWER 125–29 (2019) (explaining that leaders of movements use confirmation bias to increase disinformation).

79. Informational cascades form when individuals follow the statements or actions of predecessors and do not express their opposing opinions because they believe their predecessors are right. CASS R. SUNSTEIN, INFOTOPIA: HOW MANY MINDS PRODUCE KNOWLEDGE 88–90 (2006). As a result, the social network does not obtain important information. *Id.* at 89–90. Reputational cascades form because of social pressures. *Id.* at 91. In these cases, “people think they know what is right, or what is likely to be right, but they nonetheless go along with the crowd in order to maintain the good opinion of others.” *Id.*

80. *Violent Islamist Extremism Hearing*, *supra* note 66, at 474.

81. Klein & Flinn, *supra* note 17, at 65 (“Most recently, ISIS has drawn over 20,000 foreign fighters to Syria from more than 90 countries, mainly through cyber contacts.”).

82. *See* SUNSTEIN, *supra* note 30, at 242–45.

83. Rukmini Callimachi, *ISIS and the Lonely Young American*, N.Y. TIMES (June 27, 2015), <https://nyti.ms/1BX5HoJ> [<https://perma.cc/V6BY-U9BM>].

pushing her towards an extreme worldview.⁸⁴ The recruiters advised her to avoid the local mosque that disavowed ISIS by telling her that the government had infiltrated it, adding to her isolation in real life.⁸⁵

Terrorist organizations also use private communication to plan and execute attacks. Turning from public to private communications, such as encrypted messaging, is referred to as “going dark.”⁸⁶ Yet, terrorists are likely to continue to flourish in open and public platforms because they aim to target the public and impose fear.⁸⁷

Terrorists’ use of social media for propaganda and recruitment purposes is only part of the story. Online intermediaries such as Facebook and others not only offer the platforms that facilitate the relationship between self-radicalized cells and transnational community of terror activists, but also have a role in building systems of unforeseen vulnerabilities and enhancing the proliferation of online incitement.

II. SOCIAL MEDIA PLATFORMS AND TERROR: A DESCRIPTIVE ROADMAP

The Director of the FBI has stated with reference to Twitter, “There is a device—almost a devil on their shoulder—all day long, saying: ‘Kill. Kill. Kill. Kill.’”⁸⁸ Twenty-first-century intermediaries are not mere passive conduits; they take active roles in manipulating users’ content. This Part maps intermediaries’ role in shaping users experiences in relations to inciting content. It does not, however, advocate the imposition of liability on intermediaries under all circumstances. On the contrary, some of the roles intermediaries take are an inherent part of operating online platforms for legitimate purposes. The control

84. *Id.*

85. *Id.*

86. Klein & Flinn, *supra* note 17, at 66–67. For an expanded discussion, see GABRIEL WEIMANN, GOING DARKER? THE CHALLENGE OF DARK NET TERRORISM (n.d.), https://www.wilsoncenter.org/sites/default/files/media/documents/publication/going_darker_challenge_of_dark_net_terrorism.pdf [<https://perma.cc/UKV8-PLPV>].

87. See GILLESPIE, *supra* note 47, at 55, 171; Klein & Flinn, *supra* note 17, at 68–69.

88. Hamza Shaban, *FBI Director Says Twitter Is A Devil On The Shoulder For Would-Be Terrorists*, BUZZFEED NEWS (July 8, 2015, 5:15 PM) (quoting FBI Director James Comey) (internal quotation marks omitted), <https://www.buzzfeednews.com/article/hamzashaban/fbi-doj-evoked-isis-threat-to-justify-encryption-workarounds> [<https://perma.cc/UG4C-TK2T>].

intermediaries have over users' experience can be divided to three types: intermediation, moderation, and algorithmic targeting.

A. *Basic Intermediation: Hosting, Providing Communication Tools, and Sharing Revenues*

1. *Hosting*

General purpose social media intermediaries offer platforms for creating content.⁸⁹ They utilize technologies and design tools that allow their users to sort through vast amounts of information and share content. Intermediaries allow users to publish and share all kinds of content and encourage ongoing engagement on their platforms.⁹⁰

Terrorist organizations' use of social media platforms and tools is not new. Traditional media has been reporting the use of Twitter, Facebook, and YouTube by terror organizations for years.⁹¹ Testimonies before Congress indicate the widespread use and exploitation of social media platforms and communication services in recruiting members, soliciting funds, and spreading terrorists' propaganda,⁹² including livestreaming of terror attacks in real time, leading to visceral reactions from the audience and increasing the likelihood of sharing them.⁹³ General purpose platforms host a variety of content, only part of which is incitement; but the use of platforms by terrorists is intensifying.

89. This Article focuses on general platforms. There are, however, ideological platforms devoted to incitement and hate. These platforms do more than mere hosting, because they create a focal point for hate speech. For more on these platforms, see Michal Lavi, *Evil Nudges*, 21 VAND. J. ENT. & TECH. L. 1 (2018).

90. Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 997 (2018) ("[B]ecause social media companies encourage as many people as possible to use their sites, the inevitable result is incivility, trolling, and abuse.").

91. See, e.g., Alex Altman, *Why Terrorists Love Twitter*, TIME (Sept. 11, 2014), <https://time.com/3319278/isis-isis-twitter/> [<https://perma.cc/K4ZC-PGPP>]; Marc Santora & Al Baker, *Brooklyn Arrests Highlight Challenges in Fighting of ISIS and 'Known Wolves'*, N.Y. TIMES (Feb. 28, 2015), <https://nyti.ms/1JYRBX3> [<https://perma.cc/EYF9-RNLR>].

92. Tsesis, *supra* note 17, at 617 ("Testimony before Congress in 2015 indicated that ISIS had over 46,000 Twitter accounts and that its followers sent between 90,000 and 200,000 tweets per day.").

93. See, e.g., Evans, *supra* note 20.

2. *Providing Communication Tools*

In addition to hosting content, social media platforms provide communication tools. These tools improve communication for all users without preferring one type of content to another.⁹⁴ Social media users can utilize these tools for any purpose, whether lawful or unlawful.

The tagging options on social networks such as the Twitter hashtag make it easier to aggregate and find relevant content.⁹⁵ “Algorithms like Twitter trending catch [hashtags] and highlight them in a section on the site that is visible to many, which in turn drives more attention.”⁹⁶ These communication tools allow users to promote specific content such as newsworthy scoops. Terrorists use hashtags to make propaganda available to users. For example, ISIS uses inciting hashtags to make it easier for their supporters to cluster together.⁹⁷ ISIS tweeted over 14,000 messages threatening Americans under the hashtags #WaronWhites and #AMessagefromISISToUS, which included photos of U.S Marines hung from bridges in Fallujah.⁹⁸ Other posts include threats to kill all Americans.⁹⁹ The Hamas and other terrorist organizations exploit hashtags in a similar manner.¹⁰⁰ Moreover, communication tools allow for the spreading of propaganda, and make that propaganda publicly visible. Recruiters communicate by tweeting, retweeting, and using popular hashtags or hashtags related to other trending news stories, such as the World Cup, to communicate inciting material to a wider audience.¹⁰¹

94. All designs, however, reflect values and are not completely neutral. See WOODROW HARTZOG, *PRIVACY’S BLUEPRINT: THE BATTLE TO CONTROL THE DESIGN OF NEW TECHNOLOGIES* 21–22 (2018).

95. See Gerrard, *supra* note 38, at 4493–94 (focusing on the app Tumblr).

96. MINA, *supra* note 78, at 55.

97. Freilich, *supra* note 10, at 676; SUNSTEIN, *supra* note 30, at 242–45.

98. Christopher Bucktin, *ISIS militants send threatening Twitter messages to US warning of retaliation over Iraq air strikes*, MIRROR (Aug. 9, 2014, 6:51 AM), <https://www.mirror.co.uk/news/world-news/isis-militants-send-threatening-twitter-4027095> [<https://perma.cc/77JC-Z59E>].

99. *Id.*

100. See Tsesis, *supra* note 17, at 617 (noting hashtags such as “#slaughter of Jews”).

101. See Michelle Roter, Note, *With Great Power Comes Great Responsibility: Imposing a Duty to Take Down Terrorist Incitement on Social Media*, 45 HOFSTRA L. REV. 1379, 1388 (2017).

3. *Sharing Revenues with Users*

Intermediaries often share advertisement revenues with users. For example, YouTube allows users to create Google AdSense accounts and monetize those accounts.¹⁰² If there are ads associated with a YouTube video that had been approved by Google, an ad is presented alongside it.¹⁰³ YouTube then shares revenues with the poster for each view of the video.¹⁰⁴ The opportunity to share revenues with the intermediary is open to all users whose AdSense account Google has approved.¹⁰⁵ Thus, terrorist organizations and their affiliates can also benefit from monetizing their accounts. Consequently, social media platforms transfer direct payments to terror organizations' affiliates that operate those accounts, and indirectly support terrorist activities.¹⁰⁶

B. *Moderation: Enforcing Policy, Weeding out Terrorist Content and Accounts (Or Neglecting To Do So)*

Content moderation promotes adherence to the platforms' terms of use statements, site guidelines, and legal regimes. It is a key part of the production chain of commercial sites and social media platforms.¹⁰⁷ A body of recent scholarship focuses on content moderation and governance. Professor Tarleton Gillespie posits in his book that intermediaries must moderate content; in fact, he demonstrates that their moderation is a fundamental aspect of any platform.¹⁰⁸ Many interviews with moderators show that moderation is needed for a proper operation of the internet,¹⁰⁹ and social media companies cannot deny that moderation is a critical part of their production chain.¹¹⁰

102. See *YouTube channel monetization policies*, *supra* note 34.

103. See *id.*

104. See *id.*

105. See *Flexible Revenue Sharing*, GOOGLE DEVELOPERS, <https://developers.google.com/adsense/host/revenuesharing> [https://perma.cc/R5QU-Y5A4] (last visited Mar. 19, 2020).

106. Ronbert H. Schwartz, *Laying the Foundation for Social Media Prosecutions Under 18 U.S.C. § 2339B*, 48 LOY. U. CHI. L.J. 1181, 1189 (2017).

107. SARAH T. ROBERTS, BEHIND THE SCREEN: CONTENT MODERATION IN THE SHADOW OF SOCIAL MEDIA 71 (2019) (describing how different types of low-wage human contractors moderate content).

108. GILLESPIE, *supra* note 47, at 5–6.

109. See, e.g., ROBERTS, *supra* note 107, at 165.

110. *Id.* at 203.

Social media companies often regulate speech in many different ways, using different tools.¹¹¹ As Professor Kate Klonick shows, intermediaries already govern speech, enforce their policies and terms of service, and moderate harmful content,¹¹² even though they are not obligated to do so.¹¹³ They can moderate content before it is published on their sites (ex ante moderation), or after (ex post moderation).¹¹⁴ Moderation may be reactive, when it is employed upon notices sent to moderators or proactive when moderators seek out published content for removal.¹¹⁵ It can be done automatically by software or manually by humans.¹¹⁶ Indeed, intermediaries can and do moderate content.¹¹⁷ Facebook even has a global escalations team, which removes heinous images and videos from the platform.¹¹⁸ However, intermediaries' approaches toward moderation are inconsistent within a given platform,¹¹⁹ and differ among platforms.¹²⁰ Despite news reports regarding the use of social media by terrorists, intermediaries' moderation of terrorist content is insufficient, as it continues to spread on Twitter, Facebook, and YouTube. Social media companies are consciously failing

111. GILLESPIE, *supra* note 47, at 1–15.

112. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1625–30 (2018) (explaining that reasons for moderation are corporate responsibility and economic reasons).

113. See 47 U.S.C. § 230(c) (2018) (allowing content providers to enjoy broad immunity).

114. Klonick, *supra* note 112, at 1635.

115. *Id.*

116. *Id.*

117. See GILLESPIE, *supra* note 47, at 116 (explaining the labor of moderation by community flaggers, community manager, AI detection tools, crowd workers, and internal teams).

118. Kate Klonick, *Inside the Team at Facebook that Dealt with the Christchurch Shooting*, NEW YORKER (Apr. 25, 2019), <https://www.newyorker.com/news/news-desk/inside-the-team-at-facebook-that-dealt-with-the-christchurch-shooting> [<https://perma.cc/U4FG-2PMA>].

119. GILLESPIE, *supra* note 47, at 117 (“Because this work is distributed among different labor forces, because it is unavailable to public and regulatory scrutiny, and because it is performed under high pressure conditions, there is a great deal of room for slippage, distortions, and failure.”).

120. *Id.* at 20 (“Platforms vary, in ways that matter both for the influence they can assert over users and for how they should be governed.”). Most social media platforms prohibit violence and illegal activity in their policy guidelines, but they differ in definition of these types of content. *Id.* at 54–60.

to combat the use of their websites to promote terrorism and other abuses of the platform.¹²¹

Intermediaries are inconsistent in removing terrorists' harmful content and hashtags. Twitter used to take a laissez-faire approach to terrorist content and avoided removing it even if it was made aware of the content.¹²² Even Facebook, which has a policy against inciting content, does not take a consistent line toward the removal of terrorist content.¹²³

Facebook allows access to degrading statements on their platforms despite its own community standards. Although Facebook administrators received several requests to take down a graphic page called "Stab Israelis" and similar inciting pages, it neglected to abide by its own written policy against posting statements favoring brutal attacks, and did not remove these explicit calls for violence.¹²⁴ YouTube also allows ISIS accounts and videos on the platform, even though these accounts conflict with its policies.¹²⁵ Requests that YouTube voluntarily remove videos of militant terror groups have enjoyed limited success.¹²⁶

121. See SEC'Y OF STATE FOR THE HOME DEP'T, RADICALISATION: THE COUNTER-NARRATIVE AND IDENTIFYING THE TIPPING POINT 4 (2017), <https://www.parliament.uk/documents/commons-committees/home-affairs/Correspondence-17-19/Radicalisation-the-counter-narrative-and-identifying-the-tipping-point-government-response-Eighth-Report-26-17-Cm-9555.pdf> [<https://perma.cc/5LP6-QPBJ>]; see also Danielle Keats Citron, *Cyber Mobs, Disinformation, and Death Videos: The Internet as It Is (and as It Should Be)*, 118 MICH. L. REV. (forthcoming) (manuscript at 2) (book review) ("Right now, it is cheap and easy to wreak havoc online and for that havoc to go viral. Platforms act rationally . . . when they tolerate abuse that earns them advertising revenue and costs them nothing in legal liability.").

122. See Nina I. Brown, *Fight Terror, Not Twitter: Insulating Social Media From Material Support Claims*, 37 LOY. L.A. ENT. L. REV. 1, 10 (2016). Twitter has since taken a more aggressive approach, following the White House's official encouragement of social media platforms to block more terrorists from using their services. See Roter, *supra* note 101, at 1391–92, 1398. Twitter's efforts, however, do not satisfy international institutions such as the European Commission, which recently criticized it. See Sherman, *supra* note 65, at 147.

123. Roter, *supra* note 101, at 1399.

124. See Tsesis, *supra* note 17, at 60. Although Facebook initially refused to eliminate the "Stab Israelis" page, it eventually complied after an Israeli newspaper printed information about the company's intransigence. JNS.org, *Facebook Removes 'Stab Israelis' Page Following Article in Hebrew Press*, ALGEMEINER (Oct. 14, 2015, 2:47 PM), <https://www.algemeiner.com/2015/10/14/facebook-removes-stab-israelis-page-following-article-in-hebrew-press/> [<https://perma.cc/5DNN-VG4L>].

125. Tsesis, *supra* note 17, at 611–12.

126. *Id.*

Many technology experts agree that intermediaries' efforts to proactively detect and remove terrorists' content by utilizing technology also fall short.¹²⁷ Although intermediaries use technology to moderate harmful content by preventing upload or re-upload in related contexts,¹²⁸ such as copyright¹²⁹ and revenge porn,¹³⁰ they fail to develop and utilize sufficient technology for addressing terrorist-inciting content.

Moreover, intermediaries can utilize the very same data-driven technology they use to target their users with advertisements and enhance their profits to promote efficient identification and removal of terrorist content,¹³¹ so long as intermediaries have incentives to do so. But, thus far, technological suggestions for moderation of terrorist content have been rejected.¹³² There is concern that algorithms will fail to capture context accurately, resulting in both over-removal of content that is not incitement, but lawful information ("false positives"),¹³³ and under-

127. See Nicole Perlroth & Mike Isaac, *Terrorists Mock Bids to End Use of Social Media*, N.Y. TIMES (Dec. 7, 2015), <https://nyti.ms/1lKDwSF> [<https://perma.cc/SR4A-RPSP>] (providing the view of Hany Farid, chairperson of the computer science department at Dartmouth College, that the tracking system for child pornography he developed with Microsoft can be applied to terror content). *But see* GILLESPIE, *supra* note 47, at 98–101 ("State-of-the-art detection algorithms have a difficult time discerning offensive content or behavior even when they know precisely what they are looking for . . .").

128. Klonick, *supra* note 112, at 1635.

129. Maayan Perel & Niva Elkin-Koren, *Accountability in Algorithmic Copyright Enforcement*, 19 STAN. TECH. L. REV. 473 (2016); *see also* John Paul Titlow, *YouTube is using AI to police copyright—to the tune of \$2 billion in payouts*, FAST COMPANY (July 13, 2016), <https://www.fastcompany.com/4013603/youtube-is-using-ai-to-police-copyright-to-the-tune-of-2-billion-in-payouts> [<https://perma.cc/8AR8-3LFF>]. The EU even enacted a directive that includes filtering requirement. *See* Michelle Kaminsky, *EU's Copyright Directive Passes Despite Widespread Protests—But It's Not Law Yet*, FORBES (Mar. 26, 2019, 1:15 PM), <https://www.forbes.com/sites/michellekaminsky/2019/03/26/eus-copyright-directive-passes-despite-widespread-protests-but-its-not-law-yet/> [<https://perma.cc/MQ8U-B2FH>].

130. *See* Olivia Solon, *Facebook asks users for nude photos in project to combat 'revenge porn'*, GUARDIAN (Nov. 7, 2017, 5:16 PM), <https://www.theguardian.com/technology/2017/nov/07/facebook-revenge-porn-nude-photos> [<https://perma.cc/P6GC-R8VJ>].

131. Tsesis, *supra* note 17, at 611.

132. *See, e.g.,* Danielle Keats Citron, *Extremist Speech, Compelled Conformity, and Censorship Creep*, 93 NOTRE DAME L. REV. 1035, 1043–45 (2018).

133. *See* DAPHNE KELLER, DOLPHINS IN THE NET: INTERNET CONTENT FILTERS AND THE ADVOCATE GENERAL'S *GLAWISCHNIG-PIESCZEK V. FACEBOOK IRELAND* OPINION 18 (2019), <https://cyberlaw.stanford.edu/files/Dolphins-in-the-Net-AG-Analysis.pdf> [<https://perma.cc/HK32-9N6A>].

removal of inciting content that would allow harmful content to spread (“false negatives”).¹³⁴

C. Algorithmic-Based Targeting of Recommendations

Our own information—from the everyday to the deeply personal—is being weaponized These scraps of data, each one harmless enough on its own, are carefully assembled, synthesized, traded and sold. Taken to the extreme this process creates an enduring digital profile and lets companies know you better than you may know yourself. Your profile is a bunch of algorithms that serve up increasingly extreme content, pounding our harmless preferences into harm.¹³⁵

Hosting terrorists’ content and providing communication tools to all users, or allowing all users to share revenues, is not the whole story. Intermediaries directly influence network dynamics from the top down.¹³⁶ To promote engagement, intermediaries make their website “sticky” causing users to become addicted to the engagement and keeping them on the website.¹³⁷ One way to do so is to amplify content that triggers strong emotional registers, including hate speech and extrem-

134. GILLESPIE, *supra* note 47, at 99, 107. Using algorithms to detect hate speech is likely to result in far more false positives than false negatives because algorithms cannot capture context—tone, speaker, and audience. Danielle Keats Citron & Neil M. Richards, *Four Principles for Digital Expression (You Won’t Believe #3!)*, 95 WASH. U.L. REV. 1353, 1362 n.53 (2018).

135. Natasha Lomas, *Apple’s Tim Cook makes blistering attack on the ‘data industrial complex,’* TECHCRUNCH (Oct. 24, 2018, 5:24 AM), <https://techcrunch.com/2018/10/24/apples-tim-cook-makes-blistering-attack-on-the-data-industrial-complex/> [<https://perma.cc/RB4V-2M3P>] (quoting Apple CEO Tim Cook) (internal quotation marks omitted).

136. See OLIVIER SYLVAIN, DISCRIMINATORY DESIGNS ON USER DATA 4 (2018), <https://s3.amazonaws.com/kfai-documents/documents/28a74f6e98/Discriminatory-Designs-on-User-Data.pdf> [<https://perma.cc/82HZ-CVG7>] (“Intermediaries today do much more than passively distribute user content or facilitate user interactions. Many of them elicit and then algorithmically sort and re-purpose the user content and data they collect”); see also GILLESPIE, *supra* note 47, at 207 (“[P]latforms invoke and amplify particular forms of discourse and moderate away others”); O’Callaghan et al, *supra* note 36, at 460.

137. SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM: THE FIGHT FOR A HUMAN FUTURE AT THE NEW FRONTIER OF POWER 466 (2019) (explaining that just as ordinary people can become compulsive gamblers at the hands of gaming industry, behavioral technology at the service of intermediaries draws ordinary people into an “unprecedented vortex of social information”); see also Karen Hao, *YouTube is experimenting with ways to make its algorithm even more addictive*, MIT TECH. REV. (Sept. 27, 2019), <https://www.technologyreview.com/s/614432/youtube-algorithm-gets-more-addictive/> [<https://perma.cc/E2N6-AHPU>].

ism.¹³⁸ In fact, intermediaries are explicitly engineered to promote items that generate strong reactions because content that “evokes high-arousal emotion” is more likely to be shared, increase the engagement on the platform, and enhance the intermediary revenues.¹³⁹

Intermediaries collect information on users, spy on them without consent,¹⁴⁰ and target them with personalized recommendations to connect with others, as more accurate recommendations enhance the attractiveness of the platform and increase users’ engagement.¹⁴¹ By “systemization of the personal,” intermediaries influence, and even control, with whom users connect.¹⁴² Intermediaries can also control what content users see online based on their past activities,¹⁴³ influence their feelings,¹⁴⁴ and cause them to consume more extreme

138. SIVA VAIDHYANATHAN, *ANTISOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY* 5–9 (2018) (describing how Facebook develops algorithms that favor highly charged content and depend on a self-serving advertising system that precisely targets ads using massive surveillance and personal dossiers).

139. Jonah Berger & Katherine L. Milkman, *What Makes Online Content Viral?*, 49 J. MARKETING RES. 192, 202 (2012); see also Rupert Neate, *Extremists made £250,000 from ads for UK brands on Google, say experts*, GUARDIAN (Mar. 17, 2017, 1:30 PM), <https://www.theguardian.com/technology/2017/mar/17/extremists-ads-uk-brands-google-wagdi-ghoneim> [<https://perma.cc/JEF5-RZZW>].

140. The recent documents leaked from Facebook demonstrate how companies spy on their users without consent. Sebastian Klovig Skelton & Bill Goodwin, *Lawmakers study leaked Facebook documents made public today*, COMPUTERWEEKLY.COM (Nov 6, 2019), <https://www.computerweekly.com/news/252473540/Lawmakers-study-leaked-Facebook-documents-made-public-today> [<https://perma.cc/X5TD-Z27L>].

141. See ARI EZRA WALDMAN, *PRIVACY AS TRUST: INFORMATION PRIVACY FOR AN INFORMATION AGE* 84–85 (2018) (explaining that targeting combines information directly provided by a user, with data automatically generated from the use of the website, social media information, and data available from third parties to generate personalized information for each user); see also FRISCHMANN & SELINGER, *supra* note 64, at 150.

142. Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1021 (2014).

143. Jack M. Balkin, *Free Speech is a Triangle*, 118 COLUM. L. REV. 2011, 2027 (2018) (“The creation of personalized feeds is inevitably content-based—social media sites have to decide what content is likely to be most interesting to its end-users.”); see also Karen Levy & Solon Barocas, *Designing Against Discrimination in Online Markets*, 32 BERKELEY TECH. L.J. 1183, 1183, 1185–87 (2017).

144. Adam D.I. Kramer, Jamie E. Guillory & Jeffrey T. Hancock, *Experimental evidence of massive-scale emotional contagion through social networks*, 111 PROC. NAT’L ACAD. SCI. 8788, 8788–90 (2014).

content.¹⁴⁵ Through this new form of “surveillance capitalism,” intermediaries might predict and even engineer users’ desires and behavior as a means to produce revenue.¹⁴⁶ Intermediaries also present advertisements to users. The advertisements are not placed randomly; instead, they are targeted to the viewer based on information harvested from the viewer’s online behavior.¹⁴⁷ Targeting seems to improve in accuracy with AI development and usage of complex algorithms.¹⁴⁸

Intermediaries use algorithmic targeting to improve user experiences and enhance engagement, but their practices are often problematic and result in techno-social engineering.¹⁴⁹ In contrast to hosting content and providing communication tools, personalizing content is an active and selective action of intermediaries that does not offer equal choice to all users. The intermediaries determine what recommendations, content, and advertisement will be available to whom. Thus, different people see different content and have different online experiences.¹⁵⁰

Although it may appear that the system operates without human intervention, the intermediary structures it and the operation of the algorithm depends on the discretion of its programmers who can program it without neutrality or tinker with the results *ex post*.¹⁵¹ Personalized algorithmic targeting is

145. YouTube’s rabbit hole is the phenomenon of personalizing recommendations and playing recommended videos from a bottomless queue. See O’Callaghan et al., *supra* note 36, at 460; see also Hao, *supra* note 137.

146. FRISCHMANN & SELINGER, *supra* note 64, at 241 (“Our roles and desired can be engineered more than we appreciate.”); S.C. Matz et al., *Psychological targeting as an effective approach to digital mass persuasion*, 114 PROC. NAT’L ACAD. SCI. 12714, 12714 (2017); Shoshana Zuboff, *Big other: surveillance capitalism and the prospects of an information civilization*, 30 J. INFO. TECH. 75, 83 (2015).

147. See Julia Angwin, Madeleine Varner & Ariana Tobin, *Facebook Enabled Advertisers to Reach ‘Jew Haters,’* PROPUBLICA (Sept. 14, 2017, 4:00 PM), <http://www.propublica.org/article/facebook-enabled-advertisers-to-reach-jew-haters> [<https://perma.cc/JV7L-PS2R>].

148. On the influence of algorithms and AI on freedom of speech, see Jack M. Balkin, *Free Speech in the Algorithmic Society: Big Data, Private Governance, and New School Speech Regulation*, 51 U.C. DAVIS L. REV. 1149 (2018).

149. SYLVAIN, *supra* note 136, at 12; VAIDHYANATHAN, *supra* note 138, at 37, 55.

150. SYLVAIN, *supra* note 136, at 12.

151. See Michal Lavi, *Taking Out of Context*, 31 HARV. J.L. & TECH. 145, 154 (2017); Omer Tene & Jules Polonetsky, *Taming the Golem: Challenges of Ethical Algorithmic Decision-Making*, 19 N.C. J.L. & TECH. 125, 137–38 (2017). In a related context, it was revealed that Google’s executives and engineers tinker with the search results without neutrality to favor specific business or to increase or decrease the visibility of specific types of content. Kirsten Grind et al., *How Google Interferes*

different from algorithms that depend on users' positive choices to search for content, because the algorithm targets specific users based on their characteristics.¹⁵² Furthermore, even if a policy-neutral algorithm is used, the practice of targeting has self-reinforcing power. Algorithms are also never truly neutral.¹⁵³ This practice of algorithmic-based recommendations and targeting can influence users' future choices and the likelihood of changing their minds.¹⁵⁴ This influence may be positive or negative.¹⁵⁵ Beyond the general risk of infringement on users' autonomy and the risk of shackling them to their past interests and decisions,¹⁵⁶ intermediaries can present harmful content to specific users through an automated recommendation system.¹⁵⁷ Ysabel Gerrard demonstrates that by following terms related to the eating disorders bulimia and anorexia; she started getting more automatic recommendations for pro-eating-disorder content and suggestions for a list of users whose accounts she should follow.¹⁵⁸ Such recommendations can encourage bulimia and anorexia and result in self-harm. Likewise, YouTube has promoted "how to self-harm" tutorials for youngsters aged 13.¹⁵⁹ Some platforms ban content originated

With Its Search Algorithms and Changes Your Results, WALL STREET J. (Nov. 15, 2019, 8:15 AM), <https://www.wsj.com/articles/how-google-interferes-with-its-search-algorithms-and-changes-your-results-11573823753> [<https://perma.cc/3WMR-ERBT>].

152. On "policy-neutral" versus "policy-directed" algorithms, see Tene & Polonetsky, *supra* note 151, at 137–38. Note that Facebook's advertising algorithm already uses categories of targeting that can promote hate speech. See Kerri A. Thompson, *Commercial Clicks: Advertising Algorithms as Commercial Speech*, 21 VAND. J. ENT. & TECH. L. 1019, 1020–21 (2019).

153. Pauline T. Kim, *Manipulating Opportunity*, 106 VA. L. REV. (forthcoming 2020) (manuscript at 4) ("[E]ven if an advertiser uses neutral targeting criteria and intends to reach a diverse audience, an ad targeting algorithm may distribute information about opportunities in a biased way.").

154. Michal S. Gal, *Algorithmic Challenges to Autonomous Choice*, 25 MICH. TECH. L. REV. 59, 61–63 (2018).

155. For example, information can be used to target content that discourages users from engaging in destructive behavior. See, e.g., Hayley Tsukayama, *Facebook is using AI to try to prevent suicide*, WASH. POST (Nov. 27, 2017, 8:18 PM), <https://www.washingtonpost.com/news/the-switch/wp/2017/11/27/facebook-is-using-ai-to-try-to-prevent-suicide/> [<https://perma.cc/TPV3-3C5W>].

156. ZUBOFF, *supra* note 137, at 329–45.

157. Gerrard, *supra* note 38, at 4498.

158. *Id.* at 4503–05.

159. See Sean Keach, *YouTube caught promoting deadly 'how to self harm' tutorials for youngsters aged 13*, SUN (Feb. 5, 2019, 12:28 PM), <https://www.thesun.co.uk/tech/8356276/youtube-suicide-self-harm-videos> [<https://perma.cc/C35A-GDTM>].

from conspiracy websites as a matter of policy, but at the same time promote conspiracy theories by algorithmic targeting.¹⁶⁰ Algorithmic targeting can incite and reinforce extremism because users that consume extremist content are more likely to get a recommendation to connect with affiliates of foreign terrorist organizations,¹⁶¹ even if it is in direct opposition to the platform's own mechanism of control.¹⁶²

Algorithmic personalization of inciting content can be damaging to society, because its narrowing of information reinforces users' prior dispositions and gets them to engage with more extreme connections and controversial ideas.¹⁶³ In fact, algorithms may push users to consume more inciting content and to connect with individuals with more radical beliefs, thus causing a self-feeding cycle in which terrorist content replicates itself.¹⁶⁴ Algorithmic incitement of an individual can have consequences on his social network by affecting his engagement with others and strengthening a feedback loop that enforces itself, amplifying ideological extremism, and pursuing viral spread.¹⁶⁵ Yet, in a response to economic imperatives, intermediaries are radically indifferent to the consequences.¹⁶⁶

Can words kill? Prosecutors seem to answer this question with a resounding "yes," as demonstrated by a recent case in which a woman was found guilty of involuntary manslaughter after encouraging her boyfriend to commit suicide via text messages and a phone call.¹⁶⁷ "Words can kill" is not an abstract notion. Inciting words have tangible and long-term ef-

160. See Manheim & Kaplan, *supra* note 38, at 147.

161. See Schwartz, *supra* note 106, at 1208–09 (explaining that Facebook's data-usage-policy algorithm can connect terrorists with sympathizers and other terrorists).

162. Gerrard, *supra* note 38, at 4505–06.

163. ELI PARISER: THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU 35–48 (2011).

164. Schwartz, *supra* note 106, at 1209.

165. JULIE E. COHEN, BETWEEN TRUTH AND POWER: THE LEGAL CONSTRUCTIONS OF INFORMATIONAL CAPITALISM 76, 85 (2019).

166. ZUBOFF, *supra* note 137, at 505, 509.

167. See *Commonwealth v. Carter*, 115 N.E.3d 559, 561–65, 574 (Mass. 2019), *cert. denied sub nom. Carter v. Massachusetts*, 140 S. Ct. 910 (2020); Daniel Etcovitch, *Commonwealth v. Michelle Carter: Involuntary Manslaughter Conviction for Encouraging Suicide Over Text and Phone*, JOLT DIGEST (June 25, 2017), <https://jolt.law.harvard.edu/digest/commonwealth-v-michelle-carter-involuntary-manslaughter-conviction-for-encouraging-suicide-over-text-and-phone> [https://perma.cc/ZKB2-FX3V].

fects. Recent research demonstrates that words may lead to criminal behavior.¹⁶⁸ Terrorists' propaganda can also be linked to actual terrorist incidents.¹⁶⁹ But do platforms kill? Should intermediaries be held responsible for terrorists' attacks? Should they be liable for terrorist content on their platforms? Should they bear responsibility for incitement caused by an algorithm?

Because platforms operate differently, their liability must correspond with the action they have taken. It would be inappropriate to evaluate their liability according to a uniform standard; instead, their liability for aiding terrorism should be proportional to their activity, whether they host content or use algorithms. For this reason, it is vital to map and understand the roles intermediaries play online to make rational legal policy.

III. THE NEW SCHOOL OF REGULATION: INTERMEDIARIES' LIABILITY TO TERROR CONTENT

In traditional, or what Professor Jack Balkin calls old-school speech regulation, states imposed imprisonment or fines to regulate or control speech.¹⁷⁰ This is a "dualist or dyadic system of speech regulation."¹⁷¹ In this model, there are essentially two players: the state and the speaker.¹⁷² In contrast, the twenty-first century has created a pluralist model, what Professor Balkin calls new-school regulation, with many different players.¹⁷³ This model can be condensed into a triangle of actors: the state, the infrastructure, and the speaker.¹⁷⁴ Whereas old-school regulation is directed at speakers, new-school speech regulation is

168. See Raphael Cohen-Almagor, *Taking North American White Supremacist Groups Seriously: The Scope and Challenge of Hate Speech on the Internet*, 7 INT'L J. CRIME JUST. & SOC. DEMOCRACY, June 2018, at 38, 38–39; see also Simon Cottee, *Can Facebook Really Drive Violence?*, ATLANTIC (Sept. 9, 2018), <https://www.theatlantic.com/international/archive/2018/09/facebook-violence-germany/569608/> [https://perma.cc/3KMK-PD97].

169. See, e.g., Foo Yun Chee, *EU parliament votes to fine internet firms for not removing extremist content quickly*, REUTERS (Apr. 17, 2019, 3:03 PM), <https://reut.rs/2WIJkPy> [https://perma.cc/5ZQF-2H7G].

170. Balkin, *supra* note 143, at 2015.

171. *Id.* at 2013.

172. *Id.*

173. *Id.* at 2014.

174. *Id.* at 2014–15.

also directed at the infrastructure,¹⁷⁵ such as internet platforms that are private actors and currently not bound by the First Amendment.¹⁷⁶ States (or supranational entities like the European Union) attempt to regulate, threaten, coerce or co-opt elements of key players that shape the internet in order to get their infrastructure to surveil, police, and control speakers.¹⁷⁷ As digital infrastructure companies become increasingly more powerful in governing their spaces and collecting and analyzing content from their end users, states demand more from these companies through new-school speech regulation,¹⁷⁸ in an attempt to incentivize cooperation from the private sector.¹⁷⁹

The following Part reviews the legal response to terrorists' speech. It refers to the normative considerations taken into account in the new-school form of regulation, which imposes liability and obligations on intermediaries for terrorists' speech.

A. *Legal Response to Terrorist's Content on Social Media*

1. *Terrorists' Content Regulation in the Shadow of the Law*

A consensus exists regarding the dangers posed by terrorists' use of the internet.¹⁸⁰ Governments around the world have recognized this threat and have started forcing intermediaries to remove unlawful material from their platforms.¹⁸¹ Online intermediaries such as Facebook, Google, and Twitter have been

175. *Id.* at 2015.

176. *See, e.g.,* Prager University v. Google LLC, No. 18-15712, 2018 WL 913661, at *1 (9th Cir. Feb. 26, 2020) ("Despite YouTube's ubiquity and its role as a public-facing forum, it remains a private forum, not a public forum subject to judicial scrutiny under the First Amendment.").

177. *See* Jack M. Balkin, *Old-School/New-School Speech Regulation*, 127 HARV. L. REV. 2296, 2297-99 (2014).

178. *See id.*

179. O'Leary, *supra* note 68, at 559-60.

180. Tsesis, *supra* note 69, at 675-84.

181. DAPHNE KELLER, WHO DO YOU SUE? STATE AND PLATFORM HYBRID POWER OVER ONLINE SPEECH (Hoover Inst., Aegis Series Paper No. 1902, 2019), https://www.hoover.org/sites/default/files/research/docs/who-do-you-sue-state-and-platform-hybrid-power-over-online-speech_0.pdf [https://perma.cc/RW6R-BKVG]; Brian Chang, *From Internet Referral Units to International Agreements: Censorship of the Internet by the UK and EU*, COLUM. HUM. RTS. L. REV., Winter 2018, at 114, 116-20.

threatened with litigation in Australia,¹⁸² Israel,¹⁸³ Germany,¹⁸⁴ France,¹⁸⁵ Spain,¹⁸⁶ the United Kingdom,¹⁸⁷ the EU,¹⁸⁸ and many other jurisdictions. The European Commission adopted measures to effectively tackle unlawful online content beyond takedown notices, as it took a more proactive approach towards terrorist content.¹⁸⁹ Recently, the European Parliament also voted to fine firms like Facebook, Google, and Twitter up to four percent of their turnover if they persistently fail to re-

182. See Evelyn Douek, *Australia's New Social Media Law Is a Mess*, LAWFARE (Apr. 10, 2019, 8:28 AM), <https://www.lawfareblog.com/australias-new-social-media-law-mess> [<https://perma.cc/P8BK-TKPQ>].

183. In Israel a new social media legislative bill would enable courts to order social networks to remove posts that are not under Israel's jurisdiction. Klein & Flinn, *supra* note 17, at 82. As a result, social networks might block more accounts related to terror organizations. See *Hezbollah says some of its Facebook and Twitter pages shuttered*, TIMES ISRAEL (June 23, 2018, 11:10 AM), <https://www.timesofisrael.com/facebook-twitter-pages-of-hezbollah-shuttered/> [<https://perma.cc/T8A7-N7DL>]. But this bill ultimately did not pass. Gil Hoffman, *Netanyahu halts Facebook bill at last-minute*, JERUSALEM POST (July 18, 2018 12:39 PM), <https://www.jpost.com/Israel-News/Netanyahu-halts-Facebook-bill-at-last-minute-562802> [<https://perma.cc/8LMS-68HY>].

184. See Chang, *supra* note 181, at 116–18; Reuters in Frankfurt, *German Facebook boss to be investigated for 'ignoring racist posts'*, GUARDIAN (Nov. 10, 2015, 2:07 PM), <https://www.theguardian.com/technology/2015/nov/10/german-facebook-boss-investigated-hamburg-prosecutors-hate-speech> [<https://perma.cc/556X-EPLM>].

185. Lizzie Plaugic, *France wants to make Google and Facebook accountable for hate speech*, VERGE (Jan. 27, 2015, 12:38 PM), <https://www.theverge.com/2015/1/27/7921463/google-facebook-accountable-for-hate-speech-france> [<https://perma.cc/K95P-LLAW>].

186. See Roter, *supra* note 101, at 1400–01.

187. See Terrorism Act 2006, c.11. Under this law, “platforms have only two days to comply with a takedown request; otherwise, they are deemed to have ‘endorsed’ the terrorist content.” See GILLESPIE, *supra* note 47, at 37. In addition, the Counter-Terrorism and Border Security Act of 2019 updates terrorism offences for the digital age and grants the authorities more power to tackle the threat posed to the United Kingdom by terrorism. Counter-Terrorism and Border Security Act 2019, c.3.

188. See Chang, *supra* note 181, at 117–18; Liat Clark, *Facebook and Twitter must tackle hate speech or face new laws*, WIRED UK (Dec. 5, 2016), <https://www.wired.co.uk/article/us-tech-giants-must-tackle-hate-speech-or-face-legal-action> [<https://perma.cc/4JYG-RPFA>]; see also GILLESPIE, *supra* note 47, at 121 (“[I]n 2016 all of the major platforms promised European lawmakers to ensure review of possible terrorist or extremist content within a one-day window.”).

189. See Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (‘Directive on electronic commerce’), arts. 14, 15, 16, 2000 O.J. (L 178) 13, 14; Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, 2018 O.J. (L 63) 52.

move extremist content within one hour of being asked to do so by authorities.¹⁹⁰

“On May 31, 2016, Facebook, Microsoft, Twitter, and YouTube entered into an agreement with the European Commission to remove ‘hateful’ speech within twenty-four hours if appropriate under terms of service.”¹⁹¹ Technology companies also contemplated trying to establish a database for detecting banned violent terrorist images, audio, and video files.¹⁹² The database was supposed to include unique digital fingerprints of banned content so that files could be flagged and removed instantly.¹⁹³ At first, technology companies rejected the idea; however, six months later, they announced plans for an industry database “to help prevent the spread of violent terrorist imagery.”¹⁹⁴ The tech companies issued guidelines that limited the use of the database for the most extreme terrorists’ images that violate the content policies of all companies.¹⁹⁵ Furthermore, according to the guidelines, the removal of hashed material would not be automatic but rather subjected to a review by the tech company according to its own specific policies.¹⁹⁶

Recently, the European Parliament issued a proposal for a regulation for preventing the dissemination of terrorist content online.¹⁹⁷ The regulation proposed obligations to prevent unlawful content from reappearing after its removal.¹⁹⁸ Similarly, in a related context, the European Court of Justice held that EU law does not preclude intermediaries such as Facebook from being ordered to remove identical and, in certain circumstances, equivalent comments previously declared unlawful.¹⁹⁹ Thus, it seems that legal obligations for more proactive moderation are becoming more widespread in the EU.

190. See Chee, *supra* note 169.

191. Citron, *supra* note 132, at 1038.

192. *Id.* at 1043.

193. *Id.* at 1043–44.

194. *Id.* at 1044–45.

195. *Id.* at 1045.

196. *Id.* at 1045.

197. See EUR. PARL. DOC. (COM 0640) (2018).

198. See *id.* at 26.

199. See Case C-18/18, *Eva Glawischnig-Piesczek v Facebook Ireland Limited* 2019 EUR-Lex CELEX LEXIS 458 (Oct. 3 2019). For criticism on the Advocate General’s opinion, see KELLER, *supra* note 133, at 15–28.

The Counter Terrorism Internet Referral Units (CTIRU), which was created in the United Kingdom but was adopted in a number of countries, followed a policy of ad hoc, ex post removal policy.²⁰⁰ Given the success of the CTIRU's efforts, Europol established its Internet Referral Unit, describing them as a "partnerships with the private sector."²⁰¹ Ninety-one percent of the content reported by the unit has been removed.²⁰²

Clearly, governments' threat of legislation incentivizes intermediaries to invest resources in reducing terrorists' content. Although this dynamic has the potential to reduce terrorist content, it does not address algorithmic targeting nor lead to compensation of terror victims.

2. The U.S. Approach

In the United States, the First Amendment grants extensive protection to freedom of speech and restricts government from constraining speech.²⁰³ Thus, there is a presumption against content-based speech restrictions.²⁰⁴ Despite the threat of terrorists using social media, different regulatory initiatives to impose obligations on intermediaries regarding terrorists' content have not been enacted by Congress or adopted by the industry.²⁰⁵ The current law does not impose specific positive obligations on online intermediaries for preventing terrorist's content on their platforms. Nevertheless, victims of terror attacks have filed claims under the civil enforcement provisions of the fed-

200. See Chang, *supra* note 181, at 120–22.

201. EUROPOL, EU INTERNET REFERRAL UNIT: YEAR ONE REPORT HIGHLIGHTS 3 (2016), https://www.europol.europa.eu/sites/default/files/documents/eu_iru_1_year_report_highlights.pdf [<https://perma.cc/P33K-9HRN>].

202. *Id.* at 5.

203. U.S. CONST. amend. I ("Congress shall make no law . . . abridging the freedom of speech, or of the press.").

204. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

205. See, e.g., Intelligence Authorization Act for Fiscal Year 2016, H.R. 2596, 114th Cong. (2015); Requiring Reporting of Online Terrorist Activity Act, S. 2372, 114th Cong. (2015); GILLESPIE, *supra* note 47, at 39 (referring to the "Obama administration urg[ing] tech companies to develop new strategies for identifying extremist content, either to remove it, or report it to the national security authorities"); Citron, *supra* note 132, at 1036 (referring to Senator Lieberman's demand from media giants to remove terrorists' content).

eral antiterrorism laws, basing their theory of liability on material support doctrines.²⁰⁶

a. Material Support Doctrines

Section 2339A of the United States Code prohibits one from providing “material support or resources . . . knowing or intending that they are to be used in preparation for, or in carrying out” a violation of certain offenses, including terrorism.²⁰⁷ Unlike § 2339A, § 2339B does not include a knowing or intentional mens rea element, or specific intent, but rather prohibits the willful provision of anything of value to a group designated as a Foreign Terrorist Organization (FTO).²⁰⁸ Thus, if a provider knows that an organization has been officially designated as “terrorist,” or if it knows that an organization engages in terrorism, it may be found guilty. The lack of a specific intent requirement under § 2339B has been a persistent source of criticism.²⁰⁹

In *Holder v. Humanitarian Law Project (HLP)*,²¹⁰ the Supreme Court upheld the constitutionality of 2339B, and determined that the federal government had the authority to prohibit groups from working with terrorist organizations even when their violent operations were interlinked with more benign functions, such as charity work.²¹¹ Because of the grave danger posed by terrorist organizations, the Supreme Court interpreted coordination in broad terms, determining that working in coordination with or at the command of FTOs serves to legitimize and further their terrorist means, and therefore these actions

206. See, e.g., *Crosby Complaint*, *supra* note 7, at 49–50.

207. 18 U.S.C. § 2339A (2018); see also Schwartz, *supra* note 106, at 1186.

208. 18 U.S.C. § 2339B (2018); see also Schwartz, *supra* note 106, at 1186. An FTO is an organization that the Secretary of State has designated to be foreign terrorists. See *id.* The list of FTOs maintained by the State Department encompasses sixty-one such groups. Bureau of Counterterrorism, U.S. Dep’t of State, *Foreign Terrorist Organizations* (last visited Nov. 12, 2019), <http://www.state.gov/j/ct/rls/other/des/123085.htm> [<https://perma.cc/ZG7U-W93P>].

209. See, e.g., David Cole, *Out of the Shadows: Preventive Detention, Suspected Terrorists, and War*, 97 CALIF. L. REV. 693, 724–25 (2009); Rachel E. VanLandingham, *Jailing the Twitter Bird: Social Media, Material Support to Terrorism and Muzzling the Modern Press*, 39 CARDOZO L. REV. 1, 48 (2017).

210. 561 U.S. 1 (2010).

211. *Id.* at 7–8. In *HLP*, the plaintiffs sought to provide training in international law, political involvement, and negotiation strategies to Partiya Karkeran Kurdistan and the Liberation Tigers of Tamil Eelam. *Id.* at 9, 14–15. Both groups are on the State Department’s designated terrorist organization list. *Id.* at 9. The material support, however, was not directly linked to illegal terrorists’ actions. *Id.* at 16.

are considered material support.²¹² D.C. District Court Judge Collyer recently ordered Iran and Syria to pay \$4.1 million in damages to a family of terror victims, because these countries materially supported and gave resources to Hamas in Israel, which contributed to the hostage taking and murder of a 16-year-old victim.²¹³

Sections 2339A and 2339B do not create a private civil cause of action, but § 2333 “allows private parties who are nationals of the United States to sue in federal district court and receive treble damages and attorney’s fees if they were injured in their ‘person, property, or business by reason of international terrorism.’”²¹⁴ The scienter requirement “may be satisfied when an entity recognizes it is supporting a terrorist organization; it needs not be aware that its aid is going to advance a specific terrorist conspiracy.”²¹⁵

In September 2016, Congress enacted the Justice Against Sponsors of Terrorism Act (JASTA),²¹⁶ which expanded anti-terrorism law by adding 18 U.S.C. § 2333(d).²¹⁷ JASTA provides that U.S. nationals may assert liability against a person who aids and abets or conspires with a person who commits an act of international terrorism.²¹⁸

“Since its enactment, section 2333 has primarily targeted financial institutions, banks, and charitable organizations that provide material support in the form of fundraising to FTOs.”²¹⁹ Following the terrorist attacks in the last three years,

212. *Id.* at 30–31; *see also* *United States v. Mehanna*, 735 F.3d 32, 46, 49–50 (1st Cir. 2013) (holding that sufficient evidence of “coordination” existed where Mehanna had merely attempted to travel to an al-Qaeda training camp). For criticism of the *HLP* decision, *see* David Cole, *The First Amendment’s Borders: The Place of Holder v. Humanitarian Law Project in First Amendment Doctrine*, 6 HARV. L. & POL’Y REV. 147 (2012).

213. Elisha Ben Kimon, *US court blames murdered teen’s family for living in territories*, YNET NEWS (July 3, 2018 9:57 AM), <https://www.ynetnews.com/articles/0,7340,L-5302974,00.html> [<https://perma.cc/LEJ4-ABE2>].

214. Klein & Flinn, *supra* note 17, at 85 (quoting 18 U.S.C. § 2339B (2018)).

215. Tsesis, *supra* note 17, at 620.

216. Pub. L. No. 114-222, 130 Stat. 852 (2016) (codified in scattered sections of 18 and 28 U.S.C.).

217. *Id.* § 4, 130 Stat. at 854.

218. *See* Jennifer Steinhauer, Mark Mazzetti & Julie Hirschfeld Davis, *Congress Votes to Override Obama Veto on 9/11 Victims Bill*, N.Y. TIMES (Sept. 28, 2016), <https://nyti.ms/2dkxCaB> [<https://perma.cc/J7H7-LV2E>].

219. Schwartz, *supra* note 106, at 1088.

however, § 2333 has become the basis for civil cases against social media companies.²²⁰ Family members of terror victims argue that social media companies knowingly cooperate with designated foreign terrorists in posting, displaying, or hosting propaganda, which have resulted in the deaths of American nationals.²²¹ Section 230 and other legal requirement, however, pose challenges for plaintiffs.

b. Section 230 of the Communication Decency Act

Section 230(c)(1) of the Communications Decency Act (CDA)²²² reflects the strong U.S. bias favoring free speech over other values.²²³ Under the subsection heading “Protection for ‘Good Samaritan’ blocking and screening of offensive material,” it directs, “[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.”²²⁴ In passing § 230, Congress sought to promote self-regulation, free speech, and foster the rise of vibrant internet enterprises.²²⁵ Thus, a defendant that provides a forum for communicating materials is not likely to be responsible as a content provider.²²⁶

220. *Id.* at 1089.

221. *Id.* at 1189; see Freilich, *supra* note 10, at 677.

222. 47 U.S.C. § 230 (2018).

223. JEFF KOSSEFF, *THE TWENTY-SIX WORDS THAT CREATED THE INTERNET* 246 (2019); Eric Goldman, *Why Section 230 Is Better than the First Amendment*, 95 NOTRE DAME L. REV. REFLECTION 33 (2019).

224. 47 U.S.C. § 230(c)(1).

225. See 47 U.S.C. § 230(b)(1)–(2); Anupam Chander, *How Law Made Silicon Valley*, 63 EMORY L. J. 639, 651–52 (2014).

226. Cecilia Ziniti, *The Optimal Liability System for Online Service Providers: How Zeran v. America Online Got it Right and Web 2.0 Proves It*, 23 BERKELEY TECH. L.J. 583, 585 (2008) (“Almost uniformly, courts have interpreted § 230’s safe harbor broadly.”). There are, however, some exceptions to the immunity. It is limited to civil claims and does not apply to cases that are based on federal criminal laws. 47 U.S.C. § 230(c)(2). In addition, there have been legislative efforts to narrow this defense for specific types of speech. See Allow States and Victims to Fight Online Sex Trafficking Act of 2017, Pub. L. No. 115-164, 132 Stat. 1253; see also Mary Graw Leary, *The Indecency and Injustice of Section 230 of the Communications Decency Act*, 41 HARV. J.L. & PUB. POL’Y 553, 556–57 (2018); Eric Goldman, *‘Worst of Both Worlds’ FOSTA Signed Into Law, Completing Section 230’s Evisceration*, TECH. & MARKETING L. BLOG (Apr. 11, 2018), <https://blog.ericgoldman.org/archives/2018/04/worst-of-both-worlds-fosta-signed-into-law-completing-section-230s-evisceration.htm> [<https://perma.cc/2LK9-RSWX>].

Courts have interpreted § 230 broadly and repeatedly shielded web enterprises from lawsuits in a plethora of cases.²²⁷

Section 230 applies to secondary liability. However, if the intermediary is “responsible” in whole or in part for the “creation or development” of content, courts may find the intermediary liable as an information content provider.²²⁸ Section 230 does not define “creation” or “development.” Thus, the line between the service itself and the creation of information is blurry and the scope of liability is ambiguous.²²⁹ In the beginning, courts applied the immunity in nearly all cases.²³⁰

A decade ago, an important case, *Fair Housing Council of San Fernando Valley v. Roommates.com, LLC*,²³¹ led to confusion regarding intermediaries’ liability. That case dealt with a website that allowed users to find roommates, Roommates.com.²³² The website required users to fill in a personal profile and answer several questions, including questions about the users’ genders and sexual orientations, and to express their preferences on these issues with respect to roommates.²³³ The answers were chosen from check box and drop down menus.²³⁴ An internal search engine allowed users to search roommates while filtering unfit matches according to these criteria.²³⁵ The website also

227. See Chander, *supra* note 225, at 653; Lavi, *supra* note 48, at 867–70; see also *Herrick v. Grindr LLC*, 765 F. App’x 586, 589 (2d Cir. 2019); *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 330 (4th Cir. 1997) (“By its plain language, § 230 creates a federal immunity to any cause of action that would make service providers liable for information originating with a third-party user of the service.”); *Caraccioli v. Facebook, Inc.*, 167 F. Supp. 3d 1056, 1066 (N.D. Cal. 2016) (holding that the immunity applies even when the intermediary knew of the defamatory content, reviewed it, and decided not to remove it), *aff’d*, 700 F. App’x 588 (9th Cir. 2017).

228. Anupam Chander & Uyén P. Lé, *Free Speech*, 100 IOWA L. REV. 501, 514 (2015); Zak Franklin, *Justice for Revenge Porn Victims: Legal Theories to Overcome Claims of Civil Immunity by Operators of Revenge Porn Websites*, 102 CALIF. L. REV. 1303, 1316 (2014).

229. See Ken S. Myers, *Wikimmunity: Fitting the Communications Decency Act to Wikipedia*, 20 HARV. J.L. & TECH. 163, 201 (2006).

230. See David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373, 461–62 (2010); Freilich, *supra* note 10, at 683.

231. 489 F.3d 921 (9th Cir. 2007), *aff’d in part, rev’d in part, vacated in part en banc*, 521 F.3d 1157 (9th Cir. 2008).

232. *Id.* at 924.

233. *Id.* at 924, 926.

234. *Id.* at 926.

235. *Id.* at 928–29.

included an open section for users' comments.²³⁶ The intermediary sent periodical emails to users, which included only potential matches.²³⁷ The Fair Housing Council argued that the questions in the drop down menus violated the federal Fair Housing Act²³⁸ and led to discrimination.²³⁹

The first court to consider the issue dismissed the case because of § 230 immunity.²⁴⁰ On appeal, the Ninth Circuit declined to grant Roommates.com immunity.²⁴¹ The en banc rehearing majority opinion reached the same conclusion.²⁴² Writing for the majority, Chief Judge Kozinsky stressed that although the Communications Decency Act created immunity, it "was not meant to create a lawless no-man's-land on the Internet."²⁴³ The en banc court held that the intermediary provided a limited set of pre-populated discriminatory answers and required users to choose.²⁴⁴ The court determined that Roommates.com was an information content provider with respect to the illegal housing discriminatory questions on the site.²⁴⁵ An information content provider is "more than a passive transmitter of information."²⁴⁶ The court also declined to grant immunity for the internal search engine and the email mechanism because both did not use neutral tools but instead channeled the distribution of discriminatory content.²⁴⁷ However, the court held immunity applied to materials posted in the open comment section.²⁴⁸

236. *Id.* at 924.

237. *Id.* at 928–29.

238. 42 U.S.C. § 3604(c) (2018).

239. *Roommates.com*, 489 F.3d at 924.

240. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, No. CV 03-09386PA(RZX), 2004 WL 3799488, at *6 (C.D. Cal. Sept. 30, 2004).

241. *Roommates.com*, 489 F.3d at 926.

242. Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1175 (9th Cir. 2008) (en banc).

243. *Id.* at 1164.

244. *Id.* at 1164–67.

245. *Id.* at 1164.

246. *Id.* at 1166.

247. *Id.* at 1167.

248. The court reasoned that:

A website operator can be both a service provider and a content provider: If it passively displays content that is created entirely by third parties, then it is only a service provider with respect to that content. But as to content that it creates itself, or is "responsible, in whole or in part" for creating or developing, the website is also a content provider. Thus, a

After *Roommates.com*, courts expressed doubts regarding the scope of immunity, resulting in many contradictory judicial decisions. For example, in *Dyroff v. Ultimate Software Group, Inc.*,²⁴⁹ the court held that immunity applied even when the intermediary used data mining and machine learning algorithms that allowed the provider to analyze data on users and to channel users to participate in particular groups and consume particular types of content.²⁵⁰

On appeal, the Ninth Circuit affirmed the lower court, concluding that by recommending user groups and sending email notifications, Ultimate Software, through its Experience Project website, was acting as a publisher of others' content.²⁵¹ These functions—recommendations and notifications—are tools meant to facilitate the communication and content of others and are not content in and of themselves.²⁵² The court concluded that Ultimate Software's functions on Experience Project most resemble the "Additional Comments" features in *Roommates.com*.²⁵³ The recommendation and notification functions helped facilitate this user-to-user communication, but it did not materially con-

website may be immune from liability for some of the content it displays to the public but be subject to liability for other content.

Id. at 1162–63.

249. No. 17-cv-05359-LB, 2017 WL 5665670 (N.D. Cal. Nov. 26, 2017), *aff'd*, 934 F.3d 1093 (2019).

250. *Id.* at *1–2. Data mining and machine learning allowed the intermediary to personalize recommendations to users regarding content and discussion groups that might be of interest for the user. *Id.* In some cases, the recommendations channeled users to unlawful content. *Id.* at *9. In one instance, the recommendations allegedly steered a user to a discussion group dedicated to the sale of narcotics. *Id.* at *4. The communication on the website allegedly allowed the user to buy heroin and he died because he consumed it. *Id.* at *1. The court dismissed the case ruling that recommendations to users are ordinary, neutral functions of social network websites. *Id.* at *9. The intermediary used neutral tools that merely provided a framework that could be utilized for proper or improper purposes. *Id.* at *10. As such, it did not "create or develop" the information even in part. *Id.* at *1. Therefore, the immunity applied. *Id.* The situation in *Dyroff* is similar to the email service in *Roommates.com*. The court could reach a different conclusion because the platform gained new information from users' content and behavior to create a site architecture that affects behavior.

251. *Dyroff*, 934 F.3d at 1094, 1096.

252. *Id.* at 1096.

253. *Id.* at 1099.

tribute to the alleged unlawful content.²⁵⁴ Dyroff appealed to the Supreme Court.²⁵⁵

A similar narrow interpretation regarding algorithmic contribution to unlawful content was also adopted in the related context of intellectual property.²⁵⁶ In contrast, in *Daniel v. Armslist, LLC*,²⁵⁷ the Wisconsin Court of Appeals interpreted *Roommates.com* broadly and did not grant immunity for website features that facilitated the purchase of illegal firearms that were used in a fatal shooting.²⁵⁸ The court did not grant immunity even though only some of the transactions ended up being illegal on the buyer's side.²⁵⁹ On appeal, the Supreme Court of Wisconsin reversed the decision of the appellate court, reasoning that the defendant provided neutral tools that could be used for lawful purpose, and third parties used them to create unlawful content.²⁶⁰ The court also explained that § 230 does not contain a good faith requirement.²⁶¹ Liability is derived from the intermediary's function as publisher or speaker.²⁶² Thus, according to the Wisconsin Supreme Court, the immunity applies even if the intermediary has knowledge of unlawful content on its platform, and even if it designs the website to facilitate unlawful activity by not including phone or email verification.²⁶³

254. *Id.*

255. Petition for a Writ of Certiorari, *Dyroff v Ultimate Software*, No. 19-849 (U.S. Jan. 02, 2020).

256. *See* *Ventura Content, Ltd. v. Motherless, Inc.*, 885 F.3d 597, 605–08 (9th Cir. 2018) (concluding that neither tagging, group, nor algorithmic suggestions for “most popular” material change the user-submitted status of the material).

257. 913 N.W.2d 211 (Wis. Ct. App. 2018), *rev'd*, 926 N.W.2d 710 (Wis. 2019).

258. *Id.* at 214, 224.

259. *See id.* at 215. The opinion does not detail the exact circumstances when its statutory reading would support a section 230 defense. *See* Eric Goldman, *Wisconsin Appeals Court Blows Open Big Holes in Section 230—Daniel v. Armslist*, TECH. & MARKETING L. BLOG (Apr. 25, 2018), <https://blog.ericgoldman.org/archives/2018/04/wisconsin-appeals-court-blows-open-big-holes-in-section-230-daniel-v-armslist.htm> [<https://perma.cc/E9VM-U6U4>].

260. *Armslist*, 926 N.W.2d at 721–22, 727, *cert. denied*, 140 S. Ct. 562 (2019).

261. *Id.* at 722.

262. *Id.* at 723–24.

263. *See id.* at 726 (“That Armslist may have known that its site could facilitate illegal gun sales does not change the result. Because § 230(c)(1) contains no good faith requirement, courts do not allow allegations of intent or knowledge to defeat a motion to dismiss.”). The plaintiff filed a petition to the United States Supreme Court on this case, but the petition was denied. *Armslist*, 140 S. Ct. 562.

In general, courts choose to err on the side of immunity; however, the exact standards for excluding intermediaries from immunity remain unclear.

c. Challenges to Civil Lawsuits under Sections 2333 and 230 and Proximate Cause

Sections 2339A and 2339B are criminal provisions. However, § 2333 allows a plaintiff to file civil suits. Thus, courts have concluded that § 230 applies to civil claims based on federal crimes.²⁶⁴ Defendants in civil litigation argue that they did not publish the content and therefore, they are not responsible for something they did not produce.²⁶⁵ Most courts have granted media companies' motions to dismiss based on § 230, rejecting civil suits even when plaintiffs based their claim on direct liability and involvement of the intermediaries in the creation of information and targeting of offending messages.²⁶⁶

Another challenge to suits under § 2333 is the requirement for causal connection between the conduct and the injury under the material support statutes.²⁶⁷ This is a well-established principle of common law in torts. The requirement for causal connection is reflected in the words "by reason of" in § 2333(a).²⁶⁸ This requirement is not but-for causation, but different circuits have different standards for establishing proximate cause.²⁶⁹ The Seventh Circuit maintains a relatively low standard: there must be a substantial probability that a service is a contributing cause of an attack.²⁷⁰ In contrast, the Second

264. See, e.g., *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 157–58 (E.D.N.Y. 2017).

265. See Schwartz, *supra* note 106, at 1192.

266. See e.g., *Crosby v. Twitter*, 303 F. Supp. 3d 564, 574–75 (E.D. Mich. 2018).

267. Schwartz, *supra* note 106, at 1200–02.

268. 18 U.S.C. § 2333(a) (2018) ("Any national of the United States injured in his or her person, property, or business *by reason of* an act of international terrorism" (emphasis added)); see also *Fields v. Twitter*, 881 F.3d 739, 744–45 (9th Cir. 2018) ("If, in creating civil liability through § 2333, Congress had intended to allow recovery upon a showing lower than proximate cause, we think it either would have so stated expressly or would at least have chosen language that had not commonly been interpreted to require proximate cause for the prior 100 years' In light of these assumptions, we understand that the phrase 'by reason of' connotes some degree of directness." (alteration adopted) (quoting *Rothstein v. UBS AG*, 708 F.3d 82, 95 (2013))).

269. *Brown*, *supra* note 122, at 26–27.

270. *Id.* at 27; see also *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 697 (7th Cir. 2008) (en banc); Schwartz, *supra* note 106, at 1201.

Circuit requires that a terrorist attack be a foreseeable consequence of the specific act of support,²⁷¹ and the Ninth Circuit requires direct relation between the platform and the plaintiffs' injury.²⁷²

As the following subsections demonstrate, courts have dismissed civil cases based on material support statutes against media giants. *Cohen v. Facebook, Inc.*²⁷³ involved two sets of claims filed by the "Force Plaintiffs" and the "Cohen Plaintiffs" against Facebook that focus on the presence of the Palestinian terrorist group Hamas in social media.²⁷⁴ The Cohen Plaintiffs, 20,000 Israeli citizens, filed a negligence suit, asserting that Palestinian terrorists used Facebook to incite, enlist, and organize would be killers to slaughter Jews.²⁷⁵ Facebook allegedly knowingly allowed terror organizations to operate Facebook accounts using their own names, and Facebook's approach towards removal was inconsistent.²⁷⁶ The plaintiffs further alleged that Facebook's algorithms connected users with other users, groups, and content that might interest them.²⁷⁷ This recommendation system played a vital role in spreading terrorist content to those who were most susceptible to the message and likely to act upon the incitement.²⁷⁸ Because of wild incitement on social media, the plaintiffs argued that future attacks threaten them.²⁷⁹ The case was dismissed for lack of standing because the individual plaintiffs asserted only a threat or fear of possible future harm, which was not "actual or imminent."²⁸⁰

The Force Plaintiffs, family members of victims of terrorists' attacks in Israel, filed a suit against Facebook. The plaintiffs based their claim on the material support doctrine, asserting that Facebook was liable for its own content that was not gen-

271. See *Rothstein*, 708 F.3d at 91.

272. *Fields*, 881 F.3d at 746, 750.

273. 252 F. Supp. 3d 140 (E.D.N.Y. 2017), *aff'd sub nom.* *Force v. Facebook, Inc.*, 934 F.3d 53, 76 (2d Cir. 2019).

274. *Id.* at 146, 157–58.

275. *Id.* at 146.

276. *Id.* at 146–47.

277. *Id.*

278. *Id.*

279. *Id.* at 146.

280. *Id.* at 150 ("A plaintiff alleging only an 'objectively reasonable possibility' that it will sustain the cited harm at some future time does not satisfy this requirement." (quoting *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409–10 (2013))).

erated by another, because Facebook provided “network[ing]” and “broker[ed]” links among terrorists.²⁸¹

The court dismissed the case under § 230.²⁸² It ignored the legal problem of inciting-content recommendations and concluded that there was no difference between making the system available to terrorists and providing terrorists with valuable services.²⁸³ The services are part and parcel of access to a Facebook account and so imposing liability on that basis would turn on “Facebook’s choices as to who may use its platform.”²⁸⁴ The court further reasoned that the features criticized by the plaintiffs operate solely in conjunction with content posted by Facebook users.²⁸⁵ Thus, the court rejected the case and denied the plaintiffs’ request to reconsider the ruling.²⁸⁶

On appeal to the Second Circuit, the Force Plaintiffs argued that the district court “improperly dismissed their claims because Section 230(c)(1) does not provide immunity to Facebook under the circumstances of their allegations.”²⁸⁷ They argued that providing a forum for communication for terrorists, facilitating personalized “newsfeed” pages for each user, and providing “friends suggestions” by using algorithms extend beyond a function of an information content provider.²⁸⁸ They argued that, in fact, Facebook is acting as a publisher of the information, and even provides the content by itself, by targeting it with algorithms and contributing to terrorists’ content.²⁸⁹

The Second Circuit concluded that the district court properly applied § 230(c)(1) to plaintiffs’ federal claims.²⁹⁰ The court determined that § 230 should be read broadly.²⁹¹ Giving Hamas a forum for communication falls under § 230(c)(1), because

281. Force Complaint at 2, 49–50, *Cohen*, 252 F. Supp. 3d. 140 (No. 1:16-cv-05158).

282. *Cohen*, 252 F. Supp. 3d at 158–61.

283. *Id.*

284. *Id.* at 157.

285. *Id.*

286. *Id.* at 161.

287. *Force v. Facebook, Inc.*, 934 F.3d 53, 57 (2019).

288. *Id.* at 58–59, 65.

289. *Id.* at 64–65.

290. *Id.* at 71.

291. *Id.* at 64 (“In light of Congress’s objectives, the Circuits are in general agreement that the text of Section 230(c)(1) should be construed broadly in favor of immunity.”).

Facebook does not publish users' information and had no bearing on the plaintiffs' claims.²⁹² The court disagreed with the plaintiffs' contentions that the Facebook's algorithm turns Facebook into a publisher or a developer of the content because Facebook's algorithms are content neutral and merely display other users' content to users.²⁹³ The court concluded that making Hamas's content more visible, available, and usable by using algorithms does not amount to developing content.²⁹⁴

Chief Judge Katzmann departed from the majority's conclusion on the issue of immunity for Facebook's suggestions for friends and content by its algorithms.²⁹⁵ He explained that the sophisticated algorithms of Facebook bring users together after "collecting mountains of data" about their activity on and off its platform.²⁹⁶ Chief Judge Katzmann reasoned:

Facebook unleashes its algorithms to generate friend, groups, and event suggestions based on what it perceives to be the user's interests. If a user posts about a Hamas attack or searches for information on a Hamas leader, Facebook may "suggest" that the user become friends with Hamas terrorists on Facebook or join Hamas-related Facebook groups.²⁹⁷

Chief Judge Katzmann's opinion did not apply the immunity of § 230 for such functions, because, according to his judgment, it goes against the aim of § 230 to suppress indecent material.²⁹⁸ When a plaintiff brings a claim that is not based on the content of information shown, but rather on the connections Facebook's

292. *Id.* at 70.

293. *Id.*

294. *Id.* ("[M]aking information more available is . . . an essential part of traditional *publishing*; it does not amount to 'developing' that information within the meaning of Section 230.").

295. *Id.* at 76 (Katzmann, C.J., concurring in part and dissenting in part).

296. *Id.* at 77.

297. *Id.* (citation omitted).

298. *See id.* at 79–80 ("The legislative history illustrates that in passing § 230 Congress was focused squarely on protecting minors from offensive online material . . ."). *But see* Jeff Kosseff, *Correcting the Record on Section 230's Legislative History*, TECH. & MARKETING L. BLOG (Aug. 1, 2019), <https://blog.ericgoldman.org/archives/2019/08/correcting-the-record-on-section-230s-legislative-history-guest-blog-post.htm> [<https://perma.cc/RQ2S-CAWK>] (explaining that the broad language of Section 230's protection reflects the intent to protect the industry and its users' ability to communicate freely extends beyond prevention of indecent material).

algorithms make between individuals, the CDA does not bar relief.²⁹⁹

Chief Judge Katzmann concluded that Facebook may be immune under the CDA for allowing Hamas accounts, because “Facebook acts solely as the publisher of the Hamas users’ content.”³⁰⁰ But the immunity does not apply when Facebook “conducts statistical analyses of that information and delivers a message based on those analyses.”³⁰¹ Such activities in fact create networks of people, foment terrorism, and cause grave consequences.³⁰² Force appealed to the Supreme Court.³⁰³

Many other cases have focused on the presence of ISIS on social media. These cases have also been dismissed for lacking proximate cause under § 230. In *Fields v. Twitter, Inc.*,³⁰⁴ the wife of Lloyd Fields, an American contractor who was killed by Abu Zaid in an ISIS shooting attack in Jordan,³⁰⁵ contended that Twitter “knowingly permitted the terrorist group ISIS to use its social network as a tool for spreading extremist propaganda, raising funds and attracting new recruits,” constituting “material support.”³⁰⁶ The district court dismissed the case, explaining that Twitter was immune under § 230.³⁰⁷ Another ground for dismissal was the plaintiffs’ failure to demonstrate that they were injured “by reason of” Twitter’s conduct.³⁰⁸ On appeal, the court of appeals ignored § 230, but affirmed the district

299. See *Cohen*, 934 F.3d at 80.

300. *Id.* at 83.

301. *Id.*

302. See *id.* at 86 (explaining that social media algorithms can be utilized by foreign governments to interfere in American elections, target emotions, and promote extremism and polarization).

303. Petition for a Writ of Certiorari, *Force v. Facebook, Inc.*, No. 19-859 (U.S. Jan. 2, 2020); Mike Swift, *Facebook could face first Supreme Court challenge to Section 230 immunity*, MLEX (Jan. 13, 2020), <https://mlexmarketinsight.com/insights-center/editors-picks/Data-Protection-Privacy-and-Security/north-america/facebook-could-face-first-supreme-court-challenge-to-section-230-immunity> [https://perma.cc/9R6S-U76H].

304. 881 F.3d 739 (9th Cir. 2018).

305. *Id.* at 741–42.

306. Complaint at 1, *Fields v. Twitter, Inc.*, 217 F. Supp. 3d 1116 (N.D. Cal. 2016) (No. 16-cv-00213).

307. *Fields*, 217 F. Supp. 3d at 1127–30.

308. This is the proximate cause argument. See *id.* at 1126–27.

court's decision on the ground that the plaintiffs failed to adequately plead proximate cause.³⁰⁹

A similar case, *Gonzalez v. Google, Inc.*,³¹⁰ followed the ISIS-driven terror attacks on La Belle Bistro and other coordinated attacks in Stade de France and the Bataclan Theater, which resulted in 130 deaths.³¹¹ Nohemi Gonzalez, an America citizen, was killed in the La Belle Bistro and her family member filed a suit against Google (as owner of YouTube), Facebook, and Twitter.³¹² The plaintiffs argued that the defendants knowingly permitted ISIS to use their social networks as a tool for spreading extremist propaganda, raising funds, and attracting new recruits in violation of the § 2333.³¹³ They further argued that media giants employed algorithms that promote terrorists' propaganda.³¹⁴ For example, Google's algorithms help users to locate similar videos and accounts, including videos and accounts related to ISIS even if they do not know the correct identifier.³¹⁵ Moreover, the plaintiffs alleged that Google derived revenues from ads and targeted ads to viewers based on algorithms that analyzed users and the videos they posted.³¹⁶ Relying on the *Roommates.com* case, the plaintiffs alleged that Google was a content creator.³¹⁷

The court dismissed the case, distinguishing it from *Roommates.com* and concluding that Google did not materially contribute to the actual content of ISIS videos.³¹⁸ In addition, the court concluded the ads Google embedded next to ISIS content (which were themselves third party content), were not objectionable and did not play any role in making ISIS videos unlawful or encouraging individuals to commit acts of terror-

309. *Fields*, 881 F.3d at 741; see also *Cain v. Twitter, Inc.*, No. 17-cv-02506-JD, 2018 WL 4657275, at *2 (N.D. Cal. Sept. 24, 2018) (dismissing the case because of the lack of proximate cause).

310. 282 F. Supp. 3d 1150 (N.D. Cal. 2017).

311. *Id.* at 1154.

312. *Id.* at 1153.

313. *Id.* The plaintiffs also argued that JASTA repealed the immunity provisions of the CDA, rendering section 230(c)(1) inapplicable in this case. *Id.* at 1157–61.

314. *Id.* at 1155.

315. *Id.*

316. *Id.*

317. *Id.* at 1168–69.

318. *Id.* at 1168–71.

ism.³¹⁹ Google used “neutral tools” in targeting ads and therefore did not develop the unlawful content.³²⁰ An amended complaint in this case was also recently dismissed.³²¹

*Pennie v. Twitter, Inc.*³²² involved a shooting of five Dallas police officers in 2016.³²³ As with previous cases, the plaintiffs asserted that social media platforms allowed terrorists’ content on their platforms and “developed” that content.³²⁴ In addition, they argued that Google shared advertising revenues with FTO’s and was not immune under § 230.³²⁵ The court dismissed the case because of a lack of causal connection.³²⁶ The court declined to resolve the question whether § 230 applied where the intermediary shared advertising revenues with users that had been designated as an FTO.³²⁷ Recently, a second case regarding the Dallas shooting, with different plaintiffs, was dismissed in the court of Northern District of Texas also because of a lack of proximate cause.³²⁸

In *Crosby v. Twitter, Inc.*,³²⁹ victims and families of deceased victims of the June 2016 mass shooting by Omar Mateen in an LGBT nightclub in Orlando filed a suit against the three media giants for providing a social media platform to terrorists.³³⁰ They argued that videos and messages on social media radical-

319. *Id.* at 1168.

320. *See id.* (“Google’s provision of neutral tools, including targeted advertising, does not equate to content development under section 230, because . . . the tools do not encourage the posting of unlawful or objectionable material.”).

321. *See* Gonzalez v. Google, Inc., 335 F. Supp. 3d 1156, 1179 (N.D. Cal. 2018).

322. 281 F. Supp. 3d 874 (N.D. Cal. 2017).

323. *Id.* at 876.

324. *Id.* at 877, 891.

325. *Id.* at 884.

326. *Id.* at 892.

327. *Id.* at 891; *see also* Eric Goldman, *Fourth Judge Says Social Media Sites Aren’t Liable for Supporting Terrorists—Pennie v. Twitter*, TECH. & MARKETING L. BLOG (Dec. 10, 2017), <https://blog.ericgoldman.org/archives/2017/12/fourth-judge-says-social-media-sites-arent-liable-for-supporting-terrorists-pennie-v-twitter.htm> [<https://perma.cc/7ZNB-J3US>].

328. Retana v. Twitter, Inc., No. 3:19-CV-0539-B, 2019 WL 6619218, at *1 (N.D. Tex. Dec. 5, 2019); *see also* Eric Goldman, *Twelfth Lawsuit Against Social Media Providers for “Materially Supporting Terrorists” Fails—Retana v. Twitter*, TECH. & MARKETING L. BLOG (Dec. 8, 2019), <https://blog.ericgoldman.org/archives/2019/12/twelfth-lawsuit-against-social-media-providers-for-materially-supporting-terrorists-fails-retana-v-twitter.htm> [<https://perma.cc/77DX-PZ68>].

329. 303 F. Supp. 3d 564 (E.D. Mich. 2018).

330. *Id.* at 565.

ized Mateen and triggered him to commit the terror attack.³³¹ The court based its decision on the merits of the substantive law,³³² and the lack of proximate cause, adopting a high threshold to meet this requirement.³³³ The Sixth Circuit rejected the material support claim because of the proximate cause requirements.³³⁴

In *Clayborn v. Twitter, Inc.*,³³⁵ the families of the victims of the 2015 attack in San Bernardino filed a suit against Facebook, Twitter, and Google.³³⁶ They argued that in addition to providing the infrastructure for ISIS's activity, the defendants profited from ISIS by placing ads on ISIS postings.³³⁷ Moreover, Google shared advertising revenues with ISIS.³³⁸ The plaintiffs argued that by combining ISIS postings with advertisements, media giants create unique content.³³⁹ The Northern District of California recently dismissed the case, concluding that the plaintiff failed to establish proximate cause between the social media platforms and the injuries.³⁴⁰

Sinclair v. Twitter, Inc.,³⁴¹ involved an ISIS terrorist attack in Barcelona on August 17, 2017, where a speeding truck was the

331. *Id.* at 569.

332. *Id.* at 573–74. The court reasoned that the plaintiffs did not prove that Mateen carried out the attack under ISIS's express direction. *Id.* at 573. In addition, the court concluded that there was no factual ground to suggest that the defendants "encouraged" Mateen to commit the attack or operated in concert with him. *Id.* at 574. The court also interpreted the knowledge requirement in the material support statute broadly and determined that the defendants lacked specific knowledge that they provided services to Mateen or that the defendants knew of any terrorist activities of ISIS that could be facilitated by the specific use of their services by any identified member or affiliate of ISIS. *See id.*

333. *See id.* at 579. The court reasoned that the plaintiffs did not prove that the defendants' furnishing of social media platforms to ISIS caused the specific attack. *Id.* Indeed, ISIS claimed responsibility for the attack after it was completed. *Id.* at 576. But nothing in the complaint hints of communication between ISIS and Mateen beforehand. *Id.* at 579.

334. *Crosby v. Twitter, Inc.*, 921 F.3d 617, 624–26 (6th Cir. 2019).

335. Nos. 17-cv-06894-LB & 18-cv-00543-LB, 2018 WL 6839754 (N.D. Cal. Dec. 31, 2018).

336. *Id.* at *1–*3.

337. *Id.* at *6–*7.

338. *Id.* at *2.

339. *Id.* at *4.

340. *Id.* at *9. The Northern District of California later cited *Clayborn* in reaching the same conclusion. *See Palmucci v. Twitter, Inc.*, No. 18-cv-03947-WHO, 2019 WL 1676079, at *3–*4 (N.D. Cal. Apr. 17, 2019).

341. No. C 17-5710 SBA (N.D. Cal. Mar. 20, 2019).

primary weapon; one of the victim's children filed an action against social media giants.³⁴² The court dismissed the suit because the allegations did not show proximate causation.³⁴³ However, it left the door open for claims under wrongful death and "negligent infliction of emotional distress" state laws.³⁴⁴

In sum, most of the material support cases against media giants were dismissed based on § 230. Chief Judge Katzmann's minority opinion in *Force* presented a different approach³⁴⁵ but the majority opinion, as well as many other courts, did not divert from the traditional interpretation of § 230. In other cases, the courts rejected the plaintiffs' arguments based on a narrow interpretation of the substantive law and a lack of a causal link between the intermediary's actions and the terrorist attack.

B. Normative Analysis

Imposing liability on intermediaries rests on a junction of several branches of law. It balances constitutional rights and public safety. It considers efficiency and cost-benefit analysis of legal obligations, and the technological context involves new questions and considerations of innovation policy. Providing a legal structure to identify values and outlining the right balance is a crucial judgment call, albeit a difficult one. The following Part focuses on three central situations that require nuanced examination: intermediation, failure to remove harmful content, and algorithmic targeting.

1. Freedom of Expression and Public Safety

Antiterrorism laws threaten freedom of speech, but terrorist groups threaten public safety.³⁴⁶ How should democracies balance these two competing rights of freedom and safety? In the United States,³⁴⁷ freedom of speech is more protected than in

342. *Id.* at 1.

343. *Id.* at 6–7.

344. *See id.* at 2, 14.

345. *Force v. Facebook, Inc.*, 934 F.3d 53, 80–84 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part).

346. *See Tsesis, supra* note 17, at 617 (“[J]udges should protect constitutional rights of free speech, while recognizing congressional authority to enforce the Preamble of the Constitution’s mandate to safeguard public safety.”).

347. Oreste Pollicino & Marco Bassini, *Free speech, defamation and the limits to freedom of expression in the EU: a comparative analysis*, in RESEARCH HANDBOOK ON EU INTERNET LAW 508, 514 (Andrej Savin & Jan Trzaskowski eds., 2014).

other western democracies, whether it is political or commercial speech.³⁴⁸ Courts and scholars have developed numerous theories about why free speech should receive special protection.³⁴⁹ Freedom of speech promotes individual autonomy and self-fulfillment,³⁵⁰ as well as the search for truth.³⁵¹ A free marketplace of ideas is essential for a liberal democracy.³⁵² Contemporary theories on democracy focus on protecting and promoting a democratic participatory culture.³⁵³ Accordingly, freedom of speech is required to assure an individual's ability to participate in the production and distribution of culture.³⁵⁴ This theory stresses both individual liberty and collective self-governance.³⁵⁵

The digital age, particularly the transition from the internet society to what Professor Balkin calls the "algorithmic society," push freedom of expression to the forefront, raising old concerns regarding expression.³⁵⁶ The right balance must be struck between the benefits of free expression and the potential harm of inciting content to public safety. In the digital age, intermediaries host inciting content as they provide communication tools that enhance the flow of information.³⁵⁷ They also target personalized recommendations on relevant content and con-

348. See *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011); Jane R. Bambauer & Derek E. Bambauer, *Information Libertarianism*, 105 CALIF. L. REV. 335, 338 (2017); Tamara R. Piety, "A Necessary Cost of Freedom"? *The Incoherence of Sorrell v. IMS*, 64 ALA L. REV. 1, 4 (2012).

349. NEIL RICHARDS, *INTELLECTUAL PRIVACY: RETHINKING CIVIL LIBERTIES IN THE DIGITAL AGE* 10 (2015).

350. Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 303, 311–16 (1991) (arguing that freedom of expression enables self-determination of an individual by familiarizing public at large with his ways of life, allowing his preferences to gain public recognition and acceptability, and letting him know that he is not alone and his experiences are known to others).

351. See, e.g., JOHN STUART MILL, *ON LIBERTY* 43–44 (Elizabeth Rapaport ed., Hackett Publ'g Co. 1978) (1859); JOHN MILTON, *AEROPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING* 74–75 (T. Holt White ed., London, R. Hunter 1819) (1644).

352. See ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 26 (1948).

353. Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 3–4 (2004).

354. *Id.* at 4.

355. *Id.* at 1.

356. Balkin, *supra* note 148, at 1151–52.

357. See *supra* Part II.A.

nections.³⁵⁸ This targeting may result in an enhanced flow of unlawful terrorist content and increased ease for terrorists to connect with each other and recruit.³⁵⁹ Finally, intermediaries neglect to ban unlawful terrorists' content effectively and allow online terrorists' content to proliferate.³⁶⁰ This neglect has consequences for public safety offline.³⁶¹ The law arguably should impose liability on intermediaries for hosting terrorist speech, targeting unlawful content, and neglecting to ban unlawful content consistently.

However, imposing liability on intermediaries for material support, or by any other regulatory means, may result in collateral censorship³⁶² because the new school of regulation affects the practical ability of users to speak.³⁶³ It may result in censorship of legitimate speech, even if the intention is to remove unprotected speech.³⁶⁴ Consequently, much content will be removed following referral units' requests from intermediaries, or even by using proactive algorithmic enforcement and over-blocking users' content and accounts without transparency.³⁶⁵ This may happen even if the users are not affiliated with an FTO, because intermediaries tend to address context improperly and fail to distinguish terrorists' propaganda from other cultural content.³⁶⁶

358. See *supra* Part II.C.

359. See *id.*

360. See *supra* Part II.B.

361. See *id.*

362. Felix T. Wu, *Collateral Censorship and the Limits of Intermediary Immunity*, 87 NOTRE DAME L. REV. 293, 295–96 (2011) (“Collateral censorship occurs when a (private) intermediary suppresses the speech of others in order to avoid liability that otherwise might be imposed because of that speech.”).

363. Balkin, *supra* note 143, at 2016.

364. See *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) (“The overbreadth doctrine prohibits the Government from banning unprotected speech if a substantial amount of protected speech is prohibited or chilled in the process.” (citing *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973))). For more on censorship creep, see Citron, *supra* note 132, at 1049–71.

365. See Chang, *supra* note 181, 143–47.

366. See FRISCHMANN & SELINGER, *supra* note 64, at 146 (“[A]lgorithms can have a difficult time correctly identifying content that has context-specific meaning.”); ZEYNEP TUFECKI, *TWITTER AND TEAR GAS: THE POWER AND FRAGILITY OF NETWORKED PROTEST* 150–51 (2017); Citron & Richards, *supra* note 134, at 1362 (explaining that algorithms are likely to result in over-removal of legitimate content because they are not sensitive enough to context). Tufecki provides an example in which “Facebook had adopted the U.S. State Department’s list of ‘terrorist organizations,’ which included the Kurdish insurgent group, the PKK.” *Id.* at 150. How-

Over-censorship is likely to hinder users' constitutional right to free speech on social networks.³⁶⁷ It would curb users' ability to criticize the government and limit their ability to resist oppressive regimes.³⁶⁸ It would probably infringe on speakers' autonomy, disrupt the exchange of ideas, and undermine civic and cultural participation. In addition, one might argue that by imposing liability on intermediaries, the government infringes on their right to free speech.

This chilling effect has a silver lining, and may be beneficial to some degree.³⁶⁹ To strike the right balance between conflicting fundamental rights, courts and policymakers should focus on the role the intermediary plays in conveying the message, the severity of the message, and whether the message belongs to an unprotected category of "low-value" speech.³⁷⁰ The role an intermediary plays in the offending speech should affect the preemptive measures taken against bearing liability, which, in turn, would influence the degree of censorship.³⁷¹ Furthermore, one should always keep an open eye on benefits of the service the intermediary offers to society as a whole.

For general platforms that do not encourage incitement in particular,³⁷² intermediation generally enhances freedom of ex-

ever, "Facebook fail[ed] to distinguish PKK propaganda from ordinary content that was merely about Kurds and their culture, or news about the group or the insurgency." *Id.* AI in content moderation can likely improve the accuracy of algorithmic enforcement. See Niva Elkin-Koren, *Fair Use By Design*, 64 UCLA L. REV. 1082, 1097 (2017). However, at this time, "[t]hese systems are . . . just not very good yet." See GILLESPIE, *supra* note 47, at 98.

367. *Packingham v. North Carolina*, 137 S. Ct. 1730, 1737 (2017) (noting that websites have become embedded in our culture as ways to communicate and exercise our constitutional rights).

368. TUFECKI, *supra* note 366, at 134.

369. See CASS R. SUNSTEIN, *ON RUMORS: HOW FALSEHOODS SPREAD, WHY WE BELIEVE THEM, AND WHAT CAN BE DONE* 74–75 (Princeton Univ. Press 2014).

370. See DANIELLE KEATS CITRON, *HATE CRIMES IN CYBERSPACE* 200 (2014); Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2168 (2015); Geoffrey R. Stone, *Privacy, the First Amendment, and the Internet*, in *THE OFFENSIVE INTERNET: PRIVACY, SPEECH, AND REPUTATION* 174, 177 (Saul Levmore & Martha C. Nussbaum eds., 2010).

371. *Tsesis*, *supra* note 17, at 614 (arguing that computer intermediaries are not culpable for acting as instruments for third parties, even if the latter intended the material to be threatening).

372. See *supra* note 89. Platforms that are devoted to harmful expressions may infringe on the freedom of expression of victims and silence them. See Lavi, *supra* note 89, at 52–53. Thus, the infringement on the expression of victims may exceed the benefits of speech to speakers on these platforms. See *id.*

pression and does not aim to enhance terrorist content. Extending liability to these platforms for hosting terrorists' messages would result in collateral censorship.³⁷³ Intermediaries would strive to reduce their risks by removing content automatically or proactively including protected speech without sensitivity to context.³⁷⁴ Liability can also chill the development of communication tools and hinder users' ability to find relevant information and develop the marketplace of ideas.³⁷⁵

Sharing revenues with users is not intended to aid terrorism. It might be desirable if FTO's official profiles did not exist on social networks, but sharing revenues with users in general is not a serious threat to public safety, even if an FTO indirectly receives a small amount of money this way. Liability for sharing revenues with users may not have a serious effect on impeding users' speech today; it might result in the abandonment of this business model, which would reduce one of the incentives of users to speak.

Neglecting to remove terrorist content is different from limiting speech because of intermediaries' fear of liability. Policing harmful speech is subject to a strict scrutiny test.³⁷⁶ But narrowly tailored liability could be limited to narrow categories of speech and specific methods of enforcement may reduce the chilling effect.

Certain forms of terrorists' speech on social media are unprotected by the First Amendment, such as promotion of "imminent lawless action,"³⁷⁷ true intentional threats against individuals or groups,³⁷⁸ or posts that seek to cooperate, legitimize, recruit, coordinate, or indoctrinate on behalf of groups listed on the State Department's list of designated terrorist organization.³⁷⁹ The scope of these categories can be interpreted narrowly or broadly, influencing the degree of the chilling effect on

373. Citron, *supra* note 132, at 1039.

374. TUFECKI, *supra* note 366, at 160–62.

375. Seth F. Kreimer, *Censorship by Proxy: The First Amendment, Internet Intermediaries, and the Problem of the Weakest Link*, 155 U. PA. L. REV. 11, 16–17 (2006).

376. *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 636 (1994).

377. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); *see also* Tsesis, *supra* note 69, at 666–67 ("The incitement doctrine applies only to imminently dangerous statements and hence is of limited value to combat internet terrorist statements.").

378. *Virginia v. Black*, 538 U.S. 343, 359–60 (2003); Tsesis, *supra* note 69, at 670.

379. *See* Tsesis, *supra* note 69, at 670–75.

online speech.³⁸⁰ In general, however, these forms of speech can be regulated without resulting in a conflict with free speech, because within the categories of unprotected speech, “the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake, that no process of case-by-case adjudication is required,” and “the balance of competing interests is clearly struck.”³⁸¹ Furthermore, unprotected speech arguably does not promote values of free speech because the right of free speech is granted to both sides. By imposing fear, inciting speech may chill the speech of others, hinder their autonomy, and compromise participation in the marketplace of ideas.³⁸²

As we turn to intermediaries’ third party liability, the concern of collateral over-censorship arguably can be mitigated by restricting intermediaries’ liability to instances where they are aware of the terrorist content. Extending intermediaries’ liability to all content items on a platform would result in over-censorship, but imposing liability only for not taking down unprotected terrorists’ content and FTO’s accounts would lead to a desirable and proportionate chilling effect on speech. In such cases, the scope of liability is clearer and it does not require intermediaries to take proactive measures. Such a liability regime is superior to complete immunity, as immunity allows wild incitement, which results in great harm online and offline. Focusing on the type of speech and the intermediary’s awareness strikes the right balance between free speech and public safety.

Algorithmic targeting might promote speech and enhance users’ experiences as they meet like-minded people, but channeling users to specific content might create an echo chamber that limits the development of a free marketplace of ideas. An echo chamber might also strengthen terrorists’ messages aimed at some users. Big data analysis and artificial intelligence (AI) might predict and modify users’ behavior by utilizing their

380. See, e.g., Guiora, *supra* note 71, at 140–41; Sherman, *supra* note 65, at 142; Leibowitz, *supra* note 28, at 818.

381. *New York v. Ferber*, 458 U.S. 747, 763–64 (1982).

382. Jeremy K. Kessler & David E. Pozen, *The Search for an Egalitarian First Amendment*, 118 COLUM. L. REV. 1953, 1994–95 (2018) (“[A]rguments involving speech on both sides focus on the degree to which one party’s expressive activity compromises the ability of other private parties to exercise their own First Amendment rights.”).

natural inclinations.³⁸³ Algorithmic detection of a specific user that is interested in extreme ideas can result in targeting of recommendations, pushing users to consume unlawful terrorists' content and connect with members of FTOs, thereby changing the structure of the social network.

The ability of the intermediary to predict and influence users' behavior as a means to produce revenues raises a red flag. Intermediaries' liability for targeting can be justified to promote public safety. The chilling effect on recommendations is expected to be proportional because the intermediary can design the platform to avoid targeting unlawful content. It is true imposing liability in these cases may result in over censorship of legitimate recommendations, but intermediaries' self-censorship of recommendations is different than censoring users' speech because recommendations are based on third parties' content but are not the content itself. Arguably, the intermediary has more control over its algorithms relative to users' third party content and has more ability to avoid unlawful recommendations, especially in cases of defined forms of unprotected speech. Additionally, the potential harm for public safety that can result from recommendations on explicit incitement to terror is extensive and can bolster terror attacks outside the internet.

One may argue that imposing liability on intermediaries for algorithmic targeting of recommendations undermines their freedom to design platforms as they see fit. Imposing liability on targeting can also undermine intermediaries' freedom of expression.³⁸⁴ Recommendations might not, however, be classified as speech, but rather a tool aimed to assist users in finding the right content.³⁸⁵ On the other hand, recommendations arguably extend well beyond a functional tool. As have pointed out, the tool itself is an expression of the intermediaries' ideas³⁸⁶ or

383. ZUBOFF, *supra* note 137, at 456–57.

384. See Tim Wu, *Machine Speech*, 161 U. PA. L. REV. 1495, 1515–21 (2013); see also Toni M. Massaro, Helen Norton & Margot E. Kaminski, *SIRI-ously 2.0: What Artificial Intelligence Reveals about the First Amendment*, 101 MINN. L. REV. 2481, 2483–84 (2017).

385. See Wu, *supra* note 384, at 1517–24 (differentiating speech and functional tools).

386. See *id.* at 1525. Professor Tim Wu refers to software navigation and map programs as harder cases of differentiation between communication of ideas and functionality. *Id.* He tends to believe that they are functional tools. *Id.* Other scholars adopt a broad approach to free speech and machine speech in particular. They

advice to users.³⁸⁷ Assuming that recommendations are speech, intermediaries cannot have it both ways.³⁸⁸ They cannot allege to be active speakers when seeking First Amendment protection and only navigation tools when facing tort liability. By enjoying the right of free speech, they undermine their immunity from civil liability as conduits and can bear liability as speakers.³⁸⁹

Furthermore, intermediaries collect mountains of data on users and use them to create algorithmic recommendations. This makes them powerful, knowledgeable speakers and justifies the application of a “listener-centered” approach for government regulation.³⁹⁰ This approach permits regulation of speech for knowledgeable or powerful speakers when their expression frustrates the autonomy and self-governance of their listeners. Algorithmic recommendations that are directed at susceptible users and exploit their vulnerabilities to enhance the intermediaries’ profits make the case for “listener-centered” approaches and justify imposing liability for targeting unprotected speech.

2. Corrective Justice

A central justification for imposing liability on intermediaries is corrective justice. Aristotelian philosophy defines corrective justice as a rectification of harm, wrongfully caused by one per-

argue that platforms direct users to material created by other and report it as newspapers report and thus, recommendations enjoy free speech protection. See Eugene Volokh & Donald M. Falk, *Google: First Amendment Protection for Search Engine Results*, 8 J.L. ECON. & POL’Y 883, 891 (2012). Another approach is that algorithms represent the message of its developers and are tied to human editorial judgement. See Stuart Minor Benjamin, *Algorithms and Speech*, 161 U. PA. L. REV. 1445, 1479 (2013).

387. See James Grimmelman, *Speech Engines*, 98 MINN. L. REV. 868, 874 (2014). In fact, this machine speech repeats users’ speech and at times mimics it. Thus, this repetition promotes free speech. See Lavi, *supra* note 151, at 179–80.

388. See Oren Bracha & Frank Pasquale, *Federal Search Commission? Access, Fairness, and Accountability in the Law of Search*, 93 CORNELL L. REV. 1149, 1193 (2008). However, courts have reached different conclusions regarding search engines, recognizing intermediaries’ right of free speech for page-rank and rejecting their liability for optimization. See *Langdon v. Google, Inc.*, 474 F. Supp. 2d 622, 630 (D. Del. 2007); *Search King, Inc. v. Google Tech. Inc.*, No. CIV-02-1457-M, 2003 WL 21464568, at *3 (W.D. Okla. May 27, 2003). These rulings have been criticized in literature. See Frank Pasquale, *Reforming the Law of Reputation*, 47 LOY. U. CHI. L.J. 515, 524–27 (2015); Wu, *supra* note 384, at 1496–1503, 1526–27 (describing the potential harm of computer-generated speech that invites regulation).

389. See RICHARDS, *supra* note 349, at 87.

390. See Helen Norton, *Powerful Speakers and Their Listeners*, 90 U. COLO. L. REV. 441, 443, 451 (2019).

son to another, by means of a direct transfer of resources from the injurer to the victim.³⁹¹ Accordingly, every interaction embodies correlative rights and duties that are imposed on both parties. This deontological, non-consequentialist concept focuses on bilateral interactions, which are not reliant on external values.³⁹²

Corrective justice theorists offer different motives for rectification—including conceptions of faults and rights³⁹³—based on responsibility,³⁹⁴ and nonreciprocal risk.³⁹⁵ Most theorists explain that there should be a causal link between the act and the consequence, but causation is not enough for imposing liability.³⁹⁶ Negligence or moral fault must exist to justify compensation for the caused harm.³⁹⁷

The reason why harm is insufficient for justifying liability can be explained by nonreciprocal risks theory.³⁹⁸ Liability exists when a person causes disproportionate risk, relative to the victim's risk-creating activity.³⁹⁹ The entitlement to recover the loss is granted to all injured parties to the extent the risks imposed on them were nonreciprocal.⁴⁰⁰ The goal is to distinguish between risk that violates individual interests and background risks that must be borne by society as a whole.⁴⁰¹

391. 2 ARISTOTLE, *Nicomachean Ethics bk. V*, in THE COMPLETE WORKS OF ARISTOTLE 1781, 1786 (Jonathan Barnes ed., Princeton Univ. Press rev. Oxford trans. 1984).

392. See Ernest J. Weinrib, *Correlativity, Personality, and the Emerging Consensus on Corrective Justice*, 2 THEORETICAL INQUIRIES L. 107, 110 (2001).

393. See JULES L. COLEMAN, RISKS AND WRONGS 324–60 (1992); Benjamin C. Zipursky, *Civil Recourse, Not Corrective Justice*, 91 GEO. L.J. 695, 718 (2003).

394. Weinrib points out that tort doctrine constructs a tort relationship because liability treats the parties as doers and sufferers of the same injustice. See Weinrib, *supra* note 392, at 108–09; see also Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449, 449 (1992); Ariel Porat, *Questioning the Idea of Correlativity in Weinrib's Theory of Corrective Justice*, 2 THEORETICAL INQUIRIES L. 161, 169 (2001).

395. See George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 537–64 (1972).

396. *Id.* But see Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 157–58 (1973) (arguing that harm itself is sufficient to justify compensation). However, this theory of strict liability, which focuses on factual causality, has been criticized. See, e.g., Izhak Englard, *The System Builders: A Critical Appraisal of Modern American Tort Theory*, 9 J. LEGAL STUD. 27, 57–63 (1980).

397. Englard, *supra* note 396, at 57–63.

398. Fletcher, *supra* note 395, at 542–43.

399. *Id.*

400. *Id.*

401. *Id.*

In light of the bilateral correlative nature of torts, the literature on corrective justice tends to focus on “first order” liability of those who most directly and wrongfully caused an injury and not on “second order” liability of third parties that are not direct tortfeasors.

Intermediaries create the framework for terror attacks by allowing the activity and assisting it. Therefore, their actions are arguably more than a background risk and they can be liable for the consequences alongside the direct wrongdoer, because the corrective justice concept is also feasible when several wrongdoers caused the harm.⁴⁰² A counter argument might point out that the intermediaries did not cause the harm, and even when they bear culpability, there is no causal link between their activities and the harm terrorists’ cause.

When an intermediary hosts content, provides communication tools, or shares revenues with users it does so for all types of content. It does not focus on terrorist content. These activities are merely a background risk. In such cases, the intermediary is not responsible for the harm caused to the victims and its liability is not justified according to corrective justice theory.

The case may be different when intermediaries fail to remove terrorist content that is unprotected by the First Amendment, such as fighting words, incitement to imminent lawless action, true threats or solicitations to commit crimes. In such cases, their liability is not the result of a pure omission, but instead their operation of the platform. The intermediaries are not mere bystanders. Arguably, if an intermediary acquires actual knowledge of a specific terrorist speech and fails to remove it and report the content to the authorities, it creates nonreciprocal risk that should not be immune to liability. Because moderation is an inherent role of twenty-first-century intermediaries, failure to remove upon knowledge extends beyond mere creation of a framework for harmful expressions. However, even if one accepts that failure to remove upon knowledge is a nonreciprocal risk, a causal link must exist to impose liability under corrective justice theory. This requirement of a causal link can

402. Richard W. Wright, *Allocating Liability Among Multiple Responsible Causes: A Principled Defense of Joint and Several Liability for Actual Harm and Risk Exposure*, 21 U.C. DAVIS L. REV. 1141, 1162 (1988).

be established only in extremely rare cases when the incitement is explicit and when a specific imminent terror attack is expected.⁴⁰³

When an intermediary personalizes content and targets users' unlawful content or suggests users to connect with a declared affiliate of an FTO, it bears direct responsibility and fault for the recommendation. In such cases, the intermediary allows a design of algorithmic recommendations that includes unlawful content,⁴⁰⁴ such as incitement and postings that seek to recruit or coordinate on behalf of an FTO. But causal link requirements are met only between the intermediary and the algorithmic recommendations to users on inciting content, not between the recommendations and the terror attack. To justify liability for terrorist attacks, there should be evidence that the person who committed the attack was exposed to such recommendations and acted upon them. Otherwise, the intermediary may be responsible for the incitement,⁴⁰⁵ or for contributing to the spread of inciting speech, though not for the terror attack itself.⁴⁰⁶

3. Efficiency

The perspective of efficiency focuses on the maximization of wealth and the efficient allocation of risks.⁴⁰⁷ According to this perspective, legal rules aim to incentivize efficient conduct ex

403. In such cases, removal of the speech can be justified, even according the *Brandenburg* standard. *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam); Leibowitz, *supra* note 28, at 816.

404. Intermediaries can control the parameters at the base of the algorithms ex ante. On "policy neutral" vs. "policy directed" algorithms, see Tene & Polonetsky, *supra* note 151, at 137; Jack M. Balkin, *The Three Laws of Robotics in the Age of Big Data*, 78 OHIO ST. L.J. 1217, 1224 (2017). On government by design, see Deirdre K. Mulligan & Kenneth A. Bamberger, *Saving Governance-By-Design*, 106 CALIF. L. REV. 697, 701 (2018).

405. See, e.g., Ryan Calo & Alex Rosenblat, *The Taking Economy: Uber, Information, and Power*, 117 COLUM. L. REV. 1623, 1684 (2017) (focusing on nontransparent manipulative practices in a related context of sharing platforms and suggesting that third parties' independent research can reveal some of these manipulative practices); Gerrard, *supra* note 38, at 4498 (showing inciting eating-disorder-related recommendations generated by intermediaries); Maayan Perel & Niva Elkin-Koren, *Black Box Tinkering: Beyond Disclosure in Algorithmic Enforcement*, 69 FLA. L. REV. 181, 202-05 (2017) (discussing algorithmic enforcement of copyright infringement).

406. This is because harm is directed at the general public, not at specific individuals. Therefore, legal civil action in tort law cannot be established.

407. See Richard A. Posner, *The Ethical and Political Basis of Efficiency Norm in Common Law Adjudication*, 8 HOFSTRA L. REV. 487, 488-91 (1980).

ante and promote welfare maximization *ex post*.⁴⁰⁸ In this regard, courts should not consider the harm to victims in isolation. Rather they should include the benefits of an activity and any value that third parties gain from the activity. Their calculus should include all costs and benefits to society as a whole including the benefits of free speech and promotion of innovation.

Scholarly literature usually deals with the economic analysis of direct liability, but shies away from discussing third party liability.⁴⁰⁹ However, based on the limited literature on this type of liability, I have argued elsewhere:

[I]n some cases expanding liability to third parties is required when: (1) the enforcement of liability on the direct tortfeasor fails (for example, when the direct tortfeasor cannot be detected); (2) the third-party can monitor and control the direct wrongdoers; (3) sufficient incentives do not exist for private ordering and non-legal strategies; and (4) a legal rule can be applied at a reasonable cost.⁴¹⁰

Pursuing a civil claim against the publisher of the incitement, or the direct terrorist attacker is possible and the law does not preclude civil remedies in cases of intentional criminal acts.⁴¹¹ In the context of terrorism, however, there is a substantial risk of enforcement failure because the publisher may be anonymous or abroad and it would be difficult to bring him to comply with a judicial decision to compensate the victims.⁴¹² The intermediary can be liable for the consequences alongside the direct attacker. Moreover, it might be difficult to collect com-

408. See J.R. Hicks, *The Foundations of Welfare Economics*, 49 *ECON J.* 696, 696 (1939); Nicholas Kaldor, Note, *Welfare Propositions of Economics and Interpersonal Comparisons of Utility*, 49 *ECON J.* 549, 551 (1939).

409. Assaf Hamdani, *Gatekeeper Liability*, 77 *S. CAL. L. REV.* 53, 56–57 (2003) (“[T]he topic of third-party liability has received only scant attention by legal academics [L]ittle is known about the appropriate scope of third-party liability. Specifically, legal scholarship has little to say about the standard of liability that should apply to third parties.”).

410. Lavi, *supra* note 48, at 882.

411. R.F.V. HEUSTON & R.S. CHAMBERS, *SALMOND & HEUSTON ON THE LAW OF TORTS* 227 (Sweet & Maxwell 18th ed. 1981). The intentional torts of assault and battery can give rise to both civil and criminal liability. Another example is civil compensation claims against rapists. See Julie Goldscheid, *United States v. Morrison and the Civil Rights Remedy of the Violence Against Women Act: A Civil Rights Law Struck Down in the Name of Federalism*, 86 *CORNELL L. REV.* 109, 113–15 (2000).

412. See Ronen Perry & Tal Z. Zarsky, *Liability for Online Anonymous Speech: Comparative and Economic Analyses*, 5 *J. EUR. TORT L.* 205, 237–38 (2014) (referring to a related context of intermediaries’ liability to defamatory speech).

pensation from the direct attacker that may have died during the attack or cannot be found. In addition, the intermediary moderates the content and can control the speech published on the platform.⁴¹³ Private ordering is insufficient to tackle this problem.

Is it efficient to impose liability on intermediaries, or let the victims bear the costs?⁴¹⁴ To achieve efficiency, liability should be allocated to the cheapest cost avoider. Arguably, imposing liability on intermediaries is efficient and they are the cheapest cost avoiders of harm caused by terrorist content. They control the content on their platforms, make it easier to find it, and even encourage finding it.⁴¹⁵ This conclusion is valid even when they operate the platform and the recommendation system automatically through algorithms.⁴¹⁶ Restriction of recommendation systems and targeting is in use today. YouTube, for example, restricts its system to reduce harmful recommendations.⁴¹⁷ Likewise, Google announced that the company is planning to limit its advertisement targeting.⁴¹⁸ It is true that some

413. GILLESPIE, *supra* note 47, at 34.

414. See GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 68 (1970).

415. See *supra* Part II.A.

416. Intermediaries can control the parameters of the algorithms *ex ante*. See RONALD K.L. COLLINS & DAVID M. SKOVER, *ROBOTICA: SPEECH RIGHTS AND ARTIFICIAL INTELLIGENCE* 27 (2018) (“[Apple’s] Siri has her limitations by design. She avoids controversy; she shuns opinions; she sidesteps medical, legal, or spiritual counsel; she eschews criminal advice; and she prefers the practice and factual to the ambiguous and evaluative.”); Balkin, *supra* note 404, at 1233–36; Matthew U. Scherer, *Of Wild Beasts and Digital Analogues: The Legal Status of Autonomous Systems*, 19 *NEV. L.J.* 259, 280–90 (2018) [hereinafter *Wild Beasts*]; Matthew U. Scherer, *Regulating Artificial Intelligence Systems: Risks, Challenges, Competencies, and Strategies*, 29 *HARV. J.L. & TECH.* 353, 367 (2016) (“Even if that initial programming permits or encourages the AI to alter its objectives based on subsequent experiences, those alterations will occur in accordance with the dictates of the initial programming.”); Tene & Polonetsky, *supra* note 151, at 137–42.

417. See YouTube Team, *Continuing our work to improve recommendations on YouTube*, YOUTUBE OFFICIAL BLOG (Jan. 25, 2019), <https://youtube.googleblog.com/2019/01/continuing-our-work-to-improve.html> [https://perma.cc/74KX-ZEPD] (“[W]e’ll begin reducing recommendations of borderline content and content that could misinform users in harmful ways . . .”).

418. Tony Romm, *Google announces new political-ads policies that limit targeting but not all lies*, WASH. POST (Nov. 21, 2019, 6:41 PM), <https://www.washingtonpost.com/technology/2019/11/20/google-announces-new-political-ads-policies-limiting-targeting-not-all-lies/> [https://perma.cc/UTV2-Y668]; Scott Spencer, *An update on our political ads policy*, GOOGLE CO. NEWS (Nov. 20, 2019), <https://blog.google/technology/ads/update-our-political-ads-policy/> [https://perma.cc/3KJZ-EKX4].

technologies can lead to results that the intermediary cannot foresee *ex ante*.⁴¹⁹ But the intermediary can choose the technology it implements and limit it to a large extent beforehand.

Imposing liability on intermediaries would incentivize efficient moderation that mitigates the harm caused by terrorists' speech *ex post*.⁴²⁰ It would reduce negligent design of recommendation systems *ex ante* and promote efficient deterrence. On the other hand, granting immunity to intermediaries incentivizes them to moderate irresponsibly, design unsafe recommendation systems, and externalize the damage caused to others. In addition, intermediaries normally have deeper pockets than individual victims and are better suited to reduce secondary costs by bearing the loss themselves or by spreading it to all their users.⁴²¹ An increase in litigation costs is expected, but imposing liability on intermediaries is better than the alternative of leaving the families of victims without a remedy.

An in-depth examination reveals that efficiency considerations fail to provide clear answers regarding the allocation of liability when considering overall market characteristics. Imposing liability on intermediaries will have little benefits in reducing radicalization and incitement because deactivating terrorists' accounts or removing their content will not prevent terrorists from reopening and republishing their content.⁴²² Thus, the intermediaries' efforts of removal may seem futile.

419. For example, the intermediary does not always foresee the exact results of the use of artificial intelligence and machine learning. See ADAM THIERER, ANDREA CASTILLO O'SULLIVAN & RAYMOND RUSSELL, MERCATUS CTR. GEO. MASON U., ARTIFICIAL INTELLIGENCE AND PUBLIC POLICY 31 (2017), <https://www.mercatus.org/system/files/thierer-artificial-intelligence-policy-mr-mercatus-v1.pdf> [https://perma.cc/X4JL-9DNU] (“[E]ven if the public *could* review them, the nature of machine-learning techniques can obviate the usefulness of review because the program is teaching itself.”).

420. On this point, in the context of copyright infringement, see Douglas Lichtman & William Landes, *Indirect Liability for Copyright Infringement: An Economic Perspective*, 16 HARV. J.L. & TECH. 395, 398 (2003).

421. Perry & Zarsky, *supra* note 412, at 239.

422. See, e.g., Corrected Complaint & Demand for Jury Trial at 136–41, Clayborn v. Twitter, Inc., 2018 WL 6839754 (N.D. Cal. Dec. 31, 2017) (No. 17-cv-06894-LB) (“According to the New York Times, the Twitter account of the pro-ISIS group Asawitiri Media has had 335 accounts. When its account @TurMedia333 was shut down, it started @TurMedia334 Below is a posting from Twitter captured on June 20, 2016. The individual is named ‘DriftOne00146’ and he proudly proclaims that this is the 146th version of his account. With only 11 tweets, this individual is followed by 349 followers. This is very suspicious activity.”).

Intermediaries' effort to deactivate, or suspend terrorists' account and remove their content does not result in optimal enforcement. In fact, their activities can even backfire.⁴²³ But these efforts are not completely futile because they increase the costs users must spend to find them.⁴²⁴ In addition, to reduce the costs of enforcement, intermediaries are likely to adopt more efficient technology to identify FTOs' accounts and content.⁴²⁵ Consequently, efficiency is likely to increase.

Another argument for not imposing liability on intermediaries is the risk that sanctions would distort access to digital markets and hinder positive externalities generated by intermediaries.⁴²⁶ It could chill the development of communication tools and stifle innovative business models of revenue sharing.⁴²⁷ Moreover, because asymmetry exists between the legal outcomes of false negative determinations of unlawful speech (liability) and exemption from liability for false positives, liability creates an incentive to remove more content than necessary for security.⁴²⁸ Thus, it can lead to censorship of legitimate speech, chill recommendation systems, and hamper efficient design of platforms. Finding relevant information on the internet would be difficult,⁴²⁹ and fewer innovative tools would be developed.⁴³⁰ Imposing liability for not removing unlawful

423. SUNSTEIN, *supra* note 30, at 244 (explaining that suspending accounts can "create a more insular internal network that could promote an even more radicalizing force").

424. HARTZOG, *supra* note 94, at 223–26 (discussing in the context of online harassment).

425. *Id.* at 245; *see also* Citron & Richards, *supra* note 134, at 1362–63 ("Facebook employs algorithms to detect and remove terrorist speech. YouTube employs a tool called Content ID to prevent copyrighted material from being posted without the author's consent. The dominant online platforms—Twitter, Facebook, Microsoft, and YouTube—are developing an industry database that will collect hashes—or unique digital fingerprints—of banned violent extremist content for instant flagging, review, and removal.").

426. Kreimer, *supra* note 375, at 28–29.

427. *Id.*

428. *See* Assaf Hamdani, *Who's Liable for Cyberwrongs?*, 87 CORNELL L. REV. 901, 945 (2002) (discussing intellectual property infringements).

429. Seth Stern, Note, *Fair Housing and Online Free Speech Collide in Fair Housing Council of San Fernando Valley v. Roommates.Com, LLC*, 58 DEPAUL L. REV. 559, 590 (2009) ("If all websites strictly followed the Ninth Circuit's guidance, the Internet will eventually resemble a gigantic library with no cataloging system.").

430. The liability regime taxes innovation and influences its course. Evidence shows that innovation thrives under liberal liability regimes. *See, e.g.*, Kyle Graham, *Of Frightened Horses and Autonomous Vehicles: Tort Law and its Assimilation of Inno-*

speech is expected to disproportionately burden the rapid flow of information, free speech, and its positive externalities. As I have pointed out elsewhere, “Unlike traditional media, Internet content providers do not have the time or the resources to review and check every expression on their platform in real time.”⁴³¹ Alternatively, algorithmic enforcement is not sensitive enough to context and may result in over-chill.⁴³²

When an intermediary moderates content, its liability for terrorists’ content is secondary. Limiting liability for intermediaries to actual knowledge of unprotected speech and terrorists’ accounts and subsequently not acting upon it can mitigate an over-chilling effect. Such a standard narrows uncertainty. It does not require proactive detection and moderation; it only requires intermediaries to remove specific categories of unprotected speech and official accounts designated as FTOs. As a result, removal is likely to focus on “low-value” speech. Liability concerns are less likely to lead to disproportionate over-censorship.⁴³³ Limiting the scope of legal liability does not purport to preclude efficient efforts of moderation above this minimum standard. Thus, intermediaries may voluntarily remove wider categories of speech or develop proactive technologies for detection or removal.⁴³⁴ Intermediaries might take these measures as a result of economic considerations and accountability, but not legal liability.

vations, 52 SANTA CLARA L. REV. 1241, 1251–52 (2012); Gideon Parchomovsky & Alex Stein, *Torts and Innovation*, 107 MICH. L. REV. 285, 314 (2008); Tal Z. Zarsky, *The Privacy-Innovation Conundrum*, 19 LEWIS & CLARK L. REV. 115, 126 (2015); Guy Pessach, *Deconstructing Disintermediation: A Skeptical Copyright Perspective*, 31 CARDOZO ARTS & ENT. L.J. 833, 864 (2013).

431. Lavi, *supra* note 48, at 883. Every minute 300 hours of videos are uploaded to YouTube. See Fred McConnell, *YouTube is 10 years old: the evolution of online video*, GUARDIAN (Feb. 13, 2015, 8:39 AM), <https://www.theguardian.com/technology/2015/feb/13/youtube-10-years-old-evolution-of-online-video> [https://perma.cc/F94P-GEHB].

432. See Citron, *supra* note 132, 1054–55.

433. See KENNETH A. BAMBERGER & DEIRDRE K. MULLIGAN, *PRIVACY ON THE GROUND: DRIVING CORPORATE BEHAVIOR IN THE UNITED STATES AND EUROPE* 242 (2015) (explaining that ambiguity regarding the exposure to liability leads businesses to adopt higher standards relative to the standards that would have been adopted under clear rules).

434. Klonick, *supra* note 112, at 1616–30 (explaining that intermediaries have created a voluntary system of self-regulation because they are aware of social and corporate responsibility and economically motivated to create a hospitable environment for their users to incentivize engagement).

When an intermediary personalizes recommendations on content or connections and targets users, the liability is not secondary because it directly spreads recommendations.⁴³⁵ In such cases, the intermediary controls the design of the algorithm and can prevent recommendations that promote terror *ex ante* by programming algorithms that will not recommend content with inciting words or affiliates of FTO's as connections.⁴³⁶ However, imposing liability on recommendations can cause a chilling effect on such systems, leading to less accurate algorithmic targeting or even to the elimination of these systems. Liability for recommendations may also stifle innovation.⁴³⁷ Innovation may become too risky or expensive.⁴³⁸

Recommendations are an essential resource that reduce search costs and allow efficient engagement online. The imposition of liability, however, would probably cause a limited chilling effect on these systems so long as the liability focuses on unlawful recommendations. When the intermediaries' recommendations include inciting content, it is easier for terrorists to organize, recruit, and radicalize susceptible users, and it reduces terrorists' costs. Limiting unlawful recommendations on unprotected speech or official FTO connections is worthwhile even if insufficient sensitivity to context by algorithmic targeting reduces the accuracy of other recommendations. Furthermore, accurate recommendations, which intermediaries are economically incentivized to seek, would likely cause the development of more sensitive algorithms.⁴³⁹

435. Liability can be imposed even when someone repeats others. *See Lavi, supra* note 151, at 159.

436. On the ability to impose limitations on technology and learning algorithms in particular, see Scherer, *Wild Beasts, supra* note 416, at 280–90.

437. THIERER ET AL., *supra* note 419, at 36–37.

438. For example, machine learning might make it difficult for the intermediary to foresee results of their own algorithm because the algorithms learn and modify themselves through contacts with human users, the incorporation of obtainable data, or the insertion of new data. *See Catherine Tremble, Wild Westworld: Section 230 of the CDA and Social Networks' Use of Machine-Learning Algorithms*, 86 *FORDHAM L. REV.* 825, 837 (2017). Limiting the ability of algorithms and preventing this technology from including specific words in the design stage can result in less accurate recommendation. It may also discourage using innovative technologies as artificial intelligence.

439. Edmund Mokhtarian, *The Bot Legal Code: Developing a Legally Compliant Artificial Intelligence*, 21 *VAND. J. ENT. & TECH.* 145, 206 (2018) ("Rather than futilely attempt to micromanage these intelligent machines on an ad hoc basis, we likely

Imposing liability on intermediaries would have limited effect on innovation so long as liability remains neutral to technologies and does not depend on the adoption of a specific technology.⁴⁴⁰ “Companies should generally have the freedom to design technologies how they please, so long as they stay within particular thresholds, satisfy certain basic requirements like security and accuracy, and remain accountable for deceptive, abusive, and dangerous design decisions.”⁴⁴¹ Some innovators may “shy away from legally murky areas.”⁴⁴² Nevertheless, there are other efficiency considerations to be balanced and “promoting innovation alone cannot be a sufficient justification for exempting intermediaries from the law.”⁴⁴³ There is an even more important reason why exemption from liability would be unwise. Overall immunity for all types of architecture designs “will yield a generation of technology that facilitates the behavior that our society has decided to prohibit.”⁴⁴⁴ Furthermore, exemption from liability may disincentivize intermediaries from developing safer and more efficient technologies.⁴⁴⁵ Anyone who conducts business of any complexity must consult a lawyer about liability risks at some point. In many cases, innovation continues despite formidable legal regulations and ambiguity regarding the scope of liability. Furthermore, creativity and innovative thinking often thrive within

need to imbue them with the capability to comply with the legal systems in which they operate.”).

440. See Nancy S. Kim, *Website Design and Liability*, 52 JURIMETRICS 383, 391–403 (2012); see also NATASHA DUARTE, EMMA LLANSO & ANNA LOUP, CTR. FOR DEMOCRACY & TECH., MIXED MESSAGES? THE LIMITS OF AUTOMATED SOCIAL MEDIA CONTENT ANALYSIS 6 (2017), <https://cdt.org/wp-content/uploads/2017/11/Mixed-Messages-Paper.pdf> [<https://perma.cc/2BL5-UU85>] (“Use of automated content analysis tools to detect or remove illegal content should never be mandated in law.”).

441. HARTZOG, *supra* note 94, at 121.

442. Alex Kozinsky & Josh Goldfoot, *A Declaration of the Dependence of Cyberspace*, in THE NEXT DIGITAL DECADE: ESSAYS ON THE FUTURE OF THE INTERNET 169, 176 (Berin Szoka & Adam Marcus eds., 2010).

443. *Id.*

444. *Id.*

445. See Danielle Keats Citron & Mary Anne Franks, *Criminalizing Revenge Porn*, 49 WAKE FOREST L. REV. 345, 390 (2014).

constraint.⁴⁴⁶ Thus, the concern about impeding innovation might be overstated.⁴⁴⁷

To sum up: imposing liability on intermediaries for terrorist attacks should not be ruled out. However, there are different roles that intermediaries fulfill and different types of speech. Therefore, a one-size-fits-all approach to intermediary liability is inappropriate.

IV. TAKING INFLUENCE SERIOUSLY

The broad reach of the internet and social media in particular has taken terror to another scale and level.⁴⁴⁸ Terrorists' incitement, recruitment, and propaganda online result in terror attacks that pose a real threat to public safety and cause tremendous harm.⁴⁴⁹ How should the law respond to this harm? Should online intermediaries that allow terrorist activities on their platforms and even contribute to them through content recommendations and targeting face liability? And if so, when? Normative analysis reveals that imposing liability on intermediaries for the results of terrorists' speech should not be ruled out altogether, but a more comprehensive framework is required. The following Part examines ways to overcome legal barriers in lawsuits grounded in material support that seek civil remedies for victims. Following this analysis, it offers using the "loss chances" doctrine and other possible legal tools that can lead to partial remedies and mitigate the problem of terrorists' incitement.

A. *Overcoming Section 230's Barrier*

Intermediaries are not mere conduits. As demonstrated in Part II, they provide communication tools, moderate content, and even influence speech by using algorithmic recommendation systems and other means. They can exacerbate or mitigate harm caused by illicit actors on their platforms.⁴⁵⁰ However, the

446. See Joseph P. Fishman, *Creating Around Copyright*, 128 HARV. L. REV. 1333, 1336–37 (2015).

447. See Kozinsky & Goldfoot, *supra* note 442, at 176.

448. See *supra* Part I.B.

449. See *supra* Part III.A.

450. Klonick, *supra* note 112, at 1657–58; GILLESPIE, *supra* note 47, at 206–07.

current law provides immunity for intermediaries.⁴⁵¹ Thus, they are not treated as publishers of material they did not develop.⁴⁵² Courts have generally interpreted the immunity broadly.⁴⁵³ However, this overall immunity scheme was constructed when the web was at its infancy.⁴⁵⁴ As technologies advance and the web becomes more prevalent, the seriousness of terrorists' incitement increases and infringes on the public's sense of security and safety. Therefore, it is time to challenge the immunity regime and redefine it.

Recent scholarship acknowledges that twenty-first-century intermediaries structure, sort, and sometimes sell users' data. Thus, they cannot be treated as mere "passive conduits," and their role and duties should be reconceptualized.⁴⁵⁵ Scholars have conceptualized intermediaries as governors and even advocated the imposition of public forum obligations on intermediaries, arguing that they should be treated as state actors. Such obligations would include holding intermediaries to standards of the First Amendment and requiring intermediaries complete content neutrality.⁴⁵⁶ Other scholars have proposed viewing intermediaries as a hybrid of a conduit and media, recommending the imposition of some professional norms that apply to traditional media.⁴⁵⁷ Recently, a new approach toward information fiduciaries analogizes intermediaries' duties towards

451. 47 U.S.C. § 230 (2018).

452. See *supra* Part III.A.2.

453. *Id.*

454. Leary, *supra* note 226, at 574; see also Danielle Keats Citron, *Sexual Privacy*, 128 *YALE L.J.* 1870, 1952 (2019).

455. Kyle Langvardt, *Regulating Online Content Moderation*, 106 *GEO. L.J.* 1353, 1373 (2018).

456. K. Sabeel Rahman, *The New Utilities: Private Power, Social Infrastructure, and the Revival of the Public Utility Concept*, 39 *CARDOZO L. REV.* 1621, 1672 (2018). This position would impose public forum obligations on intermediaries. Such obligations are undesirable. Imposing public forum obligations will hinder efficient moderation and would do nothing to prevent third parties from using social media to manipulate end users. See JACK M. BALKIN, *FIXING SOCIAL MEDIA'S GRAND BARGAIN* 6 (Hoover Inst., Aegis Series Paper No. 1814, 2018), https://www.hoover.org/sites/default/files/research/docs/balkin_webready.pdf [<https://perma.cc/G6YJ-UL2S>]. Another difficulty in applying public law obligations "lies in the fact that internet platforms can 'evict' unwanted speakers without involving the courts." Langvardt, *supra* note 455, at 1367.

457. See GILLESPIE, *supra* note 47, at 43. This perspective supports the adoption of some of the professional norms of traditional journalism. See BALKIN, *supra* note 456, at 10. As Professor Balkin explains, however, the law still has a role to play. *Id.*

users' information with doctors and lawyers' fiduciary duties to their patients and clients.⁴⁵⁸ The questions of the appropriate status of intermediaries and the scope of their general duties are beyond the purview of this Article. Be that as it may, the view that the overall immunity regime granted to intermediaries should adapt to the inflated influence online intermediaries have on users is gaining traction.⁴⁵⁹

Professor Danielle Keats Citron and Benjamin Wittes propose legislative changes to narrow down the scope of the immunity provision as a solution.⁴⁶⁰ Under their proposal, the CDA's immunity provision would be available to operators only when they behave reasonably to stop illegal activity.⁴⁶¹ The consequence of that failure would not impose automatic liability, but rather remove the absolute shield from liability.⁴⁶² A continuous failure to remove an ISIS account despite repeated notifications might strip intermediaries' immunity.⁴⁶³ This proposal is a good start, but it needs clearer standards regarding the unlawfulness of the content that will not enjoy immunity.⁴⁶⁴

A different approach allows the courts to discover the boundaries of immunity without a legislative change. Interme-

458. See Jack M. Balkin & Jonathan Zittrain, *A Grand Bargain to Make Tech Companies Trustworthy*, ATLANTIC (Oct. 3, 2016), <https://www.theatlantic.com/technology/archive/2016/10/information-fiduciary/502346/> [<https://perma.cc/7Q5B-RA4M>]; see also Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1226 (2016). The approach espoused by Professors Balkin and Zittrain would impose a duty on intermediaries to operate their platforms in good faith, with respect for users instead of manipulation. Balkin & Zittrain *supra*. Note that the information fiduciary approach raises issues regarding its feasibility, enforceability, and scope. For recent criticism that identifies tensions and ambiguities in the theory of information fiduciaries, as well as a number of reasons to doubt the theory's capacity to resolve them satisfactorily, see Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497 (2019).

459. See, e.g., SYLVAIN, *supra* note 136, at 12 ("[T]hese developments undermine any notion that online intermediaries deserve immunity because they are mere conduits for, or passive publishers of, their users' expression.").

460. Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM. L. REV. 401, 418–19 (2017).

461. *Id.* at 419.

462. *Id.* at 420.

463. *Id.* at 418. This proposal allows media giants an exemption from liability for negligence. See *id.* It creates a type of notice and takedown regime. For an explicit proposal to adopt a notice and takedown regime, see Roter, *supra* note 101, at 1404–05.

464. See Citron, *supra* note 132, at 1052–55.

diaries structure, sort, target, and sometimes sell users' data.⁴⁶⁵ By targeting content, the intermediary's algorithm not only repeats the content of users and advertisers, but also selects content for publication and displays different types of content to different audiences.⁴⁶⁶ By doing so, the intermediary influences the context of the content and the magnitude ascribed to it. Therefore, intermediaries that design platforms and their code can be held responsible, at least in part, for creating or developing content.⁴⁶⁷ This approach can be applied to algorithmic recommendations and targeting in particular.⁴⁶⁸

Stripping the immunity from co-development of content is in line with a broad interpretation of *Roommates.com*.⁴⁶⁹ An intermediary's recommendations on content and connections are similar to the email mechanism in *Roommates.com*, which included only potential matches for roommates.⁴⁷⁰ There are strong justifications for stripping the intermediary of immunity in these situations, especially if users did not positively articulate their preferences and the matching is a result of conclusions of algorithmic data processing. In contrast to the approach of the *Armslist* case, which referred to a design that can facilitate both lawful and unlawful activity, depending on the users' choice of use,⁴⁷¹ a recommendation system that includes unlawful recommendations is not a neutral tool. It exposes every user to different recommendations in light of algorithmic conclusions and is not based on users' positive choices. Thus, a

465. See Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 218 (2018).

466. See *id.*

467. See *id.* at 242; see also Tremble, *supra* note 438, at 866.

468. See KOSSEFF, *supra* note 223, at 188 ("As platforms increasingly develop more sophisticated algorithm-based technology to process user data it remains to see whether courts will conclude that they are responsible for the development of illegal content."). The dissenting opinion in *Force* reflected this approach. See *Force v. Facebook, Inc.*, 934 F.3d 53, 76–77 (2d Cir. 2019) (Katzmann, C.J., concurring in part and dissenting in part). This opinion might be a step towards a change in courts' interpretation of § 230 in an algorithmic society. Chief Judge Katzmann focused on the function the defendant performed, referring to a decision in the context of commerce that imposed liability on Amazon based on the intermediary function. *Id.* at 81 (citing *Oberdorf v. Amazon.com Inc.*, 930 F.3d 136, 153–54 (3d Cir. 2019), *vacated and reh'g granted by* 936 F.3d 182 (3d Cir. 2019)).

469. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC.*, 521 F.3d 1157, 1167–68 (9th Cir. 2008).

470. *Id.* at 1167.

471. *Daniel v. Armslist, LLC*, 926 N.W.2d 710, 722 (Wis. 2019).

specific susceptible user can receive only unlawful recommendations that can have profound influence on his decision to commit a terror attack.

Thus, § 230 of the CDA is not the main barrier for civil material support claims. Courts can strip intermediaries' immunity by interpretation even today. If the courts fail to narrow down this immunity, legislative changes can overcome this barrier.⁴⁷² These changes would strip immunity from intermediaries that fail to take terrorist content down upon learning of its existence and intermediaries that target unlawful content. Two questions remain: First, should the law impose obligations and liability on intermediaries for terrorists' incitement, after stripping immunity? And second when should the courts impose upon intermediaries an obligation to compensate victims' families for material support of terror?

B. Proximate Cause and Civil Remedies

To recover civil damages pursuant to the material support statutes, a plaintiff must establish that a defendant's conduct was the proximate cause of his injuries.⁴⁷³ As explained earlier, some courts have outlined standards of substantial probability or foreseeable consequence of the specific act of support.⁴⁷⁴ The thresholds of probability, however, were articulated in cases of donations or knowingly allowing the transfer of money to terrorist organizations, or directly assisting these acts.⁴⁷⁵ In such cases, plaintiffs file an action against an entity that directly deals with a terror organization.⁴⁷⁶ Consequently, there is an inherently direct connection between the defendants and the terror organization. In the context of social media, the courts have specifically articulated a requirement of proximity between the platform and the plaintiffs' injury. They have not settled for a lower threshold.⁴⁷⁷ Social media is different from

472. See Citron & Wittes, *supra* note 460, at 418–19.

473. See *supra* Part III.A.2.c.

474. See *id.*

475. See, e.g., *HLP*, 561 U.S. 1, 10 (2010).

476. The defendant could be, for example, a donor who directly donates money or a financial institution that allows an illegal transfer of money.

477. See, e.g., *Fields v. Twitter, Inc.*, 881 F.3d 739, 748–50 (9th Cir. 2018); *Crosby v. Twitter, Inc.*, 303 F. Supp. 3d 564, 579 (E.D. Mich. 2018) (“To plead proximate cause, the plaintiffs must point to facts that tend to establish that (1) ISIS perpe-

donors, because unlike donors or transferors of money, social media companies operate platforms for all users to communicate, and there is no inherent direct connection between social media companies and terror organizations. This difference should lead to a different standard.

Intermediaries' liability for terror attacks cannot be fully analogous to general tort law cases on the duty to prevent crime.⁴⁷⁸ For example, a therapist's duty of care to protect the intended victim of a dangerous patient is established only when the therapist has actual or constructive knowledge of the intentions of the patient and identification of the particular victim.⁴⁷⁹ In contrast, intermediaries generally do not have knowledge about specific plans for an attack. A landlord's duty of care to protect tenants from foreseeable crimes committed on his premises⁴⁸⁰ is also different from the case of intermediaries, because platforms host a tremendous amount of content and are different from premises in their characteristics. In addition, terror attacks are not committed on the platform itself. The intermediary can be responsible for allowing unlawful expressions on his platform, but it is difficult to predict which inciting speech was the trigger for the attack. The intermediary does not have a direct connection with terror organizations. Thus, it is difficult to establish a causal connection between failure to remove a specific post and a terror attack. This is the problem of latent harm that is difficult to match with precise wrong.⁴⁸¹

The threshold of directness prevents victims' families from collecting full damages. There are strong policy considerations

trated the attack that injured them, and (2) the defendants' furnishing their social media platforms to ISIS caused the attack.").

478. See IZHAK ENGLARD, *THE PHILOSOPHY OF TORT LAW* 175–76 (1993).

479. See *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 345 (Cal. 1976) (holding that mental health professionals have a duty to protect individuals who are being threatened with bodily harm by a patient); see also Gabe Maldoff & Omer Tene, *The Costs of Not Using Data: Balancing Privacy and the Perils of Inaction*, 15 J.L. ECON. & POL'Y 41, 64 (2019) ("Central to the ruling in *Tarasoff* was the fact that the professional could identify the particular victim.").

480. See ENGLARD, *supra* note 478, at 180; see also *Kline v. 1500 Mass. Ave. Apartment Corp.*, 439 F.2d 477, 484 (1970) (adopting the foreseeability of criminal acts test).

481. See Omri Ben-Shahar, *Data Pollution*, 11 J. LEGAL ANALYSIS 104, 125 (2018) (giving a related example of liability for environment pollution, which "suffers from an acute problem of 'long tail'—latent harms that are difficult to causally match with precise wrongs").

running counter to waiving this threshold or replacing it with a lower one. In the absence of this threshold, intermediaries could be held responsible for all inciting speech published on their platforms that was neither removed nor reported before a terrorist's attack occurs. This scope of liability is too broad—almost limitless—and is not in line with normative considerations for liability.⁴⁸² Therefore, intermediaries' liability for full compensation of a terror attack's damages should be established only in extremely rare cases when the direct connection factor can be proven. Liability attaches to intermediaries only when terrorists' speech promotes an imminent lawless action⁴⁸³ and the intermediary has actual knowledge of the speech, but fails to remove it and report it. For example, failure to act upon actual knowledge of a specific call to commit an act of terror that materializes could give rise to liability.⁴⁸⁴ When a person other than the person that published the inciting content commits a terror attack, there should be a requirement to prove that the person who committed the attack was exposed to the inciting content that called for taking that specific lawless action.

Limiting compensation in such rare cases is in line with the material support doctrine. It may, however, result in under-deterrence because it fails to incentivize intermediaries to improve moderation and avoid unlawful targeting. It also leaves victims without any redress. Terrorists' speech on social media should be taken seriously. Therefore, policymakers should outline nuanced legal tools and measures to hold intermediaries accountable.

C. *A New Framework of Intermediaries' Obligations Regarding Content, Algorithmic Targeting, and Terrorists' Accounts*

Intermediaries can exacerbate or mitigate terrorists' speech, recruitment, and propaganda online.⁴⁸⁵ Professor Citron and

482. See *supra* Part III.B. Full compensation is not in line with corrective justice and would lead to over-censorship and over-deterrence.

483. See *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969); *In re White*, No. 2:07cv342, 2013 WL 5295652, at *62–63 (E.D. Va. Sept. 13, 2013) (posting words on the internet alone was not sufficient evidence that the defendant's suggested actions were likely to be immediately carried out by his readers); see also Leibowitz, *supra* note 28, at 815–16.

484. Consider, for example, a post that contains the date and place of an intended terror attack.

485. See *supra* Part II.

Wittes propose that only intermediaries that behave reasonably to stop illegal activity should be immune to liability.⁴⁸⁶ Failing to act against terrorist speech, however, can allow legal actions to proceed beyond preliminary stages.⁴⁸⁷ This proposal leaves courts and policymakers to decide what constitutes illegal activity and what are reasonable steps to prevent it.

This Part proposes a defined legal duty of care regarding terrorists' unlawful content. Failure to meet the proposed standards of care would strip intermediaries of their immunity and allow the imposition of civil remedies, or even penal sanctions, against them. The proposed standards would reduce vagueness and allow intermediaries to manage their risks effectively. Unlike the overbroad standards proposed in the United Kingdom's white paper,⁴⁸⁸ the proposed standard of care in this Article is tailored to unprotected speech and clearly defines the online harm. Thus, the proposal reduces the concern of undesirable political interference and the risk of disproportionate censorship.

The proposed framework would focus on moderation and algorithmic targeting. It would not impose special obligations on hosting, providing communication tools, and sharing revenues with users. In such cases, the intermediaries offer the same service to all users and do not prioritize terrorists' content over other providers' content. Thus, normative considerations do not advocate liability.⁴⁸⁹

1. *Removal of Unprotected Speech Upon Knowledge*

The first proposed change is narrowing immunity. Intermediaries should be exempt from liability only if they remove and report unprotected speech upon knowledge. A notice and

486. Citron & Wittes, *supra* note 460, at 419.

487. *Id.* at 420 ("Our proposal would not eliminate § 230's safe harbor. Instead, the safe harbor would be limited to providers or users that have taken reasonable steps to prevent or address the illegality of which plaintiffs are complaining.").

488. See SEC'Y OF STATE FOR DIG., CULTURE, MEDIA & SPORT & SEC'Y OF STATE FOR THE HOME DEP'T, ONLINE HARMS WHITE PAPER (2019), https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/793360/Online_Harms_White_Paper.pdf [<https://perma.cc/2CXX-M4D9>] [hereinafter U.K. ONLINE HARMS WHITE PAPER].

489. See *supra* Part III.B. Imposing obligations and limitations regarding these functions would over-burden the flow of information and would result in inefficiency.

takedown regime is not new and governs the related context of copyright infringement.⁴⁹⁰ Under this regime, the intermediary will not bear liability for terrorists' content if it expeditiously removes unprotected terrorists' speech and accounts of members of a designated FTO upon gaining actual knowledge of their existence. The intermediary can obtain this knowledge from private people who submit complaints, civil organizations, referral unit notifications,⁴⁹¹ or state authorities.⁴⁹² The intermediary should design clear mechanisms that make it easy to report unlawful content. If the intermediary opts to keep unprotected speech on its site, its action will not lead to automatic liability, but the intermediary will consequently lose immunity.⁴⁹³

Unprotected speech includes true threats,⁴⁹⁴ fighting words, and social media postings that seek to cooperate, recruit, coordinate, incite, or indoctrinate users on behalf of designated terrorist organizations.⁴⁹⁵ The removal obligation—as opposed to liability for full compensation—should not require imminence. Instead, a plaintiff would need to demonstrate that the speech directing, advocating, or encouraging lawless action caused a “substantial likelihood of a high level of harm.”⁴⁹⁶

This proposal is thus narrowly tailored. Even if it indirectly leads to removal of protected speech, it is likely to pass the strict scrutiny test, as it places narrow limitations on speech

490. See 17 U.S.C. § 512 (2018).

491. See Chang, *supra* note 181.

492. The FBI and the Cybersecurity Unit at the Department of Justice are examples of such authorities.

493. On notice and takedown, see Perry & Zarsky, *supra* note 412, at 241–43. This regime does not impose liability on intermediaries that fail to actively monitor user-generated content published on their platforms.

494. See Tsesis, *supra* note 69, at 670.

495. See Raphael Cohen-Almagor, *The Role of Internet Intermediaries in Tackling Terrorism Online*, 86 FORDHAM L. REV. 425, 444 (2017); Tsesis, *supra* note 69, at 670–75.

496. Leibowitz, *supra* note 28, at 821. Some authors interpret the imminence test in *Brandenburg* broadly and reach similar results. See Tsesis, *supra* note 69, at 688–89 (“[W]here a person prods another on social media—such as Snapchat, WhatsApp, or Facebook Chat—to begin without delay a politically motivated attack, the statement can constitutionally, and should as a matter of social policy, be made actionable, if under the circumstances it is likely to incite such action.”). Tsesis refers to the terrorists' speech and to the criminalization of identifiable terrorists' content. See *id.* at 697. The definition of unprotected speech is also applicable to removal obligations.

and mitigates the problem of disproportionate censorship.⁴⁹⁷ Because of the broad influence of terrorists' activities on social networks, removing and reporting the worst speech is particularly important to public security.⁴⁹⁸ This regime depends on reactive enforcement upon actual knowledge. Intermediaries can take additional measures of moderation, but they will not bear liability for failing to do so.

2. *Safety by Design: Mitigating the Risk of Targeting of Unlawful Content and Recommendations*

A second measure aims to limit the problem of targeting unlawful terrorists' content and recommendations by algorithmic designs and code.⁴⁹⁹ Algorithmic recommendations of unlawful terrorists' speech can be described as "evil nudges,"⁵⁰⁰ because they can push susceptible users to carry out a terror attack without forbidding any options or changing their economic incentives.⁵⁰¹ This practice raises a concern of incitement and manipulation by the intermediary.⁵⁰² The problem is exacerbated when the recommendations are personalized and target users who might have not actively searched for inciting content themselves.

497. See Tsesis, *supra* note 69, at 688–89. Even under a broad interpretation of imminence, in which the inclusion of direct calls for violence can be considered protected speech, the regulation can pass the strict scrutiny test because the states' interests are compelling and the notice and takedown regime is narrowly tailored.

498. Taking down inciting content is superior to reporting the content and leaving it online because not removing the content allows it to continue to spread and influence users to commit terrorist attacks. Indeed, the intermediaries should report to the authorities in cases of specific posts on upcoming incitement the same way they report on exploited children. See ROBERTS, *supra* note 107, at 106–07. Yet, The report, hoe should not replace the obligation to remove the inciting content. See Klein & Flinn, *supra* note 17, at 80.

499. *Supra* Part II.C.

500. See Lavi, *supra* note 89, at 1–2 (arguing that there should be legal liability for creating evil nudges that cause speech torts). Intermediaries' algorithms recommend unlawful content unwittingly, without an intent to incite. However, these recommendations are not arbitrary and are instead designed to target susceptible users to the type of recommended content. Thus, algorithmic design can mitigate the practice of unlawful algorithmic recommendations.

501. *Id.* at 1. For more on nudges, see RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2008).

502. See VAIDHYANATHAN, *supra* note 138, at 151–52 (raising questions about what a democracy would look like if Facebook's algorithm governed the art of science and persuasion).

To tackle this problem and enhance safety, this Part proposes the concept of “safety by design.” This type of regulation, first identified by Professor Lawrence Lessig,⁵⁰³ proposes technology-based solutions for preventing harm inflicted by the flow of information. Engineering decisions can unleash new technology not previously contemplated by the law and affect fundamental rights. Scholars and policymakers have already explored the influence of technological design and its potential to infringe on values or promote a variety of values in the design stage.⁵⁰⁴ Ethics alone cannot solve the problem of algorithmic incitement and there should be legal constraints on how algorithms are used.⁵⁰⁵ This concept may be used on the architecture of the platforms and on algorithmic code.⁵⁰⁶

An intermediary that targets unlawful content that incites to terror and recommends unlawful connections of FTO members should not enjoy complete immunity because recommendation systems are high-risk automated systems; the intermediary proposes recommendations by itself and arguably provides or at least develops the content by taking it out of its original context and targeting vulnerable users.⁵⁰⁷ Furthermore, the intermediary directly manipulates users to behave unlawfully.⁵⁰⁸ This conclusion remains true even if the targeting is committed

503. See LAWRENCE LESSIG, *CODE: VERSION 2.0*, at 123 (2006) (identifying four key forces that regulate an online environment: “the law, social norms, the market, and architecture”).

504. Designers and even lawmakers can protect values of privacy by design. “Privacy by design” is an approach that incorporates thinking about privacy-protective features and implementing them as early as possible. See BAMBERGER & MULLIGAN, *supra* note 433, at 32, 178 (2015). Regulators have discovered the benefits of using design to protect privacy, put forth guidelines, and incentivize stakeholders to adopt this approach as part of their business models. See CHRIS JAY HOOFNAGLE, *FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY* 190–92 (2016); see also Mulligan & Bamberger, *supra* note 404, at 701. Value-sensitive design is an approach that advocates identifying human needs and values and taking them into account in the design process. See Noëmi Manders-Huits & Jeroen van den Hoven, *The Need for a Value-Sensitive Design of Communication Infrastructures*, in *EVALUATING NEW TECHNOLOGIES* 51, 54 (Paul Sollie & Marcus Düwell eds., 2009); Deirdre K. Mulligan & Jenifer King, *Bridging the Gap Between Privacy and Design*, 14 U. PA. J. CONST. L. 989, 1019 (2012).

505. See Daniel Susser, *Ethics Alone Can’t Fix Big Tech*, SLATE (Apr. 17, 2019, 11:45 AM), <https://slate.com/technology/2019/04/ethics-board-google-ai.html> [https://perma.cc/M5WK-K27P].

506. Levy & Barocas, *supra* note 143, at 1230.

507. See Lavi, *supra* note 151, at 195.

508. Sylvain, *supra* note 465, at 275; Tremble, *supra* note 438, at 866.

automatically, because algorithmic, independent decisions are constrained by ex ante data choices and instructions.⁵⁰⁹ As for the scope of their liability, intermediaries are free to design their technology as they see fit, but they should be subject to basic requirements to keep users safe, and they should have a duty of care to internalize the cost they impose on society through algorithmic recommendation and targeting of unprotected content.⁵¹⁰ This duty of care focuses on the relations between the user and the intermediary. It can be applied to algorithmic targeting⁵¹¹ and protects security in society in general. This duty creates obligations to avoid targeting unprotected speech that directs, advocates, or encourages lawless action and incites and manipulates susceptible users to engage in terrorism. To meet this duty, intermediaries should utilize the concept of safety by design and instruct code developers to limit their code. Intermediaries can impose a barrier on the recommendations ex ante and avoid algorithmic recommendations with specific words or connections.⁵¹² Limitations by design are applied to other technologies and can be transplanted to the context of algorithmic recommendations as well.⁵¹³

Indeed, this solution may lead intermediaries and code developers to limit the boundaries of learning algorithms in the design stage of the code, which may result in less accurate recommendations. In the alternative, however, imposing a duty of care may incentivize intermediaries to develop more accurate technology and algorithms that will achieve both efficiency and accuracy.⁵¹⁴ Even if this scenario would not fully materialize, intermediaries cannot enjoy the rights of free speech and freedom to design without responsibility.⁵¹⁵ Because algorithmic incitement has power to influence users, promote terrorism, and cause tremendous harm, intermediaries should avoid targeting unprotected speech and connections, such as recommending connecting with members of an FTO.

509. That the recommendations are automatic does not change the conclusion, because the intermediary can impose barriers on the algorithm ex ante. See Balkin, *supra* note 404, at 1224; Mulligan & Bamberger, *supra* note 404, at 701.

510. HARTZOG, *supra* note 94, at 126.

511. See Balkin, *supra* note 404, at 1224.

512. See *id.*

513. COLLINS & SKOVER, *supra* note 416, at 27.

514. Mokhtarian, *supra* note 439, at 179.

515. See HARTZOG, *supra* note 94, at 121–26; RICHARDS, *supra* note 349, at 87.

Because recommendations are personalized, it is difficult to discover infringement of the obligation to avoid unlawfulness; most platforms avoid disclosing operational details on content recommendation practices.⁵¹⁶ However, researchers, members of civil rights organizations, and users can discover targeting of unlawful content in some instances.⁵¹⁷ Moreover, regulators can call upon or even fund independent researchers specifically to analyze digital practices to uncover inciting algorithmic systems of platforms.⁵¹⁸ In addition, policymakers can encourage challenging nontransparent recommendation systems by using a proactive method of “black box tinkering.”⁵¹⁹ This method encourages public activism and engagement in checking the practices of automatic enforcement systems.⁵²⁰ As a result, intermediaries could be held responsible for these nontransparent practices.⁵²¹

Disclosure by inside employees that might be motivated by a concern for others’ wellbeing, and who can shed light on the algorithms, may be another way to improve flawed practices and accountability. In a related context, Professor Sonia Katyal proposed encouraging greater transparency in algorithmic practices by adopting whistleblower protections.⁵²² This solution might be applicable to inciting policy-directed targeting. Protecting individual employees of media giants who come forward to address issues of flawed practices of targeting would create incentives to disclose information and may enable greater mitigation of harm and improved accountability.

A more comprehensive approach for promoting algorithmic safety and accountability is to develop new frameworks and methods of algorithmic oversight and public regulation.⁵²³ The

516. COHEN, *supra* note 165, at 136.

517. *See, e.g.,* Gerrard, *supra* note 38, at 4504 (discovered algorithmic targeting of “harm to self” content).

518. *See* Calo & Rosenblat, *supra* note 405, at 1684.

519. *See* Perel & Elkin-Koren, *supra* note 405, at 198–211 (arguing that public engagement in checking the practices of automatic enforcement systems can mitigate the problem and enhance awareness of biased algorithms).

520. *See id.*

521. *See id.*

522. Sonia K. Katyal, *Private Accountability in the Age of Artificial Intelligence*, 66 *UCLA L. REV.* 54, 126 (2019).

523. COHEN, *supra* note 165, at 267 (“The task of ensuring progress towards broadly distributed development, sustainability and algorithmic accountability is not one of courts alone, or even primarily; it will also require new methods of

Article will touch upon such methods and address them in Part IV.C.4.c.

3. *Safe Haven: Outlining a Lenient Liability Regime for Adopting Safety by Design, Best Practices, and Monitoring*

What should the legal scope of liability for algorithmic targeting be? Should the law sanction unprotected recommendations even if the intermediary did not intend to select unlawful recommendations, or should it settle with voluntary measures of prevention? The private industry has an important role in promoting algorithmic accountability for safer algorithmic targeting.⁵²⁴ However, there are different technology and media companies with different business models and agendas. In addition, companies outsource responsibility to fulfill legal requirements and duties to engineers at third party technology vendors. They see the obligations through a corporate lens that aims to maximize their profits, rather than through a substantive lens.⁵²⁵ Although voluntary regulation is highly important, relying on it alone is insufficient. Therefore, the starting point is subjecting intermediaries to a legal duty of care to avoid targeting unprotected speech and recommendations. Failing to comply with this duty can result in legal liability.⁵²⁶

In many cases the algorithm is policy neutral,⁵²⁷ and specifically targeting unlawful content is an unwitting consequence that the intermediary might not have aimed for. As explained in the last Part, liability might over-chill speech and reduce the

administrative oversight and new thinking about the approach relationship(s) between administrators and courts”).

524. Katyal, *supra* note 522, at 61 (arguing that because the state alone cannot solve the problem of algorithmic accountability, a solution should involve the private industry).

525. See Ari Ezra Waldman, *Privacy's Law of Design*, 9 U.C. IRVINE L. REV. 1239, 1245–59 (2019).

526. Liability should be governed by the concept of product liability, even if the default regime is negligence. See Katyal, *supra* note 522, at 126; Waldman, *supra* note 525, at 1263–66. Even intermediaries that use learning algorithms should be aware of the risks of harm and can make sure that the designers impose limitations on the systems' culpabilities. See Scherer, *Wild Beasts*, *supra* note 416, at 280–90. As an alternative to the strict liability regime which is likely to over-chill free speech, liability can be imposed according to a standard of “the reasonable algorithm.” See Ryan Abbott, *The Reasonable Computer: Disrupting the Paradigm of Tort Liability*, 86 GEO. WASH. L. REV. 1, 5–6 (2018).

527. See Tene & Polonetsky, *supra* note 151, at 132.

accuracy of legitimate recommendations. This result reduces fairness and efficiency, especially under a rigorous standard of strict liability, but also under an ambiguous negligence standard. On the other hand, even an algorithm that is policy neutral can pose a great risk by targeting inciting content to susceptible recipients and pushing them to commit violent terror attacks. An overall immunity regime creates disincentives for intermediaries to avoid targeting unlawful recommendations and result in under-deterrence and inefficient levels of risks to the public's safety. To balance efficiency, fairness, and public safety, a safe haven regime for algorithmic targeting should be promulgated. Under this regime, liability would not be imposed for failing to provide perfect safety. Instead, this regime aims to incentivize all companies to comply with specific requirements and minimize disproportionate risk of unlawful recommendation.

The starting point for targeting unprotected speech is a negligence theory of liability. Intermediaries that choose to opt in to a safe haven program can gain certainty regarding the scope of liability. The proposed safe haven includes concrete obligations and duties of care. It can apply only to general purpose platforms and not to purely ideological platforms that are devoted to incitement to terror and hate speech without legitimate purpose.⁵²⁸ The safe haven requirements will focus on minimizing risk for unprotected speech as a minimum standard of care. Indeed, intermediaries are encouraged to reduce the risk of extremist recommendations and to reduce the visibility of violent content. However, this extra level of care is voluntary.

By complying with the requirements of the safe haven program, intermediaries will be exempt from civil or criminal fault-based liability. Liability will be limited only to knowledge-based targeting of unprotected speech and recommendation, or for knowingly failing to fix code that causes inciting algorithmic recommendations. Intermediaries can still bear liability if civil society organizations, private people, or monitoring systems report recommendations of inciting con-

528. Platforms that are focal points for incitement, such as Gab, cannot benefit from a safe haven, and their liability will be governed under a standard of negligence, or even under a standard of inducement. See Lavi, *supra* note 89, at 5.

tent, or if the intermediary received notifications yet continues to exhibit such recommendations.⁵²⁹

The safe haven program will require intermediaries to involve attorneys in the design process and work with governmental authorities to implement and comply with safety standards in algorithmic recommendation systems.⁵³⁰ First, it will require intermediaries and industry bodies to develop and adopt safety technologies and best practices and apply them in algorithmic design.⁵³¹ Standards of safety by design aspire to prevent automatic suggestions of terrorist content and reduce the risk for unlawful recommendation of content. Industry and government experts would review the standards every year and update them as technology develops.

Second, recommendation systems can involve artificial intelligence algorithms that can learn and operate unexpectedly. However, that the system may operate in unpredictable ways is predictable. It is inefficient and unjust to provide a safe haven for knowingly operating an unpredictable system without minimizing its risks. Therefore, intermediaries that aim to comply with the safe haven requirements should limit their operations and disable the ability to create unlawful recommendations *ex ante* at the design stage.⁵³² Alternatively, a solution of monitoring systems *ex post* can mitigate the risk of diverting from initial programming. Automatic monitoring systems would review the algorithms, notify the intermediary that

529. See Kim, *supra* note 440, at 416–18.

530. See Waldman, *supra* note 525, at 1283 (in the related context of privacy by design).

531. This regulatory concept was recently found in the regulatory framework for accommodating terrorist online harm in the United Kingdom that includes a risk based duty of care in algorithmic selection of content. See U.K. ONLINE HARMS WHITE PAPER, *supra* note 488, at 70, 72 (“[C]ompanies should take [reasonable steps] to ensure that their services are safe by design Companies will be required to ensure that algorithms selecting content do not skew towards extreme and unreliable material in the pursuit of sustained user engagement.”).

532. Limiting the function of the system to avoid specific topics at the design stage is possible even when AI is involved. Apple’s Siri demonstrates this point. See COLLINS & SKOVER, *supra* note 416, at 27; see also YouTube Team, *supra* note 417 (discussing the practice of limiting harmful recommendations applied by YouTube).

it should correct algorithmic failure, and reprogram or redirect the algorithmic recommendation system *ex post*.⁵³³

Third, intermediaries should implement reporting systems that allow private people and civil society organizations to report unlawful recommendations on inciting speech efficiently and allow for correction.

Fourth, intermediaries should submit transparency reports regarding the technological mechanisms to regulators. These reports would explain how their algorithms operate and select content, thereby reducing the risk for unlawful algorithmic recommendations.⁵³⁴ Transparency obligations will enable regulators to ensure that the intermediary complies with the safe harbor obligations and to sanction noncompliance.⁵³⁵

4. Remedies, Sanctions and Regulatory Tools

a. Tort Law: Loss of Chances Doctrine

This Article explains that the proximate cause requirement makes it difficult to establish liability on online intermediaries for terror attacks after a failure to remove specific speech or a failure to prevent a specific content recommendation.⁵³⁶ However, there is a good reason to believe that inciting speech on social networks inspires terrorism.⁵³⁷ An intermediary that knowingly fails to remove unprotected terrorist speech or de-

533. On *ex post* monitoring systems as part of a liability regime of robotic functions, see Omri Rachum-Twaig, *Whose Robot is it Anyway?: Liability for Artificial-Intelligence-Based Robots*, 2020 U. ILL. L. REV. (forthcoming 2020) (manuscript at 33).

534. Algorithmic code is usually a trade secret. However, the requirement is not to expose the code but rather to explain it. For a similar proposal, see U.K. ONLINE HARMS WHITE PAPER, *supra* note 488, at 45. In addition, transparency that is limited only to the regulator should not be ruled out. See Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1540; see also Hannah Bloch-Wehba, *Access to Algorithm*, 88 FORDHAM L. REV. (forthcoming 2020) (manuscript at 49) (“Faced with demands for more transparency, courts and litigants have sometimes reached an apparent compromise: protective orders, coupled with nondisclosure orders, that permit disclosure to the parties while preventing disclosure to the general public.”).

535. Algorithmic oversight should improve and extend beyond transparency obligation as policymakers and regulators develop and adopt more substantive methods for algorithmic evaluation and public regulation. On a more comprehensive frameworks for algorithmic evaluation and public regulation, see the proposals for public regulation and algorithmic impact assessment in Part IV.C.4.c.

536. See *supra* Part IV.B.

537. See *supra* Part I.B.

signs an algorithmic recommendation system that targets recommendations for inciting content increases the risk for terrorist attacks. Victims of terror attacks and their families have sustained harm that might have been caused by the intermediary's behavior. The casual connection, however, is an uncertain factor. Namely, it is unclear whether the defendant's wrongdoing actually violated the plaintiffs' protected interest.⁵³⁸ Many scholars argue that in cases of systematic infliction of harm and uncertainty in causation, an adherence to an all-or-nothing solution is inappropriate.⁵³⁹ Therefore, plaintiffs should be able to recover their loss under the lost chances doctrine. The compensation would be proportionate to the probability of loss of chances even if the loss of chances is below fifty percent.⁵⁴⁰ The law has adopted the lost chance doctrine in different jurisdictions mainly in the fields of medical malpractice and mass torts.⁵⁴¹

Indeed, U.S. courts are inconsistent in applying this doctrine.⁵⁴² However, the loss chances doctrine may provide a solution for the problem of uncertain causation in intermediaries' liability for terrorists' content. Imposing proportional liability on the intermediary is justified from a corrective justice perspective. It imposes compensation on intermediaries according to the actual damage they caused and allows terrorist victims and their families to get partial compensation. Applying the

538. These factors define uncertainty depending on whether the defendant violated the plaintiff's protected interest. See ARIEL PORAT & ALEX STEIN, TORT LIABILITY UNDER UNCERTAINTY 125–29 (2001); Marc Stauch, *Causation, Risk, and Loss of Chance in Medical Negligence*, 17 OXFORD J. LEGAL STUD. 205, 223 (1997).

539. See, e.g., PORAT & STEIN, *supra* note 538, at 125–29.

540. See *id.* at 127.

541. In these situations, the plaintiff asserts that a certain percentage of his chances of recovery were lost as a result of the defendant's negligent omissions. See Benjamin Shmueli, "I'm Not Half the Man I Used to Be": *Exposure to Risk Without Bodily Harm in Anglo-American and Israeli Law*, 27 EMORY INT'L L. REV. 987, 998 (2013).

542. Compare *Herskovits v. Group Health Coop. of Puget Sound*, 664 P.2d 474, 476–77 (Wash. 1983) (adopting this approach) with *Cooper v. Sisters of Charity of Cincinnati, Inc.*, 272 N.E.2d 242 97, 104 (1971) and *Hiser v. Randolph*, 617 P.2d 774, 779 (Ariz. Ct. App. 1980) (rejecting this approach). Although there is no consensus for applying this doctrine, courts are more willing to adopt it relative to the increased risk doctrine that mirrors it. See Shmueli, *supra* note 541, at 998; see also Daniel J. Solove & Danielle Keats Citron, *Risk and Anxiety: A Theory of Data-Breach Harms*, 96 TEX. L. REV. 737, 740 (2018) (proposing to apply the increased risk doctrine on data breach cases and referring to anxiety risk as actual harm).

doctrine is also justified from an efficiency perspective. It results in optimal compensation and solves the under-deterrence problem that would have been the result otherwise.⁵⁴³

It should be noted that the loss chances doctrine aims to compensate for harm that already occurred. It is different from the “increased risk” doctrine that aims at compensation for increased risk for future harm that plaintiffs might seek to apply and was at the base of the plaintiffs’ suit in *Cohen v. Facebook, Inc.*⁵⁴⁴ Applying the doctrine of loss of chance is more feasible than applying the increased risk doctrine on future attacks.⁵⁴⁵ In contrast to the increased risk doctrine, loss chance doctrine deals with actual harm that already occurred. Actual specific victims may receive partial compensation from the worst actors that have knowingly failed to remove unprotected inciting content or recommendations for unprotected speech upon notice.

b. Criminal Prosecution

Criminal law allows the Justice Department to file criminal suits against companies for violating the true threats,⁵⁴⁶ or the material support statutes.⁵⁴⁷ Criminal liability could include monetary fines or takedown orders against terrorists’ accounts.⁵⁴⁸ A court might also issue an injunction to deploy software for taking down unprotected terrorists’ expressions or

543. See PORAT & STEIN, *supra* note 538, at 128–29.

544. In *Cohen*, 20,000 people filed an action and argued that future attacks threaten them. *Cohen v. Facebook, Inc.*, 252 F. Supp. 3d 140, 145–46 (E.D.N.Y. 2017). Compensating for future attacks is less desirable in such cases. Unlike data breach cases which include a limited group of people whose personal data has been breached, there is no defined group of plaintiffs, and allocating compensation is thus problematic. See Ben-Shahar, *supra* note 481, at 24; Solove & Citron, *supra* note 542. In the case of increased risk doctrine—as opposed to the lost chance doctrine—the uncertainty over causation is not the only problem. There is also uncertainty regarding who will be the actual victims.

545. Courts are not likely to recognize fear of future terror attacks as actual harm, when physical harm had not yet occurred. In *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the Supreme Court held that harms need not immediately translate into an injury if there is a significant risk of a real harm occurring later. See *id.* at 1549. However, the Court has not clarified in what cases victims would have Article III standing. See Daniel Solove, *In re Zappos: The 9th Circuit Recognizes Data Breach Harm*, PRIVACY & SECURITY BLOG (Apr. 9, 2018), <https://teachprivacy.com/in-re-zappos-9th-circuit-recognizes-data-breach-harm/> [https://perma.cc/N6DB-CJ4J].

546. Tsesis, *supra* note 17, at 625 (referring to 18 U.S.C. § 875(c) (2018)).

547. *Id.* (referring to 18 U.S.C. § 2339B(a) (2018)).

548. *Id.*

accounts.⁵⁴⁹ Because of the presumption in favor of free speech, injunctions that ban speech by technological measures should only be used in rare cases.⁵⁵⁰ In general, the best practices of applying technological measures should be determined by the industry and applied voluntarily.

Scholars have criticized the use of the material support statute for criminal prosecution and argued that it can lead to suppression of protected speech relating to terrorism.⁵⁵¹ The use might suppress news items that are published on social media because it is difficult to discern news about terrorism from terrorist propaganda.⁵⁵² These concerns are valid, but criminal prosecution should not be ruled out altogether. It should be limited to cases in which an intermediary refrained from removing severe and clear unprotected speech, or algorithmic recommendations upon actual knowledge.

Arguably, criminal prosecution in such cases can limit speech despite being narrowly tailored. Social media employees receive large volumes of requests and have to make the decision to remove unprotected content. It is difficult to determine whether a specific post is protected or not.⁵⁵³ Thus, to avoid prosecution, intermediaries might prefer to take down legitimate content and accounts to be on the safe side. However, platforms are also driven by economic incentives, and taking down too much content would result in loss of profits. Thus, the degree to which legitimate expression is chilled should be less extensive than at first glance and reflect a proper balance between free speech and the public's safety.⁵⁵⁴

549. *Id.* at 626.

550. *Id.* at 627–28 (referring to rare cases of immediate national emergencies).

551. VanLandingham, *supra* note 209, at 43–44.

552. *Id.* at 39–40.

553. Nick Hopkins, *Revealed: Facebook's internal rulebook on sex, terrorism and violence*, GUARDIAN (May 21, 2017 1:00 PM), <https://www.theguardian.com/news/2017/may/21/revealed-facebook-internal-rulebook-sex-terrorism-violence> [<https://perma.cc/34JR-BQQ9>] (“[T]he volume of work, which means [moderators] often have ‘just 10 seconds’ to make a decision.”); see also GILLESPIE, *supra* note 47, at 111–12.

554. Klonick, *supra* note 112, at 1627 (“If a platform creates a site that matches users’ expectations, users will spend more time on the site and advertising revenue will increase. Take down too much content and you lose not only the opportunity for interaction, but also the potential trust of users.” (footnote omitted)).

c. *Public Regulation, Algorithmic Impact Assessment, and Ex Post Enforcement*

Terrorist speech fits well in the “data pollution” concept—a term first proposed by Professor Omri Ben-Shahar in related contexts—which compares the harm that speech causes to social institutions with environmental pollution.⁵⁵⁵ This analogy was proposed because of similarity to environmental harm, abusive use of data collection, and dissemination of harmful speech that infringes on the public interest.⁵⁵⁶ This concept can be applied to terrorist speech because inciting terrorist propaganda leaks into the digital ecosystem, causing fear that disrupts social institutions. The harm of digital data pollution is more systemic, decentralized, and complex relative to traditional harm.⁵⁵⁷ Professor Ben-Shahar suggested that devices regulating environmental harm can be used in regulating data pollution.⁵⁵⁸ First, there are ex ante regulations that policymakers can utilize for achieving the goal of safety by design. Regulation can limit data collection and the way it is shared and thus limit personalized algorithmic targeting.⁵⁵⁹ Yet, unlike environmental harm, data is not toxic per se and it is a challenge to determine in advance which collection of data is beneficial and what constitutes “legitimate” purposes for collection.⁵⁶⁰ This solution can reduce the efficiency of recommendation systems altogether and the costs might exceed the benefits.⁵⁶¹ Another

555. See Ben-Shahar, *supra* note 481, at 106–07.

556. See *id.*

557. See COHEN, *supra* note 165, at 182.

558. See Ben-Shahar, *supra* note 481, at 108–10.

559. In the European Union, the General Data Protection Regulation (GDPR) tries to determine the principle of data minimization in advance. See Regulation (EU) 2016/679 of the European Parliament and the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), art. 78, 2016 O.J. (L 119) 15. The GDPR protects data of EU citizens, but it applies to non-EU companies that offer goods or services to EU consumers. See Michael L. Rustad & Thomas H. Koenig, *Towards a Global Data Privacy Standard*, 71 FLA. L. REV. 365, 365 (2019). Thus, it can affect data protection in the United States and is expected to have a global effect. *Id.* at 365–66. In addition, it is already creating a “Brussels Effect”—a race to the top in data protection standards—as the California Consumer Privacy Act of 2018 (CCPA) demonstrates. *Id.* at 403–05. Similar to the GDPR, this U.S. law also outlines a principle of data minimization in the context of consumer data protection. *Id.* at 404.

560. Ben-Shahar, *supra* note 481, at 133–34.

561. *Id.* at 134.

type of ex ante regulation is directed towards technology and applying best practices of moderation. Trying to determine ahead of time which technology is best to curb a certain problem, however, will cause a chilling effect on innovation that would burden speech. Furthermore, best practices of moderating user content might result in removal of inciting content upon knowledge, but it will not necessarily prevent algorithmic recommendations and targeting of unlawful content.

Other solutions are process-oriented focusing on transparency for algorithmic recommendation systems, even for intermediaries that did not opt into the proposed safe haven regime. One must bear in mind, however, that algorithms are guarded trade secrets; therefore, there are legal difficulties to imposing general transparency obligations.⁵⁶² Scholars have proposed a range of mechanisms for promoting algorithmic transparency and accountability.⁵⁶³ For example, some scholars have argued for promoting nuanced algorithmic transparency, due process, and accountability obligations.⁵⁶⁴ Other scholars have argued that the way to achieve transparency is by data protection.⁵⁶⁵ Legislation modeled after the European Union's General Data Protection Regulation (GDPR) that protects against automated decisionmaking harm⁵⁶⁶ and provides a right for individuals to

562. In the related context, data protection, the EU GDPR requires companies and governments to reveal an algorithm's purpose and the data it uses to make decisions, leading some to infer a right to explanation. See Katyal, *supra* note 522, at 106. This right, however, aims to protect a data subject's rights and not the third party. In the United States, such a right does not exist. Accountability in algorithmic programming might be achieved by private industry, rather than public regulation. *Id.* at 107–21. But not all intermediaries are expected to opt in to the safe haven regime or apply a voluntary standard of accountability.

563. See Bloch-Wehba, *supra* note 534 (manuscript at 4, 6–7) (reviewing different approaches for algorithmic transparency and arguing that there should be algorithmic transparency in the public sector as part of the law of access to government records and freedom of information because the public as a whole is affected by governmental algorithmic decisions); see also Rory Van Loo, *The Missing Regulatory State: Monitoring Businesses in an Age of Surveillance*, 72 VAND. L. REV. 1563, 1563 (2019) (proposing general regulatory monitoring on platforms and of business information and explaining that this monitoring will enhance users' privacy).

564. See, e.g., Danielle Keats Citron & Frank Pasquale, *The Scored Society: Due Process for Automated Predictions*, 89 WASH. L. REV. 1, 20 (2014); Zarsky, *supra* note 534, at 1540; Ari Ezra Waldman, *Power, Process, and Automated Decision-Making*, 88 FORDHAM L. REV. 613, 624 (2019).

565. See, e.g., Rustad & Koenig, *supra* note 559, at 453.

566. See *supra* note 559; see also Margot E. Kaminski, *The Right to Explanation, Explained*, 34 BERKELEY TECH. L.J. 189, 199 (2019).

receive explanations about the model of algorithms⁵⁶⁷ may achieve more transparency and promote procedural justice. However, such legislation focuses on data protection of data subjects and is less suitable to reduce the harm algorithmic recommendations inflict on third parties.

A different way to meet this problem is pre-implementation licensing regime that includes obligations of limited disclosure or a review by the Federal Trade Commission (FTC) or an agency like the Food and Drug Administration (FDA) that can allow protecting against algorithmic incitement to terror.⁵⁶⁸ But this broad based legal solution involves profound administrative costs. Furthermore, it might not be fully feasible when learning algorithms are at stake and may hinder innovation.⁵⁶⁹ This approach removes the burden from individuals and places it upon the company and the licensors instead. But, in doing so, it creates “a regulatory bottleneck for companies that must move quickly in order to compete.”⁵⁷⁰ Furthermore, “the focus on documentation and process as ends in themselves elevates a merely symbolic structure to evidence of actual compliance with the law,” obscures that algorithmic decisionmaking erodes “substantive values of fairness, equality, and human dignity,” and “may thereby discourage both users and policy-makers from taking more robust actions.”⁵⁷¹

A superior solution that extends even beyond the design stage is an algorithmic impact assessment that will require intermediaries to ascertain that their algorithms and tools undergo evaluation for safety by independent auditors and technology experts regularly. Algorithmic impact assessment can mitigate the risk for error or failure in the design stage or unexpected reactions of learning algorithms that may result in unprotected recommendations. This idea is not so revolutionary. Recently, legislators proposed an impact assessment for algorithmic dis-

567. See Andrew D. Selbst & Solon Barocas, *The Intuitive Appeal of Explainable Machines*, 87 FORDHAM L. REV. 1085, 1107 (2018).

568. Andrew Tutt, *An FDA for Algorithms*, 69 ADMIN. L. REV. 83, 115–16 (2017).

569. See THIERER ET AL., *supra* note 419, at 18–20.

570. Dennis D. Hirsch, *From Individual Control to Social Protection: New Paradigms for Privacy Law in the Age of Predictive Analytics*, 79 MD. L. REV. (forthcoming 2020) (manuscript at 40).

571. Waldman, *supra* note 564, at 629.

crimination.⁵⁷² The proposed bill, the Algorithmic Accountability Act of 2019, requires entities that use, store, or share personal information to conduct impact assessments for automated decision systems and data protection.⁵⁷³ These impact assessments are meant to monitor for discrimination and give entities a chance to correct discriminatory algorithms in a timely manner.⁵⁷⁴ Adding an ex post review to ex ante measures can also be used to promote the public's safety.

However, this solution is not optimal.⁵⁷⁵ It still leaves opacity regarding the algorithmic functions and guidelines for implementation measures. Yet, this solution is flexible and might be superior to ex ante full disclosure to the regulator. It can also apply on intermediaries' that chose not to join the safe haven program. Regulators and policymakers are expected to develop clearer guidelines for improving the implementation of this solution.

Ex post public enforcement is another administrative solution.⁵⁷⁶ Indeed, liability in tort law might partially compensate victims and their families by applying the loss chances doctrine.⁵⁷⁷ But it is more difficult to hold intermediaries responsible for possible harm that might occur in the future.⁵⁷⁸ A public enforcement scheme is not constrained by the same remedial standards.⁵⁷⁹ A criminal fine, a civil emission fee, or even statutory damages awarded in private class action can lead to deterrence and mitigation of harm. This public regulation can apply to intermediaries that knowingly avoid removing severe unprotected inciting speech.⁵⁸⁰ It can also apply to intermediaries that did not opt into the safe haven regime for safe algorithmic recommendations but fail to exercise a duty of care in designing

572. Algorithmic Accountability Act of 2019, H.R. 2231, 116th Cong. § 3(b) (2019).

573. *Id.*

574. *See id.*; *see also* Margot E. Kaminski & Andrew D. Selbst, *The Legislation That Targets the Racist Impacts of Tech*, N.Y. TIMES (May 7, 2019), <https://nyti.ms/2Ybb8MT> [<https://perma.cc/PZZ7-XV5C>]; Waldman, *supra* note 564, at 628–29. The obligation of regular evaluation of algorithmic tools would be enforced by the FTC. *See* Kaminski & Selbst *supra*.

575. *See* Kaminsky & Selbst, *supra* note 574.

576. Ben-Shahar, *supra* note 481, at 47–48.

577. *See supra* Part IV.C.4.c.

578. Solove & Citron, *supra* note 542, at 750.

579. Ben-Shahar, *supra* note 481, at 47–48.

580. *Id.*

recommendation systems and to intermediaries that opted into the safe haven regime but fail to comply with its requirements.

5. *Voluntary Prevention and Mitigation*

The proposals in this Article outline minimum standards, and they only address unprotected speech or recommendations on such content. Outlining broader mandatory obligations might be unconstitutional. It is also likely to result in extensive collateral censorship and reduce efficiency and innovation.⁵⁸¹ Mandates are not, however, the last word on this topic. In many cases intermediaries can and do mitigate the harm caused by terrorist activities above this minimum legal threshold. They are in a position of responsibility and have an implicit contract with the public to find ways to prevent harm. This social contract does not bind platforms in court, but it is upheld in the court of public opinion.⁵⁸² This Part gives a few examples of additional voluntary measures that intermediaries can take to mitigate terrorist activities on their platform.

a. *Improving Detection, Enforcement, and Prevention*

Intermediaries can and do moderate harmful content proactively and reactively.⁵⁸³ They use various technologies for efficient removal. They operate moderators and rely on community flagging and technologies.⁵⁸⁴ However, the efforts to remove speech ex post might be futile when terrorists, their sympathizers, and the general public share the offensive content and allow it to spread widely on platforms. Voluntary cooperation among social media giants allows them to share unique digital fingerprints that they automatically assign to videos or photos of offensive content that they have removed from their web-

581. See *supra* Part III.B.

582. GILLESPIE, *supra* note 47, at 208; KOSSEFF, *supra* note 223, at 250 (“Although platforms have taken significant steps to meet their obligations under that social contract, they can and should do more.”).

583. KOSSEFF, *supra* note 223, at 246 (explaining how YouTube uses machine learning to automatically identify extremist videos and supplements the teams of moderation who manually review videos for violating YouTube’s policies); Klonick, *supra* note 112, at 1625–36.

584. GILLESPIE, *supra* note 47, at 74–110 (reviewing the common ways of moderating content).

sites.⁵⁸⁵ This allows their peers to identify the same content on their platforms and remove it, thus mitigating the problem of wide dissemination of harmful content. Websites are expected to cooperate with each other if this measure is perceived as “family friendly” and attracts users who are inclined to that environment. In fact, intermediaries already practice this policy in some cases.⁵⁸⁶

To date, the tools of detection have many flaws in interpreting context. Therefore, removal of all replications of text-based expressions should not be used automatically to prevent content from being uploaded to the net. Rather, it should be used for detection, calling attention to the content for human oversight.⁵⁸⁷ A limited use of digital fingerprints for detection of repeated harmful content, leaving the decision of removal in the hands of each intermediary, would mitigate the concern of chilling legitimate content. In addition, limiting legal liability for unprotected speech also mitigates the concern for automatic removal of legitimate extremist content by this technology.⁵⁸⁸

Another developing solution is the use of AI to detect terrorist content. Learning algorithms can be useful for efficient pro-

585. Rafał Kuchta, *The hash—a computer file’s digital fingerprint*, NEWTECH.LAW (Oct. 9, 2017), <https://newtech.law/en/the-hash-a-computer-files-digital-fingerprint/> [<https://perma.cc/VJZ6-R93G>].

586. See Julia Fioretti & Lily Cusack, *EU urges internet companies to do more to remove extremist content*, REUTERS (Dec. 6, 2017, 2:14 PM), <https://www.reuters.com/article/us-eu-internet-forum/eu-urges-internet-companies-to-do-more-to-remove-extremist-content-idUSKBN1E02Q7> [<https://perma.cc/UPH9-3J2V>] (“Over the summer, Microsoft (MSFT.O), Facebook, Twitter and YouTube formed a global working group to combine their efforts in removing extremist content from their platforms, and last year formed a database of known ‘terrorist’ images and videos which now contains more than 40,000 hashes, or digital signatures.”); Julia Fioretti, *Web giants to cooperate on removal of extremist content*, REUTERS (Dec. 5, 2016, 6:10 PM), <https://www.reuters.com/article/us-internet-extremism-database/web-giants-to-cooperate-on-removal-of-extremist-content-idUSKBN13U2W8> [<https://perma.cc/TY99-BH2U>]; see also Klein & Flinn, *supra* note 17, at 79–81 (referring to the use of this practice in removing child pornography images).

587. This conclusion is reinforced for text-based content—as opposed to images—because the systems today are not very good with handling interpretation and context. See GILLESPIE, *supra* note 47, at 98–108.

588. In a recent article, Professor Citron even refers to the use of removal technology as part of a duty of care. Citron, *supra* note 47 (“Internet service providers (ISPs) and social networks with millions of postings a day cannot plausibly respond to complaints of abuse immediately, let alone within a day or two. On the other hand, they may be able to deploy technologies to detect content previously deemed unlawful. The duty of care will evolve as technology improves.”).

active detection of such content.⁵⁸⁹ These systems are constantly improving,⁵⁹⁰ but at this stage they are not good enough in interpreting context.⁵⁹¹ Therefore, any use of automated content analysis tools should be accompanied by human review of the output or conclusions.⁵⁹²

Intermediaries and search engines use AI and other technologies to decrease terrorist content visibility, such as livestreaming of terror attacks,⁵⁹³ or to detect use of hashtags to increase the visibility of harmful content and block them.⁵⁹⁴ For example, following the terror attack in New Zealand, Facebook decided to improve its matching technology tools to stop the spread of viral videos of this nature and expand collaboration with the industry to counter terrorism.⁵⁹⁵

Intermediaries can also counter terrorists' posts and mitigate extremism through anti-terror advertising.⁵⁹⁶ Jigsaw, one of Google's semi-independent units, has recently taken on the challenge of identifying extremist content of terrorist groups before it erupts into violence.⁵⁹⁷ Nevertheless, there are practi-

589. See, e.g., BRUNDAGE ET AL., *supra* note 39, at 60; GILLESPIE, *supra* note 47, at 97; Sheera Frenkel, *Facebook Will Use Artificial Intelligence to Find Extremist Posts*, N.Y. TIMES (June 15, 2017), <https://www.nytimes.com/2017/06/15/technology/facebook-artificial-intelligence-extremists-terrorism.html> [<https://perma.cc/SW3Y-5SVV>].

590. See Elkin-Koren, *supra* note 366, at 1097.

591. GILLESPIE, *supra* note 47, at 98–108.

592. DUARTE ET AL., *supra* note 440, at 6.

593. For example, algorithms could reduce or obscure the visibility of the live streaming of the terror attack in New Zealand, see *supra* note 18 and accompanying text. Obscuring content is in line with § 230. See *Force v. Facebook, Inc.*, 934 F.3d 53, 70 n.24 (2d Cir. 2019) (“We do not mean that Section 230 requires algorithms to treat all types of content the same. To the contrary, Section 230 would plainly allow Facebook’s algorithms to, for example, de-promote or block content it deemed objectionable.”).

594. See, e.g., Casey Newton, *Instagram will begin blocking hashtags that return anti-vaccination misinformation*, VERGE (May 9, 2019, 12:37 PM), <http://www.theverge.com/2019/5/9/18553821/instagram-anti-vax-vaccines-hashtag-blocking-misinformation-hoaxes> [<https://perma.cc/EC6J-3U7G>]. Google’s algorithms are subject to regular tinkering from executives and engineers on specific search results, including on topics such as vaccinations and autism. See Grind, *supra* note 151.

595. See Guy Rosen, *A Further Update on New Zealand Terrorist Attack*, FACEBOOK NEWSROOM (Mar. 20, 2019), <https://newsroom.fb.com/news/2019/03/technical-update-on-new-zealand/> [<https://perma.cc/2PSL-TLRE>].

596. See Andy Greenberg, *Google’s Clever Plan to Stop Aspiring ISIS Recruits*, WIRED (Sept. 7, 2016, 7:00 AM), <https://www.wired.com/2016/09/googles-clever-plan-stop-aspiring-isis-recruits/> [<https://perma.cc/AD8Q-QG23>].

597. *Id.*

cal challenges in classifying content correctly, resulting in flagging innocent individuals as terrorists. Another challenge is philosophical: by predetermining that someone is a terrorist based on past patterns, AI might infringe on that person's autonomy.⁵⁹⁸

As technology progresses, existing ways of moderation are expected to improve, and become more accurate. This will allow intermediaries to work beyond the minimum standard of unprotected speech and voluntarily mitigate the harm caused by terrorists' propaganda, incitement, and recruitment. Ethical standards and obligations should develop and encourage intermediaries to use data they gain from operating the platform to prevent harm.⁵⁹⁹

Voluntary measures for algorithmic enforcement define the scope of rights without transparency.⁶⁰⁰ One possibility to mitigate the problem of algorithmic enforcement is facilitating an out-of-court dispute settlement system to resolve disputes related to the removal or disabling of access to illegal content, as recommended by the European Council.⁶⁰¹ This system will allow users to challenge intermediaries' decisions to take down content. Another strategy is revealing improper speech restrictions by private initiatives that are committed to protect online free speech. Such initiatives would increase the awareness of policymakers, the press, and the public to online free speech violations, and lead to public outcry that would mitigate improper speech restrictions.⁶⁰² In addition, intermediaries can voluntarily disclose information on their enforcement practices by transparency reports and allow users to challenge removal decisions.⁶⁰³

It should be noted that following public concerns, Facebook is already proposing to create an independent body to make

598. GILLESPIE, *supra* note 47, at 109–10; *see also* Gal, *supra* note 154, at 75–76.

599. *See* Maldoff & Tene, *supra* note 479.

600. *See* Balkin, *supra* note 148, at 1167.

601. Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, 2018 O.J. (L 63) 58 (“Member States are encouraged to facilitate, where appropriate, out-of-court settlements to resolve disputes related to the removal of or disabling of access to illegal content.”).

602. Perel & Elkin-Koren, *supra* note 405, at 202–05.

603. Google already publishes transparency reports. *See* Google, *Transparency Report*, GOOGLE, <https://transparencyreport.google.com/?hl=en> [<https://perma.cc/K2ER-DCU2>] (last visited Nov. 5, 2019).

decisions about what kinds of content users would be allowed to post and include an oversight committee.⁶⁰⁴ Such a body can help highlight weaknesses in the policy formation of platforms, provide an independent forum for discussing disputed content moderation decisions, and allow public reasoning necessary for users.⁶⁰⁵ These measures and others can enhance accountability.

b. Rethinking Legal and Ethical Considerations of Design to Prevent Harmful Outcomes of the Algorithmic Code

Intermediaries can do more to prevent harmful outcomes of algorithmic recommendation.⁶⁰⁶ Scholars and even governments have addressed the need for a framework for designers⁶⁰⁷ and for an ethical code for code developers⁶⁰⁸ in related contexts; the U.K. government has even set up a Center for Data Ethics and Innovation to provide independent advice on the ethical and innovative deployment of data and AI.⁶⁰⁹ The industry can develop ethical guidelines as well. Recently, scholarly work has proposed to develop a set of ethical principles within professional organizations like the Association for the Advancement of Artificial Intelligence and the Association of Computing Machinery.⁶¹⁰ The proposed ethical guidelines and principles of algorithmic accountability are applicable to algorithmic recommendations that promote terrorist attacks. They are not aimed at censoring users but rather address intermediaries' algorithmic recommendations that are not always in line with the intermedi-

604. On the planned oversight board, its benefits, and limitations, see Evelyn Douek, *Facebook's "Oversight Board:" Move Fast with Stable Infrastructure and Humility*, N.C. J.L. & TECH., Oct. 2019, at 1, 28–49 (2019). This idea can promote the removal of unlawful content above the legal threshold. There are more possibilities that can mitigate harm. See Kate Klonick & Thomas E. Kadri, *Opinion, How to Make Facebook's 'Supreme Court' Work*, N.Y. TIMES (Nov. 17, 2018), <https://nyti.ms/2Ds8Ba3> [<https://perma.cc/NCY4-BWZ7>].

605. See Douek, *supra* note 604, at 67–68.

606. Mulligan & Bamberger, *supra* note 404, at 701.

607. See *id.* at 742; Levy & Barocas, *supra* note 143.

608. See WORLD ECON. FORUM, HOW TO PREVENT DISCRIMINATORY OUTCOMES IN MACHINE LEARNING 21 (2018), http://www3.weforum.org/docs/WEF_40065_White_Paper_How_to_Prevent_Discriminatory_Outcomes_in_Machine_Learning.pdf [<http://perma.cc/N9CW-Z5N9>] (referring to discriminatory design and proposing “Principles on the Ethical Design and Use of AI and Autonomous Systems”).

609. U.K. ONLINE HARMS WHITE PAPER, *supra* note 488, at 26.

610. Katyal, *supra* note 522, at 109.

aries' own policies.⁶¹¹ To improve their service, the industry in general and every intermediary in particular should identify the values they strive to promote. They should then encourage code developers, engineers, and legal advisors of technology companies to consider the full range of values and public interests implicated by technical design.⁶¹² Considering the values at stake beforehand should enhance accountability in code development, reduce negligent design, and mitigate the harmful consequences of algorithms.

After developing the algorithmic code, ex post impact assessment statement of algorithmic recommendation systems can refine and improve the system's accuracy, fairness, and accountability beyond legal obligation. This assessment is desirable even if legislators fail to adopt obligations of algorithmic accountability and technology companies adopt them voluntarily.⁶¹³

CONCLUSION

Social networks and new methods of communication enable users to spread content and find it easily. New digital developments create an ecosystem for terrorists to spread propaganda, recruit and incite others to commit terrorist attacks. Online intermediaries provide platforms and communication tools for the public. They also enhance terrorist activities by targeting personalized recommendations to consume unlawful content and connect with affiliates of FTOs.

This Article addressed the question whether online intermediaries bear responsibility for terror attacks. It argues that the law should react to the change of ecosystem and prosperity of terrorists' content and incitement. Intermediaries use new innovative communication tools, advanced targeting abilities, and new strategies of moderation. They possess great power and influence over online incitement. With greater power should come greater responsibility. Because of the change in the ecosystem of incitement online, policymakers should outline a new balance among norma-

611. See WORLD ECON. FORUM, *supra* note 608, at 13–14; Gerrard, *supra* note 38, at 4503–05; Manheim & Kaplan, *supra* note 38, at 147.

612. Mulligan & Bamberger, *supra* note 404, at 701–02.

613. Katyal, *supra* note 522, at 117 (discussing discrimination and learning algorithms and suggesting enlisting engineers to explain their design choices and evaluate their efficacy).

tive considerations for intermediaries' liability. The new balance should account for intermediaries' influences on the flow of information. Policymakers should develop and impose old and new obligations, remedies, and sanctions on intermediaries to mitigate harm caused by terrorism. The Article proposed a minimum standard for removal of unprotected speech and standards of safety by design for mitigating the damage caused by algorithmic recommendations.

The Article also addressed the legal barriers for full compensation. It advocated for the application of the loss chance doctrine in suits filed by terror victims against the worst intermediaries, thus allowing for partial compensation. It further proposed more obligations and sanctions on intermediaries in criminal and civil law. The proposals pose a minimum threshold and do not preclude voluntary measures that intermediaries can take to mitigate harm caused by terrorist activities.

THE SENATE VS. THE LAW: CHALLENGING QUALIFICATION STATUTES THROUGH SENATE CONFIRMATION

INTRODUCTION

Although the Constitution vests in the President the power to nominate executive branch officials,¹ Congress has time and again imposed qualifications on whom the President is able to ultimately appoint and, therefore, nominate in the first place. Throughout American history, the constitutionality of these qualifications has been called into question, given the Appointments Clause's insistence that the President nominate and the Senate confirm, with no role for the House, whose participation is necessarily required to make a qualification into law. This Note takes the position that those arguing against constitutionality, like Hanah Volokh, have it right: As pertains to positions subject to Senate confirmation, qualification statutes are inconsistent with the Appointments Clause and are an exercise of authority past the office-creation power vested in the Congress as a whole. Proceeding from that premise, the qualifications represent only a nonbinding expression of an earlier Senate's sentiment about an ideal officeholder. As such, if the President was to nominate and the Senate were to confirm an individual in contravention of a qualification statute,² this Note argues that the confirmation should stand.

Further, if a post-confirmation lawsuit challenges the individual's status as an officeholder, courts should decline to review the officeholder's legitimacy. This Note also cautions the executive branch and the Senate against contravening, just to make a point, the qualifications statutes currently on the books. Some qualifications have the effect of protecting constitutional norms, and although norms are not incontrovertible, they can

1. U.S. CONST. art. II, § 2, cl. 2.

2. This assumes no passage of a "waiver" for the nominee in question by both the House of Representatives and the Senate, as has been the custom practice in these kinds of situations.

serve an important purpose of “[c]onstitutional maintenance.”³ That being said, as a matter of prudence, in some instances it continues to make sense for the President and the Senate to abide by a qualification statute, despite its unconstitutionality. In addition, the relevant actors should consider other factors—such as the ambiguity or specificity of the qualification, and the extent to which the qualification excludes competent people willing to serve—when considering whether to disregard a statute. If recent history is any guide, the President and the Senate should work together to confirm capable nominees, even if not formally “qualified,” sooner rather than later, lest some of these laws continue to bar competent individuals from important public service roles.

A particularly egregious example of a qualification statute excluding such an individual occurred recently. In August of 2018, Interior Department official Greg Sheehan left the Trump Administration.⁴ His fourteen-month tenure as Principal Deputy Director of the U.S. Fish and Wildlife Service (FWS) is perhaps most famous for the agency’s proposals to modify the government’s interpretation of the Endangered Species Act.⁵ Another aspect of Sheehan’s time in Washington, D.C., however, is more important for the purposes of this Note. The executive branch believed, despite Sheehan’s impressive resume and deep understanding of the issues with which the FWS deals, that he was unable to be appointed as FWS Director. The reason? His undergraduate major. When Congress established the FWS in 1974, it mandated, “No individual may be appointed as the Director unless he is, by reason of scientific education and experience, knowledgeable in the principles of fisheries and wildlife management.”⁶ By use of the word “and,” Congress

3. Keith Whittington, *Constitutional Norms Matter*, L. & LIBERTY (Feb. 16, 2017), <https://www.lawliberty.org/2017/02/16/constitutional-norms-matter/> [https://perma.cc/RW5Q-2CPD].

4. Miranda Green, *Head of wildlife agency departing Trump administration*, HILL (Aug. 8, 2018, 4:57 PM), <https://thehill.com/policy/energy-environment/401163-fws-head-associated-with-endangered-species-act-rollbacks-departing> [https://perma.cc/W9ND-VYQQ].

5. Nichola Groom, *Trump administration proposes stripping some endangered species protections*, REUTERS (July 19, 2018, 4:40 PM), <https://www.reuters.com/article/us-usa-trump-wildlife/trump-administration-proposes-stripping-some-endangered-species-protections-idUSKBN1K92YY> [https://perma.cc/Y964-U5FF].

6. 16 U.S.C. § 742b(b) (2018).

created a two-part test for appointment to the office: the prospective Director must be knowledgeable in the principles of fisheries and wildlife management by reason of both (1) scientific education, and (2) experience. Sheehan, who did not have a formal college education in biology, wildlife management, or a related topic, did not meet the first condition.⁷ As a result, he was found ineligible to be FWS Director.⁸ No matter that Sheehan was Director of the Utah Division of Wildlife Resources for five years, or that he boasted “more than 25 years of experience with the State of Utah working in wildlife and natural resource management.”⁹ As picks for FWS Director went, arguably few were more qualified than was Sheehan, but his lack of a formal scientific education barred him from the role.

This Note examines the nature and legal effect of qualification statutes, arguing that the President and Senate can disregard them, and should do so in certain circumstances. Part I of this Note discusses whether it is constitutional for Congress to impose prequalifications on executive appointments, considering the history of the practice and various views on the back-and-forth between Congress and the President as it relates to the Appointments Clause. Part II explores some of the ways in which qualification statutes have affected the Trump Administration, highlighting the more recent implications of these restrictions in practice with a special focus on the education requirement for the FWS Director. It also illustrates some of the ways in which Congress could abuse, and has abused, qualification statutes, and considers the question of judicial review. Part III turns to future nominations and recommends a framework for executive and congressional review of qualification statutes, through which relevant parties can decide how to proceed in the nomination process and which laws to directly challenge,

7. Matthew Brown, *U.S. Fish and Wildlife boss departs after stirring fears on species law*, DENVER POST (Aug. 9, 2018, 8:02 PM), <https://www.denverpost.com/2018/08/09/u-s-wildlife-boss-steps-down/> [<https://perma.cc/FYT9-YTHA>].

8. Upon Sheehan’s departure in August 2018, FWS spokesman Gavin Shire told the press that Sheehan was “barred from [the acting director] role because he did not have the science degree required for the position under federal law.” *Id.*

9. Press Release, U.S. Dep’t of the Interior, Secretary Ryan Zinke Appoints Utah’s Greg Sheehan as the Deputy Director of the U.S. Fish and Wildlife Service (June 5, 2017), <https://www.doi.gov/pressreleases/secretary-ryan-zinke-appoints-utahs-greg-sheehan-deputy-director-us-fish-and-wildlife> [<https://perma.cc/SVX7-PE7T>].

as opposed to seeking a formal waiver with the cooperation of the House of Representatives.

I. EXAMINING THE POWER TO APPOINT

The constitutionality of qualification statutes is a hotly debated question of law. Article II of the U.S. Constitution provides that the President “shall nominate, and by and with the Advice and Consent of the Senate, shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law.”¹⁰ The text sets out a well-defined sequence of events for principal officers of the United States, beginning with nomination. First, the President—and the President alone—“shall nominate” a candidate. After this action comes the requirement for the “Advice and Consent of the Senate,” which the President must receive before he can make the appointment. In Article II, therefore, the Framers set forth a three-step process for the President: (1) nominate the officer; (2) receive the advice and consent of the Senate; and (3) appoint the officer. Although the education and experience requirements for the FWS Director, for example, purport to apply to whether or not an individual “may be appointed,”¹¹ the statute operates in practice as a diversion from the established sequence. If someone may not be appointed, a White House personnel official would reasonably conclude that there would be no point in recommending nomination to the President in the first place. Congress is therefore effectively prescreening candidates for nomination, when nomination is a responsibility vested in the President alone under the Appointments Clause. Such prescreening is unconstitutional. As Justice Kennedy wrote in *Public Citizen v. Department of Justice*:¹²

By its terms, the [Appointments] Clause divides the appointment power into two separate spheres: the President’s power to “nominate,” and the Senate’s power to give or withhold its “Advice and Consent.” No role whatsoever is given either to the Senate or to Congress as a whole in the

10. U.S. CONST. art. II, § 2, cl. 2.

11. 16 U.S.C. § 742b(b).

12. 491 U.S. 440 (1989).

process of choosing the person who will be nominated for appointment.¹³

As this Part will show, Justice Kennedy's view reflects that of generations of Presidents, executive branch lawyers, and some members of the academic community. To be sure, early congressional practice offers a worthy counterweight to the argument that qualification statutes are necessarily impermissible. But in the end, the question boils down to the clear text of the Appointments Clause. And based on that text, Congress setting qualifications on executive branch appointments of principal officers is unconstitutional. As the following shows, the debate about congressional qualifications dates back to the Founding.

A. *Hamilton, Madison, and Jackson Argued for Executive Power*

The meaning of the Appointments Clause has been in question since our country's earliest days. In *Federalist No. 77*, Alexander Hamilton posited: "In [the plan for the appointment of the officers of the proposed government] the power of nomination is unequivocally vested in the executive."¹⁴ He went on to define that sequence:

And as there would be a necessity for submitting each nomination to the judgment of an entire branch of the legislature . . . [t]he blame of a bad nomination would fall upon the President singly and absolutely. The censure of rejecting a good one would lie entirely at the door of the Senate . . .¹⁵

Drawing from Hamilton's writing, the expectation was that the judgment of the Senate could, in general, not occur until the submission of the nomination. The rejection of Hamilton's hypothetical "good one" is certainly not the same as the pre-rejection of an entire class of prospective officials who do not possess a specific résumé line or two. In *Federalist No. 76*, Hamilton answered a key question about the advice-and-consent function when the President sends a name to the Senate:

But his nomination may be overruled: this it certainly may, yet it can only be to make place for another nomination by himself. The person ultimately appointed must be the object of his preference, though perhaps not in the first degree. It is

13. *Id.* at 483 (Kennedy, J., concurring in the judgment).

14. THE FEDERALIST NO. 77, at 459 (Alexander Hamilton) (Clinton Rossiter ed., 2003).

15. *Id.*

also not very probable that his nomination would often be overruled. The Senate could not be tempted by the preference they might feel to another to reject the one proposed; because they could not assure themselves that the person they might wish would be brought forward by a second or by any subsequent nomination. They could not even be certain that a future nomination would present a candidate in any degree more acceptable to them . . .¹⁶

Here, Hamilton's arguments again challenge the validity of the Senate attempting to involve itself in the actual selection of the nominee, particularly in a way that would make a candidate more "acceptable" to the Senate, such as screening by educational background. Notably, Hamilton did not even mention the House of Representatives. The message was clear—two entities are involved in confirmation: the President and the Senate.

James Madison similarly offered his views on the matter before the House in discussing the power of the President to remove officers. He argued:

If there is any point in which the separation of the legislative and executive powers ought to be maintained with greater caution, it is that which relates to officers and offices. The powers relative to offices are partly legislative and partly executive. The Legislature creates the office, defines the powers, limits its duration, and annexes a compensation. This done, the legislative power ceases. They ought to have *nothing* to do with designating the man to fill the office. That I conceive to be of an executive nature.¹⁷

Although Congress has the power to create a principal *office*, any requirement imposed on such an office would necessarily narrow down the number of candidates whom the President may choose. This is some measure of legislative designation—Congress telling the President he may nominate *this* individual, but not *that* individual. Based on his explication, Madison would likely have been skeptical of such a scheme.

A few decades later, President Andrew Jackson advocated for the strength of the presidential appointment power. In an 1834 Protest to the Senate, President Jackson asserted his belief that "[t]he executive power vested in the Senate, is neither that

16. THE FEDERALIST NO. 76, *supra* note 14, at 455–56 (Alexander Hamilton).

17. 1 ANNALS OF CONG. 604 (1789) (Joseph Gales ed., 1834) (statement of Rep. Madison) (emphasis added).

of ‘nominating’ nor ‘appointing.’”¹⁸ President Jackson went on to say that “[s]elections are still made by the President,” and then laid out the solution for what the Senate should do about the problem of those unqualified individuals “proposed for appointment” by the President as principal officers: “withhold their consent” such that “the appointment cannot be made.”¹⁹ This mechanism is the extent of the power vested in the Senate in this area. Exercising said power stands in stark contrast to requiring, before a nominee is even named, certain kinds of education and experience for eligibility for appointment.

The common thread in the arguments of Hamilton, Madison, and President Jackson is that the Constitution has already built in a mechanism for congressional influence over the appointment of executive officers. That mechanism is the Senate confirmation process. The creation of statutory qualifications is an addition on top of that mechanism and should therefore be regarded with serious skepticism in a system of established checks and balances.

B. Modern Presidents Have Also Decried Qualification Setting

On numerous occasions in the modern day, the executive branch has weighed in on congressionally mandated qualifications for appointed offices. The Department of Justice’s Office of Legal Counsel (OLC) has issued multiple opinions on the constitutionality of Congress imposing qualifications on certain offices.²⁰ One of those opinions, from 1989, took the following position:

Congress . . . imposes impermissible qualifications requirements on principal officers. For instance, Congress will require that a fixed number of members of certain commissions be from a particular political party. These requirements . . . violate the Appointments Clause. The only congressional check that the Constitution places on the President’s power to appoint “principal officers” is the advice and consent of the Senate.²¹

18. 10 REG. DEB. 1324 (1834) (President Jackson’s protest to Senate).

19. *Id.*

20. HENRY B. HOGUE, CONG. RESEARCH SERV., RL33886, STATUTORY QUALIFICATIONS FOR EXECUTIVE BRANCH POSITIONS 5–7 (2015).

21. Common Legislative Encroachments on Executive Branch Authority, 13 Op. O.L.C. 248, 250 (1989). “This memorandum was superceded [sic] by a 1996 OLC

A 1996 OLC opinion, in response to Congress mandating certain requirements for the U.S. Trade Representative and Deputy Trade Representative, focused more on the nature of the office in concluding whether such requirements are unconstitutional.²² The opinion viewed Congress as having less power to set qualifications for offices that are “close to the President” and represent the United States to foreign governments.²³ Multiple Presidents have, in signing statements, argued against the constitutionality of at least some of these restrictions. Presidents George H.W. Bush,²⁴ William Clinton,²⁵ and George W. Bush²⁶ each issued such statements in response to bills that purported to set certain requirements on prospective appointees. Each statement, to varying degrees, asserted the power of the executive in appointments, evincing clear presidential concern about the future implications of qualification laws.

Perhaps the most major controversy in the modern qualifications debate was the subject of the George W. Bush signing statement—the passage of the Department of Homeland Security Appropriations Act, 2007.²⁷ After Hurricane Katrina exposed issues with FEMA’s leadership, Congress passed a law requiring that from then on, “[t]he [FEMA] Administrator shall be appointed from among individuals who have—(A) a demonstrated ability in and knowledge of emergency management and homeland security; and (B) not less than 5 years of executive leadership and management experience in the public or private sector.”²⁸ In President Bush’s signing statement, he “appeared to take issue with the extent to which the qualifications might limit the pool of potential nominees to the posi-

memorandum, which did not address the issue of qualifications (20 Op. O.L.C. 120).” HOGUE, *supra* note 20, at 6 n.24.

22. Constitutionality of Statute Governing Appointment of United States Trade Representative, 20 Op. O.L.C. 279, 279 (1996).

23. *Id.* at 280.

24. Presidential Statement on Signing the Morris K. Udall Scholarship and Excellence in National Environmental and Native American Public Policy Act of 1992, 28 WEEKLY COMP. PRES. DOC. 507 (Mar. 19, 1992).

25. Presidential Statement on Signing the Lobbying Disclosure Act of 1995, 31 WEEKLY COMP. PRES. DOC. 2205 (Dec. 19, 1995).

26. Presidential Statement on Signing the Department of Homeland Security Appropriations Act, 2007, 42 WEEKLY COMP. PRES. DOC. 1742 (Oct. 4, 2006).

27. See HOGUE, *supra* note 20, at 1–2.

28. Department of Homeland Security Appropriations Act, 2007, Pub. L. No. 109-295, sec. 611, § 503(c)(2), 120 Stat. 1355, 1397 (2006).

tion.”²⁹ These requirements were similar in specificity to the FWS Director qualifications, which mandate “education” in a particular field of study.³⁰

The FEMA requirement absolutely limits the pool of potential nominees. And although the statute seems reasonable—experience is desirable in a FEMA Administrator—it is also a venture by Congress beyond its constitutionally prescribed role in the nomination process. The failure of a less-experienced FEMA Administrator should inspire the President to find better candidates for the role (the person would, after all, be reported about as the “Bush FEMA Head”) rather than charge Congress with writing the “Qualifications” section of the “Help Wanted” ad for the job.

C. Academic Debate Features Multiple Viewpoints

In the academic arena, the issue of statutory qualifications has inspired a range of views. Hanah Volokh has taken the position that “statutory requirements are unconstitutional for all appointments that require the advice and consent of the Senate.”³¹ Volokh concludes, “from a straightforward reading of the text of the Appointments Clause,” that “Congress as a whole has no role in” setting qualifications for confirmation appointments.³² This conclusion most closely echoes the absolutist position of early thinkers like Hamilton, Madison, and President Jackson, but still comes from the same basic school of thought as the more recent OLC opinions and signing statements.

But Volokh’s argument has its detractors. A Note in the *Harvard Law Review* presented the “office qualifications” view, putting forward some evidence “from the early Congresses that the Founding generation believed that some qualifications on presidential appointees were permissible.”³³ This evidence includes qualifications that the early Congresses imposed on certain offices, from the Attorney General and district attorneys being

29. HOGUE, *supra* note 20, at 1.

30. 16 U.S.C. § 742b(b) (2018).

31. Hanah Metchis Volokh, *The Two Appointments Clauses: Statutory Qualifications for Federal Officers*, 10 U. PA. J. CONST. L. 745, 746 (2008).

32. *Id.* at 789.

33. Note, *Congressional Restrictions on the President’s Appointment Power and the Role of Longstanding Practice in Constitutional Interpretation*, 120 HARV. L. REV. 1914, 1919–20 (2007).

“learned in the law”³⁴ to “the presidentially appointed legislative council of Louisiana consist[ing] of land-holding residents of the Louisiana Territory.”³⁵

E. Garrett West took the opposite view of Volokh’s.³⁶ West wrote that “Congress’s exclusive power over office creation explains why Congress may impose qualifications,” relying on the congressional power to “‘establish[] by Law’ ‘all other Officers of the United States[]’” as justification.³⁷ Establishing an office and wading into the question of who may *hold* that office are, however, two separate issues. This has been true since the presidency of George Washington. The first Congress established a handful of offices—the Secretary for the Department of Foreign Affairs,³⁸ the Secretary for the Department of War,³⁹ the Secretary of the Treasury,⁴⁰ the Postmaster General,⁴¹ and the Attorney General⁴²—the lattermost containing the “learned in the law” stipulation. The Senate, however, attempted to take a step further and involve itself in the selection of nominees. It rejected a customs officer nominee of President Washington’s (Benjamin Fishbourne of Georgia), “adopted a resolution seeking face-to-face meetings with the President for every open office,” and “appointed a committee to meet with Washington to work out the procedures.”⁴³ As John Yoo describes, however:

Washington would have none of it. . . . Washington promptly nominated another candidate and rebuffed the idea of formally meeting with the Senate to choose executive officers.

34. An Act to establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 92–93 (1789).

35. Note, *supra* note 33, at 1920 (citing Act of Mar. 26, 1804, ch. 38, § 4, 2 Stat. 283, 284).

36. See E. Garrett West, Note, *Congressional Power over Office Creation*, 128 YALE L.J. 166, 166 (2018).

37. *Id.* at 201, 203 (alterations in original) (quoting U.S. CONST. art. II, § 2, cl. 2).

38. An Act for establishing an Executive Department, to be denominated the Department of Foreign Affairs, ch. 4, § 1, 1 Stat. 28, 28–29 (1789).

39. An Act to establish an Executive Department, to be denominated the Department of War, ch. 7, § 1, 1 Stat. 49, 49–50 (1789).

40. An Act to establish the Treasury Department, ch. 12, § 1, 1 Stat. 65, 65 (1789).

41. An Act for the temporary establishment of the Post-Office, ch. 16, § 1, 1 Stat. 70, 70 (1789).

42. An Act to establish the Judicial Courts of the United States, ch. 20, § 35, 1 Stat. 73, 93 (1789).

43. John Yoo, *George Washington and the Executive Power*, U. ST. THOMAS J.L. & PUB. POL’Y, Fall 2010, at 1, 8.

He wanted to make clear that he was the Chief Executive, and that members of the executive branch were his assistants. While Presidents, including Washington, have always informally consulted with members of Congress in selecting federal officers and judges, they have ever since relegated the Senate's constitutional function to the approval of *their* nominees.⁴⁴

That the First Congress passed a certain kind of law “provide[s] contemporaneous and weighty evidence of the Constitution’s meaning.”⁴⁵ Indeed, the addition of a “learned in the law” requirement for Attorneys General is a compelling fact in favor of constitutionality. But it is not dispositive. As Volokh noted, “The First Congress did impose statutory qualifications, but . . . it did so without any significant constitutional analysis. The First Congress was certainly not infallible in its interpretation of the Constitution. Its practices can add weight to an argument about constitutionality, but they cannot be decisive.”⁴⁶ And given the lack of constitutional support for congressional imposition of qualifications on executive branch appointments, Volokh’s argument is ultimately stronger. The qualifications are unconstitutional.

D. The Framers Clearly Delineated House and Senate Responsibilities

Congress consists of both the House and the Senate. The Constitution sets out some specific functions for each body. The Senate is tasked with approving treaties with other countries and presidential nominations for “Officers of the United States.”⁴⁷ The House has grand powers of its own, including “the sole Power of Impeachment”⁴⁸ and introducing “Bills for raising Revenue.”⁴⁹ Intuitively, many of these distinctions make sense. Being in theory closer to the people, the House is the body more competent to spend the people’s money, as Elbridge

44. *Id.*

45. *Printz v. United States*, 521 U.S. 898, 905 (1997) (quoting *Bowsher v. Synar*, 478 U.S. 714, 723–24 (1986)) (internal quotation marks omitted).

46. Volokh, *supra* note 31, at 775 (footnote omitted).

47. U.S. CONST. art. II, § 2, cl. 2.

48. U.S. CONST. art. I, § 2, cl. 5.

49. U.S. CONST. art. I, § 7, cl. 1.

Gerry opined in 1787.⁵⁰ At the same time, Alexander Hamilton expressed concern that allowing the House to consider foreign treaties could lead to damaging leaks of information during the treaty-making process.⁵¹ That the House and Senate are different bodies, to which different responsibilities are given, is no novel concept. Confirmation is just another one of these responsibilities. But to become law, qualification statutes, which are intimately intertwined with confirmation, must pass through the House of Representatives; by passing such statutes, the House exerts an influence on confirmation that unbalances the carefully considered constitutional delineation.

For this reason, the simple occurrence of House participation in the passage of qualification statutes is, on its own, the constitutional landmine. The West view can be correct insofar as it allows the Senate to openly refuse consideration of a certain nominee because she does not live up to a prescribed qualification, but it is wrong to the extent that it grants the House of Representatives powers beyond those that the Constitution vests in the body. As a way forward, the Senate is free in the future to pass nonbinding resolutions expressing a sentiment about the qualifications a certain nominee should have. One can think of these as qualification “guidelines,” signaling to the executive branch which kinds of nominees the Senate would like to see. But House passage—and, as a result, presentment—of these provisions as laws specifically in each existing case has been, as such, improper and void.⁵² Ultimately, these qualifications should only be seen as a reflection of the view of the Senate at the time of enactment. But Senates change; the Senate today need not consult the House and formally overturn these invalid qualification laws, nor even obtain a waiver from the law, to confirm “unqualified” nominees.⁵³

50. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 233 (Max Farrand ed., 1911).

51. Howard R. Sklamberg, *The Meaning of “Advice and Consent”: The Senate’s Constitutional Role in Treaty-making*, 18 MICH. J. INT’L L. 445, 472 (1997) (citing THE FEDERALIST NO. 75, at 452 (Alexander Hamilton) (Clinton Rossiter ed., 1961)).

52. Volokh persuasively argues that because of the House’s lack of power in this area, “[a]ny qualifications for officeholders that come out of the concerns of the House of Representatives cannot be binding.” Volokh, *supra* note 31, at 759.

53. In certain cases, Presidents have gotten around qualification statutes through the use of waivers for individual nominees. See, e.g., Volokh, *supra* note 31, at 746 & nn.5–6. A waiver might have solved the individual Sheehan quandary

* * * * *

All of this is not to say that guidelines are meaningless. Individual senators can use a departure from the guidelines to denounce the impending confirmation of a nominee, noting that the President and Senate are advancing an individual whom, as a senator might say, “this body has agreed, for many years, is not qualified to hold the position in question.” Presidential candidates could vow to only nominate individuals who meet these high standards. As the operation of the bureaucracy continues to be an important aspect of the political ecosystem, the makeup of the President’s appointees will likely persist as a relevant campaign issue. And the Chairman of the Senate Committee with relevant jurisdiction could decide to continue using the qualifications as a baseline for considering nominees.

As an example of what a Senate committee chairman considering a qualification statute might look like, look to the 1993 nomination of Mollie Beattie. Beattie, once a nominee for FWS Director, had received her undergraduate degree in Philosophy.⁵⁴ She went on to obtain her master’s in Forestry, but some apparently charged that Beattie’s educational background did not speak specifically to knowledge “in the principles of fisheries and wildlife management.”⁵⁵ In Beattie’s confirmation hearing, Senate Environment and Public Works Chairman Max Baucus took great care to address this controversy at length in his opening statement.⁵⁶ After welcoming Beattie to the Committee, Chairman Baucus jumped right into arguing that she met the qualification requirement.⁵⁷ It was a telling start to the hearing. In beginning with whether or not Beattie was qualified, the im-

in practice but it would not have resolved the fundamental question of Senate-House responsibility delineation—a far more consequential issue. Further, requiring the executive branch to expend the political capital necessary for such a waiver—on top of simply the shepherding of the nominee through confirmation—is quite an ask for the appointment of a bureau head, as opposed to the appointment of the Defense Secretary. Given the setup of the Constitution, the President and the Senate need not ask the House whether it is okay to appoint a nominee.

54. William Dicke, *Mollie Beattie, 49; Headed Wildlife Service*, N.Y. TIMES (June 29, 1996), <https://www.nytimes.com/1996/06/29/us/mollie-beattie-49-headed-wildlife-service.html> [<https://perma.cc/8BRJ-JAFZ>].

55. 16 U.S.C. § 742b(b) (2018).

56. *The Nomination of Mollie H. Beattie to be Director of the Fish and Wildlife Service: Hearing Before the S. Comm. on Env’t & Pub. Works*, 103rd Cong. 1–2 (1993) (opening statement of Sen. Max Baucus, Chairman, S. Comm. on Env’t & Pub. Works).

57. *Id.*

plication was that meeting the qualifications *was* a prerequisite to even the questioning of the nominee. The Chairman called attention to Beattie's graduate studies—in particular, the nature of the degree received, the name of the school from which she received the degree at the university in question, and the coursework associated with the degree.⁵⁸ Chairman Baucus clearly construed the education requirement to be separate from the experience requirement, as he immediately proceeded to a recitation of Beattie's résumé to make the point that “Ms. Beattie *also* has substantial *experience* in applying the principles of fisheries and wildlife management.”⁵⁹ He finished discussing qualifications by saying, “I am fully satisfied that Ms. Beattie not only satisfies the legal requirements to be Director, but that she has the education and experience to excel in that position.”⁶⁰

Senator Baucus was well within his rights to consider Beattie's education when deciding if she was fit to serve in the role. But if the Senator did not find the “legal requirements” to be persuasive, the proper response would have been to advance Beattie's confirmation anyway. As discussed, the requirements fall outside of the constitutionally prescribed sequence—nomination, Senate advice and consent, appointment—and grant the House a role in the confirmation process which the Constitution does not provide. The Senate had then, and has now, an incentive to challenge the laws and reassert that, as between the two houses of Congress, confirmation is within the Senate's exclusive domain. As such, the nomination by the President and confirmation by the Senate of an officer who does not meet said qualifications should, on its own, insulate the administrative official from legal jeopardy related to contravention of the invalid qualification law.

II. THE IMPACT OF QUALIFICATIONS AND THE QUESTION OF LEGAL JEOPARDY

Speaking practically, presidential administrations have had good reason to tread lightly with qualification laws. If these statutes are enforced by the courts, an agency could be sued to void the actions of an officeholder who does not meet the re-

58. *Id.* at 2.

59. *Id.* (emphasis added).

60. *Id.*

quirements.⁶¹ To some in the executive branch, leaving positions vacant, or finding a less desirable nominee, is preferable to risking the possible consequences of a well-timed qualification statute lawsuit that seeks to invalidate an official's, and an agency's, work to execute the President's agenda. But such a lawsuit would most likely fail under the political question doctrine.

A. *Qualification Statutes Can Complicate Staffing the Executive Branch*

Instead of being nominated as Director of the FWS, "senior political official" Sheehan occupied a "newly-created deputy director position" at the Fish and Wildlife Service from June 2017 until his resignation in August 2018.⁶² As mentioned, Sheehan's degree from Utah State University was not in science⁶³—no matter that the sum total of Sheehan's working experience made him an excellent candidate for the position.⁶⁴ As the executive branch construed the statutory qualifications placed on the FWS Director's office (under a presumption of constitutionality), 16 U.S.C. § 742b(b) knocked Sheehan out of the running for Director entirely. When Sheehan's appointment as Deputy Director of the FWS was announced, the Department added in its press release that he would "serve as the Acting Director of the [FWS] until a Director is nominated by the President and confirmed by the Senate."⁶⁵

Even this move came under fire. A conservation advocacy group, Public Employees for Environmental Responsibility (PEER), submitted a complaint to the Interior Department's Inspector General about Sheehan and two other senior political officials who had been appointed to deputy director positions not subject to Senate confirmation, at the National Park Service (NPS) and the U.S. Bureau of Land Management (BLM), respectively.⁶⁶ PEER noted that Interior referring to Sheehan and

61. See *Lucia v. SEC*, 138 S. Ct. 2044, 2050 (2018).

62. Brown, *supra* note 7.

63. *Id.*

64. See Press Release, *supra* note 9.

65. *Id.*

66. Letter from Jeff Ruch, Exec. Dir., Pub. Empls. for Env't Responsibility, to Mary L. Kendall, Deputy Inspector Gen., U.S. Dep't of the Interior (Feb. 12, 2018), https://www.peer.org/wp-content/uploads/attachments/2_12_18_IG_Complaint.pdf [<https://perma.cc/2B6X-NM7S>] [hereinafter PEER Letter].

the two others—Paul Daniel Smith of NPS and Brian Steed of BLM—as “acting directors” in Department press releases presented issues under the Federal Vacancies Reform Act (FVRA).⁶⁷ FVRA provides that if an officer whose appointment is made by the President subject to the advice and consent of the Senate—conditions which the director of each of the three aforementioned bureaus would meet—“dies, resigns, or is otherwise unable to perform the functions and duties of the office,”⁶⁸ the President may direct someone else to fill the office as an acting director for 210 days.⁶⁹ This provision comes with some restrictions. Among other requirements, the individual to be made acting director had to have served as the first assistant to the office of the officer for at least 90 days.⁷⁰

PEER’s complaint challenged the legitimacy of Sheehan, Smith, and Steed as acting directors on two counts. First, the Department’s press releases indicated that it was Interior Secretary Ryan Zinke, not President Donald J. Trump, who appointed these individuals to their acting roles.⁷¹ FVRA mandates that it is “the President (and only the President)” who makes the appointment.⁷² Second, none of the three had served the 90 days required under FVRA before their appointment as acting director.⁷³ The Inspector General’s office responded to PEER, noting that it “conducted a preliminary inquiry” into the matter.⁷⁴ The Inspector General’s office found that although Department press releases may have indicated that these officials were acting directors, “all three of them [had] been formally given the title of Deputy Director.”⁷⁵ It was, instead of presidential action under FVRA, “[p]ursuant to a delegation order issued by Secretary Zinke on January 24, 2018, [that] Steed and Smith [were] delegated the functions, duties, and

67. *See id.* at 1–5.

68. 5 U.S.C. § 3345(a) (2018).

69. *Id.* § 3346(a)(1).

70. *Id.* § 3345(a)(3)(A), (b)(1)(A)(ii).

71. PEER Letter, *supra* note 66, at 3.

72. 5 U.S.C. § 3345(a)(2).

73. PEER Letter, *supra* note 66, at 3–5.

74. Letter from Bruce Delaplaine, Gen. Counsel, Office of the Inspector Gen., U.S. Dep’t of the Interior, to Jeff Ruch, Exec. Dir., Pub. Emps. for Env’t Responsibility 1 (Feb. 23, 2018), https://www.peer.org/wp-content/uploads/attachments/3_5_18_IG_ltr.pdf [<https://perma.cc/4LRX-JE5N>].

75. *Id.*

responsibilities of the Director of their respective bureaus.”⁷⁶ Instead of being the acting directors, they would each be a deputy director, exercising the authority of the director.⁷⁷ As for Sheehan, however, Secretary Zinke delegated the FWS Director’s responsibilities to James Kurth, a career official serving as the FWS’s Deputy Director for Operations.⁷⁸ Whereas Steed and Smith could each be considered to meet the qualifications necessary to be acting directors of their respective bureaus,⁷⁹ Sheehan could not. It took almost ten months for Secretary Zinke to replace Kurth with a political appointee; in November 2018, an updated delegation order gave Margaret Everson, a new Trump Administration hire who possessed a degree in biology,⁸⁰ the authority of the Director.⁸¹ Aurelia Skipwith finally earned actual Senate confirmation to the FWS Director position in December 2019,⁸² over a full year after her nomination was initially announced in October 2018.⁸³

In March 2018, congressional leaders from both parties expressed concerns about how the Interior vacancies were affecting government operations. Republican Senator Lindsey Graham

76. *Id.*

77. *Id.* (noting that the delegation order “only covers ‘those functions or duties that are not required by statute or regulation to be performed only by the Senate-confirmed official occupying the position’”).

78. *Id.*

79. For the NPS Director, Congress stipulated that an appointee have “substantial experience and demonstrated competence in land management and natural or cultural resource conservation.” 54 U.S.C. § 100302(a)(2) (2018). And Congress mandated that the BLM Director “have a broad background and substantial experience in public land and natural resource management.” 43 U.S.C. § 1731(a) (2018).

80. Laura Bies, *New leadership named for U.S. Fish and Wildlife Service*, WILDLIFE SOC’Y (Nov. 1, 2018), <http://wildlife.org/new-leadership-named-for-u-s-fish-and-wildlife-service/> [<https://perma.cc/33RF-KVRH>].

81. SEC’Y OF THE INTERIOR, ORDER NO. 3345, AMEND. NO. 23: TEMPORARY REDELEGATION OF AUTHORITY FOR CERTAIN VACANT NON-CAREER SENATE-CONFIRMED POSITIONS § 3(h) (2018), https://www.doi.gov/sites/doi.gov/files/elips/documents/3345a23_temporary_redelegation_of_authority_for_certain_vacant_non-career_senate-confirmed_positions_0.pdf [<https://perma.cc/GY7V-SZF3>].

82. Press Release, U.S. Dep’t of the Interior, U.S. Senate Confirms Aurelia Skipwith as Director of U.S. Fish and Wildlife Service (Dec. 12, 2019), <https://www.doi.gov/pressreleases/us-senate-confirms-aurelia-skipwith-director-us-fish-and-wildlife-service> [<https://perma.cc/VW4K-USQT>].

83. Timothy Cama & Michael Burke, *Trump to nominate former Monsanto exec to top Interior position*, HILL (Oct. 22, 2018, 10:23 PM), <https://thehill.com/homenews/administration/412660-trump-to-nominate-former-monsanto-exec-to-top-interior-position> [<https://perma.cc/FJH4-NCP2>].

was quoted as saying he believed “holdovers from the other administration” could be leading to “lockdown” at agencies in the Trump Administration without Senate-confirmed leaders.⁸⁴ Democratic Senator Tom Udall commented that agency decisions are “not good” if unconfirmed “political people”—as opposed to “Senate-confirmed people . . . that have been through a vetting process”—were running the show.⁸⁵ Senator Udall also lent credence to an argument that PEER made, questioning whether the acting director controversies would leave agencies open to legal challenges, and noted that towns near BLM land were “finding agencies frozen without leadership.”⁸⁶ As the cause of the Administration’s issues in nominating individuals for these positions, “Democratic senators point[ed] to the lack of *qualified nominees* in the pipeline and to individuals who have had to pull their names after facing blistering criticism.”⁸⁷ On the other hand, “Republican lawmakers [blamed] a stalled vetting process and partisan politics.”⁸⁸ Partly because of qualifications, “filling top positions in executive agencies is a complex enterprise [in practice].”⁸⁹ It is not entirely clear how urgently the Administration sought to fill the vacancies.⁹⁰ In the case of the FWS Director, however, there is at least some evidence that the Administration made a good faith effort to comply with the qualification requirements.⁹¹

84. Hannah Northey, *‘Where is everybody?’ senators ask of missing Trump picks*, E&E NEWS (Mar. 6, 2018), <https://www.eenews.net/stories/1060075443> [<https://perma.cc/5V4F-AFKL>] (internal quotation marks omitted).

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

86. *Id.* (paraphrasing Senator Udall).

87. *Id.* (emphasis added).

88. *Id.*

89. Anne Joseph O’Connell, *Vacant Offices: Delays in Staffing Top Agency Positions*, 82 S. CAL. L. REV. 913, 929 (2009).

90. See Kyle Feldscher, *Trump won’t fill hundreds of administration jobs*, WASH. EXAMINER (Feb. 28, 2017, 7:15 AM), <https://www.washingtonexaminer.com/trump-wont-fill-hundreds-of-administration-jobs> [<https://perma.cc/4HFF-AQLD>] (“A lot of those jobs, I don’t want to appoint someone because they’re unnecessary to have In government, we have too many people.” (quoting President Trump) (internal quotation marks omitted)).

91. *Cf.* Brown, *supra* note 7.

B. *Upon Senate Confirmation, Courts Would Likely Decline to Review Qualifications Statute Cases*

Of course, as a general matter, one would like for one's doctor to be trained in medicine. If someone is installing a wiring system into your home, you would be wise to make sure that the person in question is a certified electrician. But Sheehan was not some vagrant who wandered in from the streets, scalpel in hand, asking to operate on the American wildlife refuge system. He was an experienced conservationist, denied an opportunity to lead the FWS because Congress could not conceive of someone with his background coming along. Besides, if such a weapon-wielding troll did saunter onto the national stage, the chances of him earning confirmation for office would be next to zero. On its own, the Senate's advice-and-consent role should be a guardrail against those unfit to hold office. If it is not, then what is the purpose of the whole ordeal? Further, equating education with competence may preclude some prospective appointees who would do a fine job in the offices for which Congress deemed them to be "unqualified." Whether Sheehan could have earned confirmation took a backseat to the question of whether the statutory requirements of "education" and "experience" were being met.

Conceivably, if a President nominates and the Senate confirms an individual who does not meet the "qualifications," PEER or another group could file suit against that administration official when she carries out certain actions under the authority of the office occupied. A PEER-type suit seems to be the most straightforward way for a party to get standing and find its way into court, unless one wants to wade into the hairy question of whether the House may and should sue here. The PEER complaint would seek to invalidate the official's actions, challenging the official's legitimacy as an officeholder given the statute's stipulations. Such a plaintiff, however, would likely run into the buzz saw of the political question doctrine. In the recent *Rucho v. Common Cause*⁹² decision, the Supreme Court reinforced this judicial principle, refusing to review the constitutionality of partisan gerrymandering as a nonjusticiable political question.⁹³ Appointment of an unqualified officer is similarly a

92. 139 S. Ct. 2484 (2019).

93. *Id.* at 2506–07.

political question, if not more so. Calling this an interbranch spat is generous—in this case, both the President *and* the Senate would have agreed on the nominee, as the Appointments Clause demands. A court would likely defer to the entities with dominion over this area of law—the President through nomination and the Senate through confirmation—which it would probably deem to have spoken at that point.

C. *Congress Can Use Qualifications as a Means to Questionable Ends*

Courts would be wise to adopt a hands-off approach. It may not be readily apparent, but enforcement of qualification laws can quickly devolve into a political enterprise. A more pro-worker Congress, presumed to have broad power to set qualifications for office, might be able to mandate that all future Secretaries of Labor have experience running a union. This would likely limit the number of potential appointees whom a management-friendly President would feel comfortable having serve in this position in her or his Cabinet, and could have an ultimate effect on the policy coming out of the Labor Department. Likewise, an energy-development-friendly Congress could see fit to require that all future Secretaries of the Interior have experience as an oil and gas executive, potential conflicts of interest be damned. Certain qualifications are highly correlated with policy preferences, to the point where the imposition of a qualification could basically amount to a designation of a principal officer with a certain kind of worldview. In these kinds of cases, Congress may not be sending the exact name of the officeholder to the President, but through expertise-based qualifications, it *can* tie the President's hands in the nominating process.

Perhaps these examples seem a bit ridiculous and unlikely to ever occur, but actually, such naked power plays by Congress would be tame compared to the politicking of the Sixty-Fourth Congress in the text of the National Defense Act of 1916,⁹⁴ which stipulated the following:

[O]f the vacancies created in the Judge Advocate's Department by this Act, one such vacancy, not below the grade of major, shall be filled by the appointment of a person from civil life, not less than forty-five nor more than fifty years of age, who

94. Ch. 134, 39 Stat. 166 (1916).

shall have been for ten years a judge of the Supreme Court of the Philippine Islands, shall have served for two years as a Captain in the Regular or Volunteer Army, and shall be proficient in the Spanish language and laws⁹⁵

House Committee on Military Affairs Chairman James Hay wrote the provision into the law.⁹⁶ The *New York Times* noted at the time that “[t]he one man in the world that this description seems to fit is Judge Adam C. Carson of the Supreme Court of the Philippine Islands.”⁹⁷ Judge Carson’s home in Riverton, Virginia was in Chairman Hay’s district.⁹⁸ “The reader will be gratified to know that Judge Carson got the job.”⁹⁹ “When asked if this provision . . . was designed to take care of Judge Carson, of Virginia, [Congressman James] Hay replied: ‘I am responsible for that being put in the bill, if that is any satisfaction to the gentleman.’”¹⁰⁰ The *World-News*, a Virginia newspaper, derided the provision as a “joker,” concluding that Congressman Hay’s effort to game Judge Carson’s appointment “[t]hrough a base and treacherous subterfuge . . . [was] a discredit to him and a disgrace to Virginia.”¹⁰¹

But if a House committee chairman can use qualification statutes to get jobs in the executive branch for specific constituents (and Judge Carson, as we saw, *did* get the job after all), one could envision a scenario in which members of Congress can dictate the views of certain officers by qualifying only specific people for the positions. The President’s hands would be tied for no reason other than Congress wanting to nominate its own candidates for offices. “[T]he more appointees [are] beholden to members of Congress, the less they [are] beholden to presidents.”¹⁰² As such, if the Senate and the President *do* agree about a nominee’s fitness for office in spite of a qualification

95. *Id.* § 8, at 169.

96. *Hay’s Remarkable Joker*, WORLD-NEWS, May 24, 1916, at 4 (on file with the Library of Virginia).

97. EDWARD S. CORWIN, *PRESIDENTIAL POWER AND THE CONSTITUTION: ESSAYS* 76 n.13 (Richard Loss ed., 1976) (quoting *Army Bill Joker Aims to Rob Wood of Honor Medal*, N.Y. TIMES, May 20, 1916, at 1).

98. *Id.* at 77 n.13.

99. *Id.*

100. *Hay’s Remarkable Joker*, *supra* note 96, at 4.

101. *Id.*

102. DAVID E. LEWIS, *THE POLITICS OF PRESIDENTIAL APPOINTMENTS: POLITICAL CONTROL AND BUREAUCRATIC PERFORMANCE* 65 (2008).

requirement, litigants should not be able to use the courts as a tool to second guess a carefully considered, political confirmation process that determined such qualifications to be unnecessary.

III. FACTORS FOR THE EXECUTIVE BRANCH AND THE SENATE TO CONSIDER IN LODGING A QUALIFICATIONS CHALLENGE

“According to William Howell and David Lewis, over 40 percent of agencies created by legislation between 1946 and 1995 (seventy-four agencies) have restrictions placed on the qualifications of agency officials”¹⁰³ Even if qualification statutes can be overturned, the President and Senate should not flout all of them just to prove a point. A sober framework for executive review of these statutes is then, at this juncture, necessary. Post-Sheehan, there will come a time again when a qualification statute is worthy of a challenge, and the considerations to be articulated in this part of the Note can serve as guideposts for the President and the Senate in determining whether the moment to challenge has arrived. Although Greg Sheehan simply served fourteen months as a deputy director before quietly leaving the Trump Administration, it is reasonable to predict that—as vacancies continue to plague the administrative state¹⁰⁴—it will soon be necessary for the President and the Senate to challenge a qualification statute if the President is to get her or his preferred choice in a role. The challenge should come on the basis that the statute in question generally intrudes upon the prescribed sequence of appointment and achieves the opposite aim of Congress in practice, deeming a certain qualified individual “unqualified” before the Senate even has an opportunity to review her credentials. From *Myers v. United States*¹⁰⁵ and *Humphrey’s Executor v. United States*¹⁰⁶ to *Morrison v. Olson*,¹⁰⁷ the Supreme Court has issued numerous landmark decisions on presidential removal power, in the context of the general balance of powers between the political

103. O’Connell, *supra* note 89, at 929 (citing William G. Howell & David E. Lewis, *Agencies by Presidential Design*, 64 J. POL. 1095, 1098–99 & tbl.1 (2002)).

104. *See id.* at 914.

105. 272 U.S. 52 (1926).

106. 295 U.S. 602 (1935).

107. 487 U.S. 654 (1988).

branches.¹⁰⁸ This jurisprudence should light the way toward clarity on the limits of the argument in this Note. “Those concerned with th[e] balance [of power between the political branches] at the back end (that is, at the removal stage) would do well also to consider implications from the front end.”¹⁰⁹

In general, principal officers go through a prescribed life cycle in the executive branch: (1) nomination, (2) confirmation, (3) appointment, (4) service, and (5) exit (removal in some cases). The Court in *Humphrey’s Executor* held that the President’s removal power for those officials whose “duties are neither political nor executive, but predominantly quasi-judicial and quasi-legislative” is limited.¹¹⁰ The Court essentially created two categories of executive branch officials: those whom the President may easily remove—“an executive officer restricted to the performance of executive functions,”¹¹¹ such as the postmaster who was the subject of the *Myers* case¹¹²—and those whom she or he may not remove as easily. To draw this conclusion, the Court looked to the Federal Trade Commission Act (FTCA),¹¹³ which provided only certain reasons for which an FTC Commissioner could be removed: “inefficiency, neglect of duty, or malfeasance in office.”¹¹⁴ At the front end of the FTCA was a restriction on the appointment power of the President: “Not more than three of the commissioners shall be members of the same political party.”¹¹⁵

Later in *Morrison v. Olson*, the Court’s majority opinion disavowed these “rigid categories” in stating that its removal jurisprudence is “designed . . . to ensure that Congress does not interfere with the President’s exercise of the ‘executive power’ and his constitutionally appointed duty to ‘take care that the

108. Although the Supreme Court has taken on removal in numerous contexts, the jurisprudence is inconsistent and, in some instances, contradictory. See Aziz Z. Huq & Jon D. Michaels, *The Cycles of Separation-of-Powers Jurisprudence*, 126 *YALE L.J.* 346, 349 (2016).

109. O’Connell, *supra* note 89, at 978.

110. *Humphrey’s Ex’r*, 295 U.S. at 624.

111. *Id.* at 627.

112. 272 U.S. at 107.

113. Ch. 311, 38 Stat. 717 (1914) (codified as amended at 15 U.S.C. §§ 41–58 (2018)).

114. *Id.* § 1, at 718.

115. *Id.*

laws be faithfully executed' under Article II."¹¹⁶ Still, even if the categories are not to be seen as rigid in terms of removal power, they certainly help narrow down—at least to start—offices to which this Note's conclusions are easily applicable. As such, for those officers fully accountable to the President through unrestricted executive removal power, the President and Senate should consider three factors in determining whether to try overturning statutes that impose certain qualifications or restrictions on the eventual appointee: (1) whether the qualification codifies a constitutional principle, (2) to what degree, if any, the restriction excludes objectively qualified individuals from holding the office, and (3) the statute's ambiguity or specificity.

A. *Look to the Constitutional Principle in Question*

First, certain restrictions advance constitutional principles. At least one congressional requirement for an office in particular is steeped in the principles of the Constitution itself: "A person may not be appointed as Secretary of Defense within seven years after relief from active duty as a commissioned officer of a regular component of an armed force."¹¹⁷ This provision, to which some refer as a "cooling off period,"¹¹⁸ enforces a doctrine of civilian control of the American military. In the Constitution itself, the clauses establishing this doctrine "begin in Article I," and "continue in Article II."¹¹⁹ Creating what would become the Department of Defense in 1947, Congress mandated a ten-year cooling-off period (the requirement was shortened to seven years in 2007) for prospective appointees to the position of Secretary of Defense.¹²⁰ "Congress sought to create greater unity

116. 487 U.S. 654, 689–90 (1988) (quoting U.S. CONST. art. II, § 3).

117. 10 U.S.C. § 113(a) (2018).

118. Jeremy Herb, *James Mattis: What to watch*, POLITICO (Jan. 12, 2017, 5:19 AM), <https://www.politico.com/story/2017/01/mattis-what-to-watch-233508> [https://perma.cc/YR6U-EPTE].

119. Justin Walker, *FBI Independence as a Threat to Civil Liberties: An Analogy to Civilian Control of the Military*, 86 GEO. WASH. L. REV. 1011, 1018–19 (2018). Civilian control of the military as a constitutional concern is "firmly grounded in our Constitution," reflecting "concern . . . over the threat that a standing military could pose." *Civilian Control of the Armed Forces: Hearing Before the S. Comm. on Armed Servs.*, 115th Cong. 8 (2017) (statement of Kathleen H. Hicks, Senior Vice President; Henry A. Kissinger Chair; and Director, International Security Program, Center for Strategic and International Studies) [hereinafter *Civilian Control Hearing*].

120. Congress's assent to the statutory scheme it devised for the Defense Secretary office rested on the assumption of constitutionality, given the cooling-off re-

of command while at the same time ensuring that the institution they were creating—and the individuals they would be empowering to lead it—would not threaten the principle of civilian control of the military.”¹²¹ The constitutional concern—civilian control of the military—is the compelling reason to adhere to the qualification, as opposed to the legislative concern—unity of command. Sometimes Congress will waive this requirement, but waivers are uncommon; over the course of the Department of Defense’s existence, Congress has granted only two individuals a waiver: General George Marshall in 1950 and General James Mattis in 2017.¹²² Those waivers, of course, have gone through both the House and the Senate.¹²³

Examples of qualifications on the books that would survive the to-be-proposed analysis are few and far between. Still, they exist. And although many qualifications advance legislative aims, some, like the Defense Secretary requirement, work to ensure that constitutional values are preserved. Creating a framework for review of these statutes also acknowledges that a court may be more inclined to step in and rescue a qualification statute (1) if, from a legal perspective, the qualification is seen as having been enacted pursuant to power granted under

quirement. “The Defense Secretary position is unique in our system. Other than the President acting as Commander in Chief, the Secretary of Defense is the only civilian official in the operational chain of command to the Armed Forces. Unlike the President, however, he or she is not an elected official.” *Civilian Control Hearing*, *supra* note 119, at 8.

121. KATHLEEN J. MCINNIS, CONG. RESEARCH SERV., R44725, STATUTORY RESTRICTIONS ON THE POSITION OF SECRETARY OF DEFENSE: ISSUES FOR CONGRESS 8 (2017). One might ask if part of Congress’s motivation in creating the cooling-off period was jealousy of the popularity of the military figures they were restricting from becoming Secretary of Defense. In the cited report, McInnis writes that after World War II in 1947:

[Five-star officers] enjoyed a heroic reputation and were treated to ticker tape parades, addressed joint sessions of Congress, and some were even considered as presidential contenders. By contrast, outside Presidents Roosevelt and Truman, few if any senior Administration officials or Members of Congress enjoyed a similar status among the American people, during or after the war.

Id. at 6–7. In the 1952 presidential election, war hero Dwight D. Eisenhower would himself go on to win the presidency.

122. Gabrielle Levy, *Senate Approves Waiver to Allow James Mattis as Pentagon Chief*, U.S. NEWS (Jan. 12, 2017, 4:25 PM), <https://www.usnews.com/news/politics/articles/2017-01-12/senate-approves-waiver-to-allow-james-mattis-as-pentagon-chief> [<https://perma.cc/YGZ2-5M9N>].

123. *See id.*

the Necessary and Proper Clause¹²⁴ to ensure that a created office is consistent with constitutional principles, and (2) if, from an institutional perspective, public confidence in a basic constitutional norm is at stake.

The President and Senate should be more willing to challenge qualification requirements that do not reinforce any sort of constitutional principle. Congress imposing certain kinds of education and experience requirements on the FWS Director, for example, would fail to pass muster here. The Constitution mentions nothing about expertise or education. In fact, the Constitution itself mandates only certain age, citizenship, and residency requirements for the members of Congress it vests with lawmaking powers.¹²⁵ If the Framers did not believe members of Congress needed applicable knowledge in areas ranging from the establishment of post offices to the regulation of commerce, expertise-related qualifications for executive branch officials are at least not furthering a core constitutional value.¹²⁶ At the same time, although qualification statutes concerning constitutional values are no more legally binding than any other type of qualification statutes, Presidents and Senates should generally treat them as legally binding, seeking a waiver from the House or simply finding another candidate for the job. Such treatment would achieve the important end of protecting constitutional norms.

124. U.S. CONST. art. I, § 8, cl. 18. One might argue that the Necessary and Proper Clause covers the imposition of any qualification, but such a broad interpretation would likely impermissibly infringe upon the powers granted in the Appointments Clause. The stronger argument is that some qualifications are necessary to ensure that a created office does not run afoul of the Constitution. This Note finds that argument to remain inconsistent with the Appointments Clause, but acknowledging the diversity of views in the judiciary, from an executive branch risk-mitigation standpoint it is a worthwhile consideration.

125. U.S. CONST. art. I, § 2, cl. 2; *id.* § 3, cl. 3.

126. This assertion speaks to a broader debate about the administrative state, which is tangentially related to the topic of this Note: whether it is appropriate for a generalist Congress to delegate rulemaking authority to experts in the executive branch. Compare David Schoenbrod, *Consent of the Governed: A Constitutional Norm that the Court Should Substantially Enforce*, 43 HARV. J. L. & PUB. POL'Y 213 (2020), with Eric A. Posner & Adrian Vermeule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

B. *Challenge the Square Holes when a Round Peg is
Nevertheless a Particularly Good Fit*

Second, some statutory restrictions keep otherwise-qualified individuals out of the running. In the case of a statute that speaks to expertise or experience, the President should ask: “Is it plausible for an individual who does not meet these qualifications to be qualified for the job?” Often times, Congress imposes qualifications on certain offices that are unnecessary for competent performance of the job, such as formal education or an exact amount of experience. These instances are the most unfortunate, because they keep capable, willing-to-serve individuals on the sidelines.

There is even evidence to suggest that were it applied to them, then-House Natural Resources Committee Chairman Rob Bishop and other members of his Committee might have bristled at the very requirement that barred Sheehan from serving as the Director of an agency over which their committee had jurisdiction. In a 2016 House Natural Resources Committee oversight hearing,¹²⁷ Representative Bruce Westerman, a Republican from Arkansas, and the Obama Administration’s Managing Director of the White House Council on Environmental Quality Christy Goldfuss went back and forth about wildfires. In response to a question about her educational background, Director Goldfuss told Congressman Westerman that she studied political science as an undergraduate at Brown University, to which Congressman Westerman responded, “So you studied political science, which really is not a science at all, but you are making scientific judgments on what causes wildfires.”¹²⁸ At the conclusion of Congressman Westerman’s questioning, Chairman Bishop chided him, saying, “Be careful, I am a poli-sci graduate too. . . . And you are right, it qualifies me to sell shoes at Penney’s.”¹²⁹ As the hearing progressed, the majority of the other present committee members started their questioning by mentioning their own college majors, relating what they studied in school to the subject matter at hand.¹³⁰

127. *The Impacts of the Obama CEQ’s Final Guidance for GHG Emissions and the Effects of Climate Change: Oversight Hearing Before the H. Comm. on Nat. Res.*, 114th Cong. 12–13 (2016).

128. *Id.* at 13.

129. *Id.* at 14.

130. *See id.* at 19, 30.

It is eye opening how defensive the majority of the questioners on the panel—from both sides of the aisle—became about their own educational backgrounds as soon as one of their colleagues mentioned his skepticism about an executive branch official's ability to do a certain job with an educational background that was, in the Congressman's judgment, inapplicable. An education requirement is but one of a number of qualification stipulations that may turn away individuals who can adequately perform the job in question; analyzing whether this is the case should be part of the evaluation.

If the statute does not codify a constitutional principle and does prevent capable individuals from serving, the President and Senate would be wise and well within their power to challenge the law. The appropriate forum for any other objections to a nominee is that individual's confirmation process, not a blanket law with unintended consequences.

C. *Ambiguity and Specificity Can Each Be Enemies of Good Government*

Third, the President and the Senate should be willing to challenge those statutes that say too much or say, essentially, nothing at all. Ambiguity in qualification statutes leads to uncertainty about whom the President can and cannot appoint; specificity upsets the balance of government power. Returning to the example of the qualifications that Congress imposed upon the office of FWS Director, what exactly constitutes "experience . . . in the principles of fisheries and wildlife management"? Reasonable people could disagree about whether, say, two years working in conservation policy would satisfy the requirement. What about six months as an interim head of a state wildlife agency? Is that enough? The statute is vague in this regard, opening the door to the kind of interpretation that courts should want to leave to the Senate. At the other end of the spectrum, more specific statutes can amount to the "legislative designation" Chief Justice Taft deemed unacceptable in *Myers*. In that case, the Chief Justice wrote:

It is argued that the denial of the legislative power to regulate removals in some way involves the denial of power to prescribe qualifications for office, or reasonable classification for promotion, and yet that has been often exercised. We see no conflict between the latter power and that of appoint-

ment and removal, provided of course that the qualifications do not so limit selection and so trench upon executive choice as to be, in effect, *legislative designation*.¹³¹

Consider Congressman Hay's inclusion of the above referenced provision of the National Defense Act of 1916;¹³² there, Congress did more than come "close to specifying the individual who must be appointed."¹³³ It actually specified the person. When Congress places restrictions "on whom the President can choose," it "gains power," as Anne Joseph O'Connell argues.¹³⁴ Qualification statutes should be clear enough to delineate exactly who is and is not qualified, but must not be so specific that the President is—in effect—picking from Congress's list.

The relevant factors outlined in this section flow from Article II, which provides that the President "shall nominate."¹³⁵ The approach, then, is designed to frame clearly those instances in which a qualification law has limited, or extraordinary, utility. The analysis here focuses on the President and the Senate asserting constitutionally vested powers through recognition of the modern day confirmation process, an appreciation for the value of public confidence in constitutional norms, and a desire to allow the best possible people to serve in government. In due course, Presidents and Senates should be most willing to challenge restrictions if they (1) impose requirements beyond reinforcement of the principles set forth in the Constitution, and either (2) prevent objectively qualified individuals from holding office or (3) are either so vague as to invite inconsistent application, or so specific as to constitute legislative designation.

CONCLUSION

Even in the face of qualification laws, the President and the Senate can still act to get their preferred candidates into office, notwithstanding opposition from the House. After all, the House has no formal role in confirmation of appointees, making qualification statutes unconstitutional. As such, qualifications on executive branch offices are not binding laws that

131. *Myers v. United States*, 272 U.S. 52, 128 (1926) (emphasis added).

132. *See supra* Part II.C.

133. HOGUE, *supra* note 20, at 3.

134. O'Connell, *supra* note 89, at 977.

135. U.S. CONST. art. II, § 2, cl. 2.

would put an administration into jeopardy if the Senate confirmed an “unqualified” nominee. Courts should then decline to review the legitimacy of such officials’ actions in office.

Utah conservationist Greg Sheehan was about as good as any Republican administration could have appointed as FWS Director in 2017. But despite a twenty-five-year career in management of fish and wildlife, Sheehan majored in the wrong subject as an undergraduate, and so he was ineligible to lead the FWS because of a stipulation in the law that established the FWS Director position. Qualification statutes can have a deleterious effect on the separation of powers in America and, as the Sheehan example illustrates, the ability of a President to staff the government with the right people. In the appointment process, the Constitution prescribes a specific role for the Senate, and only the Senate: Advice and Consent—full stop. In our checks-and-balances system of power, allowing Congress as a whole to freely build upon “Advice and Consent” and impose any sort of qualification restrictions it so chooses on all future Presidents’ appointees would necessarily and unacceptably enhance the legislative branch’s power overall, with a particularly objectionable grant of power to the House of Representatives. And, when a qualification statute prevents an expert from joining an administration because that expert’s lived experience does not fit neatly into the statutory box that Congress drew for the position, it is to the detriment of the nation.

For future nominations, Presidents and Senates may find that, in the face of an uncooperative House of Representatives, contravening a qualification statute is the only way to get a preferred, capable nominee into office. In so doing, the two should look to different factors in considering whether confirmation would and should void the law: (1) whether a qualification reinforces a constitutional principle, (2) whether it accommodates the entire universe of potential appointees, and (3) whether it is neither too broad as to be unintelligible nor too narrow as to create a congressional shortlist from which the President is to choose.

Eli Nachmany