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PREFACE

After many hours of proofreading, editing, and working with our authors, the staff of the *Harvard Journal of Law & Public Policy* is thrilled to present Issue 2 of Volume 45. As with everything at JLPP, this has been a team effort. At the outset, I want to acknowledge someone who is not on our masthead this Issue: former Deputy Editor-in-Chief Jason Altabet. Immediately after graduation, Jason began a judicial clerkship, and thus had to depart from his position with JLPP before this Issue's publication. I thanked Jason in the preface to the last Issue, but I want to reiterate here what a profound impact he had on keeping Volume 45 organized and on track over the course of the academic year. He has my immense gratitude.

In addition to the editors I thanked in the preface to Issue 1, I appreciate the work of so many on our Journal's staff. In particular, I would like to thank a few more editors personally. Our Deputy Managing Editors—Mario Fiandeiro, Courtney Jones, Cole Timmerwilke, and Zach Winn—worked as hard as anyone on JLPP, double checking every sentence and footnote. Our Senior Articles Editors—Kyle Eiswald, Pranav Mulpur, Dana Schneider, and Owen Smitherman—pored over the many article submissions we received and engaged in rigorous scholarly debate about which pieces we should accept. Our Notes Editors—Ethan Harper and Joel Malkin—did their part to accommodate the significant uptick in the amount of student writing we have published this Volume. Our Deputy *JLPP: Per Curiam* Editors—Kevin Lie, Jamie McWilliam, and Hunter Pearl—continued to spend countless hours to turn this new component into a powerhouse. And our Special Projects Coordinator August Bruschini took a newly created role and ran with it, helping our staff situate this Volume against the backdrop of JLPP's legendary history.

We publish this Issue of JLPP on the heels of one of the most consequential terms in the history of the Supreme Court. In October Term 2021, the Court issued major rulings on hotly contested issues, such as the Second Amendment, abortion rights, and religious freedom. As America emerges from the COVID-19

pandemic, we are at a pivotal moment in our nation's legal history. JLPP has long been the lantern of the conservative legal movement, shining a light on the path ahead by illuminating the most important debates to come. I hope that Volume 45 continues that tradition.

To that end, we are proud to share a set of essays and articles from leading voices on the right. And as always, we are thrilled to supplement those pieces with student writing from our own editors. This Issue begins with an Essay from Senator Kevin Cramer of North Dakota, who writes about cooperative federalism in environmental law and policy. Following this timely work, JLPP is honored to publish former Solicitor General Theodore Olson's Remembrance of his late wife Barbara Olson, who was killed in the September 11, 2001 terrorist attacks. Mr. Olson delivered this Remembrance in the form of remarks at the 2021 Federalist Society National Lawyers Convention. Many of JLPP's editors attended Mr. Olson's remarks live at the Convention, and we are grateful that he entrusted us with the privilege of publishing an adapted version of those remarks in this Issue. From there, we have two articles. Professor Jonathan Turley has written a bold defense of free speech, drawing on recent events across our country. And Judge John K. Bush of the United States Court of Appeals for the Sixth Circuit has co-authored an Article with former law clerk A.J. Jeffries about corpus linguistics and constitutional interpretation. Judge Bush is a JLPP alum, and we are elated to publish his work on such a significant topic.

From there, we have three pieces of student writing. Last Issue, we published three pieces as well. Although the norm has tended to be one or two pieces of student writing per issue of JLPP, I find it important for our editors to have as many opportunities as possible to publish in this storied Journal. Deputy *JLPP: Per Curiam* Editor Hunter Pearl kicks off this section with a Note about boycotts and the First Amendment. Senior Editor Samantha Thorne follows with her own Note about corpus linguistics, which dovetails nicely with the Article from Judge Bush and Mr. Jeffries.

Senior Editor Rogan Feng closes us out with a Case Comment on the Supreme Court's 2021 decision in *NCAA v. Alston*.

As I mentioned in Issue 1's preface: When I took over as Editor-in-Chief for Volume 45, I endeavored to make this our best volume yet. I am hopeful that we are on track toward achieving that goal—one that is only possible because of our editors' diligence. After a blockbuster Issue 1, this Issue features another Essay from a sitting U.S. Senator, remarks from a former U.S. Solicitor General, an Article from a leading law professor, and an Article from a sitting federal judge and one of his law clerks. And after publishing—in Issue 1—what appeared to be the most student writing we had in one issue in nearly a decade, we have now matched it in Issue 2. Volume 45 of JLPP will be one to remember.

Eli Nachmany
Editor-in-Chief

RESTORING STATES' RIGHTS & ADHERING TO COOPERATIVE FEDERALISM IN ENVIRONMENTAL POLICY

SENATOR KEVIN CRAMER[1]

For Attorney General Wayne Stenehjem: On Friday, January 28, 2022, North Dakota and our nation lost a patriot who fought for the cause of states' rights and cooperative federalism. His work in the courtroom and on North Dakota's Industrial Commission was monumental in positioning the state to be an energy powerhouse while being a steward of the environment. Wayne was also instrumental in procuring the historic stay of the Clean Power Plan from the U.S. Supreme Court. He leaves behind an incredible legacy as the state's longest-serving attorney general and a roadmap for cooperative federalism in environmental policy. Attorney General Stenehjem's servant leadership over the past four decades is woven into the battles, triumphs, and solutions discussed in this piece. God bless his memory.

Our Founders created the Model Republic—steeped in the foundation of a government of the people, by the people, and for the people. Many herald the importance of three co-equal branches

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[1] Kevin Cramer is a United States Senator from North Dakota. Prior to joining the Senate, Cramer served three terms as North Dakota's At-Large Member of the U.S. House of Representatives. He also served as a North Dakota Public Service Commissioner where he worked to ensure North Dakotans enjoy some of the lowest utility rates in the U.S., enhancing their competitive position in the global marketplace. He is a Native of Kindred, North Dakota. Kevin and his wife Kris have two adult sons, Isaac, who passed away in early 2018, and Ian; two adult daughters, Rachel and Annie; a teenage son, Abel; three granddaughters, Lyla, Willa, and Eve; and three grandsons, Beau, Nico, and Chet.

of government, which cannot be understated. But the brilliance lies in the limited federal government, whose sole powers were enumerated in the Constitution, leaving all else to the people and the states as formalized in the Ninth and Tenth Amendments.

Tension between the States and the federal government has existed since the beginning. However, recent Democrat political leadership has trended toward federal dominion well outside the bounds of the law. Nowhere is this more evident than environmental legal battles, where the federal government has pursued full authority and jurisdiction to "save" the nation from the pesky states who have not signed onto their agenda. In my ten years as a state regulator, six years as a U.S. House member, and now three years as a U.S. Senator, I have seen time and again the imposition of the federal government's mediocrity on North Dakota's excellence. Centralized government policies and hostility towards the states have essentially been normalized.

So, where did we go wrong? A multitude of efforts aided the erosion of states' rights, notably, lazy legislating, judicial activism, citizen suits, and an unchecked Department of Justice (DOJ). Our ongoing dysfunction in the Legislative Branch is certainly not helpful either. While the House and Senate squabble, the Executive Branch rules by fiat in the form of executive orders, regulations, and guidance. This was perhaps best articulated by President Barack Obama during his second term in office when he famously stated, "I am . . . going to act on my own if Congress is deadlocked. I've got a pen to take executive actions where Congress won't, and I've got a telephone to rally folks around the country on this mission."[2] Unfortunately, many of his efforts are with us today, aided in no small part by judicial rulings empowered by the *Chevron* doctrine

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[2] Tamara Keith, *Wielding a Pen and a Phone, Obama Goes It Alone*, NPR, (Jan. 20, 2014, 3:36 AM), https://www.npr.org/2014/01/20/263766043/wielding-a-pen-and-a-phone-obama-goes-it-alone [https://perma.cc/KVJ5-VJB7].

giving deference to the Executive Branch.[3] The bottom line is the People's House and the Upper Chamber need to get their acts in order.

However, one should not solely blame the Courts. Congress bears responsibility for enabling the growth of the Washington bureaucracy. Vague authorship from the House and Senate empowers not only the Executive Branch bureaucracy but also the political whims of presidential administrations. Lazy legislating makes what was once a co-equal branch of government, the Executive Branch, the arbiter of congressional intent. This has most conspicuously appeared in federal environmental policy, a challenge the Left has exacerbated for political gain. Notable legislation includes the Clean Air Act (enacted 1963),[4] the Clean Water Act (1972),[5] the Endangered Species Act (1973),[6] the Safe Drinking Water Act (1974),[7] the Resource Conservation and Recovery Act (1976),[8] the Surface Mine Control and Reclamation Act (1977),[9] and the Comprehensive Environmental Response, Compensation, and Liability Act (1980).[10] These laws were passed during predominantly Democratic control of Congress, and they had strong bonds to state governments in the form of state primacy for implementation. But these laws have been distorted to achieve total consolidation of power under the federal government.

Clean Air Act

[3] *See* Chevron, U.S.A. v. NRDC, 467 U.S. 837 (1984) (setting forth a regime of judicial deference to administrative agencies' interpretations of ambiguous statutory provisions).
[4] 42 U.S.C. §§ 7401-7671q.
[5] 33 U.S.C. §§ 1151, 1251-1387.
[6] 16 U.S.C. § 1531.
[7] 42 U.S.C. § 300f.
[8] 42 U.S.C. § 6901.
[9] 42 U.S.C. §1201.
[10] 42 U.S.C. § 9601.

Look no further than the Clean Air Act and specifically Section 111(d).[11] The Executive Branch (in this case, the Environmental Protection Agency (EPA) under President Obama) relied heavily on an overly broad interpretation of its authority. The EPA took advantage of Legislative Branch dysfunction and crafted the Clean Power Plan—an excessively burdensome, sector-wide regulation to force states to direct their electricity source away from coal under the disguise of regulating carbon dioxide. It was a direct assault on the reliability and affordability of energy generation, but more importantly, it was a blatant attack on the authority of states to set their own power generation decisions. Congress is given the authority of the pen and it makes no sense to pass authorship off to those charged with implementation, especially without the involvement of states. It is a recipe for continued litigation and conflict, rather than sound and resilient policy. Thankfully, North Dakota, alongside allied states and stakeholders, was able to receive an unprecedented stay from the U.S. Supreme Court in February of 2016,[12] perhaps speaking volumes about its illegality.

The merits of the Clean Power Plan were under review by the U.S. Supreme Court in *West Virginia v. Environmental Protection Agency*.[13] The Supreme Court ruled, "It is not plausible that Congress gave EPA the authority to adopt on its own such a regulatory scheme in Section 111(d). A decision of such magnitude and consequence rests with Congress itself, or an agency acting pursuant to a clear delegation from that representative body."[14] In a concurring opinion, Justice Gorsuch took matters further writing, "When Congress seems slow to solve problems, it may be only natural that those in the Executive Branch might seek to take matters into their own hands. But the Constitution does not authorize agencies to use pen-and-phone regulations as substitutes for laws passed by the

[11] 42 U.S.C. § 7411(d).
[12] *See* West Virginia v. EPA, 577 U.S. 1126 (2016).
[13] 142 S. Ct. 420 (2021).
[14] West Virginia v. EPA, No. 20–1530, slip op. at 31 (U.S. June 30, 2022).

people's representatives."[15] In an *amicus curiae* brief I signed along with 91 House and Senate colleagues,[16] we noted the complete lack of congressional intent to regulate greenhouse gas emissions. The Clean Air Act requires the EPA to set National Ambient Air Quality Standards (NAAQS) for six criteria air pollutants: carbon monoxide, ground-level ozone, lead, nitrogen dioxide, particulate matter, and sulfur dioxide. Carbon dioxide is not expressly included in this list. Unfortunately, in *Massachusetts v. Environmental Protection Agency*,[17] the Supreme Court stepped outside the textual bounds of the Clean Air Act and opened the door to regulating vehicular carbon dioxide emissions under the guise of an endangered public. In contrast, the brief we submitted states, "In recent years, . . . Congress has addressed major policy questions concerning greenhouse gas emissions by enacting legislation, signed into law by the President, that provides explicit and specific direction to administrative agencies."[18] For example, in the 115th Congress, I co-sponsored H.R. 3761,[19] the Carbon Capture Act, which was legislation to enhance the federal tax credit for carbon dioxide sequestration. Related provisions were later enacted as part of the Bipartisan Budget Act of 2018 (P.L. 115-123).[20] Clearly, the congressional intent of this bill was to accelerate the deployment of technology to reduce greenhouse gas emissions from a broad range of industries.

The brief also succinctly states,

> Decisions regarding greenhouse gas emissions and the power sector are major policy questions with vast economic and political

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[15] West Virginia v. EPA, No. 20–1530, slip op. at 19 (U.S. June 30, 2022) (Gorsuch, J., concurring).

[16] *See* Brief of 91 Members of Congress as Amici Curiae in Support of Petitioners, West Virginia v. EPA, 142 S. Ct. 420 (2021) (No. 20-1530), 2021 WL 6118331.

[17] 549 U.S. 497 (2007).

[18] Brief of 91 Members of Congress as Amici Curiae in Support of Petitioners at 7, West Virginia v. EPA, 142 S. Ct. 420 (2021) (No. 20-1530), 2021 WL 6118331.

[19] H.R. 3761, 115th Cong. (2017).

[20] 42 U.S.C. § 1305.

> significance. Only elected members of Congress, representing the will of the people, may decide these questions. The EPA's attempt to issue expansive regulations cannot stand in the absence of clear congressional authorization.[21]

The Obama Administration's sweeping regulation was a major shift in policy with significant implications. A plain reading of Clean Air Act Section 111(d), or any other kind of reading, does not give the EPA the authority to singlehandedly restructure the entire energy sector of our economy. These decisions are best left to states, which are better situated to understand their own energy needs and resources than is the federal government. They are also closer to the people they serve in both proximity and accountability. This was upheld in the *West Virginia v. Environmental Protection Agency* Majority Opinion. Chief Justice Roberts wrote "We declined to uphold EPA's claim of 'unheralded' regulatory power over 'a significant portion of the American economy.' … Congress certainly has not conferred a like authority upon EPA anywhere else in the Clean Air Act. The last place one would expect to find it is in the previously little-used backwater of Section 111(d)."

North Dakota was also a party in *West Virginia v. Environmental Protection Agency*. An *amicus curiae* brief filed with the Supreme Court by North Dakota Attorney General Stenehjem hails "the delicate balance of cooperative federalism established by Congress in Section 111 of the Clean Air Act which gives the States the primary role establishing standards of performance for existing sources of air emissions."[22] Unique to the proceedings, Attorney General Stenehjem rightly notes cooperative federalism is expressly written into the Clean Air Act as it relates to regulating emissions from existing sources. Clean Air Act Section 111(d)(2) outlines the process for the EPA to step in and establish performance standards if, and only if, a state fails to do so. The reality is the statute already strikes

[21] Brief of 91 Members of Congress as Amicus Curiae in Support of Petitioners, West Virginia v. EPA, 142 S. Ct. 420 (2021) (No. 20-1530), 2021 WL 6118331.

[22] Merits Brief of Petitioner, The State of North Dakota, West Virginia v. EPA, 142 S. Ct. 420 (2021) (No. 20-1530), 2021 WL 5982770.

an appropriate balance in which states are the lead regulators and the federal government acts as a backstop.

Federal overreach, combined with statutory language ripe for bureaucratic mischief, landed the EPA before the Supreme Court for more than a decade. While the Clean Air Act could have been written better, it is clear Congress never intended to overrule state authority.

Clean Water Act

The Clean Water Act has faced a fate similar to that of the Clean Air Act. The law abides by the tenets of cooperative federalism by recognizing the responsibility of states to address water pollution. States are tasked with primary enforcement responsibility. Where the law fails miserably, however, is the ability of the EPA and the Army Corps of Engineers (Army Corps) to define their own jurisdiction. This has created a regulatory nightmare and a never-ending cycle of litigation over the nearly fifty years the statute has been in place. Under the law, federal regulatory agencies are responsible for defining what is and what is not a Water of the U.S. (WOTUS). In other words, unelected bureaucrats determine what is or what is not navigable water. Cooperative federalism was clearly top of mind as navigable bodies of water fall under federal jurisdiction and all other waters fall under state jurisdiction. But, in practice, leaving agencies to define navigable water has allowed for unabashed federal power grabs under the guise of environmental protection.

In 2006, Justice Scalia, in the *Rapanos* plurality opinion joined by Chief Justice Roberts and Justices Thomas and Alito, spoke to the "immense expansion of federal regulation of land use that has occurred under the Clean Water Act—without any change in the gov-

erning statute—during the past five Presidential administrations."[23] Justice Scalia set the standard for continuous surface water connection to relatively permanent bodies of water, emphasizing the Clean Water Act was intended to deal with navigable waters or "only those relatively permanent, standing or continuously flowing bodies of water 'forming geographic features' that are described in ordinary parlance as 'streams[,] . . . oceans, rivers, [and] lakes.'"[24] However, interpreting the same statute, Justice Kennedy wrote a separate concurring opinion specifying that a WOTUS only needs a "significant nexus" or a substantial impact on the quality of a navigable body of water.[25] For those who operate on common sense, it is clear ditches, puddles, prairie potholes, and seasonal trickles are not and never will be navigable. Nevertheless, under Justice Kennedy's determination, federal bureaucrats have been given free rein to determine whether these water features have any connection to large bodies of water—never mind the term "significant nexus" is nowhere to be found in the underlying statute. Legislators' lack of clear definitions and intent led two Supreme Court Justices to two disparate interpretations.

Justice Stevens, joined by Justices Souter, Ginsburg, and Breyer, dissented. They would have granted *Chevron* deference to the Army Corps' interpretation of "navigable waters" and upheld the Sixth Circuit's ruling.[26] This further displays how lazy legislating has allowed the Clean Water Act to be abused by an emboldened Executive Branch and its respective agencies.

Neither the plurality nor the dissent commanded a majority. Justice Kennedy's concurrence argued wetlands do not need to have a continuous surface connection to a continuously flowing

[23] Rapanos v. United States, 547 U.S. 715, 722 (2006).
[24] *Id.* at 739 (alterations in original).
[25] *Id.* at 779 (Kennedy, J., concurring).
[26] *Id.* at 787–810 (Stevens, J., dissenting).

body of water to be covered under the Clean Water Act, but adjacency to a WOTUS is not sufficient to constitute a determination of a WOTUS. Instead, he decided wetlands not adjacent to navigable water must have a "significant nexus" to a WOTUS.[27] This has taken many forms over the years. The 2015 WOTUS Rule[28] defined "significant nexus" to mean water, including wetlands, either alone or in combination with other similarly situated waters in the region, significantly affecting the chemical, physical, or biological integrity of a "jurisdictional by rule" water. For an effect to be "significant" it must have been "more than speculative or insubstantial" and the term "in the region" meant "the watershed that drains to the nearest" primary water.[29] This definition was different from the test articulated by the agencies in their 2008 *Rapanos* Guidance.[30] The 2015 guidance interpreted "similarly situated" to include all wetlands (not waters) adjacent to the same tributary.

Additionally, under the 2015 Rule, regulators had to consider nine functions, including sediment trapping, runoff storage, provision of life cycle dependent aquatic habitat, and other functions to determine whether water had a significant nexus to a WOTUS.[31] If any single function performed by the water, alone or together with similarly situated waters in the region, contributed significantly to the chemical, physical, or biological integrity of the nearest "jurisdictional by rule" water, the water was deemed to have a significant

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[27] *Id.* at 779.

[28] Clean Water Rule: Definition of "Waters of the United States", 80 Fed. Reg. 37054, 37091 (June 29, 2015), https://www.federalregister.gov/documents/2015/06/29/2015-13435/clean-water-rule-definition-of-waters-of-the-united-states [https://perma.cc/TG7D-52NL].

[29] *Id.*

[30] *See* Env't Prot. Agency, Clean Water Act Jurisdiction Following the U.S. Supreme Court's Decision in *Rapanos v. United States* & *Carabell v. United States* 8 (Dec. 2, 2008), https://www.epa.gov/sites/default/files/2016-02/documents/cwa_jurisdiction_following_rapanos120208.pdf [https://perma.cc/A6ZC-35D5].

[31] *See* Clean Water Rule for Engineers Corps and Environmental Protection Agency, 80 Fed. Reg. 37053, 37067 (published on June 29, 2015) (effective on Aug. 28, 2015).

nexus. Altogether, the nine significant nexus functions and the expanded guidance of "similarly situated waters in the region" in the 2015 Rule meant the majority of water features in the U.S. could come under federal jurisdiction. This is the textbook definition of overreach. It was a total affront to states who have a vested interest in protecting the water sources within their borders.

This is what made the Obama Administration's 2015 rulemaking particularly pernicious for North Dakota, as we are the heart of the Prairie Pothole Region with numerous ephemeral streams. Prairie Potholes are shallow wetlands scattered across the upper Midwest. Some are permanent. Some are mere puddles, only filling with water during the spring. Under the 2015 Rule, more than 80 percent of North Dakota's landmass would be under federal jurisdiction in large part because of the vast presence of prairie potholes, ephemeral streams, and an arbitrary 4,000-foot buffer from an ordinary high watermark.[32] Before the Senate Environment and Public Works Committee on June 12, 2019,[33] North Dakota Agriculture Commissioner Doug Goehring testified the 2015 Rule would have expanded federal authority to cover 85,604 linear miles in North Dakota. This would amount to an increase of 80,504 linear miles[34] from the 5,100 linear miles under federal jurisdiction in the pre–2015 Rule.

The 2015 Rule fully displayed the growing disregard for cooperative federalism when the Executive Branch completely ignored the important fact that water not included within the definition of a WOTUS does not mean it lacked adequate environmental protection. For example, the North Dakota legislature already tasks the state Department of Environmental Quality (DEQ, previously the

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[32] *See* A Review of Waters of the U.S. Regulations: Their Impact on States and the American People: Hearing Before the Subcomm. on Fisheries, Water, and Wildlife of the S. Comm. on Env't and Pub. Works, 116th Cong. 1–2 (2019) (statement of Doug Goehring, Agriculture Commissioner, North Dakota).

[33] *Id.*

[34] *Id.*

Department of Health) with regulating all waters within the state, regardless of whether they fall within federal jurisdiction.[35] Accordingly, our state law places additional protections on those waters. The North Dakota DEQ goes above and beyond the federal baseline standards and actively works to prevent pollution. This includes subjecting violators to legal action. Nothing in the Clean Water Act has precluded states from similar policies. All of these points were submitted via written comment by North Dakota officials for the EPA's proposed Definition of Waters of the United States docket, published on April 21, 2014.[36] The federal government is either oblivious or actively ignoring state-level protection.

In response to this blatant disregard for the state's role in protecting its environment, several states—including North Dakota—took to the courts for resolution, with some success. In 2015, North Dakota and eleven other states filed a successful lawsuit in federal district court in North Dakota asking the court to vacate the 2015 Rule and bar the EPA and Army Corps from enforcing the new definition.[37] North Dakota argued the Obama Administration's WOTUS regulation unlawfully expanded federal jurisdiction over state land and water resources beyond the intent of Congress.[38] In response, North Dakota U.S. District Judge Ralph Erickson issued a temporary injunction on the 2015 Rule. Judge Erickson wrote in his ruling that "the States will lose their sovereignty over intrastate

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[35] *See* N.D. Cent. Code § 61-28-01, [https://perma.cc/6M37-LXR4].

[36] Governor Jack Dalrymple, Comment on the Proposed Definition of Waters of the United States (Nov. 24, 2014), https://www.regulations.gov/comment/EPA-HQ-OW-2011-0880-15365 [https://perma.cc/4L82-FPUX].

[37] *See* Press Release, Drew H. Wrigley, Attorney General, North Dakota, US District Court Sides with North Dakota in WOTUS Decision (Mar. 23, 2018), [https://perma.cc/6HXK-SGPR].

[38] *See* Mike Nowatzki, *North Dakota takes lead in lawsuit against EPA over WOTUS rule*, The Jamestown Sun (June 30, 2015, 10:26 AM), https://www.jamestownsun.com/news/north-dakota-takes-lead-in-lawsuit-against-epa-over-wotus-rule [https://perma.cc/K23P-97BJ].

waters”[39] and the EPA “violated its congressional grant of authority in its promulgation of the rule.”[40]

States, farmers, ranchers, and landowners have endured decades of regulatory change in the WOTUS definition from administration to administration without an end in sight. As the Biden Administration rewrites WOTUS, the U.S. Supreme Court will review the scope of the Clean Water Act in *Sackett v. Environmental Protection Agency* during the upcoming term.[41] EPA has indicated this will be different from the Obama Administration’s 2015 Rule.[42] Any new definition of WOTUS, like the Trump Administration’s Navigable Waters Protection Rule, needs to respect the role of states, which have primacy for a multitude of Clean Water Act programs. As with 111(d), a decision from U.S. Supreme Court on *Sackett v. Environmental Protection Agency* may finally provide much-needed clarity and, hopefully, the appropriate guardrails for an ever-expanding bureaucracy.

Water Supply Rule

Federal water policy outside of the Clean Water Act has experienced similar sagas. The Flood Control Act of 1944 and the Water Supply Act of 1958 were clearly established with cooperative federalism in mind. Under these statutes, “water surplus” was never

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[39] North Dakota v. EPA, 127 F. Supp. 3d 1047, 1059 (D.N.D. 2015).

[40] *Id.* at 1051.

[41] Greg Stohr, *Supreme Court Will Consider Limiting Reach of Clean Water Act*, BLOOMBERG L. (Jan. 24, 2022, 9:34 AM), https://news.bloomberglaw.com/environment-and-energy/supreme-court-will-consider-limiting-reach-of-clean-water-act [https://perma.cc/2PS6-37JW].

[42] Bobby Magill, *EPA to Rewrite Trump-Era Waters Rule That Boosted Builders*, BLOOMBERG L. (June 9, 2021, 4:40 PM), https://news.bloomberglaw.com/environment-and-energy/biden-administration-to-redefine-waters-of-the-united-states [https://perma.cc/9Q9Q-2M97].

defined and courts and Congress gave clear and consistent deference to states, localities, and tribes for water surrounded by Army Corps property. In the Flood Control Act of 1944, Congress wrote,

> it is hereby declared to be the policy of the Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control, as herein authorized to preserve and protect to the fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers.[43]

The law expressly recognized the preeminent role of states concerning water rights.

In 2008, however, the Army Corps issued the Real Estate Policy Guidance Letter No. 26, which inhibited state water rights and access.[44] At the very end of the Obama Administration, the Army Corps published a Notice of Proposed Rulemaking entitled "Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal, and Industrial Water Supply" (Water Supply Rule)[45] to codify the 2008 guidance and other partisan priorities. In this proposal, it defined key terms in the Flood Control Act of 1944 and the Water Supply Act of 1958 in an attempt to federalize water authority specifically reserved for the states.

During the development of the proposed rule, the Army Corps failed to meaningfully consult with states and tribes. The Obama Water Supply Rule ignored longstanding congressional intent and practices to restrict critical access to water. Historically, the Army

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[43] The Flood Control Act of 1944, 33 U.S.C. § 701 (2018).

[44] U.S. Army Corps of Eng'rs, Real Estate Policy Guidance Letter No. 26 (June 10, 2008), https://www.publications.usace.army.mil/Portals/76/Users/182/86/2486/PGL%2026.pdf?ver=HnFqKuFLeG9yRyhG69V-ew%3d%3d [https://perma.cc/5PN8-74BR].

[45] Use of U.S. Army Corps of Engineers Reservoir Projects for Domestic, Municipal & Industrial Water Supply, 81 Fed. Reg. 91556 (proposed Dec. 16, 2016) (to be codified at 33 C.F.R. pt. 209).

Corps did not require a water supply contract as a prerequisite to granting water users access to their reservoirs in arid Western states.

Since Real Estate Policy Guidance Letter No. 26 was signed in 2008, North Dakota's access to water in the Missouri River was restricted by approximately 75 percent, according to Attorney General Stenehjem. The new policy also blocked all access to water on the Mandan, Hidatsa, and Arikara Nation or Three Affiliated Tribes and Standing Rock reservations.[46] The proposal wholly contradicts "the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control"[47] as prescribed by Congress.

In 2020, the Trump Administration and the Army Corps took a step in a positive direction when they withdrew the Water Supply Rule.[48] This action recognized the legitimate right of states, tribes, and localities to access water flows within their boundaries. They took a step further in December 2020 when they rescinded guidance on surplus water agreements and released instructions aimed at

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[46] *See* Press Release, Wayne Stenehjem, Attorney General, North Dakota, Stenehjem Applauds Corps of Engineers' Policy Change (Dec. 4, 2020), https://attorneygeneral.nd.gov/news/stenehjem-applauds-corps-engineers%E2%80%99-policy-change.

[47] The Flood Control Act of 1944, 33 U.S.C. § 701 (2018).

[48] *See* Press Release, U.S. Army, U.S. Army Withdraws Water Supply Rule (Jan. 21, 2020), https://www.army.mil/article/231866/u_s_army_withdraws_water_supply_rule#:~:text=%22In%20coordination%20with%20the%20administration,supply%20rule%2C%22%20James%20said [https://perma.cc/DQZ6-EP5W]; *see also* Press Release, Senator Kevin Cramer, Sen. Cramer: President Trump Withdraws Water Supply Rule (Jan. 21, 2020), https://www.cramer.senate.gov/news/press-releases/sen-cramer-president-trump-withdraws-water-supply-rule-sen-cramer-led-effort-halt-rule-better-0 [https://perma.cc/EZH9-RTUF].

improving internal processes for reviewing requests for water supply withdrawals.[49] These actions further limited the federal government's control of local water issues and streamlined the permitting process. With nothing more than a change in administration, however, states, localities, and tribes may once again be subject to a game of regulatory ping pong. With a new Notice of Proposed Rulemaking, the Army Corps can grow the size, influence, authority, and footprint of the bureaucracy, ignore judicial precedent, override congressional intent, and trample cooperative federalism.

Lazy Legislating

As evidenced by the examples outlined thus far, lazy legislating and a power-hungry bureaucracy have given too much power to the Executive Branch and the Judiciary, neither of which are able to properly reflect the will of the people. Ambiguity in lawmaking from Congress has paved the way for regulatory whiplash, which only serves to embolden unelected bureaucrats in the swamp of Washington, D.C. A change in administration every four to eight years brings with it a change in interpretation of federal statutes, often without any input from states like North Dakota.

The role of the federal government therefore must always be measured. And what better way to achieve an optimum result than by an empowered state government? A government that is not too large for it to fail to reflect the values of its constituents, and not too small (and numerous) to be drowned out by its peers. Federal legislators should defer to states when possible and provide clear, un-

[49] *See* Press Release, Senator Kevin Cramer, Army Corps Rescinds Certain Water Supply Guidance, Lessens the Federal Role in Water Supply Withdrawal Process (Dec. 4, 2020), https://www.cramer.senate.gov/news/press-releases/sen-cramer-army-corps-rescinds-certain-water-supply-guidance-lessens-the-federal-role-in-water-supply-withdrawal-process [https://perma.cc/X7ZN-N46J].

ambiguous definitions to reduce regulatory mischief and uncertainty. This remains a personal mission of mine in the halls of Congress.

REGROW Act of 2021

I authored and introduced the Revive Economic Growth and Reclaim Orphaned Wells (REGROW) Act of 2021[50] with my colleague Senator Ben Ray Luján (a Democrat from New Mexico) to intentionally include prescriptive language to protect against the ability of federal bureaucrats to take advantage of lazy legislating. Signed into law on November 15, 2021,[51] as part of the bipartisan Infrastructure Investment and Jobs Act, it commits nearly $4.7 billion to plug and remediate orphaned oil and gas wells across the country.[52] Throughout the bill writing process, one of my main priorities was to confine the administration and bureaucracy by clearly stating our intent in the definition section so we did not defer to bureaucrats charged with implementation. Previous drafts of this bill empowered the agency to determine definitions through the rulemaking process. The law now explicitly defines an orphaned well and stipulates deference to a state's definition of an orphaned oil well. The law states,

> ORPHANED WELL The term 'orphaned well'— (A) with respect to Federal land or Tribal land, means a well— (i) that is not used for an authorized purpose, such as production, injection, or

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[50] *See* Press Release, Senator Kevin Cramer, Senate Passes Sen. Cramer's Bipartisan Bill to Plug and Remediate Nation's Orphaned Wells (Aug. 11, 2021), https://www.cramer.senate.gov/news/press-releases/senate-passes-sen-cramers-bipartisan-bill-to-plug-and-remediate-nations-orphaned-wells [https://perma.cc/L4SP-JYCW].

[51] Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 40601 (2021) (enacted).

[52] *See* Press Release, Senator Kevin Cramer, House Passes Infrastructure Package, including $413.5 Billion for Road, Bridge and Highway Projects (Nov. 6, 2021), https://www.cramer.senate.gov/news/press-releases/sen-cramer-house-passes-infrastructure-package-not-build-back-better-package [https://perma.cc/6WY2-G639].

> monitoring; and (ii)(I) for which no operator can be located; or (II) the operator of which is unable— (aa) to plug the well; and (bb) to remediate and reclaim the well site; and (B) with respect to State or private land— (i) has the meaning given the term by the applicable State; or (ii) if that State uses different terminology, has the meaning given another term used by the State to describe a well eligible for plugging, remediation, and reclamation by the State.[53]

This definition eliminates any possible confusion or empowerment of the bureaucracy to shape the law for its own purposes. By using direct language spelling out deference to existing state policy, future administrations and unelected career bureaucrats, regardless of the political party, do not have the authority to set parameters on what constitutes an orphaned well. This clarity was also necessary to expedite implementation of the program by circumventing the administrative rulemaking processes to put unemployed oilfield workers back to work and remediate the land faster. In the end, we produced results more quickly and reduced the opportunity for bureaucratic overreach or favoritism throughout the implementation process.

Consolidation of Litigation Power

Perhaps just as important as thoughtful and intentional legislating is overturning the consolidation of litigation power among the Executive Branch to the DOJ. Public Law No. 89-554 consolidated litigation authority under the DOJ, subject to certain exceptions. Though various Executive Branch agencies enjoy varying levels of independence from the DOJ, unfortunately, it is not the case for the most prominent matters I express in this Essay.

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[53] Infrastructure Investment and Jobs Act, H.R. 3684, 117th Cong. § 40601 (2021) (enacted).

As Kirti Datla and Richard L. Revesz aptly wrote in a recent article, "centralized litigation control [under the DOJ] increases agency independence from Congress but decreases agency independence from the Executive."[54] Hypothetically, politics is divorced from consideration—and any and all litigation is motivated by the DOJ's self-defined legal doctrine. They note, "While most policymaking does not occur in litigation, control over positions taken in litigation and litigation decisions results in a degree of control over substantive enforcement decisions."[55] In the real world, this end result usually erodes states' rights and is unquestionably awful for North Dakota. It also removes the impact of congressional intent and the ability of Congress to conduct oversight.

In practice, this consolidation leads to Executive Branch agencies being subordinate to the DOJ. It enables the DOJ to ignore the spirit of the law as it is not tasked with implementation or oversight. It is merely interested in the outcome of the case and its goal is always to protect the federal interest. Other Executive Branch agencies, however, must incorporate the outcome of litigation into their everyday practice, which consists of frequent, if not daily, interactions with states and the American people. There is no agency more tone-deaf and unresponsive than the DOJ, and its litigation strategies reflect this.

Fundamentally one must ask—what motivation does the federal government have to share power rather than centralize it? Very little. Compound this inherent drive with endless resources controlled by an army of elite career lawyers who have a deep disgust for any power not solely residing within the federal government. The end result is a passive-aggressive DOJ which only begrudgingly works with the states in the rare cases when a like-minded President takes notice.

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[54] Kirti Datla & Richard L. Revesz, *Deconstructing Independent Agencies (and Executive Agencies)*, 98 CORNELL L. REV. 769, 801 (2013).

[55] *Id.* at 802.

One such example is the ongoing Federal Tort Claims Act (FTCA) litigation between North Dakota and the U.S. relating to the over-$38 million dollars in damages incurred from the Dakota Access Pipeline (DAPL) protests. Negligence from the Obama White House, Army Corps, and Department of the Interior facilitated the DAPL riots, upheaval, and illegal activity which resulted in an environmental disaster on the shores of the Missouri River.[56] Since the 2016 protests, there has been continued resistance from the federal government to assist with the cost of cleanup, enforcement, and policing in any way.

On August 4, 2020, during a Senate Armed Services nomination hearing[57] for Michele Pearce to serve as General Counsel of the Department of the Army (Army), Ms. Pearce stated, "It is my understanding, after thoroughly reviewing all of the pleadings, there were absolutely missed opportunities to reach a settlement. As you are well aware, based on the fact that this case is in litigation, the decision moving forward is out of my hands."[58] We can reasonably conclude the Army, and the Army Corps by extension, have an incentive to cooperate with the State of North Dakota on FTCA claims relating to DAPL protests for the very reason the agency works with the state on a consistent basis on water resource projects in the state. However, the desire to be responsive has been thwarted by

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[56] *See* Press Release, Senator Kevin Cramer, North Dakota Delegation Urges DOJ and DOD to Assist in DAPL Settlement Case (June 10, 2019), https://www.cramer.senate.gov/news/press-releases/north-dakota-delegation-urges-doj-and-dod-to-assist-in-dapl-settlement-case [https://perma.cc/3JZ2-QCV5].

[57] *Nominations—Whitley—Manasco—Pearce—Hardy*, S. COMM. ON ARMED SERVS. (Aug. 4, 2020), https://www.armed-services.senate.gov/hearings/20-08-04-nominations_whitley--manasco--pearce--hardy [https://perma.cc/TM4L-LTTA].

[58] Press Release, Senator Kevin Cramer, North Dakota Delegation Urges DOJ and DOD to Assist in DAPL Settlement Case (June 10, 2019), https://www.cramer.senate.gov/news/press-releases/north-dakota-delegation-urges-doj-and-dod-to-assist-in-dapl-settlement-case [https://perma.cc/3JZ2-QCV5].

the heavy hand of the DOJ, which has no impetus for or interest in being responsive to the state.

Following this interaction, in September 2020, the Army formally recommended the DOJ enter into settlement negotiations "[t]o avoid protracted and costly litigation, particularly in light of the harm that occurred in this case."[59] Despite these public statements, to date, no settlement has been reached and a trial is set for May 2, 2023.

Cooperative federalism would be better served if Executive Branch agencies were to litigate their own issues. Each agency has not only the best understanding of the statutes in question but also both self-interest and a stake in the case. Under our cooperative federalism model, states are partners, if not leaders, when it comes to environmental statutes. Agencies are thus tasked to work with states, which have primary enforcement responsibility for federal statutes and have a vested interest in representing themselves in court. In this case, the Army Corps would best represent itself in the DAPL FTCA matter as it has a vested interest in the management of the Missouri River Basin and its relationship with the State of North Dakota. The DOJ, however, has no such obligations or interests.

A Path Forward

Many like to quote Justice Brandeis' phrase "laboratories of democracy,"[60] but this distorts the very principle of cooperative federalism. While this rightly recognizes state sovereignty and individuality, it ignores the fact that the federal government is a

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[59] Press Release, Senator Kevin Cramer, Sen. Cramer: Army Recommends DOJ Settle with ND over DAPL Protest Costs (Sept. 1, 2020), https://www.cramer.senate.gov/news/press-releases/sen-cramer-army-recommends-doj-settle-with-nd-over-dapl-protest-costs [https://perma.cc/9HJD-9SUL].

[60] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

product of the states. A state government is subject to a central government, of course, but a central government should be deferential to the sum of its parts: states. Over the years, cooperative federalism has been understood as the relationship between the states and the federal government, with heavy deference towards the latter. Common sense would infer this to mean states should cooperate with the federal government when in reality the foundation of federalism is the exact opposite.

In theory, cooperative federalism and environmental policy should peacefully and easily coexist. Landmark legislation like the Clean Air Act, Clean Water Act, and other statutes which guide the EPA's mission of protecting human health and the environment—all of which passed with bipartisan support in Congress—are dependent on state enforcement for results. We know this can work. I saw near-perfect execution of cooperative federalism and environmental policy when I was a Public Service Commissioner. Since 1980, North Dakota has had primacy under the Surface Mine Control and Reclamation Act, the primary statute governing the regulation of active coal mines and reclamation of abandoned mine lands. This is a partnership where North Dakota, via the Public Service Commission, is responsible for the implementation of the statute and the federal government is responsible for oversight. Over the last 41 years, North Dakota has been a responsible steward of the program permitting energy development and remediating land across the state.

Primary enforcement authority for the underground injection control (UIC) of Class VI wells, wells used for the geologic sequestration of carbon,[61] is another example of successful cooperative federalism. North Dakota is one of only two states to have Class VI

[61] Class VI - Wells used for Geologic Sequestration of Carbon Dioxide, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/uic/class-vi-wells-used-geologic-sequestration-carbon-dioxide [https://perma.cc/2T7H-NG2Q].

primacy. Granted primacy by the EPA in April 2018,[62] North Dakota has already permitted two high-profile carbon capture projects: Project Tundra[63] and Red Trail Energy.[64]

Success at the federal level is wholly dependent on the work of states, as states have received delegated authority to regulate and enforce these regulatory programs, while the federal government provides technical assistance and oversight. A framework so perfectly set up to carry out cooperative federalism, in practice, is a much different story. Environmental statutes have been repeatedly used by administrations to federalize natural resources policy. This enables not-so-thinly-veiled federal power grabs under the guise of protecting the environment.

Restoring the rightful place of cooperative federalism requires a major re-prioritization of responsibilities of the Legislative and Executive Branches. Legislators must be tasked with more prescriptive lawmaking to precisely define congressional intent. This, in turn, will provide better direction to Executive Branch agencies to execute their mission in the absence of an emboldened bureaucracy. Realigning litigation responsibilities from the DOJ to Executive Branch agencies would better encompass the reality that cooperative federalism depends on the federal government cooperating with states, not the other way around. Our country works best this way.

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[62] State of North Dakota Underground Injection Control Program; Class VI Primacy Approval, Federal Register (Apr. 24, 2018), https://www.federalregister.gov/documents/2018/04/24/2018-08425/state-of-north-dakota-underground-injection-control-program-class-vi-primacy-approval [https://perma.cc/8EX6-9Y2F].

[63] Press Release, Industrial Commission of North Dakota, World's Largest Carbon Capture Facility—Project Tundra—Receives North Dakota Industrial Commission Approvals (Jan. 21, 2022), https://www.nd.gov/ndic/ic-press/News-DMR220121Minnkota.pdf [https://perma.cc/QL2Y-CE5G].

[64] *Red Trail Energy CCS*, ENERGY & ENV'T RSCH. CTR., https://undeerc.org/research/projects/redtrailenergyccs.html [https://perma.cc/8QUJ-8XQZ].

IN REMEMBRANCE OF BARBARA K. OLSON

THEODORE B. OLSON*

It is a great, great privilege to be a part of The Federalist Society and to be participating in the Barbara Olson Memorial Lecture.

On a clear and sunny September 11, twenty years ago, the world we had been living in crumbled and time seemed to come to a stop. Unlike December 7, 1941, when the full force of Japan's Air Force launched a surprise attack on a faraway Navy base, this time a mere nineteen individual zealots armed with hate, and with little more than box cutters, executed a massive, coordinated, and crippling attack on our people, our government, and our institutions.[1] They exploded hijacked commercial airliners packed with civilian passengers into America's commercial base in New York City and the nerve center of our defense establishment at the Pentagon a few miles from here. Had it not been for the towering heroics of a few brave passengers, one of their hijacked planes would likely have hit the Capitol and killed hundreds of members of Congress.[2] Thou-

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* Theodore B. Olson was the husband of Barbara K. Olson. Barbara Olson was killed on September 11, 2001 as the airplane on which she flew was crashed into the Pentagon by terrorists. Mr. Olson served as Solicitor General of the United States. Mr. Olson delivered these remarks in remembrance of his wife on November 12, 2021 at the 2021 Federalist Society National Lawyers Convention. They have been adapted for publication in JLPP.

1. *See* NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., 9/11 COMMISSION REPORT 4–9 (2004) [hereinafter 9/11 COMMISSION REPORT], available at http://www.9-11commission.gov/report/911Report.pdf [https://perma.cc/DPN8-9MS5].

2. *See id.* at 45.

sands of individuals on those flights and occupying those structures were murdered, maimed, and horribly burned that day.[3] New York's commercial center and the command-center of our national defense were reduced in a single morning to smoking rubble. Wrenched abruptly from our complacent, comfortable bubbles, we came face-to-face that day with a vulnerable, fragile, and defenseless future, not from an attack by a warring nation, but from a tiny collection of determined fanatics. The gut-punch reality was hard to accept, but we had to: the world was populated by thousands more like them, similarly motivated and equally capable of horrible devastations, with nothing to lose.[4]

One of our own, Federalist Barbara Bracher Olson, was one of the victims that day as she headed for Los Angeles on American Airlines Flight 77.[5] The terrorists could not have selected a more quintessential American victim. She was a Texan Catholic who had put herself through a predominantly Jewish law school in the heart of New York City. She declined a lucrative job at a prominent New York law firm to come to Washington in order to fulfill her long-standing ambition to be at the center of the nation's political world.

The Federalist Society was a dream come true for Barbara. She loved the rough and tumble of robust debate. Bursting with ideas, energy, passion, and enthusiasm, she persuaded the Dean of her pervasively liberal law school to allow her to form the first Federalist Society chapter at Cardozo Law School. And immediately after law school, she thrust herself into Washington life becoming—in rapid succession—a lawyer in private practice, an Assistant United States Attorney, a top congressional investigator, Deputy Solicitor of the House of Representatives, general counsel for the Senate

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3. *September 11 Terror Attacks Fast Facts*, CNN (Sept. 3, 2021, 10:40 AM), https://www.cnn.com/2013/07/27/us/september-11-anniversary-fast-facts/ [https://perma.cc/YZY9-J7D4].

4. *See* 9/11 COMMISSION REPORT at 67.

5. *See id.* at 9.

Whip, author of two best-selling books about the Clintons (not favorable, I must say), and a regular and remarkably successful political and legal commentator on national television.[6]

Barbara saw, in the Federalist Society, a reflection of herself. She was a passionate believer in individual liberty, private enterprise, and limited government. She had an insatiable appetite for ideas, debate, and intellectual jousting. Barbara enjoyed mixing it up on virtually any subject, and she was very, very good at it. She was outspoken, articulate, and—it must be said—brash. She could and would take on anyone, in any venue, on any issue, with little or no advanced notice. She was quick and had a rapier-like wit. I told her once that some people thought she was opinionated. She thought that was a great compliment. Of course she had opinions; she had very little time for anyone who didn't have opinions. But she debated with passion, not anger—never mean-spirited or unkind. She delivered her thrust with a flip of her long blonde hair and a mischievous and contagiously radiant smile. Her adversaries liked and respected her, but feared her at the same time.

Barbara was a fighter until the very moment when the terrorists extinguished her life. She somehow managed to reach out to me by phone from her doomed flight as it was being hijacked. Knowing, because I told her—I had to—that two other hijacked planes had been flown into the World Trade Center Towers in New York, she sought in those last moments advice as to how she could save herself and her fellow passengers. Had she been on that plane in Pennsylvania, I believe with all my heart that she would have joined those brave souls who gave their lives to take that plane down rather than letting it continue to fly into the heart of Washington.

6. Neil A. Lewis, *Barbara Olson, 45, Advocate and Conservative Commentator*, N.Y. TIMES (Sept. 13, 2001), https://www.nytimes.com/2001/09/13/us/barbara-olson-45-advocate-and-conservative-commentator.html [https://perma.cc/JU9Q-RMPE].

Barbara loved being a part of the Federalist Society, the debates, the people, your energy, your principles, and, of course, your convictions. You populated and enlivened the world of ideas, and placed your opinions, arguments, and contentions on the line.

As Gene said, Barbara co-hosted with me summer gatherings of student Federalists in our backyard every year. Indeed, the concept was originally her idea. We started in 1990 or '91 with a few summer students, Washington lawyers, and a few judges. She sought to create networks and mentorships for young Federalists. I think our first event involved something like thirty people. By the time Barbara was murdered, the crowds had come to exceed 500 in our backyard, and it kept growing and growing until Gene finally put a stop to that and moved the event to a more convenient and inexpensive venue: the Supreme Court. Those backyard events for these young students included lawyers and judges and people from Washington, luminaries such as Robert Bork, Clarence Thomas, Nino Scalia, David Sentelle, Larry Silberman, Dick Leon, Steve Williams, Doug Ginsburg, Danny Boggs, Spence Abraham, Sam Alito, Chuck Cooper, Paul Clement, Boyden Gray, Lee Liberman Otis, Ray Randolph, Lillian BeVier—the list goes on and on. I cannot forget the thrill in your young faces when you came face-to-face with Bob Bork or Clarence Thomas or Nino Scalia. To this day, I encounter lawyers from all over the country, including members of Congress, members of the Cabinet, high-level public officials, and prominent lawyers who attended those summer parties as young students. They can't wait to tell me what an inspiration that afternoon was for them. Many of you are here tonight. This is just a part of Barbara's legacy.

This speech is called the Barbara K. Olson Memorial Lecture. Although I never really cared for the term "lecture." It sounds too much like a colonoscopy or any recent speech by President Biden. So I prefer to think of this as a remembrance.

In preparing for this evening, I thought I might try to channel Barbara and what she might think and say about the state of politics

and society in America today had her life not been so brutally ended on September 11. I have no doubt that she would have had a lot to say to us, so I will try to limit these imaginary insights to just four subjects.

First, America's stature and standing in the world and in the hearts of its people. Barbara, like her fellow Texans, loved this country and was proud to be an American. She believed in an America that stood tall; was respected by its citizens, allies, and other nations; feared by its enemies; abided by its commitments; and protected the lives and rights of its people—the America that gave birth to the individuals about whom Tom Brokaw coined the term "the greatest generation."

After 9/11, America came together and demonstrated its unity, resolve and resilience. We proved to one another, and to the world, that we could not be defeated by terrorism, however horrific and devastating the attack might be. President Bush and Vice President Cheney joined in inspiring the American people to rebuild our transportation industry, our economy, our defenses, and our united spirit. We mobilized our forces to attack Al-Qaeda and the Taliban.[7] We vowed never to forget and never to forgive the brutal savages that sheltered terrorists, spawned terrorism, enslaved and debased their own people—particularly women—and wantonly took the lives and futures of thousands of Americans.

Barbara would have been proud of what we as a country accomplished, particularly in Afghanistan, in isolating and punishing the Taliban.[8] She was a fierce advocate for the rights of the oppressed and disadvantaged, helping to form, among other things,

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7. *See Hearing on Operation Enduring Freedom: Hearing Before the S. Comm. on Armed Services*, 107th Cong. 5 (2002).

8. *See, e.g.*, KENNETH KATZMAN & CLAYTON THOMAS, CONG. RSCH. SERV., RL30588, AFGHANISTAN: POST-TALIBAN GOVERNANCE, SECURITY, AND U.S. POLICY 7 (2017) ("The Taliban regime unraveled after it lost Mazar-e-Sharif on November 9, 2001, to forces led by Dostam. Northern Alliance forces—despite promises to the United States that

the Independent Women's Forum, to assist and advance the voices of conservative women in this country, so that in future controversies, there would be a conservative voice when liberal women came forward to claim to speak for all the women in America.[9] And, even as a fledgling attorney, when lawyers of the State Department and the Justice Department were reluctant to do it, she volunteered to go to New York and, by herself, serve papers on the Palestinian Liberation Organization, to expel that terrorist organization from the United States. She was thrilled to do that. Everybody said, "Are you okay? Is it going to be alright? Aren't you afraid?" No.

So I could only imagine what Barbara would have thought if she had been here to witness the reckless, precipitous, and panicked withdrawal of our troops and personnel from Afghanistan this summer, abandoning its people, particularly its women, to the oppression of the Taliban, deserting the people in that country who had helped us hold the Taliban at bay for twenty years and skulking away from hundreds of American citizens and many thousands of American supporters and friends.[10] She can't speak for herself tonight, but I believe I know what she would have felt when America turned its back on its own citizens, our allies, and those who had fought side-by-side with us—leaving tens of thousands of people in the hands of the very murderous fanatics who had facilitated her murder.

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they would not enter Kabul—did so on November 12, 2001, to popular jubilation. The Taliban subsequently lost the south and east to U.S.-supported Pashtun leaders, including Hamid Karzai. The Taliban regime ended completely on December 9, 2001, when the Taliban and Mullah Umar fled Qandahar, leaving it under tribal law. Subsequently, U.S. and Afghan forces conducted 'Operation Anaconda' in Paktia Province in March 2002. On May 1, 2003, U.S. officials declared an end to 'major combat.'").

9. *See* R. Gaull Silberman, *Remembering IWF Founder Barbara Olson*, INDEP. WOMEN'S F. (Dec. 1, 2001), https://www.iwf.org/2001/12/01/remembering-iwf-founder-barbara-olson/ [https://perma.cc/9CW3-RFXV].

10. *See, e.g.*, George Packer, *The Betrayal*, THE ATLANTIC (Jan. 31, 2022), https://www.theatlantic.com/magazine/archive/2022/03/biden-afghanistan-exit-american-allies-abandoned/621307/ [https://perma.cc/RMN5-94ZZ].

We have learned that our Marines were given a mere thirty minutes to pluck a few people out of thousands of Afghans "who had been coming by bus, car, and foot for 10 straight days assembling near" the gates of that airport, "standing knee-deep" in sewage, attempting to flee from the terror of the Taliban to whom we had abandoned control of their country.[11] Twelve minutes into that desperate half hour, a suicide bomber detonated a device that killed 170 of them and thirteen of our own servicemen and women.[12] Thousands of helpless people were deserted and, for the most part, forgotten.[13]

What kind of nation does that? Certainly not the America of Douglas MacArthur, George Patton, Dwight Eisenhower, or Ronald Reagan: the America that took on Nazi Germany and Imperial Japan; an America that fought for its people and the Bill of Rights; that kept its promises; sent its military after the terrorists; respected and encouraged women and girls to be educated; and stood up to bullies, murderers, thugs, hijackers, and kidnappers. Barbara would have been outraged, incredulous and inconsolable that our nation had expended billions of dollars, sent hundreds of our soldiers to their death, and invested twenty years to defeat groups like Al-Qaeda and the Taliban and ISIS[14]—only to quit, lay down our arms, retreat in panic and turn Afghanistan over to those very same people, who have consistently proclaimed their hatred

11. Helene Cooper & Eric Schmitt, *Witnesses to the End*, N.Y. TIMES (Nov. 7, 2021), https://www.nytimes.com/2021/11/07/us/politics/afghanistan-war-marines.html [https://perma.cc/5QS3-Y3R5].

12. *See id.*

13. *See id.*

14. *See, e.g.*, Deirdre Shesgreen, *'War Rarely Goes as Planned': New Report Tallies Trillions US Spent in Afghanistan, Iraq*, USA TODAY (Sept. 1, 2021, 3:16 PM), https://www.usatoday.com/story/news/politics/2021/09/01/how-much-did-war-afghanistan-cost-how-many-people-died/5669656001/ [https://perma.cc/69MT-DWUM].

for America and Israel, and who repeatedly vow to destroy us.[15]. And she would have been astonished when we proclaimed to the world that our forthcoming surrender would be completed in time for September 11, dishonoring the memory of that national tragedy by capitulating to the same people who had engineered it.[16]. What a cruel mockery of the people murdered and crippled on September 11. Phrases like "we will never forget" meant something in Barbara's America. She would have seethed at hearing these words uttered in the same breath as speeches bragging about the amazing success of our evacuation—the "retrograde," they called it[17]—of our troops, diplomats, and those very few lucky enough not to be left behind.

We were told when we announced that we would wash our hands of Afghanistan that this would not be another Saigon.[18]. The Afghan government and its armies would hold off the Taliban for months or more.[19] And when the eminently predictable and sudden collapse did occur—putting the lie to these predictions—we were

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15. *See, e.g.*, Brahma Chellaney, *Biden Surrenders Afghanistan to Terrorists*, THE HILL (Aug. 18, 2021), https://thehill.com/opinion/international/568348-biden-surrenders-afghanistan-to-terrorists/ [https://perma.cc/UBG3-NY74].

16. *See* Helene Cooper et al., *Biden to Withdraw All Combat Troops from Afghanistan by Sept. 11*, N.Y. TIMES (July 24, 2021), https://www.nytimes.com/2021/04/13/us/politics/biden-afghanistan-withdrawal.html [https://perma.cc/C47U-TB7N].

17. *See Remarks by President Biden on the Drawdown of U.S. Forces in Afghanistan*, THE WHITE HOUSE (July 8, 2021, 2:09 PM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/07/08/remarks-by-president-biden-on-the-drawdown-of-u-s-forces-in-afghanistan/ [https://perma.cc/ZG5P-EN6C].

18. *Biden Says Kabul Is No Saigon*, WALL ST. J. (July 8, 2021, 6:48 PM), https://www.wsj.com/articles/biden-says-kabul-is-no-saigon-11625784536 [https://perma.cc/R4N6-7EYX].

19. *See Remarks by President Biden on the Drawdown of U.S. Forces in Afghanistan*, *supra* note 17.

told that all Americans would be safely evacuated as well as our supporters.[20]

And then, of course, we stampeded out of our airbase in a panic, in the dead of night, without notice to our allies, leaving behind massive amounts of aircraft, vehicles, weapons, uniforms, and ammunition.[21] And we were so rushed to escape from the only remaining, barely functioning airport, that we left thousands of humans standing in wastewater while issuing talking points about our great success in evacuating the people we did not forget.[22] Again, you heard, "We will not forget. We will not forgive."[23] How much accountability has there been for that public, humiliating defeat? None that I have seen. How much are we doing to affect the removal of the remaining abandoned Americans and tens of thousands of terrified Afghans? I haven't heard much about that, either. How much longer before the reenergized, re-armed, and diplomatically legitimatized Taliban, and the other Jihadists grouping in Afghanistan, attack America or Israel, or Paris, or Madrid, or churches, synagogues, restaurants, playgrounds, or nightclubs? We

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20. *See Remarks by President Biden on Evacuations in Afghanistan*, THE WHITE HOUSE (Aug. 20, 2021, 1:49 PM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/20/remarks-by-president-biden-on-evacuations-in-afghanistan/ [https://perma.cc/493G-D9YC].

21. *See* Kathy Gannon, *US Left Afghan Airfield at Night, Didn't Tell New Commander*, AP NEWS (July 6, 2021), https://apnews.com/article/bagram-afghanistan-airfield-us-troops-f3614828364f567593251aaaa167e623 [https://perma.cc/WPJ5-2DGR].

22. *See* Poppy Wood, *Desperate Afghans Wade Through Knee Deep Sewage Trying to Get into Kabul Airport*, INEWS (Aug. 25, 2021, 11:48 AM), https://inews.co.uk/news/world/afghanistan-evacuation-news-afghan-civilians-sewage-reach-kabul-airport-1166945 [https://perma.cc/4Q33-QC6H]; *see Remarks by President Biden on Evacuations in Afghanistan*, *supra* note 20.

23. *Remarks by President Biden on the Terror Attack at Hamid Karzai International Airport*, THE WHITE HOUSE (Aug. 26, 2021, 5:24 PM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/26/remarks-by-president-biden-on-the-terror-attack-at-hamid-karzai-international-airport/ [https://perma.cc/SQN4-RDB8].

hear about our over-the-horizon capacity to stop such terrorism.[24] Does anyone believe that?

Second, Barbara would be astonished by our government's unlawful, unilateral relinquishment of our southern border to armies of migrants from all over the world. A central tenet of a nation's sovereignty is the establishment, sanctity, and protection of its borders and its citizens. Ensuring domestic tranquility and providing for the common defense are a nation's obligations so plain that they are asserted in the preamble to the Constitution and central to our existence as a nation.[25] We seem to have rescinded that cornerstone of sovereignty. Tens, indeed hundreds, of thousands of individuals are pouring into the United States, completely undeterred by our national government, in violation of our laws, overriding our ability to make reasoned decisions as to who can come into this country and threatening the safety and security of all Americans.[26] The invaders include, of course, decent, desperate, sympathetic people seeking asylum and freedom from poverty and corrupt and tyrannical regimes, but also human traffickers, smugglers of addictive poisons such as heroin and fentanyl, fugitives, and unvaccinated carriers of COVID-19 and other afflictions.[27] We don't even seem to be trying to distinguish among them. What other conclusion to draw than that the federal government has intentionally abrogated the principles of American borders and territorial integrity, without the consent of the people and our elected representatives? We are being forced to accept and absorb millions of persons of all ages,

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24. *See Remarks by President Biden on the End of the War in Afghanistan*, THE WHITE HOUSE (Aug. 31, 2021, 3:28 PM), https://www.whitehouse.gov/briefing-room/speeches-remarks/2021/08/31/remarks-by-president-biden-on-the-end-of-the-war-in-afghanistan/ [https://perma.cc/892J-FMQB].

25. U.S. CONST. pmbl.

26. U.S. CUSTOMS & BORDER PROT., SOUTHWEST LAND BORDER ENCOUNTERS (2022).

27. Press Release, U.S. Customs and Border Protection, Over 400 Pounds of Meth, Cocaine and Heroin Were Discovered in Toolboxes (Apr. 15, 2022, 12:00 PM), https://www.cbp.gov/newsroom/local-media-release/over-400-pounds-meth-cocaine-and-heroin-were-discovered-toolboxes [https://perma.cc/NMH3-AW6B].

backgrounds, and motivations without any systematic effort or ability to provide them with a humane integration, education, or opportunity.[28] Our government is now said to be negotiating the size of the bounty we will be paying to some of them.[29] Naturally, they are met with resentment and hostility in many segments of the country because they have flouted our immigration laws with the complicity of our executive.

We cannot begin to handle the burdens this massive invasion creates for our local communities and neighborhoods, so our government either ignores or papers them over with public relations smokescreens and dishonest, evasive pretenses that this is not happening. If the United States cannot or will not control who enters this country, what does this do to our ability to enforce other laws? Indeed, what does that mean for the rule of law in any traditional sense? How can American citizens be expected to respect and obey the law if our federal government sanctions, indeed embraces, even rewards, non-citizens who've entered this country in violation of our laws of entry and who acknowledge no responsibility to abide by any or all of our laws?

This sounds fairly bleak, doesn't it? But I was trying to figure out what Barbara would say. That leads me to the third dreadful trend that we are witnessing throughout this country that Barbara would have abhorred: the lawlessness permeating and overwhelming our cities. Funding for law enforcement is being "reallocated." That is to say, reduced dramatically; and law enforcement officers

28. MIGRATION POL'Y INST., IMMIGRANTS IN THE UNITED STATES: HOW WELL ARE THEY INTEGRATING INTO SOCIETY? (2011).

29. Michelle Hackman et al., *U.S. in Talks to Pay Hundreds of Millions to Families Separated at Border*, WALL ST. J., Oct. 28, 2021.

are retiring or quitting in droves.[30] Increasingly, few sentient individuals are willing to enter a profession offering little beyond personal risks, meager compensation, and daily heapings of disrespect and humiliation.[31] Recently, district attorneys in all parts of the country, including particularly San Francisco, Los Angeles, New York, and Chicago, are refusing to enforce laws or prosecute violators. Arrests are not being made.[32] The criminals who are unlucky enough to be arrested are promptly being released—in New York, for example—to offend again, which they routinely, regularly, and frequently do.[33]

Shoplifters, vagrants, and drug addicts (although you can't call them that) swarm streets and harass and intimidate businesses and vulnerable citizens. Stores are closing in the centers of our major cities, especially our poorest neighborhoods, because businesses cannot stop hordes of thieves from walking brazenly and arrogantly in and out with trash bags or suitcases full of merchandise.[34]. Homeless encampments (whose occupants we are now told to refer to as the "unhoused") have sprung up everywhere—in our streets,

30. Eric Westervelt, *Cops Say Low Morale and Department Scrutiny Are Driving Them Away from the Job,* NPR (June 24, 2021, 2:53 PM), https://www.npr.org/2021/06/24/1009578809/cops-say-low-morale-and-department-scrutiny-are-driving-them-away-from-the-job [https://perma.cc/2FQH-KHAT].

31. William Barr, *Rising Disrespect for Cops Not Only Wrong, It Puts Us in Danger*, N.Y. POST (Dec. 16, 2019, 8:41 PM), https://nypost.com/2019/12/16/barr-rising-disrespect-for-cops-not-only-wrong-it-puts-us-in-danger/ [https://perma.cc/VGD5-JEA2].

32. *See, e.g.*, Emily Bazelon & Jennifer Medina, *He's Remaking Criminal Justice in L.A. But How Far Is Too Far?*, N.Y. TIMES, (Nov. 17, 2021), https://www.nytimes.com/2021/11/17/magazine/george-gascon-los-angeles.html [https://perma.cc/U5FC-J878].

33. William J. Bratton & Rafael A. Mangual, *'Bail Reform' Is Killing New Yorkers as Eric Adams Pushes for Change*, WALL ST. J., (Feb. 16, 2022, 12:04 PM), https://www.wsj.com/articles/bail-reform-killing-new-yorkers-violence-convictions-criminals-judges-court-order-release-murder-stabbing-assault-violent-crime-11645029571 [https://perma.cc/KN46-6SXY].

34. Neil Vigdor, *Walgreens to Close 5 Stores in San Francisco, Citing 'Organized' Shoplifting*, N.Y. TIMES, Oct. 13, 2021, https://www.nytimes.com/2021/10/13/us/walgreens-store-closures-san-francisco.html [https://perma.cc/38S4-4LRT].

sidewalks, parks, underpasses, and subways, bus and railroad terminals, near schools, and even in airports.[35] The streets of San Francisco and other once-livable-and-beautiful cities are littered with needles, garbage, human waste, debris, and open air drug markets.[36] People are being assaulted, panhandled, badgered, or attacked on the streets, coffee shops, sidewalk restaurants, on buses, and in subways.[37] Bicycles are being stolen. Car thefts and carjackings are becoming epidemic.[38] Rates of burglaries, assaults, street crimes, shootings, rapes, and homicides are steadily increasing.[39]

We once used the term "third-world country" to refer to some big city neighborhoods. That has become an insult to the impoverished nations that do not have a fraction of the resources we do. Today, substantial segments of Philadelphia, Baltimore, Seattle, Portland, San Francisco, Chicago, New York, and Washington, D.C. merit that description, only worse. How many of you can identify areas in your communities where you would not dare to go after

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35. *See* Michelle Conlin, *In Pandemic America's Tent Cities, a Grim Future Grows Darker*, REUTERS, (Dec. 23, 2020, 6:04 AM), https://www.reuters.com/article/us-health-coronavirus-usa-homelessness-i/in-pandemic-americas-tent-cities-a-grim-future-grows-darker-idUSKBN28X19Y [https://perma.cc/Q537-4FDH].

36. *See* Betty Yu, *Poll: San Francisco Residents Consider Relocating as Crime Worsens, Quality of Life in a Decline*, CBS SF BAY AREA, (June 30, 2021, 5:36 AM), https://sanfrancisco.cbslocal.com/2021/06/30/poll-san-francisco-residents-consider-relocating-as-crime-worsen-quality-of-life-in-a-decline/ [https://perma.cc/NKP5-LRW9].

37. *See* Aaron Chalfin & John MacDonald, *We Don't Know Why Violent Crime Is Up. But We Know There's More Than One Cause.*, WASH. POST, (July 9, 2021, 3:17 PM), https://www.washingtonpost.com/outlook/we-dont-know-why-violent-crime-is-up-but-we-know-theres-more-than-one-cause/2021/07/09/467dd25c-df9a-11eb-ae31-6b7c5c34f0d6_story.html [https://perma.cc/L22X-933B].

38. *See Facts + Statistics: Auto Theft*, INSURANCE INFO. INST., https://www.iii.org/fact-statistic/facts-statistics-auto-theft [https://perma.cc/2L7E-94QY] (last visited Apr. 14, 2022).

39. *See* James Alan Fox, *COVID Pandemic and Isolation Likely Pushed Spike in 2020 Homicides and Assaults*, USA TODAY, (Oct. 4, 2021, 1:59 PM), https://www.usatoday.com/story/opinion/policing/2021/10/04/violent-crime-covid-isolation-pushed-spike/5903199001 [https://perma.cc/CQ23-QSYR].

dark—or even in the daylight? And don't answer that question. I know the truth of it. The same local officials who have allowed this to happen with failed, mindless, feel-good policies are endlessly reelected to pursue the same policies.[40]

Barbara spent much of her life in Houston, San Francisco, Los Angeles, New York, and Washington, D.C. She would today be profoundly depressed to see the decay and disintegration taking hold and strangling these and other cities because of "progressive" policies of apathy, virtue-signaling, and disinterest by elected (for life, it seems) political officials. They say they are simply not enforcing small crimes. But when did an offense against our laws, or our people, become too trivial to enforce? These public figures seemingly don't care about the victims of those crimes, which often can turn out to be very serious. How suddenly civility disappears when civil order disintegrates.

Fourth, Barbara was a passionate believer in robust, even fierce, debate. She would have been shocked at the cultural, societal shift that has occurred so rapidly in America, not only silencing but oppressing ideas, terms, names, phrases, even holidays, in the name of extinguishing triggers, microaggressions, sensitivities, and imaginary acts of discrimination.[41] Not only must we watch what we say, but how and when we say it, and to whom we are speaking. I'm disregarding my own admonition, of course. Failure to carefully, cautiously calibrate your speech, can and will, as they say in the *Miranda* warning, be used against you. And the banter or silly, immature jokes you exchanged in high school can and surely will be deployed to condemn you twenty years later or forty years later.

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40. *See* Astead W. Herndon, *They Wanted to Roll Back Tough-on-Crime Policies. Then Violent Crime Surged*, N.Y. TIMES (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/us/politics/prosecutors-midterms-crime.html [https://perma.cc/4P8X-VHUC].

41. *See America Has a Free Speech Problem*, N.Y. TIMES, (Mar. 18, 2022), https://www.nytimes.com/2022/03/18/opinion/cancel-culture-free-speech-poll.html [https://perma.cc/K3PX-9B27].

I recall Barbara's response to a study and report critical of judges and lawyers at a D.C. Circuit conference a few years ago, castigating acts and words deemed demeaning to women, such as interruptions and insufficiently sensitive questions directed towards women lawyers.[42] Barbara rejected the notion that women couldn't and shouldn't be interrupted during oral arguments or subjected to hostile or otherwise "mean" questions in court. She did not want, nor did she think, that women should be treated like fragile flowers or delicate china who couldn't take it. Not only did she feel that women, just like men, could handle and prevail in a rough and tumble legal and social environment, but that believing and acting otherwise towards women was demeaning, discriminatory, and led to the view that women, especially women lawyers, were inferior, not tough enough. She hated that.

Barbara Olson would have been shocked to see that the "woke" movement had come so far that even a statue of Thomas Jefferson would be removed from city government in New York, that holidays like Columbus Day and traditional Halloween costumes were either banned or attacked as cultural appropriations.[43] I read just four days ago that the Newport News, Virginia School Board had designated the John Marshall Early Learning Center to be given a less odious name in response to a decree from Virginia Governor Ralph Northam, otherwise known only for admitting and denying that the picture of a person in blackface in his college yearbook was

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42. *See* Saundra Torry, *Female Lawyers Face Sexism, Study Finds*, WASH. POST (May 28, 1994), https://www.washingtonpost.com/archive/local/1994/05/28/female-lawyers-face-sexism-study-finds/249d3773-1e03-4265-a273-6f04e0381074/ [https://perma.cc/6AE6-L29H].

43. *See* Marsha Mercer, *More States Say Goodbye to Columbus Day*, PEW RSCH. (Oct. 11, 2019), https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2019/10/11/more-states-say-goodbye-to-columbus-day [https://perma.cc/96P6-TH89]; Leila Fadel, *Cultural Appropriation, A Perennial Issue on Halloween*, NPR (Oct. 29, 2019, 5:00 AM), https://www.npr.org/2019/10/29/773615928/cultural-appropriation-a-perennial-issue-on-halloween [https://perma.cc/PX94-J7PR].

him.[44] John Marshall, our longest-serving and most acclaimed Chief Justice—too toxic for his name to be on a public school.

When a speaker may be banned because his or her views are unpopular; when street gangs are allowed to intimidate—or shoot—young children on the way to school;[45] when a person harboring a dog may not be considered an "owner" but only a custodian; when a "mother" has to be referred to as a "birthing parent";[46] when the new "James Webb" Telescope faces calls for a new name because NASA Administrator Webb had been Under Secretary of State seventy years ago in the Truman administration during a congressionally instigated purge on gay persons;[47] when pronouns such as "he" or "she" become not only offensive but prohibited if uttered without consent;[48] when those pronouns must become

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44. *See* Jessica Nolte, *Newport News Adds John Marshall Early Learning Center to List of Schools to be Renamed*, DAILY PRESS (Oct. 20, 2021, 5:11 PM), https://www.dailypress.com/news/education/dp-nw-newport-news-school-renaming-20211020-qrsdaggu65fghmnu7c3sf2kk4u-story.html [https://perma.cc/8E6E-9NXF]; Alan Blinder, *Was That Ralph Northam in Blackface? An Inquiry Ends Without Answers*, N.Y. TIMES (May 22, 2019), https://www.nytimes.com/2019/05/22/us/ralph-northam-blackface-photo.html [https://perma.cc/X37J-9D29].

45. *See, e.g.*, Rick Rojas & Rebecca White, *Bronx Boy, 14, Killed in 'Point Blank' Shooting Caught on Surveillance Video*, N.Y. TIMES (May 22, 2015), https://www.nytimes.com/2015/05/23/nyregion/14-year-old-boy-is-fatally-shot-in-the-bronx.html [https://perma.cc/7MXV-4KBL].

46. *See, e.g.*, Benjamin Fearnow, *Biden Admin Replaces 'Mothers' with 'Birthing People' in Maternal Health Guidance*, NEWSWEEK (June 7, 2021, 4:28 PM), https://www.newsweek.com/biden-admin-replaces-mothers-birthing-people-maternal-health-guidance-1598343 [https://perma.cc/2PJR-WQ8B].

47. *See* Chanda Prescod-Weinstein et al., *The James Webb Space Telescope Needs to Be Renamed*, SCIENTIFIC AM. (Mar. 1, 2021), https://www.scientificamerican.com/article/nasa-needs-to-rename-the-james-webb-space-telescope/ [https://perma.cc/A3YY-CXWU]; Adam Mann, *New Revelations Raise Pressure on NASA to Rename the James Webb Space Telescope*, SCIENTIFIC AMERICAN (Apr. 4, 2022), https://www.scientificamerican.com/article/new-revelations-raise-pressure-on-nasa-to-rename-the-james-webb-space-telescope/ [https://perma.cc/68K9-S8KE]. *But see* Alexandra Witze, *NASA Won't Rename James Webb Telescope—and Astronomers Are Angry*, NATURE: NEWS (Oct. 1, 2021), https://www.nature.com/articles/d41586-021-02678-1 [https://perma.cc/X3TS-KTD3].

48. *See, e.g.*, N.Y.C. COMM'N ON HUMAN RIGHTS, LEGAL ENFORCEMENT GUIDANCE ON DISCRIMINATION ON THE BASIS OF GENDER IDENTITY OR EXPRESSION: LOCAL LAW NO. 3

"they" or "them";[49] or when the leader of a decades-old Feast of Lanterns celebrating the first Chinese woman to be born on the Monterey Peninsula must apologize for the parade and issue these words: "*The harm I have caused as an unconscious white woman, filled with white fragility and my own perfectionism*";[50] and when the Federalist Society, itself, could be castigated because of less-than-popular views of some of its members,[51] what have we become?

Barbara would have seen this as an assault on freedom, the stifling of dissent and unfavored views, and the constitutionalization of conformity. A step on the way to mind-control, uniformity, and tyranny against individual liberty—everything that this organization stands against. She would have seen the systemic categorization of decisions, benefits, rights, promotions, and appointments based on race or gender as fundamentally un-American. She bristled when she was told that Texas females should refer to themselves as "women," not think of themselves as "girls." The more

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(2002); N.Y.C. ADMIN. CODE § 8-102(23), at 4 (2019), https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/2019.2.15%20Gender%20Guidance-February%202019%20FINAL.pdf [https://perma.cc/E86B-4HWZ].

49. *See id.* at 5.

50. *Kaye Coleman Feast of Lanterns Apology*, MONTEREY COUNTY WEEKLY (Oct. 10, 2021), https://www.montereycountyweekly.com/kaye-coleman-feast-of-lanterns-apology/pdf_3ea4ab3a-29f2-11ec-ac33-bfb1f5b0e5c5.html [https://perma.cc/8DGL-PVEZ]. *See also* Pam Marino, *Former Feast of Lanterns Queen and Board President Issues Public Apology for Cultural Appropriation*, MONTEREY COUNTY WEEKLY (Oct. 11, 2021), https://www.montereycountyweekly.com/blogs/news_blog/former-feast-of-lanterns-queen-and-board-president-issues-public-apology-for-cultural-appropriation/article_6f2d33aa-29f0-11ec-8127-ff5a0c819bce.html [https://perma.cc/22KA-R9WY].

51. *See, e.g.*, Mark Joseph Stern, *A Federalist Society Star Helped Foment the Capitol Riot: The Federalist Society Has No Comment*, SLATE (Jan. 13, 2021), https://slate.com/news-and-politics/2021/01/john-eastman-federalist-society-capitol-insurrection.html [https://perma.cc/C3G7-4JA2]; Brian Schwartz, *Progressive Group Urges Corporations to Halt Donations to Conservative Federalist Society After Riot*, CNBC: POLITICS (Jan. 15, 2021, 1:29 PM), https://www.cnbc.com/2021/01/15/federalist-society-under-fire-after-leader-spoke-at-pro-trump-rally-before-riot.html [https://perma.cc/4V5F-6AGJ].

someone tried to intimidate Barbara because of what we now call "un-woke" speech, the more she would have used it.

But I want to leave you on a little lighter note. I inform you—I must inform you, and I am happy to inform you—that the *New York Times* is coming to your rescue. In last Sunday's paper, apparently shocked by the November 2 elections, the *Times* published a collection of pieces—maybe some of you saw this—with suggestions of how America, as they put it, can "snap out of it" and "revitalize and renew the American spirit."[52]. Among their suggestions—and I'm not making this up—you would have been gratified to see were proposals to eliminate citizenship[53] and all age limits on eligibility to vote (parents can vote for their newborns);[54] to erase all student, medical, and rental debt;[55] make international law part of the American law;[56] replace the stars and stripes with a monochromal (they have a picture of this) gray flag;[57] and, this is the best part, create multiple new states from California, Texas, and Florida.[58] There you

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52. Ezekiel Kweku, Opinion, *Snap Out of It, America!*, N.Y. TIMES (Nov. 7, 2021), at TW2. *See also* Astra Taylor, *Make Americans' Crushing Debt Disappear*, N.Y. TIMES at TW8 (Nov. 7, 2021); Jonathan Holloway, *To Unite a Divided Country, Enlist the Young*, N.Y. TIMES (Nov. 7, 2021), at TW6.

53. Atossa Araxia Abrahamian, *There Is No Good Reason You Should Have to Be a Citizen to Vote*, N.Y. TIMES (July 28, 2021), https://www.nytimes.com/2021/07/28/opinion/noncitizen-voting-us-elections.html [https://perma.cc/GTF3-VXG7].

54. Lyman Stone, *The Minimum Voting Age Should Be Zero*, N.Y. TIMES (Sept. 1, 2021), https://www.nytimes.com/2021/09/01/opinion/politics/kids-right-to-vote.html [https://perma.cc/B8F6-7S7S].

55. Astra Taylor, Make Americans' Crushing Debt Disappear, N.Y. TIMES (July 2, 2021), https://www.nytimes.com/2021/07/02/opinion/student-loan-medical-debt-forgiveness.html [https://perma.cc/2TCX-TL6Y].

56. Samuel Moyn, *International Law Shall Be Part of American Law*, N.Y. TIMES (Aug. 4, 2021), https://www.nytimes.com/interactive/2021/08/04/opinion/us-constitution-amendments.html [https://perma.cc/78PD-ZKJK].

57. Na Kim, *Redesigning America's Flag*, N.Y. TIMES (Sept. 28, 2021), https://www.nytimes.com/interactive/2021/09/28/opinion/america-flag-design.html [https://perma.cc/X7EK-92EZ].

58. Noah Millman, *America Needs to Break Up Its Biggest States*, N.Y. TIMES (July 7, 2021), https://www.nytimes.com/2021/07/07/opinion/us-states.html [https://perma.cc/QC2E-KD5H].

have it—the simple answer to all of our problems: expand the franchise to include infants and anyone else who wants to vote, abolish debt, gray wash the American flag, and give California twelve Senators!

If Barbara were speaking to you this evening, she would have lamented at what we have done to our citizens here and abroad, lawlessness in our communities, and the widespread surrender of our national respect and integrity. She would weep, but also rage. She would not be silent—I am certain of that. She would be engaged, fighting, speaking out, organizing, demanding a return of our national integrity and domestic order and safety, and goading those who remain silent in the face of these developments.

Of course, she would be encouraged by the involvement of Federalists and like-minded Americans to stand up against these weaknesses, these trends, this disintegration. She would not let us give into apathy, malaise, helplessness, and cravenness, which we are now seeing all around us.

So thank you for honoring Barbara with this lecture series and for showing up in such robust numbers for the event every year. Barbara cannot be here physically to participate, but her spirit lurks in the conference rooms and hallways of every Federalist Society meeting. Thank you.

The Horseless Carriage of Constitutional Interpretation: Corpus Linguistics and the Meaning of "Direct Taxes" in *Hylton v. United States*

John K. Bush* and A.J. Jeffries**

> "The great object of the Constitution was, to give Congress a power to lay taxes, adequate to the exigencies of government; but they were to observe . . . the rule of apportionment, according to the census, when they laid any direct tax."
>
> *Hylton v. United States*, 3 U.S. (3 Dall.) 171, 173 (1796) (opinion of Chase, J.)

Introduction

"What would the Founders do?"[1] That is a worthwhile question for corpus linguistics to ask as its methodology matures and foundational corpora like the Corpus of Founding-Era American English come into being. What sources would they consult? What did they read? Answering those questions will make corpus linguistics a more valuable tool to answer the foundational question in constitutional interpretation: what did We the People agree to in 1788?[2]

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* Judge, United States Court of Appeals for the Sixth Circuit.

** Law clerk to Judge Justin Walker, United States Court of Appeals for the D.C. Circuit. Former law clerk to Judge Bush. J.D. Stanford Law School, B.A. Southern Methodist University. JLPP's editorial staff has not independently reviewed the corpus linguistics analysis presented herein.

1. Richard Brookhiser, What Would the Founders Do? 46 (2006).

2. *See* Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 Const. Comment. 47, 59 (2006) ("[W]hen the Constitution declares that 'We the People' 'ordain and

We consider those questions in the context of "direct taxes"—a hotly debated topic throughout our nation's history.[3] The Constitution gives Congress a broad power to tax, but it places important limitations on that power, including that direct taxation may occur only if the tax is apportioned among the states.[4] A direct tax is constitutionally apportioned when the amount of the tax paid from each state is equal to its share of the nation's total population.[5]

The subject of direct taxation first came up in federal court after Congress imposed a tax on carriage ownership in 1794.[6] A century later, Congress enacted an income tax.[7] And today, as the conception of the proper role of government expands yet further, prominent politicians have begun to advocate for a tax on wealth.[8] Each of those novel federal taxes has faced the same constitutional challenge: an argument that each is a "direct tax" and therefore are unconstitutional unless they are apportioned according to the so-called "Direct Tax Clause" of Article I.[9] Yet despite the apportionment requirement's importance, it has remained accepted wisdom

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establish' the Constitution, it declares that 'We the People' are the legal, even if not the physical, authors of the words contained in the document. According to the Constitution, 'We the People' are trying to communicate, and the intentions of 'We the People' are therefore the key to that communication.").

3. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 173 (1796).

4. *See* U.S. CONST. art. I, §§ 2, 8–9.

5. *See* U.S. CONST. art. I, § 2.

6. *See* Act of June 5, 1794, 1 Stat. 373, ch. 45, *repealed by* Act of Apr. 6, 1802, ch. 19, 2 Stat. 148.

7. Joseph M. Dodge, *What Federal Taxes Are Subject to the Rule of Apportionment Under the Constitution?*, 11 U. PA. J. CONST. L. 839, 880 (2009). Congress also imposed an income tax during the Civil War that survived until 1872. *Id.* at 879.

8. Danielle Kurtzleben, *How Would a Wealth Tax Work?*, NPR (Dec. 5, 2019, 5:00 AM), https://www.npr.org/2019/12/05/782135614/how-would-a-wealth-tax-work [https://perma.cc/A2NW-QK7V] (noting then-presidential candidates Elizabeth Warren and Bernie Sanders's support for a wealth tax).

9. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796); *see also* Pollock v. Farmers' Loan & Tr. Co., 157 U.S. 429 (1895) (Pollock I) (superseded by Constitutional Amendment as stated in Brushaber v. Union Pac. R.R. Co., 240 U.S. 1, 18 (1916)); Daniel Hemel & Rebecca Kysar, *The Big Problem with Wealth Taxes*, N.Y. TIMES (Nov. 7, 2019),

at the Supreme Court that "[e]ven when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a 'head tax' or a 'poll tax'), might be a direct tax."[10]

Corpus linguistics offers a way to test the Court's claim that those who wrote and ratified the Direct Tax Clause enacted constitutional text that they did not themselves understand. "[C]orpus linguistics is the study of language function and use by means of an electronic collection of naturally occurring language called a corpus."[11] By examining hundreds of uses of a phrase in its natural context, researchers can better identify the "relevant senses or meanings of the words and phrases that appear in the constitutional text."[12] This Article applies the technique to the phrase "direct tax" in the Direct Tax Clause, which reads, "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."[13] Defining that clause is vitally important because of the "practical impossibility in modern times of apportioning just about any plausible tax."[14]

Our analysis sought to answer three questions. Did "direct tax" have an established meaning at the Constitution's ratification? If so,

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https://www.nytimes.com/2019/11/07/opinion/wealth-tax-constitution.html [https://perma.cc/7EBR-VPD6].

10. Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 570 (2012) (internal citation omitted).

11. Jennifer L. Mascott, *Who Are "Officers of the United States"?*, 70 STAN L. REV. 443, 467 (2018) (quoting Stephen C. Mouritsen, *Hard Cases and Hard Data: Assessing Corpus Linguistics as an Empirical Path to Plain Meaning*, 13 COLUM. SCI. & TECH. L. REV. 156, 190 (2011)) (alteration in original).

12. Lawrence B. Solum, *Triangulating Public Meaning: Corpus Linguistics, Immersion, and the Constitutional Record*, 2017 B.Y.U. L. REV. 1621, 1645.

13. U.S. CONST. art. I, § 9, cl. 4. The Apportionment Clause also says that "Representatives and direct Taxes shall be apportioned among the several States . . . ." U.S. CONST. art. I, § 2, cl. 3.

14. Dawn Johnsen & Walter Dellinger, *The Constitutionality of a National Wealth Tax*, 93 IND. L. J. 111, 119 (2018); *see also* Dodge, *supra* note 7, at 843–45 (explaining how apportionment would work).

what was that meaning? And finally, what role should corpus linguistics play in assessing questions of original public meaning like the first two? To the first question, the corpus offered a resounding yes. Our answers to the second and third questions, however, offer support for Lawrence Solum's view that, while corpus analysis can be a useful tool for constitutional interpretation, it alone is not always enough to determine a constitutional text's meaning.[15]

Part I of this Article describes the clause's origins and the modern debate among scholars over the meaning of "direct tax." Part II.A briefly explains corpus linguistics and the corpus we used. Part II.B presents our findings. Then Part II.C analyzes them. Part IV discusses our findings' implications for *Hylton v. United States*,[16] the Supreme Court's first foray into interpreting the Direct Tax Clause and a case that provides clues as to what the Framers would advise that we should do with respect to the use of corpus linguistics. Finally, Part IV offers our brief thoughts on avenues for future analysis of the Direct Tax Clause.

I. THE UNCERTAIN ACADEMIC DEBATE

A. The Introduction of the Phrase Direct Tax into the Constitution

Three clauses in Article I of the Constitution shape the national government's taxing power. First, in describing the composition of the House of Representatives, Section Two says that "Representatives and direct Taxes shall be apportioned among the several States which may be included within this Union, according to their respective Numbers . . . ."[17] Second, Section Eight provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States; but all Duties, Imposts and Excises shall be uniform throughout the United

15. *See* Solum, *supra* note 12, at 1647.
16. 3 U.S. (3 Dall.) 171 (1796).
17. U.S. CONST. art. I, § 2, cl. 3.

States."[18] And third, Section Nine limits the taxing power by dictating that "No Capitation, or other direct, Tax shall be laid, unless in Proportion to the Census or enumeration herein before directed to be taken."[19] So how did the national government's taxing power take shape?

Under the Articles of Confederation, the federal government had no taxing authority.[20] Instead, it had to ask the states for funds in proportion to the value of the states' respective lands.[21] If the states chose not to comply, they faced no repercussions, so the states' compliance rate was a paltry 37%.[22] That left the federal government impotent if it had to face war, rebellion, or any other national crisis.[23] So when the delegates to the Constitutional Convention arrived in Philadelphia, taxation was near the top of the agenda.[24]

At the convention,[25] after much debate over the proper principle by which to allocate representation in the lower house, Gouverneur Morris moved to introduce into the Constitution a requirement that "taxation shall be in proportion to Representation."[26] In

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18. U.S. CONST. art. I, § 8, cl. 1.

19. U.S. CONST. art. I, § 9, cl. 4.

20. *See* Dodge, *supra* note 7, at 848.

21. *Id.*

22. Erik M. Jensen, *The Apportionment of "Direct Taxes": Are Consumption Taxes Constitutional?*, 97 COLUM. L. REV. 2334, 2381 n.253 (1997) (citing ROGER H. BROWN, REDEEMING THE REPUBLIC: FEDERALISTS, TAXATION, AND THE ORIGINS OF THE CONSTITUTION 12 (1993)) [hereinafter Jensen, *Consumption Taxes*].

23. *See id.* at 2380.

24. *Id.* at 2381 ("Creation of an adequate revenue system was, for many if not most founders, a critical aspect of constitution making."); Dodge, *supra* note 7, at 848 ("The Constitutional Convention of 1787 largely resulted from an effort (led by Virginia) to create a national government with a meaningful taxing power.").

25. There was, of course, no official history of the convention, but Madison's notes—though far from perfectly reliable—offer insight into the drafting process. Dodge, *supra* note 7, at 848–49 & n.27.

26. 1 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 591–92 (Max Farrand ed., rev. ed. 1966).

response to objections, including George Mason's fear that it might "drive the Legislature to the plan of Requisitions,"[27] Morris then introduced the critical distinction between direct and indirect taxes. He proposed to address the objections "by restraining the rule to *direct* taxation" so that "[w]ith regard to indirect taxes on *exports* & imports & on consumption, the rule would be inapplicable."[28] So limiting the rule would not introduce inequality between the states, he thought, because "[n]otwithstanding what had been said to the contrary he was persuaded that the imports & consumption were pretty nearly equal throughout the Union."[29] James Wilson, a future member of the *Hylton* Court, "approved the principle, but could not see how it could be carried into execution; unless restrained to direct taxation."[30]

Later, the Convention added a specific "clause requiring capitation taxes to be apportioned according to the census."[31] Then, when the final draft of the Constitution emerged from the Committee on Style and Arrangement, the capitation and direct-tax provisions merged into the current language requiring apportionment of a "Capitation, or other direct, Tax."[32]

Before that final version, however, one other brief mention of direct taxes was made. On August 20, late in the convention but before the draft went to the Committee on Style and Arrangement, Rufus King "asked what was the precise meaning of *direct* taxation? No one answd[sic]."[33]

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27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.*
31. Dodge, *supra* note 7, at 853.
32. *Id.* at 854; U.S. CONST. art. I, § 9, cl. 4.
33. 2 THE RECORDS OF THE FEDERAL CONVENTION OF 1787, at 350 (Max Farrand ed., rev. ed. 1966).

B. Academic Disagreement

Over the years, many academics have drawn from that page in Madison's notes the conclusion that the term "direct tax" was simply devoid of meaning when the Framers placed it in the Constitution.[34] Others have concluded that the Framers must have had a reason for differentiating between direct and indirect taxes, and they have offered interpretations of their own.[35] Taken together, those theories offer a spectrum of possible meanings for the phrase ranging from nugatory to expansive. We briefly survey those views, starting from disregarding the clause altogether and moving to the most expansive reading. Our survey is not comprehensive, but it offers a sense of the possible meanings "direct tax" could carry.

Professor Bruce Ackerman contends that we should simply ignore the requirement that Congress apportion all direct taxes.[36] He

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34. *See, e.g.*, Dwight W. Morrow, *The Income Tax Amendment*, 10 COLUM. L. REV. 379, 398 (1910); Johnsen & Dellinger, *supra* note 14, at 117–18 ("The evidence establishes that the term's meaning was unclear to the Framers themselves."); Bruce Ackerman, *Taxation and the Constitution*, 99 COLUM. L. REV. 1, 4 (1999) ("[T]he Founders didn't have a very clear sense of what they were doing in carving out a distinct category of 'direct' taxes for special treatment."). Erik Jensen, in refuting this somewhat apocryphal reading of the historical record, points out that "[a]t the Massachusetts ratifying convention, King himself did not appear to be the hopelessly confused soul that the unanswered question would suggest. In urging ratification, King stated, 'It is a principle of this Constitution, that representation and taxation should go hand in hand.'" Jensen, *Consumption Taxes*, *supra* note 22, at 2379 (quoting 2 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 36 (Jonathan Elliot ed., 1876)). Charlotte Crane, in a draft article, goes a step further and posits "not only the possibility that the expression did have a meaning, but also that conscious efforts may have been made during the early years of the republic to obscure that meaning." Charlotte Crane, Reclaiming the Meaning of "Direct Tax" 3 (Feb. 15, 2010) (unpublished manuscript) (available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553230)[https://perma.cc/ACW8-TFT4].

35. *See infra* note 41.

36. Ackerman, *supra* note 34, at 58.

believes that because Gouverneur Morris introduced the requirement that Congress apportion direct taxes as part of a deal with the slave states, we should disregard it in light of the repudiation of slavery in the Reconstruction Amendments.[37] Perhaps, he says, "some future court might find itself obliged by the express language of the Constitution to strike down a classic 'Capitation Tax.'"[38] Beyond that narrow example, though, Professor Ackerman would have the courts refuse to classify any other tax as a direct tax.[39]

Next comes what we will call the pragmatic approach. Dawn Johnsen and Walter Dellinger break with Professor Ackerman and argue instead for this approach because they "must assume that the Framers included the phrase 'or other direct' following 'capitation' for a reason," and "constitutional text may not be ignored simply because it was the product of compromise rather than thoughtful policy—even compromise inextricably infected by the evils of slavery."[40] Under their reading, only capitations, slave taxes, and taxes on real property are direct taxes.[41] They take those limits from their reading of the Justices' opinions in *Hylton v. United States*.[42] On top of that "categorical" meaning, they add a "functional" rule: only a tax that can be apportioned sensibly, with "just and equitable" results, can be a direct tax.[43] The functional rule admits of some circularity—a tax can only be direct if it can be apportioned, and when

37. *Id.* at 10, 51.

38. *Id.* at 51.

39. *Id.*

40. Johnsen & Dellinger, *supra* note 14, at 120.

41. *Id.* at 124–25.

42. *Id.* at 122.

43. *Id.* at 125; *see also* Calvin H. Johnson, *Apportionment of Direct Taxes: The Foul-Up in the Core of the Constitution*, 7 WM. & MARY BILL OF RTS. J. 1, 71–82 (1998) (advocating for a similar functionalist approach limiting apportionment to cases "when it is reasonable and convenient" while acknowledging that such an approach is ahistorical); *but see* Dodge, *supra* note 7, at 916–17 (disputing Johnson's interpretations of *Hylton*). Johnson actually believes that the original meaning of direct tax is broader than any of these definitions, encompassing any internal tax, including an excise or consumption tax. *See*

it is deemed direct it must be apportioned—but Johnsen and Dellinger contend that it accurately describes how the Supreme Court has interpreted the Direct Tax Clause for most of our history.[44]

Slightly more expansively, Joseph Dodge argues that direct tax is limited to "requisitions, capitation taxes, and taxes on tangible property."[45] After first discussing and rejecting the prior two interpretations, Dodge draws his principle from several sources. First, he describes the "unanimous agreement in historical sources, legislative and executive practice, and judicial doctrine that 'direct tax' encompasses taxes on real estate."[46] Second, he decides that any tax that is subject to apportionment must have "*a definite geographical location in a state*" because the national government must know how much of an item exists within each state's borders to properly extract that state's share of the tax.[47] Third, he notes the difficulty of determining "what constitutes a real estate tax."[48] And fourth, he explains the states' comparative advantage in taxing tangible personal property and the national government's comparative advantage in taxing intangible property, income, and other easily movable forms of value.[49] That combination of historical sources and policy considerations leads to his conclusion that tangible personal property is the best place to draw the line between direct and indirect taxes.[50]

Finally, and most broadly, Professor Jensen has argued in numerous pieces that the line between direct and indirect taxes is

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Johnson, *supra*, at 46. An abundance of data in the corpus anecdotally disproved Johnson's conception of the phrase's original meaning.

44. Johnsen & Dellinger, *supra* note 14, at 122–25 (relying heavily on *Hylton*).

45. Dodge, *supra* note 7, at 841.

46. *Id.* at 918.

47. *Id.* at 922 (emphasis in original).

48. *Id.* at 927.

49. *Id.* at 930–31.

50. *Id.* at 932.

whether the tax is imposed directly on an individual and is not "shiftable"; whether the person paying the tax can, at least in theory, pass the burden of the tax on to someone else.[51] Jensen offers this example: take a widget seller that faces a new five percent tax on its $1 widgets.[52] It can pass that tax on to consumers by selling its widgets for $1.05, so the tax is shiftable.[53] Economic realities, like a competitor who does not face the tax burden, may force the seller to instead pay the tax itself, but that does not change the nature of the tax as shiftable.[54] On Jensen's theory, a tax that is at least theoretically shiftable is indirect, and a tax that cannot possibly be shifted is direct.[55]

Throughout these scholars' sometimes heated[56] debate over the Direct Tax Clause's meaning, none has closely examined the Clause's original public meaning. We turn to corpus linguistics for the insight it offers into that facet of the interpretive question.

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51. Erik M. Jensen, *Taxation and the Constitution: How to Read the Direct Tax Clauses*, 15 J.L. & POL. 687, 698 (1999) [hereinafter Jensen, *How to Read*]; Erik M. Jensen, *Interpreting the Sixteenth Amendment (By Way of the Direct-Tax Clauses)*, 21 CONST. COMMENT. 355, 360 (2004); Erik M. Jensen, *The Taxing Power, the Sixteenth Amendment, and the Meaning of "Incomes"*, 33 ARIZ. ST. L.J. 1057, 1075 (2001); *see* Jensen, *Consumption Taxes*, *supra* note 22, at 2394–95; *see also* Erik M. Jensen, *Did the Sixteenth Amendment Ever Matter? Does it Matter Today?*, 108 NW. U. L. REV. 799, 809 (2014).

52. Jensen, *Consumption Taxes*, *supra* note 22, at 2395.

53. *Id.*

54. *Id.*

55. *Id.* at 2405–06.

56. *See, e.g.*, Ackerman, *supra* note 34, at 52–56 (accusing Jensen of having an "intemperate formulation," creating "distortion," making "a hash of the Founding text," and taking a "backwards approach to the definition of key terms"); Jensen, *How to Read*, *supra* note 51, at 689 ("Life is too short to respond to all the problems in Professor Ackerman's article."); *id.* at 688 ("I should have left interpretation of constitutional matters to the Grand Theorists at Yale, who generally avoid the racism that taints my article and who are never enterprising.").

II. CORPUS LINGUISTICS ANALYSIS OF "DIRECT TAX" AND "DIRECT TAXES"

To find greater context for the meaning of "direct tax" in the Constitution, we searched for "direct tax" and "direct taxes" in the Corpus of Founding-Era American English (COFEA). In this section, we will describe corpus linguistics and how it works, then briefly describe COFEA. Then we will analyze the findings from our corpus linguistics analysis.

A. Corpus Linguistics

1. What It Is and How It Works

Corpus linguistics is based on the simple idea that the best way to determine ordinary meaning is "to analyze real examples of language as it is actually used."[57] At its most basic level, corpus linguistics is simply a method for determining meaning in which one uses a random sample of relevant sources that use a particular word or phrase. Lawyers do an informal version of this when they search Westlaw to look at how a bunch of cases use a particular word or phrase in order to determine its meaning. Corpus linguistics is a way to formalize this process and, hopefully, make it more accurate and replicable. The main advantages of using corpus linguistics are (1) it prevents cherry-picking sources, (2) it allows for larger and more representative sample sizes, and (3) it limits sources to those that are relevant for answering the particular question at issue (*e.g.*, for the original meaning of the Constitution, only including sources from the Founding era).

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57. *See* James C. Phillips, Benjamin Lee & Jacob Crump, *Corpus Linguistics and Officers of the United States*, 42 HARV. J. L. & PUB. POL'Y 871 (2019) (quoting PAUL BAKER, GLOSSARY OF CORPUS LINGUISTICS 65 (2006)).

Corpus linguistics has long been used by linguists and has recently been imported into law.[58] Its growing popularity in legal circles stems from two beliefs: first, that words have meaning; and second, if the ordinary meaning of a legal text is discernible, then we should follow it.[59] In effect, corpus linguistics offers a way to try to make the search for ordinary meaning scientific and replicable.[60] That makes it very appealing to "original public meaning" originalists, who believe that the Constitution's meaning is based on the public's understanding of its text at the time the states ratified it.

Whether it always succeeds in those noble aspirations is a subject of some debate.[61] But at the very least, it offers enough promise to be a valuable tool that legal interpreters should consider adding it "to their belts."[62]

First, someone must assemble an appropriate "corpus"—a large database of naturally occurring language that will be representative of the people whose use of the word the researcher hopes to understand.[63] If, for example, an originalist hopes to understand how the Founding generation understood the phrase "establishment of religion," it would do no good to search in a corpus of twenty-first century newspaper articles.[64] Rather, that researcher would look in a corpus of Founding-era texts. Using an appropriate corpus is essen-

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58. *See* Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J. 788, 795 (2018).

59. *Id.* at 793–95.

60. Thomas R. Lee & James C. Phillips, *Data-Driven Originalism*, 167 U. PA. L. REV. 261, 289–90 (2019).

61. *Compare* Donald L. Drakeman, *Is Corpus Linguistics Better than Flipping a Coin?*, 109 GEO. L.J. ONLINE 81, 84 (2020) (answering the titular question in the negative) *with* Lee & Phillips, *supra* note 60.

62. Wilson v. Safelite Grp., Inc., 930 F.3d 429, 439 (6th Cir. 2019) (Thapar, J., concurring in part and in the judgment).

63. *See* Lee & Phillips, *supra* note 60, at 290.

64. *See* Stephanie H. Barclay et al., *Original Meaning and the Establishment Clause: A Corpus Linguistics Analysis*, 61 ARIZ. L. REV. 505, 531 (2019) (using COFEA instead).

tial to the inquiry—"[a]s in the computing term 'garbage in, garbage out,' corpus linguistic analysis can be no better than the corpus one is using."[65]

After finding or creating an appropriate corpus, the researcher has several ways to analyze the data. First, one can look generally to word frequency over time and within different types of sources.[66] Second, one can look to collocation, which considers the tendency of words "to be biased in the way they co-occur."[67] Words that appear near each other with uncommon frequency have some relationship, though it takes further analysis to discern their specific relationship.[68] Third, one can examine "the heart of corpus linguistics analysis": the concordance line.[69]

A concordance line is "a listing of each occurrence of the sought word or pattern presented with the words surrounding it."[70] Basically, each concordance line looks like a Google search result—it contains a snippet of text "centered on the word or phrase searched."[71] For an example, see Figure 1 below.

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65. James Cleith Phillips & Sara White, *The Meaning of the Three Emoluments Clauses in the U.S. Constitution: A Corpus Linguistic Analysis of American English from 1760-1799*, 59 S. TEX. L. REV. 181, 199 (2017); *see* Lee & Mouritsen, *supra* note 58, at 812 (noting the impropriety of using Google as a corpus because of its "black box" algorithm and overly general nature).

66. Phillips & White, *supra* note 65, at 199–200.

67. *Id.* at 200 (quoting SUSAN HUNSTON, CORPORA IN APPLIED LINGUISTICS 68 (2002)).

68. *Id.* (offering the collocation of "dark" and "light" as an example).

69. *Id.* at 201.

70. Barclay et al., *supra* note 64, at 530.

71. Phillips & White, *supra* note 65, at 201.

Figure 1: Example of concordance lines from a search for "direct tax" in COFEA. (Additional context can be seen by clicking on each line.)

	Concordance			Text ID
	--			--
1	nstituti6nal ground he was against continuing a	direct tax	longer than two years ; every Congress ought to	HeinR191
2	on sundry motions relative to the bill for laying a	direct tax	upon the United States 2059 , 2060 on the pass	HeinR191
3	earing too great a part of' the burden ; but , if the	direct tax	on land were to take place , would it not , lie ask	HeinR190
4	hundred and fifty thousand dollars be raised by	direct tax	, for the year 1794 , to be apportioned among th	HeinR188
5	o law, shall be passed. 4. No capitation or other	direct tax	shall be laid, unless in proportion to the census	evans.N22529

Examining concordance lines allows our hypothetical researcher to see how each occurrence of the word was used in context.[72] "It is the slow and difficult analysis of concordance lines—the qualitative aspect of corpus linguistic analysis—that usually provides the best and most important data in corpus linguistic analysis."[73]

One starts by identifying different "senses" of the relevant word or phrase. For example, a researcher investigating the Second Amendment could identify two possible senses of "bear arms": the arms of an ursine mammal or carrying weapons. The researcher then codes (i.e. labels) different concordance lines according to which sense is used. If, after coding enough lines, the latter sense predominates over the former, it is "strong evidence" that the Second Amendment defends our right to carry weapons rather than our right to consume bears' arms.[74] After identifying senses, the re-

72. Barclay et al., *supra* note 64, at 531.

73. Phillips & White, *supra* note 65, at 201; *see* Lee & Phillips, *supra* note 60, at 291 ("Sense-distribution coding (from concordance-line analysis) is arguably the most important use of a corpus; other tools are more exploratory than confirmatory in nature (or at best provide only weak evidence of meaning).").

74. Lee & Phillips, *supra* note 60, at 292. *But see* Kyra Babcock Woods, Note, *Corpus Linguistics and Gun Control: Why* Heller *Is Wrong*, 2019 B.Y.U. L. REV. 1401 (demonstrating that a corpus linguistics analysis of the Second Amendment is far more difficult

searcher embarks upon the hard work of corpus linguistics analysis—going through each concordance line and determining which sense it fits within. If a word or phrase has only a few hits, one can code every line.[75] More often, one will code a sufficiently large sample of the hits to provide confidence in the results.[76] Such analysis is inherently "qualitative in nature," and thus introduces an element of subjectivity.[77] Ideally, researchers can counter that subjectivity by having multiple people examine the same concordance lines to ensure agreement.[78] At the end of that long, laborious process, the researcher should have greater insight into the frequency with which the relevant population used each sense of a word or phrase.

It is important to note, however, that although one sense predominating over another is "strong evidence that meaning is how that term or phrase was most commonly understood," it is not dispositive.[79] Often, corpus linguistics will be most useful in determining the scope of ordinary meaning rather than providing the single, correct, concrete meaning of a phrase.[80] "Corpus data may tell us something about the relative frequency of the various meanings, but the most frequent meaning is not necessarily the ordinary meaning in context."[81] Thus, although corpus linguistics can shed light on a word's ordinary meaning, it cannot alone determine that

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than the above example); Josh Jones, Comment, *The "Weaponization" of Corpus Linguistics: Testing* Heller*'s Linguistic Claims*, 34 B.Y.U. J. PUB. L. 135 (2020) (same).

75. *See* Lee & Phillips, *supra* note 60, at 291.

76. *Id.*

77. *Id.* at 291, 329.

78. Phillips & White, *supra* note 65, at 207 (doing so); Jones, *supra* note 74, at 173 ("The last caveat I would add is that this Note's concordance line coding was obviously the product of my own intuition and biases. Ideally, coding decisions are reviewed by multiple people and decisions are subject to quality control.").

79. Lee & Phillips, *supra* note 60, at 292.

80. Solum, *supra* note 12, at 1645.

81. *Id.* at 1647.

meaning. Carissa Byrne Hessick offers a helpful example.[82] Imagine, she invites us, "a dispute over the scope of a statute that provides relief for flood victims."[83] In a relevant corpus, one could easily imagine that the most frequently used sense of flood refers to extreme flooding, "such as New Orleans after Hurricane Katrina in 2005 or Houston during Hurricane Harvey in 2017," because those events receive more news coverage and generate more discussion than smaller-scale floods do.[84] That analysis is not dispositive of the question "whether the average American would understand the statutory term 'flood' to include three inches of water in a homeowner's basement after a neighboring water main burst."[85] Now that we have briefly explained the benefits, limitations, and techniques of corpus linguistics analysis, we can turn to our chosen corpus.

2. COFEA

COFEA, the Corpus of Founding-Era American English, is a historical corpus covering the period from "1760–1799—the beginning of the reign of King George III until the death of George Washington."[86] It combines the Evans Early Imprint Series, the National Archives Founders Papers Online Project, and relevant materials from Hein Online.[87] The Evans Series contains "nearly two-thirds of all books, pamphlets, and broadsides known to have been printed in this country between 1640 to 1821."[88] Of those nearly 40,000 documents, approximately 6,000 were available in fully searchable form; COFEA contains those 6,000.[89] The Founders

82. Carissa Byrne Hessick, *Corpus Linguistics and the Criminal Law*, 2017 B.Y.U. L. REV. 1503.

83. *Id.* at 1509.

84. *Id.*

85. *Id.*

86. Lee & Phillips, *supra* note 60, at 293.

87. *Id.*

88. *Id.* (quoting TEXT CREATION PARTNERSHIP, http://www.textcreationpartnership.org/tcp-evans/ [https://perma.cc/9Y6J-48XU] (last visited Oct. 16, 2018)).

89. *Id.*

Online database contributed the "correspondence and other writings of six major shapers of the United States: George Washington, Benjamin Franklin, John Adams (and family), Thomas Jefferson, Alexander Hamilton, and James Madison," including the letters those six received from other Founders and ordinary citizens.[90] And Hein Online provided legal materials from the relevant year range, including statutes, case law, legal papers, legislative debates, and the like.[91] In total, COFEA contains 100,000 texts and over 150 million words.[92] It's not perfect,[93] but it's "the best tool we currently have."[94]

B. Our Corpus Analysis

Our search for "direct tax" and "direct taxes" in COFEA yielded 1,161 results (475 for the singular, 686 for the plural). Initially, we analyzed the frequency of results within each source and between years. Then, after collocate analysis offered little insight, we embarked on the "hard work of qualitatively analyzing concordance lines."[95] First, we identified which senses of the term we should look for, while remaining open to new ones as the analysis progressed. Next, because there were too many results to code all of them, we used an online tool to calculate how many hits we would need to analyze to get a 5% confidence interval (after removing unusable lines like quotations of the Constitution or congressional indices, for example).[96] Finally, after coding five-hundred hits (with eighty-eight exclusions[97]), we analyzed our data.

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90. *Id.* at 294 (quoting *Founders Online*, NAT'L ARCHIVES, https://founders.archives.gov/ [https://perma.cc/GD48-CDCH] (last visited October 16, 2018)).

91. *Id.*

92. *Id.*

93. *Id.* at 294–95 (describing its three major shortcomings in representativeness).

94. *Id.* at 295.

95. *Id.* at 312.

96. *See* Phillips & White, *supra* note 65, at 205–06 (using the same methods).

97. We noted a reason for excluding each of these concordance lines to ensure future scholars seeking to replicate our results could understand our logic.

1. General Frequency Data

Two types of frequency analysis proved interesting with regard to direct taxes.

First, we examined which corpora our hits came from. We saw dramatic disparities in the frequency with which our search terms appeared in the different sources:

Figure 2: Source Distribution as Percentage of Hits

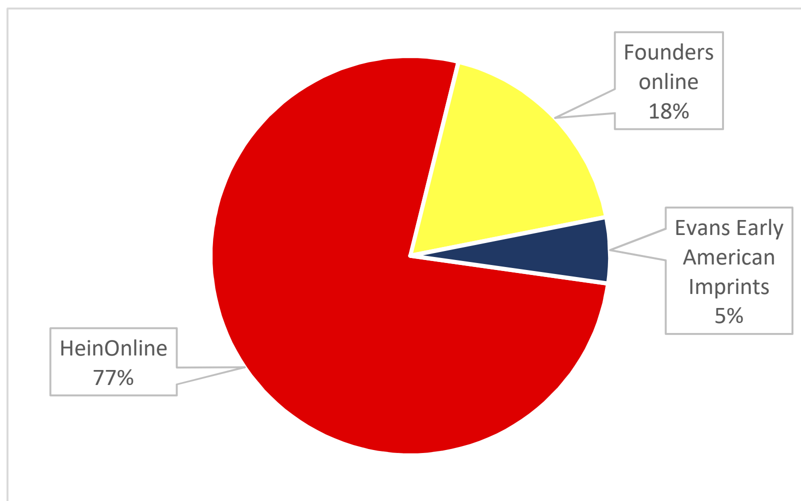
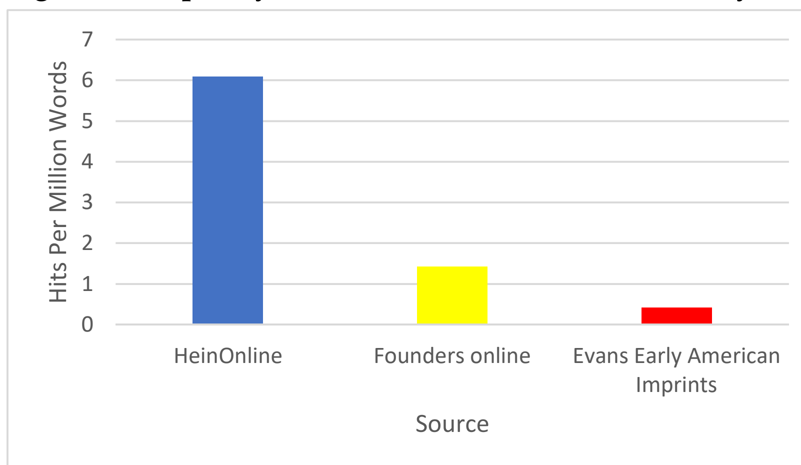


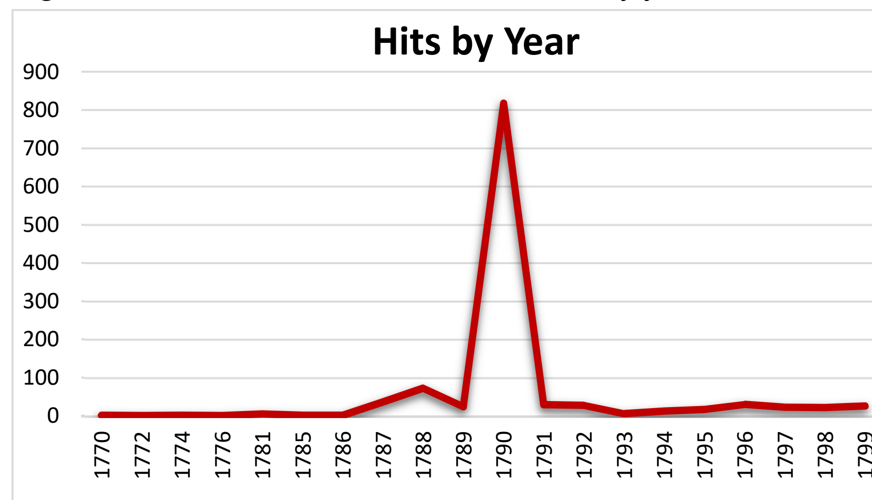
Figure 3: Frequency of "direct tax" and "direct taxes" by corpus



As the pie chart shows in Figure 1, the overwhelming majority of our hits came from Hein Online. Materials in Hein Online are primarily legal.[98] So the strong representation in Hein Online can be "evidence that the term either has a legal meaning, or at least has more relevance to a legal context compared to an ordinary one."[99] That disparity raises the possibility that "direct tax" is a legal term of art rather than a phrase in common parlance.[100] But it is also possible that the term simply has greater salience to a legal context without being a term of art.[101] Thus, the source comparison tells us that "direct tax" is a predominately legal term, even if it is not necessarily a term of art.

Second, we examined which years had the most hits. We saw a huge spike for one year:

Figure 4: Number of hits for "direct tax(es)" by year in COFEA



98. Phillips & White, *supra* note 65, at 204.
99. Lee & Phillips, *supra* note 60, at 312.
100. *See id.*
101. *See id.*

In 1790, a year and a half after the Constitution's ratification, direct tax appears 818 times in COFEA. That sum represents just over 70% of the total hits, with most of those coming from congressional debates about the assumption of state debt and whether to impose a direct tax to pay for it. For comparison, the year with the next-most hits was 1788, when the ratification debates produced seventy-three uses of the searched-for phrases. There were thirty-seven hits for 1787, the year with the most hits until the Constitution was ratified; before that, the year with the most hits was 1781, with only five hits.

From that data, we could draw two possible conclusions. On the one hand, we could conclude that the phrase "direct tax" was simply a made-up term that required later interpretation by Congress, the President, and the courts, as some scholars believe. On the other hand, we could conclude that it was an understood term that simply had limited importance, at least among the sources COFEA draws on, until it received attention as a limitation on Congress's power to tax. Again, the frequency data in isolation cannot answer that question. So we turn now to the sense analysis.

2. Senses We Used

Because we (perhaps ambitiously) sought to answer two questions, we coded for two different categories of senses. To answer the larger question of what a direct tax is, we coded for "concrete uses" of direct tax(es) when possible. By that we mean concordance lines where we could determine from the context what kind of tax the speaker referred to or how he decided whether a tax would be direct or not. When we could not code for a "concrete sense," we then coded to answer the narrower question whether people understood the phrase direct tax at the Founding and, if so, any frame of reference they had for the term. We called those "determinate senses."

We derived our concrete senses primarily from the different academic definitions described above, but we ultimately removed one and added one. For removal, we (unsurprisingly) found no

support for Bruce Ackerman's desire to ignore the apportionment requirement in light of its role in the constitutional debate over slavery, so we will not list it as a possible sense. As to the sense we added, we thought it came from a sufficiently reputable source to merit inclusion—Alexander Hamilton. In his brief in *Hylton*, the carriage tax case, Hamilton argued that "[t]he following are presumed to be the only direct taxes: capitation or poll taxes. Taxes on lands and buildings. General assessments, whether on the whole property of individuals, or on their whole real or personal estate; all else must of necessity be considered as indirect taxes."[102] Essentially, Hamilton's approach is Johnsen and Dellinger's categorical rule discussed above with two crucial changes: first, he added "general assessments" on individuals' whole property or whole estate; second, he did not argue for Johnsen and Dellinger's functional limitation on the direct-tax rule.[103]

That leaves the following senses, with the shorthand we used for graphics in parentheses:

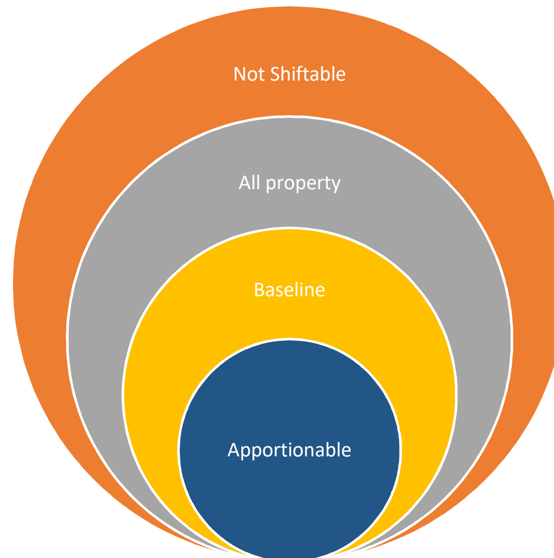
- A tax that is capable of apportionment as Johnsen and Dellinger describe it (apportionable);
- The Hamiltonian "baseline" of real estate, capitations, and general assessments (baseline);
- Dodge's "all tangible property" approach (all personal property);
- Jensen's "any tax that is not shiftable" approach (not shiftable).

It bears noting that all of these terms overlap, such that each sense necessarily includes any tax that would fit within the prior. A Venn diagram helps to display the relationship. See Figure 5.

102. Brief for the United States, Hylton v. United States, 3 U.S. (3 Dall.) 171 (1796), *reprinted in* 8 THE WORKS OF ALEXANDER HAMILTON 378, 382 (Henry Cabot Lodge ed., Fed. Edition 1904).

103. *Cf.* Johnsen & Dellinger, *supra* note 14, at 124–25 (describing the limitation).

Figure 5: Venn diagram of senses of "direct tax"



Today, the only direct tax that could possibly be apportioned in a "just and equitable" fashion is a capitation.[104] As a capitation is part of all other definitions, the "apportionable" meaning fits within the others. Next, all taxes within the Hamiltonian baseline fall on property, so it is a subset of the "all tangible property" meaning. And finally, as Jensen explains in defining his shiftableness approach, no tax on the ownership of property is shiftable.[105]

As we discuss in further detail below, that overlap—combined with the heavy weight of Congressional Record sources—makes it difficult to reach a firm conclusion as to the correct sense of "direct tax."

We had less academic guidance on our determinate senses. Initially, we expected to have only two: used as an accepted term and treated as ambiguous. But as we conducted the corpus analysis, we

104. *Id.* at 125; Dodge, *supra* note 7, at 844 (explaining why only a capitation can be fairly apportioned).

105. Jensen, *Consumption Taxes*, *supra* note 22, at 2360.

determined that we could use two more particular determinate senses. Thus, our final sense-coding included:

- Used as an understood term without questioning (accepted term);
- Used to refer to state direct taxes (state direct taxes);
- Used in contradistinction to indirect taxes (all non-indirect taxes);
- And treated as ambiguous or accompanied with expressions of uncertainty (treated as ambiguous).

We almost exclusively used the determinate senses when we could not decide on a concrete sense (though in a few rare cases we double-coded a term as using both a concrete sense and the state-direct-tax sense). Thus, we had to add all of the concrete uses to the non-ambiguous determinate uses to fully answer the question whether "direct tax" was simply an unknown term. Now that our senses are clear, we can present our data.

3. Sense Analysis

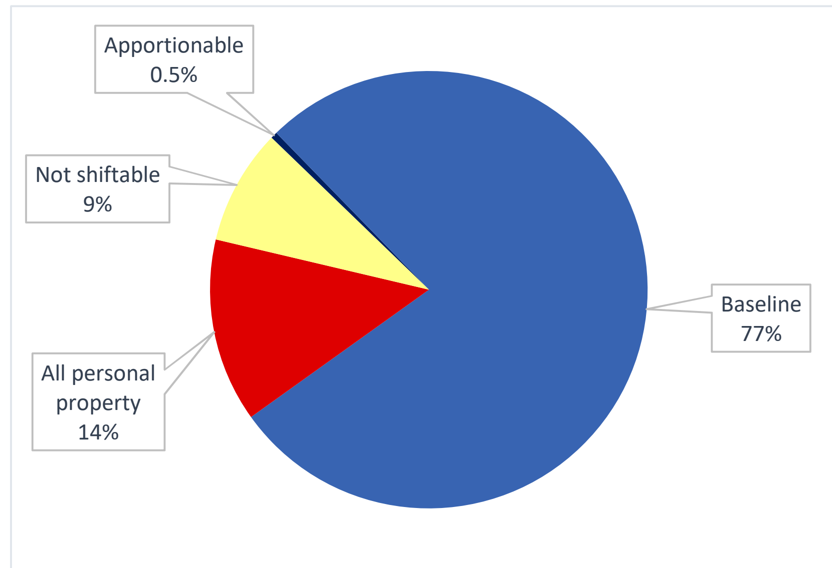
First, in our analysis of the 199 concrete uses of the term, we found that discussions of the baseline conception of a direct tax predominated over all other conceptions.

Notably, we found only one concordance line that used direct tax in the "apportionable" sense. In 1794, Representative Theodore Sedgwick of Massachusetts argued that a carriage tax must not be a direct tax because "as several of the States had few or no carriages, no such apportionment could be made, and the duty of course could not be imposed."[106] But just a few paragraphs earlier, he had also conceded that, of course, "a capitation tax and taxes on land and on property and income generally, were direct charges, as well in the immediate as ultimate sources of contribution."[107] Because it

106. 4 ANNALS OF CONG. 644–645 (1794).
107. *See id.* at 644.

is unclear how those principles would interact—if, as for Johnsen and Dellinger,[108] the specific examples of direct taxes might yield to the broader apportionability principle—we erred on the side of coding it as both baseline and apportionable.

Figure 6: Distribution of senses of "direct tax" and "direct taxes"



Second, our analysis of determinate uses of direct tax—especially once we accounted for the uses we coded as concrete—undermines the notion that "the term's meaning was unclear to the Framers themselves."[109]

108. *See supra* notes 41–45 and accompanying text.
109. Johnsen & Dellinger, *supra* note 14, at 117–18.

Figure 7: Usage Determinacy

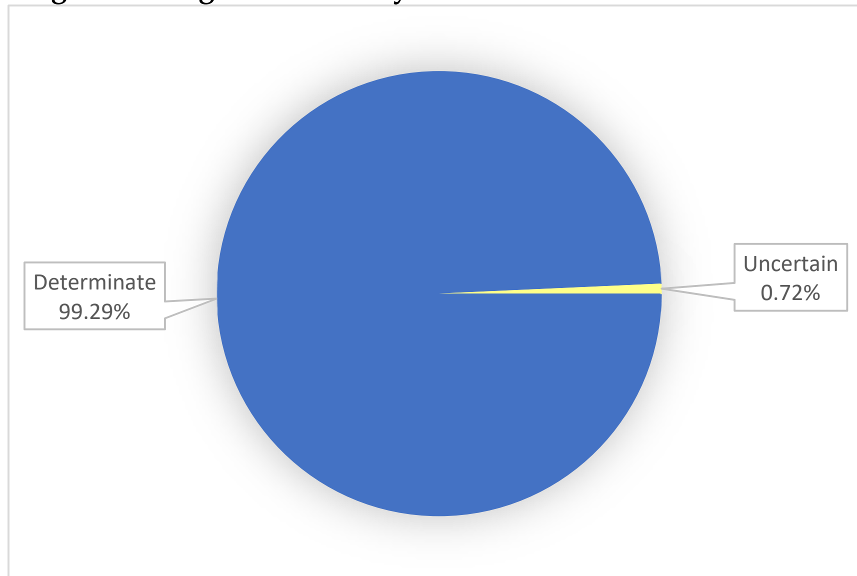
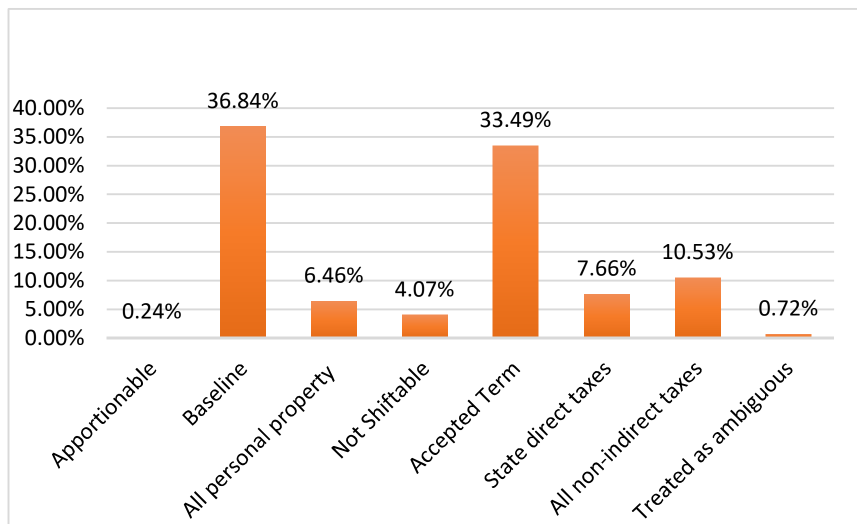


Figure 8: Percentage of senses of direct tax(es)



That only three of the 412 concordance lines we coded expressed uncertainty or confusion as to the term's meaning seems to resolve the question that the year data, by showing a spike in uses after the Constitution's ratification, raises. Rather than being an undefined term, the term "direct tax" had a definite meaning but little salience, at least in the sources in COFEA, until the Constitution granted the power to impose direct taxes to Congress and limited that power with the apportionment requirement. That conclusion also finds support in the frequent recourse of concordance lines to state taxes as a basis for understanding what a direct tax was—if the states' normal means of imposing taxes, other than state imposts, were generally understood to be direct taxes, then the term necessitated little discussion.

C. *Analysis*

What can we draw from our corpus data, then? We will note at the outset of our analysis two problems that weakened our ability to draw firm conclusions. Then we will nonetheless offer at least tentative findings, and we will note areas of future research that our determinate-use analysis indicates could prove fruitful in understanding the original meaning of direct tax. Finally, we will offer our thoughts about the value of corpus linguistics in answering difficult interpretive questions.

1. Caveats

There are two issues we had to account for in our final analysis.

First, as we showed earlier, the overwhelming majority of our hits came from Hein Online. On top of the legal tilt that shows, almost the entirety of those 834 hits came from Hein Online's collection of the debates in the House of Representatives. More specifically, they came from debates in the House about whether to impose a direct tax (and, if one must be imposed, how best to do so), as well as from discussion of the actual bill to impose a tax on land, houses, and slaves. In discussing whether and how to impose a direct tax, most Representatives accepted that a tax on real estate

would be the most manageable and constituted the quintessential direct tax. Thus, that context may have biased the data in favor of the "baseline" formulation.

Second, especially in light of the first issue, the overlapping nature of the senses makes it difficult to conclude that a narrower sense of the term necessarily sets its upper bound. It is similar to Carissa Hessick's flood problem.[110] Just as everyone agrees that the post-Katrina flooding is a flood, everyone in the Founding generation understood that at a minimum a tax on land would be a direct tax, so land taxes were a common point of reference. But that does not necessarily mean that land taxes exhaust the phrase's meaning.

2. Findings

After that necessary bit of throat clearing, we can at last offer our findings.[111] First, the clear point: the Supreme Court was incorrect in *National Federation of Independent Businesses v. Sebelius*, at least when it claimed that "[e]ven when the Direct Tax Clause was written it was unclear what else, other than a capitation (also known as a 'head tax' or a 'poll tax'), might be a direct tax."[112] If nothing else, everyone accepted that a land tax was a direct tax. More broadly, though, the data show very few instances of people expressing uncertainty about the phrase's meaning—in a staggering 99.28% of concordance lines, the speaker spoke confidently about the term, even when he did not offer a concrete sense. And it seems quite clear that, at a minimum, the types of direct taxes that fell within Alexander Hamilton's baseline category (land, houses, slaves, capitations, and general assessments) were unanimously accepted as direct taxes. Thus, our corpus analysis can disprove the myth that

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110. *See* Hessick, *supra* note 82, at 1509.

111. As one of us is a sitting federal judge, it is important to note that these are our tentative findings as to the original meaning of direct tax. In a case involving the issue of whether a particular tax is a direct tax, Judge Bush would have to consider more than the narrow questions we are analyzing—most importantly, binding Supreme Court precedent that is outside the scope of this Article.

112. 567 U.S. 519, 570 (2012) (citation omitted).

the Founders plucked the phrase "direct tax" from thin air and plugged it into the Constitution.

Second, although the corpus data do not provide a concrete, usable definition or test for what the constitutional phrase "direct tax" means, they offer some clarity as to particular uses. For example, it has long been accepted wisdom, even among prominent proponents of a wealth tax like Thomas Piketty, that such a tax would be unconstitutional.[113] Some scholars who hope to see a wealth tax enacted have challenged that accepted wisdom.[114] But a wealth tax is the exact kind of "[g]eneral assessment[], whether on the whole property of individuals, or on their whole real or personal estate," that Hamilton noted lay at the heart of direct taxation.[115] As such, our corpus analysis indicates that the accepted wisdom is correct. It also confirms the conventional wisdom that any tax that falls on real property must be apportioned to pass constitutional muster.[116]

Our more-particularized-determinate-use analysis also offers valuable insight into avenues of research that might further clarify what exactly a direct tax is. First, its frequent use as encompassing all non-indirect taxes supports Erik Jensen's view that the two terms constitute the entirety of the taxing power.[117] So an indirect way to define the original meaning of direct taxes would be to de-

113. Joseph Bankman & Daniel Shaviro, *Piketty in America: A Tale of Two Literatures*, 68 TAX L. REV. 453, 491 (noting Piketty's statement that "I realize that this is unconstitutional, but constitutions have been changed throughout history. That shouldn't be the end of the discussion." (quoting Thomas Piketty, Address at the Fourth Annual NYU/UCLA Tax Policy Symposium (Oct. 3, 2014) (quoted in *Economist and Bestselling Author Thomas Piketty Discusses Wealth Inequality with Diverse Experts*, N.Y.U. L. NEWS (Oct. 7, 2014), http://www.law.nyu.edu/news/thomas-piketty-capital-twenty-first-century-economist [https://perma.cc/ZZB4-MJXE])).

114. *See* Ackerman, *supra* note 34, at 6; *see generally* Johnsen & Dellinger, *supra* note 14.

115. Brief for the United States, *supra* note 102, at 382.

116. *See* Bankman & Shaviro, *supra* note 113, at 489.

117. *See* Jensen, *Consumption Taxes*, *supra* note 22, at 2395.

termine concrete definitions of the three types of indirect taxes: imposts, duties, and excises.[118] More particularly, finding the line between an excise, a duty, and a direct tax could be dispositive because the Supreme Court has often characterized taxes challenged as direct as instead being either an excise or a duty.[119] If a litigant can show that a tax is neither a duty nor an excise, then a court will likely find it to be a direct tax. Second, the term's use to refer to state taxes indicates that there would be great value in an analysis of state taxation practices at the Founding. To that end, Secretary of the Treasury Oliver Wolcott Jr.'s report to the House of Representatives on a plan to lay a direct tax offers an excellent starting point.[120] It describes state taxing methodologies in some detail and, at a minimum, reinforces the conclusion that a general assessment on a person's property is a direct tax.[121]

3. Observations about Corpus Linguistics

At least in matters of constitutional interpretation, we are persuaded that corpus linguistics is a useful tool for determining the scope of a phrase's possible meanings, but that it alone will rarely be enough to prove which sense is correct.[122] But it can definitively disprove theories and senses, as we have shown. In the context we studied, it disproved both the notion that "direct tax" has no original meaning to be found and the claim that its meaning turns on

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118. *See* U.S. CONST. art. I, § 8, cl. 1.

119. *See, e.g.*, Nicol v. Ames, 173 U.S. 509, 519 (1899); Bromley v. McCaughn, 280 U.S. 124, 136 (1929); *see also* Ari Glogower, *A Constitutional Wealth Tax*, 118 MICH. L. REV. 717, 729 n.83 (2020) (noting this trend).

120. 6 ANNALS OF CONG. 2635–2713 (1799-1801).

121. *See id.* at 2645–58 (describing the systems in Vermont, New Hampshire, and Massachusetts).

122. *See* Solum, *supra* note 12, at 1645. *But see* Lee & Phillips, *supra* note 60, at 296–300 (using corpus linguistics to prove the correct sense of domestic violence). The domestic violence example may, however, be the exception that proves the rule because the original public meaning of the Domestic Violence Clause was clear before any corpus analysis.

the apportionability of a particular tax. That makes corpus linguistics a valuable tool in any originalist's toolbelt.

That being said, it is a tool that very few judges will be able to employ of their own accord. Even an analysis that does not meet the gold standard—a single coder using only a sample of the concordance lines—took well over a hundred hours, far more than can be devoted by a court of appeals judge to the average case. It is true, as Justice Lee and Stephen Mouritsen argue, that it will be a "relatively rare case" where it is necessary and useful to turn to corpus linguistics.[123] But even in those cases, judges will probably have to rely on litigants or, more likely, interested professors or researchers to conduct the corpus analysis. Even then, though, the inherent subjectivity of sense division means that judges will have to check those interested parties' work to be sure that their interests in a case's outcome—consciously or unconsciously—did not lead them to dress up advocacy with the scientific gloss of corpus linguistics.

In short, corpus linguistics is a valuable tool in the search for meaning. But its use is tempered by the large number of hours it demands of its users. And the inherent subjectivity of some aspects of the analysis presents serious risks for biased analyses misleading courts. As such, advocates for corpus linguistics should not just focus on teaching judges how to do it and extolling the virtues of corpus linguistics; they should also teach judges how to recognize dubious analyses and explain the reasons to be skeptical of litigants bearing corpora.

III. *HYLTON V. UNITED STATES* AND ITS IMPLICATIONS FOR OUR ANALYSIS

With the corpus results in hand, we now turn to the first case in which the Supreme Court had the opportunity to provide an answer to Rufus King's question about what a direct tax is. In *Hylton*

123. Lee & Mouritsen, *supra* note 58, at 872.

v. United States[124] the Court held that carriage taxes were not "direct taxes," but it did not offer a comprehensive definition of the term. Nonetheless the parties' arguments and the Court's seriatim opinions are useful for our purposes because they reveal how an early dispute over constitutional meaning was litigated and resolved. Our findings from COFEA allow for assessment of the extent to which the arguments and opinions in *Hylton* aligned with recorded linguistic usage at the time. In addition, the methodologies followed by the litigants and the Court in *Hylton* provide clues to fashion the appropriate use of corpus linguistics today.

Hylton concerned the constitutionality of a federal tax on various types of carriages that Congress imposed in 1794.[125] Carriage taxes were akin to luxury taxes—more politically palatable than, say, a tax on whiskey. There was never a "Carriage Rebellion." Instead, the Carriage Act generated controversy in Congress because of the constitutional questions it raised. In the House debate, Madison argued that the carriage taxes were unconstitutional because they were direct taxes and did not satisfy the Constitution's apportionment requirement.[126] But Congressman Fisher Ames of Massachusetts responded that the legislation need not comply because the carriage duties were indirect excise taxes.[127]

This congressional sparring over the "Carriage Tax Law," as it was called, was driven less by carriages than by larger issues as to the scope of Congress's power to tax.[128] John Taylor of Caroline (Hylton's counsel in the circuit court) described a parade of horribles if the statute were allowed to stand: "The excise is a precedent,

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124. 3 U.S. (3 Dall.) 171 (1796).

125. Act of June 5, 1794, 1 Stat. 373.

126. *Carriage Act of 1794*, STATUTES & STORIES: COLLECTIONS & REFLECTIONS ON AM. LEGAL HIST. (Aug. 5, 2018), https://www.statutesandstories.com/blog_html/carriage-act-of-1794/ [https://perma.cc/QFH2-2UYH].

127. *Id.*

128. *See* Crane, *supra* note 34, at 8 (arguing that the carriage tax was effectively a test case that the Washington administration brought to expand federal taxing powers).

enabling Congress to intercept such a portion of a man's victuals, drink, and cloathing, the fruits of his own manual labour, as they may think proper—and under that of the carriage tax, every other species of property, is exposed."[129]

When the case came before the Supreme Court the next year, Hamilton and Charles Lee (the United States Attorney General) were the natural choices to defend the constitutionality of the Carriage Act in the Supreme Court. As Secretary of the Treasury, Hamilton had proposed taxation of not just carriages but also an array of personal property. On top of that, he was a highly skilled appellate advocate and had retired from public office in early 1795, shortly before *Hylton* was argued in the circuit court. A successful defense of the Carriage Act would significantly further Hamilton's financial vision.

But before that could happen, the government needed an opponent. Finding one proved no easy task. The reason was jurisdictional: at the time, the Supreme Court had a $2000 amount-in-controversy threshold,[130] and the applicable taxes and penalties totaled $16 per carriage,[131] which meant that a plaintiff had to owe taxes on a lot of carriages to obtain Supreme Court review. To overcome that obstacle, the defendant, Virginia businessman Daniel Hylton, entered into a joint stipulation with the government that he "owned possessed and kept one hundred & twenty five chariots for the conveyance of persons."[132] The submission also claimed that the carriages were kept "exclusively for [the Defendant's] own separate use, and not to let out for hire, or for the conveyance of persons for

129. 7 THE DOCUMENTARY HISTORY OF THE SUPREME COURT OF THE UNITED STATES, 1789–1800 389 (Maeva Marcus ed., 2003).

130. Jensen, *Consumption Taxes*, *supra* note 22, at 2351–52.

131. *Id.*

132. DOCUMENTARY HISTORY, *supra* note 129, at 382. Interestingly, the document seemed to initially say one carriage—a caret rises after one to add "hundred and twenty five" to complete (or perhaps create) his seemingly legendary carriage stable. *Id.*

hire."[133] Added up, the $16 in taxes and penalties imposed per coach gave a sum equal to exactly the jurisdictional amount.[134] No one on the Court questioned whether Hylton was really such an avid carriage collector. Nor did anyone claim a conflict of interest when Hylton's son-in-law Alexander Campbell replaced Taylor as Hylton's counsel, despite the fact that Campbell also served as United States Attorney for the District of Virginia and had even "played a role in the case on behalf of the Government at the circuit court."[135] Campbell's co-counsel was Jared Ingersoll, the Attorney General of Pennsylvania. The Department of the Treasury paid the attorneys' fees for both sides.[136]

The Supreme Court elided those curious circumstances to address the substantive question presented: "whether the law of Congress, of the 5th of June, 1794, entitled 'An act to lay duties upon carriages, for the conveyance of persons,' is unconstitutional and void?"[137]

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133. *Id.*

134. Jensen, *Consumption Taxes*, *supra* note 22, at 2351–52. Jensen notes that the parties' agreement that Hylton could satisfy his tax liability for only $16 highlights the dubiousness of the "patently phony claim" that Hylton owned 125 carriages for personal use. *Id.* at 2352. Ironically, even setting aside its falsity, the dubious accounting that Hylton and the government agreed on did not actually satisfy the jurisdictional requirement. Like today's amount-in-controversy requirement for diversity jurisdiction, the Supreme Court's jurisdiction required more than the threshold amount to hear a case. *Id.* Because even with the carriage-quantity stipulation Hylton owed exactly $2000, the Supreme Court lacked jurisdiction to decide *Hylton*. *Id.* Which raises a further interesting—but open—question: does an opinion issued by a court that clearly lacked jurisdiction still constitute binding precedent?

135. Crane, *supra* note 34, at 69.

136. *Id.* at 70–71, 71 n.116.

137. Hylton v. United States, 3 U.S. (3 Dall.) 171, 172 (1796). The Court thus was called upon to interpret the meaning of the Constitution some seven years before *Marbury v. Madison* and Chief Justice Marshall's famous dictum that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. (1 Cranch) 137, 177 (1803).

Many involved in *Hylton* had personal experience in the Constitution's creation. Two of the advocates (Hamilton and Ingersoll) and two of the Justices on the Court (William Paterson and James Wilson)[138] were Framers of the Constitution.[139] Those Justices, along with two of the other Justices (James Iredell and William Cushing), also had participated in their respective states' debates over its ratification.[140] One of the principal congressional opponents of the carriage tax (Madison) also participated in the adoption and ratification of the Constitution. The fact that the very people responsible for the legal terms in dispute were the same people who ended up arguing over what those terms meant gives pause to any corpus linguistics endeavor that purports to determine constitutional meaning with absolute certainty. Indeed, the dispute pitted co-authors of *The Federalist Papers* (Madison and Hamilton) against each other, so it is fair to say that the constitutional question was close.

One explanation for the disagreement, of course, might be that the relevant text simply was ambiguous. That was what Hamilton argued to the Court:

> What is the distinction between *direct* and *indirect* taxes? It is a matter of regret that terms so uncertain and vague in so important a point are to be found in the Constitution. We shall seek in vain for any antecedent settled legal meaning to the respective terms—there is none.[141]

One Justice (Paterson) also found the Constitution to be unclear, but he found ambiguity not in the distinction between direct and

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138. Only three of the Supreme Court's then-six members voted in *Hylton*. Chief Justice Oliver Ellsworth "was sworn into office in the morning" that the opinion issued, "but not having heard the whole of the argument, he declined taking any part in the decision of this cause." 3 U.S. (3 Dall.) at 172 n.1. The other justice who abstained, William Cushing, explained that "it would be improper to give an opinion on the merits of the cause" because he had "been prevented, by indisposition, from attending to the argument." *Id.* at 184 (Cushing, J.).

139. U.S. CONST. Signatories.

140. *See* Ackerman, *supra* note 34, at 21.

141. Brief for the United States, *supra* note 102, at 378–79.

indirect taxes, but rather in the parties' agreement that the carriage tax must fall within one of four explicit categories mentioned in the nation's charter: a duty, impost, excise, or direct tax.[142] Justice Paterson noted that "[t]he argument on both sides turns in a circle."[143] Hylton argued that the carriage tax was "not a duty, impost, or excise, and therefore must be a direct tax," while the government contended the carriage tax was not a direct tax, "and therefore must be a duty or excise."[144] The circular arguments over the categories led nowhere, Justice Paterson concluded, in part because some categories were ill-defined: "What is the natural and common, or technical and appropriate, meaning of the words, duty and excise, it is not easy to ascertain. They present no clear and precise idea to the mind. Different persons will annex different significations to the terms."[145]

Where Hamilton and Paterson saw ambiguity, however, the other Justices found clarity. Justice Iredell flatly stated, "I think the Constitution itself affords a clear guide to decide the controversy," and Justice Chase likewise thought the constitutional text admitted of no uncertainty.[146] And, although the Court rejected Hylton's argument that the carriage tax was a direct tax, a majority of the Justices seemed to agree with him that the relevant constitutional text could be plainly read.

Lack of ambiguity also underlay the arguments in the circuit court. Taylor, on behalf of Hylton, noted that the Carriage Act, by its terms, imposed "duties and *rates*" and that both "duty" and "rate" were defined in various secondary sources as forms of

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142. 3 U.S. (3 Dall.) 171, 176 (opinion of Paterson, J.).
143. *Id.*
144. *Id.*
145. *Id.*
146. *Id.* at 173–75 (opinion of Chase, J.); *id.* at 181 (opinion of Iredell, J.).

taxes.[147] From this basis he argued that "direct taxes" included duties and rates that were directly imposed, and that because the Act directly imposed duties and rates on carriages, it was a direct tax within the meaning of the Constitution.[148] Wickham, for the government, rejected Taylor's logic as inconsistent with other sources that differentiated between direct and indirect taxes. He "contend[ed] that, long before the Constitution of the United States was framed, a tax upon the revenue or income of individuals, was considered and well understood to be a *direct tax*. A tax upon their expences, or consumption an *indirect tax*—That this is a tax on expence or consumption, and therefore an indirect tax."[149]

That both Wickham and Taylor were certain as to meaning—albeit with diametrically opposite conclusions as to whether a carriage tax fit that meaning—is consistent with our corpus findings that people wrote and spoke of direct taxation as if they knew what it meant. A majority of the Justices who issued opinions in the case shared the litigants' confidence in clarity too. By adding the argument that the line between direct and indirect taxes was, in fact, fuzzy, Hamilton expressed views that seem to have been in the distinct minority.[150]

However, all of the Justices ended up ruling in favor of Hamilton's client, but reached their ruling through different routes. Some Justices opined more than others as to what taxes could be considered "direct taxes." However, none of them purported to provide a complete list or a concrete definition.

For Justice Chase, the distinguishing characteristic of a direct tax was whether "[t]he rule of apportionment" could "reasonably

147. DOCUMENTARY HISTORY, *supra* note 129, at 386.

148. *Id.* at 386–87.

149. *Id.* at 413.

150. It bears noting that Hamilton found far greater certainty about the term in other contexts like the Federalist Papers. *See* Jensen, *Consumption Taxes*, *supra* note 22, at 2357–58. His arguments from ambiguity in *Hylton* may have been little more than good lawyering.

apply" to the tax.[151] He did not believe apportionment could be applied to carriage taxes "without very great inequality and injustice."[152] He gave as an example two states with equal populations, but one of which had "100 carriages, and in the other 1000."[153] In that scenario, "[t]he owners of carriages in one State, would pay ten times the tax of owners in the other."[154] He rejected Hylton's argument that this harsh effect could be eliminated by allowing the tax to be apportioned based on other items (horses, tobacco, and rice, for example) in addition to carriages: "it seems to me, that it would be liable to the same objection of abuse and oppression, as a selection of any one article in all the States."[155] Justice Chase characterized an "indirect tax" as any tax on an expense, and he thought "an annual tax on a carriage for the conveyance of persons, is of that kind; because a carriage is a consumeable commodity; and such annual tax on it, is on the expence of the owner."[156] He also was "inclined to think, but of this [he did] not give a judicial opinion, that the direct taxes contemplated by the Constitution, are only two, to wit, a capitation, or poll tax, simply, without regard to property, profession, or any other circumstance; and a tax on LAND."[157] He "doubt[ed] whether a tax, by a general assessment of personal property, within the United States, is included within the term direct tax."[158] Justice Chase, then, took a narrower view of the term than even Hamilton did, a view that is not altogether consistent with our corpus findings.

Perhaps because of that narrow construction, Justice Chase's reasoning also expressed no concern with the Framers' decision to

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151. *Hylton*, 3 U.S. (3 Dall.) at 174 (opinion of Chase, J.).
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.* at 174–75.
156. *Id.* at 175.
157. *Id.*
158. *Id.*

carve out an area of taxes that required apportionment. Justice Paterson's opinion, in contrast, revealed intense dislike for apportionment. He claimed that the apportionment requirement was included to benefit southern slaveowners.[159]

Justice Paterson had heard and participated in the debates at the Constitutional Convention. He was famous for having introduced the so-called "New Jersey Plan," which called for equal representation of the states in Congress.[160] Justice Chase was not at the Convention, and he did not have access to Madison's notes from the Convention, which would not be published until years later.[161] So, it was understandable that Justice Chase's opinion was limited to logic deduced from the constitutional text without reference to any debate from the Convention. But Justice Paterson had personal knowledge of that debate, and he revealed some of it in his discussion of the apportionment provision:

> The provision was made in favor of the southern States. They possessed a large number of slaves; they had extensive tracts of territory, thinly settled, and not very productive. A majority of the states had but few slaves, and several of them a limited territory, well settled, and in a high state of cultivation. The southern states, if no provision had been introduced in the Constitution, would have been wholly at the mercy of the other states. Congress in such case, might tax slaves, at discretion or arbitrarily, and land in every part of the Union after the same rate or measure: so much a head in the first instance, and so much an acre in the second. To guard them against imposition in these particulars, was the

159. *Id.* at 177 (opinion of Paterson, J.).

160. William Paterson, Notes for Speeches in Convention, June 16, 1787. Manuscript. William Paterson Papers, Manuscript Division, Library of Congress (59.01.00) [Digital ID# us0059_01p1] (accessible at www.loc.gov/exhibits/creating-the-united-states/convention-and-ratification.html#obj4) [https://perma.cc/EAJ2-KS53]).

161. Gregory E. Maggs, *A Concise Guide to the Records of the Federal Constitutional Convention of 1787 as a Source of the Original Meaning of the U.S. Constitution*, 80 GEO. WASH. L. REV. 1707, 1728 (2012); Richard Beeman, Plain, Honest Men: The Making of the American Constitution (New York: Random House), pp. 429–30 (listing all the delegates without naming Chase).

> reason of introducing the clause to the Constitution, which directs that representatives and direct taxes shall be apportioned among the states, according to their respective numbers.[162]

According to Justice Paterson, "[t]he Constitution has been considered as an accommodating system; it was the effect of mutual sacrifices and concessions; it was the work of compromise."[163] He characterized "the rule of apportionment" as "of this nature."[164] But, he added, the rule was "radically wrong; it cannot be supported by any solid reasoning."[165] He found no justification for giving southerners special tax treatment for their slaves.[166] The rule of apportionment, in his mind, was an aberration that "therefore, ought not to be extended by construction."[167] Nor did "numbers" (i.e., a state's population) "afford a just estimate or rule of wealth. It is, indeed, a very uncertain and incompetent sign of opulence."[168] That was yet "another reason against the extension of the principle" of apportionment "laid down in the Constitution."[169] Thus, even though Justice Paterson did not think the question presented in the case was as clear-cut as the rest of the court deemed it to be, one thing was clear to him: the category of direct taxes should be narrowly construed because of the seeming unfairness of the apportionment requirement.

Justice Paterson also agreed with Justice Chase that "[a] tax on carriages, if apportioned, would be oppressive and pernicious" because of the uneven distribution of carriages between the states.[170] He claimed that Hylton's argument constituted nothing more than

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162. *Hylton*, 3 U.S. (3 Dall.) at 177 (opinion of Paterson, J.).
163. *Id.* at 177–78.
164. *Id.* at 178.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.*
169. *Id.*
170. *Id.* at 179.

a return to the method of raising money under the Articles of Confederation, which was a disaster: "Requisitions were a dead letter, unless the state legislatures could be brought into action; and when they were, the sums raised were very disproportional. Unequal contributions or payments engendered discontent, and fomented state-jealousy."[171] And Justice Paterson belittled Hylton's argument that the tax could be imposed on other goods to avoid unfair impact on particular carriage owners. He called it "absurd" and "novel," and that "[t]here will be no rule to walk by" if apportionment were adopted for carriage taxes.[172]

Justice Iredell was not as harsh in his rhetoric as was Justice Paterson, but he too ruled against Hylton all the same. With respect to Hylton's argument about apportioning the tax based on a variety of items, Justice Iredell remarked, "I should have thought this merely an exercise of ingenuity, if it had not been pressed with some earnestness; and as this was done by gentlemen of high respectability in their profession, it deserves a serious answer, though it is very difficult to give such a one."[173] He then proceeded to give an example of a tax that allowed for horses to be substituted for carriages in apportioning taxes.[174] Such apportionment, he noted, might end up with only horses being taxed by a statute that purports to be a tax on carriages.[175] That hypothetical was enough for Justice Iredell to reject Hylton's attempt to address the perceived unfairness of apportionment.[176] In the end, Justice Iredell shared Justice Chase's view that because the carriage tax could not be fairly apportioned, it was "not a direct tax in the sense of the Constitution."[177]

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171. *Id.* at 178.
172. *Id.* at 179–80.
173. *Id.* at 182 (opinion of Iredell, J.).
174. *Id.* at 182–83.
175. *See id.*
176. *See id.* at 183.
177. *Id.*

Justice Iredell also agreed with Justice Chase that "[t]here is no necessity, or propriety, in determining what is or is not, a direct, or indirect, tax in all cases."[178] Nonetheless, he speculated that "a direct tax in the sense of the Constitution" might be "a tax on something inseparably annexed to the soil: Something capable of apportionment under all such circumstances."[179] And he noted that "[a] land or a poll tax may be considered of this description."[180] Iredell's view of what would be a direct tax appears to be consistent with our corpus results, insofar as it confirms that a tax that falls on land is a direct tax. As to any other article that might be taxed, Justice Iredell observed that "there may possibly be considerable doubt."[181] What was not in any doubt was that the carriage tax was "not a direct tax in the sense of the Constitution."[182]

Finally, Justice Wilson penned the shortest opinion of any Justice who decided the case. He wrote simply that he had expressed his views before—he was one of the judges who had ruled for the government in the circuit court—and "the unanimity of the other three Judges" on the Supreme Court served to "relieve" him "from the necessity" of giving his reasoning again.[183] Unfortunately, Justice Wilson's circuit court opinion is not available in any publication we have located.

One informative aspect of the Justices' opinions and counsel's arguments in *Hylton* is the use of secondary sources to determine constitutional meaning. Hamilton mentioned "the doctrine of the French Economists," along with a reference to "Locke and other speculative writers," but he did not rely on those sources for the

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178. *Id.*
179. *Id.*
180. *Id.*
181. *Id.*
182. *Id.*
183. *Id.* at 183–84 (opinion of Wilson, J.).

definition of "direct taxes."[184] Instead, he argued that the common denominator of those writings—that "land taxes only would be *direct* taxes"—was inconsistent with the Constitution, in which "a capitation is spoken of as a direct tax."[185] Thus, he concluded "something more" than just land "was intended by the Constitution" when it used the term "direct taxes."[186] But what that was, Hamilton argued, was unclear.

Wickham also cited the French economists, along with Adam Smith's *Wealth of Nations*, but, unlike Hamilton, he found no ambiguity of terms used in those sources.[187] Even though the Frenchmen disagreed with Smith "on the question" in particular of "whether *direct* or *indirect* taxes are to be preferred," both sides agreed that the term "direct tax" meant "a tax on revenue, or the source from which it is drawn" and that "indirect tax" meant "a tax on consumption and expence."[188]

Taylor did not directly respond to Wickham's cited works, but instead relied on dictionaries to interpret the relevant constitutional terms. He argued that "[i]n all the glossaries, legal, scientific or general to which I have referred, the term *excise* is expounded to mean *tribute*, and tribute is a tax."[189] Taylor cited, in particular, Samuel Johnson's *Dictionary of the English Language*, published in 1755, for its definitions of a "tax," a "duty," and "direct."[190] He also discussed English common law practice as well as policy arguments rooted in political philosophy and history.[191]

The Justices, however, placed only limited reliance on anything other than the constitutional text in their opinions. The only source

184. Brief of the United States, *supra* note 102.
185. *Id.*
186. *Id.*
187. DOCUMENTARY HISTORY, *supra* note 129, at 414–15.
188. *Id.* at 416–17.
189. *Id.* at 385.
190. *Id.* at 386–87.
191. *Id.* at 389–92.

cited other than the Constitution and the Carriage Act was Adam Smith's *Wealth of Nations*, which Justice Paterson's opinion quoted for its discussion of taxation of consumable goods.[192] And other than a fleeting reference to "[t]he history of the United Netherlands" for a small point in Justice Paterson's opinion, the Justices gave no indication that foreign law had any relevance to the issue presented.[193]

What are we to make of the Court's apparent inattention to secondary sources, even dictionaries, to determine constitutional meaning? If corpus linguistics as we know it had been available to the *Hylton* Court, would the Justices have used it?

One answer is that today's practice of corpus linguistics was not needed because the advocates and the Justices were so close in time to the Constitution's adoption and ratification—indeed, some of the Framers and Ratifiers themselves were in court. The reasoning of the Justices, particularly those who attended the Constitutional Convention, evinces personal knowledge of the framing and ratification debates. Today we can replicate that knowledge, albeit imperfectly, through corpus linguistics research.

But despite the fact that some Framers and Ratifiers were present in *Hylton*, the legal arguments and reasoning in that case relied on more than simply personal recollection. Hylton's counsel used "glossaries," including a well-known British dictionary; both sides cited philosophical and legal writings of the French economists and the Scottish enlightenment. The use of such a "corpus," though limited, in early Supreme Court and lower federal court advocacy suggests the propriety of reliance on the corpus linguistics available today in more robust form. The advocacy in *Hylton* also suggests that more than just American sources should be included in the cor-

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192. *See* Hylton v. United States, 3 U.S. (3 Dall.) 171, 180–81 (1796) (opinion of Paterson, J.).

193. *Id.* at 178.

pus to determine constitutional meaning: counsel in *Hylton* implicitly argued that the Framers were influenced by usage of words not only from the British Isles (as the reliance on Adam Smith and John Locke suggests) but also from translated writings from the Continent (for example, the citations to the French economists and the history of the Netherlands). So determining which sources made it to the United States and incorporating them into COFEA could increase its value as a resource for academics, litigants, and courts. The absence of foreign sources in COFEA weakens the force of our findings based on that database.

Finally, Justice Paterson's extensive references to the experiences of the states under the Articles of Confederation confirm the relevance of word usage not just at the national level but also in state laws, customs and practices. And, again, to the extent the states' experience was informed by foreign examples, particularly England, sources from those jurisdictions may be relevant for determining constitutional meaning as well.

IV. AVENUES FOR FUTURE STUDY

Our research left us with two crucial open questions as to the original meaning of direct tax. We still do not know where the line is between a direct tax on property and an indirect excise. And we do not know whether a tax's directness turns on the class of property to which it applies or its economic characteristics. How should we seek the answers to those open questions, having exhausted the assistance corpus linguistics can provide? There are a few possible avenues.

First, as we noted above, research into state systems of taxation and into the original meaning of excise and duty could help clarify the meaning of "direct tax" in the Constitution.[194] Such study should include state practices both before and after ratification of the Constitution, and even as late as the early nineteenth century (a

194. *See supra* notes 117–121 and accompanying text.

time period beyond COFEA's 1799 cutoff date). For example, during the War of 1812, Congress imposed taxes on real estate and various forms of personal property, including household furniture and gold and silver watches.[195] Some of those taxes were apportioned by state; others were not.[196] In a letter published in 1815 in response, Gouverneur Morris declared his "Belief that a Tax on Houses Lands Slaves Cattle or Furniture is a direct Tax" that "ought to be apportioned among the States in the Ratio pointed out by the national Compact."[197] Though Morris was only one voice in the public debate, his writing suggests that additional corpus research after the timeframe that COFEA covers may be probative. At the very least, it should extend beyond its current termination point, Washington's death year, to a year that would capture most of the lifetimes of the founding generation.

Second, Lawrence Solum's constitutional triangulation method offers some promise.[198] He advocates for using a combination of corpus linguistic analysis, immersion, and intense study of the Constitutional Record.[199] Immersion—delving into "sources such as diaries, newspapers, broadsheets, novels, and letters" and even into state and English tax laws—could further clarify popular understanding of the power to impose direct taxes.[200] And thorough analysis of less-studied aspects of the constitutional record (at least with respect to direct taxation) like the ratification debates could shed further light on what the people understood themselves to agree to

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195. Act of July 22, 3 Stat. 22; Aug. 2, 1813, 3 Stat. 53; Act of Jan. 9, 1815, 3 Stat. 164; Act of Jan. 18, 1815, 3 Stat. 186.

196. Act of Jan. 9, 1815, 3 Stat. 164 (apportioning the tax on real property); Act of Jan. 18, 1815, 3 Stat. 186 (imposing an unapportioned tax on personal property).

197. Letter from Gouverneur Morris to the New York Legislature, *reprinted in* TO SECURE THE BLESSINGS OF LIBERTY: SELECTED WRITINGS OF GOUVERNEUR MORRIS 635, 637 (J. Jackson Barlow ed., 2012).

198. *See* Solum, *supra* note 12, at 1624–25.

199. *Id.*

200. *Id.* at 1649.

when they gave the national government the power to impose direct taxes.[201]

Third, Professor William Baude's revival of the Madisonian notion of constitutional liquidation offers another avenue future researchers could take.[202] It is a hotly contested concept, but for those who agree with Baude about liquidation, the Direct Tax Clause could be a prime candidate. Liquidation requires three things: indeterminacy, a course of deliberate practice, and settlement.[203] First, a term or phrase in the Constitution must have "doubtful or contested meanings."[204] That is clearly present here. Although there are some clear meanings of direct tax, there remains a doubtful gray area that is subject to great contestation. Thus, future scholars could seek to determine whether a course of deliberate practice and an ultimate settlement occurred as to the meaning of direct tax, so as to liquidate its meaning as to the close questions the early congresses and Court faced.[205] For liquidation purposes, it bears noting that the all-Federalist Supreme Court's decision in *Hylton* could not liquidate the meaning of direct tax; the final stage (settlement) instead required the acquiescence of the opposing party (in the carriage tax context, Jeffersonian Republicans like Madison) and the acquiescence of the people at large.[206] Whether those features existed merits further exploration.

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201. *See id.* at 1655–63.

202. William Baude, *Constitutional Liquidation*, 71 STAN. L. REV. 1 (2019). *See also* NLRB v. Noel Canning, 573 U.S. 513, 525 (2014) (citing Madison's liquidation approach in using settled practice to interpret the Constitution).

203. Baude, *supra* note 202, at 13.

204. *Id.* at 14 (quoting Letter from James Madison to Martin L. Hurlbut (May 1830), *reprinted in* 9 THE WRITINGS OF JAMES MADISON (Gaillard Hunt ed., 1910)).

205. *See id.* at 16–21.

206. *Id.* at 18–21.

CONCLUSION

Soon after the American Revolution ended, Alexander Hamilton wrote to Gouverneur Morris, "Let us both erect a temple to time; only regretting that we shall not command a longer portion of it to see what will be the event of the American drama."[207] Corpus linguistics goes in the opposite direction of Hamilton's vision: it allows for time travel of sorts to study a digital record from the beginning of the drama—the world of the Framers. Like Marty McFly's DeLorean, corpus linguistics can be improved with modification for subsequent trips back to the past.[208]

But the vehicle, as is, proved usable enough for our purposes. First, the corpus confirmed that the Founding generation did in fact speak of "direct taxes" with confidence that the term could be defined. Second, our findings revealed consensus as to at least some types of taxes that were considered to be direct. Finally, corpus linguistics fits comfortably within the methodology used in *Hylton*. Counsel in that case relied on a rudimentary body of secondary-source materials that predated or were contemporaneous with the Constitution as an aid for its interpretation. Corpus linguistics is simply a more robust approach that is consistent with early federal-court advocacy. And, at least in this instance involving research into the taxing of carriages, corpus linguistics shows promise to be as technologically revolutionary as carriages of the horseless variety.

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207. *From Alexander Hamilton to Gouverneur Morris, 21 February 1784*, NAT'L ARCHIVES: FOUNDERS ONLINE, https://perma.cc/22NG-4G4A (last visited Jan. 7, 2022). [Original source: 3 THE PAPERS OF ALEXANDER HAMILTON, 1782–1786, 512–14 (Harold C. Syrett, ed.)].

208. *Compare* BACK TO THE FUTURE (Universal Pictures 1985) *with* BACK TO THE FUTURE PART II (Universal Pictures 1989) *and* BACK TO THE FUTURE PART III (Universal Pictures 1990).

HARM AND HEGEMONY: THE DECLINE OF FREE SPEECH IN THE UNITED STATES

JONATHAN TURLEY[1]

INTRODUCTION

Throughout its history, the United States has struggled with movements that aim to silence others through state or private action. These periods have been pendulous, with acute suppression followed by relative tolerance for free speech. This boom–or-bust pattern for free speech may well continue. However, the United States is arguably living through one of its most serious anti-free speech periods, and there are signs that the current period could result in lasting damage for free speech due to a rising orthodoxy and intolerance on our campuses and in our public debate. Where fighting for freedom of speech was once a near-universal rallying cry, opposing free speech has now become an article of faith for some in our society. This has led to a rising movement that justifies silencing opposing views, often on the grounds that stopping others from speaking is, in fact, an exercise in free speech. This movement has both public and private components, but it is different from any prior period due to new technological, political, and economic pressures on the exercise of free speech.

The struggle for free speech in the United States is interwoven with our history, from the colonial period to the present day. From the outset, there was a clear concept of free speech, but not a clear

1. J.B. and Maurice C. Shapiro Chair of Public Interest Law, The George Washington University. (c) 2022, Jonathan Turley. All rights reserved.

commitment to protecting it. Indeed, figures like Thomas Paine and John Peter Zenger raised many issues against the English Crown that are still debated today in conflicts over free speech and the free press.[2] Anti-free speech movements tend to rise from deep fractures in our society in periods of unrest. The sense of great injury felt by many can be translated into a license to silence those who are seen as causing or exacerbating that injury. These periods provide an opportunity not only for government abuses but also for extremist groups to feed on social unrest. In recent years, various extremist groups have emerged on both ends of the ideological spectrum, from the Boogaloo movement on the far right to the Antifa movement on the far left. However, the greatest threat to free speech today is the growing support for censorship and speech codes in the mainstream of political and academic thought.

The intolerance for dissenting speech recurs across countries and historical periods. Orthodoxy is the enemy of free speech, and orthodox views are often the result of religious or social values. Heretical and immoral speech has long been the target of majoritarian anger, combining speech intolerance with religious dogma. At one time or another, virtually every religion has tried to compel outsiders to adhere to orthodox views, and blasphemy prosecutions continue in many countries today.[3] Even after the adoption of the Constitution and the Bill of Rights, dominant faiths continued to use

2. *See* Jonathan Turley, *The War on Free Speech: Politicians and Commentators Label War Critics "Traitors"*, RES IPSA, March 18, 2022, https://jonathanturley.org/2022/03/18/the-war-on-free-speech-politicians-and-commentators-label-war-critics-traitors/ [https://perma.cc/ZE6D-AXF5]; Jonathan Turley, *Viewpoint: How Likely Is an Assange Conviction in US?*, BBC (Apr. 11, 2019), https://www.bbc.com/news/world-us-canada-47874728 [https://perma.cc/JW5S-3CED].

3. Jonathan Turley, *Just Say No To Blasphemy: U.S. Supports Egypt in Limiting Anti-Religious Speech*, RES IPSA (Oct. 19, 2009), https://jonathanturley.org/2009/10/19/just-say-no-to-blasphemy-u-s-supports-eygpt-in-limiting-anti-religious-speech [https://perma.cc/BYA9-QU6E]; *see also* Haroon Janjua, *Eight-Year Old Boy Becomes Youngest Person Charged with Blasphemy in Pakistan*, THE GUARDIAN (Aug. 9, 2021),

social or governmental controls to perpetuate their values, including abuses directed at other faiths. Yet the most damaging anti-free speech movements in our history tended to be secular efforts involving government-mandated or government-encouraged speech controls. That is true of the current threats against free speech, involving private groups and companies that have imposed unprecedented levels of speech controls across digital and educational platforms.[4]

There has already been a great deal of discussion on the erosion of free speech in the United States.[5] There is obviously no meter that continually measures free speech protection, so this debate is unavoidably anecdotal. Yet objections to the "cancel culture" now extend from academia to journalism to the arts.[6] In each of these areas, long-standing principles of diversity and tolerance of viewpoints

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https://www.theguardian.com/global-development/2021/aug/09/eight-year-old-becomes-youngest-person-charged-with-blasphemy-in-pakistan [https://perma.cc/QY4M-AJXJ].

4. Indeed, calls for greater censorship often emphasize a false sense of neutrality in the use of benign algorithms to remove content. Jonathan Turley, *Enlightened Algorithms? Progressives Ask Big Tech to Censor "Bad" Ideas to Save Us from Ourselves*, USA TODAY (Sept. 26, 2021), https://www.usatoday.com/story/opinion/2021/09/26/elizabeth-warren-wants-amazon-censor-your-reading/5832060001 [https://perma.cc/RUC4-A99W].

5. I have previously testified on issues related to this article. *Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (June 7, 2022) (testimony of Professor Jonathan Turley); *Fanning the Flames: Disinformation and Extremism in the Media: Hearing Before the Subcomm. on Communications and Technology of the H. Comm. on Energy and Commerce*, 117th Cong. (Feb. 24, 2021) (testimony of Professor Jonathan Turley); *The Right of The People Peaceably To Assemble: Protecting Speech By Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Aug. 4, 2020) (testimony of Professor Jonathan Turley).

6. My blog, Res Ipsa (www.jonathanturley.org), chronicles such cases on a rolling basis. I will be offering examples from the blog of some of the more notable controversies but recognize that much of this record remains anecdotal in the absence of a reliable comprehensive study. Yet these public controversies are important in their own right since they can create a chilling effect on the exercise of free speech and academic freedom.

have been replaced by increasing rigidity and hegemony. Underlying these controversies is a fundamental debate over the meaning of free speech and its inherent harm. The notion of silencing others as a form of speech reflects a deep and widening disagreement over the protections for heterodoxy in a variety of different fields. Leading publications like the *New York Times* have apologized for publishing opposing views on issues, while leading journalists, editors, and columnists have resigned under fire for publishing dissenting viewpoints.[7] Museum curators have been forced out for questioning calls for race-based policies on acquisition or preferences.[8] When leading writers, from Salman Rushdie to J.K. Rowling to

7. In June 2020, Sen. Tom Cotton (R-AR) ran a column encouraging the use of troops to quell rioting, discussing the history of repeated such deployments by American presidents. The column was controversial, but it did not misstate the law. Though many of us disagreed with Sen. Cotton's proposal, it offered a conservative opinion. The outcry after the column's publication led to the opinion editor's resignation, a promise to reduce future opinion articles, and an overhauling of staff. Elahe Izadi et al., *After Staff Uproar, New York Times Says Sen. Tom Cotton Op-Ed Urging Military Incursion into U.S. Cities 'Did Not Meet Our Standards'*, WASH. POST (June 4, 2020), https://www.washingtonpost.com/media/2020/06/03/new-york-times-tom-cotton [https://perma.cc/79LU-HLKN]; *see also* Jonathan Turley, *Mea Culpa: New York Times Caves to Protests and Apologizes For Posting Conservative Opinion*, RES IPSA (June 5, 2020), https://jonathanturley.org/2020/06/05/mea-culpa-new-york-times-caves-to-protests-and-apologizes-for-posting-conservative-opinion [https://perma.cc/RT63-2ZAW]. A similar apology was issued by *Newsweek* after it ran a story on the possible challenge to the eligibility of Kamala Harris for president by John Eastman, a conservative law professor. *See* Tal Axelrod, *Newsweek Apologizes for Kamala Harris Op-Ed*, THE HILL (Aug. 15, 2020), https://thehill.com/homenews/media/512155-newsweek-apologizes-for-kamala-harris-op-ed [https://perma.cc/R9WP-LB6Y]; *see also* Jonathan Turley, *Yes, Kamala Harris Is Eligible for Vice President*, RES IPSA (Aug. 14, 2020), https://jonathanturley.org/2020/08/14/yes-kamala-harris-is-eligible-for-vice-president [https://perma.cc/TDX9-5BA4].

8. *See, e.g.*, Julia Halperin, *Gary Garrels, the San Francisco Museum of Modern Art's Longtime Chief Curator, Resigns Amid Staff Uproar*, ARTNET NEWS (July 11, 2020), https://news.artnet.com/art-world/gary-garrels-departure-sfmoma-1893964 [https://perma.cc/33EZ-C25P] (detailing how a senior museum curator resigned after stating the San Francisco Museum of Modern Art could not avoid collecting the work of white men, as it would amount to "reverse discrimination").

Noam Chomsky, signed a letter raising alarm over the growing intolerance for opposing views,[9] they were denounced by colleagues.[10] At the same time, legislative proposals to criminalize speech have been proposed in the cause of protecting democracy.[11]

These conflicts are often dismissed because many are the actions or policies of private actors like Big Tech companies rather than a form of state action. While some have called to amend the Constitution to allow for greater speech regulation,[12] others insist that blacklisting of authors or banning certain cable networks are not true free speech conflicts since they fall outside of the First Amendment.[13] However, free speech values are neither synonymous with nor contained exclusively within the First Amendment. As will be discussed below, all of these public and private forms of censorship undermine free speech values.

The rise in speech regulation is often defended on the basis that free speech itself is a danger. This article explores the rationalization that speech controls are justified as a defense or response to the

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9. *JK Rowling Joins 150 Public Figures in Warning over Free Speech*, BBC NEWS (July 8, 2020), https://www.bbc.com/news/world-us-canada-53330105 [https://perma.cc/R3YJ-LGFK].

10. *See, e.g.*, Allyson Chiu, *Backlash After Cultural Icons Including Margaret Atwood Warn Free Speech Is Under Threat*, NAT'L POST (July 8, 2020), https://nationalpost.com/news/world/backlash-after-cultural-icons-including-margaret-atwood-warn-free-speech-is-under-threat [https://perma.cc/3ZX6-273L].

11. *See, e.g.*, Jonathan Turley, *New York Considers Legislation to Curtail Free Speech in the Name of Democracy*, RES IPSA (Dec. 30, 2021), https://jonathanturley.org/2021/12/30/new-york-considers-legislation-to-curtail-free-speech-in-the-name-of-democracy [https://perma.cc/XPQ3-M6RH].

12. *See, e.g.*, Jonathan Turley, *"Aggressively Individualistic": Miami Law Professor Proposes a "Redo" of the First and Second Amendments*, RES IPSA (Dec. 20, 2021), https://jonathanturley.org/2021/12/20/aggressively-individualistic-miami-law-professor-proposes-a-redo-of-the-first-and-second-amendments [https://perma.cc/EY96-R4NN].

13. *See, e.g.*, Jonathan Turley, *Free Speech Inc.: How Democrats Have Found a New but Shaky Faith in Corporate Speech*, RES IPSA (May 10, 2021), https://jonathanturley.org/2021/05/10/free-speech-inc [https://perma.cc/EDJ2-WXYA].

harm posed by opposing views. It is a framing that explicitly or implicitly raises the "harm principle" of John Stuart Mill—with a lethal twist. Many have long relied upon the harm principle in a myriad of areas to define the limits on government controls and action, particularly in defense of free speech.[14] A type of Millian harm principle is now being used to justify both government controls and private action to silence those with opposing views. Indeed, the anti-free speech movement on our campuses is often defended as a type of militant Millian movement,[15] a construct that is neither faithful to Mill's writing nor logical in its application. Yet that same rationale has been used by social media companies[16] as the foundation for the robust censorship programs now enforced across the media in what is often called the "post-truth" environment.[17]

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14. Jonathan Turley, *The Loadstone Rock: The Role of Harm in the Criminalization of Plural Unions*, 64 EMORY L.J. 1905 (2015).

15. *See, e.g.*, Jason Pontin, *The Case for Less Speech*, WIRED (Nov. 6, 2018), https://www.wired.com/story/ideas-jason-pontin-less-speech [https://perma.cc/24GH-LK5D] ("I don't want speech to be less free, exactly. I want less speech absolutely and I want what is said to be less destructive. Less speech is more. Less speech, more coolly expressed, is what we all need right now—a little less goddamn talk altogether.").

16. For example, Facebook's former "content moderation director" Dave Willner has explained that the company used Millian harm principles as the foundation for its censorship program. However, he admitted that the use of the principle was "more utilitarian than we are used to in our justice system. It's fundamentally not rights–oriented." Julia Angwin & Hannes Grassegger, *Facebook's Secret Censorship Rules Protect White Men from Hate Speech but Not Black Children*, PROPUBLICA (June 28, 2017), https://www.propublica.org/article/facebook-hate-speech-censorship-internal-documents-algorithms [https://perma.cc/44TH-7BDQ]. As discussed in this article, the use of the harm principle for censorship gradually expanded to encompass a broader and broader scope of speech. *Id.*

17. "Post-truth" has become a convenient re-framing of the free speech debate to maintain that prior free speech principles are no longer suited to a world where virality rather than truth dominates in discourse. Post-truth has been defined as "circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief." Cynthia Kroet, *'Post-Truth' Enters Oxford English Dictionary*, POLITICO (June 27, 2017), http://www.politico.eu/article/post-truth-enters-oxford-english-dictionary [https://perma.cc/R8E8-NQ89].

This article looks at the anti-free speech movement and its reliance on the harm rationale. However, it is important to note that arguments for greater speech regulation often reject another aspect of Mill's writings on free speech: the self-corrective or protective capacity of free speech systems. That view is treated as hopelessly and even dangerously outdated. One commentator wrote, "Many more of the most noble old ideas about free speech simply don't compute in the age of social media. John Stuart Mill's notion that a 'marketplace of ideas' will elevate the truth is flatly belied by the virality of fake news."[18] Such claims are often presented as manifestly true. The fact that "disinformation" or hateful speech exists on social media is treated as evidence that traditional Millian notions of free speech are proven failures. Such a view ignores that neither Mill nor his adherents ever claimed that free speech would chase bad speech from the media platforms or our lives. Disinformation and hateful speech existed in Mill's life and have always existed as part of human interactions. Free speech does not cure stupidity; it merely exposes it. Likewise, speech intolerance is pronounced across the ideological spectrum.[19]

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18. Zeynep Tufekci, *It's the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018), https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship [https://perma.cc/S232-6KWS].

19. For example, while some advocating critical race theory (CRT) or related concepts have shown intolerance for opposing views on campus, they have also been the subject of intolerance. *See, e.g.*, Jonathan Turley, *Lawyer Sues Legal Aid Society for Discrimination After Being Attacked for Her Criticism of Critical Race Theory*, RES IPSA (July 14, 2021), https://jonathanturley.org/2021/07/14/lawyer-sues-legal-aid-society-for-discrimination-after-being-attacked-for-her-criticism-of-critical-race-theory [https://perma.cc/K2XK-UA8S]; Jonathan Turley, *GoFundMe Shuts Down Fundraiser of Parents Opposing Critical Race Theory in Loudoun County*, RES IPSA (Mar. 31, 2021), https://jonathanturley.org/2021/03/31/gofundme-shuts-down-fundraiser-of-parents-opposing-critical-race-theory-in-loudoun-county [https://perma.cc/WP5A-Z5YW]. Efforts to prevent the teaching of CRT in universities reflect the same intolerance for diversity of thought. *Republicans Try to Ban Critical Race Theory in Colleges*, DAILYCABLE, https://thedailycable.com/06/14/politics/39183/republicans-try-to-ban-critical-race-theory-in-colleges [https://perma.cc/U85P-MYUV] (last visited Feb. 8, 2022).

Recent controversies have reinforced the view that forms of public and private censorship only make it harder for good speech to prevail. With the rise of speech controls, the faith of the public in both the government and the media has declined.[20] As a result, people no longer have faith in what they read, or they confine themselves to siloed news sources. Ironically, while disinformation is often used to justify censorship systems, the current mistrust is a breeding ground for disinformation that feeds on the isolation and suspicions of citizens. That in turn undermines, rather than strengthens, our democracy. As Alexander Meiklejohn noted, the ability to marshal your own facts and reach your own conclusions is an essential component of self-governance:

> Public discussions of public issues, together with the spreading of information and opinion bearing on those issues, must have a freedom unabridged by our agents. Though they govern us, we, in a deeper sense, govern them. Over our governing, they have no power. Over their governing we have sovereign power.[21]

The distrust fueled by speech controls can undermine not just political but also public health discussions on issues like vaccines.[22] Controlling information tends to diminish faith in that information.

In addressing these rationales for speech regulation, this article looks at our long struggle with free speech over the decades and how a new anti-free speech movement has emerged. This movement is proving far more effective due to a synthesis of private and

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20. Jonathan Turley, *Trust in the Media Hits All-Time Low*, RES IPSA (Jan. 22, 2021), https://jonathanturley.org/2021/01/22/trust-in-the-media-hits-an-all-time-low-in-new-polling [https://perma.cc/NQM5-YHW6] (noting only forty-six percent trust the media).

21. Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 257 (1961).

22. Caroline Catherman & Leslie Postal, *Central Florida Doctors Urge Vaccinations as Parents Debate Whether to Get COVID-19 Shots for Kids*, ORLANDO SENTINEL (Nov. 5, 2021), https://www.orlandosentinel.com/coronavirus/os-ne-coronavirus-cdc-pfizer-covid-vaccine-kids-5-to-11-20211105-jhdd45rn2jdbpagwzhbcvtmaia-story.html [https://perma.cc/EEK6-PASU] ("The polling found 75% of unvaccinated parents get most of their information from social media and distrust mainstream media sources.").

public forms of speech regulation. The idea that free speech values will be instinctively and jealously defended can no longer be assumed, even by academics and writers who have been traditional advocates for those values. That raises the question of what alternatives exist to ensure free speech values are upheld in our institutions. This article proposes that free speech values can be legislatively protected, even coerced, by the government. There is a role for the government in reinforcing traditional enclaves for the exercise of the freedom of expression in our society. Indeed, with the rise of massive private systems of censorship, free speech may now depend on the government more than at any time in our history.

I. FREE SPEECH AND THE ILLIBERAL INTERPRETATION OF MILLIAN HARM

The right to free speech holds the curious position of being universally accepted as a defining right of our democracy while also being continually challenged as to what it actually means. For some of us, free speech is a normative value or human right—a right that is not just an essential part of a truly free society but also an essential part of a fully human person. Others view free speech in more functionalist terms as supporting a free society, but not necessarily a transcendent or unalterable right. Not surprisingly, one's view often depends on a broader understanding of the proper role (and limitations) of government. That understanding has direct bearing, not simply in defining the right of free speech, but also in delineating the role of government in protecting the right.[23] Someone who

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23. While some opinions echo functionalist rationales, the Court has expressly emphasized that the First Amendment is not just a protection for speech directly related to democratic values:

> It is no doubt true that a central purpose of the First Amendment "was to protect the free discussion of governmental affairs." . . . But our cases have

holds a functionalist view may be more willing to make tradeoffs against free speech, particularly if the utility of free speech can be achieved by other means.

Free speech theories often interlace normative and functionalist rationales. This duality is captured in Cato's letters that were widely distributed in the colonies, which included the statement: "[w]ithout Freedom of Thought, there can be no such Thing as wisdom; and no such thing as publick Liberty, without Freedom of Speech; which is the Right of every Man, as far as by it, he does not hurt and Control the right of another."[24] The statement captures many of the elements discussed below. It recognized the importance of the right to the search for wisdom and fulfillment. Yet, it also speaks of the right itself in functionalist terms as a necessary protection of liberty. Finally, it alludes to a type of harm principle (à la John Stuart Mill) as the measure of permissible government interference regarding the right to free speech. Many of today's rivaling views come down to claims of harmful speech as a justification to regulate said speech, or to prevent others from engaging in it. The harm principle is generally viewed by libertarians as a barrier to speech regulation,[25] but it has also been used by extremist groups as a tool to justify the denial of opposing views.[26]

> never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (citations omitted) (quoting concurring opinion of Powell, J., 431 U.S. at 259).

24. JOHN TRENCHARD & THOMAS GORDON, CATO'S LETTERS OR ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, AND OTHER IMPORTANT SUBJECTS 110 (Ronald Hamowy ed., Liberty Fund 1995) (1755).

25. *See* Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 455 (1988). The Millian influence is also evident in the writings of justices like Justice Scalia, Justice Kennedy, Justice Breyer, and Chief Justice Roberts. *See* Eric T. Kasper & Troy A. Kozma, *Absolute Freedom of Opinion and Sentiment on All Subjects: John Stuart Mill's Enduring (and Ever-Growing) Influence on the Supreme Court's First Amendment Free Speech Jurisprudence*, 15 U. MASS. L. REV. 2, 52 (2020).

26. *See infra* Part III.B and accompanying citations.

The Constitution expresses the protection of speech from government in absolutist terms: "Congress shall make no law . . . abridging the freedom of speech."[27] That language led jurists like Justice Black to take the position that the Constitution "says 'no law,' and that is what I believe it means."[28] Justice Black's position was more textual than ideological on the meaning of the right. Yet, even if not absolute, free speech is properly treated as a defining freedom. Indeed, despite the erosion of free speech in Europe,[29] this view is captured in Article Ten of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which affirms that the right to freedom of expression "shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers."[30]

As Cato's statement reflects, free expression is inextricably tied to human rights. While John Locke recognized that humans yielded the total freedom afforded by the state of nature when they embraced civilization, he still recognized certain rights as inalienable, including the freedom of thought.[31] Locke did not address the right to free speech directly, and some have challenged arguments that

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27. U.S. CONST. amend. I.

28. *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 554 (1962) (quoting Justice Black in an interview with Professor Edmond Cahn).

29. *See, e.g.*, Jonathan Turley, *The Biggest Threat to French Free Speech Isn't Terrorism. It's the Government.*, WASH. POST (Jan. 8, 2015), https://www.washingtonpost.com/opinions/what-it-means-to-stand-with-charlie-hebdo/2015/01/08/ab416214-96e8-11e4-aabd-d0b93ff613d5_story.html [https://perma.cc/9LVC-JATK].

30. European Convention for the Protection of Human Rights and Fundamental Freedoms art. 10(1), Nov. 4, 1950, 213 U.N.T.S. 221.

31. While Locke recognized the authority of the state after transcending the state of nature, certain pre-state rights remain attached to the individual. This view of natural rights was highly influential for the generation of the Framers. *See, e.g.*, THOMAS GORDON, OF FREEDOM OF SPEECH: THAT THE SAME IS INSEPARABLE FROM PUBLICK LIBERTY., NO. 15 (1721), *reprinted in* CATO'S LETTERS: ESSAYS ON LIBERTY, CIVIL AND RELIGIOUS, & OTHER IMPORTANT SUBJECTS 96 (Da Capo Press 1971) (1755).

his writings on freedom constitute a robust endorsement of free speech.[32] However, without the freedom of speech, there is no freedom of thought, which Locke explicitly named as an inalienable right.[33] Thus, Cato's letters maintained that in a free society, you must be able to "think what you would, and speak what you thought."[34] It is the paradigmatic right embraced by writers like Milton who declared, "Give me the liberty to know, to utter, and to argue freely according to conscience, above all liberties."[35] This deontological view was manifest in the early American expression of the freedom of speech.[36] For example, the Pennsylvania Declaration of Rights affirmed "certain natural, inherent and inalienable rights"[37] and expressly stated that "the people have a right to freedom of speech, and of writing, and publishing their sentiments."[38] James Madison said that speech was one of the inalienable natural rights "retained" by individuals when they establish a government.[39]

A natural rights foundation for free speech waned with the greater adherence to utilitarianism and positivism in legal theory. The latter movement spawned figures like Oliver Wendell Holmes who rejected the natural rights premise of figures like Locke. For

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32. Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 S. CAL. L. REV. 649, 703 (1987) ("Because of its explicitly religious premise, Locke's defense cannot be imported unaltered to serve as a theory of free speech under the [F]irst [A]mendment.").

33. JOHN LOCKE, AN ESSAY CONCERNING HUMAN UNDERSTANDING 353 (Peter H. Nidditch ed., Clarendon Press 1975) (1689) ("[T]hough Men uniting into politick Societies, have resigned up to the publick the disposing of all their Force . . . yet they retain still the power of Thinking . . . .").

34. TRENCHARD & GORDON, *supra* note 24, No. 15, at 113.

35. JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING, TO THE PARLIAMENT OF ENGLAND 40 (NuVision Publ'ns 2010) (1644).

36. *See generally* Philip A. Hamburger, *Natural Rights, Natural Law, and American Constitutions*, 102 YALE L.J. 907, 922 (1993).

37. PA. CONST. of 1776, art. I (1776).

38. *Id.* at art. XII.

39. THE FOUNDERS' CONSTITUTION vol. 5, 20, 26 (Philip B. Kurland & Ralph Lerner eds., 1987).

Holmes, rights like free expression were separate from "the rights of man in a moral sense."[40] Advocates for free speech shifted toward defending free speech in terms of its functional value to the democratic process and balanced value against what Roscoe Pound called "public interests."[41] Free speech increasingly was defended as critical to Holmes's marketplace of ideas[42]—a value of "social interests" as opposed to "the individual interest."[43] Once defined in this way, balancing allowed for tradeoffs with state interests in limiting speech. Thus, Pound declared free speech "may so affect the activities of the state necessary to its preservation as to outweigh the individual interest or even the social interest in free belief and free speech."[44]

Once unmoored from a natural rights foundation, free speech becomes a socially defined and socially tolerated right, often balanced against countervailing interests like combatting hate speech.[45] Even with Pound's construction, the discussion returns to where it began, with a question of harm. Under this construct, the right could be curtailed when social interests outweigh individual interests. For libertarians, the use of Millian harm can be appealing since Mill is widely read as sharply curtailing the range of government action to areas where a person's actions or speech harms others.[46] However, the harm principle can be used perversely as a rationale for speech controls. How one defines *harm* can turn a

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40. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 460 (1897).

41. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 343, 344 (1915).

42. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (valorizing the "free trade in ideas").

43. Roscoe Pound, *Interests of Personality*, 28 HARV. L. REV. 445, 453 (1915).

44. *Id.* at 456.

45. Early advocates of a broad interpretation of free speech included Theodore Schroeder, who confined speech limits to criminal acts. *See The Meaning of Unabridged "Freedom of Speech"*, *in* THEODORE SCHROEDER, FREE SPEECH FOR RADICALS 37, 40 (1916).

46. *See generally* JOEL FEINBERG, HARM TO OTHERS (1987).

libertarian principle into an authoritarian measure. Indeed, as discussed below, that is precisely what many governments and groups like Antifa have done.

The harm rationale underlies many of the calls for the barring of both speakers and viewpoints from social media and even news programming. Members of Congress have demanded that Big Tech companies bar views that are misinformative on questions ranging from election fraud to climate change to transgender policies.[47] Given the prior use of Mill's harm principle by companies like Facebook as the basis for "content modification" programs, these politicians sought continually greater harm avoidance. Indeed, banning entire networks became plausible, if not imperative. In a letter to all major cable suppliers, Democratic members of Congress demanded that companies explain why they allow networks like Fox News to be carried on cable. Underlying the suggestion of removing the network from cable access was the notion that it was harming society through disinformation. Representatives Anna Eshoo and Jerry McNerney stressed:

> [N]ot all TV news sources are the same. Some purported news outlets have long been misinformation rumor mills and conspiracy theory hotbeds that produce content that leads to real harm. Misinformation on TV has led to our current polluted information environment that radicalizes individuals to commit seditious acts and rejects public health best practices, among other issues in our public discourse.[48]

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47. *See, e.g.*, Jonathan Turley, *Twitter CEO Admits Censoring the Hunter Biden Story Was "Wrong" . . . Democrats Call for More Censorship*, RES IPSA (Nov. 18, 2020), https://jonathanturley.org/2020/11/18/twitter-ceo-admits-censoring-hunter-biden-story-was-wrong-democrats-call-for-more-censorship [https://perma.cc/53DL-KH9A].

48. Letter from Rep. Anna Eshoo and Jerry McNerney to Thomas M. Rutledge, CEO and Chairman, Charter Communications, Inc. (Feb. 22, 2021) (footnote omitted) https://eshoo.house.gov/sites/eshoo.house.gov/files/Eshoo-McNerney-TV-Misinfo%20Letters-2.22.21.pdf [https://perma.cc/LQM9-VLJV].

The harm rationale has been repeated, mantra-like, in Congress as many members have threatened to pull immunity protections from social media companies under Section 230 of the 1996 Communications Decency Act.[49]

It is important to note that the use of the harm rationale as a limit on speech is also now common in mainstream academic work. Professor Randall Bezanson has argued that recent Supreme Court cases on free speech are "analytically and methodologically flawed" and that these rulings have led to a countervailing danger of "too much free speech."[50] Likewise, Professor Mary Anne Franks has dismissed claims of a free speech crisis in America's universities, stating,

> The true threat to free speech on college campuses is posed not by university norms on free speech, but by the attack on those norms by the Internet culture of free speech. The Internet model of free speech is little more than cacophony, where the loudest, most provocative, or most unlikeable voice dominates . . . . If we want to protect free speech, we should not only resist the attempt to remake college campuses in the image of the Internet, but consider the benefits of remaking the Internet in the image of the university.[51]

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49. 47 U.S.C. § 230(c) (2018). *See* Jonathan Turley, *Learning to Fear Free Speech: How Politicians Are Moving to Protect Us from Our Unhealthy Reading Choices*, RES IPSA (Oct. 11, 2021), https://jonathanturley.org/2021/10/11/learning-to-fear-free-speech-how-politicians-are-moving-to-protect-us-from-our-unhealthy-reading-choices [https://perma.cc/8FJF-RAGT].

50. RANDALL P. BEZANSON, TOO MUCH FREE SPEECH? 258 (2012).

51. Mary Anne Franks, *The Miseducation of Free Speech*, 105 VA. L. REV. ONLINE 218, 242 (2019), https://www.virginialawreview.org/volumes/content/miseducation-free-speech [https://perma.cc/75YG-2844] [hereinafter Franks, *Miseducation*]. Professor Franks calls free speech advocates "elitists" who call for tolerance but who do not experience the harm or costs from free speech. Mary Anne Franks, *Free Speech Elitism: Harassment Is Not the Price 'We' Pay for Free Speech*, HUFFINGTON POST: THE BLOG (Jan. 23, 2014), http://www.huffingtonpost.com/mary-anne-franks/harassment-free-speech-women_b_4640459.html [https://perma.cc/H7F8-LSLU].

The "cacophony" that Professor Franks finds so unsettling on the Internet is the very manifestation of free and open debate for free speech advocates. Franks simply discards some views as unworthy and inimical to education:

> While there are many competing ideas about the goal of higher education, and all universities fall short of the ideal, at the core of the educational project is the desire to learn more—about the world, about other people, about the nature of truth. That project requires discernment, not blind insistence on the value of hearing "both sides."[52]

"Discernment" is euphemistically appealing for intellectuals who still cannot admit to censorship. In the same fashion, denouncing "both sidesism" is more palpable than calling for the silencing of an opposing side.

Similarly, Professor Alexander Tsesis has argued that "regulating intimidating and defamatory speech on campus outweighs the minimal burden it places on speakers" and suggested that the First Amendment concerns tied to hate speech codes can be adequately addressed by current case law in such a way that the university can still "openly foster the discussion of ideas."[53] All of these arguments reject the strong normative basis for the preservation of an open "marketplace of ideas."[54] By abandoning the bright lines of norma-

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52. Franks, *Miseducation*, *supra* note 51, at 239.

53. Alexander Tsesis, *Burning Crosses on Campus: University Hate Speech Codes*, 43 CONN. L. REV. 617, 671–72 (2010).

54. In fairness to such writers, the Court itself often espouses conflicting normative and functionalist sentiments on free speech even in the same opinions. For example, in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Court noted:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society's interest in "uninhibited, robust, and wide-open" debate on

tive free speech, scholars find themselves on a spectrum of censorship that runs from "discernment" in silencing certain speakers to the more extreme "deplatforming" by groups like Antifa. The extent of speech curtailment becomes a matter of degree. Antifa takes this harm rationale to the extreme of denying the right of expression to a wide array of voices deemed harmful and reactionary.[55]

The deep association with Mill and his harm principle can lead writers to slip the moorings of his actual writings on subjects like free speech. We often describe the Mill we want as opposed to the Mill we got in works like *On Liberty*.[56] Mill was in the end a utilitarian who incorporated rights into his view of what is best "for all

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> public issues. They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Id. at 339–40 (citations omitted). The Court directly references the Millian notion of the self-corrective capacity of free speech and the reliance on good speech to counter bad speech in the marketplace of ideas. However, it then notes the lack of value of false statements or false speech. This seemingly conflicted position however can be reconciled in the context of defamation law. Mill never suggested that citizens could not challenge false or fraudulent statements in their individual capacity, particularly when such statements caused concrete harm. Indeed, such harm is Millian. It is not a moral but cognizable legal injury. Allowing liability for such false statements is not imposing the "authoritative intrusion" denounced by Mill.

55. *See* Jonathan Turley, *Is Antifa the Greatest Movement Against Free Speech in America?*, THE HILL (Aug. 4, 2020) https://thehill.com/opinion/civil-rights/510405-is-antifa-the-greatest-movement-against-free-speech-in-america [https://perma.cc/3GQT-VERY].

56. JOHN STUART MILL, ON LIBERTY (Project Gutenberg ed. 2011) (1859), available at https://www.gutenberg.org/files/34901/34901-h/34901-h.htm [https://perma.cc/VH28-NPE3] [hereinafter MILL, ON LIBERTY]. Mill himself references limits on speech in cases of incitement for example. "No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act." *Id.* at 103–04. He went on to explain:

> An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob

concerned."[57] After all, utilitarian figures like Jeremy Bentham rejected natural law as "nonsense upon stilts."[58] Yet, the harm principle is arguably the single most influential theory in protecting individual rights from majoritarian controls. Mill identified "one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . ."[59] Under that principle, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is . . . to prevent harm to others."[60] Mill anticipated that his principle could be misused since "[h]ow (it may be asked) can any part of the conduct of a member of a society be a matter of indifference to the other members? No person is an entirely isolated being; it is impossible for a person to do anything seriously or permanently hurtful to himself without mischief reaching at least his near connections, and often far beyond them."[61]

Mill recognized the essentiality of free speech, "being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it."[62] For those who view free speech as a natural right, such statements

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> assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.

Id. at 104. While the reservation for opinions that become actions is nonproblematic, many of us would disagree with this passage as a rationalization for criminalization or regulation of speech. However, it has been cited by at least one court as the basis for treating former President Trump's January 6th speech as grounds for civil liability. *See* Thompson v. Trump, 2022 U.S. Dist. LEXIS 30049 (D.D.C. 2022).

57. JOHN STUART MILL, UTILITARIANISM (1861), *reprinted in* 10 COLLECTED WORKS OF JOHN STUART MILL 218 (J.M. Robson ed., University of Toronto Press 1963).

58. JEREMY BENTHAM, ANARCHICAL FALLACIES (1859), *reprinted in* NONSENSE UPON STILTS: BENTHAM, BURKE, AND MARX ON THE RIGHTS OF MAN 201 (Jeremy Waldron ed., 1987).

59. MILL, ON LIBERTY, *supra* note 56, at 17.

60. *Id.*

61. *Id.* at 154.

62. *Id.* at 13.

support a categorical view of harm as excluding speech that does not fall into a narrow category of crimes like conspiracy. For others, Mill's harm principle can be read as part of a general utilitarian philosophy where utility favors functionalist limits on free speech and other values. At its most extreme, the harm principle can be reduced to a threshold exclusion for entirely harmless acts or views. Under that approach, once harm is found, the issue becomes not of harm but expediency.[63] Writers like Gerald Dworkin have stressed that it "is clear that the [harm] principle is supposed to settle the issue of the state's jurisdiction, not the question of when the state *should* exercise its power."[64] The danger of this jurisdictional, as opposed to categorical, approach is evident in the classic slippery slope where the question becomes a mere debate of the efficacy of particular speech controls in addressing harmful speech. Mill offered a more nuanced view between these extremes.[65] He was admittedly more utilitarian than categorical in his discussion on free speech. He viewed heterodoxy as a vital element of the advancement of thought and society.[66] He viewed the right as a guarantee that ideas could be tested, supplying a range of options for society to choose from.[67]

The discussion of the practicality or utility of free speech expressed in Mill's writings should not take away from his overall philosophy of maximizing individual freedom and confining state

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63. *See* Steven D. Smith, *Is the Harm Principle Illiberal?*, 51 AM. J. JURIS. 1 (2006).

64. Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 934 (1999).

65. *See* David A.J. Richards, *Constitutional Legitimacy, The Principle of Free Speech, and the Politics of Identity*, 74 CHI.-KENT L. REV. 779, 789 (1999) ("John Stuart Mill's liberal theory of free speech and private life seems to many more normatively powerful than the utilitarian grounds he urges in support of it. In particular, nothing in the structure of utilitarian argument (which gives equal weight to all pleasures and pains) can reasonably explain the normative priority Mill, like most liberals, accords speech.").

66. MILL, ON LIBERTY, *supra* note 56, at 52.

67. *Id.* at 19.

action.[68] Mill started with a view that "all restraint, *qua* restraint, is an evil."[69] He also viewed free speech as essential to being fully human, describing "the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion."[70] Mill clearly rejected the notion of insults or offense as harms that crossed the threshold for coercive actions.[71] While he acknowledged that lines must be drawn, he argued that those lines ought to be as far removed from limitations on the freedom of thought as possible:

> That there is, or ought to be, some space in human existence thus entrenched around, and sacred from authoritative intrusion, no one who professes the smallest regard to human freedom or dignity will call in question: the point to be determined is, where the limit should be placed; how large a province of human life this reserved territory should include. I apprehend that it ought to include all that part which concerns only the life, whether inward or outward, of the individual, and does not affect the interests of others, or affects them only through the moral influence of example.[72]

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68. This overall context is lost in arguments that build on such rhetorical points like Mill not actually using the term "freedom of expression" as opposed to "expression of opinion." Richard Vernon, *John Stuart Mill and Pornography: Beyond the Harm Principle*, 106 ETHICS 621, 622–23 (1996) ("'Discussion' and 'opinion' are words much narrower than 'expression' in their scope of reference. (They are narrower, even, than 'speech.')").

69. *Id.* at 623.

70. MILL, ON LIBERTY, *supra* note 56, at 97.

71. The solution to such annoying or insulting speech is voicing countervailing values and making countervailing associations. It is the same principle that applies to those claiming social harm to intimate relationships. Richard A. Epstein, *Toleration: The Lost Virtue*, 14 THE RESPONSIVE COMMUNITY 41, 50 (2004) ("[N]o one . . . requires [opponents of gay marriage] to alter anything that they do with their own lives. . . . The operative principle should remain that two individuals can form whatever associations they choose unless one can show harm (beyond offense) to third parties, and this cannot be done in this case.").

72. JOHN STUART MILL, PRINCIPLES OF POLITICAL ECONOMY (1848), *reprinted in* 3 THE COLLECTED WORDS OF JOHN STUART MILL 938 (J.M. Robson, ed., 1965).

Mill was the ultimate believer in heterodoxy, like Jeremy Bentham. While Mill tended to defend values like free speech in classic utilitarian terms, his very work, particularly *On Liberty*, was a testament to his faith in the freedom of thought. In his view, free speech allows both individuals and society at large to transcend calcified or orthodox values.[73]

The great irony is that the rise of speech control advocates represents a triumph of figures who long argued for morality laws and reactionary social measures during the life of Mill. One such figure was Lord Patrick Devlin, who used his Maccabaean Lecture at the British Academy in 1959 to argue that immorality was a social harm that justified coercive government measures.[74] That fluid concept of harm is the basis for a variety of laws and theories that would curtail free speech, including Catherine MacKinnon's effort to ban pornography.[75]

Governments have long used the claim of harm to justify the regulation of speech. Indeed, in Mill's lifetime, immoral or unorthodox views were often punished as unhealthy or harmful.[76] Mill himself was the target of such criticism.[77] The importance that Mill

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73. MILL, ON LIBERTY, *supra* note 56, at 30–31 (describing how the "peculiar evil of silencing the expression of an opinion is, that it is robbing the human race").

74. For a discussion of the Devlin lecture, *see* Turley, *Loadstone Rock*, *supra* note 14.

75. It is part of what I have previously called "coercive liberalism," in which opposing speech is declared harmful and therefore sanctionable. *Id.*

76. The famous Hart-Devlin debate was triggered by the release of the Report of the Committee on Homosexual Offenses and Prostitution (or the "Wolfenden Report") which declared that criminal law must be used to deter immoral ideas and advocacy:

> [I]ts function, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable because they are young, weak in body or mind, inexperienced, or in a state of special physical, official, and economic dependence.

PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 2 (1965) (quoting REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION ¶ 13 (1957)).

77. Indeed, Mill himself was arrested as a young man for helping a poor individual obtain contraceptives. Adam Gopnik, *Right Again: The Passions of John Stuart Mill*, NEW

placed on free speech was reflected in the second chapter of *On Liberty*, entitled "Of the Liberty of Thought and Discussion."[78] The adoption of this expansive view nullifies any harm principle and allows for the expansion of speech regulation. It is not surprising, therefore, that this approach has been adopted by writers and groups seeking to deny the right to expression. Again, Mill emphasizes free thought and expression as belonging to one's internal "domain":

> With respect to the domain of the inward consciousness, the thoughts and feelings, and as much of external conduct as is personal only, involving no consequences, none at least of a painful or injurious kind, to other people: I hold that it is allowable in all, and in the more thoughtful and cultivated often a duty, to assert and promulgate, with all the force they are capable of, their opinion of what is good or bad, admirable or contemptible, but not to compel others to conform to that opinion; whether the force used is that of extra-legal coercion, or exerts itself by means of the law.[79]

Today's advocates of harm-based speech controls flip this concept on its head in treating censorship as a type of self-defense. That is the flawed logic behind the now common position on campuses that blocking or interrupting speakers is itself a form of free speech. Such private action, while not the focus of Mill's writings, contradicts his defense of the "the liberty of discussion." Mill was not assuming that all public advocacy would be a "discussion" of rivaling viewpoints. Protests are not particularly dialogic for the opposing sides, but they are part of a larger dialogue in articulating positions and viewpoints. However, many protests today focus on stopping speech by entering speaking areas to scream or shout out speakers.

YORKER (Sept. 29, 2008), https://www.newyorker.com/magazine/2008/10/06/right-again [https://perma.cc/3XG8-9MTD].

78. MILL, ON LIBERTY, *supra* note 56, at 28.

79. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 72, at 938.

It also occurs when protesters block entrances to speaking areas.[80] That is certainly a form of protest, but it is also designed to stop speech. That is at odds with Mill's concept of free discussion. Without the "freedom of the expression" to debate these questions, "the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct."[81]

Contemporary anti-free speech arguments explicitly or implicitly reject the model of tolerance underlying Millian and related theories. Mill considered speech regulation as inimical to both individual and societal growth because true knowledge for the individual cannot come in the vacuum of speech regulation where orthodox views are largely replicated rather than challenged. As Mill noted, "he who knows only his own side of the case, knows little of that."[82] However, the greater loss was expressed in terms of the loss to society:

> The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[83]

Indeed, the very stress or anxiety cited by many as a basis for banning speakers is precisely what Mill and others sought to produce in society. Such confrontation with opposing views developed not

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80. Jonathan Turley, *Schapiro's Unsafe Zone: Northwestern University Students Attack Police in Defunding Protest*, RES IPSA (Nov. 2, 2020), https://jonathanturley.org/2020/11/02/schapiros-un-safe-zone-northwestern-university-students-attack-police-in-defunding-protest [https://perma.cc/C3GX-NHS3].

81. MILL, ON LIBERTY, *supra* note 56, at 97–98.

82. *Id.* at 37.

83. *Id.* at 19.

just a tolerance for other views but better citizens. As Professor Jeremy Waldron has noted:

> [E]thical confrontation . . . is a positive good for Mill: it improves people and it promotes progress. But ethical confrontation is not a painless business. It always hurts to be contradicted in debate, if one takes seriously the views one is propounding . . . . If nobody is disturbed, distressed, or hurt in this way, that is a sign that ethical confrontation is not taking place, and . . . that the intellectual life and progress of our civilization may be grinding to a halt.[84]

Universities have always played a critical role in maintaining this heterodoxy and tolerance. That is not to say that universities have always risen to the challenge to protect dissenting viewpoints. Moreover, it is important to note that one can maintain a robust defense of free speech without embracing a natural rights basis for the right or even the individualism that underlies libertarian theories. A good example is Roscoe Pound. With figures like John Dewey and Herbert Croly, Pound was part of the movement against "excessive individualism" and in favor of balancing rights against social interests.[85] Yet Pound was involved in the fight for free speech on campuses at a time when it was the conservatives who were failing to actively protect those on the left in raising dissenting voices.[86] Pound advocated for permitting professors to speak out on public controversies and hold controversial views. He railed against the view that professors should remain silent on public controversies with direct bearing on "law reform and the law schools," stating that the idea "[t]hat the specialist has got to keep

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84. Jeremy Waldron, *Mill and the Value of Moral Distress*, *in* LIBERAL RIGHTS: COLLECTED PAPERS 1981-1991, at 115, 124 (1993).

85. *See generally* David M. Rabban, *Free Speech In Progressive Social Thought*, 74 TEX. L. REV. 951 (1996).

86. Letter from Roscoe Pound to Edwin R.A. Seligman (Dec. 8, 1914), Roscoe Pound Papers, Box 228, Folder 11, Harvard Law School Library; *see also* N.E.H. HULL, ROSCOE POUND AND KARL LEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 93 (1997).

quiet or confine himself to classroom discussion on such subjects seems to me distinctly against the public interest."[87] He added:

> I do not see why the university professor should be restrained in any way in the discussion of any subject of public interest which comes within the scope of his studies. . . . If he conducts his discussion as a scholar should, the fact that at the same time he makes a vigorous and possibly effective presentation of his views to the public ought not to be taken against him. . . . In short, I think the scholars in this country have been altogether too meek.[88]

Pound objected that "we are getting very intolerant in this country of even necessary freedom of speech."[89]

Pound's view of free speech would be reflected in the first Declaration of Principles of Academic Freedom in 1915 by the American Association of University Professors (AAUP).[90] The Declaration stressed the protection of free speech and the guarantee of "unfettered discussion" free of the "prescribed inculcation of a particular opinion upon a controverted question."[91] Yet academics have often grappled with the tension between their political causes and their obligation of objectivity and neutrality in the classroom. This concern is articulated by figures like Stan Fish, who objected that academic freedom loses its core legitimacy when professors use it to advocate rather than educate. For that reason, Fish maintains that when "academics are functioning not as academics, but as political advocates, [then] they do not merit academic freedom."[92] Some of the professors referenced in this article, particularly those who have

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87. *Id.*
88. *Id.*
89. Rabban, *supra* note 85, at 999 (citing Letter from Roscoe Pound to Henry A. Forster (Apr. 25, 1916), Roscoe Pound Papers, Box 157, Folder 4, Harvard Law School Library).
90. Edwin R.A. Seligman et al., *General Report of the Committee on Academic Freedom and Academic Tenure* (1915), *reprinted in* 91 IND. L.J. 57, 60 (2015).
91. *Id.*
92. STANLEY FISH, VERSIONS OF ACADEMIC FREEDOM: FROM PROFESSIONALISM TO REVOLUTION 19 (2014).

violently attacked others or shut down the ability of others to speak, are the very antithesis of our profession.

As Fish noted, when a professor "tries to promote a political or social agenda, . . . he or she has stepped away from the immanent rationality of the [academic] enterprise and performed an action in relation to which there is no academic freedom protection . . . ."[93] There is a danger of such views sweeping too broadly. The right of professors to engage in political speech is protected by the freedom of speech, while academic freedom protects the right to pursue and teach ideas without fear of retaliation. Moreover, professors have faced efforts to bar them from advocating for social or political reforms, including a recent move by the University of Florida to keep political science professors from serving as experts to challenge changes in election rules.[94] While occurring outside of the classroom, such advocacy can be directly linked to (and is indeed the outgrowth of) academic work. There are clearly differences in how a professor expresses viewpoints inside and outside of a classroom. In the classroom, a professor is expected to facilitate the learning of students through the exposure to different viewpoints and values. In that capacity, proselytizing or politicizing can hamper the ability of students to form their own opinions and consider the full range of a subject. This line, however, is becoming increasingly difficult to discern. Indeed, the AAUP recently honored a controversial academic who allegedly holds anti-Israeli views.[95] The protection of such academics is paramount under principles of free speech and

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93. STANLEY FISH, SAVE THE WORLD ON YOUR OWN TIME 81 (2008).

94. Jonathan Turley, *University of Florida Bars Professors from Testifying Against New State Voting Rules*, RES IPSA (Oct. 31, 2021), https://jonathanturley.org/2021/10/31/university-of-florida-bars-professors-from-testifying-against-new-state-voting-rules [https://perma.cc/3Z29-KDRX].

95. *See, e.g.*, Aaron Bandler, *SFSU Professor Who Called Zionists White Supremacists Selected for Academic Award*, JEWISH J. (May 22, 2020), https://jewishjournal.com/news/united-states/316239/sfsu-professor-who-called-zionists-white-supremacists-selected-for-academic-award [https://perma.cc/KJ8W-MWH5].

academic freedom.[96] However, AAUP specifically noted that the professor "transcends the division between scholarship and activism that encumbers traditional university life."[97] It seemed to suggest the erasure of any distinction between advocacy inside or outside of the classroom that was drawn by figures like Pound.[98] Putting Fish's objections to the side, Pound was arguing for the ability of academics to engage in political discourse outside of the university.[99]

The irony is that Pound specifically objected to the effort to suppress anarchist speech and said that it is "almost impossible to advocate views at variance with those of the majority without being subjected to something very like persecution."[100] He warned that these same efforts to punish "the [hare]-brained reformer may be used by an impulsive plurality to hold down the sane, level-headed

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96. The AAUP publication *Journal on Academic Freedom* was embroiled in a controversy after it solicited articles on viewpoint intolerance on campus, but only by conservatives. *See* Jonathan Turley, *AAUP Journal Solicits Papers on Conservative Intolerance on Campuses*, RES IPSA (Nov. 2, 2021), https://jonathanturley.org/2021/11/02/aaup-journal-solicits-papers-on-conservative-intolerance-on-campuses [https://perma.cc/P9NR-P5MJ].

97. *AAUP Announces 2020 Awards for Outstanding Faculty Activists*, AAUP (May 20, 2020), https://www.aaup.org/news/aaup-announces-2020-awards-outstanding-faculty-activists [https://perma.cc/Z3C2-4GFJ].

98. The line becomes even more uncertain when universities encourage particular viewpoint expression from faculty while sanctioning opposing views. For example, the University of Washington encouraged faculty to post "Indigenous Land Acknowledgements" on their syllabi but, when a professor posted a contrary statement, the university ordered the removal of the statement. *See* Jonathan Turley, *UW Professor Triggers Free Speech Fight over "Indigenous Land Acknowledgment"*, RES IPSA (Jan. 13, 2022), https://jonathanturley.org/2022/01/13/university-of-washington-professor-triggers-free-speech-fight-over-schools-indigenous-land-acknowledgement [https://perma.cc/M9L3-RUPE].

99. *See* Rabban, *supra* note 85, at 998–99.

100. *Id.* at 999 (citing Letter from Roscoe Pound to Henry A. Forster (Apr. 25, 1916), Roscoe Pound Papers, Box 157, Folder 4, Harvard Law School Library).

advocate of caution in matters of social legislation."[101] Pound's defense of free speech highlights how the politics have shifted while the underlying issue remains the same. Much of the viewpoint intolerance on campuses has come from the left, though there have been such cases from more conservative institutions.[102] As discussed above, we have seen professors and writers across the country subjected to discipline or campaigns for termination for expressing criticism of the recent protests or their underlying claims.[103] Others have faced retaliation for questioning Black Lives Matter as an organization, even while supporting the main premise of the organization.[104] The same danger of orthodoxy is evident in what Pound referred to as the same suppressive attitude used in "the old-time controversies as to heresy in religious matters."[105] The loss of "ethical confrontation" is evident in the many successful efforts to cancel or shut down those with opposing views on our campuses.

II. PUBLIC AND PRIVATE REGULATION OF THE "MARKETPLACE OF IDEAS"

The Millian foundation for the "marketplace of ideas" is evident in the writings of the Supreme Court, particularly those of Justice Holmes.[106] The concept embodies not just a free forum for creative and transformative thought but also the belief in a self-

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101. *Id.*

102. *See, e.g.*, Jonathan Turley, *Speaking Event of Historian Jon Meacham Cancelled at Samford University*, RES IPSA (Oct. 30, 2021), https://jonathanturley.org/2021/10/30/speaking-event-for-historian-jon-meacham-cancelled-at-samford-university [https://perma.cc/JR2B-NEXV].

103. *See infra* Part III.C and accompanying text.

104. *Id.*

105. Rabban, *supra* note 85, at 999 (quoting Letter from Roscoe Pound to John N. Dryden (Feb. 5, 1916), Roscoe Pound Papers, Box 157, Folder 4, Harvard Law School Library).

106. Mill himself did not coin the term "marketplace of ideas." *See* Jill Gordon, *John Stuart Mill and the 'Marketplace of Ideas'*, 23 SOCIAL THEORY AND PRACTICE, 235, 235 – 49

corrective capacity in free speech.[107] This protected area for free speech is the very growth plate for democracy where ideas are expressed and tested. The curtailment of speech was a concern for the Framers but the First Amendment was confined to the threat of state censorship or punitive actions. The 21st Century has seen the rise of private censorship, which may ultimately prove a far greater threat to the Millian marketplace.

(1997). Indeed, the term is often credited to Justice Holmes in his 1919 dissent to *Abrams v. United States*: "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market." 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

107. Professor Stanley Ingber criticized this view as "rooted in laissez-faire economics" and mythology. Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 (1984). In an account that strikingly mirrors the rationales used for curtailing free speech today, Ingber noted:

> Although laissez-faire economic theory asserts that desirable economic conditions are best promoted by a free market system, today's economists widely admit that government regulation is needed to correct failures in the economic market caused by real world conditions. Similarly, real world conditions also interfere with the effective operation of the marketplace of ideas: sophisticated and expensive communication technology, monopoly control of the media, access limitations suffered by disfavored or impoverished groups, techniques of behavior manipulation, irrational responses to propaganda, and the arguable nonexistence of objective truth, all conflict with marketplace ideals. Consequently, critics of the market model conclude, as have critics of laissez-faire economics, that state intervention is necessary to correct communicative market failures.

Id. Like many today, Ingber argued that the faith in free speech serves as a chimera to protect the status quo. *Id.* at 6 ("[T]he present marketplace simply fine-tunes differences among elites while defusing pressure for change and fostering a myth of personal autonomy essential to the continued popular acceptance of a governing system biased toward the status quo."). Notably, as many in academia moved away from the Millian model, a new status quo has emerged based on a narrower band of tolerated ideas and viewpoints. Ironically, it has illustrated the self-destructive elements of centrally controlled economies— the extreme alternative to laissez-faire market approaches. As Mill predicted, there is less tolerance for experimentation and exploration of alternative or dissenting views.

A. Government Speech Controls and Coercion

The United States has gone through repeated periods of crackdowns and criminalization of free speech. Early in the Republic, the anti-sedition laws were used not only to intimidate but also to arrest those with opposing views. The use of the Sedition Act by President John Adams and the Federalists was recognized at the time as not just an abuse, but also the height of hypocrisy. Adams and the Federalists routinely engaged in false and malicious writings about Thomas Jefferson, including declaring that, if elected, "[m]urder, robbery, rape, adultery, and incest will be openly taught and practiced, the air will be rent with the cries of the distressed, the soil will be soaked with blood, and the nation black with crimes."[108] Jefferson and James Madison denounced the law, which made it illegal for anyone to "print, utter, or publish . . . any false, scandalous, and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States . . . ."[109] This included a Vermont congressman who was prosecuted for criticizing John Adams's "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice."[110] The prosecution proved the point but the irony was lost on Adams. It was not, however, lost on Jefferson, who remarked that "our general government has, in the rapid course of [nine] or [ten] years, become more arbitrary and has swallowed more of the public liberty than even that of England."[111] Yet even those leaders seem to have had a more modest view of free

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108. Peter Onuf, *Thomas Jefferson: Campaigns and Elections*, MILLER CTR., https://millercenter.org/president/jefferson/campaigns-and-elections [https://perma.cc/C9GM-PKN6] (last visited Mar. 6, 2022).

109. Sedition Act of 1798, Ch. 74, 1 Stat. 596 (1798) (expired 1801).

110. *See* CHARLES SLACK, LIBERTY'S FIRST CRISIS: ADAMS, JEFFERSON AND THE MISFITS WHO SAVED FREE SPEECH 114, 127–28 (2015).

111. *Id.* at 163–64 (citing Letter from Thomas Jefferson to John Taylor (Nov. 26, 1798), *in* 2 THE BILL OF RIGHTS: A DOCUMENTARY HISTORY (1971)).

speech protections, including the possibility of seditious prosecutions.[112] Whether a result of the conflict with the Federalists or a deep-seated view of free speech, the sedition prosecution period led to the articulation of our modern First Amendment values.[113] At least twenty-five leading Republicans were arrested, from journalists to politicians, though that number may not fully capture the full extent of the government crackdown.[114] All those convicted would later be pardoned by President Jefferson. The Sedition Act was never found unconstitutional and, fittingly, expired on Adams's last day in office as a lasting and indelible mark on his presidency.[115]

Prosecutions for unlawful speech continued periodically in the United States, becoming particularly abusive during periods like the Civil War and other times of armed conflict.[116] For example, under President Woodrow Wilson, the country experienced a crackdown on dissenting views when the United States entered World War I in April 1917.[117] Wilson called for new laws to punish dissenters, dismissing free speech concerns by declaring that "[disloyalty] was not a subject on which there was room for . . . debate" since such disloyal citizens "sacrificed their right to civil liberties."[118] To

112. In a statement during the Virginia Resolutions debate, Madison assured his opponents "every libellous writing or expression might receive its punishment in the state courts." Address of the General Assembly to the People of the Commonwealth of Virginia, *in* 6 THE WRITINGS OF JAMES MADISON 333–34 (Gaillard Hunt ed., 1908).

113. *See* LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 304 (1985) (discussing how this period of political conflict "provided the foundation for the Modern theory of the First Amendment").

114. Wendell Byrd, *New Light On The Sedition Act of 1798: The Missing Half Of The Population*, 34 L. & HIST. REV. 514, 545–46 (2016).

115. GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 71 (2004).

116. ANTHONY R. FELLOW, AMERICAN MEDIA HISTORY 131–33, 136 (2d ed. 2010).

117. Jack A. Gottschalk, *"Consistent with Security" . . . A History of American Military Press Censorship*, 5 COMM. & L. 35, 38 (1983).

118. PAUL L. MURPHY, WORLD WAR I AND THE ORIGIN OF CIVIL LIBERTIES IN THE UNITED STATES 53 (1979).

carry out the crackdown on free speech, Wilson needed and found an eager partner in Congress. Congress enacted the Espionage Act of 1917, introducing the criminalization of any acts that "cause or attempt to cause insubordination, disloyalty, mutiny, or refusal of duty in the military or naval forces of the United States" or willfully to "obstruct the recruiting or enlistment service of the United States."[119] At the time, Attorney General Charles Gregory made clear the menacing intent of such laws, declaring: "May God have mercy on them, for they need expect none from an outraged people and an avenging government."[120]

It was during this period that Congress rediscovered the allure of sedition laws. One year after passing the Espionage Act, Congress passed the Sedition Act of 1918.[121] From 1918 to 1921, Gregory's successor Attorney General Mitchell Palmer prosecuted hundreds of individuals under these laws—gaining infamy as the architect of the "Palmer Raids."[122] Communists, socialists, and anarchists faced repressive measures across the country.[123] In just one raid in January 1920, over 3,000 alleged Communists were rounded up.[124] The abuses during this period were not simply a failure of the Executive and Legislative branches, the so-called "political branches," to protect free speech. They were the result of a complete three-branch failure with the acquiescence of the Supreme Court and lower courts. A well-known example is the decision of

119. Espionage Act of 1917, Ch. 30, Tit. I, § 3, 40 Stat. 217, 219 (1917).

120. *All Disloyal Men Warned by Gregory*, N.Y. TIMES (Nov. 21, 1917), [https://perma.cc/9EMV-CQCD]. For a discussion of this period see Geoffrey R. Stone, *Free Speech and National Security*, 84 IND. L.J. 939 (2009).

121. Sedition Act of 1918, Ch. 75, 40 Stat. 553 (1918) (repealed Mar. 3, 1921).

122. EDWIN P. HOYT, THE PALMER RAIDS, 1919–1920: AN ATTEMPT TO SUPPRESS DISSENT 6 (1969).

123. *See generally* CHRISTOPHER M. FINAN, FROM THE PALMER RAIDS TO THE PATRIOT ACT: A HISTORY OF THE FIGHT FOR FREE SPEECH IN AMERICA 30, 32–34 (2007); STONE, *supra* note 115, at 220–26.

124. FINAN, *supra* note 123, at 1–4.

the Ninth Circuit in *Shaffer v. United States*,[125] where the court upheld the criminalization of clearly protected political speech.[126] The defendant was charged with mailing copies of *The Finished Mystery*, a book with the following passage:

> If you say it is a war of defense against wanton and intolerable aggression, I must reply that . . . it has yet to be proved that Germany has any intention or desire of attacking us . . . The war itself is wrong. Its prosecution will be a crime. There is not a question raised, an issue involved, a cause at stake, which is worth the life of one blue-jacket on the sea or one khaki-coat in the trenches.[127]

That is clearly protected speech, but the Ninth Circuit blissfully dismissed the First Amendment claim while adopting a wildly attenuated harm analysis:

> It is true that disapproval of war and the advocacy of peace are not crimes under the Espionage Act; but the question here . . . is whether the natural and probable tendency and effect of the words . . . are such as are calculated to produce the result condemned by the statute . . . . The service may be obstructed by attacking the justice of the cause for which the war is waged, and by undermining the spirit of loyalty which inspires men to enlist or to register for conscription in the service of their country . . . To teach that patriotism is murder and the spirit of the devil, and that the war against Germany was wrong and its prosecution a crime, is to weaken patriotism and the purpose to enlist or to render military service in the war.[128]

Similarly, in *Debs v. United States*,[129] the Court took the same approach to upholding the conviction of socialist leader Eugene

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125. 255 F. 886 (9th Cir. 1919).
126. *Id.* at 886.
127. *Id.* at 887; *see also* STONE, *supra* note 115, at 945.
128. *Shaffer*, 255 F. at 888.
129. 249 U.S. 211 (1919).

Debs.[130] It was one of the lowest points in the Supreme Court's history, with the Court yielding to hysteria and government abuse.[131]

The Court upheld the conviction of Debs for speech that was the very essence of the First Amendment.[132] Debs merely gave a speech opposing the war.[133] Before the jury, Debs refused to back down in his exercise of free speech and reaffirmed his opposition to "the present government" and "social system":

> Your honor, I ask no mercy, I plead for no immunity. I realize that finally the right must prevail. I never more fully comprehended than now the great struggle between the powers of greed on the one hand and upon the other the rising hosts of freedom. I can see the dawn of a better day of humanity. The people are awakening. In due course of time they will come into their own.[134]

Justice Holmes, writing for a unanimous Court, ruled for the government, stating that these words had the "natural tendency and reasonably probable effect" of deterring people from supporting or enlisting in the war.[135]

Outside of wartime crackdowns, our struggle to protect free speech hit another low during the Cold War and the "Red Scare." Again, this period revealed a total failure of all three branches in supporting a crackdown on free speech. The Executive Branch arrested suspected Communists, and Congress enacted new powers

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130. *Id.* at 217.

131. Jonathan Turley, *At Michigan Rally, Bernie Sanders Revels in his Role as Political Successor to Eugene Debs*, USA TODAY (Mar. 10, 2020), https://www.usatoday.com/story/opinion/2020/03/10/bernie-sanders-michigan-rally-political-successor-eugene-debs-column/5000675002 [https://perma.cc/R2M7-X9M6].

132. *Debs*, 249 U.S. at 217.

133. Michael E. Deutsch, *The Improper Use of the Federal Grand Jury: An Instrument for the Internment of Political Activists*, 75 J. CRIM. L. & CRIMINOLOGY 1159, 1173 (1984).

134. *Id.* at 1173 n.72.

135. *Debs*, 249 U.S. at 216.

under the Internal Security Act to allow the mass detention of dissidents.[136] The grand jury process was regularly used to target political dissidents and coerce people to reveal their associations and beliefs.[137] Of course, the most visible abuses occurred in the hearings on "Un-American Activities" with figures like Senator Joseph McCarthy. The work of these committees was replicated in myriad federal and state laws barring rights and privileges to suspected Communists.[138] Notably, however, some academics supported this crackdown. For example, Professor Carl Auerbach reconstructed the premise of the early anti-sedition laws by claiming that certain speech cannot be protected because it is inimical to the constitutional system.[139] Thus, Auerbach insisted that the First Amendment must be understood contextually as part of a "framework for a constitutional democracy."[140] Accordingly, if the First Amendment is a functionalist device to advance the democratic system, the right of free speech cannot be interpreted in a way that undermines the stability of the system. It becomes antithetical to interpret the amendment "to curb the power of Congress to exclude from the political

136. David Cole, *The New McCarthyism: Repeating History in the War on Terrorism*, 38 HARV. C.R.-C.L. L. REV. 1, 16, 19 (2003).

137. David J. Fine, Federal Grand Jury Investigation of Political Dissidents, 7 HARV. C.R.-C.L. L. REV. 432 (1972).

138. As Professor Stone observed: "The long shadow of the House Committee on Un-American Activities (HUAC) fell across our campuses and our culture . . . In 1954, Congress enacted the Communist Control Act, which stripped the Communist Party of all rights, privileges, and immunities. Hysteria over the Red Menace produced a wide range of federal and state restrictions on free expression and association. These included extensive loyalty programs for federal, state, and local employees; emergency detention plans for alleged subversives; pervasive webs of federal, state, and local undercover informers to infiltrate dissident organizations; abusive legislative investigations designed to harass dissenters and to expose to the public their private political beliefs and association; and direct prosecution of the leaders and members of the Communist Party of the United States." Stone, *supra* note 120, at 939, 949–50, 954.

139. Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 184 (1956); *see also id.* at 189.

140. *Id.* at 189.

struggle those groups which, if victorious, would crush democracy and impose totalitarianism."[141]

The Auerbachian view captures the lingering rationale for excluding certain speech from constitutional or political protection. His construction is simple and familiar. Free speech is valued for its function in preserving a constitutional democracy. To the extent that it does not advance the stability of the system, it is disfavored. It is the rejection of the normative view that the constitutional system exists to guarantee the right, not the right to guarantee the constitutional system. Once a functionalist view is adopted, speech denial can become merely a matter of perspective. Those views deemed dangerous or hostile to the system are viewed as beyond the protections of the constitutional system. Consensus on harm leads to hegemony in speech. It is a relativistic view that will be readily embraced, not just by the government, but by those who believe that free speech only protects and fosters reactionary viewpoints.[142]

The Auerbachian model is reflected in opinions and writings that seek to tie the protection of speech to the inherent worth of its content. This includes treating some conflicts as "low-value speech" subject to greater regulation.[143] While the Court has largely held the line on requiring satisfaction of the strict scrutiny standard for curtailing, censoring, or punishing speech, it has recognized that some areas have been historically treated as low-value speech with less protection.[144] This distinction is often traced to *Chaplinsky*

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141. *Id.*

142. *See generally The Right of The People Peaceably to Assemble: Protecting Speech by Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Aug. 4, 2020) (testimony of Professor Jonathan Turley).

143. *See* Clay Calvert, *Escaping Doctrinal Lockboxes in First Amendment Jurisprudence: Workarounds for Strict Scrutiny for Low-Value Speech in the Face of* Stevens *and* Reed, 73 S.M.U. L. REV. 727 (2020).

144. Most famously, Justice Stevens advances this categorical treatment of speech with his statement that in *Young v. American Mini Theatres, Inc.*, that while "every schoolchild can understand why our duty to defend the right to speak" would apply

v. New Hampshire,[145] when the Court upheld the conviction of a Jehovah's Witness who used “offensive, derisive, or annoying word[s]” in public after he accused a city marshal of being a “God damned racketeer” and “a damned Fascist.”[146] The differentiation of speech protection based on the perception of the underlying value of the speech presents the classic slippery slope danger. This is evident in past descriptions by the Court that are laden with subjectivity dressed up as objective criteria: maintaining that some speech is “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.”[147] Thus, the Court has embraced the notion of speech curtailment where “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.”[148]

The Court has continued use of categorical distinction of speech to some extent in cases like *United States v. Stevens*.[149] The low value speech concept been challenged by academics like Professor Genevieve Lakier.[150] However, in *Stevens*, the Court also noted that “[w]hen we have identified categories of speech as fully outside the

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to “political oratory or philosophical discussion, . . . few of us would march our sons and daughters off to war to preserve the citizen's right to see ‘Specified Sexual Activities’ exhibited in the theaters of our choice.” *Young v. Am. Mini Theaters, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion).

145. 315 U.S. 568 (1942). *See* Ronald Turner, *Hate Speech and the First Amendment: The Supreme Court’s* R.A.V. *Decision*, 61 TENN. L. REV. 197, 205 (1993) (noting that *Chaplinsky* allowed for “extreme categorization, with the Court indicating that certain types of expression, such as fighting words, the lewd and obscene, the profane, and the libelous, are wholly outside the coverage and protection of the First Amendment”).

146. *Chaplinsky*, 315 U.S. at 569.

147. R.A.V. v. City of St. Paul, 505 U.S. 377, 383 (1992) (quoting *Chaplinsky*, 315 U.S. at 572).

148. *Id.* at 400 (citation omitted).

149. 559 U.S. 460, 468 (2010).

150. Genevieve Lakier, *The Invention of Low-Value Speech*, 128 HARV. L. REV. 2166, 2169 (2015).

protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis."[151] The recognition of such exceptions accepts "a functionalist distinction between high- and low-value speech."[152] While the exceptions remain thankfully few, this is a distinction that would resonate later on campuses and with corporations limiting speech.

In a curious way, we are living through a period reminiscent of the Red Scare, though socialism is now popular with almost half of voters[153] and a majority of Democratic voters.[154] That, in my view, is a good thing in terms of diversity and tolerance in our political system. However, there is now an inverse intolerance against conservative voices.[155] The Red Scare was a period in which writers and others were put on blacklists and denied employment for holding the "wrong" views.[156] There now exists a palpable fear of being accused of being reactionary or racist in questioning any aspect of recent protests or their underlying demands. Where academics and

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151. *Stevens*, 559 U.S. at 471. Indeed, in a near unanimous decision, the Court declared a ban on "crush videos" to be unconstitutional while noting:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

Id. at 470.

152. Lakier, *supra* note 150, at 2174.

153. Mohamed Younis, *Four in 10 Americans Embrace Some Form of Socialism*, GALLUP (May 20, 2019), https://news.gallup.com/poll/257639/four-americans-embrace-form-socialism.aspx [https://perma.cc/VD23-JXBE].

154. Hunter Moyler, *76 Percent of Democrats Say They'd Vote for a Socialist for President, New Poll Shows*, NEWSWEEK (Feb. 11, 2020), https://www.newsweek.com/76-percent-democrats-say-theyd-vote-socialist-president-new-poll-shows-1486732 [https://perma.cc/6GVT-SZL2].

155. *See generally* Young America's Found. v. Stenger, 2021 U.S. Dist. LEXIS 159439 (N.D.N.Y. 2021) (discussing pattern of viewpoint intolerance).

156. *See* GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME FROM THE SEDITION ACT OF 1798 TO THE WAR ON TERRORISM 359–66 (2004).

writers were once targeted for their criticism of the government, one is more likely today to be denounced for support of the government, particularly law enforcement. At the same time, a distinctly anti-free speech movement has emerged with a harm-based philosophy. The result is not just a narrowing of tolerated speech but a narrowing of debate. There is a prejudice that becomes an orthodoxy, a danger discussed by John Milton, who warned: "if it come to prohibiting, there is not aught more likely to be prohibited than truth itself; whose first appearance to our eyes bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors."[157] What is "prohibited" today is often the result of corporate systems of censorship rather than the classic state action model. As discussed below, these companies fall outside of First Amendment controls and cite their associational and free speech rights as a basis for silencing opposing views on their platforms.

Anti-free speech campaigns for censorship on the Internet and anti-free speech groups have been more successful than their predecessors. That is due, in significant part, to an unprecedented coalition of private companies, academics, media, and activists in favor of speech controls.[158] Yet while various groups have chilled speech on campuses, their success pales in comparison to the actions of Facebook, Twitter, and other major companies.[159] The protection of free speech is far more challenging than its curtailment.

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157. JOHN MILTON, AREOPAGITICA (1644), *reprinted in* COMPLETE POEMS AND MAJOR PROSE 733 (Merritt Y. Hughes ed., 1957).

158. *See* Jonathan Turley, *Why Burn Books When You Can Ban Them? Writers and Publishers Embrace Blacklisting in an Expanding American Anti-Free Speech Movement*, RES IPSA (Jan. 22, 2021), https://jonathanturley.org/2021/01/22/why-burn-books-when-you-can-ban-them-writers-and-publishers-embrace-blacklisting-in-an-expanding-american-anti-free-speech-movement [https://perma.cc/Q5SC-4883].

159. I have opposed efforts to declare Antifa a terrorist group because such actions would create their own free speech concerns and actually further anti–free speech agendas. *See* Jonathan Turley, *Declaring Antifa a Terrorist Organization Could Achieve Its Own*

Any measures to guarantee free expression must also balance the countervailing rights of groups and corporations, including their anti-free speech advocacy.

B. Private Censorship and the Outsourcing of Speech Regulation

The functionalist theory of free speech has found fertile ground with those arguing for private censorship and blacklisting of individuals to prevent speech considered harmful. In rationalizing efforts to silence others, many emphasize that the targeted speech has little value[160] while stressing its negative impact on political or academic discourse.[161] This reframing of the issue has allowed censorship and speech intolerance to "go mainstream" as many writers, academics, and politicians call for the removal of viewpoints or individuals.[162] This includes pressure to use algorithms to favor

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Anti-Speech Agenda, L.A. TIMES, June 1, 2020, *available at* https://jonathanturley.org/2020/06/04/declaring-antifa-a-terrorist-organization-could-achieve-its-anti-free-speech-agenda [https://perma.cc/KVZ5-GYEM]; *see also The Right of the People Peaceably to Assemble: Protecting Speech by Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Aug. 4, 2020) (testimony of Professor Jonathan Turley). Yet, there is a push in Congress to make ideology a critical determinant in targeting groups for domestic terrorism investigations. *See Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (June 7, 2022) (testimony of Professor Jonathan Turley).

160. Cass R. Sunstein, *Pornography and the First Amendment*, 1986 DUKE L.J. 589, 607–08 (1986).

161. *See generally* JEREMY WALDRON, THE HARM IN HATE SPEECH (2014).

162. As one writer put it:

> These scholars argue something that may seem unsettling to Americans: that perhaps our way of thinking about free speech is not the best way. At the very least, we should understand that it isn't the only way. Other democracies, in Europe and elsewhere, have taken a different approach. Despite more regulations on speech, these countries remain democratic; in fact, they have created better conditions for their citizenry to sort what's true from what's not and to make informed decisions about what they want their societies to be. Here in the United States, meanwhile, we're drowning in lies.

Emily Bazelon, *The First Amendment in the Age of Disinformation*, N.Y. TIMES (Oct. 13, 2020), https://www.nytimes.com/2020/10/13/magazine/free-speech.html [https://perma.cc/4HUW-7SAV].

"true" book selections or articles.[163] By distinguishing between worthy and unworthy speech, critics relieve themselves of any sense of responsibility for censorship and further allow for public campaigns to enlist major companies to enforce a system of exclusion and removal. This includes blocking others from speaking about disruptive or violent actions as part of "deplatforming" campaigns[164] or editorial decisions barring publications.[165]

The pandemic has reinforced this long-building movement toward harm-based claims for speech regulation. Misinformation on vaccines or masks can clearly be harmful to those who fail to rely

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163. *See* Jonathan Turley, *Enlightened Algorithms? Progressives Ask Big Tech to Censor "Bad" Ideas to Save Us from Ourselves*, USA TODAY (Sept. 26, 2021), https://www.usatoday.com/story/opinion/2021/09/26/elizabeth-warren-wants-amazon-censor-your-reading/5832060001 [https://perma.cc/87K6-CRW7]; Jonathan Turley, *Learning to Fear Free Speech: How Politicians Are Moving to Protect Us from Our Unhealthy Reading Choices*, RES IPSA (Oct. 11, 2021), https://jonathanturley.org/2021/10/11/learning-to-fear-free-speech-how-politicians-are-moving-to-protect-us-from-our-unhealthy-reading-choices [https://perma.cc/C5P7-LJ2Z].

164. This includes refusing to recognize even free speech groups as potentially "harmful" or "divisive." Jonathan Turley, *"Potential and Real Harm": Emory Law SBA Refuses Recognition of Free Speech Group*, RES IPSA (Jan. 18, 2022), https://jonathanturley.org/2022/01/18/potential-and-real-harm-emory-law-sba-refuses-recognition-of-free-speech-group [https://perma.cc/NW99-BDWM].

165. Jonathan Turley, *Emory Law Journal Accused of Censorship as Law Professors Withdraw Articles in Protest*, RES IPSA (Jan. 5, 2022), https://jonathanturley.org/2022/01/05/emory-law-journal-accused-of-censorship-as-law-professors-withdraw-articles-in-protest [https://perma.cc/6HHB-DRY9]; Jonathan Turley, *The Rising Generation of Censors: Law Schools Are the Latest Battleground over Free Speech*, RES IPSA (July 8, 2021), https://jonathanturley.org/2021/07/08/the-rising-generation-of-censors-law-school-are-the-latest-battleground-over-free-speech [https://perma.cc/524X-G5NS].

on credible sources, leading to harms like drinking bleach[166] or ingesting dangerous chemicals.[167] However, social media companies also barred studies and theories that were later found to be credible, ranging from the origins of the virus[168] to the lack of efficacy of commonly worn masks[169] to the higher protection afforded by natural immunities.[170] The censorship of those theories curtailed meaningful debate over issues directly impacting the health of the public. Yet advocates insisted that free speech does not offer its own protection against bad speech in the "post-truth" world.[171] Virality, not

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166. Nicholas Reimann, *Some Americans Are Tragically Still Drinking Bleach as a Coronavirus 'Cure'*, FORBES (Aug. 24, 2020), https://www.forbes.com/sites/nicholasreimann/2020/08/24/some-americans-are-tragically-still-drinking-bleach-as-a-coronavirus-cure/?sh=51f999756748 [https://perma.cc/N35Q-RR3J]. *But see* Sally Robertson, *Reports of Drinking Bleach to Prevent Covid-19 Skewed by "Problematic" Claims*, NEWS-MEDICAL.NET (Dec. 15, 2020), https://www.news-medical.net/news/20201215/Reports-of-drinking-bleach-to-prevent-COVID-19-skewed-by-problematic-claims.aspx [https://perma.cc/YUN6-YDZR].

167. *Arizona Man Dies After Attempting to Take Trump Coronavirus Cure*, THE GUARDIAN (Mar. 20, 2020), https://www.theguardian.com/world/2020/mar/24/coronavirus-cure-kills-man-after-trump-touts-chloroquine-phosphate [https://perma.cc/57BQ-9XHW].

168. Bret Stephens, *Media Groupthink and the Lab-Leak Theory*, N.Y. TIMES (May 31, 2021), https://www.nytimes.com/2021/05/31/opinion/media-lab-leak-theory.html [https://perma.cc/VN3M-367Y].

169. Apoorva Mandavilli, *The C.D.C. Concedes That Cloth Masks Do Not Protect Against the Virus as Effectively as Other Masks*, N.Y. TIMES (Jan. 14, 2022), https://www.nytimes.com/2022/01/14/health/cloth-masks-covid-cdc.html [https://perma.cc/JF9K-MDZN].

170. James Hockaday, *Instagram 'Fueling Conspiracy Theorists' by Banning #Naturalimmunity Hashtag*, METRO (Sept. 17, 2021), https://metro.co.uk/2021/09/17/instagram-fueling-conspiracy-theorists-by-banning-naturalimmunity-hashtag-15275249/ [https://perma.cc/WYC6-56XY]. *See also* Julie Steenhuysen & Manas Mishra, *Prior COVID Infection More Protective Than Vaccination During Delta Surge — U.S. Study*, REUTERS (Jan. 19, 2022), https://www.reuters.com/business/healthcare-pharmaceuticals/prior-covid-infection-more-protective-than-vaccination-during-delta-surge-us-2022-01-19 [https://perma.cc/SKR5-9NQZ].

171. Zeynep Tufekci, *It's the (Democracy-Poisoning) Golden Age of Free Speech*, WIRED (Jan. 16, 2018), https://www.wired.com/story/free-speech-issue-tech-turmoil-new-censorship [https://perma.cc/NW6L-4M73] ("John Stuart Mill's notion that a 'marketplace of ideas' will elevate the truth is flatly belied by the virality of fake news.").

truth, is now the defining element for leaders like President Joe Biden, who accused these companies of "killing people" by failing to censor more statements.[172] There is an assumption that such censorship was a net positive for society without any real balancing of countervailing costs, like the failure to test certain public health policies or the plummeting trust in the media to report fairly on such issues.[173]

The complaints about deplatforming and blocking individuals and groups on social media have already been discussed extensively in the popular and academic press.[174] The greatest concern, however, is that the use of these companies hits the blind spot in the Constitution as a "Little Brother" rather than a "Big Brother" threat to free speech. The First Amendment was focused on the threat of government censorship, an emphasis that spared the country a history with the type of state media bureaucracies in countries such as China or Iran.[175] Yet, the focus on preventing state media controls is increasingly inconsequential in light of the growing levels of control exercised by private companies. Recent years have shown that a uniform system of corporate censorship can be

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172. Jonathan Turley, *Fear Free Speech: Biden Denounces Big Tech as "Killing People" by Not Censoring Speech*, RES IPSA (July 17, 2021), https://jonathanturley.org/2021/07/17/the-lethality-of-free-speech-biden-denounces-big-tech-as-killing-people-by-not-censoring-speech/ [https://perma.cc/97B3-DJG7].

173. Megan Brenan, *Americans' Trust in Media Dips to Second Lowest on Record*, GALLUP (Oct. 7, 2021), https://news.gallup.com/poll/355526/americans-trust-media-dips-second-lowest-record.aspx [https://perma.cc/Z5SF-PXTP].

174. *See generally* Disinvitation Database, FIRE, https://www.thefire.org/resources/disinvitation-database [https://perma.cc/8MPK-WMKU].

175. *See* Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1952) (explaining that states and cities did have censorship boards like New York's board which monitored content deemed "obscene, indecent, immoral, inhuman, sacrilegious, or . . . of such a character that its exhibition would tend to corrupt morals or incite to crime"); *see generally* Simeon Djankov et al., *Who Owns the Media*, 46 J.L. & ECON. 341 (2003) (explaining how those boards fell to the wayside over time and how this led to the rise of free speech values in the country; around the world, however, much of the media remains under the economic control of governments).

far more effective than the classic model of a central ministry in controlling information. What is particularly concerning is how the use of private companies to impose an extensive censorship system has been embraced by many in academia and the media.[176] As noted earlier, while companies like Twitter or publishing houses are clearly not the subjects of the First Amendment, they can still eviscerate free speech through private censorship. There are over three billion social media users, and people spend an average of two hours and twenty-four minutes a day on social media sites.[177] These platforms now are the primary form of communication and political discourse for the public—exceeding telephonic and mail communications by an overwhelming and growing margin.[178] In terms of speech curtailment, the level of censorship meted out through social media companies is unprecedented. Given that social media dominates today's political discourse, these companies have direct control over a far greater range of speech than would any state apparatus.[179]

The dangers posed by private censorship for a political system are the same as government censorship in the curtailment of free speech. The danger of such private censorship was evident when

176. *See, e.g.*, MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH (2021).

177. Deyan G., *How Much Time Do People Spend on Social Media in 2021?*, TECHJURY (Jan. 4, 2022), https://techjury.net/blog/time-spent-on-social-media [https://perma.cc/BEY8-PC54].

178. *Id.*

179. Indeed, authoritarian figures have long recognized the threat of these companies. Russian President Vladimir Putin denounced Big Tech as a threat to "democratic institutions." As one of the world's most authoritarian and murderous figures, Putin is hardly concerned with democratic institutions. Madeline Roache, *Putin Warns Big Tech Poses a Threat to "Legitimate Democratic Institutions"*, TIME (Jan. 27, 2021), https://time.com/5933666/putin-davos-agenda-speech/ [https://perma.cc/7S88-6T33]. He can, however, recognize (and even begrudgingly respect) a system of continual speech regulation and control that surpasses his own capabilities on a global scale.

Twitter blocked the *New York Post* story on Hunter Biden's influence-peddling before the 2020 election.[180] While the story could still be located on other sites, the company (and other sites subsequently) dramatically curtailed access and effectively labeled the story as unreliable.[181] After the election, Twitter Chief Executive Officer Jack Dorsey appeared before the Senate and admitted that the company's actions were wrong. Dorsey's statement was apologetic but still incomplete and evasive. He admitted that "this action was wrong and corrected it within 24 hours."[182] However, it was not Dorsey's statement but the response of Democratic senators that was so striking. Various senators demanded an increase, not a decrease, in censorship.[183]

The hearing highlighted the demand for corporate censorship and the threat of congressional monitoring to ensure the removal of certain viewpoints. Dorsey pledged to continue to censor "misleading" content.[184] Adopting the same functionalist rhetoric,

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180. *See* Jonathan Turley, *Joe Biden and the Disappearing Elephant: How to Make a Full-Sized Scandal Disappear Before an Audience of Millions*, RES IPSA (Oct. 19, 2021), https://jonathanturley.org/2021/10/19/joe-biden-and-the-disappearing-elephant-how-to-make-a-full-sized-scandal-vanish-in-front-of-an-audience-of-millions [https://perma.cc/4G38-WUY7].

181. Adi Robertson, *New York Post's Hunter Biden Laptop Source Sues Twitter for Defamation*, THE VERGE (Dec. 28, 2020), https://www.theverge.com/2020/12/28/22203412/john-paul-mac-isaac-hunter-biden-laptop-new-york-post-twitter-moderation-hacked-materials-lawsuit [https://perma.cc/CDY4-34T7]. *But see FEC Backs Twitter over Hunter Biden Censorship in a Decision Based on Lies*, N.Y. POST (Sept. 13, 2021), https://nypost.com/2021/09/13/fec-backs-twitter-over-hunter-biden-censorship/ [https://perma.cc/2D5K-LA6N].

182. Brittany Bernstein, *Twitter CEO Dorsey Says It Was 'Wrong' to Block New York Post Hunter Biden Story*, YAHOO! NEWS (Nov. 17, 2020), https://news.yahoo.com/twitter-ceo-dorsey-says-wrong-171149910.html [https://perma.cc/VY3Q-HJ7E].

183. Jonathan Turley, *Twitter CEO Admits Censoring the Hunter Biden Story Was "Wrong" . . . Democrats Call for More Censorship*, RES IPSA (Nov. 18, 2020), https://jonathanturley.org/2020/11/18/twitter-ceo-admits-censoring-hunter-biden-story-was-wrong-democrats-call-for-more-censorship/ [https://perma.cc/Q33W-4K6H].

184. *Id.*

Dorsey and others emphasized that misleading speech had little value and indeed undermined the democratic process. While acknowledging that "[i]t's hard to define it completely and cohesively," he said such censorship would focus on "the highest severity of harm."[185] Once the members accepted the license to censor low-value speech, members seemed to rush forward with additions of other categories of unworthy or harmful speech. Delaware Senator Chris Coons demonstrated the very essence of the "slippery slope" danger of the harm rationale for speech controls:

> Well, Mr. Dorsey, I'll close with this. I cannot think of a greater harm than climate change, which is transforming literally our planet and causing harm to our entire world. I think we're experiencing significant harm as we speak. I recognize the pandemic and misinformation about COVID-19, manipulated media also cause harm, but I'd urge you to reconsider that because helping to disseminate climate denialism, in my view, further facilitates and accelerates one of the greatest existential threats to our world. So thank you to both of our witnesses.[186]

Despite the difficulty in defining the category, Dorsey reaffirmed the commitment to combat it through censorship or "content modification."[187] In response, Coons pressed for expanded censorship to include "harmful" postings viewed as "climate denialism."[188] Likewise, Connecticut Senator Richard Blumenthal seemed to take the opposite meaning from Twitter admitting that it was wrong to censor the Biden story.[189] Blumenthal said that he was "concerned that both of your companies are, in fact, backsliding or retrenching, that you are failing to take action against dangerous disinformation."[190] Accordingly, he demanded an answer to this question:

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185. *Id.*
186. *Id.*
187. *Id.*
188. *Id.*
189. *Breaking the News: Censorship, Suppression, and the 2020 Election: Before the S. Comm. On the Judiciary*, 116th Cong. (2020).
190. *Id.*

> Will you commit to the same kind of robust content modification playbook in this coming election, including fact-checking, labeling, reducing the spread of misinformation, and other steps, even for politicians in the runoff elections ahead?[191]

"Robust content modification" has a certain Orwellian feel to it. It is, in fact, censorship. Indeed, academics have acknowledged that censorship is modeled on measures long associated with authoritarian countries. Harvard Law School professor Jack Goldsmith and University of Arizona law professor Andrew Keane Woods are resigned to the idea that speech regulation has become unavoidable on the Internet and suggest that government decisionmakers ought to be more involved in the speech regulation decisions so far delegated (ostensibly) to the private sector.[192] While Goldsmith and Woods are obviously not calling for authoritarian abuse, they are advocating for control over the internet to regulate speech—crossing the Rubicon from free speech to censorship models. They declared:

> In the great debate of the past two decades about freedom versus control of the network, China was largely right and the United States was largely wrong. . . . Significant monitoring and speech control are inevitable components of a mature and flourishing internet, and governments must play a large role in these practices to ensure that the internet is compatible with a society's norms and values.[193]

The pressure brought upon Big Tech companies by political figures highlights the danger of a type of out-sourcing of censorship

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191. *Id.* This was a reference to the runoff elections in Georgia which would determine the control of the Senate in the 117th Congress.

192. Jack Goldsmith & Andrew Keane Woods, *Internet Speech Will Never Go Back to Normal*, THE ATLANTIC (Apr. 25, 2020), https://www.theatlantic.com/ideas/archive/2020/04/what-covid-revealed-about-internet/610549 [https://perma.cc/4Q7K-YLMM].

193. *Id.*

functions by governmental actors.[194] In some cases, the nexus is open and obvious. Recently, Twitter admitted that it was censoring criticism of the Indian government over its handling of the pandemic, particularly its failure to prepare for a second wave of infections.[195] There are widespread reports that the actual number of cases in the country could be three times higher than reported by the government[196] and that hundreds of thousands could be at risk or have died due to government neglect.[197] However, journalists, political figures, and others who critiqued government inaction were blocked by Twitter at the behest of the government.[198] Twitter simply asserted its authority to "withhold access to the content" if the company determined the content to be "illegal in a particular jurisdiction."[199] Once the Indian government restricted free speech, Twitter became the instrument for the enforcement of the rule through private censorship. Elsewhere, Twitter has been censoring critics of pandemic orders and those who have challenged scientific

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194. *See* Jonathan Turley, *'Shadow State': Embracing Corporate Governance to Escape Constitutional Limits*, THE HILL (July 17, 2021), https://thehill.com/opinion/judiciary/563520-shadow-state-embracing-corporate-governance-to-escape-constitutional-limits [https://perma.cc/XJ3M-D3YF].

195. Jonathan Turley, *Twitter Admits to Censoring Criticism of the Indian Government*, RES IPSA (Apr. 25, 2021), https://jonathanturley.org/2021/04/25/twitter-admits-to-censoring-criticism-of-the-indian-government [https://perma.cc/URG3-5N6R].

196. Michael Le Page, Clare Wilson et al., *Covid-19 News: Japan To Declare State of Emergency*, NEW SCIENTIST, April 23, 2021.

197. Shaikh Azizur Rahman & Emma Graham-Harrison, *India's Covid Death Toll at Record High, but True Figure Likely to Be Worse*, THE GUARDIAN (Apr. 24, 2021) https://www.theguardian.com/world/2021/apr/24/indias-covid-death-toll-hides-stark-truth-for-the-poor-its-even-worse [https://perma.cc/LK2J-VWZZ].

198. Sheikh Saaliq & Aijaz Hussain, *Virus 'Swallowing' People in India; Crematoriums Overwhelmed*, ASSOCIATED PRESS (Apr. 25, 2021), https://apnews.com/article/health-india-religion-coronavirus-c644fc9eb09beb04e16d0215a6693886 [https://perma.cc/RP72-LMLX].

199. *Id.*

claims as a threat to public health.[200] Yet in India, critics are attempting to reveal what they believe are threats to public health.[201] For Twitter, the sole issue appears to be that expressing such views is unlawful. Thus, the company has become a private arm of state censorship by enforcing such rules.

In the United States, the corporate-government alliance has been less direct but no less damaging for free speech. The demands for censorship have been reinforced by letters threatening congressional action. Many of those threats have centered on removing Section 230 immunity, pursuing antitrust measures, or other vague regulatory responses to penalize or deplatform conservative sites or speakers. That was the case with the previously referenced letter

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200. *See, e.g.*, Jonathan Turley, *Twitter Suspends Science Writer After He Posts Results of Pfizer Clinical Test*, RES IPSA (July 31, 2021), https://jonathanturley.org/2021/07/31/twitter-suspends-science-writer-after-he-posts-results-of-pfizer-clinical-test [https://perma.cc/3DSJ-9NUD].

Twitter's policy states:

> Content that is demonstrably false or misleading and may lead to significant risk of harm (such as increased exposure to the virus, or adverse effects on public health systems) may not be shared on Twitter. This includes sharing content that may mislead people about the nature of the COVID-19 virus; the efficacy and/or safety of preventative measures, treatments, or other precautions to mitigate or treat the disease; official regulations, restrictions, or exemptions pertaining to health advisories; or the prevalence of the virus or risk of infection or death associated with COVID-19. . . . When Tweets include misleading information about COVID-19, we may place a label on those Tweets that includes corrective information about that claim. . . . In some cases we may also add labels to provide context in situations where authoritative (scientific or otherwise) opinion might change or is changing over time, in situations where local context is important, or when the potential for harm is less direct or imminent.

TWITTER, COVID-19 MISLEADING INFORMATION POLICY (2021), available at https://help.twitter.com/en/rules-and-policies/medical-misinformation-policy [https://perma.cc/JLR9-Y3RL] (last visited Mar. 6, 2022).

201. *India Covid: Anger as Twitter Ordered to Remove Critical Virus Posts*, BBC (Apr. 26, 2021), https://www.bbc.com/news/world-asia-56883483 [https://perma.cc/GU4E-URQU] ("One Twitter user accused the government of 'finding it easier to take down tweets than ensure oxygen supplies.'").

to cable companies from Representatives Eshoo and McNerney asking why viewers should be allowed access to Fox News, which was the most watched cable news channel in 2020.[202] In stressing that "not all TV news sources are the same," the members confronted the carriers on airing the networks as purported "hotbeds" of disinformation and conspiracy theories.[203] Specifically, they objected that "Fox News . . . has spent years spewing misinformation about American politics."[204] The first question raised by the members seemed more like a statement:

> What moral or ethical principles (including those related to journalistic integrity, violence, medical information, and public health) do you apply in deciding which channels to carry or when to take adverse actions against a channel?[205]

The obvious answer would incorporate the foundational principles of free speech and the free press, which are not even referenced in a letter pushing for major news outlets to be essentially shut down. Instead, the companies are asked if they will impose a morality judgment on news coverage and, ultimately, access. This country went through a long and troubling period of morality codes being used to censor material in newspapers, speeches, books, and movies, including material created by feminists, atheists, and other disfavored groups.[206] To invite a return to such subjective standards is alarming.

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202. Letter from Reps. Anna Eshoo and Jerry McNerney to John Stankey, CEO, AT&T, Inc. (Feb. 22, 2021). For full disclosure, the author has worked as a legal analyst for NBC, CBS, BBC, and currently Fox News.

203. *Id.*

204. *Id.* While Rep. Eshoo later insisted that she was "just asking" questions, the absence of a question mark after these lines left little doubt that they were demands, not inquiries. Kimberley A. Strassel, *'Just Asking' for Censorship*, WALL ST. J. (Feb. 25, 2021), https://www.wsj.com/articles/just-asking-for-censorship-11614295623 [https://perma.cc/9H2W-A9XM].

205. Letter from Reps. Anna Eshoo and Jerry McNerney to John Stankey, CEO, AT&T, Inc. (Feb. 22, 2021).

206. *See* Turley, *Loadstone Rock*, *supra* note 14.

The type of demands contained in the Eshoo-McNerney letter has led some to question whether Congress is crossing the line into coercing companies to engage in censorship, particularly in the use of Section 230. The language of the Section itself is problematic in that it gives these companies immunity "to restrict access to or availability of material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected."[207] As Columbia Law professor Philip Hamburger has noted, the statute appears to permit what is made impermissible under the First Amendment: "Congress makes explicit that it is immunizing companies from liability for speech restrictions that would be unconstitutional if lawmakers themselves imposed them."[208] As Hamburger notes, that does not mean that the statute is unconstitutional, particularly given the judicial rule favoring narrow constructions to avoid unconstitutional meanings.[209] However, there is another lingering issue raised by the use of this power to carry out the clear preference on "content modification" of one party.

The Section 230 controversy raises the question of whether government actors (including members of Congress) can do indirectly what they are prohibited from doing directly. With members openly suggesting areas for speech bans, the risk of censorship by surrogate is obvious. That is particularly important when the challenged actions may be the result of coercion or compulsion. In the area of federalism, states are protected by decisions barring both

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207. 47 U.S.C. § 230(c).

208. Philip Hamburger, *The Constitution Can Crack Section 230*, WALL ST. J. (Jan. 29, 2021), https://www.wsj.com/articles/the-constitution-can-crack-section-230-11611946851 [https://perma.cc/XE8K-JJ4V].

209. *Id.*; *see, e.g.*, Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988) (narrowly construing law to avoid constitutional problems); Republican Party of Hawaii v. Mink, 474 U.S. 1301, 1302 (1985) (narrowly interpreting the recall provisions of the Honolulu City Charter).

coercion and commandeering by the federal government in cases like *New York v. United States*[210] and *Printz v. United States*.[211] In *National Federation of Independent Business v. Sebelius*,[212] seven members of the Court ruled that the Affordable Care Act's requirement that states expand Medicaid eligibility "runs contrary to our system of federalism" as embodied in the anti-commandeering principle.[213] In cases like *Murphy v. National Collegiate Athletic Association*,[214] the Court has reaffirmed that Congress may not issue direct orders to state governments.[215] While obviously distinct from the federalism context, the use of Section 230 and other demands on both Big Tech and cable companies raises an analogy to achieving unconstitutional results by commandeering third parties. The question is whether the threat of removing immunity protections or other benefits under laws like Section 230 is coercive to the point of "abridging the freedom of speech, or of the free press" as applied to these companies.[216]

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210. 505 U.S. 144, 161 (1992) (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, Inc., 452 U.S. 264, 288 (1981) ("Congress may not simply 'commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program.'").

211. 521 U.S. 898, 935 (1997) ("The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers . . . to administer or enforce a federal regulatory program. It matters not whether policymaking is involved . . . .").

212. 567 U.S. 519 (2012).

213. *Id.* at 577–78.

214. 138 S. Ct. 1461 (2018).

215. *Id.* at 1476.

216. Notably, Facebook even blocked former-President Donald Trump's voice. Facebook removed a video of an interview by Lara Trump of her father-in-law and the company declared that it would censor any content "in the voice of Donald Trump." Brooke Singman, *Facebook Removes Video of Trump Interview with Daughter-in-Law Lara Trump*, FOX NEWS (Mar. 31, 2021), https://www.foxnews.com/politics/facebook-removes-trump-interview-video-daughter-in-law-lara-trump [https://perma.cc/4MGZ-AYP5]. The classic commandeering case involves the conscription of states to carry out federal goals under threat of losing vital federal support. For example, in *New York v. United States*, 505 U.S. 144 (1992), the Court held that part of the Low-Level Radioactive Waste Policy Amendments Act of 1985 was unconstitutional because it "commandeer[ed] the

Likewise, courts have found that third parties can be considered state actors, such as when private security guards conduct searches under the direction of—or in coordination with—law enforcement. As with the First Amendment, the Fourth Amendment applies to governmental, not private actors. However, "[t]he Fourth Amendment protects against unreasonable searches and seizures by Government officials and those private individuals acting as instruments or agents of the Government."[217] This creates the same difficulty in determining whether private actors are responding to their own priorities or the directions of the government. In the case of congressional pressure, these companies can claim that a cooperative rather than an "agency relationship"[218] existed. Whether such threats can constitute a type of state action or even a type of commandeering through regulatory or legislative threats is a novel question. There are a few cases raising such issues, but they are limited and inconclusive.[219] However, the calls for greater censorship from the President and

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legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program . . . ." *Id.* at 176, 188 (quoting Hodel v. Virginia Surface Mining & Reclamation Ass'n, 452 U.S. 264, 288 (1981)). Specifically, the Court found that the "take title" provisions represented an unconstitutional command to the states. *Id.* The Court further expanded on that holding in *Printz v. United States*, 521 U.S. 898 (1997), by striking down one of the Brady Handgun Violence Prevention Act requirements. Specifically, the Court declared that that the Federal Government, in conducting background checks, "may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." *Id.* at 935.

217. United States v. Jarrett, 338 F.3d 339, 344 (4th Cir. 2003) (quoting Coolidge v. New Hampshire, 403 U.S. 443, 487 (1971)) (internal quotation marks and alterations omitted).

218. *Id.* (citing United States v. Ellyson, 326 F.3d 522, 527 (4th Cir. 2003)).

219. It may be possible for pressure from government officials to constitute state action for the purposes of an actual First Amendment claim. *See* Okwedy v. Molinari, 333

members of Congress create a credible fear of retaliation for companies if they fail to carry out political agendas.

This is admittedly a novel threat to free speech, but courts have long barred actions that indirectly curtailed constitutionally protected rights. Prohibited congressional actions range from voter deterrence to restriction of religious exercise to racial discrimination. Such protections are largely meaningless if Congress can pass laws that pressure or coerce private actors to limit the exercise of such rights.[220] Yet absent direct punitive actions, it is hard for a court to attribute private actions to governmental coercion.[221] After all, these

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F.3d 339, 344 (2d Cir. 2003); Rattner v. Netburn, 930 F.2d 204, 210 (2d Cir. 1991). In one case, a borough president in New York City asked a billboard company to take down a sign. *Okwedy*, 333 F.3d at 341–42. In another case, a village official wrote to a local chamber of commerce, objecting to an ad. *Rattner*, 930 F.2d at 205–07. In both cases, however, the standard involved a dismissal where all facts must be inferred in favor of the opposing party. The point is valid that letters can cross the line as a threat of retaliation or action against a private company. Yet, members of Congress have countervailing political speech and legislative interests. Courts are often uncomfortable in drawing such lines between advocacy and coercion by elected officials. *See* X-Men Sec., Inc. v. Pataki, 196 F.3d 56, 70 (2d Cir. 1999) (finding that legislators expressing criticism of a private company were "not decisionmakers but merely advocates"). *But see Okwedy*, 333 F.3d at 344 ("A public-official defendant who threatens to employ coercive state power to stifle protected speech violates a plaintiff's First Amendment rights, regardless of whether the threatened punishment comes in the form of the use (or, misuse) of the defendant's direct regulatory or decisionmaking authority over the plaintiff, or in some less-direct form.").

220. Even in the Fourteenth Amendment area, the use of private actors is largely insulated from review absent a close level of coordination. *See* Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974) (holding that the conduct of private individuals will not be attributed to the state unless there is a "sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself").

221. That was the case in the recent ruling by the United States Court of Appeals for the District of Columbia in *Association of American Physicians & Surgeons v. Schiff,* 23 F.4th 1028 (D.C. Cir. 2022), *which rejected a claim that a letter from Rep.* Adam B. Schiff, Chairman of the House Intelligence Committee, was a form of state action after he wrote letters to Google and Facebook "encourag[ing] them to use their platforms to prevent what [Representative] Schiff asserted to be inaccurate information on vaccines." *Id.* at 1030. The Court ruled that:

companies could have taken the same action without the coercion of Congress. As private companies, they can align themselves with one side of the political spectrum. There are also many who honestly believe that certain political, medical, or social views are harmful. It would be difficult for courts to attribute the censorship solely to coercion rather than these other factors. Yet despite these challenges, the express threats to remove Section 230 immunity absent greater censorship could offer a good faith basis for challenging some of these programs or policies.

Given the limits of judicial review, any effort to limit private censorship is more likely to succeed due to legislative action. The federal government has an interest in free speech not only as a protected right in the Constitution but also as a vital component for thriving social, political, and economic systems. Protection for the "marketplace of ideas" should be prioritized along with other fundamental liberties like voting and religious worship.[222] For example, the Supreme Court has recognized the importance of free speech and association to higher education:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.[223]

> [A]ppellants' allegations have not presented a plausible account of causation. Even assuming the Association's content was indeed demoted in search results and on social media platforms, the technology companies may have taken those actions for any number of reasons unrelated to Representative Schiff. Appellants offer no causal link that suggests it was an isolated inquiry by a single Member of Congress that prompted policy changes across multiple unrelated social media platforms.

Id. at 1034.

222. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market . . . .").

223. Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967).

There is no question that protecting free speech and academic freedom is in the national interest. Moreover, orthodoxy limits intellectual discourse and exploration. It chills those who might challenge assumptions or assertions. If heterodoxy is the "marketplace of ideas," orthodoxy is its graveyard. Yet, private universities and companies can claim intolerance of opposing viewpoints as a protected bias. The question is whether the government has the capability to protect that interest through legislation or whether enforced orthodoxy is itself merely a form of protected speech.

III. Coercing Free Speech: The Role of Legislation and Regulation In Protecting the Millian "Marketplace of Ideas"

Harm-based rationales have long been used to limit or deny free speech. Harm avoidance can be a license for speech controls. Yet, as discussed above, Mill's harm principle offers both a measure of the problem and a method for correcting it. It is possible to reorient current rules to focus more narrowly on Millian harm to maximize the space for free speech. Of course, legislating viewpoint toleration can seem oxymoronic as a way of coercing free speech.[224] There is a false dichotomy, however, in coercing others to support particular viewpoints and in coercing authorities (whether governmental or educational) to protect all viewpoints. One seeks to silence others while the other seeks to guarantee speech. Coercing free speech is premised on the notion that speech alone is not a harm and, to the contrary, is essential from not only a normative but a functionalist perspective. Mill's writings obviously can be used more narrowly where the harm principle is treated as more of

224. It is fair for some to ask whether there is a conceptual or practical difference between coercing values through legislation barring pornography, as discussed in an earlier article, *see* Turley, *Loadstone Rock*, *supra* note 14, at 1933–37, and coercing values like free speech, as suggested in this article. The difference is that supporting free speech generally is not content-based or fixed on a particular viewpoint. It favors all viewpoints in supporting a defining value in our society.

a threshold exclusion for entirely harmless acts or views. Once harm is found under this approach, the issue becomes not a question under the harm principle but rather under a type of expediency principle.[225] As noted above, this view ignores the full context of Mill's view and fails to see how such an interpretation would render the harm principle a virtual nullity. The government currently coerces private parties such as restaurants or schools to respect the civil rights of citizens and to stop discriminatory policies. That coercion is not viewed as equivalent to that of racists who try to stop segregation or inclusion. Civil rights laws force access for everyone in the same way that free speech legislation would force the access of all viewpoints.

The government encourages the exercise of speech in myriad ways from maintaining open forums to crafting legal standards. For example, in *New York Times Co. v. Sullivan*,[226] Justice Brennan cited Mill as part of the justification for extending First Amendment protections to defamation cases.[227] Brennan notably focused on free speech, not as a natural right but as a right that was instrumental or important to the democratic process.[228] He quoted Mill to reaf-

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225. *See* Smith, *supra* note 63, at 5 (citing Jorge Menezes Oliveira, *Harm and Offence in Mill's Conception of Liberty* at 19 (unpublished paper, Oxford University), available at http://www.trinitinture.com/documents/oliveira.pdf [https://perma.cc/MK9B-63WX])("If a kind of conduct is deemed harmless, then it is outside the coercive authority of the state. Conversely, if conduct *does* cause harm, then it is within the state's regulatory domain; but whether regulation is prudent or appropriate still depends on the application of the 'principle of expediency.' There is much conduct that government legitimately *could* regulate but prudently *should not*.").

226. 376 U.S. 254 (1964).

227. *Id.* at 272 n.13, 277, 279 n.19.

228. *Id.* at 278–83. Despite such functionalist rationales, Brennan publicly eschewed positivism:

> The shift must be away from finespun technicalities and abstract rules. The vogue for positivism in jurisprudence—the obsession with what the law is . . . had to be replaced by a jurisprudence that recognizes human beings as the most distinctive and important feature of the universe which confronts our

firm that "[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'"[229] The *Sullivan* decision reflects how legislative or judicial choices can expand or shrink the range of viewpoints by offering safe harbors for free speech.

Mill wrote about the role of government supporting such rights. He generally divided governmental actions into authoritative and non-authoritative acts under which "the authoritative form of government intervention has a much more limited sphere of legitimate action than the other."[230] Non-authoritative action includes the role of a government to protect the space of individual choice and action, "not meddling with them, but not trusting the object solely to their care, establishes, side by side with their arrangements, an agency of its own for a like purpose."[231] There is even a role for authoritative action, but the burden is much higher and it is excluded from areas that must be left to individual choice:

> [Authoritative action] requires a much stronger necessity to justify it in any case; while there are large departments of human life from which it must be unreservedly and imperiously excluded. Whatever theory we adopt respecting the foundation of the social union, and under whatever political institutions we live, there is a circle around every individual human being, which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep: there is a part of the life of every person

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> senses, and the function of law as the historic means of guaranteeing that preeminence.

William J. Brennan, Jr., Address at the Annual Survey of American Law at New York University Law School (Apr. 15, 1982), *in* Daniel J. O'Hern, *The Twelfth Annual Chief Justice Joseph Weintraub Lecture: Brennan and Weintraub: Two Stars to Guide Us*, 46 RUTGERS L. REV. 1049, 1058 (1994).

229. *Sullivan*, 376 U.S. at 279 n.19 (quoting JOHN STUART MILL, UTILITARIANISM AND ON LIBERTY 100 (Mary Warnock ed., Blackwell Publ'g 2d ed. 2003) (1859)).

230. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 72, at 19.

231. *Id.*

> who has come to years of discretion, within which the individuality of that person ought to reign uncontrolled either by any other individual or by the public collectively.[232]

The issue of free speech straddles the line of Millian authoritative and non-authoritative action. Federal legislation involves the government "issuing a command and enforcing it by penalties,"[233] but those commands are designed to protect, not reduce, the "circle[s]" around individuals in their freedom of thought and expression.

This is why "coercing free speech" can be consistent with expanding individual freedoms. Writers like Mill wrote about how civilization promotes the pursuit of individual happiness and development. Hobbes described how the social contract underlying the creation of a state was prompted by a desire to leave the state of nature where "every man has a right to everything, even to one another's body."[234] It is in the state of nature where no rights are respected and individual existence is "solitary, poor, nasty, brutish, and short."[235] Legislation designed to protect civil liberties, like civil rights laws, is aligned with that social contract—it combats those who would use intimidation or violence to silence opposing viewpoints. If the social contract helped create Mill's circles, legislation can reinforce them and maximize individual choice.

From a classical liberal perspective, the notion of governmental action to protect free speech has a certain Hobbesian appeal. After all, the reason to leave the state of nature was so no longer to be ruled by the brutish and violent realities of stateless existence. The social contract to surrender powers to the state was based on the promise of protection from the violence and intimidation of others. For a state or local government to stand by idly as others violently stop the exercise of free speech constitutes something of a bait–and-

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232. *Id.* at 937–38.
233. *Id.* at 937.
234. THOMAS HOBBES, LEVIATHAN, ch. xiv, at 99 para. 4 (Edwin Curley ed., Hackett Publ'g Co. 1994) (1651).
235. *Id.*

switch, where powers are surrendered but protections are withheld by the state.

The challenge is to find a suitable role for the federal government that does not itself threaten free speech values or associational rights. In some cases, the federal government has been excessive in its response to violent protests. For example, the classification of Antifa as a terrorist organization is unwarranted,[236] and individual terrorism charges in cases in Charlottesville,[237] New York,[238] Seattle,[239] and Oklahoma City[240] raise questions of overreach. Conversely, the federal government has focused on the threat to tangible property rather than to the intangible constitutional rights of others. Antifa often directs its violence toward preventing others from speaking. However, the government has worked to stretch laws to cover what are primarily state offenses, including bringing federal arson charges for the burning of a municipal police vehicle in Chicago.[241] Ideally, the denial of a civil liberty protected under

236. Jonathan Turley, *Why Trump's Tweet About Labeling 'Antifa' a Terrorist Group Is So Dangerous*, L.A. TIMES (June 1, 2020), https://www.latimes.com/opinion/story/2020-06-01/antifa-protests-donald-trump-terrorist-group [https://perma.cc/67PQ-EJZV].

237. Jonathan Turley, *Should Protesters Be Classified as Terrorists?*, THE HILL (Aug. 13, 2017), https://thehill.com/blogs/pundits-blog/civil-rights/347702-opinion-should-protesters-be-classified-as-terrorists [https://perma.cc/9WQK-996K].

238. Jonathan Turley, *"Gasoline is Awfully Cheap": Police Action Against "Ace Burns" Raises Free Speech Concerns*, RES IPSA (June 8, 2020), https://jonathanturley.org/2020/06/08/gasoline-is-awfully-cheap-police-action-against-ace-burns-raises-free-speech-concerns [https://perma.cc/6R7M-ZER7].

239. Jonathan Turley, *How Seattle Autonomous Zone Is Dangerously Defining Leadership*, THE HILL (June 13, 2020), https://thehill.com/opinion/judiciary/502576-how-seattle-autonomous-zone-is-dangerously-defining-leadership [https://perma.cc/YX73-UABM] [hereinafter Turley, *Seattle Autonomous Zone*].

240. Jonathan Turley, *Oklahoma Teens Charged with Terrorism for Breaking Windows During Protests*, RES IPSA (July 22, 2020), https://jonathanturley.org/2020/07/22/oklahoma-teens-charged-with-terrorism-for-breaking-windows-during-protests [https://perma.cc/3RK9-P6YD].

241. Jonathan Turley, *"Joker" Case in Chicago Shows New Expansive Claim of Federal Jurisdiction*, RES IPSA (June 4, 2020), https://jonathanturley.org/2020/06/04/joker-case-in-chicago-shows-new-expansive-claim-of-federal-jurisdiction [https://perma.cc/7J3D-252V].

the Bill of Rights in Chicago should be more of a federal priority than should be the torching of a police cruiser.

As noted earlier, there is the countervailing concern that protecting free speech can be viewed as compelled speech. Since corporations and universities often claim Millian harms from unregulated speech, that claim is likely to be made in challenging any effort to guarantee the expression of diverse viewpoints. Yet, there is already ample protection against the government compelling adherence to particular viewpoints or preventing opposing viewpoints from being heard. As shown in *West Virginia State Board of Education v. Barnette*,[242] any law forcing the expression of ideologies or beliefs is subject to strict scrutiny: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[243] However, this is not a case of forcing speech but allowing speech. The government is not forcing groups to speak by including opposing views in their own demonstrations. Rather, these groups are being denied the right to stop others from speaking through violence or threats.

An obvious comparison can be drawn to *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*,[244] in which the Court held that organizers of a St. Patrick's Day parade could not be forced under anti-discrimination laws to allow GLIB—an Irish gay affinity group—to march in the parade.[245] The inclusion of the group was deemed a transgression upon "the general rule of speaker's autonomy."[246] The decision in *Hurley* can be cited on both sides of this debate. It treats an anti-discrimination law as compelling speech and thus could support a similar claim under an anti-free

242. 319 U.S. 624 (1943).
243. *Id*. at 642.
244. 515 U.S. 557 (1995).
245. *See id.* at 566.
246. *Id.* at 578.

speech law. However, *Hurley* involved a compelled inclusion of a message in the parade. The issue often raised in deplatforming is the failure of cities to protect demonstrations or the canceling of events at public universities due to expected security issues. A law or policy based on protecting the right to demonstrate in such spaces would not force the inclusion of any viewpoint. Indeed, it would protect all sides in being able to speak with the condition that no group could use threats or violence to prevent opposing speech.[247] In *Hurley*, the Court viewed the parade itself as more akin to a "protest march" where the organizers were not barring GLIB members from participating but rather barring their displays of countervailing messages.[248]

The greatest retort to the compelled speech argument would likely be found in *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*).[249] The case involved a challenge to the Solomon Amendment, which conditioned federal aid to law schools on allowing access of students to military recruiters. Many universities barred such access due to the discrimination of the military against homosexuals under the "Don't Ask, Don't Tell" policy.[250] The schools argued that the pressure not to discriminate against military recruiters (and some students) was itself compelled speech.[251] The Court rejected that claim. It found that the involvement of the

247. A distinction can be drawn with social media companies, which clearly have free speech and associational rights of exclusion. The issue with social media is whether the government can condition the receipt of benefits, like immunity, on maintaining forums akin to public spaces. However, absent some regulation, such as a public utility or change in status, these private companies can forego such benefits and continue to engage in viewpoint discrimination. Such federal funding conditions makes the case more similar to *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.* (*FAIR*), 547 U.S. 47 (2006).

248. 515 U.S. at 577.

249. 547 U.S. 47 (2006).

250. Claudio Sanchez, *U.S. Government Punishes Schools That Ban Military Recruiting*, NPR (June 1, 2005), https://www.npr.org/templates/story/story.php?storyId=4675926 [https://perma.cc/4Z2K-YQVL].

251. *Rumsfeld*, 547 U.S. at 62–63.

law schools in dealing with recruiters through such channels as email was too inconsequential to constitute compelled association.[252] Unlike in *Hurley*, the Court found that permitting such associations did not involve an "overwhelmingly apparent" message attributable to the schools.[253] The Court held that

> The Solomon Amendment has no similar effect on a law school's associational rights. Students and faculty are free to associate to voice their disapproval of the military's message; nothing about the statute affects the composition of the group by making group membership less desirable. The Solomon Amendment therefore does not violate a law school's First Amendment rights.[254]

The standard for compelled speech goes back to the original *Barnette* decision from 1943, when the Court declared a "compulsory flag salute and pledge requires affirmation of a belief and an attitude of mind."[255] The Court's defense of the "fixed star in our constitutional constellation" was to bar compelled speech and state-enforced orthodoxy."[256] Coercing free speech is not the same as compelling speech. The former forces tolerance for diverse viewpoints while the latter forces expression of viewpoints. That is why the principal arguments against free speech legislation are more likely to focus on the harm rather than the exercise of free speech.

A. Protecting the Virtual Marketplace

The Internet is arguably the single greatest invention for free speech since the printing press. The focus of legislation should be

252. *Id*. at 62.
253. *Id*. at 66.
254. *Id*. at 69–70.
255. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 633 (1943).
256. *Id*. at 650.

to return to the original vision of social media companies and Internet providers as being largely content-neutral.[257] Sites like Facebook were pitched by figures like Mark Zuckerberg as meant to "give people the power to build community and bring the world closer together."[258] The Internet is now a vital means for people to exercise Mill's ideal of "liberty of expressing and publishing opinions."[259] It is the space for individual exploration and invention that Mill saw as the fulfillment of the human purpose. That pursuit should not be hampered by the opposing values or priorities or sensitivities of others:

> [L]iberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong.[260]

There are clearly countervailing free speech and associational interests in the growing controversy over censorship on the Internet. These companies have free speech and associational rights in the content of their platforms as well as contractual reservations of the right to exclude some viewpoints. However, the virtual marketplace is largely controlled by a handful of massive corporations, which increasingly bar views deemed to be "disinformation" or "misinformation." The private status of these companies hits the previously discussed blind spot in the Constitution. As a result, some have called for the reexamination of the status of Internet Service Providers (ISPs) and, specifically, social media companies.

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257. Jonathan Turley, *The Case for Internet Originalism*, THE HILL (Oct. 31. 2020), https://thehill.com/opinion/judiciary/523750-the-case-for-internet-originalism [https://perma.cc/CHR9-BF2B] [hereinafter Turley, *Internet Originalism*].

258. Mark Zuckerberg, *Bringing the World Closer Together*, FACEBOOK (Mar. 15, 2021), https://www.facebook.com/notes/mark-zuckerberg/bringing-the-world-closer-together/10154944663901634 [https://perma.cc/LYV9-3FM5].

259. MILL, ON LIBERTY, *supra* note 56, at 71.

260. *Id.*

The expansive view of harmful speech on the Internet has led to one of the largest censorship systems in history. With that expansion has come increasing complaints of bias. Establishing such bias, however, is difficult since these companies control data and records and have resisted efforts at transparency. Recently, there was a widely reported study that purportedly showed that the censoring of material on Twitter and other platforms showed no political bias.[261] However, the report states the following:

> The question of whether social media companies harbor an anti-conservative bias can't be answered conclusively because the data available to academic and civil society researchers aren't sufficiently detailed. Existing periodic enforcement disclosures by Facebook, Twitter, and YouTube are helpful but not granular enough to allow for thorough analysis by outsiders.[262]

Thus, the report is not actually based on a review of individuals and groups censored by these companies because the companies refuse to release the data. Congress could require greater transparency through both legislative inquiry as well as regulatory means in the censoring of speech on the Internet. There are also options for a more sweeping change in the status of these companies as a regulated industry.

The legal foundation for such a free speech protection on the Internet can be based on well-established federal jurisdictional grounds over interstate commerce. There is also a long line of statutes seeking national uniformity in areas impacting commerce and communications. Congress commonly relies on the preemption

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261. PAUL M. BARRETT & J. GRAM SIMS, CTR. FOR BUS. & HUM. RTS., N.Y.U., FALSE ACCUSATION: THE UNFOUNDED CLAIM THAT SOCIAL MEDIA COMPANIES CENSOR CONSERVATIVES (Feb. 2021), https://bhr.stern.nyu.edu/bias-report-release-page [https://perma.cc/RG6C-2JWA].

262. *Id.*

doctrine to create uniform national standards.[263] Whether laws are meant to guarantee clean air standards or the uniformity of medical devices, the courts recognize that, absent commandeering concerns, there is an inherent right for the federal government to supersede conflicting state laws. Some of these laws arguably curtail forms of speech or at least the regulation of commercial speech. For example, the Public Health Cigarette Smoking Act of 1969 provides that "no requirement or prohibition based on smoking and health shall be imposed under State law with respect to the advertising or promotion of any cigarettes the packages of which are labeled in conformity with the provisions of this chapter."[264] There is clearly a difference between requiring airbags in cars and requiring free speech in schools. The question is whether Congress should, or can, claim the right to create a uniform protection of free speech as it does with technological or safety standards.

Congress has long exercised jurisdiction over interstate communications in wire, mail, and electronic communications or transfers. The Internet companies are already subject to a host of federal laws. Nevertheless, Congress would have to tailor legislation to address not only constitutional concerns but also practical considerations. Some specific speech measures have been tried in the past, but those efforts have had mixed, and at times counterproductive, results. One coercive measure that would not advance the interests of free speech or the free press would be the restoration of the Fairness Doctrine, requiring radio and television news outlets to feature opposing viewpoints "in any case in which broadcast facilities are

263. For example, the National Traffic and Motor Safety Act of 1966 provides that "no State . . . shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (1988) (repealed 1994); *see* Geier v. Am. Honda Motor Co., 529 U.S. 861, 867 (2000).

264. 15 U.S.C. § 1334 (2018); *see* Cipollone v. Liggett Grp., 505 U.S. 504, 515 (1992).

used for the discussion of a controversial issue of public importance."[265] That 1949 rule[266] was an ill-conceived measure ultimately rescinded in 1987.[267] From traditional free speech and free press perspectives, government regulation of media is often anathema to the language and purpose of the First Amendment. It raises the same objection from Justice Black that "I read 'no law . . . abridging' to mean *no law abridging*."[268] Yet the Supreme Court upheld the doctrine in 1969, but applied a lower standard of review (the intermediate scrutiny test) in *Red Lion Broadcasting Co. v. FCC*.[269] The analysis remains highly controversial, particularly in the application of an intermediate standard of review. There is ample reason to question whether *Red Lion* would be reaffirmed or alternatively applied to cable, rather than to broadcast, companies.[270] When *Red Lion* was decided, there were only a small number of broadcasters, and that "scarcity" played a major role in the Court's analysis:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the

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265. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 40 F.C.C. 598, 599 (1964). Under the rule, "[a] licensee . . . is called upon to make reasonable judgments in good faith on the facts of each situation—as to whether a controversial issue of public importance is involved, as to what viewpoints have been or should be presented, as to the format and spokesmen to present the viewpoints, and all the other facets of such programming." *Id.*

266. Editorializing by Broadcast Licensees, 13 F.C.C. 1246, 1247 (1949).

267. Syracuse Peace Council, 2 FCC Rcd. 5043, 5057 (1987) (concluding "that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest").

268. Smith v. California, 361 U.S. 147, 157 (1959) (Black, J., concurring).

269. 395 U.S. 367, 400–01 (1969).

270. That includes the countervailing logic and holding of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 258 (1974) (striking down a state fairness law as applied to a newspaper's coverage).

> viewers and listeners, not the right of the broadcasters, which is paramount.[271]

This reasoning is no longer compelling, given the diversity of media outlets today, including cable programming.[272] Moreover, in a 1985 report, the FCC created a record that shows that the rule did not lead to greater diversity of views. Rather, it actually reduced coverage in some cases.[273] Broadcasters acknowledged that they would not run certain stories or cover issues out of concern that they would face scrutiny under the Fairness Doctrine.[274] The FCC also noted that the doctrine was imposing high costs for broadcasters and that there was an uneven enforcement of the policy.[275] The Fairness Doctrine would only introduce greater control over the media and enable those who want to manipulate content. It did little beyond superficial balancing opinions and was widely criticized as ineffectual. The key to coercing free speech is to protect forums of content neutrality and protection. It requires Congress to do something that it has shown little appetite for or interest in doing in the past, which is limiting its own influence and power. The focus should be on preserving neutral forums on the Internet such as social media sites rather than forcing companies to publish a balance of views. This is the difference between a focus on limiting viewpoint censorship and the compulsion of viewpoint expression.

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271. *Red Lion*, 395 U.S. at 390 (citations omitted).

272. Jonathan Turley, *The Fairness Doctrine Is Bad News*, THE HILL (Mar. 13, 2021), https://thehill.com/opinion/judiciary/543043-the-fairness-doctrine-is-bad-news [https://perma.cc/JBA9-WBJY].

273. 1985 Fairness Report, General Fairness Doctrine Obligations of Broadcast Licensees, 50 Fed. Reg. 35,418 (Aug. 30, 1985); *see also* Syracuse Peace Council, 2 FCC Rcd. 5043, 5057 (1987) (concluding "that the fairness doctrine contravenes the First Amendment and thereby disserves the public interest").

274. 50 Fed. Reg. 35,418 (Aug. 30, 1985).

275. *Id.*

A focus on social media is based on a recognition of its status as the dominant forum for contemporary expression and communications. As discussed earlier, social media companies have substantially increased the censorship and flagging of content deemed false or misleading. The companies engage in such censorship increasingly at the behest of political figures, who control whether the industry will continue to enjoy immunity under Section 230(c)(1) of the Communications Decency Act (CDA). The CDA states: "No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[276] It further defines "interactive computer service" as "any information service, system, or access software provider that provides or enables computer access by multiple users to a computer server, including specifically a service or system that provides access to the Internet and such systems operated or services offered by libraries or educational institutions."[277] The Fourth Circuit issued an opinion in *Zeran v. America Online*[278] that remains the foundational case for this immunity. The opinion emphasized the status of Internet providers as neutral forums. Given "the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium," the court concluded that the law means that "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions—such as deciding whether to publish, withdraw, postpone or alter content—are barred."[279] In this way, Congress

276. 47 U.S.C. § 230(c)(1).

277. 47 U.S.C. § 230(f)(2).

278. Zeran v. Am. Online, 129 F.3d 327 (4th Cir. 1997).

279. *Id.* at 330. Courts have pushed back on the sweeping interpretation of Section 230 in other leading cases. *See, e.g.*, Fair Housing Council of San Fernando Valley v. Roommates.com, LLC, 521 F.3d 1157, 1165–69 (9th Cir. 2008) (barring website's encouragement of illegal content); Barnes v. Yahoo!, Inc., 570 F.3d 1096, 1106–09 (9th Cir. 2009) (rejecting immunity from liability for subsequent promises regarding content).

solved the "moderator's dilemma," where moderation could make companies liable for user content but neutrality could turn sites into fora for harmful speech.

The special protection afforded social media companies was consistent with other neutral industries. For example, in *Smith v. California*,[280] the Court overturned the conviction of a Los Angeles bookstore owner whose store sold an obscene book. Justice Brennan stressed in the majority opinion that "[b]y dispensing with any requirement of knowledge of the contents of the book on the part of the seller, the ordinance tends to impose a severe limitation on the public's access to constitutionally protected matter."[281] If such a bookseller is criminally liable for content, "he will tend to restrict the books he sells to those he has inspected; and thus the State will have imposed a restriction upon the distribution of constitutionally protected as well as obscene literature."[282] Yet companies like Twitter now openly engage in those "traditional editorial functions" while enjoying immunity denied to others performing those functions like newspapers and television programming. These companies originally were viewed as alternatives to telephone companies. They have indeed reached that goal, with billions of annual users at sites like Facebook and Twitter. The "Internet originalist" position is still possible if the companies return to the function of neutral communicative companies as opposed to publishers.[283] However, that does not appear to be the intent of these companies, which have pledged continuing censorship programs. That position simplifies the question for many. For years, the concern was that removing immunity from these companies would only increase their censorship of content. The status quo maintains the worst of both worlds of companies engaged in extensive censorship while the government bars lawsuits from citizens who are injured

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280. 361 U.S. 147 (1959).
281. *Id.* at 153.
282. *Id.*
283. *See* Turley, *Internet Originalism*, supra note 257.

by publications. These companies have resolved the "moderator's dilemma" by becoming full-fledged moderators.

As discussed earlier, Mill believed that free speech requires "some space in human existence thus entrenched around, and sacred from authoritative intrusion."[284] What has changed today is that such "authoritative intrusion" can come from not just state action but also corporate and private action. Moreover, the most important "space" today is not physical but virtual on the Internet and through social media. Accordingly, the most important role for state action in the area of free speech is to protect the entire "marketplace of ideas"—both physical and virtual forums for the expression of viewpoints. The protection of such spaces affirms the Millian, rather than the functionalist, model of free speech. It is protecting free speech for the sake of free speech itself. The obvious countervailing concern is that, as private companies, social media platforms are allowed to pursue their own free speech and associations interests. As noted earlier, absent regulations as public utilities or a change in that status,[285] these remain private companies with First Amendment rights to engage in viewpoint discrimination.[286] The question is whether these companies can be induced to reduce censorship policies through conditional federal benefits or immunities.

284. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 72, at 938.

285. *See* U.S. Telecom Ass'n v. FCC, 825 F.3d 674, 740 (D.C. Cir. 2016) (rejecting challenge to the FCC's 2015 net neutrality order because the FCC's rules "affect[ed] a common carrier's neutral transmission of *others'* speech, not a carrier's communication of its own message").

286. *See* Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n, 475 U.S. 1, 9 (1986) (plurality opinion); *see also id.* at 24 (Marshall, J., concurring in the judgment) ("While the interference with appellant's speech is, concededly, very slight, the State's justification—the subsidization of another speaker chosen by the State—is insufficient to sustain even that minor burden.").

Section 230 was designed to protect what Congress saw as "a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[287] Congress understood that providers had to be able to remove objectionable material. However, the immunity provision was seen as furthering free speech by reducing the pressure of lawsuits that could lead to greater censorship. This point was made in *Zeran*:

> The purpose of this statutory immunity is not difficult to discern. Congress recognized the threat that tort-based lawsuits pose to freedom of speech in the new and burgeoning Internet medium. The imposition of tort liability on service providers for the communications of others represented, for Congress, simply another form of intrusive government regulation of speech. Section 230 was enacted, in part, to maintain the robust nature of Internet communication and, accordingly, to keep government interference in the medium to a minimum.[288]

Congress certainly wanted to foster Internet sites by limiting liability, and it further wanted the removal of child pornography and other material. However, it also viewed providers as the platform for millions (now billions) of communications that would not be the responsibility of the companies.[289] It was hoped that immunity would allow this "forum for true diversity" in viewpoints to flourish.

As social media censorship expanded exponentially, questions over the continued logic of immunity have also increased. The debate has forced a conceptual clash between users and these companies. The outrage over the increased censorship reveals a view that these sites should serve as neutral platforms for communication

287. 47 U.S.C. § 230(a)(3).

288. Zeran v. Am. Online, Inc., 129 F.3d 327, 330 (4th Cir. 1997).

289. *Id.* at 331 ("The amount of information communicated via interactive computer services is . . . staggering. The specter of tort liability in an area of such prolific speech would have an obvious chilling effect. It would be impossible for service providers to screen each of their millions of postings for possible problems.").

and expression. As the forums increasingly replace telephonic communications, the analogies (and expectations) vis-à-vis telephone companies also increase. If Verizon or Sprint interrupted calls to stop people from expressing false or misleading thoughts, the public would be outraged. Twitter serves the same communicative function between consenting parties; it simply allows thousands of people to participate in such digital exchanges.

The status of social media companies was raised in dicta by Justice Thomas in his concurrence in the Supreme Court's dismissal of the appeal in *Biden v. Knight First Amendment Institute*,[290] a case challenging the blocking of users from then-President Donald Trump's Twitter account. Thomas observed that "there is clear historical precedent for regulating transportation and communications networks in a similar manner as traditional common carriers."[291] Thomas noted that these companies had supplanted telephone and mail companies and the support given to social media companies was used as a basis for regulation: "By giving these companies special privileges, governments place them into a category distinct from other companies and closer to some functions, like the postal service, that the State has traditionally undertaken."[292] Justice Thomas continued:

> In many ways, digital platforms that hold themselves out to the public resemble traditional common carriers. Though digital instead of physical, they are at bottom communications networks, and they 'carry' information from one user to another. A traditional telephone company laid physical wires to create a network connecting people. Digital platforms lay information infrastructure that can be controlled in much the same way. And unlike newspapers, digital platforms hold themselves out as organizations that focus on distributing the speech of the broader

290. 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring).
291. *Id.* at 1223.
292. *Id.*

> public. Federal law dictates that companies cannot 'be treated as the publisher or speaker' of information that they merely distribute.[293]

The regulation of social media companies as akin to a telephone company would allow the government to impose public forum protections from censorship.[294] Since the government itself is subject to the First Amendment, any regulations would need to be content neutral, with the exception of narrow categories like child pornography. The treatment of Internet Service Providers (ISPs) like common carriers would be a broader application of Section 230, which is modeled on the treatments of telephone companies or postal carriers. Those companies do not exercise editorial control over communications. ISPs do exercise an expanding degree of such editorial control. In conditioning operations of ISPs on maintaining public fora, the harm principle would allow for a workable and reasonable standard for such companies. ISPs could continue to delete threats of actual harm, criminal conduct, or fraudulent or deceptive practices, but the censorship of the amorphous categories of "misinformation" or "disinformation" would be impermissible. That broader notion of harm placed the Internet on the slippery slope of corporate speech management as different groups demanded curtailment of their own views of "untruth" in areas ranging from climate change to election fraud. The "harm" from such views is precisely what Mill rejected as the basis for state action. As Jeremy Waldron discussed, moral distress is not part of the balance of liberty and harm under Mill's approach.[295] To the contrary, moral distress, "far

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293. *Id.* at 1224 (citations omitted).

294. Various academics have raised this possible shift in status in light of the monopolistic powers exercised by these companies. *See, e.g.*, Tunku Varadarajan, *The 'Common Carrier' Solution to Social-Media Censorship*, WALL ST. J. (Jan. 15, 2021), https://www.wsj.com/articles/the-common-carrier-solution-to-social-media-censorship-11610732343 [https://perma.cc/3KRB-45MK].

295. Waldron, *supra* note 84, at 115; *see also* Jennifer Cobbe, *Algorithmic Censorship by Social Platforms: Power and Resistance*, 34 PHILOS. & TECHNOL. 739, 740 (2020), https://doi.org/10.1007/s13347-020-00429-0 [https://perma.cc/693U-WHN2] ("From

from being a legitimate ground for interference . . . is a positive and healthy sign that the processes of ethical confrontation that Mill called for are actually taking place."[296]

The reason that we are now in this inherently conflicted position is that federal law does not expressly require editorial neutrality or limit moderation. Rather, it allows for moderation with an ill-defined and ambiguous standard of offensive content as material that is "obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable."[297] Reducing corporate censorship can be tied to the receipt of benefits or immunities (or as part of a more sweeping change as a regulated industry or common carrier). Bipartisan legislative proposals tend to focus on greater transparency but would not seriously mitigate the censorship of viewpoints. For example, the Platform Accountability and Consumer Transparency Act (PACT Act) would require internet platforms to "publish an acceptable use policy . . . in a location that is easily accessible to the user."[298] While PACT would improve transparency and avenues to contest censorship, it would not seek to create truly neutral platforms. A more aggressive approach would be to narrow that moderation language to focus on unlawful content and leave the rest of the "objectionable" content to people using free speech to voice their objections.[299] An alternative approach would be to tie the

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their earliest days, many social platforms adopted a hands-off approach and promoted the apparent benefits of connecting people, sharing information, and the free exchange of ideas.").

296. Waldron, *supra* note 84, at 125. *But see* Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. ST. L.J. 1107, 1107 (2012).

297. 47 U.S.C. § 230(c)(2)(A).

298. Platform Accountability and Consumer Transparency Act, S. 797, 117th Cong. §5(a)(1) (2021).

299. Such legislation has been offered in Congress to narrow severely the moderation authority permitted under continued immunity. *See* Stop the Censorship Act, H.R. 4027, 116th Cong. (2020). In addition to the approach of Stop the Censorship Act, senators have introduced The Online Freedom and Viewpoint Diversity Act (OFVDA), to

scope of moderation to case law controlling upon the government in terms of protected speech. That is compelling for those who view the recent congressional pressure for "robust content modification" as an indirect form of government censorship. Under proposals like the Stopping Big Tech's Censorship Act,[300] moderation would be limited to situations where "(I) the action is taken in a *viewpoint-neutral manner*; (II) the restriction limits only the time, place, or manner in which the material is available; and (III) there is a compelling reason for restricting that access or availability."[301] Such a change would force companies like Twitter to make a choice — openly and honestly. It can be a platform for free speech and expression, or it can be a publisher with full regulation of content and viewpoints. It cannot be both.

The failure of executive orders, lawsuits, and public pressure to change censorship policies on social media shows the need for legislative change.[302] Some legislative changes could backfire in creating an opportunity for political interference and new free speech concerns. For example, the Ending Support for Internet Censorship Act[303] seeks to require "politically unbiased content moderation by covered companies" but also would require "an immunity certification from the Federal Trade Commission" that shows by clear and convincing evidence that the company did not engage in politically biased regulation of speech.[304] The proposal reflects a need for some outside review of the companies in fulfilling the conditions

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change "otherwise objectionable" material to material "promoting self-harm, promoting terrorism, or unlawful." S. 4534, 116th Cong. §2(1)(B)(i)(II) (2020).

300. S. 4062, 116th Cong. (2020).

301. *Id.* §2(B)(i) (emphasis added).

302. Former President Donald Trump issued an executive order to seek "clarification" of such moderation. Exec. Order No. 13,925 §2, 85 Fed. Reg. 34,079, 34,080 (May 28, 2020). That order mandated that "immunity should not extend beyond its text and purpose to provide protection for those who purport to provide users a forum for free and open speech, but in reality use their power over a vital means of communication to engage in deceptive or pretextual actions stifling free and open debate by censoring certain viewpoints." *Id.*

303. S. 1914, 116th Cong. (2019).

304. *Id.* §2(a)(1).

for immunity. However, giving such certification power to the executive branch could invite a new form of bias and threats to free speech. Such review is best left to the courts with clearly defined standards and transparency rules.

B. Protecting the Physical Marketplace

The Internet enables the vast majority of political speech today. However, in-person demonstrations and speeches continue to be a key part of our political dialogue even during the pandemic—the "space" that Mill likely had in mind in calling for protections from "authoritative intrusion." The ability to interact in real time with others is key to many forms of political and artistic speech. Those physical spaces, however, are also being subjected to anti-free speech campaigns—efforts to prevent speakers from being heard through violence or intimidation. Many now demonstrate their faith in their own values by preventing others from expressing theirs. The federal and state governments can also directly protect free speech activities through increased enforcement. There have been complaints that state and local governments show differing levels of protection for groups depending on their viewpoints.[305]

It is difficult to fulfill the defining goals of prior Supreme Court cases if such physical forums are effectively closed to speakers. In his articulation of the "marketplace of ideas" concept, Oliver Wendell Holmes described this perverse notion:

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech

305. *Compare* Lois Beckett, *US Police Three Times as Likely to Use Force Against Leftwing Protesters, Data Suggests*, THE GUARDIAN (Jan. 14, 2022), https://www.theguardian.com/us-news/2021/jan/13/us-police-use-of-force-protests-black-lives-matter-far-right [https://perma.cc/4CN9-DYWM], *with* Paul Bedard, *Two-Thirds Want BLM Riots Probed, More Than Jan. 6*, YAHOO! (July 21, 2021), https://www.yahoo.com/now/two-thirds-want-blm-riots-192600820.html [https://perma.cc/AGK4-QARY].

> impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.[306]

The "marketplace of ideas" is often an actual marketplace or other public area for "the free trade of ideas." Obviously, counter protesters are also part of that free trade, as are the featured speakers. However, the deplatforming movement is designed to silence rather than rebut opposing views. The question is whether legislation can help close any gaps in enforcement or reduce the uncertainly over enforcement (which can create a chilling effect on free speech activities). For example, in July 2020, the Sixth Annual Law Enforcement Appreciation Day in Denver was cancelled after speakers, including state legislators, were physically assaulted.[307] Not only was there little coverage of the attack, but there were allegations that the police "stood down" as a mob descended on the

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

307. Danielle Wallace, *Anti-Cop 'Mob' Swarms Back the Blue Event in Denver, Bloodying Several Before Shutting Things Down: Reports*, FOX NEWS (July 20, 2020), https://www.foxnews.com/us/denver-back-the-blue-event-violence-black-lives-matter-mob-protesters-anti-police [https://perma.cc/HFV9-LBGS]. Such attempts to disrupt public events obviously also come from the right so shown in the arrest of far-right extremists heading to a pride march in Idaho. Will Carless, *White Supremacist Group Patriot Front Charged with Planning 'Riot' at Idaho Pride Event: What We Know*, USA TODAY (June 13, 2022), https://www.usatoday.com/story/news/nation/2022/06/13/patriot-front-idaho-pride-what-we-know/7610970001/ [https://perma.cc/4HQG-SPH2].

speakers.[308] The event was successfully blocked. The individuals who sought to speak at a properly permitted event were denied their First Amendment rights due to a lack of support for their exercise of free speech.[309]

Current federal criminal laws are not ideal for addressing this problem and can create their own dangers if used more broadly in the free speech area. One of the greatest concerns arises with the use of sedition and terrorism charges, particularly given our history of abusing such laws. For example, former President Trump declared in 2020 that "the United States of America will be designating ANTIFA as a Terrorist Organization."[310] As noted earlier, the use of terrorism powers against groups like Antifa is unwarranted absent new evidence of a change in its organizational and operational profile. The danger is that such designations could expand a narrow crime into one of more general application.[311] However, due in part to the lack of options, the federal government expanded ter-

308. Bradford Betz, *Denver Police Union Head: 'Stand-Down' Order Was in Effect When Pro-Cop Rally Attacked*, FOX NEWS (July 22, 2020), https://www.foxnews.com/us/denver-police-union-head-stand-down-order [https://perma.cc/WLY3-FBAU].

309. This is different from many individual cases of intimidation from such attacks like the beating of police officers present at a unity march with religious groups across the Brooklyn Bridge. While the counter protesters were linked to a Defund The Police encampment, there was no confirmation of the groups responsible for the attack. *See* Myles Miller et al., *Top NYPD Cop Among Officers Hurt in Bloody Brooklyn Bridge Scuffle with Protesters*, NBC 4 N.Y. (July 16, 2020), https://www.nbcnewyork.com/news/top-nypd-cop-among-officers-hurt-in-scuffle-with-protesters/2517385 [https://perma.cc/UVU3-33HN].

310. *Antifa: Trump Says Group Will Be Designated 'Terrorist Organization'*, BBC (May 31, 2020), https://www.bbc.com/news/world-us-canada-52868295 [https://perma.cc/98X8-Z72Y]. Democrats have also sought to target far-right groups for terrorism designations or investigations. *Examining the 'Metastasizing' Domestic Terrorism Threat After the Buffalo Attack: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (June 7, 2022) (testimony of Professor Jonathan Turley).

311. *Id.* (testimony on the use of domestic terrorism designations against groups in the United States based on their ideology).

rorism investigations under 28 C.F.R. 0.85(l), which defines terrorism to include "the unlawful use of force and violence against persons or property to intimidate or coerce a government, the civilian population, or any segment thereof, in furtherance of political or social objectives."[312]

After the January 6 riot on Capitol Hill in 2021, the Justice Department made limited use of seditious conspiracy under 18 U.S.C. § 2384.[313] While the vast majority of charges were for crimes like trespass and unauthorized entry, a small number were charged with seditious conspiracy, which includes acting "by force to prevent, hinder, or delay the execution of any law."[314] Such prosecutions only address violent acts seeking the overthrow of the country or barring the execution of laws. The FBI has gradually broadened the scope of these investigations to include radical political groups, including "black identity extremism" (BIE) groups.[315] This work by the Joint Terrorism Task Forces (JTTFs) is a legitimate concern for free speech advocates. Even though we have not seen criminal cases brought solely on basis of the exercise of free speech, the investigations can have a chilling effect on various groups. Again, Antifa is a good example. Some of these individuals may be properly charged with terrorist acts, but Antifa itself is viewed by many as

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312. 28 C.F.R. 0.85(l) (2021).

313. *See* Indictment, United States v. Elmer Stewart Rhodes et al., (D.D.C. Jan. 12, 2022).

314. 18 U.S.C. § 2384; *see* Jonathan Turley, *The Oath Keepers: What the Indictment Says and Does Not Say About the January 6 Riot*, RES IPSA (Jan. 14, 2022), https://jonathanturley.org/2022/01/14/the-oath-keepers-what-the-indictment-says-and-does-not-say-about-the-january-6-riot [https://perma.cc/DH7A-98AL]. Additional charges were brought against members of the Proud Boys. *See* Leader of Proud Boy and Four Other Members Indicted For Seditious Conspiracy and Other Offenses Related to U.S. Capitol Breach, Press Release, Department of Justice, June 6, 2022, https://www.justice.gov/opa/pr/leader-proud-boys-and-four-other-members-indicted-federal-court-seditious-conspiracy-and [https://perma.cc/78SY-X84X].

315. JEROME P. BJELOPERA, CONG. RSCH. SERV.: IN FOCUS, IF10769, FBI CATEGORIZATION OF DOMESTIC TERRORISM (2017); JEROME P. BJELOPERA, CONG. RSCH. SERV., R44921, DOMESTIC TERRORISM: AN OVERVIEW (2017).

more of a movement than a single group.[316] There are, however, loosely associated individuals who appear at these protests. Our current laws seem to make a quantum leap from insular crimes, like statue destruction, to terrorism. Terrorism prosecutions cannot be the primary weapon against Antifa. If so, we have the problem captured in the old military adage that if you only have a hammer, every problem looks like a nail. If you only have enforcement powers with regard to terrorism, every wrongdoer looks like a terrorist.[317]

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316. However, those Antifa members who do not commit crimes still view others as "ethical" in doing so. Rick Paulas, *Why Antifa Dresses Like Antifa*, N.Y. TIMES (Nov. 29, 2017), https://www.nytimes.com/2017/11/29/style/antifa-fashion.html [https://perma.cc/P8GB-XK92].

317. It is also worth noting that Antifa is not known for killing people, and indeed, right-wing extremists are responsible for more terrorist incidents in the United States. *See* Jenny Gross, *Far-Right Groups Are Behind Most U.S. Terrorist Attacks, Report Finds*, N.Y. TIMES (Oct. 24, 2020), https://www.nytimes.com/2020/10/24/us/domestic-terrorist-groups.html [https://perma.cc/FS2L-5RTJ]. A review of data suggests that their violence, while serious and unlawful, is not closely comparable to right-wing terrorist attacks perpetuated within the United States:

> Based on a CSIS data set of 893 terrorist incidents in the United States between January 1994 and May 2020, attacks from left-wing perpetrators like Antifa made up a tiny percentage of overall terrorist attacks and casualties. Right-wing terrorists perpetrated the majority—57 percent—of all attacks and plots during this period, particularly those who were white supremacists, anti-government extremists, and involuntary celibates (or incels). In comparison, left-wing extremists orchestrated 25 percent of the incidents during this period, followed by 15 percent from religious terrorists, 3 percent from ethno-nationalists, and 0.7 percent from terrorists with other motives. In analyzing fatalities from terrorist attacks, religious terrorism has killed the largest number of individuals—3,086 people—primarily due to the attacks on September 11, 2001, which caused 2,977 deaths. In comparison, right-wing terrorist attacks caused 335 fatalities, left-wing attacks caused 22 deaths, and ethno-nationalist terrorists caused 5 deaths.

Seth G. Jones, *Who Are Antifa, and Are They a Threat?*, CSIS (June 4, 2020), https://www.csis.org/analysis/who-are-antifa-and-are-they-threat [https://perma.cc/MDT6-M68A].

Among the other options is the broader use of the Racketeer Influenced and Corrupt Organizations (RICO) Act against groups seeking to prevent free speech activities through violence or threats.[318] Given the broad reach of RICO, it is possible that the pattern of criminal acts by Antifa groups constitutes "an enterprise."[319] Among the list of thirty-five federal and state offense predicates under RICO are acts like extortion and arson, which have been raised in areas with some of the most severe rioting.[320] The use of RICO, however, is a concern, given its broad application with only two required crimes for a pattern. Antifa does not ordinarily direct, as an organization, particular acts of arson or property destruction. The danger is that political organizations or groups could be treated as racketeering enterprises based on loose association with the misconduct of supporters.

The concerns over using existing laws should not deter efforts to address the threats to free speech activities. There is a striking disconnect in the federal government prosecuting crimes like "arson" (that can be prosecuted on the local level) while leaving the denial of free speech generally to state or individual legal actions. One crime involves can involve the loss of a vehicle and the other deals with the denial of a constitutional right. The federal code does address "Federally Protected Activities" but expressly recognizes that protection of such activities remains a state and local matter.[321] However, the law reserves federal authority to protect the right of

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318. Former Attorney General Barr publicly declared that the JTTFs were designated as the "principal means" of investigating these groups, providing for the use of criminal and civil actions under RICO. *Oversight of the Department of Justice: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. (2020) (statement of William Barr, Attorney General).

319. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985); Katie Shepherd, *Portland Protesters Broke ICE Building Windows. Police Responded with Tear Gas.*, WASH. POST (Aug. 20, 2020), https://www.washingtonpost.com/nation/2020/08/20/portland-protests-ice-tear-gas [https://perma.cc/D3UY-R4P6].

320. *See, e.g.*, Scheidler v. Nat'l Org. for Women, Inc., 537 U.S. 393, 404–06 (2003).

321. 18 U.S.C. § 245(a)(1) (2020).

people "participating lawfully in speech or peaceful assembly" but it prefaces the exercise of such rights "without discrimination on account of race, color, religion or national origin."[322] Thus, these laws are directed at discriminatory policies on non-ideological grounds. It also focuses on the individuals committing unlawful conduct rather than the cities for failing to enforce laws or protect speech.

Justice Department officials have previously sought the expansion of the federal law by relaxing the necessity of showing that the act was intended to prevent citizens from participating lawfully in speech or peaceful assembly.[323] Yet, there has not been a push to allow enforcement when the denial of such lawful speech and assembly is based on viewpoint discrimination. Absent some external pressures, cities or states can create barriers to speech through lax enforcement or refusal to permit certain groups due to their political, religious, or social views. There is a legitimate issue as to whether the federal government should support municipal and state governments with law enforcement subsidies if these leaders withhold protection from certain citizens. Congress could create a better avenue for these citizens to present their grievances to federal officials if they believe that there is a systemic failure to protect lawful, permitted events. Otherwise, as on college campuses, officials can continue to blame the risk of violence by extremist groups for shutting down events or declining permits.

There is also an ability to protect free speech activities through civil actions. State and federal actions (like Section 1983 lawsuits) often focus on the denial of constitutional rights. For example, California allows recovery for:

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322. *Id.* § 245(b)(5).

323. *See Combating Hate Crimes: Hearing Before the S. Comm. on the Judiciary*, 106th Cong. 8–9 (1999) (statement of Eric H. Holder, Jr., Deputy Att'y Gen. of the United States).

> Any individual whose exercise or enjoyment of rights secured by the Constitution or laws of the United States, or of rights secured by the Constitution or laws of this state, has been interfered with, or attempted to be interfered with, as described in subdivision (b), may institute and prosecute in their own name and on their own behalf a civil action for damages.[324]

The problem is that the law addresses "interference" by third parties rather than inaction by local authorities to protect free speech activities.[325] As a result, absent state enforcement and prosecution, citizens have little recourse for the denial of core constitutional rights. Even if these laws addressed the failure to properly protect speakers, it would be difficult to prove a case against a particular law enforcement department. Past controversies have not involved a refusal to deploy personnel but rather the failure to deploy sufficient police presence and resources to guarantee that events could continue despite violent counterdemonstrators. It would be difficult to craft laws to have much of an impact on these failures given the situational discretion that must be afforded to police in responding to violent demonstrators. Police have a primary goal of avoiding injuries to themselves and others by not escalating confrontations and could plausibly make the case that waiting to intervene is their safest choice. Such laws would require admissions from police like the one of the D.C. Chief of Police[326] that he elected not to intervene in some violent protests. However, that type of admission is rare. Few courts would relish the role of determining

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324. CAL. CIV. CODE § 52.1(c) (West 2022).

325. Likewise, private citizens do not have the investigative capacity or tools to determine the names and associations of those who violently stop "platforming."

326. *See* Jonathan Turley, *"Where's the Police When You Need Them": D.C. Delegate Asks the Right Question After Bizarre Incident Near White House*, RES IPSA (June 24, 2020), https://jonathanturley.org/2020/06/24/wheres-the-police-when-you-need-them-d-c-delegate-asks-the-right-question-after-bizarre-incident-near-white-house [https://perma.cc/362Q-B75S] ("D.C. Chief of Police Peter Newsham stated that his department has made the 'tactical decision' not to intervene as certain statues have been torn down in front of them.").

when police deployment judgments were insufficiently aggressive to secure a location.[327]

Rather than shoehorn free speech protections into existing laws, Congress could craft a law designed to deter violent disruptions of free speech activities or to incentivize better local enforcement efforts. The most obvious concern is that federal legislation will itself be a threat to free speech. Yet, federalized protections of free speech would clearly be governmental action limited by the First Amendment. The danger of such legislation is also ameliorated by federalism principles in seeking to force state and local action to protect spaces for expression. Thus, federal legislation should be limited to the protection rather than the curtailment of speech. Protesting itself is protected. It is violent efforts to bar speech that would be the focus of federal legislation as well as incentivizing local officials to protect free speech events. The governmental interest in protecting the constitutional right of free speech should be easy to establish. It would also be difficult to challenge the interstate component for federal action, given that the regulated entities are involved in interstate commerce and travel. Of course, the creation of any private rights of action must be tailored to the federal claim. For example, Congress moved to protect women in the Violence Against Women Act ("VAWA"), but that law was ultimately struck down.[328] The VAWA had created a private cause of action for victims of "a crime of violence motivated by gender" to allow them to

327. Take the Denver pro-police event as an example. Officers were present and did engage violent protesters. *See* Shelly Bradbury, *Anti-Police Protesters Mob Rally Supporting Law Enforcement in Denver's Civic Center*, DENVER POST (July 19, 2020), https://www.denverpost.com/2020/07/19/pro-police-rally-denver-cific-center-counter-protest/ [https://perma.cc/4S9F-GE74]. However, they did not forcibly seek to move the large violent crowd back to create a buffer zone at the event. Such a move not only can escalate the violence but also can put police officers in the position of barring nonviolent pedestrians and observers from a public event.

328. *See* United States v. Morrison, 529 U.S. 598, 602 (2000).

sue their attackers in federal court.[329] The question is whether legislation barring certain denials of free speech or creating private rights of action would face a similar fate.

While the VAWA was struck down by the Court, the precursor criminal law 42 U.S.C. § 1985(3) was upheld.[330] The statute, contained in the Civil Rights Act of 1871, allowed victims to sue in federal court for any conspiracy meant to deprive "directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws" to sue their attackers for monetary damages in federal court.[331] The law was notably directed at private actors to protect a constitutional right and could be a foundation for similar measures protecting free speech. The application to the free speech areas should also satisfy the interstate component found lacking in cases like *United States v. Lopez*[332] and *United States v. Morrison*.[333] Big Tech companies and universities operate on an interstate basis in both their services and "users." Even curtailing free speech in a plaza or public space has interstate elements given the transmission of such events and the participation of figures or groups from outside a given state. Indeed, the curtailment of speech in one state has an impact nationally. Such displacement arguments are common in cases like *Gonzales v. Raich*,[334] in which the Court noted how marijuana production in one state impacted consumption or available supply in other states.[335] Obviously, cases like *Gonzales* deal with illegal drugs and how production impacts illegal drug consumption outside of a state. However, new free speech legislation needs to come with a new understanding of interstate impact of anti-free speech policies and practices. Free speech is not a self-contained, localized

329. 42 U.S.C. § 13981(c) (2012).
330. *See* Griffin v. Breckenridge, 403 U.S. 88, 104 – 05 (1971).
331. Civil Rights Act of 1871, ch. 22, § 2 (1871) (codified as amended at 42 U.S.C. § 1985(3) (2012)).
332. *See* 514 U.S. 549, 567–68 (1995).
333. *See* 529 U.S. 598, 617–619 (2000).
334. 545 U.S. 1 (2005).
335. *See id.* at 18–19.

exercise. It is part of an increasingly national and international dialogue carried out through social media and interstate communications. This is not a case, as Chief Justice John Roberts noted in *Sebelius*, in which Congress "reach[es] beyond the natural limit of its authority and draw[s] within its regulatory scope those who otherwise would be outside of it."[336] The existing regulation of both virtual and physical forums should allow for ample grounds for regulation to address the denial of free speech rights.

Moreover, any federal legislation will be limited by anti-commandeering case law. At issue is whether states can be compelled to offer greater guarantees of the exercise of free speech, including curtailing the use of "security concerns" to either cancel events or withhold law enforcement support for events. In *Murphy v. NCAA*,[337] six justices found that the Professional and Amateur Sports Protection Act ("PASPA") constituted unconstitutional commandeering by making it generally unlawful for a State to "authorize" sports gambling schemes.[338] Rather than commanding enactments or regulations like background checks, the law barred the passage of state legislation counter to the purposes of the Act.[339] The Court held that PASPA "violate[d] the anticommandeering rule" because it "unequivocally dictate[d] what a state legislature may and may not do."[340] Notably, one of the three rationales cited by Justice Alito for the anti-commandeering doctrine is that "the anti-commandeering principle prevents Congress from shifting the costs of regulation to the States."[341] As in *Murphy*, it could be claimed that free speech events (like gambling) have costs that states would have to bear, particularly by groups attracting large counter demonstrations. Moreover, such laws can be challenged as

336. Nat'l Fed. of Indep. Bus. v. Sebelius, 567 U.S. 519, 560 (2012).
337. 138 S. Ct. 1461 (2018).
338. *Id.* at 1481 (citing 28 U.S.C. § 3702(1) (2012)).
339. *Id.*
340. *Id.* at 1478.
341. *Id.* at 1477.

forcing law enforcement operations when officials believe that protecting an event (rather than terminating the event) presents unacceptable risks to law enforcement and others. The language of any such federal law or regulations would have to accommodate such discretion while creating a default in favor of protecting free speech activities as a condition of the receipt of federal funds.

Whether addressed under state or federal law, the primary concern remains the protection of fora for political expression while avoiding the danger of government control over the content of the speech in such forums. That is why legislative efforts are most likely to succeed if directed toward violent threats and actions that target individuals or events with the intention of preventing the exercise of free speech. Federal legislation can create systems that track and highlight the record of states in protecting or failing to protect free speech activities. Such reporting laws can draw attention to the failure of local officials. Federal law cannot compel state officials to carry out such duties. It is extremely difficult to sue for the failure to arrest and virtually impossible to sue for the failure to prosecute cases.[342] Such decisions are viewed as discretionary questions.[343] The Supreme Court has ruled that:

> [I]mplicit in the idea that officials have some immunity—absolute or qualified—for their acts, is a recognition that they may err. The concept of immunity assumes this and goes on to assume that it

342. *See* Tom Perkins, *Most Charges Against George Floyd Protesters Dropped, Analysis Shows*, THE GUARDIAN (Apr. 17, 2021), https://www.theguardian.com/us-news/2021/apr/17/george-floyd-protesters-charges-citations-analysis [https://perma.cc/VSQ8-4DRE]; Kyle Iboshi, *Feds Quietly Dismiss Dozens of Portland Protest Cases*, KGW8 (Mar. 2, 2021), https://www.kgw.com/article/news/investigations/portland-protest-cases-dismissed-feds/283-002f01d2-3217-4b12-8725-3fda2cad119f [https://perma.cc/QKA6-TMVA].

343. Ironically, these cases often fail after the invocation of immunity defenses, which are the focus of much of the criticism in current protests. *See* Jonathan Turley, *Chopped: Will Seattle Officials Now Claim Immunity from Lawsuits Opposing Such Defenses for Police Officers?*, RES IPSA (May 3, 2021), https://jonathanturley.org/2021/05/03/chopped-will-seattle-officials-now-claim-immunity-from-lawsuits-after-opposing-such-defenses-for-police-officers [https://perma.cc/PLB7-5BK8].

> is better to risk some error and possible injury from such error than not to decide or act at all.[344]

Prosecutorial discretion is treated as virtually absolute by the courts under these immunity cases.[345]

Federal legislation can also create federal causes of action to challenge both government and private action. The use of federal legislation to reinforce speech rights can find analogies to the Civil Rights period when local officials often failed to intervene to stop attacks on protesters or refused to prosecute the culprits. While state prosecutors and police had the authority to investigate and prosecute attacks based on race or other forms of discrimination, they failed to do so, leaving citizens to be victimized by both criminal acts and acts of nonfeasance. Federal civil rights legislation allowed the federal government to bring its own cases for the denial of constitutional protections.[346] The Justice Department continues to act in parallel or unilaterally in cases in which equal rights or civil rights are violated, particularly in cases of racist attacks.[347]

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344. Scheuer v. Rhodes, 416 U.S. 232, 242 (1974).

345. *See* Harlow v. Fitzgerald, 457 U.S. 800, 807 (1982); *see also* Kipp v. Saetre, 454 N.W.2d 639, 642–43 (Minn. Ct. App. 1990).

346. *See* Jordan Blair Woods, *Ensuring a Right of Access to the Courts for Bias Crime Victims: A Section 5 Defense of the Matthew Shepard Act*, 12 CHAP. L. REV. 389, 394–95 (2008).

347. *See* David A. Hall, *Ten Years Fighting Hate*, 10 U. MIAMI RACE & SOC. JUST. L. REV. 79, 97–102 (2020) (describing prosecutions under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act). Hall notes that the majority of prosecutions under the Matthew Shepard and James Byrd, Jr., Hate Crimes Prevention Act have been for crimes motivated by racism. *Id.* at 98; *see also* Paul Duggan & Justin Jouvenal, *Neo-Nazi Sympathizer Pleads Guilty to Federal Hate Crimes for Plowing Car into Protestors at Charlottesville Rally*, WASH. POST (Apr. 1, 2019), https://www.washingtonpost.com/local/public-safety/neo-nazi-sympathizer-pleads-guilty-to-federal-hate-crimes-for-plowing-car-into-crowd-of-protesters-at-unite-the-right-rally-in-charlottesville/2019/03/27/2b947c32-50ab-11e9-8d28-f5149e5a2fda_story.html [https://perma.cc/N6U5-WXGP] (noting that James Fields Jr. faced both state criminal and federal hate crime charges for his attack at the 2017 Unite the Right rally in Charlottesville, Virginia).

There has not been a similar collateral system of enforcement for civil liberties like free speech. Despite years of expanding federal crimes and jurisdiction, this is not an area where Congress has sought to ensure parallel federal guarantees for the protections of free speech as it has for equal protection.[348]

The greatest chance for change is to focus on the denial or blocking of free speech events as a key factor for federal funds. Congress can incentivize local officials to protect speakers. Such laws should also be enforceable through citizen lawsuits. Past federal efforts have been flawed and narrow. The Restitution for Economic Losses Caused by Leaders who Allow Insurrection and Mayhem (RECLAIM) Act was introduced in the Senate in July 2020.[349] As the title indicates, the Act seems designed to have more of a political than legal impact. The law would hold state and local officials liable for damages in the type of "autonomous zones" seen in Seattle's "CHAZ" area.[350] It would allow for treble damages for citizens in such zones who are injured due to rioting and the lack of law enforcement protection.[351] It would also permit federal grant assistance to be withheld from local governments that prevent police

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348. *See* Woods, *supra* note 346, at 406–16 (discussing the scope of Congress's power to protect civil rights by federal legislation under Section 5 of the Fourteenth Amendment).

349. Restitution for Economic losses Caused by Leaders who Allow Insurrection and Mayhem Act, S. 4266, 116th Cong. (2020), https://www.cruz.senate.gov/files/documents/Bills/2020.07.22%20-%20RECLAIM%20Act%20.pdf [https://perma.cc/5PBB-AYQM] [hereinafter RECLAIM Act].

350. Press Release, Sen. Cruz Introduces Bill to Hold Local Officials Liable for Allowing Violent 'Autonomous Zones', Ted Cruz, U.S. Senator for Texas (July 22, 2020), https://www.cruz.senate.gov/newsroom/press-releases/sen-cruz-introduces-bill-to-hold-local-officials-liable-for-allowing-violent-and-145autonomous-zones-and-146 [https://perma.cc/ZP6T-DFNC] [hereinafter Cruz Press Release]. The Capitol Hill Autonomous Zone (CHAZ) was a self-declared autonomous zone of protesters, including the occupation of the East Precinct building. Seattle Mayor Jenny Durkan agreed to pull back police and allowed the zone to govern itself. However, after a series of violent acts and other growing problems, the city moved in to end the occupation. *See* Turley, *Seattle Autonomous Zone*, *supra* note 239.

351. *See* Cruz Press Release, *supra* note 350.

forces from protecting citizens or their property inside law enforcement free zones.[352] The law is restricted to the relatively rare situation in which autonomous zones are maintained with the consent of local or state officials.[353] Moreover, it is fraught with vague criteria, like barring the use of "authority to prohibit law enforcement officers from taking law enforcement action that would prevent or materially mitigate significant physical injury or death or damage or destruction of property caused by or related to a riot for any reason other than to prevent imminent harm to the safety of law enforcement officers."[354] That reads like an exception that would swallow the rule, since many deployment decisions are based in part on concern for officer safety. Moreover, police cannot avoid all such damage, given the need to allocate limited personnel and resources even without the existence of a riot or an autonomous zone.

The one aspect of the RECLAIM Act that is both practical and constitutional is limiting or barring funding to jurisdictions with a history of lax protection of free speech events. Yet, even with federal conditional funding, there is only so much that the federal government can do to protect citizens from the anti-free speech views of their elected officials. Citizens always have the recourse of legal actions for the denial of constitutional rights. However, there are additional, subtle ways that state and local officials can undermine free speech.

Trying to address free speech through state-focused legislation may seem like a Sisyphean task. As noted, there are constitutional and practical limits to what Congress can do force local officials to be more protective for free speech activities. That is why Congress should also reinforce the traditional areas where free speech has flourished: on college and university campuses.

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352. *See id.*
353. RECLAIM Act, *supra* note 349.
354. *Id.*

C. Protecting the Educational Space

Any effort to reinforce free speech values in the United States must focus on universities, which play a vital role as enclaves for political and intellectual discourse. These schools serve as incubators for new ideas and transformative movements. It is a reciprocal relationship: free speech is the very oxygen that sustains intellectual discourse. As Justice Douglas stated in his famous dissenting opinion in *Adler v. Board of Education*,[355] "[t]he Constitution guarantees freedom of thought and expression to everyone in our society. . . . [N]one needs it more than the teacher."[356]

Clearly, some of the efforts discussed earlier to protect virtual and physical spaces will impact free speech activities on campuses. However, colleges and universities have some unique elements that should be addressed separately, including the need to protect other values like academic freedom.

The shift in attitudes toward free speech in the United States is no more evident than on college campuses where free speech is often portrayed more as a growing danger than as a defining right. As the source of much data used by informed citizens, educational institutions have a pronounced impact on our society and our democratic institutions. Efforts to punish academics who hold opposing

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355. 342 U.S. 485 (1952) *overruled by* Keyishian v. Board of Regents, 385 U.S. 589 (1967).

356. *Id.* at 508 (Douglas, J., dissenting).

historical,[357] legal,[358] scientific,[359] or social views[360] erode faith in higher education and the reports produced from our universities. The vacuum created by censorship and blacklisting does not stay unoccupied. Preferred viewpoints fill the space and face less challenge or scrutiny.

1. The Counter-Millian Movement in Academia

From a Millian perspective, the lack of diversity of opinion reduces academia to recitation of "dead dogma, not a living truth."[361] Intellectuals benefit from dissenting and opposing views by refining their own views. Otherwise, "[b]oth teachers and learners go to sleep at their post as soon as there is no enemy in the field."[362] Not only have many in academia ignored Mill's narrow view of harm, but they have also used the very definition that he abhorred to reduce diversity of thought and expression.

The effort to bar speech in conferences and publications is often justified by claiming that opposing views are simply unworthy of

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357. *See* Jonathan Turley, *American and South Korean Professors Fight for Academic Freedom in Controversy over "Comfort Women" Publication*, RES IPSA (Mar. 6, 2021), https://jonathanturley.org/2021/03/06/american-and-south-korean-professors-fight-for-academic-freedom-in-controversy-over-comfort-women-publications [https://perma.cc/Z2PH-YZDV] [hereinafter Turley, *Fight for Academic Freedom*].

358. *See* Jonathan Turley, *The Rising Generation of Censors: Law Schools Are the Latest Battleground over Free Speech*, RES IPSA (July 8, 2021), https://jonathanturley.org/2021/07/08/the-rising-generation-of-censors-law-school-are-the-latest-battleground-over-free-speech [https://perma.cc/8K7D-3TX4].

359. *See* Jonathan Turley, *Berkeley Physicist Resigns After Colleagues Block UChicago Professor from Speaking at Science Event*, RES IPSA (Oct. 20, 2021), https://jonathanturley.org/2021/10/20/berkeley-physicist-resigns-after-colleagues-block-uchicago-professor-from-speaking-at-science-event [https://perma.cc/KL6B-2T2G].

360. *See* Jonathan Turley, *Harvard Professor Under Fire in Latest Attack on Free Speech*, RES IPSA (July 9, 2020), https://jonathanturley.org/2020/07/09/harvard-professor-under-fire-in-latest-attack-on-free-speech [https://perma.cc/9BRH-YM97].

361. MILL, ON LIBERTY, *supra* note 56, at 64.

362. *Id.* at 105.

being considered or tolerated.[363] While academia has long valued a diversity of opinion, the spectrum of such diversity has narrowed dramatically. The dwindling number of conservative or libertarian faculty members accelerates this trend by pushing their views further and further outside the "mainstream" of academic thought. That trend also makes it more difficult for new conservative faculty applicants whose writings are dismissed as fringe or not "intellectually rigorous."[364] In this self-sustaining cycle, the biased selection of faculty becomes the biased curtailment of viewpoints. The isolation of academics then diminishes not just their speech but also their ability to continue in academia. It increases the view of accepted truth among academics, due to a greater uniformity of viewpoints and values. As Mill warned: "All silencing of discussion is an assumption of infallibility."[365] This concern was raised recently in the termination of St. Joseph's University mathematics professor Gregory Manco. Manco was suspended after critics disclosed anonymous comments that he made outside of school on social media critical of reparations.[366] Many found his statements to

363. *See, e.g.*, Jonathan Turley, *Speaking Event for Historian Jon Meacham Canceled at Samford University*, RES IPSA (Oct. 30, 2021), https://jonathanturley.org/2021/10/30/speaking-event-for-historian-jon-meacham-cancelled-at-samford-university [https://perma.cc/JFH2-788B]; Jonathan Turley, *MIT Cancels Lecture by UChicago Professor Who Criticized Diversity Programs*, RES IPSA (Oct. 5, 2021), https://jonathanturley.org/2021/10/05/mit-cancels-lecture-by-uchicago-professor-who-criticized-diversity-programs [https://perma.cc/U66Z-VWJ2].

364. *See, e.g.*, Bradford Richardson, *Democratic Professors Outnumber Republican Professors 10 to 1: Study*, WASH. TIMES (Apr. 26, 2018), https://www.washingtontimes.com/news/2018/apr/26/democratic-professors-outnumber-republicans-10-to-/ [https://perma.cc/ZU3G-4H4V].

365. MILL, ON LIBERTY, *supra* note 56, at 31–32.

366. Jonathan Turley, *St. Joseph's University Professor Suspended for Criticism of Reparations on Social Media*, RES IPSA (Feb. 25, 2021), https://jonathanturley.org/2021/02/25/st-josephs-university-professor-suspended-for-criticism-of-reparations-on-social-media [https://perma.cc/3DZ7-3BKX] [hereinafter Turley, *St. Joseph's Professor*].

be insulting and offensive. These were views expressed in his private time on a social media site.[367] He was ultimately cleared because he was exercising his free speech rights.[368] However, the university then refused to renew his contract.[369] The university issued a statement that was more of a shrug than an explanation of the grounds for the action: "a non-renewal does not affect an individual's eligibility for future employment opportunities with the University."[370] Few other universities would risk hiring him after St. Joseph's criticized and suspended him for his public comments. The result is not just removing him from teaching but also warning other faculty that even anonymous comments can be grounds for their isolation and eventual removal.[371] It is certainly tempting in such cases to dismiss such speech as "low value" and unworthy of protection. This allows for a consensus to form over what viewpoints or speech are tolerable. However, the fact that professors like Manco are in the minority is irrelevant. Indeed, many share Manco's view of reparations, but Mill would protect him even if he

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367. *See* Jonathan Turley, *St. Joseph's University Refuses to Renew Contract for Professor Who Prevailed in Free Speech Fight*, RES IPSA (July 30, 2021), https://jonathanturley.org/2021/07/30/st-josephs-university-refuses-to-renew-contract-for-professor-who-prevailed-in-free-speech-fight/ [https://perma.cc/DM7D-B9NC].

368. *Id.*

369. *Id.*

370. *Id.*

371. Another such controversy arose at Georgetown University Law Center where conservative Professor Ilya Shapiro was suspended after a horrendously badly worded tweet was condemned as racist. Shapiro was criticizing President Biden's pledge only to consider black females for his first appointment to the Court. While supporting a liberal Indian-American jurist, Shapiro opposed the appointment of what he described as a "lesser black woman." He later deleted the tweet and apologized. He was then suspended for months before being reinstated. However, he resigned after the Dean essentially cited a technicality for not firing him based on the starting date of his employment. Shapiro objected that the message was that he would be fired if he made further controversial statements. Jonathan Turley, *Shapiro Resigns from Georgetown After the Law School Reinstates Him on a Technicality*, RES IPSA (June 8, 2022), https://jonathanturley.org/2022/06/08/shapiro-resigns-from-georgetown-after-the-law-school-reinstates-him-on-a-technicality/ [https://perma.cc/LQD6-F3KU].

was the sole reparations critic left in academia: "If all [of] mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind."[372]

There is an alarming trend of teachers being investigated, fired, or sanctioned[373] for expressing contrary views at every level of the educational system.[374] However, the most chilling examples of intolerance have come from campuses of higher education. The extensive "cancelling" of speeches and events on campuses often involves rejecting the classical view that free speech protects all speakers, even those who are viewed as advancing harmful ideas. For example, a protest leader who succeeded in blocking a conservative speaker at UC Berkeley voiced an increasingly common

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372. MILL, ON LIBERTY, *supra* note 56, at 30.

373. These cases also involve official condemnations that can severely damage a professor's standing and career. *See, e.g.*, Jonathan Turley, *Princeton Facing Possible Legal Action After Labeling Professor Racist for Opposing Race-Based Faculty Perks*, RES IPSA (Sept. 30, 2021), https://jonathanturley.org/2021/09/30/princeton-facing-possible-legal-action-after-labeling-professor-racist-for-opposing-race-based-faculty-perks [https://perma.cc/U4NV-JT5U]. In the case of Princeton Professor Joshua Katz, the university rejected calls to fire him for questioning a plan to award faculty benefits based on race. However, it then re-opened a previously adjudicated matter (for which Katz had already been punished) and terminated him on those grounds. Jonathan Turley, *Chasing Katz: Princeton Moves to Fire Classics Professor Who Criticized Anti-Racism Measures*, RES IPSA (May 21, 2022), https://jonathanturley.org/2022/05/21/chasing-katz-princeton-moves-to-fire-classics-professor-who-criticized-anti-racism-measures/ [https://perma.cc/F7T4-JM3H].

374. *See, e.g.*, *Principal on Leave for "Tone-Deaf" Black Lives Matter Post*, ASSOCIATED PRESS (June 15, 2020), https://apnews.com/4b54b83811cb6267441f10b2489295f6 [https://perma.cc/89L7-2YKH] (describing how Vermont principal was put on administrative leave for tweet that supported Black Lives Matter but criticized the "coercive measures" of the movement); Beth LeBlanc, *Walled Lake Teacher Fired After His Trump tweets Files Federal Suit Against District*, DETROIT NEWS (Feb. 25, 2021), https://www.detroitnews.com/story/news/local/michigan/2021/02/25/walled-lake-teacher-fired-after-trump-tweets-files-federal-suit/6806605002/ [Walled Lake teacher fired after his Trump tweets files federal suit against district] (noting that high school coach was fired after praising Trump and criticizing liberals on Twitter).

refrain in an editorial: "I don't think that anyone's free speech is being impaired. I think sometimes the free speech amendment is used as a way to frame violent conversations as a matter of free speech."[375] When a University of North Carolina student assaulted pro-life advocates on campus in 2019, she gave another common explanation for violent protests: that seeing certain opposing views is "triggering" and hurtful.[376] The rationalization of disruptive or violent conduct on campuses seeks to shift responsibility to the speaker for causing disorder. By declaring opposing views harmful or threatening, the range of responses is expanded to include measures of "self-defense." This construct converts speech into a discretionary right, subject to how it is received or interpreted by other individuals or groups.

Faculty across the country face rising threats of punitive action for espousing unpopular views. A recent study showed nearly two hundred instances of professors being disciplined or fired for protected speech.[377] For example, Harvard Professor Steven Pinker was the subject of a campaign to fire and remove him from a leading academic society because he questioned, on Twitter, whether police

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375. Sonali Kohli & Nina Agrawal, *UC Berkeley Cancels Ann Coulter Appearance, Citing Safety Concerns After Violent Protests*, BALT. SUN (Apr. 19, 2017), https://www.baltimoresun.com/la-me-edu-ann-coulter-20170419-story.html [https://perma.cc/X8VP-F8C8].

376. *See* Caleb Parke, *Liberal Student Arrested for Punching Pro-Lifer on UNC Campus, Triggered by Images of Aborted Children*, FOX NEWS (May 9, 2019), https://www.foxnews.com/us/liberal-student-arrested-punching-pro-lifer [https://perma.cc/6B8V-H7NT].

377. David Acevedo, *Tracking Cancel Culture in Higher Education*, NAT'L ASS'NS OF SCHOLARS (Mar. 2, 2021), https://www.nas.org/blogs/article/tracking-cancel-culture-in-higher-education [https://perma.cc/3BJL-QFES]; *see also* Eric Kaufmann, *Academic Freedom Is Withering*, WALL ST. J. (Feb. 28, 2021), https://www.wsj.com/articles/academic-freedom-is-withering-11614531962 [https://perma.cc/4CL7-WCM9].

shootings were due to systemic racism or a long pattern of excessive use of force by police departments.[378] Harvard Professor J. Mark Ramseyer not only faced calls for his termination in 2020 but also demands that a journal publishing his work be banned because of his research positing that Korean "comfort women" from World War II were likely contracted, not forced, by the Japanese military.[379] University of Chicago Professor Harald Uhlig was targeted for criticizing the Black Lives Matter movement and the Defund the Police campaign.[380] University of Pennsylvania Professor Carlin Romano was targeted because he questioned language on a proposed statement on systemic racism.[381] Cornell Professor William Jacobson, who is also a conservative commentator, faced calls for his termination after criticizing the Black Lives Matter movement.[382] Another was suspended for criticizing reparations.[383] One professor was stripped of his directorship over a program after

378. Michael Powell, *How a Famous Harvard Professor Became a Target over His Tweets*, N.Y. TIMES (July 22, 2020), https://www.nytimes.com/2020/07/15/us/steven-pinker-harvard.html [perma.cc/S9TC-6MF2].

379. Turley, *Fight for Academic Freedom*, *supra* note 357.

380. Jonathan Turley, *Writers and Academics Call for Removal of Chicago Professor for Criticizing BLM and Defunding Police*, RES IPSA (June 11, 2020), https://jonathanturley.org/2020/06/11/writers-and-academics-call-for-removal-of-chicago-professor-for-criticizing-blm-and-defunding-police [https://perma.cc/MVH6-SMYH].

381. Petra Mayer, *National Book Critics Circle Board Members Resign over Racism Allegations*, NPR (June 15, 2020), https://www.npr.org/sections/live-updates-protests-for-racial-justice/2020/06/15/877385352/national-book-critics-circle-board-members-resign-over-racism-allegations [perma.cc/FZZ8-9PW2]; *see also* Jonathan Turley, *Penn Professor Faces Call for His Removal After Questioning an Anti-Racism Statement*, RES IPSA (July 23, 2020), https://jonathanturley.org/2020/07/23/penn-professor-faces-calls-for-his-removal-after-questioning-an-anti-racism-statement [https://perma.cc/T3Q5-UUUD].

382. Nick Givas, *Cornell Professor Who Criticized Black Lives Matter Faces Student Boycott*, FOX NEWS (June 17, 2020), https://www.foxnews.com/us/cornell-professor-criticized-black-lives-matter-faces-student-boycott [perma.cc/CV8Q-YKCF].

383. Turley, *St. Joseph's Professor*, *supra* note 366.

questioning affirmative action in medical admissions[384] while another was put under investigation (and required police protection) after tweeting criticism of "white shaming" and claims of systemic racism.[385] At Yale, a law professor (who was protested for defending Justice Brett Kavanaugh) was reportedly sanctioned without basic due process protections or notice.[386] Another law professor was put under extended investigation and suspension after he criticized the Chinese government as the likely source of COVID-19.[387]

These are only a few of the growing number of examples of intolerance on campuses, which include cases in which professors

384. Crystal Phend, *Anti-Affirmative Action Paper Blows Up on Twitter*, MEDPAGE TODAY (Aug. 4, 2020), https://www.medpagetoday.com/publichealthpolicy/medicaleducation/87903 [https://perma.cc/F8LH-6ZCP].

385. Martin E. Comas, *UCF Protesters Demand Professor Be Fired for Racist Tweets*, ORLANDO SENTINEL (June 14, 2020), https://www.orlandosentinel.com/news/seminole-county/os-ne-ucf-professor-negy-racist-tweets-20200614-pqznqg-safnhqbd36eb2pign4si-story.html [https://perma.cc/J2BX-2QQW].

386. Jonathan Turley, *Persona Non Grata: Yale Professor Who Defended Kavanaugh Is Reportedly Sanctioned Without Notice or Explanation*, RES IPSA (Apr. 12, 2021), https://jonathanturley.org/2021/04/12/persona-non-grata-yale-professor-who-defended-kavanaugh-is-reportedly-sanctioned-without-notice-or-explanation [https://perma.cc/6FZX-D96E].

387. Jonathan Turley, *USD Law Professor Under Investigation for Column Criticizing Chinese Government*, RES IPSA (Mar. 22, 2021), https://jonathanturley.org/2021/03/22/usd-law-professor-under-investigation-for-column-criticizing-chinese-government [https://perma.cc/9QMK-LC72]. This intolerance for opposing views, even of a pandemic, is not confined to this country. In Sweden, a leading medical researcher ended further work on the virus after a campaign against him. His transgression was to report on findings that children could go back to school safely and were not either at significant risk of transmittal or contraction of the virus. However, unlike in this country, there was a national movement to protect academic freedom from such canceling campaigns. Jonathan Turley, *Sweden Moves to Protect Academic Freedom After Professor Quits Covid Research Due to Harassment*, RES IPSA (Mar. 2, 2021), https://jonathanturley.org/2021/03/02/sweden-moves-to-protect-academic-freedom-after-professor-quits-covid-research-due-to-harassment [https://perma.cc/8EGX-4YMJ].

have been physically assaulted or threatened by protesters.[388] For faculty members, the choice is stark. If they voice dissenting views or even support dissenting colleagues, they risk being "tagged" as racist or intolerant.[389]

What is striking about many of these instances is that other professors have supported the campaigns for the termination or punishment of colleagues with opposing views. While most professors do not condone violent or threatening conduct, the most extreme

388. *See, e.g.*, Katharine Q. Seelye, *Protesters Disrupt Speech by 'Bell Curve' Author at Vermont College*, N.Y. TIMES (Mar. 3, 2017), https://www.nytimes.com/2017/03/03/us/middlebury-college-charles-murray-bell-curve-protest.html [https://perma.cc/B9FS-PBVV].

389. Such controversies can lead to the loss of many of the things that define and give meaning to an academic career, from publication to speaking opportunities. It may even result in termination or coerced resignation. The impact of such losses is evident in the most extreme cases, where faculty have taken their own lives. *See, e.g.*, Jonathan Turley, *Princeton Professor Commits Suicide After Termination of Contract—Raising Questions over His Treatment by University*, RES IPSA (Apr. 22, 2011), https://jonathanturley.org/2011/04/22/princeton-professor-commits-suicide-after-termination-of-contract-raising-questions-over-his-treatment-by-university [https://perma.cc/23G3-C3PX]. For example, a conservative North Carolina professor faced calls for termination over controversial tweets and was pushed to retire. Jonathan Turley, *North Carolina Professor Triggers a Free Speech Fight over Inflammatory Tweet*, RES IPSA (June 9, 2020), https://jonathanturley.org/2020/06/09/north-carolina-professor-triggers-a-free-speech-fight-over-inflammatory-tweet [https://perma.cc/9UW9-7ESA]. Dr. Mike Adams, a professor of sociology and criminology, had long been a lightning rod of controversy. In 2014, Adams prevailed in a lawsuit that alleged discrimination due to his conservative views. He was then targeted again after an inflammatory tweet calling North Carolina a "slave state." That led to his being pressured to resign with a settlement. He then committed suicide just days before his last day as a professor. Joshua Rhett Miller, *UNC Wilmington Professor Mike Adams Died by Suicide: Cops*, N.Y. POST (July 28, 2020), https://nypost.com/2020/07/28/unc-wilmington-professor-mike-adams-died-by-suicide-deputies [https://perma.cc/VKQ9-Q2VG]. Such cases obviously are complex and often involve other preexisting or aggravating conditions. However, they also reflect the tremendous loss to an intellectual that is losing academic opportunities due to his or her viewpoints.

faculty voices have advocated violent action[390] or making life a "living hell" for those with opposing views[391] or causing "Republicans . . . to suffer."[392] There is a range of such "direct actions" from professors who have led protests, from "shutting down"[393] speeches to physically[394] or verbally assaulting[395] people with opposing views

390. Jonathan Turley, *"A Desire That They Suffered Until Their Last Breath": Alabama Professor Under Fire for Hateful Comments Following Rush Limbaugh's Death*, RES IPSA (Feb. 19, 2021), https://jonathanturley.org/2021/02/19/a-desire-that-they-suffered-until-their-last-breath-alabama-professor-under-fire-for-hateful-comments-following-rush-limbaughs-death/ [https://perma.cc/D63R-EP7P] (detailing various calls for violence in academia).

391. Jonathan Turley, *"Living Hell": Clemson Professor Prompts Others to Find the Home Address of Public Letter Author*, RES IPSA (Aug. 8, 2020), https://jonathanturley.org/2020/08/08/living-hell-clemson-professor-under-fire-after-prompting-others-to-find-the-home-address-of-critic [https://perma.cc/5F7V-W2FJ].

392. Jonathan Turley, *"Republicans Need To Suffer": Drake Professor Triggers Free Speech Debate with Hateful Tweets Against Men and Conservatives*, RES IPSA (Jan. 30, 2021), https://jonathanturley.org/2021/01/30/republicans-need-to-suffer-drake-professor-triggers-free-speech-debate-with-hateful-tweets-against-men-and-conservatives [https://perma.cc/TF3E-KSQR].

393. *See, e.g.*, Jonathan Turley, *University of New Hampshire Professor Identified in Effort to Disrupt Free Speech Event*, RES IPSA (May 30, 2018), https://jonathanturley.org/2018/05/30/university-of-new-hampshire-professor-identified-in-effort-to-disrupt-free-speech-event [https://perma.cc/J9M5-4QYH] (describing incident in which professor shouted at a speaker, "We don't want you in the LGBT community. Get the f**k out."); Ryan Blessing, *Police: QVCC Administrator Stole Conservative Commentator's Notes*, THE BULLETIN (Dec. 13, 2017), https://www.norwichbulletin.com/story/news/courts/2017/12/13/police-qvcc-administrator-stole-conservative/16844162007 [https://perma.cc/8MA5-ECJ3] (detailing incident in which professor and administrator were shown stealing notes of conservative speaker to stop event).

394. *See, e.g.*, Joshua Rhett Miller *California Professor Pleads No Contest to Assault on Pro-Life Students*, FOX NEWS (Nov. 23, 2015), https://www.foxnews.com/us/california-professor-pleads-no-contest-to-assault-on-pro-life-students [https://perma.cc/DN5P-WQ3S] (describing case in which University of California Professor was charged with assaulting pro-life display and table on campus after leading her students from a class).

395. *See, e.g.*, Mackenzie Mays, *Fresno State Prof Says He Did Nothing Wrong, Won't 'Pay a Dime' for Erasing Anti-Abortion Messages*, FRESNO BEE (Nov. 10, 2017), https://www.fresnobee.com/news/local/education-lab/article183987576.html (detailing incident in which professor berated pro-life students, denied they had a right to free speech on campus, and erased their chalk messages).

on campus.[396] This includes faculty members associated with violent antifascist groups.[397]

Students have faced similar backlash over expressing opposing or unpopular views. For many years, there have been questions raised over ill-defined speech standards, including "microaggression" rules, and their impact on free speech for students.[398] There is no empirical study on the range of such controversies, but few would disagree that they are on the rise around the country.[399] The rise in intolerance for dissent has come at a time of falling support for free speech and the expectations of both students and faculty. Polls show a sharp decline of support for free speech and a rise in students who say that they do not feel comfortable sharing their views.[400] For example, a poll found that seventy percent of students

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396. One of the early and most notable examples of this trend of intolerance was the videotaping of Missouri Professor Melissa Click telling protesters to get rid of a student journalist. *Ex-Mizzou Professor Melissa Click, Fired over Protest Clash, Gets New Job*, NBC NEWS (Sept. 4, 2016), https://www.nbcnews.com/news/us-news/ex-mizzou-professor-melissa-click-fired-over-protest-clash-gets-n642711 [https://perma.cc/X3W4-WM22].

397. One such faculty member is college professor Eric Clanton, who pleaded guilty after assaulting various people at a free speech rally by hitting them in the head with a heavy bike lock. Emilie Raguso, *Eric Clanton Takes 3-Year Probation Deal in Berkeley Rally Bike Lock Assault Case*, BERKELEYSIDE (Aug. 8, 2018), https://www.berkeleyside.com/2018/08/08/eric-clanton-takes-3-year-probation-deal-in-berkeley-rally-bike-lock-assault-case [https://perma.cc/W3SP-67B5].

398. In one case, Georgetown University student Bill Torgerson was the subject of a formal resolution of condemnation by the Student Senate as well as a bias complaint from the university. The reason was a column on his own website espousing conservative views on current issues. *See* Ethan Greer, *GUSA Senate Condemns Blog Written by a Georgetown Student*, GEORGETOWN VOICE (July 8, 2020), https://georgetownvoice.com/2020/07/08/gusa-senate-condemns-blog-post-written-by-a-georgetown-student [https://perma.cc/6CC5-8DFK].

399. One survey of 800 college students found one in three believed violence was justified to oppose "hate speech." Jonathan Turley, *Poll: One in Three College Students Believe Violence Is Justified to Stop "Hate Speech"*, RES IPSA (Nov. 5, 2018), https://jonathanturley.org/2018/11/05/poll-one-in-three-college-students-believe-violence-is-justified-to-stop-hate-speech [https://perma.cc/K79E-TE6N].

400. *See, e.g.*, *Harvard Youth Poll Finds Majority of Young Americans Support Impeachment and Removal of President Trump*, HARV. KENNEDY SCH. (Nov. 18, 2019),

said that they experienced political bias and that students believe that only one percent of their faculty are conservative.[401] A poll at Pomona found nearly nine out of ten students said that "the climate on . . . campus prevents students/faculty from saying things they believe because others might find them offensive."[402] Nearly two-thirds of faculty members felt the same.[403] Seventy-six percent of conservative and moderate students strongly agree that the school climate hinders their free expression.[404] The poll showed a sharp difference in the freedom expected from students based on their ideology. The rate of conservative and moderate students expressing fear about expressing their views was "nearly 2.5 times higher than very liberal students."[405] Another poll of 800 full-time undergraduate students found that a majority "felt intimidated" in

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https://iop.harvard.edu/about/newsletter-press-release/harvard-youth-poll-impeachment-nov18-2019 [https://perma.cc/KUD9-ELBX] (finding that only 35 percent of young Republicans felt comfortable sharing their political opinions with professors) [hereinafter *Harvard Youth Poll*]; JENNIFER LARSON ET AL., UNC FACULTY REPS., FREE EXPRESSION AND CONSTRUCTIVE DIALOGUE AT THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL (Mar. 2, 2020), *available at* https://fecdsurveyreport.web.unc.edu/files/2020/02/UNC-Free-Expression-Report.pdf [https://perma.cc/SBN6-HDKQ]; *Perceptions of Speech and Campus Climate: 2018 Gallup Survey of Pomona Students and Faculty*, POMONA COLL. (Feb. 8, 2018), https://www.pomona.edu/public-dialogue/survey [https://perma.cc/XCN4-EJXA] [hereinafter *Gallup Survey*]. According to a Knight Foundation survey, 41 percent of students believe that hate speech should not be protected. *Free Expression on College Campuses*, KNIGHT FOUND. (May 13, 2019), https://knightfoundation.org/reports/free-expression-college-campuses [https://perma.cc/3DXX-TP7G].

401. Jennifer Harper, *Inside the Beltway: Yale Students Report That Just 1% of Their Professors Are Conservative*, WASH. TIMES (May 4, 2017), https://www.washingtontimes.com/news/2017/may/4/inside-the-beltway-yale-students-say-1-of-professo [https://perma.cc/9RDW-WF9E]; *see also Survey: 70% of Yale Students Often Experience Political Bias in the Classroom*, WILLIAM F. BUCKLEY, JR. PROGRAM AT YALE (May 3, 2017), https://www.buckleyprogram.com/post/survey-70-of-yale-students-often-experience-political-bias-in-the-classroom [https://perma.cc/SB9S-RKFU].

402. *Gallup Survey*, *supra* note 400.

403. *Id.*

404. *Id.*

405. *Id.*

sharing their views due to the expressed views of their professors and other teachers.[406] As with the growing intolerance among professional journalists, this trend is evident among student journalists and editors.[407] Similarly, university administrators have called for limits on free speech and have supported often vague limitations on speech.[408]

These controversies are offered not as a survey of all such incidents but rather as a sufficient sampling to show there is a legitimate concern over the exercise of free speech at every level of our educational system.[409] There is a growing narrative, as reflected in

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406. James Freeman, *Most U.S. College Students Afraid to Disagree with Professors*, WALL ST. J. (Oct. 26, 2018), https://www.wsj.com/articles/most-u-s-college-students-afraid-to-disagree-with-professors-1540588198 [https://perma.cc/35JC-8J82].

407. *Free Speech Is Not Violated at Wellesley*, WELLESLEY NEWS (Apr. 12, 2017), https://thewellesleynews.com/2017/04/12/free-speech-is-not-violated-at-wellesley [https://perma.cc/R2PG-Y5CK] ("Shutting down rhetoric that undermines the existence and rights of others is not a violation of free speech; it is hate speech . . . . [I]f people are given the resources to learn and either continue to speak hate speech or refuse to adapt their beliefs, hostility may be warranted.").

408. *See, e.g.*, Douglas Belkin, *Why Northwestern President Morton Schapiro Favors Safe Spaces*, WALL ST. J. (May 16, 2017), https://www.wsj.com/articles/why-northwestern-president-morton-schapiro-favors-safe-spaces-1494987120 [https://perma.cc/L452-5VR4] ("You want to protect the First Amendment, obviously, but it isn't absolute."). Some presidents have expressly denounced the "disingenuous misrepresentation of free speech" and declared that they will not protect speech that can "spread hate or create animosity and hostility." Ric N. Baser, *Hate Speech Does Not Equal Free Speech*, SAN ANTONIO EXPRESS-NEWS (Dec. 13, 2017), https://www.expressnews.com/opinion/commentary/article/Hate-speech-does-not-equal-free-speech-12428780.php [https://perma.cc/VQ2T-XQ5E] (discussing letter declaring that colleges will not protect inappropriate or hostile speech).

409. The list of classes, events, and speeches canceled due to hecklers and "shout downs" would be too long to list, but one of the most illustrative was a sociology class that was canceled due to protesters at Northwestern University. The Sociology 201 class by Professor Beth Redbird examined "inequality in American society with an emphasis on race, class and gender." To that end, Redbird invited both an undocumented person and a spokesperson for the Immigration and Customs Enforcement. It is the type of balance that should be valued on every campus. Instead, protesters blocked the doors for the class with the ICE representative. The University intervened and, after securing a promise that the protesters would not disrupt that class, allowed the protesters inside.

many of these controversies, that free speech itself is a danger and that certain views constitute harm for the purposes of proscriptive or defensive action. It is also important not to overstate the role of movements like Antifa in these controversies. The ultimate responsibility for the erosion of free speech values in our country cannot be attributed to these extremist groups. That ignoble distinction rests with academics, journalists, and others who actively support actions taken against those with opposing views or stand silent as their colleagues are harassed, investigated, or fired for their views. The attack on free speech is not nearly as damaging as the lack of active support for free speech, a dangerous passivity that has created the vacuum in which these groups operate and flourish. It is the antithesis of the intellectual mission of higher education and precisely the self-destructive path of orthodoxy denounced by Mill: "The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it."[410]

The courts have routinely ruled against universities for the denial of free speech as well as the denial of due process.[411] However, many universities seem to prefer litigation to reforming policies curtailing free speech. Even with free speech groups opposing these cases, universities drive up the costs and force delays by requiring students and faculty to litigate basic free speech values. In the past,

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They then shouted down the class until it was canceled. Notably, the students responsible proudly gave their names to the campus newspaper, and the University took no action against them other than expressing disappointment. Mariana Alfaro, *Students Protest ICE Representative's Visit on Campus*, DAILY NORTHWESTERN (May 17, 2017), https://dailynorthwestern.com/2017/05/17/campus/students-protest-ice-representatives-visit-to-campus [https://perma.cc/Y974-6FJD].

410. MILL, ON LIBERTY, *supra* note 56, at 30–31.

411. *See, e.g.*, Young Am.'s Found. v. Stenger, No. 3:20-CV-0822 (LEK/ML), 2021 WL 3738005 at * 15 (N.D.N.Y. Aug. 24, 2021); Meriweather v. Hartop, 992 F.3d 492, 498 (6th Cir. 2021).

these cases have often floundered on standing or jurisdictional grounds. One of the most maddening barriers has been the need to show concrete harm other than the loss of free speech to secure judicial review.[412] Free speech is often treated as an abstraction in such damage calculations. It is a bitterly ironic problem since universities increasingly cite the harm posed by unregulated free speech to justify limitations while treating the denial of free speech as a *de minimis* cost for students or faculty.[413]

That may change with a major 8-1 ruling of the Supreme Court in *Uzuegbunam v. Preczewski*.[414] In *Uzuegbunam*, the Court was faced with a former Georgia Gwinnett College student who wanted to share his religious views with other students on campus.[415] He was twice prevented by campus police from handing out religious literature and told by the director of the college's Office of Student Integrity that he had to apply for a permit and confine his speech to two designated "free speech expression areas."[416] Yet when Uzuegbunam received a permit, he was then again prevented from speaking because a security officer told him that students had complained that he was disturbing the peace.[417] The college forced Uzuegbunam to go to court and initially claimed that such religious speech constituted incitement akin to "fighting words."[418] After Uzuegbunam litigated that question, a familiar thing occurred: the

412. *See, e.g.*, Lopez v. Candaele, 630 F.3d 775, 789 (9th Cir. 2010); Rock for Life-UMBC v. Hrabowski, 411 F. App'x 541, 548 (4th Cir. 2010); *see also* Jennifer L. Bruneau, Comment, *Injury-in-Fact in Chilling Effect Challenges to Public University Speech Codes*, 64 CATH. U. L. REV. 975 (2015).

413. Zoe Tidman, *Government 'Exaggerating Threat to Freedom of Speech to Push Through New Laws,' Says University Union*, INDEPENDENT (May 14, 2021), https://www.independent.co.uk/news/education/education-news/free-speech-university-laws-ucu-b1846076.html [https://perma.cc/7AAM-28TG].

414. 141 S. Ct. 792 (2021).

415. *Id.* at 794.

416. *Id.* at 797.

417. *Id.* at 794–95 (a second student also claimed to have been prevented from speaking under the policies).

418. *Id.* at 797.

college eliminated the policies and sought to dismiss the lawsuits as moot.[419] It is an all–too-common pattern where universities and colleges force students or academics to go to court and then later drop the cases when it is clear that the institution may lose. This time the Court declared that enough was enough. In an opinion written by Justice Thomas, the Court held that nominal damages are enough to allow citizens to litigate the loss of free speech rights.[420] In his lone dissent, Chief Justice Roberts offered a classic floodgates argument that "[g]oing forward, the Judiciary will be required to perform this function whenever a plaintiff asks for a dollar. For those who want to know if their rights have been violated, the least dangerous branch will become the least expensive source of legal advice."[421] Chief Justice Roberts' floodgates argument led to a sharp rebuke by Justice Thomas, who wrote:

> That this rule developed at common law is unsurprising in the light of the noneconomic rights that individuals had at that time. A contrary rule would have meant, in many cases, that there was no remedy at all for those rights, such as due process or voting rights, that were not readily reducible to monetary valuation. . . . By permitting plaintiffs to pursue nominal damages whenever they suffered a personal legal injury, the common law avoided the oddity of privileging small-dollar economic rights over important, but not easily quantifiable, nonpecuniary rights.[422]

The ruling on nominal damages will minimize one of the barriers that keeps courts from considering constitutional and contractual claims in defense of free speech rights. The decision does not remove other requirements of particularized injury or standing. However, the Court found nominal damages could meet redressability demands. The Court held:

419. *Id.*
420. *Id.* at 802.
421. *Id.* at 807 (Roberts, C.J., dissenting).
422. *Id.* at 800 (majority opinion) (citations omitted).

> Applying this principle here is straightforward. For purposes of this appeal, it is undisputed that Uzuegbunam experienced a completed violation of his constitutional rights when respondents enforced their speech policies against him. Because "every violation [of a right] imports damage," nominal damages can redress Uzuegbunam's injury even if he cannot or chooses not to quantify that harm in economic terms.[423]

Even with such new precedent, the courts are unlikely to turn the tide on speech limitations. Such challenges are easier against public universities while private universities can litigate hazy contractual claims with the small percentage of litigants willing to go to court.

Absent some greater protection of expressive activities, enclaves of free speech will continue to collapse. For many faculty and students, the "circle" of permissible or tolerated speech continues to shrink. This is a literal physical reduction when schools impose "free speech zones" designed to bar free speech in all but a small, sometimes remote space on a university's campus. More often it is the loss of a sense of freedom to express opposing thoughts on subjects of race, police abuse, or other issues that conflict with majoritarian values. Diversity of viewpoints is the most cherished characteristic of higher education, but, as the Pound writings indicate,[424] we are again facing a period of reinforced orthodoxy on our campuses. It is easier for those with minority viewpoints to be silent than to deal with the outcry if they try to speak. The chilling effect of these protests and campaigns is the artificial appearance of uniformity or agreement. This results from a straightforward calculation. Fighting for the free speech rights of a minority of faculty or students costs a great deal of money and strife. Conversely, maintaining a hostile environment for such dissenting views allows for the appearance of neutrality while the costs are borne silently by

423. *Id.* at 802 (citation omitted) (alteration in original).
424. *See* Pound *supra* notes 41, 43.

those too intimidated to speak out.[425] It is not just the exclusion of many students and faculty from the full participation in intellectual discourse and learning that is troubling, but also it is the loss of "ethical confrontation." It is precisely those confrontations that bring depth and vigor to higher education. Even Professor Jeremy Waldron, who has advocated speech regulation, has noted "[i]f nobody is disturbed, distressed, or hurt in this way . . . the intellectual life and progress of our civilization may be grinding to a halt."[426] If a faculty member cannot question the statistics on police abuse or question the impact of affirmative action, universities become little more than echo chambers for orthodoxy.

2. Legislating Diversity in Education Spaces

Historically, while political figures have sought to limit free speech, this right has been protected on our campuses as an essential element of our intellectual mission of free and open discourse. By defending free speech rights on campuses, Congress can guarantee protected enclaves for free speech even in those jurisdictions where local officials are not inclined to support the exercise of this right. Local enforcement is the best way to stop violence at protests. Federal civil actions could be used to compel cities to meet this responsibility in cases in which there is a pattern of police "standing down" or declining to protect permitted events. Yet, as noted earlier, it would be difficult to federally compel what are often treated as discretionary acts by local officials. That is why the focus should be on, to adopt a Millian term, protecting "circles" of protected speech and academic freedom. Indeed, as the Supreme Court stated

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425. Again, many faculty and students are now unsure of what they can say and thus say nothing. One recent Harvard study found only thirty-five percent of Republican or conservative students felt comfortable expressing their views. *Harvard Youth Poll*, *supra* note 400; *see also* LARSON ET AL., *supra* note 400 (study at the University of North Carolina funding that conservative students were 300 times more likely to self-censor their political views).

426. Waldron, *supra* note 84, at 115, 124.

in *Sweezy v. New Hampshire*,[427] these circles or enclaves of protection are the very thing that sustains a healthy democratic system: "Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die."[428]

Various states have already responded to controversies over free speech, particularly regarding the use of "free speech zones" on campuses that have been criticized for isolating student advocates. Free speech zones curtail the "ethical confrontation" value of free speech, confining exposure to such opposing views in a way that minimizes any potential disruption or insult. Some states have attempted to force greater ideological diversity on faculties that rarely hire conservative professors, as discussed below. The greatest limitation on state legislative measures is that it is most effective with public institutions, which are already subject to direct protections under the First Amendment. When professors have barred certain views in class, or when universities have barred speech on campus, there have been corrective measures based on the First Amendment.[429] While most private universities receive considerable federal funds, private universities are not generally dependent on state funding and are not subject to limits based on state action.[430]

427. 354 U.S. 234 (1957).

428. *Id.* at 249–50 (overturning a contempt citation of a university professor who had refused to answer questions about his possible support for the Communist Party).

429. *See, e.g.*, Jonathan Turley, "*Giant Warning": Iowa State Professor Attempts to Ban Students Who Question Black Lives Matter, Abortion, or Other Forms of "Othering"*, RES IPSA (Aug. 19, 2020), https://jonathanturley.org/2020/08/19/giant-warning-iowa-state-professor-under-fire-for-banning-students-who-question-black-lives-matter-abortion-or-other-forms-of-othering [https://perma.cc/69Q5-SYDD].

430. Some have noted, however, that even private universities have developed a reliance on federal funds that can challenge their status and independence on a practical level. *See* Richard Vedder, *There Are Really Almost No Truly Private Universities*, FORBES (Apr. 8, 2008), https://www.forbes.com/sites/richardvedder/2018/04/08/there-are-really-almost-no-truly-private-universities/?sh=48c3c6857bc5 [https://perma.cc/RX8H-FYV4].

The first intellectual diversity state law was enacted in South Dakota. After a number of controversies over conservatives being harassed or barred from speaking on campus, the legislature passed "An Act to Promote Intellectual Diversity at Certain Institutions of Higher Education."[431] The four sections of the Act speak of general commitments to free speech and diversity, including a "commitment to the principles of free expression . . . in an environment that is intellectually and ideologically diverse" and require a commitment to—and annual reports on—ensuring "intellectual diversity and free exchange of ideas."[432] The law was opposed by some faculty and groups on the grounds that it was an intrusion upon academic freedom, even though the provisions included viewpoint diversity protections for faculty in hiring and teaching.[433] There is certainly a danger that laws could intrude upon academic freedom, even in the cause of supporting academic freedom and diversity of thought. Yet, universities would be more credible advocates for academic freedom if they had not reduced conservative voices to a small percentage, if any, on most faculties.[434] Moreover, the opposition to these laws rarely have anything to suggest beyond the status quo despite growing concerns over ideological intolerance and diversity.

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431. H.B. 1087, 2019 Leg. (S.D. 2019).

432. S.D. CODIFIED LAWS §§ 13-53-50, 13-53-53 (2021).

433. Molly Worthen, *Can We Guarantee That Colleges Are Intellectually Diverse?*, N.Y. TIMES (Aug. 30, 2019), https://www.nytimes.com/2019/08/30/opinion/sunday/college-intellectual-diversity.html [https://perma.cc/7PGQ-C7YT]; Lisa Kaczke, *Concerns Linger as South Dakota Universities Implement New Intellectual Diversity Law*, ARGUS LEADER (Oct. 30, 2019), https://www.argusleader.com/story/news/politics/2019/10/30/south-dakota-universities-implement-new-intellectual-diversity-law-sue-peterson/2501504001 [https://perma.cc/UW5L-ZJB4].

434. *See* Natalie L. Kahn, *'An Endangered Species': The Scarcity of Harvard's Conservative Faculty*, HARV. CRIMSON (Apr. 9, 2021), https://www.thecrimson.com/article/2021/4/9/disappearance-conservative-faculty [https://perma.cc/8D8F-AJ24]; Jon A. Shields, *The Disappearing Conservative Professor*, NAT'L AFFS. (Fall 2018), https://nationalaffairs.com/publications/detail/the-disappearing-conservative-professor [https://perma.cc/BZ8V-XSDM].

Free speech zones have also been the source of state legislation. In the case of Texas Tech, the free speech zone was confined to a twenty–foot-wide gazebo.[435] Western Michigan University moved its free speech zone behind a campus building.[436] Even greater concern is raised by the selective use of such zones. For example, the University of Houston would deem certain forms of speech to be "potentially disruptive" and confine those groups to zones.[437] That turned out to include pro-life groups but not some of their opposing groups.[438] Courts have ruled in favor of free speech rights over such restrictions by treating campuses as public forums.[439] In the Texas Tech case, the court took a dim view of not only the zones (which the university changed before the ruling) but also the underlying speech content regulations, stating that the court was

> of the opinion that application of the Speech Code to the public forum areas on campus would suppress substantially more than threats, "fighting words," or libelous statements that may be considered constitutionally unprotected speech, to include much speech that, no matter how offensive, is not proscribed by the First Amendment.[440]

These decisions, however, did not slow the legislative outrage over universities confining or abridging the exercise of free speech. As of August 2020, at least seventeen states have banned free speech

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435. *See generally* Roberts v. Haragan, 346 F.Supp.2d 853 (N.D. Tex. 2004).

436. Joseph D. Herrold, *Capturing the Dialogue: Free Speech Zones and the "Caging" of First Amendment Rights*, 54 DRAKE L. REV. 949, 951 (2006) (citing *Your Right to Say It . . . But Over There*, CHI. TRIB., Sept. 28, 2003, at 3).

437. Pro-Life Cougars v. Univ. of Houston, 259 F.Supp.2d 575, 577–78 (S.D. Tex. 2003).

438. *Id*.

439. *See, e.g.*, Hays County Guardian v. Supple, 969 F.2d 111, 119 (5th Cir. 1992).

440. Roberts v. Haragan, 346 F.Supp.2d at 872; *but see* Ala. Student Party v. Student Gov't Ass'n of the Univ. of Ala., 867 F.2d 1344 (11th Cir. 1989) (rejecting constitutional challenge).

zones.[441] Some of these state laws codify the standard used by the courts, mandating that "[s]ubject to reasonable time, place and manner restrictions, a community college or university may not limit any area on campus where free speech may be exercised."[442] Other laws incorporate judicial opinions on unprotected speech but declare:

> An institution of higher education shall not limit or restrict a student's expression in a student forum, including subjecting a student to disciplinary action resulting from his or her expression, because of the content or viewpoint of the expression or because of the reaction or opposition by listeners or observers to such expression.[443]

The laws do not intrude upon academic freedom but rather protect the students and faculty from being denied their full exercise of free speech on campuses.

These state laws are largely coextensive with state jurisdiction over public schools and case law on public forums. While laws like South Dakota's have reporting obligations, most bar free speech zones while largely reaffirming the importance of free speech.[444] Although these laws are effective on some levels, specific provisions that address a wider array of limits on speech (like surcharging or indemnification rules as a precondition for speakers) are still missing from these laws. They do little to force greater transparency

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441. This includes Virginia, Missouri, Arizona, Kentucky, Colorado, Utah, North Carolina, Tennessee, Florida, Georgia, Louisiana, Arkansas, South Dakota, Iowa, Alabama, Oklahoma, and Texas. FIRE, SPOTLIGHT ON SPEECH CODES 2020, at 23 (2019), https://www.thefire.org/presentation/wp-content/uploads/2019/12/04102305/FIRE-Spotlight-On-Speech-Codes-2020.pdf [https://perma.cc/776R-CWMW]

442. ARIZ. REV. STAT. ANN. § 15-1865 (2021).

443. COLO. REV. STAT. § 23-5-144 (2017).

444. Andrew Blake, *Florida Lawmakers Ban 'Free Speech Zones' on College Campuses*, WASH. TIMES (Mar. 6, 2018), https://www.washingtontimes.com/news/2018/mar/6/florida-lawmakers-ban-free-speech-zones-college-ca [https://perma.cc/YPW5-GTE8].

and accountability at universities. Allowing for some form of outside review of challenges to the denial of free speech activities is a vital protection against heterodoxy on campuses. Most importantly, state laws show a limited ability to influence schools beyond state institutions. The greatest influence may be found in the federal government.

The federal government already plays a prominent role in higher education. The federal government spends billions of federal dollars on grants, projects, consultancies, and other support for academics and their institutions.[445] It also spends billions on federal loan guarantees for tuition and costs of students. Increasingly, however, many Americans are expressing concern about whether they can attend these schools and still participate in public debates as conservatives, libertarians, or simply individuals who hold contrarian views.[446] That has led to calls for the federal government to act to guarantee viewpoint diversity. On March 19, 2019, the Trump Administration issued an executive order entitled "Executive Order on Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities."[447] Most of the provisions concern transparency on issues of financial aid and employment. The order does not force equal transparency on free speech policies, controversies, or cases. Just as students can gain needed information on issues like "the prices and outcomes of postsecondary education,"

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445. DATA LAB, FEDERAL INVESTMENT IN HIGHER EDUCATION, https://datalab.usaspending.gov/colleges-and-universities [https://perma.cc/ER4K-EJE4] (last visited Feb. 13, 2022) ("In 2018, higher education institutions received a total of $1.068 trillion in revenue from federal and non-federal funding sources. Investments from the federal government were $149 billion of the total, representing 3.6% of federal spending.").

446. *See, e.g.*, Christa Case Bryant, *At College Decision Time, Conservatives Face Tough Choices*, CHRISTIAN SCI. MONITOR (Apr. 23, 2018), https://www.csmonitor.com/EqualEd/2018/0423/At-college-decision-time-conservatives-face-tough-choices [https://perma.cc/2VT4-JJHV] ("Will the institution welcome, or at least tolerate, our viewpoints? To hear many conservatives tell it, the answer on many campuses is increasingly, 'No.'").

447. Exec. Order No. 13,864, 84 Fed. Reg. 11,401 (Mar. 21, 2019).

they could also benefit from information on the relative levels of protection afforded to free speech and viewpoint diversity. Nearly all universities publish aspirational statements of how they favor free speech,[448] but the demonstrated practice of many universities is often diametrically opposed to their stated policies.[449] As academics, we would like to believe that it is the quality of education that draws students to our institutions. Ideally, students should be picking on the basis of what a school can offer them in terms of intellectual development. The most important element to intellectual growth is freedom of thought and speech. Yet, students have no means to see which schools have the worst free speech practices or the greatest number of related complaints. Missing are any meaningful provisions to support the core statement on free speech that the federal government endorses—namely, to "encourage institutions to foster environments that promote open, intellectually engaging, and diverse debate, including through compliance with the First Amendment for public institutions and compliance with stated institutional policies regarding freedom of speech for private institutions."[450]

The federal government's "encouragement" will have little influence on academic institutions, particularly private institutions, absent a coercive element to reinforce these values.

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448. *See, e.g.*, *Statement on Free Speech and Expression*, BOSTON UNIV., https://www.bu.edu/about/about-free-speech-and-expression [https://perma.cc/L29J-VZFM] (last visited Feb. 13, 2022) ("Freedom of speech and expression are central to the mission of Boston University. The University has a responsibility to allow and safeguard the airing of the full spectrum of opinions on its campuses and to create an environment where ideas can be freely expressed and challenged.").

449. While Boston University has a strong statement in favor of free speech, *see id.*, it has been given a "red" speech code rating on free speech by FIRE. *School Spotlight: Boston University*, FIRE, https://www.thefire.org/schools/boston-university [https://perma.cc/G6EN-S2CG] (last visited Feb. 13, 2022). According to FIRE, "[a] red light university has at least one policy that both clearly and substantially restricts freedom of speech." *Id.*

450. Exec. Order No. 13864, 84 Fed. Reg. 11,401 at § 2(a) (Mar. 21, 2019).

Congress has already explored the limited use of such conditions for funding universities.[451] For example, the Free Right to Expression in Education Act would "conditio[n] funds under Title IV of the [Higher Education Act] on public colleges and universities allowing expressive activities in outdoor areas on campus."[452] The law, however, is both vague and limited in its scope, particularly in the exclusion of private universities. While the First Amendment does not bind private universities, Congress can condition federal funds, including use of federal funds supporting grants and tuition, on the satisfaction of minimal conditions. For example, Congress conditions the receipt of some funds on schools allowing access for ROTC programs and military recruitment under the "Solomon Amendment."[453] The Court upheld this law as within the authority of Congress over the qualification for federal funding.[454] The Court held that such a condition "neither limits what law schools may say nor requires them to say anything. . . . As a general matter, the Solomon Amendment regulates conduct, not speech. It affects what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*."[455]

Once again, any federal effort to protect free speech and other rights must be narrowly tailored and enforced to avoid curtailing free speech in the name of protecting it.[456] That does not mean, however, that the government cannot refuse to directly support such

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451. *See* WHITNEY K. NOVAK, CONG. RSCH. SERV., LSB10438, FREE SPEECH ON COLLEGE CAMPUSES: CONSIDERATIONS FOR CONGRESS 4 (2020).

452. *Id. See* H.R. 1672, 116th Cong. (2019), https://www.congress.gov/bill/116th-congress/house-bill/1672/text [https://perma.cc/FHG5-DHZV], for the full text of the proposed bill.

453. 10 U.S.C. § 983 (2022).

454. Rumsfeld v. Forum for Acad. & Inst. Rights, Inc. (FAIR), 547 U.S. 47 (2006) (holding the Solomon Amendment's requirement of providing access to military recruiters involved conduct, not speech).

455. *Id.* at 60.

456. Content-based discrimination is a threat to both free speech and the free exercise of religion. For that reason, I have long opposed the use of the tax code and other des-

institutions. There is obvious cause for blocking the use of federal subsidies and grants, for example, for universities that discriminate against applicants on the basis of race, religion, or other such classifications. The recent executive order on free speech protections on campus does not have the weight or authority of an actual federal law.[457] It generally requires that listed agencies "take appropriate steps, in a manner consistent with applicable law, including the First Amendment, to ensure institutions that receive Federal research or education grants promote free inquiry, including through compliance with all applicable Federal laws, regulations, and policies."[458] The executive order cannot be viewed as imposing meaningful limits for universities and colleges in the absence of a clear legislative foundation. While twelve federal grantmaking agencies were instructed to coordinate with the Office of Management and Budget to certify that schools receiving federal funds complied with the policies, including free academic inquiry, private institutions lie outside of their grasp.[459] Instead, private institutions were simply encouraged to comply with their "stated institutional policies" on freedom of speech.[460] The executive order also does not address federal aid for tuition, which would have the greatest coercive

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ignations to punish organizations based on their religious beliefs or free speech expression, even for organizations with offensive views. *See, e.g.*, Jonathan Turley, *The Patent Office Goes out of Bounds in Redskins Trademark Case*, WASH. POST (June 20, 2014), https://www.washingtonpost.com/opinions/the-patent-office-goes-out-of-bounds-in-redskins-trademark-case/2014/06/20/e0001ee8-f7bd-11e3-8aa9-dad2ec039789_story.html [https://perma.cc/H7DZ-E5L8]; Jonathan Turley, Faithful Discrimination: *Are Non-Discrimination Policies Themselves Discriminatory?*, RES IPSA (Apr. 16, 2010), https://jonathanturley.org/2010/04/18/faithful-discrimination-are-non-discrimination-policies-themselves-discriminatory/ [https://perma.cc/VB7W-ALKU].

457. *See* Andrew Kreighbaum, *Trump Signs Broad Executive Order*, INSIDE HIGHER EDUC. (Mar. 22, 2019), https://www.insidehighered.com/news/2019/03/22/white-house-executive-order-prods-colleges-free-speech-program-level-data-and-risk [https://perma.cc/39V7-AWWB].

458. Exec. Order No. 13,864, 84 Fed. Reg. 11,401 (Mar. 21, 2019).

459. *Id.*

460. *Id.*

impact for both private and public institutions. The standards for respecting and defending free speech are not onerous and should be easily accepted. They merely require schools to guarantee what they currently promise.

Congress can require that universities adopt a list of basic protections for the exercise of free speech as a precondition for any federal funding, from grants to tuition support. I have previously proposed ten possible commitments for universities—categorical imperatives for free expression.[461] Many should not have to be codified. For example, at one time, requiring the expulsion or termination of students or faculty for physical assaults or attacks would have seemed ridiculously obvious. There could be no greater con-

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461. *See The Right of the People Peaceably to Assemble: Protecting Speech by Stopping Anarchist Violence: Hearing Before the S. Comm. on the Judiciary*, 116th Cong. (Aug. 4, 2020) (testimony of Professor Jonathan Turley). The list includes (1) guaranteeing that speakers appear on campus under the same costs and conditions, regardless of their views (or opposition to their views); (2) committing to disciplinary action of students or faculty who block classes, lectures, or speeches by violent acts or threats of violence; (3) committing to the expulsion or termination of students or faculty who physically assault speakers or others seeking to exercise free speech or the right to peaceful assembly; (4) committing to disciplinary action of students or faculty who block classes, lectures, or speeches through disruptive conduct inside classrooms, halls or other spaces reserved for such presentations; (5) enforcing a presumption that the exercise of free speech outside of the school (including statements on social media) for faculty or students is generally not a matter for school sanctions or termination; (6) committing to due process of students and faculty who are disciplined for exercising free speech rights, including the right to discovery of patterns of bias or inconsistent treatment in other controversies; (7) barring restrictive "free speech zones" and other exclusionary zones for free expression (other than rules barring demonstrations, disruptions, or exhibits in classrooms, halls, or other spaces used for lectures, presentations, and events); (8) barring student governments or organizations from sanctioning or censuring fellow students for their exercise of free speech without a clear and narrowly tailored standard as well as the approval of a university body; (9) barring faculty from sanctioning, censoring, or retaliating against students for their political, social, or religious statements or values (subject to protected exceptions for religious-based institutions); and (10) barring faculty from requiring that students adhere to, adopt, or endorse political, social, or religious positions as a condition for any class, program, or benefit (subject to protected exceptions for religious-based institutions).

tradiction for an institution of higher education than having a professor attack someone on campus. However, we have seen such physical attacks by both students and faculty go without action from administrators. One of the most egregious cases involved a University of California professor who pleaded guilty to assaulting pro-life advocates and destroying their display on campus.[462] Not only did many faculty members and students support the professor, but also some rejected the right of one of the attacked advocates to speak on campus and even compared pro-life advocates to terrorists. Not only was the convicted academic kept on the faculty, but other schools also honored her leadership in advocacy.[463] Much like the failure of local officials to prosecute criminal acts, the failure of universities to take action against violent faculty and students serves to increase the threatening environment for dissenting voices on campuses. The message is clear: if you are physically attacked for controversial views, the university might not take action. This view fuels both the violence and the resulting intimidation for faculty and students alike.

The ten proposed principles do not supplant the universities in determining when violations have occurred. They do not compel university verdicts or adjudications. Instead, they create an obligation to address and document such cases. They also do not intrude into academic freedom or judgment, even when schools have limited the ideological range of the faculty. For example, there is no

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462. Jonathan Turley, *Professor Miller-Young Sentenced to Probation and Anger Management Classes for Attack on Pro-Life Advocates*, RES IPSA (Aug. 18, 2014), https://jonathanturley.org/2014/08/18/professor-miller-young-sentenced-to-probation-and-anger-management-classes-for-attack-on-pro-life-advocates [https://perma.cc/8YA5-BH7A].

463. Jonathan Turley, *California Professor Who Assaulted Pro Life Advocates Is Featured by Oregon*, RES IPSA (Oct. 17, 2018), https://jonathanturley.org/2018/10/17/california-professor-who-assaulted-pro-life-advocates-is-featured-by-oregon-to-help-students-embrace-the-radical-potential-of-black-feminism-in-our-everyday-lives [https://perma.cc/N88M-2KED].

requirement of ideological diversity on faculties. It is highly doubtful, therefore, that most schools will become more ideologically diverse. The percentage of Republican or conservative or libertarian professors is already quite small on most faculties, particularly at top schools. Less than ten percent of faculty in all schools identify as conservative,[464] and Democrats outnumber Republicans by over ten times on faculties.[465] In some schools this ratio goes as high as 132 to 1.[466] It is impossible to deny that there is a bias against conservatives on faculties and on academic journals like law reviews. Liberal faculties can continue to dismiss candidates who advance opposing views as intellectually unsound or simply not as intellectually "promising" as more liberal candidates. Such "pretext" employment decisions are common factors in discrimination cases,[467] but they are generally shielded in the academic environment.[468] First, viewpoint discrimination is not a prohibited category under Title VII and other laws. Second, great deference is given to academic judgments. Indeed, universities were exempted from Title

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464. Scott Jaschik, *Professors and Politics: What the Research Says*, INSIDE HIGHER EDUC. (Feb. 27, 2017), *https://www.insidehighered.com/news/2017/02/27/research-confirms-professors-lean-left-questions-assumptions-about-what-means* [https://perma.cc/EVB6-KDPD].

465. Mitchell Langbert et al., *Faculty Voter Registration in Economics, History, Journalism, Law, and Psychology*, 13 ECON. J. WATCH 422, 425, fig.2 (2016).

466. Mitchell Langbert, *Homogenous: The Political Affiliations of Elite Liberal Arts College Faculty*, 31 ACAD. QUESTIONS 186, 192–93, tbl.2 (2018), https://www.nas.org/academic-questions/31/2/homogenous_the_political_affiliations_of_elite_liberal_arts_college_faculty [https://perma.cc/FT86-P6LN].

467. Where such pretextual language has failed in gender or racial discrimination cases, it is often due to the lack of specificity. *See, e.g.*, Kahn v. Fairfield Univ., 357 F.Supp.2d 496, 501–02 (D. Conn. 2005) ("While Search Committee members made conclusory statements that Kahn was 'arrogant' or 'difficult to work with,' they had difficulty providing a basis for such conclusions. . . . Given the imprecise nature of the University's purported legitimate, non-discriminatory reasons, the evidence provided by Kahn to support a factual finding of pretext is sufficient to defeat a motion for summary judgment.").

468. *See, e.g.*, Weinstock v. Columbia Univ., 224 F.3d 33, 43 (2d Cir. 2000) ("When a college or university denies tenure for a valid non-discriminatory reason, and there is no evidence of discriminatory intent, this Court will not second-guess that decision.").

VII even for racial discrimination,[469] but that exemption was later rescinded in light of pretextual decisions.[470] There remains great deference to academic decisions, the reasons for which were most famously summed up in Justice Frankfurter's concurring opinion in *Sweezy*, laying out what he saw as the four components of academic freedom.[471] That freedom includes an academic institution's right "to determine . . . on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[472] As a result, universities can still use the same pretextual and coded language used to bar minorities and liberal candidates from conservative faculties decades earlier.[473] Where gender and racial discrimination is often shown by the relative credentials of candidates, no such protection is afforded to conservative candidates routinely rejected by overwhelmingly liberal faculties. The range of ideological diversity has become narrower and narrower.[474] The intolerance often cited by conservative scholars

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469. Civil Rights Act of 1964, Pub. L. No. 88-352, § 702, 78 Stat. 241 (1964) (codified as amended at 42 U.S.C. § 2000e-l(a) (2000)) (excepting "an educational institution with respect to the employment of individuals to perform work connected with the educational activities of such institution").

470. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 702, 86 Stat. 103 (codified as amended at 42 U.S.C. § 2000e-l(a) (2000)).

471. Sweezy v. New Hampshire, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

472. *Id.* (citation omitted).

473. *See* Martha S. West, *Gender Bias in Academic Robes: The Law's Failure To Protect Women Faculty*, 67 TEMP. L. REV. 67, 138 (1994) ("By the 1980s and 1990s, sophisticated academics have generally learned not to express open hostility to women as women. Explicit statements of gender bias are now less common in academia.").

474. For example, a recent study by the Harvard Crimson found only 1.46% of the Harvard faculty identified as conservative. Some 79.7% identified as "liberal" or "very liberal." James S. Bikales & Jasper G. Goodman, *Plurality of Surveyed Harvard Faculty Support Warren in Presidential Race*, HARV. CRIMSON (Mar. 3, 2020), https://www.thecrimson.com/article/2020/3/3/faculty-support-warren-president [https://perma.cc/N2SA-X4KP]. One Yale professor estimated the percentage at Yale as "0%." James Freeman, *Yale Prof Estimates Faculty Political Diversity at '0%'*, WALL ST. J. (Dec. 9, 2019), https://www.wsj.com/articles/yale-prof-estimates-faculty-political-di-

and students continues due to the lack of transparency and independent review, let alone corrective action. Yet any governmental attempt to address such bias would present serious concerns over academic freedom since intellectual bias is more difficult to show objectively than is bias based on race or gender.[475]

Moreover, the proposed principles do not provide a single definition of offensive speech, despite long-standing objections to vague standards applied to students and faculty. Despite the abuse of such vague speech codes,[476] such provisions are the product of deliberations within each academic community as it deals with maintaining environments that are safe and protective for students.[477] As with the Solomon Amendment, the proposed provi-

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versity-at-0-11575926185 [https://perma.cc/VRX5-UALS]. One study showed a 95:1 ratio in Democratic over Republican donations. Jonathan Turley, *Study: Professors Donate to Democrats over Republicans by 95:1 Ratio*, RES IPSA (Jan. 23, 2020), https://jonathanturley.org/2020/01/23/study-professors-donate-to-democrats-over-republicans-by-a-951-ratio/comment-page-1 [https://perma.cc/3DXC-CM9T]. It is absurd to continue to pretend that this virtual exclusion of conservative views on faculties is anything other than a systemic ideological litmus test.

475. Banerjee v. Board of Trustees of Smith College, 648 F.2d 61, 64 (1st Cir.), *cert. denied*, 454 U.S. 1098 (1981) ("It is understandable . . . that the clarity of articulation of reasons for refusing tenure by such collegial decision-making apparatus as that involved here may differ from that given by a business employer.").

476. Georgetown's code of student conduct lists 41 behaviors that violate its code and notes that for each type of behavior: "Attempts to commit a violation will be deemed as serious as actually committing the act; [w]hen it is determined that a violation of the Code occurred at an individual's residence, all residents may be held accountable . . . [and u]nless specifically stated within the definition of a violation, intent is not an element in determining responsibility, but it will be considered in the application of sanctions." GEORGETOWN UNIV., CODE OF STUDENT CONDUCT 8 (2019-20), https://georgetown.app.box.com/s/bibfmpo93061uxmwir29 [https://perma.cc/H2C2-DFP4]. The 18th prohibited behavior in the code is "incivility," defined as "[e]ngaging in behavior, either through language or actions, which disrespects another individual." *Id.* at 14.

477. Often these rules turn on undefined terms that produce a chilling effect in the lack of clarity over their meaning. For example, Boston University issued new guidelines that, among other things, prohibited the use of the university's computer facilities "irresponsibly or in a way that might needlessly interfere with the work of others."

sions focus on the underlying conduct rather than speech. The conditions focus on guaranteeing heterodoxy and due process through the exercise of free speech. In addition, such conditions would not in any way limit protests of faculty, classes, or events, so long as such actions do not prevent others from attending the event or listening to the targeted speakers. Blocking others from speaking or preventing others from listening to opposing views is not the exercise of free speech. It is the very antithesis of free speech. The provisions would focus on the ability of opposing views and speakers to be heard on campuses. Moreover, such a threshold condition for federal funds could be linked to a process of grievance to a specially mandated board or commission under the auspices of the Department of Education or the Justice Department. This would allow for some independent body to review these controversies, particularly when students or academics are disciplined for comments outside of the classroom. University administrators have routinely failed to protect these rights and in some cases lead the attack on faculty or students with opposing views. Neither the AAUP nor the American Bar Association have arrested, let alone reversed, the rise in viewpoint intolerance. An independent board could be empowered to demand answers from universities and to require the type of supporting material often denied to students and faculty by administrators.

BOSTON UNIV., UNIVERSITY CONDITIONS OF USE & POLICY ON COMPUTING ETHICS (June 12, 2020), https://www.bu.edu/dos/policies/lifebook/computing-ethics [https://perma.cc/HC4H-XJFP]. The University warned that failure to comply with the guidelines "constitutes a violation of University policy and will subject the violator to disciplinary and/or legal action by the University, and, in some cases, criminal prosecution. In addition, the University may require restitution for any use of service which is in violation of these guidelines." *Id*. Other universities simply state that students can be punished for statements or use of computers to transmit statements that are "contrary to the mission or values of the University." W. MICH. UNIV., RESNET ACCEPTABLE USE POLICY (Dec. 1, 2011), https://wmich.edu/policies/resnet-acceptable-use [https://perma.cc/P3U3-DN7J].

The focus of such federal legislation is to expose and deter content-based discrimination of speech. However, such governmental authority would be limited. The use of such federal spending conditions is not an invitation to substitute the viewpoint bias of university administrators with that of governmental officials. The Supreme Court has already struck such a balance. The Court allowed for federal conditions in *Rumsfeld v. Forum for Academic & Institutional Rights (FAIR)* in finding that the requirement of access to law schools was not compelled speech.[478] However, the Court drew a line at government interference in *FCC v. League of Women Voters*,[479] in which the Court reviewed the Public Broadcasting Act of 1967 and its prohibition of "noncommercial educational broadcasting stations . . . engaging in editorializing" if they received grants from the Corporation for Public Broadcasting.[480] That level of federal interference was found to run counter to the First Amendment and the protection of "journalistic freedom."[481] Such limitations were deemed as too intrusive and, in applying strict scrutiny, the Court found that the law could not satisfy the least-restrictive-means test.[482] In the context of universities, any standards would face similarly close scrutiny under the First Amendment. The limitation on

478. *See* 547 U.S. 47, 64 (2006).
479. 468 U.S. 364 (1984).
480. *Id.* at 366 (citation omitted).
481. *Id.* at 378–80.
482. *Id.* at 395. The Court held:

> [A]lthough the Government certainly has a substantial interest in ensuring that the audiences of noncommercial stations will not be led to think that the broadcaster's editorials reflect the official view of the government, this interest can be fully satisfied by less restrictive means that are readily available. To address this important concern, Congress could simply require public broadcasting stations to broadcast a disclaimer every time they editorialize which would state that the editorial represents only the view of the station's management and does not in any way represent the views of the Federal Government or any of the station's other sources of funding.

Id.

speech discrimination would focus on the guarantee of a viewpoint-neutral environment while allowing the prohibition of unlawful or unprotected speech as well as recognized and neutral time, place, or manner restrictions. Such protections protect the right to speak, not to curtail such speech by the university as well as its community members.

Courts have long protected expression on campuses and forced universities to shoulder the burden of showing how allowing free speech would undermine education. Courts have resisted balancing arguments based on the interests of the government against free speech in applying the tests from *Pickering v. Board of Education*,[483] *Connick v. Myers*,[484] and *Waters v. Churchill*.[485] For example, in *Burnham v. Ianni*,[486] the Eighth Circuit did not conduct a strict *Pickering* balancing analysis in declaring that photographs posted in the History Department at the University of Minnesota Duluth constituted expressive speech under the First Amendment.[487] The case involved speech outside of the classroom, and the Eighth Circuit held that "[t]he government employer must make a substantial showing that the speech is, in fact, disruptive before the speech may be punished."[488] Universities can curtail speech, but they must carry the First Amendment burden of showing how allowing the speech would impede education. It is not enough to simply declare free speech as harmful to those who do not share the viewpoint. As the Court ruled in 1967 in *Keyishian v. Board of Regents*, academic freedom remains not just the touchstone of higher education but a

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483. 391 U.S. 563 (1968).

484. 461 U.S. 138 (1983).

485. 511 U.S. 661 (1994).

486. 119 F.3d 668 (8th Cir. 1997)

487. *Id.* at 674; *cf.* Trotman v. Bd. of Trustees of Lincoln Univ., 635 F.2d 216, 224–25 (3d Cir. 1980) (applying the public employee speech doctrine to professors challenging actions taken against them "in spirited criticism of administrative policies with which they disagree").

488. *Burnham*, 119 F.3d at 680.

"transcendent value to all of us and not merely to the teachers concerned."[489]

A narrowly tailored standard would allow ample opportunity for universities to protect against racist or offensive comments in classes or on campus. The guidelines would focus on a number of key elements, such as whether remarks were made off campus. The guidelines would monitor the ability of all viewpoints to be expressed on campus and address the use of collateral limits such as mandatory insurance or prohibitive security fees to bar certain speakers. Most importantly, the guidelines would allow a comparison between remarks tolerated and remarks censored by universities. Finally, they would give the public a basis for comparing colleges to allow for a more informed debate. The only truly independent means for such review today are the courts, but such claims are often limited if the university is not a public institution, subject to First Amendment restrictions. A federal body and system of certification would allow faculty and students at private institutions to have greater ability to challenge university actions.

Conditional federal funding can be crafted to avoid the danger of government management of universities. Federal conditions would be confined to the most basic protections afforded by free speech. Of course, if private universities want to regulate speech, they can do so, but they cannot expect the support of tax dollars for programs that discriminate against large populations of students and academics. Without some outside action, there is a risk that private institutions will increasingly become (or at least be viewed) as hostile and unhealthy environments for many students. Indeed, there is a growing concern that many students will increasingly be forced to look only to public institutions for their education due to the added protections for free speech. Aside from a few exceptions, like the University of Chicago, which maintains fierce protections

489. 385 U.S. 589, 603 (1967).

for free speech, private institutions are regularly criticized for ideological intolerance.[490] A conservative student, like the one recently ostracized at Georgetown University,[491] must often chose between remaining silent for four years, embracing accepted truths, or limiting his or her future opportunities. This Faustian choice is not acceptable to many who want to experience college without fear of abuse or retaliation. This trend will result in the balkanization of our educational programs, where private institutions become echo chambers for orthodox viewpoints, while state institutions afford free speech protections as required by the First Amendment. Academics were once united in free speech as a virtual article of faith. That has changed. What was once an atmosphere of pluralism and tolerance has become one of orthodoxy and retribution. Our failing as academics has created the dangerous vacuum that is enabling groups to silence those with opposing views.

CONCLUSION

Roughly 70 years ago, Justice Douglas gave his famous speech entitled "The One Un-American Act" about the greatest threat to a free nation.[492] He warned that the restriction of free speech "is the most dangerous of all subversions. It is the one un-American act that could most easily defeat us."[493] The harm from loss of free

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490. *See* Jonathan Turley, *Free Speech Should Not Be Big News*, USA TODAY (Aug. 30, 2016), https://www.usatoday.com/story/opinion/2016/08/29/free-speech-university-of-chicago-trigger-safe-space-censorship-diversity-microaggressions-jonathan-turley/89515984 [https://perma.cc/6325-VETT].

491. *See* Jonathan Turley, *Georgetown Student Association Condemns Conservative Student for Criticizing BLM and the* Bostock *Ruling*, RES IPSA (July 10, 2020), https://jonathanturley.org/2020/07/10/georgetown-student-association-condemns-conservative-student-for-criticizing-blm-and-the-bostock-ruling [https://perma.cc/LJ95-JXX3].

492. William O. Douglas, *The One Un-American Act*, 7 NIEMAN REP. 1, 20 (1953), https://niemanreports.org/wp-content/uploads/2014/03/Spring-1953_150.pdf [https://perma.cc/D4EK-J85E].

493. *Id.*

speech was viewed as existential for our democracy. Today, the focus of many writers and academics is on the harm of unregulated free speech. Recently, a leading cable host heralded censorship on the Internet as part of a new "harm reduction model" of both free speech and freedom of the press.[494] Free speech is now treated as presumptively harmful absent governmental and corporate regulation. The harm is often ill-defined and applied inconsistently. The premise remains that unregulated free speech can threaten the democracy as a whole or it can threaten individual students who feel unsafe due to the expression of opposing views. Rather than treating free speech as the essential element for intellectual discourse, it is often portrayed as akin to a type of controlled substance in our public and academic discourse.

The trend toward speech codes and regulation has been building for decades. Reaching that critical mass has resulted in the loss of not just a long-cherished right, but also endangered a long-awaited moment for this country. The recent protests have served to focus the nation on the transcendent issues of racial discrimination and police misconduct. It is an important moment, as we deal with the continuing scourge of racism, to achieve the promise of equal opportunity and equal treatment in our country. It is a moment that should not be allowed to pass without a robust national dialogue on racial justice. Meaningful reforms require a full understanding of the underlying facts and patterns of racism in areas ranging from law enforcement to the labor market to education. Free speech allows the exchange of ideas on such causes and solutions, distilling both facts and proposals to a viable core for reform. Without such challenging debate, we risk wasting this critical period (and unity) on reforms that are neither vetted nor viable as lasting solutions for racial justice.

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494. Jonathan Turley, *"A Harm Reduction Model": CNN's Brian Stelter Offers a Perfectly Orwellian Attack on Free Speech and Freedom of the Press*, RES IPSA (Feb. 2, 2021), https://jonathanturley.org/2021/02/02/a-harm-reduction-model-cnns-brian-stelter-offers-a-perfectly-orwellian-attack-on-free-speech-and-freedom-of-the-press [https://perma.cc/P4MR-GD5T].

Ultimately, the greatest threat to free speech in this country remains the original threat: silence. Across the country, there seems to be dwindling support—and patience—for the exercise of free speech. There is a rising anger, fueled by legitimate frustration over continuing problems of racial and economic inequality. However, there is also a comparative decline in active support for dissenting voices, a trend we have seen in prior anti-free-speech periods. During the Red Scare, Attorney General Charles Gregory declared that dissenters must speak at their own risk: "May God have mercy on them, for they need expect none from an outraged people and an avenging Government."[495] The "avenging" elements in our society are now found not just in the extremist movements but also in a growing number of writers, academics, and others who are embracing orthodoxy over diversity of thought. If we are to preserve this defining right, we may have to embrace the incongruous notion of coercing free speech. There is a role for government, even under a Millian perspective, for protecting enclaves of free expression and free thought. The alternative is to return to a state where threats and fear dictate the range of acceptable values and expression.

In many ways, we are facing the same debate that was held before the 1915 AAUP Declaration over the protection of both free speech and academic privilege.[496] That Declaration was preceded by the embrace of three defining principles in Germany, which were referenced by earlier drafts for the Declaration.[497] Those principles were Lehrfreiheit (teaching freedom), Lernfreiheit (learning freedom), and Freiheit der Wissenschaft (academic self-governance).[498] The AAUP largely dropped Lernfreiheit and Freiheit der

495. *All Disloyal Men Warned by Gregory*, *supra* note 120.

496. Seligman et al., *supra* note 90.

497. *Id. See also* Walter P. Metzger, *Profession and Constitution: Two Definitions of Academic Freedom in America*, 66 TEX. L. REV. 1265, 1266 (1988); Rebecca S. Eisenberg, *Academic Freedom and Academic Values in Sponsored Research*, 66 TEX. L. REV. 1363, 1365 (1988).

498. Seligman et al., *supra* note 90.

Wissenschaft in favor of Lehrfreiheit and academic privilege.[499] Lehrfreiheit "protected the restiveness of academic intellect from the obedience norms of hierarchy."[500] The emphasis on Lehrfreiheit made learning freedom more of an extension or byproduct of the academic freedom of faculty. As Walter Metzger has observed,

> Once excised from the profession's concept of academic freedom, *Lernfreiheit* would never be restored. . . . [T]he AAUP has never investigated a campus incident in which an alleged violation of student freedom was the sole complaint, and it has always assumed that student freedom is not an integral part of academic freedom, but is something different—and something less.[501]

Despite this emphasis on teaching over learning freedoms, the committee drafting the Declaration was clear that the protection of academic freedom was meant to free our campuses from the demands of "an overwhelming and concentrated public opinion."[502]

Such dominance would subjugate all teaching and learning to "a tyranny of public opinion."[503] The last decade has shown a curious shift in the emphasis from conditions after the 1915 Declaration. The viewpoint intolerance shown on campuses is often driven by students claiming the right to silence others (or remove teachers) is essential to *Lernfreiheit* (or learning freedom). However, learning freedom is now defined as freedom from opposing or triggering values. The result is the imposition of the type of orthodoxy that

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499. Metzger, *supra* note 497, at 1269.

500. *Id.*

501. *Id.* at 1272.

502. The Committee, known as the Seligman Committee, declared that universities must remain "an intellectual experiment station, where new ideas may germinate and where their fruit, though still distasteful to the community as a whole, may be allowed to ripen until finally . . . it may become a part of the accepted intellectual food of the nation or of the world." AM. ASS'N OF UNIV. PROFESSORS, 1915 DECLARATION OF PRINCIPLES (Dec. 31, 1915), https://aaup-ui.org/Documents/Principles/Gen_Dec_Princ.pdf [https://perma.cc/539R-9T6Z].

503. *Id.*; *see also* Judith Areen, *Government as Educator: A New Understanding of First Amendment Protection of Academic Freedom and Governance*, 97 GEO. L.J. 945 (2009).

the 1915 Declaration sought to deter. What has changed is that many faculty members are now either silent on or supportive of calls for such orthodoxy. Normative values in favor of free speech are no longer dominant or at least sufficient on campuses to protect the exercise of free speech by faculty and students with minority viewpoints.

The same shift toward viewpoint intolerance is evident in the physical and virtual spaces outside of the educational system. The greatest concern is that the rise of corporate censorship and deplatforming campaigns could change the expectations of the public in the exercise of free speech. As those expectations fall, greater speech regulation and curtailment may fill the void. That is the pattern seen in Europe with expanding criminalization and regulation of speech. Charting a different course will require two paradigm shifts addressed in this article. First, we must reconsider how to protect what Mill called the "circle around every individual human being, which no government, be it that of one, of a few, or of the many, ought to be permitted to overstep."[504] To the extent that we want to protect circles of free speech, the government may now prove the guarantor of—rather than the threat to—free speech. It is possible to coerce free speech through content-neutral principles that protect forums of expression. Second, we must address the distorted and expanding views of speech as inherently harmful because a viewpoint is triggering or obnoxious. The use of the harm rationale has led to rising hegemony from virtual to educational spaces. Indeed, that is the harm that should unite and motivate us in resisting viewpoint intolerance in the marketplace of ideas.

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504. MILL, PRINCIPLES OF POLITICAL ECONOMY, *supra* note 72, at 19.

POLITICAL NONEXPENDITURES: "DEFUNDING BOYCOTTS" AS PURE SPEECH

HUNTER PEARL*

ABSTRACT

Recent challenges to state anti-BDS laws have exposed the anachronistic foundations of First Amendment protection for boycotts. Grappling with precedent that assumed a complete separation between economic activity and speech, courts have conducted substantially different First Amendment analyses of nearly identical laws. This Note addresses the legal confusion by applying the Supreme Court's modern conceptions of political expenditures and compelled subsidization from cases like Citizens United v. Federal Election Commission *and* Janus v. American Federation of State, County, and Municipal Employees *to boycott law. When people who disagree with an entity's speech boycott that entity, this Note argues that they are effectively defunding that speech. Laws prohibiting such boycotts directly infringe upon the quantity and extent of the boycotters' speech and thus should be subject to exacting or strict scrutiny. This conception could prove vital in protecting contemporary boycotts, which are less outwardly expressive but are nonetheless deeply political.*

INTRODUCTION

In 2017, the state of Arkansas enacted a statute requiring companies doing business with state entities to certify that they are not

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boycotting Israel.[1] In *Arkansas Times LP v. Waldrip*,[2] the United States District Court for the Eastern District of Arkansas considered whether the law violated the First Amendment.[3] After a brief paragraph stating that a refusal to engage in commercial dealings was not pure speech,[4] the court examined whether a boycott of Israel is expressive conduct by considering whether such a boycott is inherently expressive.[5] Finding the boycott neither pure speech nor inherently expressive conduct, the court concluded that the Arkansas law did not even implicate the First Amendment. It distinguished *NAACP v. Claiborne Hardware Company*,[6] in which the Supreme Court found a boycott *was* protected under the First Amendment, either because it involved meetings, speeches, and non-violent picketing or because it sought to vindicate domestic civil rights.[7] An Eighth Circuit panel reversed the district court, holding that the Arkansas law imposed unconstitutional conditions on government contractors because the act could apply to verbal or written speech supporting an anti-Israel boycott.[8] On rehearing en banc, the Eighth Circuit rejected the panel's reasoning and instead adopted the district court's reasoning, characterizing the boycott as unexpressive

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1. *See* Ark. Code Ann. § 25-1-503(a)(1)–(2) (Westlaw current through 2021 Reg. Sess., 2021 First Extraordinary Sess., 2021 Sec. Extraordinary Sess.).
2. 362 F. Supp. 3d 617 (E.D. Ark. 2019), *aff'd*, No. 19-1378, 2022 WL 2231807 (8th Cir. June 22, 2022).
3. *See Waldrip*, 362 F. Supp. 3d at 622–26.
4. *See id.* at 623.
5. *See id.* (citing Rumsfeld v. F. for Acad. And Inst. Rts., Inc. (FAIR), 547 U.S. 47, 66 (2006)).
6. 458 U.S. 886 (1982).
7. *See Waldrip*, 362 F. Supp. 3d at 624–26. The district court found the facts of the instant case more similar to those of *International Longshoremen's Association, AFL-CIO v. Allied Intern., Inc.*, 456 U.S. 212 (1982). *See Waldrip*, 362 F. Supp. 3d at 625–26. The court read *International Longshoremen's Association* as the rule and *Claiborne Hardware* as the exception. *See id.*
8. Arkansas Times LP v. Waldrip, 988 F.3d 453, 467 (8th Cir. 2021), *rev'd en banc*, No. 19-1378. 2022 WL 2231807 (8th Cir. June 22, 2022).

commercial conduct entitled to no First Amendment protection.[9] Beyond the Eighth Circuit, other courts considering challenges to laws targeting Boycott, Divestment, Sanctions (BDS) boycotts have concluded that the First Amendment protects BDS boycotters but have diverged in their reasoning. For example, courts have found that such laws violated protected expressive conduct without sufficient justification for those violations[10] or illicitly targeted the viewpoints behind or surrounding the boycott.[11]

Yet perhaps there is more merit to the idea of boycotts as speech-qua-speech than these judgments have considered. Starting with *Buckley v. Valeo*,[12] politically motivated campaign spending has been protected as pure speech, a conception that the Supreme Court brought to compelled subsidization of speech outside the campaign finance context in *Janus v. American Federation of State, County, and Municipal Employees*.[13] This Note argues that the Court's views on speech that developed in the campaign finance cases and *Janus* directly apply in the boycott context. Indeed, boycotts that target an entity based on that entity's speech on issues of political concern functionally defund those communications, so the boycotts are themselves political communications entitled to protection as speech. This understanding would extend greater First Amendment protection to these "defunding boycotts" than they might otherwise receive as expressive conduct.

Part I of this Note identifies the history of the Court's evolving conceptions of boycotts and their interactions with the First

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9. *See* Arkansas Times LP v. Waldrip, No. 19-1378. 2022 WL 2231807, at *4 (8th Cir. June 22, 2022) (en banc).

10. *See* Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1039–49 (D. Ariz. 2018), *vacated and remanded*, 789 Fed. Appx. 589 (9th Cir. 2020).

11. *See, e.g.*, Amawi v. Pflugerville Indep. Sch. Dist., 373 F. Supp. 3d 717, 757–78 (W.D. Tex. 2019), *vacated as moot*, Amawi v. Paxton, 956 F.3d 816 (5th Cir. 2020); Koontz v. Watson, 283 F. Supp. 3d 1007, 1020–24 (D. Kan. 2018); Martin v. Wrigley, 540 F. Supp. 3d 1220, 1227–31 (N.D. Ga. 2021).

12. 424 U.S. 1 (1976).

13. *See* 138 S. Ct. 2448, 2486 (2018).

Amendment: boycotts as unlawful restraint of trade in mid-twentieth Century labor union cases, boycotts as movements with inseparable constitutionally protected elements such as speech and assembly in *Claiborne Hardware*, and boycotts as discreet acts that are protected only insofar as they are inherently expressive in *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*. (*FAIR*). Part II introduces a different way to think about certain politically motivated purchases—political expenditure as pure speech—that developed in the campaign finance context. Finally, Part III argues that, consistent with modern First Amendment jurisprudence, the conception of political expenditure as pure speech should be applied to boycotts. This conception would bestow stronger First Amendment protection upon boycotts that aim to defund speech implicating political issues.

I. HISTORIC TREATMENT OF BOYCOTTS

A. Labor Union Cases

First Amendment protections for boycotts have evolved over time. Although boycotting in the United States predates the Founding,[14] the use of the tactic grew in prominence in the first half of the twentieth century in the labor dispute context.[15] Labor unions' role in the national economy was a politically fraught question during this time. Indeed, unions gained significant power under the National Labor Relations Act of 1935 ("Wagner Act") but lost much of this power under the Labor Management Relations Act of 1947 ("Taft-Hartley Act").[16] Between the passage of these two acts, the

14. *See On This Day, the Boston Tea Party Lights a Fuse*, NAT'L CONST. CTR. (Dec. 16, 2021), https://constitutioncenter.org/blog/on-this-day-the-boston-tea-party-lights-a-fuse/ [https://perma.cc/5N9M-W4LE] (describing colonists' protest of Crown policies).

15. *See* Zoran Tasic, *The Speaker the Court Forgot: Re-Evaluating NLRA Section 8(b)(4)(b)'s Secondary Boycott Restrictions in Light of* Citizens United *and* Sorrell, 90 WASH. U. L. REV. 237, 245–46 (2012).

16. *See id.* at 245–48.

Supreme Court recognized in *Thornhill v. Alabama*[17] that the First Amendment's speech and press clauses protected peaceful picketing. In *Thornhill*, the Court struck down a state law that banned all labor picketing.[18] Only a year later, however, the Court limited *Thornhill* when it upheld an injunction preventing a labor union from engaging in any picketing because its boycott effort had included acts of violence and property destruction.[19]

The Court continued to limit First Amendment protection for boycotts and picketing well into the latter half of the twentieth century. In *Giboney v. Empire Storage & Ice Co.*,[20] the Court upheld an anti-picketing injunction because the "sole immediate purpose" of the boycott was to restrain trade in violation of state law.[21] In *Hughes v. Superior Court*,[22] the Court used the unlawful purpose or objectives test to uphold an anti-picketing injunction against a group trying to pressure a grocery store to hire black clerks in proportion to the racial makeup of its customer base.[23] The group's objectives did not violate any specific statutes, but the Court deferred to the California Supreme Court's finding that promoting any race-based hiring was contrary to California's general public policy.[24] In 1957, the Court upheld an injunction under a state statute that severely restricted picketing, noting that since *Thornhill*, the case law

17. 310 U.S. 88 (1940).
18. *See id.* at 101; *see also* Am. Fed'n of Lab. V. Swing, 312 U.S. 321, 324–26 (1941) (holding unconstitutional Illinois's common law policy prohibiting any picketing except by employees against their employer).
19. *See* Milk Wagon Drivers Union of Chi., Loc. 753 v. Meadowmoor Dairies, 312 U.S. 287, 294–95 (1941).
20. 336 U.S. 490 (1949).
21. *See id.* at 501; *see also* Am. Radio Ass'n, AFL-CIO v. Mobile S.S. Ass'n, Inc., 419 U.S. 215, 229 (1974).
22. 339 U.S. 460 (1950).
23. *See id.* at 461.
24. *See id.* at 468.

"established a broad field in which a State, in enforcing some public policy . . . could constitutionally enjoin peaceful picketing[.]"[25]

The Court's deference to state public policy led to a series of cases deferring to the National Labor Relations Board's ("NLRB") national authority over labor disputes. In 1959, the Landrum-Griffin Act amended the Taft-Hartley Act to make more explicit the Act's prohibition on economically pressuring an entity to "cease doing business with any other person"[26]—that is, a "secondary" boycott.[27] Although the Court interpreted the prohibition narrowly,[28] it found that the prohibition "impose[d] no impermissible restrictions upon constitutionally protected speech" when applied to picketing that "spreads labor discord by coercing a neutral party to join the fray."[29]

This short constitutional analysis held true even when a secondary boycott was politically motivated. In *International Longshoremen's Association, AFL-CIO v. Allied International, Inc.*,[30] the Court applied the secondary boycott provision to a union that refused to load and unload ships engaged in trade with the Soviet Union due to political disagreement with the Soviet invasion of Afghanistan.[31]

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25. *See* Int'l Brotherhood of Teamsters, Loc. 695, A.F.L. v. Vogt, Inc., 354 U.S. 284, 293 (1957).

26. 29 U.S.C. § 158(b)(4)(i)(B).

27. *See Boycott*, BLACK'S LAW DICTIONARY (11th ed. 2019) ("[S]econdary boycott. (1903) A boycott of the customers or suppliers of a business so that they will withhold their patronage from that business."); *see also* Richard A. Bock, *Secondary Boycotts: Understanding NLRB Interpretation of Section 8(b)(4)(b) of the National Labor Relations Act*, 7 U. PA. J. LAB. & EMP. L. 905, 912–16 (2005).

28. *See, e.g.*, NLRB v. Fruit & Vegetable Packers & Warehousemen, Loc. 760 (Tree Fruits), 377 U.S. 58, 71–72 (1964) (finding that picketing that asked customers to not buy a particular product was not an unfair labor practice); NLRB. V. Servette, Inc., 377 U.S. 46, 55 (1964).

29. NLRB v. Retail Store Emps. Union, Loc. 1001, 447 U.S. 607, 616 (1980).

30. 456 U.S. 212 (1982).

31. *See id.* at 226–27 ("We have consistently rejected the claim that secondary picketing by labor unions in violation of § 8(b)(4) is protected activity under the First Amendment . . . . It would seem even clearer that

The fact that the boycotter was a labor union might have led the Court to implicitly discredit the boycotter's legitimate political motivations. If the secondary boycott prohibition was meant to curb unfair competition by economic pressure designed "not to communicate but to coerce," it would be overinclusive as applied to political boycotts that *are* trying to communicate. The rule would also be underinclusive, because a large direct political boycott can exert just as much economic pressure as a secondary political boycott. More fundamentally, the Court did not even try to justify why First Amendment protection for boycotts should simply disappear once a certain threshold of economic pressure is crossed.

B. *Political Boycotts as Expressive Conduct*

The same year the Court decided *International Longshoremen*, the Court also decided *NAACP v. Claiborne Hardware Co.*,[32] a landmark case that absorbed scholarly analysis of the First Amendment right to boycott.[33] *Claiborne Hardware* involved an NAACP civil rights

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conduct designed not to communicate but to coerce merits still less consideration under the First Amendment."). Though the Court accepted the NLRB's finding that the union's "sole dispute is with the USSR over its invasion of Afghanistan," *id.* at 223 (quoting Int'l Longshoremen's Ass'n, Loc. 799, 257 NLRB 1075, 1078 (1981)), it refused to find a political exception to the statutory provision. *See id.* at 226.

32. 458 U.S. 886 (1982).

33. *See, e.g.*, Marc A. Greendorfer, *Boycotting the Boycotters: Turnabout Is Fair Play Under the Commerce Clause and the Unconstitutional Conditions Doctrine*, 40 CAMPBELL L. REV. 29, 59 (2018); *Recent Legislation*, 129 HARV. L. REV. 2029, 2031–34 (2016) [hereinafter HLR Note]; Barbara Ellen Cohen, Note, *The Scope of First Amendment Protection for Political Boycotts: Means and Ends in First Amendment Analysis:* NAACP v. Claiborne Hardware Co., 1984 WIS. L. REV. 1273 (1984); Michael C. Harper, *The Consumer's Emerging Right to Boycott:* NAACP v. Claiborne Hardware *and Its Implications for American Labor Law*, 93 YALE L.J. 409 (1984); Gordon M. Orloff, Note, *The Political Boycott: An Unprivileged Form of Expression*, 1983 DUKE L.J. 1076 (1983).

boycott of white-owned businesses in Claiborne County, Mississippi.[34] One of the boycott's animating forces was a demand that the businesses hire black clerks and cashiers.[35] However, the "major purpose of the boycott . . . was to influence governmental action."[36] The Mississippi Supreme Court had sustained the imposition of common law tort damage liability on the NAACP and individual boycott leaders for the white merchants' economic losses.[37] The Supreme Court of the United States reversed, holding that "[t]he right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself."[38]

Although *Claiborne Hardware* is often cited for the proposition that all political boycotts are entitled to First Amendment protection,[39] its text supports a more limited reading. The Court in *Claiborne Hardware* distinguished *Hughes v. Superior Court*, which enjoined a similarly political boycott, by stating that the NAACP's boycott in *Claiborne Hardware* was not "designed to secure aims that are themselves prohibited by a valid state law."[40] The boycott in *International Longshoremen*, which was also politically motivated,[41] was distinguished as a secondary boycott and thus regulable as unfair competition.[42] This distinction is arguable because the lower court in *Claiborne Hardware* found that the boycott *was* a secondary

34. *See Claiborne Hardware*, 458 U.S. at 889.

35. *Id.* at 900.

36. *Id.* at 914.

37. *Id.* at 894–96.

38. *Id.* at 914.

39. *See, e.g.*, Koontz v. Watson, 283 F. Supp. 3d 1007, 1021 (D. Kan. 2018); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1041 (D. Ariz. 2018), *vacated and remanded*, 789 Fed. Appx. 589 (9th Cir. 2020) (unpublished); HLR Note, *supra* note 33, at 2031–32.

40. *Claiborne Hardware*, 458 U.S. at 915 n.49. This circular reasoning raises the question: to what extent may a law validly restrict the aims of boycotts?

41. *See* Int'l Longshoremen's Ass'n, AFL-CIO v. Allied Intern., Inc., 456 U.S. 212, 223 (1982).

42. *See Claiborne Hardware*, 458 U.S. at 912.

boycott, a characterization the Court only meekly disputed in footnotes.[43] The more likely difference between the two cases is that the Court was more willing to allow the NLRB to regulate a union boycott in the shipping industry than it was to allow Mississippi to punish civil rights boycotters who refused to purchase certain consumer goods to "vindicate rights of equality and of freedom that lie at the heart of the Fourteenth Amendment itself."[44]

Even if *Claiborne Hardware* protects all political boycotts and not just those that "effectuate rights guaranteed by the Constitution itself,"[45] it probably offers only mild protection. The Court in *Claiborne Hardware* cited *United States v. O'Brien*[46] for the proposition that regulation which has an incidental effect on First Amendment freedoms may be justified in certain instances.[47] *O'Brien* established a test for when "expressive conduct"—that is, nonspeech conduct that nonetheless implicates speech elements—may be regulated.[48] The Court has treated the *O'Brien* test as an equivalent to

43. Although the NAACP chapter listed the white merchants' refusal to hire black clerks as one of their demands, *Claiborne Hardware*, 458 U.S. at 900, the boycott primarily aimed at changing government policy which the local businesses could not control. *Id.* at 914. The Court did not squarely address the secondary boycott argument because, although the trial chancellor found the boycotters to be in violation of a state law against secondary boycotts, the Mississippi Supreme Court held the statute inapplicable because it had been enacted two years after the boycott began. *See id.* at 891–92, 894. The U.S. Supreme Court suggested in footnotes that the boycott might not have been secondary because "[m]any of the owners of these boycotted stores were civic leaders," but it did not explicitly hold that this was a novel exception to the secondary boycott definition. *See id.* at 890 n.3, 892 n.8.

44. *See id.* at 914. *Compare id.*, *with* Intl. Longshoremen's Ass'n, AFL-CIO v. Allied Intern., Inc., 456 U.S. 212, 227 (1982) ("There are many ways in which a union and its individual members may express their opposition to Russian foreign policy without infringing upon the rights of others.").

45. *Claiborne Hardware*, 458 U.S. at 914.

46. 391 U.S. 367 (1968).

47. *Claiborne Hardware*, 458 U.S. at 912.

48. "[A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression;

intermediate scrutiny review applied to time, place, or manner restrictions on speech.[49] *Claiborne Hardware*'s ambiguous analysis has sparked debate about how the Court actually made use of *O'Brien*'s test, if it did at all.[50] For the purposes of this paper, it is sufficient to note that the Supreme Court has subsequently read *Claiborne Hardware* to rest, at least in part, on *O'Brien*,[51] and it has emphasized *Claiborne Hardware*'s civil rights context rather than characterizing it broadly as a political consumer boycott.[52]

C. *The "Inherently Expressive" Requirement*

In the twenty-first century, protection for boycotts as expressive conduct might have narrowed further. *Rumsfeld v. Forum for Academic and Institutional Rights, Inc*. (*FAIR*)[53] dealt with an association of law schools and law faculties that attempted to restrict military recruiting on their campuses to protest the military's "don't ask, don't tell" policy.[54] In response, Congress enacted the Solomon Amendment, which withdrew federal funds from any school that did not offer military recruiters the same access to its campus and

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and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *O'Brien*, 391 U.S. at 377.

49. Clark v. Community for Creative Non-Violence, 468 U.S. 288, 298 (1984).

50. The Court might have implicitly done the *O'Brien* analysis, simply concluding that a complete prohibition on a peaceful civil rights boycott was clearly greater than was essential to further the government's interest in this case. It also might have found that the boycott was illicitly targeted for suppression based on its speakers or viewpoint and was therefore entitled to the highest protection. *See, e.g.*, Cohen, *supra* note 33, at 1284–88; Orloff, *supra* note 33, at 1091–92. Or perhaps the Court found the expressive conduct at issue to be inseparable from fully protected speech elements and so applied strict scrutiny. Greendorfer, *supra* note 33, at 59. Or, finally, the boycott might have been itself a protected First Amendment category such as association or a petition for grievances, or an innovation like a right to political action. Harper, *supra* note 33, at 417, 420–21.

51. FTC v. Super. Ct. Trial Laws. Ass'n, 493 U.S. 411, 431 (1990).

52. *See id.* at 425–26.

53. 547 U.S. 47 (2006).

54. *See id.* at 52.

students that it provided to nonmilitary recruiters.[55] The Court rejected any First Amendment protection for what was in essence a military recruiter boycott[56] because such an act was not "inherently expressive"—that is, the message it was expressing would not be overwhelmingly apparent to an outside observer.[57] An observer could not understand the reason why a military recruiter was interviewing away from a law school campus without hearing the school's accompanying speech that they were protesting military policy. That accompanying explanatory speech, however, cannot make the conduct expressive.[58]

The requirement that expressive conduct be inherently expressive could be fatal to boycotts' First Amendment protection. The expression latent in burning a draft card[59] or an American flag[60] is visceral, but the actual act of a boycott is simply a refusal to engage or deal in commercial relations. Perhaps the boycott in *Claiborne Hardware*, where hundreds of previously loyal black customers suddenly ceased patronizing the local white-owned businesses,[61] was inherently expressive—but even if so, should courts withhold protection for smaller and less obvious boycotts? In *Claiborne Hardware*, the Court approvingly noted that the boycott was surrounded by protected elements of speech, assembly, association, and petition, which the Court called "inseparable."[62] Yet under the subsequent *FAIR* test, these elements are merely explanatory speech that cannot transform a boycott into inherently expressive conduct.

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55. *Id.* at 51.
56. Notably, the Court did not use the word "boycott." *See generally id.*
57. *See id.* at 66.
58. *Id.*
59. United States v. O'Brien, 391 U.S. 367 (1968).
60. Texas v. Johnson, 491 U.S. 397 (1989).
61. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 922–23 (1982).
62. *Id.* at 911 (citation omitted).

FAIR and *Claiborne Hardware* set the stage for modern debates on First Amendment protections for boycotts. Strong First Amendment protection is triggered if the government targets the viewpoint behind the boycott or the core speech activities surrounding the boycott—such as speech, assembly, association, and petition.[63] If government action affects only the refusal to deal itself, however, it is constitutional unless the boycott is inherently expressive and the government cannot satisfy some form of intermediate scrutiny.[64] Earlier labor union cases are still good law and apparently could apply when the context is more commercial than political.[65] These conceptions are consistent with the Supreme Court's caselaw dealing with boycotts, but they reflect a separation of economic transactions and protected speech that is alien to the Court's modern jurisprudence in other areas.

II. POLITICAL EXPENDITURES AS SPEECH

The Supreme Court has increasingly recognized that First Amendment protection does not stop when money is involved; indeed, monetary transactions can be speech-qua-speech, entitled to the same protection as spoken and written words.[66] This conception of "money as speech" grew up in the campaign finance context but has been applied elsewhere recently.[67] It coincides with the Supreme Court's increasingly serious constitutional protection for

63. *See, e.g.*, Arkansas Times LP v. Waldrip, 988 F.3d 453, 461 (8th Cir. 2021), *rev'd en banc*, No. 19-1378. 2022 WL 2231807 (8th Cir. June 22, 2022) (quoting NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982)).

64. *See, e.g.*, Arkansas Times LP v. Waldrip, No. 19-1378. 2022 WL 2231807, at *2–3 (8th Cir. June 22, 2022) (en banc); Jordahl v. Brnovich, 336 F. Supp. 3d 1016, 1039–49 (D. Ariz. 2018), *vacated and remanded*, 789 Fed. Appx. 589 (9th Cir. 2020).

65. *See, e.g.*, FTC v. Super. Ct. Trial Lawyers Ass'n, 493 U.S. 411, 426 (1990) (finding a boycott whose "undenied objective . . . was to gain an economic advantage" to be a restraint of trade in violation of antitrust laws).

66. *See, e.g.*, Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–40 (2010).

67. *See infra* notes 68–92.

speech made for commercial purposes as well as stronger protections against compelled association.

The modern origins of this conception come from *Buckley v. Valeo*.[68] In *Buckley*, the Court examined, among other things, the Federal Election Campaign Act of 1971's limits on campaign contributions and expenditures.[69] The D.C. Circuit had upheld these provisions under the *O'Brien* test,[70] but the Supreme Court rejected the equation of expenditure of money for political communications with *O'Brien* and expressive conduct:

> The expenditure of money simply cannot be equated with such conduct as destruction of a draft card. Some forms of communication made possible by the giving and spending of money involve speech alone, some involve conduct primarily, and some involve a combination of the two. Yet this Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a nonspeech element or to reduce the exacting scrutiny required by the First Amendment.[71]

The *Buckley* Court similarly rejected the equation of content-neutral time, place, and manner restrictions with limits on the amount of money that can be spent for, and thus the quantity and extent of, political speech.[72] Recognizing that "virtually every means of communicating ideas in today's mass society requires the expenditure of money,"[73] the Court upheld the provisions limiting individual campaign contributions under heightened scrutiny,[74]

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68. 424 U.S. 1 (1976).
69. *Id.* at 6–7.
70. *Id.* at 15–16.
71. *Id.* at 16.
72. *Id.* at 17–18 & n.17.
73. *Id.* at 19.
74. *Id.* at 29. The Court would later call this "closely drawn" scrutiny. McConnell v. Fed. Election Comm'n, 540 U.S. 93, 94 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

but struck down the provisions limiting campaign expenditures by a candidate on his or her own behalf, total expenditures in multiple campaigns, and expenditures on behalf of a candidate under "exacting" scrutiny.[75]

In subsequent campaign finance cases, the Court expanded *Buckley*'s insight that there is no wall of separation between the exchange of money and political speech core to the First Amendment. *First National Bank of Boston v. Bellotti*[76] held that corporate contributions to ballot initiative campaigns were protected speech, regardless of whether they were related to the corporation's financial interests.[77] The Court struck down the state law at issue, finding that it did not serve a sufficiently compelling government interest and was not closely drawn to avoid unnecessary infringement on speech.[78]

In the 1990s and early 2000s, the Court decided cases upholding campaign finance laws, seeming to retreat from strong constitutional protections for political spending.[79] But then the Court reversed course, decisively expanding *Buckley* and *Belotti*.[80] The landmark case in this new jurisprudence was *Citizens United v. Federal Election Commission*.[81] Applying strict scrutiny, the *Citizens United* court found a federal law's restrictions on independent corporate

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75. *See Buckley*, 424 U.S. at 44–45, 58–59. The scrutiny was very strict in application.

76. 435 U.S. 765 (1978).

77. *See id.* at 784.

78. *See id.* at 794–95.

79. *See, e.g.*, *McConnell*, 540 U.S. at 94, *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Fed. Election Comm'n v. Beaumont, 539 U.S. 146 (2003), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Austin v. Michigan State Chamber of Com., 494 U.S. 652 (1990), *overruled by* Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010).

80. *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 572 U.S. 185 (2014); American Tradition P'ship., Inc. v. Bullock, 567 U.S. 516 (2012); Arizona Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721 (2011); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008); Randall v. Sorrell, 548 U.S. 230 (2006).

81. 558 U.S. 310 (2010).

expenditures for political advertisements impermissibly burdened speech.[82] The Court reiterated that for-profit corporations are entitled to full First Amendment protection for their political expenditures,[83] and some scholars have read the case as a strong indication that the Court is moving towards equal scrutiny for abridgements of "commercial speech" —that is, speech that proposes a commercial transaction.[84] In subsequent campaign finance cases, the Court went on to hold aggregate limits on campaign contributions unconstitutional[85] and reaffirmed that even spending caps on individual campaign contributions infringe on speech if they are too low.[86]

The understanding that purchases can be speech has migrated outside of the campaign finance context. In *Janus v. American Federation of State, County, and Municipal Employees*,[87] the Supreme Court held that state laws requiring public-sector employees to pay union agency fees (funds germane to collective bargaining) violate the First Amendment.[88] In doing so, the Court overturned *Abood v. Detroit Board of Education*,[89] a landmark case supporting compulsory agency fees, and—according to the dissent—also overturned four decades of precedent supporting *Abood*.[90] Sidestepping whether compelled subsidies should be subject to "exacting" or "strict"

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82. *See id.* at 365–66.

83. *Id.* at 365.

84. *See, e.g.*, Tamara R. Piety, Citizens United *and the Threat to the Regulatory State*, 109 MICH. L. REV. FIRST IMPRESSIONS 16, 19 (2010). The trajectory appears to have come full circle; the landmark commercial speech case cited *Buckley* for the proposition that "[i]t is clear, for example, that speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another." Virginia State Bd. of Pharm. v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748, 761 (1976) (citing Buckley v. Valeo, 424 U.S. 1, 35–59 (1976)).

85. *McCutcheon*, 572 U.S. at 218.

86. Thompson v. Hebdon, 140 S. Ct. 348, 351 (2019).

87. 138 S. Ct. 2448 (2018).

88. *Id.* at 2478.

89. 431 U.S. 209 (1977).

90. *Janus*, 138 S. Ct. at 2497 (Kagan, J., dissenting).

scrutiny,[91] the Court found that forcing public employees to pay money to unions did not serve a sufficiently compelling government interest and used means that were too restrictive on associational freedoms, regardless of whether those forced payments were for collective bargaining or more overtly political purposes.[92]

Just as limiting the amount of money one can spend for political speech is a restriction on speech itself, compelling one to pay money for private speech with a political valence infringes on one's right to say—or not to say—whatever one wishes. Notably, even the *Janus* dissent did not dispute that personal financial expenditure could constitute speech.[93] Additionally, because paying unions dues or fees are part and parcel of union association, the Court was also concerned with workers' freedom to eschew association.[94] The Court treated freedom of association seriously, giving it detailed discussion and integrating it into the compelled subsidization analysis.[95] This analysis suggests that, where government action implicates both compelled subsidization and compelled association concerns, the government's burden is greater than it would be to satisfy either concern individually.

III. BOYCOTTS AS POLITICAL EXPENDITURES

Boycotts that make political statements and defund political communication *through* the refusal to commercially deal with certain parties are best understood using the money-as-speech model developed in *Citizens United* and *Janus*. *Citizens United* held that

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91. *Id.* at 2464–65 (majority opinion).

92. *Id.* at 2466.

93. David F. Forte, *To Speak or Not to Speak, That Is Your Right:* Janus v. AFSCME, 2018 CATO SUP. CT. REV. 171, 175 (2018).

94. *Janus*, 138 S. Ct. at 2463.

95. *Id.* at 2465 (2018) (explaining that "a compelled subsidy must 'serve a compelling state interest that cannot be achieved through means significantly less restrictive of associational freedoms'") (quoting Knox v. Serv. Emps. Int'l Union, Local 1000, 567 U.S. 298, 310 (2012) (internal quotation marks and alterations omitted)).

courts must critically examine laws that target any point in the speech process, including the funding stage.[96] Courts therefore must critically examine laws that restrict boycotts of speaking entities because such laws compel speech by compelling the funding of speech. The speaking entity need not be a political actor. Although the regime under *Abood* would have allowed the compulsion of union fees except those that explicitly subsidized political or ideological speech not germane to collective bargaining,[97] *Janus* recognized that even commercial and union speech in collective bargaining can have political valence, entitling workers to full constitutional protection against compelled subsidization.[98] Indeed, this protection is at least as great as that given to government workers compelled to join a particular political party.[99] Even the purchase or nonpurchase of mundane goods can be speech if it is done with the intent of funding or defunding the seller's speech. And just as the Court in *Janus* protected non-union workers from the compelled association that is created by forced commercial relations with a union,[100] courts should protect boycotters who make statements through refusing economic relations from state attempts to compel those relations.

To determine if a boycott should qualify for this protection, a court should look at the reasons that sparked the boycott. Suppose a boycotting group is politically opposed to a message that the boycotted entity endorsed. In that case, the boycott engages in counter-speech at the funding step of the communication process—or, alternatively, refuses to fund that message—and thus is itself speech. The boycotted party's message could be a political creed, commercial speech that has taken on a political valence (as in *Janus*), or perhaps even monetary funding for another speaking entity. As long

96. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 336–37 (2010).
97. *Id.* at 2460–61.
98. *See id.* at 2474, 2483.
99. *Id.* at 2484.
100. *Janus*, 138 S. Ct. at 2486.

as the money withheld in the boycott plausibly could have funded the boycotters' disfavored speech, to prohibit the boycott would in effect compel those boycotters to support that speech—regardless of whether an observer would perceive it as an endorsement.

Other boycotts may not qualify. Private decisions to refrain from buying an inferior product are not protected boycotts because they are not motivated by a desire to express a political message through boycott. And suppose a business refuses to serve a customer based on that customer's race or other intrinsic characteristic. In that case, the business is not engaged in a protected boycott because intrinsic characteristics are not speech and cannot be defunded. Some organized boycotts are in response to nonspeech actions by the boycotted entity; because speech is not present, even politically motivated boycotts of this type are closer to expressive conduct than speech. Yet *Janus* suggests that if the boycott is motivated by commercially oriented speech activity by the boycotted entity—for which a political valence is likely present if it has inspired a boycott—the boycott is speech.[101]

Challenges to laws and executive orders aimed at the Boycott, Divestment, Sanctions (BDS) movement[102] are instructive of the boundaries of boycotts as speech. These laws, enacted in at least 35

101. *See id.* at 2483.

102. Movement organizers describe BDS as a "Palestinian-led movement" that "urges action to pressure Israel to comply with international law." These actions include withdrawing investments from "all Israeli and international companies that sustain Israeli apartheid" and withdrawing support from "complicit Israeli sporting, cultural and academic institutions[.]" *What is BDS?*, BDS MOVEMENT, https://bdsmovement.net/what-is-bds [https://perma.cc/F5AE-P5HX] (last visited Feb 1, 2022).

states,[103] often assert that the measures aim to prohibit discriminatory boycotts,[104] suggesting religious or national origin-based discrimination. Many proponents of these laws have argued that the BDS movement is anti-Semitic,[105] a charge that the movement denies.[106] Still, the BDS movement states that it targets institutions "complicit" in the Israeli government's actions,[107] a term that may include entities that have never offered speech support for the Israeli government. Indeed, the BDS movement's list of companies to boycott include Israeli companies of all kinds,[108] suggesting that national origin or economic presence is at issue rather than the companies' speech. Because the BDS boycott is not directed at defunding speech specifically, it is not a good candidate for protection as pure speech.

But that does not end the inquiry. Although these laws aimed at the BDS movement, they could be applied to boycotts that intend to defund speech. In *Koontz v. Watson*,[109] a federal district court considered the application of a Kansas anti-BDS law to a member of Mennonite Church USA who participated in the church's boycott

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103. *See Anti-Semitism: State Anti-BDS Legislation*, JEWISH VIRTUAL LIB., https://www.jewishvirtuallibrary.org/anti-bds-legislation [https://perma.cc/RLP4-5JEX] (last visited Feb. 1, 2022).

104. *See, e.g.*, Minn. Stat. § 3.226(1)(a) (2017); Nev. Rev. Stat. §§ 332.065(5)(a)(1)(II); S.C. Code Ann. § 11-35-5300 (2015).

105. Eugene Kontorovich, *Anti-BDS Laws Don't Perpetuate Discrimination. They Prevent It.*, JEWISH TELEGRAPHIC AGENCY (June 15, 2016), https://www.jta.org/2016/06/15/opinion/anti-bds-laws-dont-perpetuate-discrimination-they-prevent-it [https://perma.cc/5FZR-SX8D].

106. *What is BDS?*, BDS MOVEMENT, https://bdsmovement.net/what-is-bds [https://perma.cc/F5AE-P5HX] (last visited Feb 1, 2022) ("BDS is an **inclusive**, **anti-racist** human rights movement that is **opposed** on principle to all forms of **discrimination**, including **anti-semitism** and **Islamophobia**.") (emphasis in original).

107. *Id.*

108. *BDS List*: *Boycott These Products and Companies to Stop Israeli Apartheid*, BDS LIST, http://bdslist.org/full-list/ [https://perma.cc/X2RC-YL25] (last visited Feb 1, 2022).

109. 283 F. Supp. 3d 1007 (D. Kan. 2018).

of certain Israeli products.[110] Describing its boycott as a "third way" on Israel and Palestine,[111] the church resolved to engage in "economic boycotts and divestment from companies that support the occupation of the West Bank and Gaza."[112] This focus on companies' support for political decisions makes it far more likely that Mennonite Church USA's boycott would qualify for protection as pure speech, although a proper inquiry must also consider which companies the boycott selected and why those particular companies were chosen. Had the court in *Koontz* done this analysis, it could have considered the extent to which the Mennonite Church USA's boycott acted upon a genuine intention to defund objectionable speech versus identity-based discrimination. The existence of defunding boycotts also informs the First Amendment analysis for cases like *Arkansas Times LP v. Waldrip*,[113] which considered the constitutionality of a certification requirement applied to a newspaper that had not engaged in a boycott of Israel but wanted to reserve that right. If such a certification requirement could include a defunding boycott in its prohibition, it must surpass at least exacting scrutiny to avoid overbreadth.

This conception of defunding boycotts as speech is a necessary addition to the First Amendment jurisprudence because Supreme Court cases dealing with labor picketing and boycotts from the first half of the 20th Century up through *International Longshoremen* seem to have relied on a presumption that labor relations were a category outside of constitutionally protected expression. This conception

110. *Id*. at 1013.

111. *Mennonites Choose 'Third Way' on Israel and Palestine* (July 6, 2017), MENNONITE CHURCH USA, https://www.mennoniteusa.org/news/mennonites-choose-third-way-israel-palestine/ [https://perma.cc/RP3Y-KX4F].

112. *Seeking Peace in Israel and Palestine: A Resolution for Mennonite Church USA*, MENNONITE CHURCH USA, https://www.mennoniteusa.org/wp-content/uploads/2020/08/IP-Resolution.pdf [https://perma.cc/N49C-HV2P] (last visited Oct. 12, 2021).

113. No. 19-1378, 2022 WL 2231807, at *4 (8th Cir. June 22, 2022).

was alien to the Court in *Janus*, which applied strong speech protection against compelled collective bargaining.[114] In *Claiborne Hardware*, the Court's finding of First Amendment protection stressed the speech and assembly activities that accompanied the boycott but avoided explicit pronouncements about the protection for the refusal to deal that characterized the boycott itself.[115] Picking apart noncommercial expressive actions is unnecessary under the Court's holding in *Buckley*, reaffirmed in *Citizens United*, that a regulation dealing with the expenditure of money to create political speech is a content-based reduction in the quantity of expression and thus deserves enhanced scrutiny.[116] And to the extent *FAIR* suggests that one's politically motivated refusal to deal with an entity is not entitled to First Amendment protection unless that refusal to deal is itself obviously expressive of a political message, it is squarely at odds with *Janus*'s holding that the First Amendment protected even recognizably non-union employees from compulsory agency fees.

A reorientation of boycott law towards the Supreme Court's modern understanding of the interplay between money and speech would not completely resolve the difficulties shown by the varying analyses of anti-BDS laws, but it would clarify some confusion. When a compelled purchase would fund disfavored speech, neither the presence of an intermediary nor a lack of obvious expression will diminish the strong First Amendment protection afforded to the boycott. When a boycott instead targets an entity's nonspeech action, expressive conduct analysis is more appropriate. This expressive conduct analysis could potentially consider third-party coercion or the lack of obvious expression. Still, a strict separation between "economic" conduct and "expressive" conduct is unwarranted: political boycotts often focus on the nonpurchase of commonplace goods. Courts should generally recognize that even

114. *See* Forte, *supra* note 93, at 172.
115. *See* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 911 (1982).
116. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 339 (2010).

moderate limitations on boycotts can impose serious burdens on the expression of politically disempowered groups.

Some still resist the idea that compelled monetary payments can burden speech. For example, Professors William Baude and Eugene Volokh argue that compelled payments are similar to taxes and never implicate the First Amendment, even when they fund speech of which we disapprove politically.[117] Baude and Volokh acknowledge that this conception goes against the assumptions of *both* the majority and dissent in *Janus*.[118] They maintain, however, that it should not be unconstitutional for the government to compel public-sector workers to pay agency fees because it would not even implicate the First Amendment if the government simply paid its employees less and then gave the difference to unions.[119] Characterizing the government as the representative of the people does not eliminate this inconsistency; whether or not a majority of the population supports a particular compelled message does not decide its First Amendment protection.[120]

One way to reconcile this inconsistency is as follows: all Americans have an equal stake in the way that their tax dollars are spent, so the only protection that the constitution offers against morally objectionable government expenditures is the political process—elections, bicameralism and presentment, etc. If the government were prohibited from giving money to speaking entities that any groups oppose, it would be in practice prohibited from giving money to *any* speaking entities because there will always be groups that oppose certain speech. Such a regime would raise First Amendment issues of its own; for instance, it would forbid government

117. William Baude & Eugene Volokh, *Compelled Subsidies and the First Amendment*, 132 HARV. L. REV. 171, 171–72 (2018).

118. *Id.* at 179 ("Even the dissent in *Janus* — which adopted a generally barn-burning rhetorical approach — never really disputed this general view of compelled subsidies as compelled speech.").

119. *See id.* at 174–75.

120. *Id.* at 182.

contractors from speaking at all, lest they upset some group. The way the government spends money from general funds can be more than a negligible promotion of certain speech. Still, the government interest in allowing funds to go to speaking entities is overwhelming. Similarly, although the government has wide latitude to express even controversial political speech through its own rhetoric, the First Amendment imposes limits on compelling or even subsidizing private speakers to express government speech.[121]

Under this reasoning, it would be constitutionally suspect for Congress to create systems outside of its general taxation and spending process for continuous forced payments from one group to subsidize another group's speech. Baude and Volokh draw support for their contention that the First Amendment permits such compelled subsidization schemes from *Board of Regents of the University of Wisconsin System v. Southworth*[122] and *Johanns v. Livestock Marketing Association*.[123] In *Southworth*, the Supreme Court upheld a public university's activity fee which made students subsidize private student organizations because the university constructed the fee in a content-neutral manner.[124] This analysis is clearly foreclosed by *Janus*, and Baude and Volokh acknowledge that *Janus* has put *Southworth*'s future in jeopardy.[125] *Johanns*, wherein the Court upheld a targeted assessment on beef producers for generic beef advertising as permissible government speech,[126] presents a tougher issue. Perhaps this scheme is acceptable because the funds pass through the government, where they may be separated and politically scrutinized as depletions of the public purse. But if this proves too fine or formal of a distinction, the current Court probably is

121. *See, e.g.*, Leg. Servs. Corp. v. Velazquez, 531 U.S. 533, 548–49 (2001); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 834 (1995).

122. 529 U.S. 217 (2000).

123. 544 U.S. 550 (2005).

124. *Southworth*, 529 U.S. at 229–30.

125. Baude & Volokh, *supra* note 117, at 200.

126. *Johanns*, 550 U.S. at 561–67.

more devoted to the *Janus* regime and would sooner overturn *Johanns* than adopt Baude and Volokh's position. Government speech is best thought of as the exception to the otherwise government-free marketplace of ideas.

Given the Court's general consensus that compelled subsidization of speech raises First Amendment concerns,[127] the contention that paying cannot be speaking seems, at best, aspirational. One year after *Janus*, Volokh joined one of the many amicus briefs submitted for the Eighth Circuit appeal of *Arkansas Times v. Waldrip*, taking the position that "[d]ecisions not to buy or sell goods or services are generally not protected by the First Amendment."[128] The brief supports this statement with examples of refusals to serve or hire certain classes of people that would implicate antidiscrimination laws, public accommodation laws, or common carrier laws,[129] but finds only rare exceptions for boycotts whose refusals to deal implicate the First Amendment (mostly based on other clauses).[130] It did not mention *Janus*, a case that would require such a big exception that it makes the whole framework implausible. Many services besides collective bargaining include speech with a political valence, and even the sale of goods can be central to funding an entity's speaking agenda.

As explained above, this Note agrees that a "boycott" against a person based on his or her physical identity is not entitled to speech protection because one's identity is not speech. One cannot defund an innate characteristic, and, in any case, nondiscrimination in public accommodations is a compelling end.[131] For the application of anti-BDS laws, it thus matters whether entities are being targeted

127. Janus v. Am. Fedn. of State, County, and Mun. Employees, Council 31, 138 S. Ct. 2448, 2464 (2018).

128. Brief of Profs. Michael C. Dorf, Andrew M. Koppelman, and Eugene Volokh as Amici Curiae in Support of Defendants-Appellees at 1, Arkansas Times LP v. Waldrip, 988 F.3d 453 (8th Cir. 2021), No. 19-1378, 2019 WL 2488957.

129. *Id.* at 1–3.

130. *Id.* at 18.

131. *See, e.g.*, Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 252–53 (1964).

because of their Israeli identity or because they have expressed a message in support of the Israeli government's political actions. If it is the latter, it is a political refusal to deal that has the purpose and effect of defunding speech, just like the *Janus* workers' refusal to pay union agency fees. Any government attempts to compel subsidization of this message infringe on the First Amendment and should be subject to exacting, if not strict, scrutiny.

The practical effect of adding this new conception to boycott law will likely be modest at first, but it may soon prove quite important based on recent trends. Boycotts historically tended to be created and maintained by small local groups, often with similar economic interests. But national partisan news outlets and social media have made boycotts an increasingly national affair. They have also made it possible to organize a boycott nearly immediately and without cost. That alone is sufficient to expect a national increase in the frequency of boycotts. But even stronger stimuli include partisanship among the general population and a modern expectation that corporations—even those that sell mundane goods like chicken sandwiches or pillows—make statements in support of certain political causes.

For example, in June of 2020, the CEO of Goya Foods made positive statements about then-president Donald Trump. Within days, politicians and celebrities posted on social media calling for a boycott of Goya—which in turn led to an anti-boycott ("buycott") by those supportive of the statements.[132] These politically motivated consumption decisions were not part of a movement involving parades and picketing and thus were not obviously expressive, and it is conceivable that a law or agency could regulate boycotts of basic food staples like rice and beans without targeting viewpoints. But

132. Sumner Park, *How a Goya Boycott Led to a 'Buycott'*, FOX BUS. (Oct. 16, 2020), https://www.foxbusiness.com/lifestyle/goya-boycott-led-to-a-buycott [https://perma.cc/GM3J-K4TF].

the purposes of the boycott and buycott were, respectively, to defund and fund political speech, so we should treat them as speech.

While one may criticize the increasing association of everyday purchasing decisions with political (and often partisan) positions,[133] we are still better off in a world in which the government cannot restrict defunding boycotts. Before political actors finish drawing the battle lines over Environmental, Social, and Governance (ESG) investing,[134] we would do well to agree *ex ante* that the government should not attempt to restrict private investment choices. Choosing default rules for public pension funds is a legitimate government function, but leveraging government funds to coerce private actors goes too far and would lead to a counterproductive environment. For example, one state government punishing entities that boycott ESG-rejecting companies could provoke other state governments—or even the federal government—to require such a boycott. Absent government restrictions, citizens can vote with their dollars whether to support, ignore, or counter any defunding effort. Behind these efforts are more than impersonal market forces; politically disempowered groups may turn to boycotts as their only way to avoid complicity in funding speech they oppose.

CONCLUSION

First Amendment protection for boycotts has fluctuated in the last century. The Supreme Court appeared to show serious support for political boycotts in *Claiborne Hardware*, but the holding was vague and subject to qualifications. Furthermore, by implicitly associating boycotts with expressive conduct, the Court established

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133. *See, e.g.*, VIVEK RAMASWAMY, WOKE, INC.: INSIDE CORPORATE AMERICA'S SOCIAL JUSTICE SCAM 281–92 (2021) (arguing that political boycotts and buying sprees degrade the democratic process because they rely on "one dollar, one vote" rather than "one person, one vote").

134. Erika Bolstad, *Boycotting the Boycotters: In Oil-Friendly States, New Bills Aim to Block Divestment from Fossil Fuels*, IN THESE TIMES (Mar. 19, 2021), https://inthesetimes.com/article/fossil-fuel-divestment-ban-texas-north-dakota-oil [https://perma.cc/3HCL-SSJ3].

weak constitutional protections that only grew weaker after *FAIR*. But the Court's more recent holdings in *Citizens United* and *Janus* point toward stronger protections for boycotts. Political boycotts that have the purpose and effect of defunding an entity's speech express messages at the funding stage in the same way as political expenditures. Laws that restrict these boycotts thus compel speech and should be subject to exacting, if not strict, scrutiny. This conception could prove vital in protecting modern boycotts that respond to the political statements of ordinary companies and do not involve the visibly expressive marches and picketing of older boycotts.

THE ORDINARY LAWYER CORPUS: THE FEDERALIST PAPERS APPROACH

SAMANTHA THORNE*

INTRODUCTION

Corpus linguistics ("CL") is gaining steam in courts and in journals. Though neither a *Harry Potter* incantation[1] nor a *CSI* forensic investigative procedure,[2] CL helps courts place ordinary language usage in context. By examining large corpora of written and transcribed words, judges can more objectively determine how people understand legal texts and, in turn, how they as judges ought to interpret ambiguous legal texts.

Yet we are not to the point of Supreme Court justices declaring "we are all corpus linguists now."[3] CL is well acquainted with criticism. But rather than disparaging the tool itself, many critics really

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* J.D. Candidate, Harvard Law School Class of 2023. Adam Thorne (Deeplearning Scientist at PhysicsAI; B.S. in Biomechanical Engineering and M.S. in Mechatronics, Robotics, and Machine Learning from Stanford University) built the "ordinary lawyer" corpus.

1. Josh Jones, *The "Weaponization" of Corpus Linguistics: Testing Heller's Linguistic Claims*, 34 BYU J. PUB. L. 135, 144 (2019) ("'Corpus linguistics' might sound strange and intimidating—not unlike a *Harry Potter* incantation . . . .").

2. John S. Ehrett, *Against Corpus Linguistics*, 108 GEO. L.J. ONLINE 50, 51 (2019) ("'Corpus linguistics' may sound like a forensic investigative procedure on *CSI* or *NCIS* . . . .").

3. *But cf.* Elena Kagan, *The Scalia Lecture: A Dialogue with Justice Kagan on the Reading of Statutes*, HARV. L. TODAY (Nov. 17, 2015), http://today.law.harvard.edu/in-scalia-lecture-kagan-discusses-statutory-interpretation [http://perma.cc/3BCF-FEFR] ("[W]e're all textualists now.").

object to how a particular CL analysis is structured based on the critic and corpus linguist having competing interpretive theories.[4] Interpretive approaches undergird the CL analysis and come to light when answering whether CL should value a general speech community over a more specialized one, public meaning over speaker intent, and (if prioritizing public meaning) whether it is public meaning today or at the time of enactment.[5] These issues lie at the heart of selecting the relevant speech community and thus the proper corpus for a CL analysis.

Many CL analyses in the literature have prioritized contemporary public meaning based on a general speech community.[6] This Note does the same. But rather than choosing the broader public or the "ordinary person" as the relevant speech community, this Note focuses on lawyers (the "ordinary lawyer"). Despite lawyers' large role in connecting ordinary people to courts, their voices are silent in CL analyses. No corpus consisting of words written entirely by lawyers exists.

While the lawyer voice has been silent in CL, it has not been silent in other methods of discerning ordinary meaning. First, publications that employ survey methods to find ordinary meaning import a legal perspective. Professor Kevin Tobia surveys law students and U.S. judges in *Testing Ordinary Meaning*,[7] while authors of *Statutory Interpretation from the Outside* survey 1L law students.[8]

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4. *See* Thomas R. Lee & Stephen C. Mouritsen, *The Corpus and the Critics*, 88 U. CHI. L. REV 275, 300 (2021) ("One critique of the use of corpus tools concerns the selection of the relevant language community. . . . [W]e think that the arguments about language community ultimately reinforce rather than undermine the need for and utility of corpus linguistic analysis . . . .").

5. *See id.* at 294 ("The answers to these questions will determine which corpus a judge should use in a particular case.").

6. *See, e.g.*, Thomas R. Lee & Stephen C. Mouritsen, *Judging Ordinary Meaning*, 127 YALE L.J., 788, 847 (2018) [hereinafter Lee & Mouritsen, *Judging Ordinary Meaning*].

7. Kevin P. Tobia, *Testing Ordinary Meaning*, 134 HARV. L. REV. 726, 734 (2020).

8. Kevin Tobia et al., *Statutory Interpretation from the Outside*, 122 COLUM. L. REV. 213, 245 (2022).

Second, textualism has considered a lawyer perspective. Then-Professor Amy Coney Barrett explained in *Congressional Insiders and Outsiders* that Justice "Scalia was not always clear about whether the prototypical reader is an ordinary member of the public or a lawyer."[9] At times, "he treated lawyers as the relevant linguistic community" since "one can hardly claim that the ordinary guest at a cocktail party would be aware of the ancient principles of common law . . . ."[10] Justice Barrett highlighted that "[m]ore should be said about whether and when a court should interpret statutes through the eyes of an ordinary lawyer rather than an ordinary person."[11] The fact that these methods of finding ordinary meaning value the lawyer perspective raises the question of why CL has not followed their lead.

Even *prioritizing* the lawyer voice in CL analyses may be worthwhile. Professors John McGinnis and Michael Rappaport address this.[12] They argue that the relevant interpretive *rules* that existed at a document's time of enactment bind how judges interpret the document in the future.[13] In the case of the Constitution, this rule was a "legal interpretive rule": looking to the *lawyer's* understanding of legal documents. This rule seems to extend to statutes.[14] Provided this phenomenon, why does the CL literature not prioritize ordinary meaning based on a general ordinary lawyer corpus?

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9. Amy Coney Barrett, *Congressional Insiders and Outsiders*, 84 U. CHI. L. REV. 2193, 2202 (2017).

10. *Id.*

11. *Id.* at 2210.

12. John O. McGinnis & Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case Against Construction*, 103 NW. U. L. REV. 751 (2009).

13. *Id.* at 764 ("[I]nterpretive rules that were regarded as applying to the Constitution are binding.").

14. *See id.* at 757 (articulating legal interpretive rules govern how to interpret legal documents generally).

Two plausible explanations exist. First, no one has made a strong enough normative argument for choosing lawyers as a relevant speech community yet. Second, a lawyer-focused corpus does not appear to exist. This Note addresses both blind spots.

Part II details the legal theory underpinning the "ordinary lawyer" CL analysis. I argue that statutory register, modern practice, and history support a law of interpretation of prioritizing a lawyer perspective in finding ordinary meaning. Part III highlights the goals and methods of constructing an "ordinary lawyer" corpus. Part IV summarizes the three cases undergoing an ordinary lawyer CL analysis (*McBoyle v. United States*, *United States v. Muscarello*, and *Taniguchi v. Kan Pacific Saipan, Ltd.*). This section discusses the cases' interpretive questions and the outcomes of Justice Lee and Professor Mouritsen's 2018 ordinary person CL analyses. Part V details the results of the three cases' ordinary lawyer CL analysis and compares them to Justice Lee and Professor Mouritsen's ordinary person corpus results of the same cases. Finally, Part VI concludes the Note, considering some implications of the CL ordinary lawyer analysis and potential next steps.

I. LEGAL THEORY: WHY A LAWYER SPEECH COMMUNITY?

A. *Law of Interpretation*

Deferring to lawyers' understandings of legal documents is a background law of interpretation. When ambiguity stumps courts, Professors William Baude and Stephen Sachs argue that a general "law of interpretation" should fill "gaps that would otherwise be filled by the interpreter's normative priors."[15] This is the idea that "a system of established rules of construction might make the process of statutory interpretation more predictable, effective, and

15. William Baude & Stephen E. Sachs, *Law of Interpretation*, 130 HARV. L. REV. 1079, 1097 (2017).

even legitimate."[16] Interpretive rules bind legal arguments since they "allo[w] us to agree on what our rules are precisely so that we can debate whether to change them."[17]

A law of interpretation requires normative support, which Professors McGinnis and Rappaport provide. They advocate that the determinative law of interpretation in constitutional contexts is an "original methods" approach, defined as looking to how individuals at the time of enactment expected courts and readers to resolve interpretive questions that arose from the Constitution.[18] The original method for interpreting the Constitution is to adopt a "legal interpretive rule": deferring to the lawyer community's linguistic practice and prioritizing its understanding of legal documents.[19] Professors McGinnis and Rappaport state that statutes and other legal documents at the time of the Constitution's enactment share the same legal interpretive rules as the Constitution.[20] They also state that the legal interpretive rule applies whether one prioritizes original intent or original meaning.[21] For original intent, enactors

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16. Thomas R. Lee et al., *A Linguistic Approach to Linguistic Canons*, at 269 (forthcoming).

17. Baude & Sachs, *supra* note 15, at 1097.

18. *See* McGinnis & Rappaport, *supra* note 12, at 754–55 ("[T]he meaning of language requires reference to the interpretive rules and methods that were deemed applicable to that language at the time it was written.").

19. *Id.* at 765.

20. *See id.* at 769 ("These rules were applied generally to legal documents."); *see also id.* at 770 ("[T]he enactors assumed the interpretive rules that were applied to statutes would also be a model for constitutional interpretive rules."). It is worth noting what the authors say at *id.* at 791 n.140 ("[W]e do not have space to determine the amount of evidence needed to establish the interpretive rules that are binding today.") This Note assumes CL can apply original methods to more modern statutes because features of modern statutes do not differ significantly from early statutes and because Professors Rapport and McGinnis qualify their statement at *id.* ("If the interpretive rules derive from a constitutional provision, the evidence required is not likely to differ from that needed to establish any constitutional norm as a matter of original meaning.").

21. *See id.* at 765.

expected their words to be understood based on background interpretive rules: how one with formally endowed legal knowledge would approach finding meaning.[22] For original meaning, the broader public understood that a lawyer's interpretation of the document would trump the layperson's.[23] This does not mean that deferring to lawyers' understandings of legal texts requires words to be read as legal terms of art: lawyers often interpret language ordinarily.[24] Interestingly, Professors McGinnis and Rappaport argue that using original methods tethers statutory analyses to the time of enactment and originalist principles.[25] This tether could mean that CL analyses are not beholden to corpora that only capture Framer or congressional intent at the time of enactment, or the public's understanding of words at that time.

If original methods trump more minute originalist inquiries into public understanding or speaker intent at the time of enactment, prioritizing legal interpretive rules has strong implications for CL. First, focusing on the lawyer perspective overcomes temporal concerns with CL corpora. Choosing a corpus to find ordinary meaning relies just as much on answering "meaning as of when?" as answering "whose meaning?"[26] One may advocate looking only at word usage surrounding a statute's time of enactment and avoiding modern corpora like the NOW Corpus (assuming that the relevant enactment time is before NOW's start date).[27] Because a lawyer corpus is an application of the original method of legal interpretive rules, originalists have more flexibility in choosing an adequate CL corpus when using a lawyer-focused corpus. Second, a lawyer corpus and its original method application help bridge an enduring

22. *See id.* at 760.

23. *See id.*

24. *See id.* at 765 n.49.

25. *Id.* at 772 ("[T]he meaning of the Constitution [was] derived from original methods [and] will be continuous with the ordinary meaning of the document.").

26. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 6, at 818.

27. The NOW Corpus is a database of more than 15 billion words from web-based newspapers and magazines from 2010 to the present.

division perennial to statutory interpretation: speaker intent versus reader understanding. This Note prioritizes ordinary meaning over intent because it aligns well with "our understanding of what the rule of law entails," and collective intent and original expectations are nebulous concepts.[28] Ordinary meaning also better assuages concerns related to public notice, reliance interests, consistent application, and respect to legislative will while yielding "greater predictability than any other single methodology."[29] But it is important to note that this law of interpretation stands regardless of prioritizing intent or meaning. Applying Professors McGinnis and Rapport's original methods theory to statutes since the Founding Era, statutory speakers intend, and statutory readers understand, that people read statutes in accordance with background legal interpretative rules.

B. *Statutory Register*

Register analysis supports this law of interpretation of prioritizing the lawyer perspective. Justice Thomas Lee and Professor Stephen Mouritsen assert that a search for ordinary meaning must "address the differences in various linguistic registers."[30] They connect ordinary meaning to linguistic register because choosing an appropriate speech community depends on the register at issue. To analyze register, one looks at the functional relationship between language use and its situational context. Looking at this relationship helps capture extralinguistic variables essential to understanding language. In a forthcoming article, Justice Lee and his coauthors "define the key extralinguistic variables that define the statutory register" by "identify[ing] the mode of communication and the nature of the participants."[31] They land on three features: Statutory

28. WILLIAM N. ESKRIDGE, JR., INTERPRETING LAW: A PRIMER ON HOW TO READ STATUTES AND THE CONSTITUTION 36 (2016).

29. *Id.*

30. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 6, at 827.

31. Lee et al., *supra* note 16, at 278.

language "(a) is highly consequential; (b) may be produced only by a limited few who are constitutionally invested with legislative power; and (c) is intentionally difficult to create and to revise, such that cancellation of an anticipated implicature must be made in advance."[32] I add two more features, both focusing on statutory participants. First, lawyers have an overrepresented role in the legislative process as statutory producers. As Professors Adam Bonica and Maya Sen highlight in their book:

> American history points us to a pivotal and often-overlooked player: lawyers . . . [S]ince the nation's founding, lawyers have occupied politically outsized roles. For example, more than half of the men who signed the Declaration of Independence in 1796 were lawyers or trained in law (twenty-nine out of fifty-six) while twelve out of the first sixteen presidents were lawyers. In contemporary times, lawyers—a group that today comprises just 0.4 percent of the voting-age population—are extraordinarily overrepresented in Congress and the Executive Branch, with nearly 42 percent of congressional representatives as of 2018 coming from the legal profession.[33]

Second, legislators write statutes knowing that lawyers will be the key readers: "they interpret the law on behalf of clients" from the general public and "are themselves agents of the people they represent."[34] In other words, lawyers have an overrepresented role in statutory consumption. While Justice Lee and others argue "there is very little opportunity for interaction between the producers and the consumers of statutory language," the interaction that exists seems to come from lawyers being present in both production and consumption roles.[35] These two situational features of statutes—that they are written and read by an overrepresented community of lawyers—point to choosing lawyers as the relevant speech community.

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32. *Id.* at 280.
33. ADAM BONICA & MAYA SEN, THE JUDICIAL TUG OF WAR 5 (2020).
34. Barrett, *supra* note 9, at 2209.
35. Lee et al., *supra* note 16, at 279.

C. *Practice*

Modern lawyer-client practices indicate that CL analyses should focus on the lawyer community. Lawyers advocate for their clients and help them access legal interpretation. In the CL literature, authors prioritize finding ordinary meaning based on contemporary language use by the broader public predominantly for fair notice purposes. And many may worry that prioritizing an "ordinary lawyer" corpus over an "ordinary person" one evades that fair notice goal. But "in reading a statute as a lawyer would, a court is not betraying the ordinary people to whom it owes fidelity, but rather employing the perspective of the intermediaries on whom ordinary people rely."[36] The constructive notice fiction "does not depend on the proposition that the language of the law is accessible to all people" but rather "assumes that the people are capable of deciphering language"—usually by relying on lawyers as a language deciphering tool.

Lawyer-generated revenues support relying on the lawyer community as the relevant speech community.

> [M]illions of ordinary people each year . . . consult with lawyers about the meaning of legal documents[.] [This] provides strong evidence that legal interpretive rules and concepts are employed in legal documents. The billions of dollars spent through these visits are not wasted, because it is important that statutory or contractual terms be more precise and less ambiguous than terms of ordinary language.[37]

And according to the 2021 Am Law 100 Report, the largest law firms in the U.S. earned $111 billion in total revenue in 2020 and the

36. Barrett, *supra* note 9, at 2209-10.
37. McGinnis & Rappaport, *supra* note 12, at 765 n.51.

average revenue per lawyer was $1.05 million.[38] This information all suggests that lawyers bring value when it comes to interpreting legal documents. Whether costs for legal services align with the value that they provide is another question, but these inflows support the background legal interpretive rule argument.

D. History

U.S. history defends prioritizing lawyers as the relative speech community. Consider the representative nature of American governance and the constitutional ratification process. "[T]he people did not vote directly on the Constitution, just as they did not vote directly on the passage of statutes."[39] Instead, they "relied on their representatives—who were more likely to be schooled in legal understanding or able to consult more learned colleagues."[40] Representation existed at the time of ratification and exists today.[41] Looking to the lawyer perspective neither takes the "We the People" out of the Constitution[42] nor removes the people's voice from the legislative process. U.S. government (through elected officials) and judicial practice (through lawyers who "draft documents that speak in the client's name") rely on representation.[43]

Next, consider the *Federalist Papers*. "As with other legal documents, the people decided whether to ratify the Constitution based on an explanation of its meaning by those with legal knowledge."[44] Alexander Hamilton, James Madison, and John Jay (collectively "Publius") wrote articles and essays to connect the larger public to

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38. *2021 Am Law Report*, AMERICAN LAWYER, law.com/americanlawyer/2021/04/20/the-2021-am-law-100-report/ [https://perma.cc/NN3L-NGQM] (last visited June 24, 2022).

39. *Id.* at 771.

40. *Id.*

41. *See* BONICA & SEN, *supra* note 33, at 5.

42. McGinnis & Rappaport, *supra* note 12, at 770.

43. *Id.* at 771.

44. *Id.*

a vital legal document. Hamilton and Jay were both lawyers. Although Madison did not practice law, he studied it. More recently recovered manuscripts of his notes (lost for over a century) reveal his "significant grasp of law and his striking curiosity about the problem of language."[45] According to Professor Mary Sarah Bilder, Madison approached "the problem of legal interpretation as a *student* of law, never from the secure status of *lawyer*."[46]

Like the States and the public, the Court has also relied on these lawyers' understandings of the Constitution. Countless cases from *Marbury v. Madison*[47] to *Printz v. U.S.*[48] have relied on the *Federalist Papers* to interpret the Constitution. Some of the most controversial Court opinions like *Bush v. Gore*[49] also cite the *Federalist Papers* to answer interpretive questions. Considering Court usage of *The Federalist* is important. The *Federalist Papers* seem to apply Professors McGinnis and Rappaport's original methods law of interpretation directly.[50] This phenomenon strongly evinces that courts consider lawyer interpretations of legal texts when resolving legal questions.

E. Addressing Concerns

The above arguments evoke pushback. Does prioritizing ordinary lawyer meaning over ordinary public meaning ossify lawyers' disproportionate political and judicial power and create a quasi-aristocracy? This question is beyond the scope of this Note and depends more on policies to make law school and legal services more accessible. I only argue that courts and society already seem to focus on lawyer interpretations in their interpretive processes. An "ordinary lawyer" corpus aligns theory with on-the-ground practices and makes lawyers' extensive role in interpretation explicit.

45. Mary Sarah Bilder, *James Madison, Law Student and Demi-Lawyer*, 28 LAW & HIST. REV. 389, 390 (2010).

46. *Id.*

47. 5 U.S. (1 Cranch) 137, 170 (1803).

48. 521 U.S. 898 (1997).

49. 531 U.S. 98 (2000) (per curiam).

50. McGinnis & Rappaport, *supra* note 12, at 770

Bringing this practice to light is important not only for resolving ambiguities in legal texts but also for down-the-road policy decisions.

I also do not argue that interpreters and CL users should always prioritize the lawyer voice, particularly a modern lawyer voice. I echo Justice Barrett's call for more to "be said about whether and when a court should interpret statutes through the eyes of an ordinary lawyer rather than an ordinary person."[51] But I also answer Justice Barrett's call, in part. I hope this Note makes a case for why one should consider prioritizing lawyer perspectives and at least match CL practices with other ordinary meaning methods, which consider the lawyer voice at times. As I will discuss after conducting my own "ordinary lawyer" CL analyses, utilizing such a corpus can yield interpretive benefits.

Another concern from the above arguments relates to the *Federalist Papers* analogy. Many have hailed the essays as an important source of evidence of the Constitution's original meaning. But maybe the *Federalist Papers* do not embody the law of interpretation that Professors McGinnis and Rappaport advance. Instead, the essays may be more of an analog to legislative history since two of the three authors (Hamilton and Madison) were delegates at the 1787 Constitutional Convention and helped write the Constitution. One could argue that the newly minted American public and later courts did not refer to the *Federalist Papers* because they were following the original methods interpretation approach. Instead, they consider the *Federalist Papers* because men who were a part of the drafting and ratification process wrote them.

I disagree. First, the public likely did not rely on the *Federalist Papers* due to most of the writers' being Constitutional Convention delegates—Hamilton, Madison, and Jay wrote anonymously under a single pseudonym. And the public did not know the *Federalist*'s

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51. Amy Coney Barrett, *supra* note 9, at 2210.

authorship until after Hamilton's death.[52] Second, while Supreme Court opinions have highlighted the writers' constitutional contribution status when relying on the *Federalist Papers*, I argue that relying on the *Federalist Papers* despite the authors' status still falls under the original methods law of interpretation. The key tenet of the legal interpretive rules is that lawyers have an educational, training, or knowledge advantage in interpreting certain types of documents. Because the Constitution was not well-circulated at this point and was a unique document, most people at the time of ratification—even lawyers—could not meet the requisite level of added interpretive value to a document with which they were unfamiliar. Third, the *Federalist Papers* are distinct from legislative history. Publius wrote them to persuade a larger public and they are not a transcript of Constitutional Convention proceedings.

II. CREATING AN "ORDINARY LAWYER CORPUS"

At the outset, it is important to note that creating a full-fledged "ordinary lawyer" corpus requires more attention than was allotted here, despite the time and labor already dedicated. The "ordinary lawyer" corpus is an initial corpus. But searching for ordinary meaning consistently and methodologically is like a relay: what matters most is that you advance the literature and allow people to grab the baton to build off prior progress. The work of determining ordinary meaning is even more like a "relay marathon"[53] (think

52. *About the Authors—Federalist Essays in Historic Newspapers*, LIBRARY OF CONGRESS, https://guides.loc.gov/federalist-essays-in-historic-newspapers/authors [https://perma.cc/3HZY-H3DC] (last visited June 24, 2022).

53. *See* James Salzman, Professor of Law, Harvard Law School and UCLA School of Law, COP26—What happened, What didn't happen, and What happens next? At Harvard Law School (Nov. 18, 2021) Harvard Law School lecture. Professor Salzman used this analogy to describe COP26 and long-term international efforts in the environmental policy and legal arena.

something akin to a *Ragnar* relay)[54] since courts and scholars have sought to resolve ambiguity in legal texts by discerning ordinary meaning since our nation's founding. It is an endurance event holistically even if the individual contributions are less so. Although this corpus did not run the full marathon, I believe it ran a strong relay leg.

A. Goals

The goal in constructing an "ordinary lawyer" corpus was to follow the *Federalist Papers* approach. This meant finding lawyer-written articles, essays, and blogs accessible to and intended for a larger public that provide lawyerly insights into legal texts and legal issues.[55] JD Supra and Lawyers.com meet these criteria. JD Supra offers articles written by large law firms that cover issues ranging from labor and employment to constitutional law.[56] Reading these articles does not require a subscription. The same is true for Lawyers.com.[57] We only used articles from Lawyers.com to fill in an area of law absent from JD Supra: criminal law. Because criminal proceedings mainly involve state actors, Lawyers.com is an important source for finding articles that covered criminal topics. The website includes blog posts written by lawyers from smaller, more local, and state-focused firms. The Lawyers.com blogs are more informal than the JD Supra articles. Individuals from the public can even submit criminal law questions for lawyers to answer.

Another goal was to make a lawyer equivalent to NOW's broader public-focused corpus. But because this is a from-scratch

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54. The Ragnar Relay Series is a series of long-distance running relay races organized and orchestrated by Ragnar Events, LLC, which is based in Salt Lake City, UT. Teams of twelve run about 200 miles in a relay fashion from start to finish.

55. The broader public includes fellow lawyers, akin to the *Federalist Papers* largely being circulated to state representatives.

56. JD SUPRA, https://www.jdsupra.com/browse/legal-news.aspx [https://perma.cc/3D7U-3SVC] (last visited Feb. 14, 2022).

57. *Criminal Law*, LAWYERS.COM, https://www.lawyers.com/legal-info/criminal/ [https://perma.cc/96BL-8EFF] (last visited June 9, 2022).

corpus, it is raw and not tagged or monitored like the NOW Corpus. It is also much smaller than the NOW Corpus since it has only two contributory streams: JD Supra and Lawyers.com. But the "ordinary lawyer" corpus is a general corpus that looks to language use that is less formal than lawyer briefs to courts. The corpus extends beyond the adversarial process, which would likely advocate for two senses of the word. The "ordinary lawyer" corpus also provides more novel machine-learning techniques compared to more traditional corpora.

B. *Methodology*

I recruited the help of a deep learning scientist to construct the corpus using machine learning. He used Python web scraping libraries to extract word usage from various articles taken from two websites: www.jdsupra.com/browse/legal-news.aspx and blogs.lawyers.com/attorney/criminal-law/. He extracted all JD Supra articles from all the listed topics: Labor and Employment, Finance and Banking, General Business, Civil Procedure, Science, Computers and Technology, International Trade, Health, Securities, Business Organization, Elections and Politics, Intellectual Property, Administrative Agency, Privacy, Tax, Consumer Protection, Communications and Media, Environmental, Civil Rights, Energy and Utilities, Insurance, Residential Real Estate, Civil Remedies, Antitrust and Trade Regulation, Constitutional Law, and Government Contracting. These articles ended up being from 2020 to 2021. He scraped all Lawyers.com criminal law articles from 2018 to 2021. In total, he extracted 1028 articles and created a corpus text file of all articles appended together. Most of the articles came from JD Supra despite the longer time horizon accounted for in Lawyers.com. The dates do not align between the two websites because only articles dating to 2020 could be extracted from JD Supra. There would be too insignificant a sample of criminal law articles if we extracted only articles from 2020 to 2021 from Lawyers.com.

III. THE CASES & PREVIOUS "ORDINARY PERSON" CORPUS LINGUISTICS OUTCOMES

We performed a CL analysis for three cases using the "ordinary lawyer" corpus: *McBoyle v. U.S.*,[58] *U.S. v. Muscarello*,[59] and *Taniguchi v. Kan Pacific Saipan, Ltd*.[60] Justice Lee and Professor Mouritsen use these three cases in their Article, *Judging Ordinary Meaning*, to conduct a CL analysis through the NOW Corpus—the predominant modern general "ordinary person" corpus. The interpretive questions that I analyze are the same in substance and scope that Justice Lee and Professor Mouritsen analyze. Keeping these factors the same helps us compare the ordinary lawyer corpus to the ordinary person corpus.

The paragraphs below outline the three cases' legal questions and Justice Lee and Professor Mouritsen's accompanying NOW CL results. Collocation and concordance line analyses combine to create a CL analysis. Collocation shows us "the words that are statistically most likely to appear in the same context" as a searched term for a given period.[61] It gives a "*snapshot* of the semantic environment" that the subject word appears in which concordance lines later confirm.[62] Concordance lines "provide the crucial context in which different instantiations of the searched term have occurred."[63] Concordance lines require corpus linguists to pull randomized sample uses of the searched term and display it in its semantic environment. This CL prong relies on more context than collocation.

58. 283 U.S. 25 (1931).
59. 524 U.S. 125 (1998).
60. 566 U.S. 560 (2012).
61. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 6, at 837.
62. *Id.* (emphasis added).
63. Jones, *supra* note 1, at 147.

A. McBoyle v. U.S.

In *McBoyle v. U.S.*, the Court answered whether an "airplane" was a "vehicle" under the National Motor Vehicle Theft Act of 1919.[64] The justices concluded that "[w]hen a rule of conduct is laid down in words that evoke in the common mind only the picture of vehicles moving on land, the statute should not be extended to aircraft."[65] In other words, an airplane is not a vehicle under the statute.

Based on Justice Lee and Professor Mouritsen's collocation analysis, the NOW Corpus strongly indicates that "automobile" is the most common use of "vehicle."[66] The concordance lines confirm this. Indeed, 91 percent of "vehicle" uses were automobile-related, and none related to "airplanes." "To the extent that our notion of ordinary meaning has a frequency component, this data suggests that *automobile* is overwhelmingly the most common use of the word *vehicle*" in the NOW Corpus.[67]

B. U.S. v. Muscarello

Muscarello asked whether "carrying a firearm" encompassed the conveyance of a gun in a glove compartment when interpreting a statute that called "for a five-year mandatory prison term for a person who 'uses or carries a firearm' 'during and in relation to' a 'drug trafficking crime.'"[68] Applying a more sense-ranking approach, the Court held that "carries a firearm" broadly includes one who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment which the person accompanies. Worrying about the statute's purpose to combat the dangerous combination of drugs and guns, Justice Breyer's majority

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64. McBoyle, 283 U.S. at 27.
65. *Id.*
66. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 6, at 837.
67. *Id.* at 842.
68. *Id.* at 803.

opinion focused on the term "carry" (not "carries a firearm"), arguing its usage is not limited to "on-the-person application." Justice Ginsburg's dissent disagreed with Justice Breyer's isolation of "carries" and noted that the issue presented "is not 'carries' at large but 'carries a firearm.'"[69]

Justice Lee and Professor Mouritsen follow the majority and isolate "carries" in their CL analysis.[70] But they do factor in the larger "carries a firearm" syntactic structure and semantic relationships: controlling for the "syntax of a transitive verb, with the semantic features of a human subject and a weapon object."[71] The carry collocation analysis is less straightforward than the vehicle collocation. Various "carries" uses did not fit within the object and subject features that Justice Lee and Professor Mouritsen prioritize. Instead, there are instances of the inverse structure (inanimate objects carrying the human subject), metaphorical uses (felonies carrying certain penalties), and references to carrying out plans and executing. Justice Lee and Professor Mouritsen argue that the search still "reveals common collocates of *carry* that have similar semantic features to *firearm*" that "help us better evaluate the contexts in which *carry a firearm* occurs."[72]

After controlling for the desired structure and relationship of "carries a firearm," the concordance analysis yielded 104 instances indicating a sense of "carry a firearm" on one's person and only five suggesting "carry" in the car sense. "To the extent that we view the question of ordinary meaning as involving statistical frequency," Justice Lee and Professor Mouritsen's analysis "tells us that carry on one's person is overwhelmingly the most common use, while carry in a car is a possible but far less common use."[73]

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69. Muscarello, 524 U.S. at 143 (Ginsburg, J., dissenting).
70. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 6, at 799.
71. *Id.* at 823.
72. *Id.* at 846.
73. *Id.* at 847–48.

C. *Taniguchi v. Kan Pacific Saipan, Ltd.*

Taniguchi involved an interpretive question about the ordinary meaning of the term "interpreter." Namely, is a litigation expert who translates written documents from one language to another an interpreter under a statute authorizing an award of costs for prevailing parties that use such services? The majority held that the statute did not encompass written translation since the more common sense of interpreter is one "engaged in simultaneous oral translation."[74] The majority and dissent mainly disagreed over whether the statute covers only the most common sense or permissible senses too.[75]

Justice Lee and Professor Mouritsen's "interpreter" collocates largely support the majority's position that interpreter most commonly refers to an "interpreter of spoken language" given collocates of "speaking, spoke, and listen."[76] The concordance analysis was slightly less straightforward since multiple senses of "interpreter" referenced interpretation of works of art, documents written in a primary language, and interpretation from a primary language to a second language.[77] Various concordance lines included transcripts of spoken interviews facilitated by an interpreter too. Importantly, however, there was not "a single instance of anyone referred to as an *interpreter* performing a text-to-text translation."[78] This finding (or more aptly lack of finding "interpreter" as a text-to-text translator) supports the majority's holding.

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74. Lee & Mouritsen, *Judging Ordinary Meaning*, supra note 6, at 799.
75. *Id.*
76. *Id.* at 848 (emphasis omitted).
77. *Id.* at 849.
78. *Id.* at 850.

IV. APPLYING THE "ORDINARY LAWYER" CORPUS: CL RESULTS

We automated the collocation analysis by creating Python Word Clouds. For every article read, the machine learning identified instances of "vehicle," "vehicles," "carry," "carries," "carried," "carrying," "interpreter," and "interpreters." We stored the four words on either side of the searched term and created Word Clouds from these stored surrounding words. Word Clouds visually represent word frequencies by presenting more frequent words in proportionally larger text.

The concordance analysis was partially automated. We stored the ten words on both sides of each searched term to create a concordance text file with twenty-one-word phrases (with the searched term at the center). Having these concordance lines all listed, I also read directly from the website articles to ensure that the extracted language fit with what the public reading the articles would see and chiefly read in this manner. In manually reviewing, I mainly read the title, the sentence with the searched term, and the two sentences the term was sandwiched in between.

A. McBoyle v. U.S.

1. Collocation

McBoyle interprets the word "vehicle." Based on the Word Cloud below, the surrounding word "snapshot" that collocation provides indicates "vehicle" (or "vehicles") is used most in "motor vehicle" or "electric vehicle" contexts. These uses seem to "evoke in the common mind only the picture of vehicles moving on land."[79] But "motor vehicle" and "electric vehicle" also seem too broad. Justice Lee and Professor Mouritsen's collocation "vehicle" analysis provided more specific indicators of on-the-ground vehicle usage.

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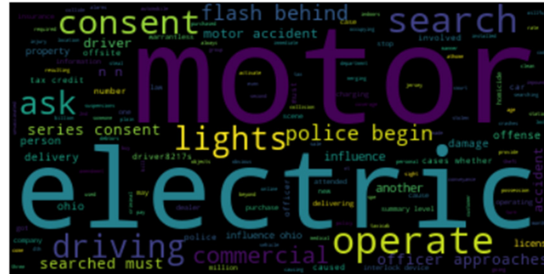
79. McBoyle, 283 U.S. at 27.

Word Cloud vehicle



2. Concordance Lines

The "meat and potatoes" part of the CL analysis saved the day. 167 out of 170 uses of "vehicle" referred to automobiles, with the vast majority being a direct substitute to "car" used in a surrounding sentence. A few cases introduced some uncertainty about whether "electric vehicle" refers to "electric cars." Reading more surrounding text and seeing that it refers to ground transportation largely resolved these uncertainties. Here are some examples of "vehicle" in an automobile sense:

1. *In September 2021, North Carolina became the first state to amend its dealer statute to expressly permit at-home vehicle delivery in connection with the sale of new and used cars.*[80]
2. *Armando was pulling into a gas station and came very close to hitting another vehicle that was not in its lane. He had heated*

80. Jessica Berk & Alison Eggers, *Parameters for At-Home Vehicle Delivery by Dealers Codified in North Carolina*, JD SUPRA (Nov. 24, 2021), https://www.jdsupra.com/legalnews/parameters-for-at-home-vehicle-delivery-6536006/ [https://perma.cc/HJ2J-9HG7].

words with the driver and then parked his car to go into the convenience store. The two men in the vehicle he almost hit parked, exited their car, and started walking over towards Armando.[81]

3. *As cars evolve, users increasingly demand different functionalities, shifting the value from hardware to software. Based on the rapidly-changing consumer preferences, software may soon make up over 30 percent of vehicle content.*[82]
4. *Stealing a car is a property crime that comes with additional penalties. In New Jersey, an individual who steals a motor vehicle is required to pay a $500 penalty and has their license suspended for a year.*[83]
5. *Under the bill, Washington and Oregon are projected to receive billions in funds . . . $71 million for Washington to expand its electrical-vehicle charging network . . . .*[84]

When reading through the "electric vehicle" uses, it is important to note that charging stations refer to stations for electric *cars*. The three uses that did *not* use "vehicle" in the automobile sense used "vehicle" to describe a "freight vehicle" or as a legal term of art ("contract vehicle" and "special purpose vehicle"). At times, I expanded the context scope to resolve enduring uncertainties but

81. Christina Tsirkas, *When Accused of Aggravated Assault, Stand Your Ground*, LAWYERS.COM (Apr. 7, 2019), https://blogs.lawyers.com/attorney/criminal-law/when-accused-of-aggravated-assault-stand-your-ground-54495/ [https://perma.cc/UR9Y-H7HP].

82. Amir El-Aswad, *OESA Strategic Insights Executive Briefing Series 2021—Preparing Suppliers for Market Disruptions, Searching the Deep Sea to Electrify Vehicles, and Introducing the Lucid Air*, JD SUPRA (Dec. 9, 2021), https://www.jdsupra.com/legalnews/oesa-strategic-insights-executive-6708056/ [https://perma.cc/S672-9A4B].

83. Herbert Ira Ellis, *What Are the Different Types of Property Crimes In New Jersey?*, LAWYERS.COM (Nov. 12, 2020), https://blogs.lawyers.com/attorney/criminal-law/what-are-the-different-types-of-property-crimes-in-new-jersey-65566/ [https://perma.cc/C6L6-44F4].

84. Amber Novack & Tara O'Hanlon, *What the Infrastructure Bill Means for Transportation, Construction, and Real Estate in the Northwest*, JD SUPRA (Nov. 17, 2021), https://www.jdsupra.com/legalnews/what-the-infrastructure-bill-means-for-5329656/ [https://perma.cc/A4E8-J95U].

mainly kept the context to what I stated previously. People might disagree with my decision to expand the degree of context. But following Professor Nourse, context provides pragmatic enrichment essential to interpretation.[85]

These collocation results align with Justice Lee and Professor Mouritsen's results. The distinguishing feature is context. The searched word in the lawyer corpus relates to a statute or a legal issue (e.g., the potential crime in the *Armando* example). Here, lawyers couch their use of "vehicle" in a legal context more like an interpreting court will likely confront. "The need to consider context is a staple element of the judicial inquiry into ordinary meaning:"[86] Everyone "takes nonsemantic context—pragmatics—into account in deriving meaning from language."[87] Thus, relying on lawyer-written articles "pragmatically enriches meaning."[88]

B. *U.S. v. Muscarello*

1. Collocation

Muscarello interprets iterations of "carry" ("carry," "carries," "carried," and "carrying"). The snapshot provided by the Word Cloud does not control for a "syntax of a transitive verb, with the semantic features of a human subject and a weapon object."[89] But I account for this in the concordance analysis.

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85. Victoria Nourse, *Picking and Choosing Text: Lessons for Statutory Interpretation from the Philosophy of Language*, 69 FLA. L. REV. 1409, 1412 (2017).

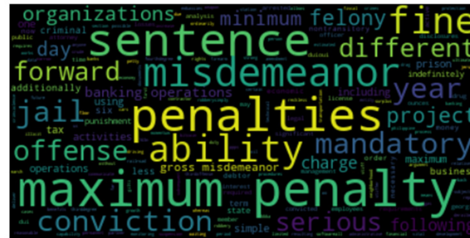
86. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 6, at 821.

87. *Id.* at 816.

88. Nourse, *supra* note 85, at 1418.

89. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 6, at 823.

Word Cloud carries



Like in Justice Lee and Professor Mouritsen's analysis, the collates did not fall neatly within the "carries a firearm" semantic and syntactic structure. The collocates overwhelmingly refer to the more "metaphorical uses" of carries (e.g., felonies carrying certain penalties) that Justice Lee and Professor Mouritsen reference in their analysis.

2. Concordance Lines

I analyzed 85 uses of "carry." Most are used in the metaphorical sense ("fourth-degree crimes carry a prison sentence of up to 18 months and a fine of up to $10,000") or in the "carry out" (put into effect) sense ("the section authorizes $150,000,000 to be appropriated to the Secretary for fiscal years 2022–2026 to carry out future development"). Other "carry" uses include "carry forward" (temporally); "carry on" (endure); "carry over" (in a technical tax sense); and carries in terms of water forces (to direct the course of). "Carry" uses also refer to the inverse example that Justice Lee and Professor Mouritsen highlight (an inanimate object carries a human subject rather than vice versa). Of the 85 uses read, only six met the desired "carries a firearm" structure. I include each instance below.

1. *Months after voters overwhelmingly backed a referendum, the state now allows citizens over 21 years old to carry up to six*

> *ounces of marijuana legally. Police officers will not be allowed to arrest minors in possession or consuming cannabis, nor approach them if they smell it around the person.*[90]

This "carry" usage indicates that "carry" means to possess and have on one's person. The "smell it around the person" and "possession" language support this characterization. This example of "carry" usage does not seem to encompass having a gun locked in a car compartment.

2. *After all, the Constitution begins with "We The People of the United States." I have been carrying the same copy – now very well-worn – in my book bags and briefcases since 1976, when I started high school.*[91]

This example is trickier. One might argue that because the author transports the pocket Constitution in a carrier, which likely has not always been on his person since 1976, "carry" encompasses something less than having on one's person. But one could counter and say that carrying on one's person is part of a book bag or briefcase's nature. A stationary glovebox is quite different. And it seems that the author's point is that he always has the Constitution with him even if he uses some hyperbole to get there.

3. ***Carry all documents required for admission to the U.S.*** *Upon entry to the U.S., some entrants may need to show additional evidence of work authorization or government approval in addition to a passport and valid visa stamp.*[92]

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90. Herbert Ira Ellis, *New Jersey Cannabis Bill Ends Arrests for Marijuana Possession*, LAWYERS.COM (Mar. 11, 2021), https://blogs.lawyers.com/attorney/criminal-law/new-jersey-cannabis-bill-ends-arrests-for-marijuana-possession-67079/ [https://perma.cc/RVY5-HX8L].

91. Louis Vlahos, *One Step Closer to "Building Back"—Where Do Federal Transfer Taxes Stand?*, JD SUPRA (Nov. 23, 2021), https://www.jdsupra.com/legalnews/one-step-closer-to-building-back-where-3466529/ [https://perma.cc/5Q6M-ZL9N].

92. Survi Parvatiyar et al., *Plan Ahead for Holiday Travel: 2021 Checklist for Foreign Nationals and Employers*, JD SUPRA (Nov. 18, 2021), https://www.jdsupra.com/legalnews/plan-ahead-for-holiday-travel-2021-1740855/ [https://perma.cc/XW4E-BN3H].

"Carry" here seems to indicate that the object ("documents") must be on one's person since it will need to be readily accessible to give to Homeland Security.

4. *It is important to note that the thief need not use or threaten another person with the weapon in order to be convicted of robbery—simply carrying the weapon or having it within one's control at the time of the offense is sufficient. When a weapon is used or brandished, or if harm is inflicted on someone during the course of a robbery, the offense can be elevated to "aggravated" status and more serious penalties apply*.[93]

The use of "or" (between "simply carrying the weapon" and "within one's control") is important. The author seems to use "or" to rephrase "carrying" as "within one's control" and equates the two. Or he is saying "within one's control" is a lesser degree of "carrying." Or the two could be distinct and unrelated. I do not think the third option is at play here. Rather "carrying" seems to be no less than "within one's control." Due also to the temporal "at the time of the offense" phrase, this "carry" usage does not seem to capture leaving a weapon in a locked glove box.

5. [A member of the public submitted a question for a lawyer to answer here. Because it is a harder interpretive question, I provide the full context as Nourse recommends.]

   Q: I was joyriding with some of a few old friends and state troopers had flashed their lights, but I didn't see them until they were behind me completely. Once I had announced to everyone in the car that they were behind us, the friend in the passenger passed back a black hat which unbeknown to me, had a gun in there. So eventually I see an exit ramp and try to come off, but I was going too fast and lost control of the car and crashed. Now I'm and [sic] being charged with fleeing or eluding an officer, firearm not to be

93. Daniel Williams, *Understanding Theft Crimes in Ohio*, LAWYERS.COM (Feb. 5, 2021), https://blogs.lawyers.com/attorney/criminal-law/understanding-theft-crimes-in-ohio-2-66798/ [https://perma.cc/J8S4-HUT5].

> *carried w/o license (no crim-violence) and reckless endangering another person.*
>
> *A: Lawyer up, immediately! Gun cases (Uniform Firearms Act) are taken seriously by the DA and not often bargained down. There is always reasonable doubt for an attorney to work with when there is a gun or drugs found in a car with multiple occupants. You need a good attorney to develop that "black hat" defense. It will be easier for everyone in the car if someone admits to possessing the gun.*[94]

This example is the hardest yet. One snag is that the incident occurred in a car. The key phrase is "passed back a black hat." This phrase indicates that someone had possession of the gun and physical control of it. The joyrider doesn't seem to be the one who had possession of the gun but the lawyer still advises him to "lawyer up, immediately" because of a likely violation of a statute.[95] The lawyer highlights that the carrying issue turns on a "black hat defense." It seems like the attorney views passing a hat with a gun in it as carrying the gun. To me, this "carry" use is distinguishable from a drug deal happening outside a car in which a gun is locked in a glovebox. But if not, this would only be one usage of "carry" that potentially aligns with the *Muscarello* majority's interpretation.

The lawyer corpus's concordance analysis aligns with Justice Lee and Professor Mouritsen's conclusion that "carry on one's person is overwhelmingly the most common use, while carry in a car is a possible but far less common use."[96] However, there is one vital distinction: Justice Lee and Professor Mouritsen's sample is 104 while mine is only six. This inhibits my ability to reach a well-

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94. William R. Pelger, *How Do I Go About Handling A Fleeing and Eluding Charge?*, LAWYERS.COM (Nov. 03, 2019), https://blogs.lawyers.com/attorney/criminal-law/how-do-i-go-about-handling-a-fleeing-and-eluding-charge-58796/ [https://perma.cc/7GPP-4ECS].

95. *Id.*

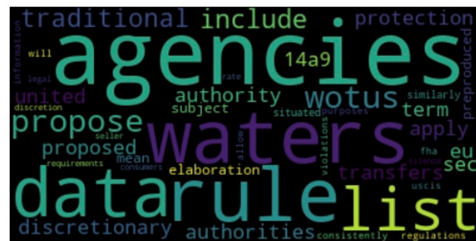
96. Lee & Mouritsen, *Judging Ordinary Meaning*, *supra* note 6, at 848.

formed opinion about how to interpret "carry." Increasing the size of the lawyer corpus will help alleviate this problem.

Considering the amount of non-desired "carry" senses that I read, Justice Ginsburg's argument about not isolating "carry" but including the full "carries a firearm" phrase seems more impactful after conducting the CL analysis. Justice Lee and Professor Mouritsen's method of factoring in the syntactic structure and semantic relationships is a happy medium between the majority and dissent, though. It allows more examples of "carry" to be analyzed while still controlling for features of the "carries a firearm" phrase.

C. *Taniguchi v. Kan Pacific Saipan, Ltd.*

Strangely, no instances of the word "interpreter" appeared in the entire corpus. This was not a bug in the code since we were able to assess iterations of "interpret" and create a Word Cloud from that (see below). Because there was no data, there was no CL analysis for *Taniguchi*. A future note or article would replace *Taniguchi* and analyze a third case—perhaps *U.S. v. Costello*[97] since Justice Lee and Professor Mourtisen assess that case in *Judging Ordinary Meaning*.[98] Ideally, a third case would have unique insights contrasting from Justice Lee and Professor Mourtisen's CL NOW corpus outcomes.



97. 350 U.S. 359 (1956).
98. *Id.* at 805.

CONCLUSION

The CL "ordinary lawyer" outcomes did not differ significantly from Justice Lee and Professor Mouritsen's "ordinary person" CL analysis. Although the sample sizes differed between the two corpora and the "ordinary lawyer" corpus enveloped more technical uses of words, readers would expect both of those differences. A key difference is the legal theory that underpins the two corpora.

The lawyer corpus operationalizes Professors McGinnis and Rappaport's original methods approach to interpretation into the world of CL. Although a seminal work, Justice Lee and Professor Mouritsen's *Judging Ordinary Meaning* ordinary person approach lacks a strong originalism tether beyond prioritizing public meaning—it does not account for original intent, original meaning, or original methods at the time of enactment. The ordinary lawyer corpus uses modern word usage to find meaning while alleviating fair notice concerns. It also accounts for the interpretive habit of modern and historical readers and writers of legal texts by deferring to lawyerly interpretations. But even more, Professors Baude and Sachs's law of interpretation, Justice Lee and others' register analysis, modern lawyer-client practices, and American history all support the original method approach of finding meaning through lawyerly understanding. Because of this, CL analyses should employ an ordinary lawyer corpus more often.

The key difference between the two corpora is context. Of all the concordance lines that I analyzed, each one used the searched term in a statutory, constitutional, or legal context. This differs significantly from the NOW Corpus. Because the NOW Corpus pools together words from magazines and news articles, many uses of the searched term do not relate to legal issues. Because the issues and contexts that the lawyer articles discuss are like issues that will eventually face courts, relying on lawyers' word usages and understandings seems beneficial to courts, compared to relying on the "ordinary person" understanding. Since words derive meaning

from their context, relying on a more legal semantic, syntactic, and pragmatic context helps courts find ordinary meaning.

As the "ordinary lawyer" corpus is in its early stages, I provide some insights to give the next relay leg a head start. First, transcribe JD Supra's lawyer podcasts. Doing so would increase the number of words that machine learning can scrape and store in a corpus. Next, use more Lawyers.com blogs that extend beyond matters of criminal law. These Lawyers.com blogs focus more on a broader public and use less technical senses of words. Finally, look for more lawyerly websites that meet the *Federalist Papers* criteria. The goal is to expand the size of the corpus without sacrificing parallels to *The Federalist*.

QUICK LOOK REVIEW AS A NEW PATH TO SALVATION: *NCAA V. ALSTON*, 141 S. CT. 2141 (2021)

ROGAN FENG*

College sports are big business in America. The broadcast license extension for the NCAA's "March Madness" basketball tournament is worth $8.8 billion.[1] The Football Bowl Subdivision's "College Football Playoff" television rights sold for $5.64 billion.[2] Colleges compete fiercely for their share of the pie, investing fortunes in coaches[3] and sports facilities.[4] But the schools do not compete in one important respect: per NCAA rules, the main component of athlete compensation is largely limited to a full-ride scholarship.[5] In *NCAA v. Alston*,[6] the Supreme Court weighed in on this arrangement and upheld a lower court ruling that the NCAA's

* J.D. Candidate, Harvard Law School Class of 2023.

1. *See* Erik Brady, *NCAA Extends Tournament Deal with CBS, Turner Through 2032 for $8.8 Billion*, USA TODAY (Apr. 12, 2018), https://www.usatoday.com/story/sports/ncaab/2016/04/12/ncaa-contract-extension-cbs-turner-ncaa-tournament-march-madness/82939124/ [https://perma.cc/5GFU-65EF].

2. Brief for Respondents at 5, NCAA v. Alston, 141 S. Ct. 2141 (No. 20-512).

3. *See, e.g.*, *Who Are the Highest-Paid College Football Coaches? These Are the Five Top Salaries*, USA TODAY (Nov. 8, 2021), https://www.usatoday.com/story/sports/ncaaf/2021/11/08/highest-paid-college-football-coach-salaries/6319667001/ [https://perma.cc/BE88-B5D5].

4. *See, e.g.*, Thom Patterson, *America's Incredibly Expensive College Football Stadiums*, CNN (Sept. 28, 2018), https://www.cnn.com/2018/09/28/us/expensive-college-football-stadiums/index.html [https://perma.cc/9VDD-CKE8].

5. *See* Reply Brief for Petitioners at 7, NCAA v. Alston, 141 S. Ct. 2141 (No. 20-512).

6. 141 S. Ct. 2141 (2021).

limitations on education-related benefits, such as graduate or vocational school scholarships, illegally restrained trade.[7] The significance of this case for sports law can hardly be overstated. In opening the door to education-related benefits, *Alston* invites yet more ambitious challenges to remaining NCAA compensation restrictions, including those that currently prohibit cash salaries.[8] However, while *Alston* provides a historic breakthrough for Division I athletes, it is no victory for antitrust plaintiffs more generally. In its decision, the Court revisited a doctrine known as "quick look review"—an abbreviated, less fact-intensive version of the standard rule of reason—and suggested that challenged practices may be *upheld*, not just struck down, with a mere quick look.[9] The Court hands antitrust defendants a new legal argument. It also risks adding to the already-significant lower court confusion over quick look doctrine.

The NCAA imposes many restrictions on student athlete compensation in the name of preserving amateurism. According to its rules, schools cannot pay salaries to athletes, and non-cash compensation is subject to exacting limitations.[10] *Alston*, for example, was largely concerned with the NCAA's restrictions on non-cash, education-related benefits, which can include post-eligibility scholarships, tutoring services, and paid internships.[11] The NCAA has often defended its compensation restrictions by characterizing them

7. *See id.* at 2147, 2166.

8. *See generally infra* note 48 (discussing the ramifications of *Alston* on any form of compensation restriction).

9. *See Alston*, 141 S. Ct. at 2155 ("[Quick look is] only for restraints at opposite ends of the competitive spectrum. For those sorts of restraints—rather than the restraints in the great in-between—a quick look is sufficient for approval or condemnation.").

10. *See* In re NCAA Ath. Grant-In-Aid Cap Antitrust Litig., 375 F. Supp. 3d 1058, 1063–64 (N.D. Cal. 2019) (describing changes in NCAA compensation rules over the years).

11. *See Alston*, 141 S. Ct. at 2166 (Kavanaugh, J., concurring).

as pro-competitive rules that are necessary to foster amateurism.[12] In essence, the NCAA argues that if student athletes were paid, college sport would be indistinguishable from professional sport and, as such, not a viable commercial product. The Supreme Court, in a 1984 case concerning the NCAA's television rights plan, seemed to approve of this reasoning, noting that the preservation of amateurism "widen[ed] consumer choice" and was "procompetitive."[13]

In antitrust language, the NCAA does not—nor could it—claim that its rules do not restrain competition. Rather, the NCAA argues that its compensation rules are not *unreasonable* restraints. Section 1 of the Sherman Antitrust Act expressly prohibits "[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States."[14] Notwithstanding the statute's sweeping language, the Supreme Court has read the Act as only prohibiting those business practices that are "unreasonable" restraints on trade.[15]

Most often, courts assess reasonability on a case-by-case basis, using a balancing test known as the rule of reason. The test involves three steps.[16] First, a plaintiff must show that challenged conduct has significant anticompetitive effects.[17] Then, the burden shifts to defendants to show that there are pro-competitive effects.[18] Finally,

12. *See, e.g.*, Deppe v. NCAA, 893 F.3d 498, 500 (7th Cir. 2018) (year-in residence rule); Agnew v. NCAA, 683 F.3d 328, 342 (7th Cir. 2012) (scholarship caps).

13. NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 102, 110 (1984). Although the Court's discussion of amateurism in *Board of Regents* was a gloss accompanying an analysis of restraints on television rights, some lower courts have adopted the Supreme Court's reasoning. *See, e.g.*, McCormack v. NCAA, 845 F.2d 1338, 1343–44 (5th Cir. 1988) (accepting the Supreme Court's gloss in *Board of Regents* that solicitude should be given to the pro-competitive effects of NCAA rules).

14. 15 U.S.C. § 1.

15. *See* State Oil v. Khan, 522 U.S. 3, 10 (1997).

16. *See* Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018) (providing a recent statement on the rule reason).

17. *See id.*

18. *See id.*

if a court finds pro-competitive effects, the burden shifts back to the plaintiff to show that there are substantially less restrictive rules that could achieve the same pro-competitive effect.[19] In essence, the rule of reason three-step provides for a fact-intensive assessment of a challenged restraint's economic impact.[20]

The cost of evaluating restraints on a case-by-case basis is high.[21] Hence, courts have also developed other tests, which allow for particularly harmful practices to be struck down summarily. At the opposite end of the spectrum from the rule of reason, the *per se* rule allows courts to "conclusively presume[] . . . [that a practice is] unreasonable"[22] as long as it belongs to a category of practices that "always or almost always tend to restrict competition and decrease output[.]"[23] And in between the *per se* rule and the rule of reason, the Court has also fashioned a lesser-known "quick look review" that relieves plaintiffs of the burden of proving anticompetitive effect, but still gives defendants the chance to provide procompetitive justification.[24]

In *NCAA v. Alston*, the plaintiffs, a class of current and former Division I athletes, alleged that the NCAA's compensation rules violated Section 1 of the Sherman Antitrust Act.[25] The district court held that the NCAA's compensation rules were subjected to a rule of reason.[26] Applying the three-step test, Judge Wilken of the Northern District of California enjoined NCAA's rules against education-related benefits but left in place rules against cash payment. First,

19. *See id.*

20. *See id.*

21. *See* Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 835–36 (2016).

22. *See* N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958), *quoted in* United States v. Joyce, 895 F.3d 673, 676–77 (9th Cir. 2018).

23. *See* Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19–20 (1979), *quoted in* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 723 (1988).

24. *See infra* text accompanying notes 51–56.

25. 15 U.S.C. § 1.

26. *In re NCAA Grant-In-Aid Cap Antitrust Litigation*, 375 F. Supp. 3d at 1066.

as the parties did not meaningfully contest that the challenged restraints suppress the price of athletes' services, the district court found that the plaintiff athletes carried their burden in showing anticompetitive effect.[27] But, at step two, the court found that the rules also had a pro-competitive effect because they "help maintain consumer demand for college sports . . . by preventing unlimited cash payments unrelated to education."[28] Finally, however, the court found that there exists a less restrictive alternative set of rules in which the NCAA prohibits cash payment but allows non-cash education-related benefits.[29] Limited academic awards, the District Court reasoned, would not compromise the amateur nature of Division I sports and would not significantly erode consumer demand.[30] Consistent with its analysis, the District Court enjoined the rules restricting non-cash education-related benefits.[31] Both sides appealed.

The Ninth Circuit affirmed the District Court. It held that the District Court's application of the rule of reason was supported by the record.[32] The District Court correctly applied the rule of reason and struck the right balance between procompetitive and anticompetitive effects in crafting its remedy.[33]

In a unanimous decision by Justice Gorsuch, the Supreme Court affirmed.[34] The NCAA focused its appeal on an argument that the lower courts were wrong to have applied the rule of reason analysis at all—rather, they should have applied a more deferential quick look review.[35] Mainly, the NCAA argued that, being a joint venture

27. *Id.* at 1067.
28. *Id.* at 1102.
29. *Id.* at 1103–07.
30. *Id*.
31. *Id.* 1109–10.
32. In re NCAA Grant-in-Aid Cap Antitrust Litig., 958 F.3d 1239, 1263 (9th Cir. 2020).
33. *Id*.
34. NCAA v. Alston, 141 S. Ct. 2141, 2166 (2021).
35. *Id.*at 2155.

between member schools, it should be allowed to make rules facilitating cooperation between members, especially those rules that reasonably serve to distinguish the NCAA's product of amateur sports from professional sports.[36] Pointing to Supreme Court precedent, the NCAA also argued that the Court in *Board of Regents* expressly endorsed its position.[37]

Justice Gorsuch disagreed with these arguments. Restraints on competition, he wrote, are not exempted from the rule of reason simply because they happen in the context of joint ventures.[38] While courts should give latitude to business arrangements that are vital to a joint venture's functioning, the majority of restraints in a joint venture are still subject to the rule of reason.[39] *Alston* involved a complex question of balancing various pro-competitive and anti-competitive effects—the resolution of such complex questions calls for a fact-intensive analysis more than a "twinkling of the eye."[40] *Board of Regents*, explained Justice Gorsuch, might have suggested that courts should take care when reviewing the NCAA's compensation rules, but the case does not provide blanket cover to *all* NCAA restraints.[41] And in any case, antitrust law is dictated by market realties: if the market has changed since the time of *Board of Regents*, courts today must reassess previous conclusions.[42]

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36. *Id.* Joint ventures involve cooperation between multiple parties in the form of a single business entity. In this case, the NCAA functions as a joint venture between member schools, facilitating sports competitions between school teams. The Supreme Court has previously acknowledged that joint ventures can have pro-competitive effect. *See* Texaco Inc. v. Dagher, 547 U.S. 1, 7–8 (2006) (holding that a joint venture's decision to sell separately branded oil at same price was not a *per se* illegal price fixing agreement).

37. *Alston*, 141 S. Ct. at 2158.

38. *Id.* at 2155.

39. *Id.*

40. *Id.* (quoting NCAA v. Bd. of Regents of Univ. of Okla., 468 U.S. 85, 110 (1984)).

41. *Id.* at 2158.

42. *Id.*

Though Justice Gorsuch held that the NCAA could not resort to quick look review under the facts in *Alston*, he did not rule out that some antitrust defendants could avoid the rule of reason analysis and prevail via quick look review. According to the Court's opinion, quick look can resolve cases that obviously favor either the plaintiff or defendant. First, quick look review is enough to approve a challenged practice when it is "so obviously incapable of harming competition that [it] require[s] little scrutiny." And second, on the opposite end of the spectrum, courts may also strike down a practice that "so obviously threaten[s] to reduce output and raise prices" with only a quick look.[43] As an example, Justice Gorsuch commented that joint ventures might avail themselves of a defensive quick look when their market share is so insignificant that they cannot credibly wield market power.[44]

Justice Kavanaugh joined the Court's opinion *in toto*, but concurred separately to raise doubts about the legality of the NCAA's remaining compensation rules, which restrict non-education-related benefits. The NCAA's argument that its compensation restrictions are pro-competitive turns crucially on the theory that amateurism is essential to college sports and that many consumers prefer amateur sports.[45] But in Justice Kavanaugh's opinion, just as "restaurants . . . cannot come together to cut cooks' wages on the theory that 'customers prefer' to eat food from low-paid cooks," the NCAA cannot escape judicial scrutiny simply by defining its product market as amateur—that is, unpaid—sports.[46] Making no attempt to hide the natural implication of his reasoning, Justice Kavanaugh fired a warning shot at the NCAA, concluding that the NCAA and member colleges' practice of "not paying student athletes a fair share of the revenues" is "highly questionable."[47]

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43. *Id.* at 2155–56.
44. *Id.* at 2156.
45. *See id.* at 2152.
46. *Id.* at 2167 (Kavanaugh, J., concurring).
47. *Id.* at 2168 (Kavanaugh, J., concurring).

Alston is a pivotal victory for student athletes and their supporters. Not only did the Supreme Court unanimously endorse education-related benefits for student athletes, Justice Kavanaugh's concurrence also sends a clear signal that some members of the court would look favorably on a more ambitious challenge of the NCAA's compensation rules. Division I athletes can, perhaps, begin to hope for much better days ahead.[48] But *Alston*'s broader implications for antitrust plaintiffs are not nearly as sunny. The Court's majority opinion signals a potential shift in long established doctrine on quick look review. Prior to *Alston*, quick look review was solely a device that allowed plaintiffs to *challenge* clearly anticompetitive practices without having to go through the full rule of reason analysis.[49] In other words, quick look review was a sword for plaintiffs, not a shield for defendants. But the Supreme Court in *Alston* noted that defendants can also benefit from quick look review when a court deems the challenged practice to be "obviously incapable of harming competition."[50] In so holding, the Court hands antitrust defendants a new argument to use against plaintiffs and enforcing agencies. But the Court's opinion only briefly discussed its innovation, raising—largely without answering—questions as to how quick look review will henceforth be applied.

Prior to *Alston*, quick look review served as a way for courts to strike down practices that, though not *per se* illegal, were very clearly anticompetitive. In *California Dental Association v. FTC*,[51] the Supreme Court introduced quick look review as a truncated version of the rule of reason.[52] According to the Court, quick look applied where a challenged restraint, though not a *per se* condemnable

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48. *See, e.g.*, Sean Gregory, *Why the NCAA Should Be Terrified of Supreme Court Justice Kavanaugh's Concurrence*, TIME (June 21, 2021, 6:24 PM), https://time.com/6074583/ncaa-supreme-court-ruling/ [https://perma.cc/53M9-BN8F].

49. *See infra* text accompanying notes 51-56 (explaining previous doctrine).

50. *Alston*, 141 S. Ct. at 2155 (majority opinion).

51. 526 U.S. 756 (1999).

52. *Id.* at 770–71.

practice, is so suspect that "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets."[53] If a plaintiff demonstrates that a restraint is inherently suspect, courts relax the plaintiff's burden.[54] The plaintiff no longer needs to show economic harm through a detailed economic analysis.[55] The burden shifts to the defendants: defendants may overcome the court's presumption of illegality if they show that there are pro-competitive effects sufficient to redeem the restraint.[56] Quick look review filled a gap between the *per se* rule and the rule of reason: unlike the *per se* rule, quick look review would still be open to the pro-competitive possibility of challenged restraints, but it placed the burden more on the defendant when compared to the rule of reason.

The Supreme Court in *Alston*, however, put a completely new spin on quick look review. Justice Gorsuch—in one brief paragraph and without making mention of *California Dental Association*—created a new variety of quick look review. Whereas in *California Dental Association*, quick look was solely a device that facilitated condemnation of inherently suspect restraints, Justice Gorsuch commented in *Alston* that practices "obviously incapable of harming competition" can also be reviewed under a quick look.[57] In other words, quick look can now function as a vehicle for the facilitated *approval* of challenged practices: if defendants can convince a court that a restraint is "obviously incapable of harming competition," the court would give them a fast track through judicial review.[58]

53. *Id.* at 770.
54. WILLIAM C. HOLMES AND MELISSA MANGIARACINA, ANTITRUST LAW HANDBOOK § 2.10 (2020).
55. *Id.*
56. *Id.*
57. NCAA v. Alston, 141 S. Ct. 2141, 2155 (2021).
58. *Id.*

Interestingly, the NCAA's argument was precisely that its compensation rules should have been deferentially reviewed because they served the clearly procompetitive function of preserving amateur sports.[59] The Supreme Court disagreed on a factual level with the NCAA on the harmfulness of its compensation rules, but the NCAA seems to have won the legal argument that defendants can use quick look review to their advantage.

Justice Gorsuch's expansion of the quick look doctrine, though, was largely an unneeded innovation. Recall that under the rule of reason, the plaintiffs bear the initial burden of showing anti-competitive effect.[60] Empirical studies show that this is not an easy burden to bear—in up to 97% of claims to which the rule of reason is applied, courts dispose of cases at this first stage.[61] In effect, the rule of reason is already a defendant-friendly test, one that can be counted on to weed out meritless claims. The new quick look review, if taken up by lower courts, would tilt the playing field further towards defendants, providing nearly presumptive legality to certain classes of business practices. Where judges deem a challenged practice to be "obviously harmless," they might even dispose of the case at the motion to dismiss stage,[62] melding Justice Gorsuch's new quick look with *Bell Atlantic Corporation v. Twombly*'s[63] higher pleading standards.[64] But tilting the field in such a way, to the extent that it reduces opportunity for case-by-case economic analysis, would come at the cost of accuracy. Indeed, the trend of the past decades has been one of retreating from bright-

59. *See* Reply Brief for Petitioner at 7, NCAA v. Alston, 141 S. Ct. 2141 (2021) (No. 20-512).

60. *See supra* text accompanying note 27.

61. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828, 837 (2009).

62. Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIAMI BUS. L. REV. 39, 65–66 (2017).

63. 550 U.S. 544 (2007)

64. *See id.* at 555–56 (requiring plaintiff to raise factual allegations—as opposed to conclusory legal claims—that "raise a right to relief above the speculative level").

line rules, which declared broad categories of conduct *per se* unreasonable, towards a more flexible rule of reason that accommodated for possible case-specific pro-competitive effects. The same principle would suggest caution when shielding categories of conduct under a cover of *per se* reasonableness.

In addition, *Alston* has provided only the vague contours of the new defensive quick look, giving lower courts the work of filling in the blanks. Chief among the uncertainties are the types of business practices that count as being "obviously incapable of harming competition." The Court's opinion provides only a vague explanation, suggesting that defendants with very small market share would be able to benefit from quick look review, as small size implies commensurably small market power.[65] Additionally, quick look may be applied to agreements in joint ventures, such as rules "necessary to produce a game" in the case of the NCAA and other sports leagues.[66] This guidance, however, is not necessarily easy to apply. Whether a joint venture's internal restraint is "necessary," for instance, is likely to be a contested issue, as it was in *Alston*.[67]

It is easy to think of *Alston* as a Supreme Court case that signals a tougher approach to antitrust. But read more closely, *Alston* is a box of assorted chocolates with both bitters and sweets. For sports law, the case portends a more aggressive judicial review. The NCAA should be particularly worried about its remaining compensation restrictions, including notably its rule against cash payments. And the general counsels of professional sports leagues, which have also been the beneficiary of judge-made antitrust carveouts, may be well advised to flag this case. But the broader implications for antitrust law are mixed. While the Court did not accept the NCAA's argument that the Association's compensation restrictions should be exempt from the rule of reason, it indicated—

65. *See* NCAA v. Alston, 141 S. Ct. 2141, 2156 (2021).
66. *Id.* at 2157 (quoting Chicago Pro. Sport Ltd. P'ship v. NBA, 95 F.3d 593, 600 (7th Cir. 1996)).
67. *Id.* at 2155–56.

against the grain of precedent—that challenged practices can sometimes be upheld with a mere quick look. In effect, the Court seems to have ruled against the NCAA on the facts of the case all while giving a subtle nod to its legal theory.