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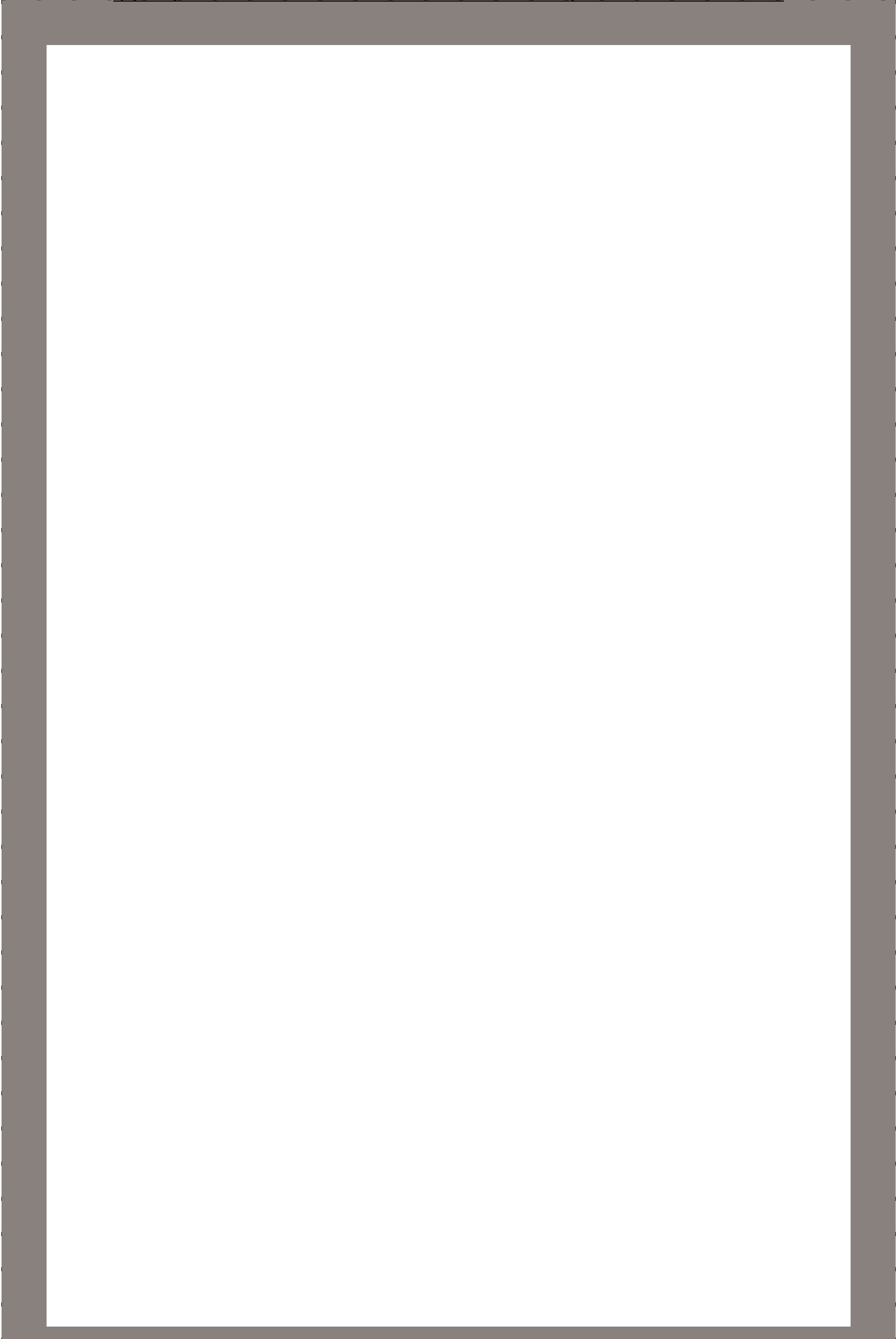

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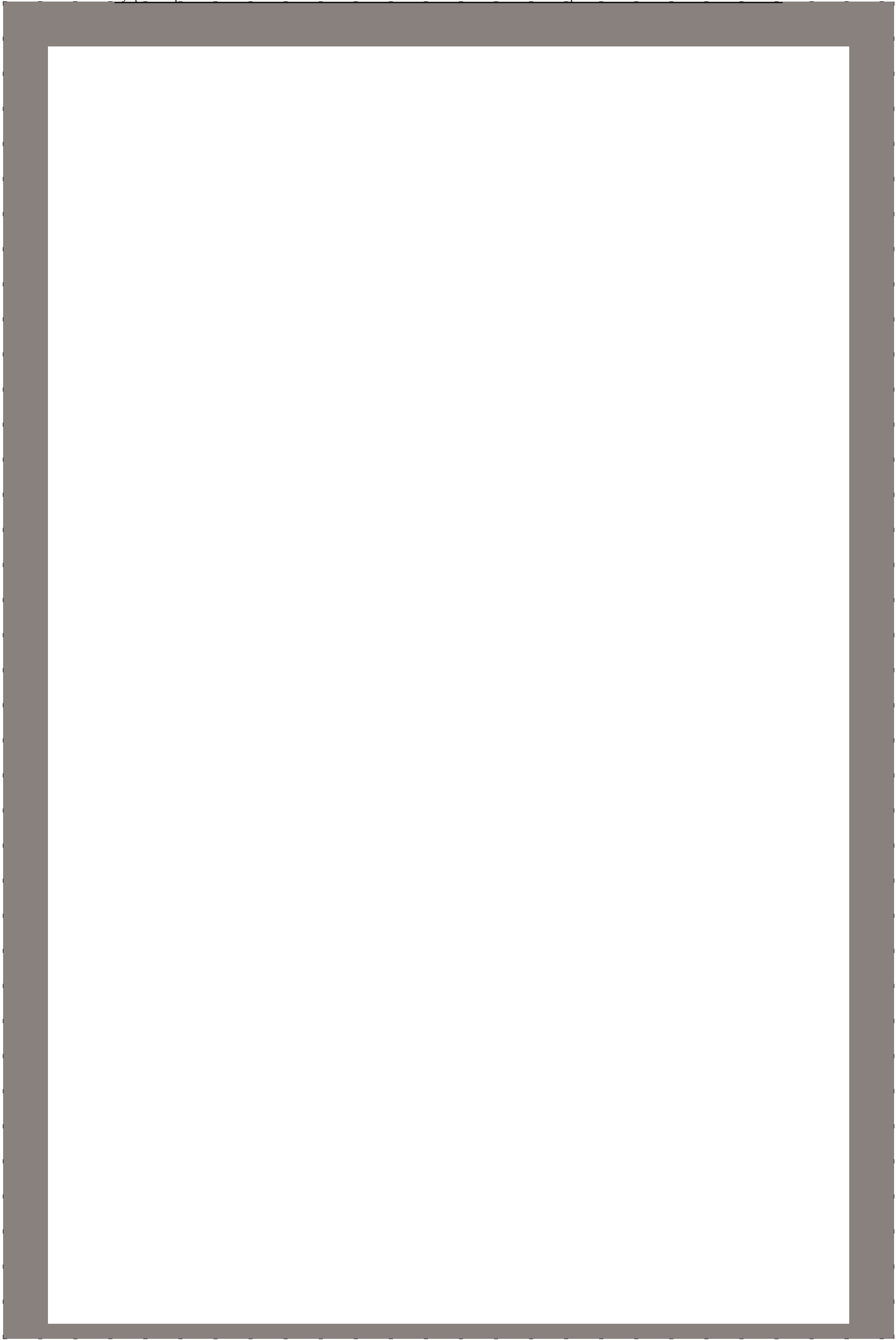

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Beyond the Marketplace of Ideas: Bridging Theory and Doctrine to Promote Self-Governance

*David S. Ardia**

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Introduction

Social scientists who study the impact of the Internet, social media, and other forms of digital information sharing on our public sphere paint a disturbing picture of the health of American democracy. Our current media ecosystem produces too little high-quality information;[1] we tend to be attracted to information that confirms our existing biases about the world and

* Reef C. Ivey II Excellence Fund Term Professor of Law, University of North Carolina School of Law, and Faculty Co-Director, UNC Center for Media Law and Policy. Thanks to Bill Marshall, Mary-Rose Papandrea, and participants at the First Amendment Law Review's 2019 symposium on "The First Amendment and an Informed Society" for helpful comments and discussion. Thank you also to Allysan Scatterday, Maureen Gleason, and Alexandra Hernandez for invaluable research assistance.

[1] *See* David S. Ardia, Evan Ringel, Victoria Smith Ekstrand & Ashley Fox, *Addressing the Decline of Local News, Rise of Platforms, and Spread of Mis- and Disinformation Online: A Summary of Current Research and Policy Proposals*, U. of N.C. Ctr. for Media L. & Pol'y 1, 9–21 (2020); Penelope Muse Abernathy, *News Deserts and Ghost Newspapers: Will Local News Survive?*, U. of N.C. Sch. of Media & Journalism Ctr. for Innovation & Sustainability in Loc. Media (2020); Pen America, *The Decimation of Local Journalism and the Search for Solutions* (Nov. 20, 2019), https://pen.org/wp-content/uploads/2019/11/Losing-the-News-The-Decimation-of-Local-Journalism-and-the-Search-for-Solutions-Report.pdf [https://perma.cc/V2DS-YRDU].

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to share this information with little regard for its veracity;[2] and there are an increasing number of actors who seek to leverage these vulnerabilities to distort public discourse and undermine democratic decision-making.[3]

These observations force us to confront a question that has vexed First Amendment scholars for decades: Is the Constitution indifferent to whether Americans are informed about their government and the world? I believe the answer to this question is a resounding no; the Constitution, and the system of government it establishes, is predicated on an informed electorate. Without an informed electorate, sovereignty cannot reside in the people.[4] As James Madison famously said, "[a] popular government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both."[5]

But what does it mean to say that our constitutional system is predicated on an informed electorate? Does the Constitution therefore place affirmative obligations on the government to pass laws, develop policies, and act in ways that support an informed citizenry? Surprisingly, these questions have received minimal scrutiny by jurists. One reason is that judges in First Amendment cases largely eschew any deep analysis of whether their decisions advance specific constitutional values, relying instead on general ap-

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[2] *See* Brian Southwell, *Why We Lie to Ourselves and Others About Misinformation*, MEDIUM (Mar. 28, 2018) (finding that false information tends to be shared more readily than accurate information), https://medium.com/trust-media-and-democracy/why-we-lie-to-ourselves-and-others-about-misinformation-770165692747 [https://perma.cc/FH9Z-HTQ6]; Alice E. Marwick, *Why Do People Share Fake News? A Sociotechnical Model of Media Effects*, 2 GEO. L. TECH. REV. 474, 508 (2018) (explaining that fact-checking statements may actually cause a reader to "double down" on pre-existing beliefs); Axel Westerwick, Benjamin K. Johnson, & Silvia Knobloch-Westerwick, *Confirmation Biases in Selective Exposure to Political Online Information: Source Bias vs. Content Bias*, 84 COMMC'N MONOGRAPHS 343, 343 (2017) (observing that "individuals select messages more frequently or spend disproportionately more time with messages that align with preexisting opinions over information that challenges preexisting views").

[3] *See* Alice Marwick & Rebecca Lewis, *Media Manipulation and Disinformation Online*, DATA & SOC'Y RSCH. INST. 1, 34–39 (2017) (discussing various techniques used to exploit information vulnerabilities of the public); Lee Rainie, Janna Anderson & Jonathan Albright, *The Future of Free Speech, Trolls, Anonymity, and Fake News Online*, PEW RSCH. CTR. 1, 13 (Mar. 29, 2017) (describing weaponization of social media during the 2016 election); Renee DiResta, Kris Shaffer, Becky Ruppel, David Sullivan & Robert Matney, *The Tactics & Tropes of the Internet Research Agency*, NEW KNOWLEDGE 1, 99 (Dec. 17, 2018) (reporting on how Russia's Internet Research Agency "exploited social unrest and human cognitive biases" in the 2016 election).

[4] The idea that sovereignty resides in the people derives support from a number of sources. *See, e.g.*, U.S. CONST. pmbl. ("We the People of the United States . . . do ordain and establish this Constitution for the United States of America."); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT 54–55 (1689) (T. Peardon ed. 1952) (writing that the state may exercise authority over the individual only with his or her consent and thus all power to make laws resides in the citizenry and it is only through the delegation of that authority that the state may act); John Stuart Mill, Considerations on Representative Government 6–9 (1861) (C. Shields ed. 1958) (concluding that government may govern only with the acceptance of its citizens).

[5] Letter from J. Madison to W.T. Barry (Aug. 4, 1822), reprinted in 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910). Madison went on to warn that "[k]nowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives." *Id.*

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peals to the "marketplace of ideas" and concluding that "more speech" is the answer to nearly all First Amendment problems.[6]

While it may be true that more speech is the best solution in many instances the exclusive focus on more speech confuses the means with the ends. What is it that we are hoping to achieve with more speech? Judges—and many scholars—typically point to the "search for truth" as the ultimate objective,[7] echoing Justice Oliver Wendell Holmes' dissent in *Abrams v. United States* that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."[8] Driven in large part by laissez-faire economic principles, proponents of what is known as the "marketplace of ideas theory" argue that competition in the "marketplace for speech" will inexorably produce truth and that government should have little, if any, role in supporting or influencing public discourse.[9]

I push back strongly against this view, noting that the marketplace for speech is riddled with systemic failures.[10] Due to a host of cognitive and behavioral factors, the assertion that speech occurs within a self-regulating market that needs only the presence of more speech to produce "truth" has not held up to empirical scrutiny.[11] Moreover, the First Amendment is con-

[6] *See, e.g.*, Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) ("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."); McConnell v. FEC, 540 U.S. 93, 258–59 (2003) (Scalia, J., concurring in part and dissenting in part) (invalidating portions of the Bipartisan Campaign Reform Act of 2002 and remarking that "[g]iven the premises of democracy, there is no such thing as too much speech").

[7] *See, e.g.,* LEE C. BOLLINGER, THE TOLERANT SOCIETY 45 (1986) ("The end result of this process [of open discussion], we hope, is that we will arrive at as close to an approximation of the truth as we can."); Eugene Volokh, *In Defense Of The Marketplace Of Ideas / Search For Truth As A Theory Of Free Speech Protection*, 97 VA. L. REV. 595, 600–01 (2011) (arguing that two primary rights derived from the right to free speech are "the right to uncover the truth for oneself" and "to participate in the continuing development of human knowledge"); Brian C. Murchison, *Speech and the Truth-Seeking Value*, 39 COLUM J.L. & ARTS 55, 112 (2015) ("[T]he truth-seeking value lies behind cautious exploration of the past; it fuels resistance to silencing forces in the present; and it prompts the creation of legal rules to ensure a steady flow of accurate information in the future."); Frederick Schauer, *Free Speech, the Search for Truth, and the Problem of Collective Knowledge*, 70 SMU L. REV. 231, 231 (2017) (noting that the "basic concept of freedom of speech as enabling a society to increase its level of knowledge, to facilitate its identification of truth, and to expose error has a wide and persistent currency").

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

[9] *See infra* Part I.C.

[10] *See infra* Part III.A.

[11] *See, e.g.,* Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 N.Y.U. L. REV. 1160, 1163 (2015) (noting that "a considerable amount of existing empirical research . . . justif[ies] skepticism about the causal efficacy of establishing an open marketplace of ideas in identifying true propositions and rejecting false ones"); Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal,* 2010 U. ILL. L. REV. 799, 802 ("Empirical work in the fields of cognitive psychology and behavioral economics suggests that both the rational audience and the more-is-better assumptions may be demonstrably false in some commonplace settings."); Derek E. Bambauer, *Shopping Badly: Cognitive Biases, Communications, and the Fallacy of the Marketplace of Ideas,* 77 U. COLO. L. REV. 649, 696 (2006) ("The fact that cognitive biases interfere with our ability to make good decisions has serious conse-

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cerned with far more than preserving free competition within a metaphorical speech marketplace. The First Amendment plays a vital role in the American constitutional system, facilitating self-governance by ensuring that citizens are capable of participating in the deliberative processes that are essential to a representative democracy.

This article proceeds in three parts. Part I examines the longstanding debate over the First Amendment's purpose and explains why the marketplace of ideas theory has come to dominate both judicial and public understanding of the First Amendment's speech and press clauses.[12] The marketplace theory's ascendency, however, has proven to be problematic. It rests on an overly simplified account of public discourse, treating speech as merely a commodity that can be allocated through market-style transactions, and it has come to embody an extreme version of libertarian economic thinking that is undermining the very democratic processes the First Amendment was intended to serve and strengthen.

Part II looks beyond the superficial appeal of the marketplace theory to highlight the structural role the First Amendment plays in the American constitutional system. Building on the work of Charles Black, John Hart Ely, Alexander Meiklejohn, and Robert Post,[13] I maintain that whatever else the First Amendment was meant to achieve, a core function of its speech, press, assembly, and petitioning clauses was to ensure that citizens could effectively exercise their right of self-governance. As an increasing number of First Amendment scholars are beginning to recognize, unbridled faith in a supposedly self-correcting speech marketplace is a dangerous foundation for a democracy.

Part III considers how the First Amendment can foster self-governance. It lays out three principles that should guide the development of legal doctrines that support an informed and empowered electorate. First, we need to move beyond the idea that the First Amendment's only function is to enshrine free market ideology. Second, the First Amendment does not bar the government from addressing market failures in the actual markets in which communication takes place, especially when those failures undermine the public's capacity for self-governance. Third, the capacity for self-governance turns, at least in part, on whether the public has the information it needs to effectively evaluate issues of public policy.

Building on this last point, Part III proposes several ways to bridge theory and doctrine to promote self-governance, including using antitrust

quences for the marketplace of ideas model for regulating communications."). For a discussion of the cognitive and behavioral factors that impede the search for truth, *see infra* notes 90–95 and accompanying text.

[12] Although the First Amendment contains six clauses that prohibit the government from creating laws that establish a national religion, impede the free exercise of religion, abridge the freedom of speech, infringe upon the freedom of the press, interfere with the right to peaceably assemble, and prohibit citizens from petitioning for governmental redress of grievances, *see* U.S. CONST. amend. I, my focus here is primarily on the First Amendment's protections for speech and the press.

[13] *See infra* notes 109–137 and accompanying text.

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law to address concentrated economic power in communication markets, expanding and enforcing privacy and consumer protection laws to create more competition among speech platforms, and initiating programs that support journalism and other knowledge institutions within society. It also argues that as an influential participant in public discourse, the government should have an obligation to wield its influence in ways that support self-governance, not undermine it by misleading its citizens or starving them of the information they need. Part III therefore proposes two new rights that should be recognized under the First Amendment: a right not to be lied to by the government when it undermines the public's capacity for self-governance and a right to information in the government's possession that can assist the public in its efforts to understand and evaluate issues of public policy.

I. Competing Theories of the First Amendment

Scholars and historians have long debated why the Constitution proscribes that "Congress shall make no law . . . abridging the freedom of speech, or of the press."[14] The text of the First Amendment is silent about its purpose and the historical record is largely mute about the meaning of its clauses.[15] This has spawned what might be described as a cottage industry among First Amendment scholars to identify every possible justification for protecting speech and to articulate, so far without success, a single unifying theory of the First Amendment.[16]

Part of the reason scholars continue to disagree over the First Amendment's purpose is that the values advanced by expressive freedoms are contested.[17] As Thomas Emerson lamented in 1963, "[d]espite the mounting number of [First Amendment] decisions and an even greater volume of comment, no really adequate or comprehensive theory of the first amendment has been enunciated, much less agreed upon."[18] For Emerson, the failure to develop a satisfactory theory "is hardly surprising," given that the

[14] U.S. Const. amend. I.

[15] *See* 5 Ronald D. Rotunda & John E. Nowak, Treatise on Constitutional Law-Substance & Procedure § 20.5(a) (5th ed. 2012) ("There is little that anyone can draw from the debates within the House concerning the meaning of the First Amendment. In addition, there is the absence of useful records of debates in the Senate—or the states—on its ratification." (footnotes omitted)); Ashutosh Bhagwat, *The Democratic First Amendment*, 110 Nw. U. L. Rev. 1097, 1101 (2016) ("[T]he Free Speech Clause has the most shallow and obscure history of any provision of the First Amendment.").

[16] *See* Thomas I. Emerson, *Toward A General Theory of the First Amendment*, 72 Yale L.J. 877, 877 (1963) [hereinafter Emerson, *General Theory of the First Amendment*] (observing that "no really adequate or comprehensive theory of the first amendment has been enunciated, much less agreed upon"); David S. Han, *The Value of First Amendment Theory*, 2015 U. Ill. L. Rev. Slip Ops. 87, 87 (noting that "First Amendment scholars have long struggled to articulate a grand unified theory underlying the protection of free speech").

[17] *See* David S. Ardia, *Court Transparency and the First Amendment*, 38 Cardozo L. Rev. 835, 880 (2017).

[18] Emerson, *supra* note 16, at 877.

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"issues are controversial and the problems complex."[19] In a body of work that continues to influence scholars today, Emerson set out to bring some clarity to the job, remarking that the "first task" is to examine the various elements that are necessary to support an effective system of free expression "in a modern democratic society."[20]

A. The Debate Over the First Amendment's Purpose

The effort to identify a justificatory theory for the First Amendment is largely driven by the desire for determinacy in First Amendment cases and consistency in First Amendment doctrine.[21] In the words of David Han, "First Amendment theory provides tangible 'cash value' insofar as it gives courts concrete predictive or prescriptive guidance in deciding individual cases."[22] The goal of ascertaining a single, universally applicable theory holds particular allure to scholars because it would offer "a set of consistent normative principles that would explain and justify First Amendment doctrine."[23]

Although a unified theory of the First Amendment has so far proven to be elusive,[24] scholars have largely coalesced around four theories explaining the First Amendment's protections for speech.[25] The first and most widely recognized justification for protecting speech is the advancement of knowl-

[19] *Id.*

[20] *Id.* at 878. Emerson identified three elements that he felt should be analyzed: "(I) what it is that the first amendment attempts to maintain: the function of freedom of expression in a democratic society; (II) what the practical difficulties are in maintaining such a system: the dynamic forces at work in any governmental attempt to restrict or regulate expression; and (III) the role of law and legal institutions in developing and supporting freedom of expression." *Id.*

[21] *See* Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 U.C.L.A. L. REV. 1405, 1417 (1987) (writing that the "principal goal" of First Amendment theorists is to "replace uncertainty with certainty," which would involve giving "clear guidelines for decisionmakers" and "clear rules for decision"); Lawrence B. Solum, *The Value of Dissent*, 85 CORNELL L. REV. 859, 859 (2000) ("One ambition of [First Amendment] theorizing is the production of a comprehensive theory of the freedom of expression, a set of consistent normative principles that would explain and justify First Amendment doctrine."); Alexander Tsesis, *Free Speech Constitutionalism*, 2015 U. ILL. L. REV. 1015, 1019 (2015) (stating that a "unified theory of representative democracy can provide aspirational guidance and predictive consistency, which legislators can then translate into policy and judges can interpret into doctrine").

[22] Han, *supra* note 16, at 89.

[23] Solum, *supra* note 21, at 859.

[24] *See, e.g.*, Daniel A. Farber & Philip P. Frickey, *Practical Reason and the First Amendment*, 34 UCLA L. REV. 1615, 1626 (1987) (surveying attempts to formulate a "grand theory" of the First Amendment and concluding that "[n]one of them . . . is acceptable as a general theory of the first amendment"); Solum, *supra* note 21, at 859 (observing that "despite an outpouring of scholarly effort" to identify a comprehensive theory of freedom of expression, "the consensus is that free speech theory has failed to realize this imperial ambition").

[25] *See* Ardia, *supra* note 17, at 882; Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. REV. 1, 32 (2012); Tsesis, *supra* note 21, at 1016. Because the Supreme Court has largely eschewed giving the First Amendment's Free Press Clause independent meaning, *see* David A. Anderson, *Freedom of the Press*, 80 TEX. L. REV. 429, 430 (2002) ("[A]s a matter of positive law, the Press Clause actually plays a rather minor role in protecting the freedom of the press."), I focus primarily on the theoretical justifications for the Free Speech Clause.

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edge or truth,[26] which has come to be encapsulated by the metaphor of a "marketplace of ideas."[27] A second theory asserts that the First Amendment's purpose is to facilitate the democratic processes necessary for self-governance.[28] A third theory posits that speech should be protected because it advances individual autonomy and self-fulfillment.[29] A fourth theory justifies protection for speech on the ground that it is necessary to serve as a check on government.[30] Other theories have also been proposed, including promoting tolerance and acting as a "safety valve" to let off societal tensions,[31] and some scholars argue that the First Amendment should be understood as encompassing an eclectic set of overlapping and sometimes conflicting rationales.[32]

The Supreme Court, for its part, has never expressly adopted one theory over the others and there are echoes of most of them in the Court's First

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[26] *See, e.g.*, Davis v. FEC, 554 U.S. 724, 755–56 (2008) (Stevens, J., concurring in part and dissenting in part) ("[I]t is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969))).

[27] *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (remarking that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"). Holmes did not actually use the phrase "marketplace of ideas" in his dissent in *Abrams*, but he is typically credited with having injected the idea into First Amendment jurisprudence. *See infra*, Part I.B.

[28] *See, e.g.*, Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 24–28 (1979); Cass R. Sunstein, Democracy and the Problem of Free Speech 121–65 (1993) (contending that free speech is a "precondition" for democracy); Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 Ind. L.J. 1, 20–21 (1971) (arguing that freedom of speech is necessary for "democratic organization"); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 Calif. L. Rev. 2353, 2362 (2000) ("The democratic theory of the First Amendment. . . protects speech insofar as it is required by the practice of self-government."); James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 Va. L. Rev. 491, 497 (2011) ("[T]he value that best explains the pattern of free speech decisions is a commitment to democratic self-governance.").

[29] *See, e.g.*, C. Edwin Baker, Human Liberty and Freedom of Speech 47–69 (1989) (arguing that speech is protected because it promotes both the speaker's "self-fulfillment" and "participation in change"); Emerson, *General Theory of the First Amendment, supra* note 16, at 879 (describing freedom of expression's role in "[t]he achievement of self-realization"). Although the protection of autonomy interests has influenced First Amendment doctrine, *see, e.g.*, Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, 482 U.S. 569 (1987); Stanley v. Georgia, 394 U.S. 557 (1969), most constitutional scholars do not see it as a primary justification for the First Amendment's speech protections. *See* Robert C. Post, Democracy, Expertise, Academic Freedom: A First Amendment Jurisprudence for the Modern State xi (2012) ("[T]he fundamental constitutional commitments of the nation, as reflected in the actual scope of First Amendment coverage, do not suggest that the protection of autonomy can be deemed a basic purpose of the judicially enforced First Amendment."); Weinstein, *supra* note 28, at 503 ("Although autonomy is not a core free speech value, this does not mean that it has no role to play in current doctrine.").

[30] *See, e.g.*, Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 Am Bar Found. Res. J. 521, 527 (1977).

[31] *See, e.g.*, Geoffrey R. Stone, Louis M. Seidman, Cass R. Sunstein & Mark V. Tushnet, The First Amendment 15–16 (2d ed. 2003).

[32] *See, e.g.*, Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 Nw. U. L. Rev. 1212, 1251–52 (1983); Ronald A. Cass, *The Perils of Positive Thinking: Constitutional Interpretation and Negative First Amendment Theory*, 34 U.C.L.A. L. Rev. 1405, 1422 (1987); Han, *supra* note 16, at 87.

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Amendment jurisprudence, with the justices drawing on different justifications for protecting speech depending on the nature of the First Amendment conflict at issue.[33]

B. The Rise of the "Marketplace of Ideas" Theory

Although the Supreme Court has not adopted a unitary theory of the First Amendment, no theory dominates both judicial and public understanding of the First Amendment in the same way as the "marketplace of ideas."[34] Typically mentioned in combination with the search for truth,[35] the desire to sustain a marketplace of ideas has been invoked dozens of times by the Supreme Court in cases involving a wide variety of issues ranging from trademark law to government subsidies for the arts.[36] At bottom, the marketplace

[33] *See, e.g.*, Post, *supra* note 28, at 2372 ("First Amendment jurisprudence contains several operational and legitimate theories of freedom of speech, so that it is quite implausible to aspire to clarify First Amendment doctrine by abandoning all but one of these theories."); Tsesis, *supra* note 21, at 1017 ("The Supreme Court has been inconsistent in its application [of free speech theory], and, indeed, has never definitively adopted one over the others.").

[34] *See* Thomas Healy, The Great Dissent: How Oliver Wendell Holmes Changed His Mind—And Changed the History of Free Speech in America 7 (2013) ("[I]t is no exaggeration to say that Holmes's [allusion to a free trade in ideas] gave birth to the modern era of the First Amendment, in which freedom to express oneself is our preeminent constitutional value."); Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821, 823–24 (2008) ("Justice Holmes—joined by Justice Brandeis—conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech."); William P. Marshall, *In Defense of the Search for Truth as a First Amendment Justification*, 30 Ga. L. Rev. 1, 1 (1995) ("In Speech Clause jurisprudence, . . . the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.").

[35] For readability, I will refer to both the search for truth and marketplace of ideas justifications for protecting speech as the "marketplace of ideas" theory or simply "marketplace" theory.

[36] *See, e.g.,* Matal v. Tam, 137 S. Ct. 1744, 1762 (2017) (trademark law); Reed v. Town of Gilbert, 135 S. Ct. 2218, 2237 (2015) (Kagan, J., concurring) (town ordinances restricting temporary signs); United States v. Alvarez, 567 U.S. 709, 727–28 (2012); Davenport v. Wash. Educ. Ass'n, 551 U.S. 177, 188 (2007) (expenditure of non-member union fees); Randall v. Sorrell, 548 U.S. 230, 280 (2006) (Stevens, J., dissenting) (expenditure limits for political candidates); McCreary County v. American Civil Liberties Union, 545 U.S. 844, 883 (2005) (O'Connor, J., concurring) (religious display of the Ten Commandments); Virginia v. Hicks, 539 U.S. 113, 119 (2003) (distribution of leaflets in public housing developments); Nat'l Endowment for the Arts v. Finley, 524 U.S. 569, 587 (1998) (process for awarding artistic grants); Reno v. Am. C.L. Union, 521 U.S. 844, 885 (1997) (speech on the internet); 44 Liquormart v. Rhode Island, 517 U.S. 484, 496 (1996) (alcohol advertisements); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988) (parodies of public figures); Bd. of Educ. v. Pico, 457 U.S. 853, 866-67 (1982) (book selection by public school libraries); Widmar v. Vincent, 454 U.S. 263, 267 n.5 (1981) (use of public university buildings by student religious organizations); Citizens Against Rent Control v. City of Berkeley, 454 U.S. 290, 295 (1981) (contribution limits to committees supporting or opposing ballot measures); Consol. Edison Co. v. Pub. Serv. Comm'n, 447 U.S. 530, 537–38 (1980) (informational inserts in utility bills); FCC v. Pacifica Found., 438 U.S. 726, 745–46 (1978) (regulation of radio broadcasts); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 760 (1976) (prescription drug advertisement); Bigelow v. Virginia, 421 U.S. 809, 826 (1975) (editorial control over newspaper advertisements); Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241, 248 (1974) (editorial

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of ideas theory embodies the proposition 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,"[37] and that truth should be determined through "uninhibited, robust, and wide-open" public debate.[38]

While the marketplace of ideas theory holds outsize influence on popular understanding of the First Amendment, it is a relatively recent addition to American free speech jurisprudence.[39] In fact, prior to the twentieth century, the Supreme Court had little cause to even consider the theoretical justifications for the First Amendment's protections for speech. This changed in 1918, when the Court took up a series of cases brought by individuals who had been convicted under the Espionage Act of 1917 for speech that opposed U.S. involvement in World War I.[40] In three unanimous opinions authored by Justice Oliver Wendell Holmes, the Court held that it is within Congress's power to criminalize seditious speech, adopting the view that the First Amendment does not prohibit the government from punishing speakers when their speech presents a clear and present danger to the nation.[41]

A mere eight months after this first set of cases was decided, however, Holmes dissented in a fourth anti-war case, *Abrams v. United States*, in which a 7-2 majority on the Court upheld the conviction of several individuals for the distribution of leaflets advocating resistance to the war effort.[42] Joined by Justice Louis Brandeis, Holmes wrote what many consider to be

control over op-ed columns); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) (editorial control over discussion of public issues on TV and radio broadcasts); Time, Inc. v. Hill, 385 U.S. 374, 406–07 (1967) (Harlan, J., concurring in part and dissenting in part) (false light claim).

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

[38] *Sullivan*, 376 U.S. at 270.

[39] Although Justice Holmes is typically credited with coining the phrase in 1919 in his dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), the first reference to a "marketplace of ideas" in a Supreme Court opinion was in Justice Brennan's majority opinion in *Lamont v Postmaster General*, 381 U.S. 301, 308 (1965), forty-six years after *Abrams*. The first articulation of the importance of fostering competition among ideas, however, has been attributed to the poet John Milton, who criticized the English system of licensing in Areopagitica in 1644 and wrote:

> And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously, by licensing and prohibiting, to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter?

John Milton, Areopagitica 35 (Jim Miller & Dover Thrift eds. 2016) (1644).

[40] *See* Schenck v. United States, 249 U.S. 47 (1919); Frohwerk v. United States, 249 U.S. 204 (1919); Debs v. United States, 249 U.S. 211 (1919); Abrams v. United States, 250 U.S. 616 (1919).

[41] *See Schenck*, 249 U.S. at 52; *Frohwerk*, 249 U.S. at 208–09; *Debs*, 249 U.S. 211. Summarizing the Court's approach in these cases, Holmes wrote in *Schenck v. United States*: "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." 249 U.S. at 52.

[42] 250 U.S. 616 (1919).

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the most important dissent in American constitutional history.[43] While Holmes's central disagreement with the majority involved their loose application of the clear and present danger test—Holmes thought Abrams's actions presented no immediate danger, dismissing the leaflets as the "silly" actions of an "unknown man"[44]—his dissent in *Abrams* is remembered and celebrated for its allusion to what has since become known as the marketplace of ideas rationale for protecting speech.[45]

Holmes, who had previously shown little desire to use the First Amendment to limit government power, prefaced his invocation of the need for the "free trade in ideas" with language that seemed to support the government's suppression of speech:

> 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.[46]

Whereas Holmes regarded the government's effort to suppress dissident speech as "perfectly logical," his service in the Civil War and experience watching American society split apart over World War I, had shown him the danger of attempting to sweep away all opposing viewpoints:

> [W]hen 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.[47]

As Holmes historian and law professor Thomas Healy observes, "Holmes's dissent in *Abrams* marked not just a personal transformation but the start of a national transformation as well."[48] Healy notes that Holmes's reference to a free trade in ideas became not only a "cultural catchphrase" but also an influential intellectual seed in the Supreme Court's expanding First

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[43] HEALY, *supra* note 34, at 7; Blocher, *supra* note 34, at 823–24 ("In a single passage of his dissenting opinion in *Abrams v. United States*, Justice Holmes—joined by Justice Brandeis—conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech.").

[44] *Abrams*, 250 U.S. at 628 (Holmes, J. dissenting).

[45] Holmes never actually used the phrase "marketplace of ideas" in his dissent in *Abrams*. *See supra* note 39. As Vincent Blasi explains, "[t]hat is a paraphrase supplied by his interpreters." Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 24 (2004).

[46] *Abrams*, 250 U.S. at 630 (Holmes, J. dissenting).

[47] *Id.*

[48] HEALY, *supra* note 34, at 7.

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Amendment jurisprudence.[49] As other scholars have similarly concluded, Healy writes that "it is no exaggeration to say that Holmes's dissent [in *Abrams*] gave birth to the modern era of the First Amendment nor can it be disputed that, nearly a century later, his dissent continues to influence our thinking about free speech more than any other single document."[50]

C. Criticisms of the Marketplace of Ideas Theory

The idea that the ultimate good for society is best reached by the free trade in ideas rests on certain assumptions about how public discourse actually takes place and the capacity of individuals to engage with ideas in the "competition of the market." Many scholars have questioned these assumptions, pointing to obvious market failures and to contradictions within the theory itself. Criticism of the marketplace of ideas as a justification for the protection for speech generally falls into two categories. The first challenges the very notion that a "marketplace" is a valid construct for understanding public discourse. A second vein of criticism accepts some aspects of market ideology, but argues that the marketplace for speech, as currently constituted, simply is not working.

Critics who challenge the notion that a "marketplace" is a valid construct for understanding public discourse point out that modern communication practices bear little resemblance to the economist's model of an idealized market where ideas compete with each other through barter-style transactions.[51] For neoclassical economists, a market is a mechanism that reflects, in terms of prices and quantities, aggregated individual preferences.[52]

[49] *Id.*

[50] Healy, *supra* note 34, at 7; *see also* Blocher, *supra* note 34, at 823–24 ("Justice Holmes—joined by Justice Brandeis—conceptualized the purpose of free speech so powerfully that he revolutionized not just First Amendment doctrine, but popular and academic understandings of free speech."); Marshall, *supra* note 34, at 1 ("In Speech Clause jurisprudence, . . . the oft-repeated metaphor that the First Amendment fosters a marketplace of ideas that allows truth to ultimately prevail over falsity has been virtually canonized.").

[51] *See, e.g.,* Post, *supra* note 29, at xi ("The very concept of a marketplace of ideas has long been subject to devastating objections based upon its various imperfections, inefficiencies, and internal contradictions."); Blocher, *supra* note 34, at 831 (noting that "the marketplace of ideas metaphor also has explanatory weaknesses and normative difficulties, almost all of which track the shortcomings of its idealized view of an uninhibited, costless, and perfectly efficient free market"); Darren Bush, *The "Marketplace of Ideas": Is Judge Posner Chasing Don Quixote's Windmills?*, 32 Ariz. St. L.J. 1107, 1110 (2000) (describing the "(in)appropriateness of the economic interpretation of Holmes' metaphor as a tool for legal analysis"); David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 Colum. L. Rev. 334, 348–50 (1991) ("No matter how we define the ground rules, there is no theory that explains why competition in the realm of ideas will systematically produce good or truthful or otherwise desirable outcomes."); Edwin Baker, *First Amendment Limits on Copyright*, 55 Vand. L. Rev. 891, 897 (2002) ("[The] marketplace of ideas theory is fundamentally unsound both normatively and descriptively.").

[52] Summarizing several basic economics textbooks, John Mixon writes that the fundamental assumptions of neoclassical economics are that: "(1) resources are scarce; (2) people are rational; (3) people pursue their own goals and welfare; (4) people have perfect information, or at least enough to make a rational decision; (5) market participants make voluntary exchanges they deem beneficial; (6) in a competitive market, supply and demand reliably set correct

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In other words, competition among ideas boils down to the application of basic supply and demand principles: how much are people willing to "pay" for "truth"? Stated in this way, it becomes clear that a marketplace is a poor analogy for describing what actually takes place when people speak. As Paul Brietzke notes, "[s]ociety is not a debating club like the Oxford Union, not a 'town meeting or . . . a group of scientists interested in figuring out some truth.'"[53] Ideas, both true and false, are not a scarce resource subject to supply and demand equilibrium. In fact, ideas are non-excludable and non-rivalrous.[54] "Even if we consume more than we can use, we cannot prevent anyone else from doing the same—ideas are free as the air."[55]

Others who challenge the conceptual validity of the marketplace of ideas metaphor question whether "truth" even exists in a heterogeneous society. These critics assert that truth is "a constitutively social category" that depends on how "a private sensory experience is transformed into a publicly witnessed and agreed fact of nature."[56] Truth cannot be objective because "knowledge depends on how people's interests, needs, and experiences lead them to slice and categorize an expanding mass of sense data."[57]

As Frederick Schauer observes, the notion that truth should be defined as any idea that can survive in the competition of the market "is implausible in the context of factual, scientific, and other ideas—including many moral ones—in which there is a conception of truth that is independent of what the marketplace of ideas at any particular time may happen to accept."[58] He points to the fact that the earth was round even when almost all people thought it was flat and the widespread belief that a person's personality is dictated by the shape of his or her skull, as examples of the limits of the marketplace of ideas' truth-defining function.[59]

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prices and quantities; [and] (7) left alone, a frictionless (perfect) market produces maximum personal and public utility . . . ." John Mixon, *Neoclassical Economics and the Erosion of Middle-Class Values: An Explanation for Economic Collapse*, 24 NOTRE DAME J.L., ETHICS & PUB. POL'Y 327, 345–46 (2010) (footnotes omitted).

[53] Paul H. Brietzke, *How and Why the Marketplace of Ideas Fails*, 31 VAL. U. L. REV. 951, 962 (1997) (quoting LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 229 (1986)).

[54] *See, e.g.*, Mark A. Lemley & Mark P. McKenna, *Owning Mark(et)s*, 109 MICH. L. REV. 137, 178 (2010). "A resource is said to be non-rivalrous when its use by one person does not interfere with its use by another (or in other words, when such additional use entails no marginal cost) and non-excludable when it cannot easily be controlled in such a way as to exclude others from using it." Shyamkrishna Balganesh, *Demystifying the Right to Exclude: Of Property, Inviolability, and Automatic Injunctions*, 31 HARV. J.L. & PUB. POL'Y 593, 627 (2008).

[55] Lior Zemer, *The Making of a New Copyright Lockean*, 29 HARV. J.L. & PUB. POL'Y 891, 922–23 (2006).

[56] Steven Shapin & Simon Schaffer, Leviathan and the Air-Pump 225 (1989); *see also* STEVEN K. WHITE, SUSTAINING AFFIRMATION: THE STRENGTHS OF WEAK ONTOLOGY IN POLITICAL THEORY 8 (2000) (describing the acceptance of "weak ontologies" that take "all fundamental conceptualizations of self, other, and world" to be "contestable").

[57] C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 974 (1978).

[58] Schauer, *supra* note 7, at 236.

[59] *Id.* at 236.

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Schauer finds it more plausible that the marketplace of ideas does not define "truth" but instead provides "a comparatively reliable social mechanism for identifying error, for locating truth, and thus, in the aggregate, for advancing social knowledge."[60] In other words, if we accept that truth exists independent of any process for identify it, then the argument is that "freedom of speech is the best method of locating those independently defined truths or is at least a method for doing so that it is superior to any or most other available alternative methods."[61] Bill Marshall offers a similar perspective, remarking that the "value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself."[62]

Due in part to the difficulty of defining "truth" and identifying a reliable method for its ascertainment, the Supreme Court has never stated that lies are entirely outside First Amendment protection.[63] To the contrary, the Court has repeatedly stated that the First Amendment protects some types of false speech based on the view that "erroneous statement is inevitable in free debate" and that false speech "must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . .to survive.'"[64] Most recently, in *United States v. Alvarez*, Justice Kennedy reaffirmed that "[a]bsent from those few categories where the law allows content-based regulation of speech is any general exception to the First Amendment for false statements."[65] Robert Post writes that "[t]his strongly suggests that First Amendment doctrine is not in fact organized around epistemic concerns."[66]

Putting aside the debate about whether the goal of fostering competition among ideas is the ascertainment of "truth" or merely the benefits that come from the search itself, a second vein of criticism accepts some aspects of market ideology but argues that the marketplace for speech, as currently

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[60] *Id.* at 237.

[61] *Id.*

[62] Marshall, *supra* note 34, at 4; *see also* Murchison, *supra* note 7, at 58 (distinguishing the value in the process of searching for truth from the value of attaining truth); Joseph Blocher, *Free Speech and Justified True Belief*, 133 HARV. L. REV. 439, 473 (2019) (noting that the First Amendment "emphasizes not just the outcomes of free speech, but also the value of certain modes and habits of thinking").

[63] *See* Erwin Chemerinsky, *False Speech and the First Amendment*, 71 OKLA. L. REV. 1, 6 (2018); Alan K. Chen & Justin Marceau, *High Value Lies, Ugly Truths, and the First Amendment*, 68 VAND. L. REV. 1435, 1437 (2015); Catherine J. Ross, *Ministry of Truth? Why Law Can't Stop Prevarications, Bullshit, and Straight-Out Lies in Political Campaigns*, 16 FIRST AMEND. L. REV. 367, 406 (2017). Nevertheless, there are some contexts in which the Court has refused to provide any First Amendment protection for false speech, including false and deceptive advertisements, *see, e.g.*, Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563 (1980), and false statements given under oath, *see* United States v. Alvarez, 567 U.S. 709, 720 (2012).

[64] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (1964) (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)); *see also* Garrison v. Louisiana, 379 U.S. 64, 73 (1964); *Alvarez*, 567 U.S. at 718.

[65] 567 U.S. at 718.

[66] Robert Post, *Understanding the First Amendment*, 87 WASH. L. REV 549, 556 (2012); *see also* Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 WASH. L. REV. 445, 471 (2012).

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constituted, simply is not working in achieving either of these goals.[67] These critics suggest that there are reasons to be skeptical that our public sphere, as currently fashioned, provides the best—or even a reliable—method for advancing either social knowledge or finding "truth," however we might define that term.

Traditional markets operate on the theory that participants, pursuing their own self-interests, will lead to an efficient exchange of goods and services.[68] The idea, widely credited to Adam Smith, is that "individuals pursuing their own self-interest are led by an invisible hand to promote the interest of the public, even though promotion of the public interest was no part of their original intention."[69] Supporters of the marketplace of ideas theory similarly invoke, often implicitly, the premise that the "invisible hand" of competition among ideas will guide society to "truth."[70] Yet the touchstone of these theories—that individuals are rational self-interested participants—has come under fierce attack by behavioral economists who study traditional markets[71] and by communication scholars who study public discourse,[72] both of whom note that research is showing that human behavior is characterized by bounded rationality, lack of willpower, and distorted self-interest.

[67] *See, e.g.*, Brietzke, *supra* note 53, at 965 ("If it can be said to exist, the ideas marketplace is shot through with 'market failures.'"); Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 5 ("[R]eal 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."); Jerome A. Barron, *Access to the Press—A New First Amendment Right*, 80 HARV. L. REV. 1641, 1647–48 (1967) ("The 'marketplace of ideas' view has rested on the assumption that protecting the right of expression is equivalent to providing for it. But changes in the communications industry have destroyed the equilibrium in that marketplace.").

[68] *See, e.g.,* Maurice E. Stucke, *Money, Is That What I Want?: Competition Policy and the Role of Behavioral Economics*, 50 SANTA CLARA L. REV. 893, 899–905 (2010).

[69] *See, e.g.*, Robin Paul Malloy, *Adam Smith in the Courts of the United States*, 56 LOY. L. REV. 33, 36 (2010) (citing ADAM SMITH, I AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS, BOOK IV, at 477–78 (Edwin Cannan ed. 1976) (1776)). As Professor Malloy notes, people have used Smith's idea to support the argument that "law should facilitate and incentivize individual action and little need exists for so-called 'big government,' or for government intervention into the free market." *Id.* at 36–37.

[70] *See, e.g., Abrams*, 250 U.S. at 630 (Holmes, J. dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."); Time, Inc. v. Hill, 385 U.S. 374, 406 (1967) (Harlan, J., concurring in part and dissenting in part) ("'The marketplace of ideas' where it functions still remains the best testing ground for truth."); Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.").

[71] *See, e.g.,* Stucke, *supra* note 68, at 908 (citing relevant research and concluding that "behavioral economists find that people systematically and predictably do not behave under certain scenarios as neoclassical economic theory predicts").

[72] *See, e.g.*, Brietzke, *supra* note 53, at 962 ("The deep (economic) rationality assumption characteristic of the ideas marketplace, and of other markets as well, cannot hold in the real world."); Lidsky, *supra* note 11, at 828–33 (citing relevant research and concluding that humans suffer from bounded rationality, are predictably irrational, and systematically err in filtering available information).

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Communication scholars also point out that ideas rarely succeed based solely on their merits, with most people "unable to compete with the wealthy corporations and organized interest groups that have access to sophisticated public relations tools and communications technologies."[73] As Stanley Ingber notes:

> [R]eal world conditions. . .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.[74]

The observation that modern communication practices have not produced a well-functioning marketplace of ideas is not new. Jerome Barron warned more than 50 years ago that technology and media concentration had made private barriers to expression a formidable constraint on the speech marketplace.[75] As he and others pointed out, money and entrenched power are often far more influential in the competition of the market than an idea's intrinsic merits.[76] Even from the vantage point of the mid-twentieth century, Barron concluded that "if ever there were a self-operating marketplace of ideas, it has long ceased to exist."[77]

Many scholars who were critical of the twentieth-century media ecosystem argued that "more speech" was the solution to the problems they were seeing.[78] Perhaps the most well-known judicial articulation of this view is Justice Brandeis' eloquent concurrence in *Whitney v. California*, where he wrote that "[i]f there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."[79]

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[73] Brietzke, *supra* note 53, at 965.

[74] Ingber, *supra* note 67, at 5; *see also* Brietzke, *supra* note 53, at 965 ("If it can be said to exist, the ideas marketplace is shot through with 'market failures.'"); Barron, *supra* note 67, at 1648 ("[C]hanges in the communications industry have destroyed the equilibrium in that marketplace."); *see generally* Claudio Lombardi, *The Illusion of a "Marketplace of Ideas" and the Right to Truth*, 3 AM. AFFS. 198 (2019).

[75] *See* Barron, *supra* note 67, at 1647–50.

[76] *See e.g.*, Spencer Overton, *The Donor Class: Campaign Finance, Democracy, and Participation*, 153 U. PA. L. REV. 73, 86–92 (2004) (discussing the effect that wealth has on successful political campaigns); Cass Sunstein, *Free Speech Now*, 59 U. CHI. L. REV. 255, 276–78 (1992) (explaining how disparities in access impact the marketplace of ideas); Ingber, *supra* note 67, at 5 (describing how "real world conditions. . . interfere with the effective operation of the marketplace of ideas").

[77] Barron, *supra* note 67, at 1641.

[78] *See, e.g.*, Barron, *supra* note 67, at 1644; Sunstein, *Free Speech Now*, *supra* note 76, at 292–93; Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1410 (1986); Dominic Caristi, *The Concept of a Right to Access to the Media: A Workable Alternative*, 22 SUFFOLK U. L. REV. 103, 108–10 (1988).

[79] 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). This idea has become known as the "counterspeech doctrine." *See, e.g.*, Robert D. Richards & Clay Calvert, *Counterspeech 2000: A New Look at the Old Remedy for "Bad" Speech*, 2000 B.Y.U. L. REV. 553, 556 (2000) (describing

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The marketplace of ideas theory was a natural fit for those who wished to improve the functioning of the public sphere, as it "presupposes an information-poor world" where the First Amendment's role is to protect speakers from government interference.[80] The origin of the doctrine in the Supreme Court's World War I seditious speech cases make this clear and later cases continue to invoke this theme.[81]

Unlike the twentieth century, however, it is no longer speech that is scarce, but the public's attention and capacity to make sense of the cacophony that characterizes modern public discourse.[82] The Internet, which was supposed to democratize communication practices and lead us to new vistas of social knowledge,[83] has not been the savior we had hoped for.[84] We are now awash in information, but this has counterintuitively led to a "poverty of attention."[85] With attention becoming increasingly scarce, a small number of private entities have cornered the market in the new attention economy. As antitrust experts are beginning to recognize, and I discuss more fully in Part III, existing communication markets "exhibit highly concentrated structures, with a single dominant firm possessing a massive share" of

how courts rely on "counter" speech as a remedy for "bad" speech); Philip M. Napoli, *What If More Speech Is No Longer the Solution? First Amendment Theory Meets Fake News and the Filter Bubble*, 70 FED. COMM. L.J. 55, 57 (2018) (examining courts' application of the counterspeech doctrine).

[80] Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete [https://perma.cc/ZB3G-RW2C].

[81] *See, e.g.,* Brandenburg v. Ohio, 395 U.S. 444 (1969) (challenging conviction for advocating violence under state criminal syndicalism statute); Gitlow v. New York, 268 U.S. 652 (1925) (challenging conviction under New York's "criminal anarchy" statute for printing and promoting socialist manifesto); Dennis v. United States, 341 U.S. 494 (1951) (challenging conviction for conspiring and organizing for the overthrow and destruction of the U.S. government).

[82] *See* Jack M. Balkin, *Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society*, 79 N.Y.U. L. REV. 1, 7 (2004) ("The digital revolution made a different kind of scarcity salient. It is not the scarcity of bandwidth but the scarcity of audiences, and, in particular, scarcity of audience attention.").

[83] *See* YOCHAI BENKLER, THE WEALTH OF NETWORKS: HOW SOCIAL PRODUCTION TRANSFORMS MARKETS AND FREEDOM 32 (2006) (observing that, in part because of the Internet, "[b]oth the capacity to make meaning—to encode and decode humanly meaningful statements—and the capacity to communicate one's meaning around the world, are held by, or readily available to, at least many hundreds of millions of users around the globe"); ANDREW L. SHAPIRO, THE CONTROL REVOLUTION: HOW THE INTERNET IS PUTTING INDIVIDUALS IN CHARGE AND CHANGING THE WORLD WE KNOW 55 (1999) ("Disintermediation is the somewhat ungainly word that is used to describe this circumventing of middlemen . . . . The control revolution allows us to take power from these intermediaries and put it in our own hands.").

[84] *See, e.g.,* Richard L. Hasen, *Cheap Speech and What It Has Done (to American Democracy)*, 16 FIRST AMEND. L. REV. 200 (2017) (noting that the economics of "cheap speech" made possible by the Internet has undermined mediating and stabilizing institutions of American democracy).

[85] Herbert A. Simon, *Designing Organizations for an Information-Rich World*, in COMPUTERS, COMMUNICATIONS, AND THE PUBLIC INTEREST 40 (M. Greenberger ed. 1971) (remarking that "a wealth of information creates a poverty of attention"). Nobel Laureate Herbert Simon warned that a "wealth of information means a dearth of something else: a scarcity of . . . attention." *Id.*

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its relevant market.[86] In practical terms, "we have simply exchanged one set of intermediaries (e.g., newspaper publishers and broadcast stations) for another set of intermediaries (e.g., Internet service providers, content hosts, and search providers)."[87] In our electronically mediated public sphere, these private gatekeepers have more power to manipulate public attention—and distort public discourse—than any government has ever had.[88]

In addition to the power imbalances in the current media ecosystem, there are reasons to be skeptical that even a highly competitive speech marketplace will produce a reliable mechanism for locating truth and advancing social knowledge. Due to a host of sociotechnical factors, the assertion that the marketplace for speech is a self-regulating institution that needs only the presence of more speech to produce "truth" has not held up to sustained empirical scrutiny.[89] Over the past half-century, research has increasingly shown that human decision making is often irrational.[90] Psychologists and behavioral economists see this so often they refer to the departure from optimal decision making as "bounded rationality."[91] As Lyrissa Lidsky explains, "[i]ndividuals become boundedly rational when complex decision-making environments tax their cognitive faculties" and in response to such conditions they employ "mental shortcuts."[92] These mental shortcuts create a number of problems, including motivating people to "seek[ ] out information that supports their preconceptions and avoid[ ] evidence that undercuts their beliefs"[93] thus allowing them "to maintain false beliefs in the face of seemingly incontrovertible evidence."[94] In fact, humans appear to have "an evolu-

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[86] *See, e.g.*, John M. Newman, *Antitrust in Attention Markets: Objections and Responses*, 59 Santa Clara L. Rev. 743, 751–52 (2020) (characterizing these firms as "attention merchants" and describing the substantial market share of Google, Amazon, and Facebook); Tim Wu, *Blind Spot: The Attention Economy and the Law*, 82 Antitrust L.J. 771, 793–805 (2019) (lamenting antitrust law's "blind spot" for the attentional markets that Facebook, Google, and the major television networks compete in).

[87] David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity Under Section 230 of the Communications Decency Act*, 43 Loy. L.A. L. Rev. 373, 383–84 (2010).

[88] *See, e.g.,* Siva Vaidhyanathan, Antisocial Media: How Facebook Disconnects Us And Undermines Democracy 5-9 (2018); Robert W. McChesney, Digital Disconnect: How Capitalism is Turning the Internet Against Democracy 109–29 (2013); Evgeny Morozov, The Net Delusion: The Dark Side of Internet Freedom 215–25 (2011).

[89] *See, e.g.,* Ho & Schauer, *supra* note 11, at 1163; Lidsky, *supra* note 11, at 802; Bambauer, *supra* note 11, at 696.

[90] *See, e.g.*, Daniel Kahneman, Oliver Sibony & Cass R. Sunstein, Noise: A Flaw in Human Judgment 161–75 (2021) (describing the "psychological mechanisms that explain both the marvels and the flaws of intuitive thinking").

[91] *See* Herbert A. Simon, Introductory Comment, in Economics, Bounded Rationality and the Cognitive Revolution 3, 3–7 (Herbert A. Simon, Massimo Egidi, Riccardo Viale & Robin Marris eds., 1992).

[92] Lidsky, *supra* note 11, at 829.

[93] Brendan Nyhan & Jason Reifler, *When Corrections Fail: The Persistence of Political Misperceptions*, 32 Pol. Behav. 303, 307 (2010) ("[R]espondents may engage in a biased search process, seeking out information that supports their preconceptions and avoiding evidence that undercuts their beliefs.").

[94] R. Kelly Garrett, Erik C. Nisbet, & Emily K. Lynch, *Undermining the Corrective Effects of Media-Based Political Fact Checking? The Role of Contextual Cues and Naïve Theory*, 63 J.

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tionary tendency towards gullibility and wanting to believe what people are telling them."[95]

Despite these normative and descriptive criticisms of the marketplace of ideas theory, the conviction that the First Amendment's purpose is to ensure a free trade in ideas has had remarkable staying power.[96] Joseph Blocher, who maintains that the marketplace of ideas can be improved by focusing on certain speech-enhancing institutions, writes that although market failure rhetoric has often been employed to justify government involvement in economic markets, it has not had a similar impact on First Amendment doctrine or theory.[97] He laments that "[c]ourts have clung to an idealized, neoclassical view of the marketplace of ideas far more tenaciously than economists have . . . when it comes to the 'real-world' market."[98] As a result, the courts have repeatedly rejected interventions that target market failures in an effort to preserve the laissez-faire ideal of an unregulated marketplace for speech,[99] a point I will take up more fully in Part III.

A theory that holds that the First Amendment's only role is to preserve an unfettered marketplace for speech begs the question First Amendment scholars have grappled with for nearly a century: what were the Framers ultimately trying to achieve by granting near absolute protection for speech and the press ("Congress shall make no law . . .")? Surely, perfect competition among ideas in a fictional marketplace was not the end goal. Free markets are not a constitutional value. Justice Holmes warned in his dissenting opinion in *Lochner v. New York* that the Constitution "does not enact Mr. Herbert Spencer's *Social Statics*" and thereby enshrine laissez-faire econom-

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COMM. 617, 617 (2013) ("Detailed reporting based on thorough research is not always enough to unseat inaccurate political ideas, as people are able to maintain false beliefs in the face of seemingly incontrovertible evidence.").

[95] Parmy Olson, *Why Your Brain May Be Wired to Believe Fake News*, Forbes (Feb. 1, 2017), https://perma.cc/UN3J-DFAC ("Humans have an evolutionary tendency towards gullibility and wanting to believe what people are telling them."); *see also* THE SOCIAL PSYCHOLOGY OF GULLIBILITY: CONSPIRACY THEORIES, FAKE NEWS, AND IRRATIONAL BELIEFS 3 (Joseph P. Forgas & Roy Baumeister eds., 2019) ("In an attempt to understand, predict and control the social and physical world, humans have created an amazing range of absurd and often vicious and violent gullible beliefs.").

[96] *See* Blocher, *supra* note 34, at 836 ("Despite the power of the market failure critique, and notwithstanding the exceptions announced in *Schenck*, *Brandenburg*, *Miller*, and other cases, the Court continues to invoke the marketplace of ideas metaphor as generally justifying broad speech protections, not limitations."); Ho & Schauer, *supra* note 11, at 1164–65 ("But even in the face of relatively longstanding skepticism, the [concept of a marketplace of ideas] endures.").

[97] Blocher, *supra* note 34, at 836; *see also* Shiffrin, *supra* note 32, at 1281 (noting that "arguments about market failure have limited appeal to the current Court.").

[98] Blocher, *supra* note 34, at 836.

[99] *See* Aaron Director, *The Parity of the Economic Market Place*, 7 J.L. & ECON. 1, 8 (1964) (noting that in terms of market regulation, free speech is "the only area where laissez-faire is still respectable"); Ari Ezra Waldman, *The Marketplace of Fake News*, 20 U. PA. J. CONST. L. 845, 854 (2018) ("[T]he marketplace of ideas sits behind the First Amendment's hands-off doctrines. It is this laissez-faire approach that makes regulating fake news so difficult: any attempt to stop fake news, the argument goes, inhibits a public sphere that is supposed to be robust, active, and free of government intervention.").

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ics.[100] As the Supreme Court ultimately came to realize,[101] "a constitution is not intended to embody a particular economic theory."[102]

Apart from the failings of the marketplace of ideas as both a description of public discourse and as a reliable mechanism for increasing social knowledge, there is a deeper problem with judicial reliance on a theory that elevates market rhetoric over democratic values. Indeed, this gets to the core of why some scholars reject the very notion that the "marketplace of ideas" is a valid explanatory theory for understanding the First Amendment.[103] They point out that applying the rhetoric of economists misdirects the inquiry and unnecessarily constrains the First Amendment's reach. Darren Bush powerfully captures this view:

> Acknowledging that speech is not a market in any real sense frees society, academics, and the courts to view speech cases jurisprudentially; that is, it frees the courts to examine the facts in light of the policies of the First Amendment and the consequences of ruling a certain way instead of analyzing the facts in light of the economic model. In Chicago School jurisprudence, the model is the surrogate for policy. The sole ethical and legal consideration for the model is efficiency. And, while efficiency rings of something scientific, it is a value-laden construct whose premise is that resources should be in the hands of those that value them the most, as indicated by their willingness and ability to pay. But these ethical considerations are well hidden by economists shrouded in the trappings of science. By eliminating the economic model from the realm of free speech, ethical considerations are permitted to "come out of hiding."[104]

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[100] 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

[101] *See, e.g.,* Ferguson v. Skupra, 372 U.S. 726, 729–30 (1963) ("Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. . .The doctrine that prevailed in *Lochner*, *Coppage*, *Adkins*, and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely— long since been discarded."); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 669 (1966 ("We agree, of course, with Mr. Justice Holmes that the Due Process Clause of the Fourteenth Amendment 'does not enact Mr. Herbert Spencer's Social Statistics.' Likewise, the Equal Protection Clause is not shackled to the political theory of a particular era."); City of Cleburne v. Cleburne Living Center, 473 U.S. 432, 470–71 (1985) (Marshall, J., concurring) ("As a matter of substantive policy, therefore, government is free to move in any direction or change directions, in the economic and commercial sphere. The structure of economic and commercial life is a matter of political compromise, not constitutional principle, and no norm of equality requires that there be as many opticians as optometrists.").

[102] *Lochner*, 198 U.S. at 75 (Holmes, J., dissenting).

[103] *See* sources cited *supra* in note 51.

[104] Bush, *supra* note 51, at 1147 (quoting PHILIP MIROWSKI, MORE HEAT THAN LIGHT: ECONOMICS AS SOCIAL PHYSICS, PHYSICS AS NATURE'S ECONOMICS (1989)); *see also* Gregory P. Magarian, *Market Triumphalism, Electoral Pathologies, and the Abiding Wisdom of First Amendment Access Rights*, 35 HOFSTRA L. REV. 1373, 1401 (2007) (remarking that market triumphalism "substitutes blind fealty to the market for any consideration of the value judgments that necessarily underlie any policy choice, including laissez-faire distribution of expressive opportunities").

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Indeed, when we look past the economic rhetoric that currently dominates free speech jurisprudence, what comes of out hiding is the First Amendment's preeminent structural role supporting self-governance.

II. The First Amendment's Structural Role Supporting Self-Governance

To fully grasp the First Amendment's purpose, we must consider how its protections for speech and the press fit within the overall constitutional structure that underlies the American system of government.[105] This requires that we acknowledge the kind of instrument the Constitution is: a constitutive text that purports, in the name of the People of the United States, to create a number of distinct but interrelated institutions and practices, both legal and political, and to define the rules governing these institutions and practices. While the historical record surrounding the First Amendment is limited, "[t]he framers did, after all, exercise intentional and deliberate choices in establishing that basic structure [of the federal government], which they embodied in a document intended to have enduring organic and operative effects for an unknowable future."[106]

When we examine how the First Amendment fits into these interrelated institutions and practices, it becomes obvious that the First Amendment was intended to do more than simply enshrine free market ideology.

A. Structural Constitutional Law

The idea that we should interpret the First Amendment by examining how its protections fit within our overall constitutional structure invokes a mode of constitutional interpretation known as structuralism. [107] The emphasis on constitutional structure goes beyond merely the structure of the Constitution's text, but instead focuses on "the constitutional relationships between the national government and the states, the branches of the national government, the government and the people and, in sum, the general arrangement of offices, powers, and relationships allegedly manifest in the

[105] *See, e.g.*, Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 Yale L.J. 1131, 1147 (1991) (writing that the First Amendment's limitations on Congress "obviously sounds in structure"); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 Stan. L. Rev. 299, 308 (1978) ("Structural analysis of the Constitution is significantly more useful for determining the basic meaning of the first amendment.").

[106] BeVier, *supra* note 105, at 308.

[107] *See* Sotirios A. Barber & James E. Fleming, Constitutional Interpretation: The Basic Questions 120 (2007); Philip Bobbitt, Constitutional Fate: Theory of The Constitution 74 (1982). Proponents of constitutional structuralism contend that this method produces clearer justifications for decisions that require interpretation and application of imprecise provisions of the Constitution than textualism alone. *See, e.g.*, Charles L. Black, Jr., Structure and Relationship in Constitutional Law 13, 22 (1969); Bobbitt, *supra*, at 74.

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Constitution's text and the settled facts of constitutional history." [108] Although structural arguments may not always be formally invoked, a structuralist approach to divining the meaning of the Constitution is a common mode of constitutional interpretation, having informed our understanding of a number of fundamental doctrines within constitutional law, including the relationships among the three branches of the federal government (commonly called separation of powers); the relationship between the federal and state governments (known as federalism); and the relationship between citizens and the government.

Charles Black and John Hart Ely, two influential proponents of structuralism have both offered persuasive arguments for interpreting the First Amendment within a broader, structural context.[109] For Black and Ely, "[t]he question is not whether the [Constitution's] text shall be respected, but rather how one goes about respecting a text of that high generality and consequent ambiguity."[110] In a series of lectures in the 1960s, Black observed that difficult constitutional cases are resolved "not fundamentally on the basis of . . . textual exegesis which we tend to regard as normal, but on the basis of reasoning from the total structure which the text has created."[111] For Black, this meant a "method of inference from the structures and relationships created by the Constitution in all its parts or in some principal part."[112] As Michael Dorf explains: "The Structure in which Black was most interested is the structure of the government of the United States of America. The Relationship is the relationship of its component parts: the federal government; the state governments; citizens; aliens; local officials; Congress; the President; the Supreme Court; and so forth."[113]

Even committed originalists rely on structural arguments when interpreting the Constitution.[114] "The Rehnquist and Roberts Courts have re-

[108] BARBER & FLEMING, *supra* note 107, at 120; *see also* Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1236 (1995) ("I put such great emphasis upon text *and* structure, both the structure *within* the text—the pattern and interplay in the language of the Constitution itself and its provisions—and the structure (or architecture) *outside* the text—the pattern and interplay in the governmental edifice that the Constitution describes and creates, and in the institutions and practices it propels." (emphasis added)).

[109] *See generally* BLACK, *supra* note 107; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980). Cass Sunstein has made similar arguments. *See* Sunstein, *supra* note 28, at 119–22, 259–61.

[110] BLACK, *supra* note 107, at 30; ELY, *supra* note 109, at 13 (noting that "[c]onstitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured"). Anticipating the potential criticism that structural interpretation is too imprecise and speculative, Black responded: "I submit that the generalities and ambiguities are no greater when one applies the method of reasoning from structure and relation." BLACK, *supra* note 107, at 30–31.

[111] BLACK, *supra* note 107, at 15.

[112] *Id.* at 7.

[113] Michael C. Dorf, *Interpretive Holism and the Structural Method, or How Charles Black Might Have Thought About Campaign Finance Reform and Congressional Timidity*, 92 GEO. L.J. 833, 835–36 (2004).

[114] Thomas B. Colby, *The Sacrifice of the New Originalism*, 99 GEO. L.J. 713, 755 n.253 (2011) (commenting that originalists "often endorse structural arguments that are not clearly

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peatedly invalidated statutory programs, but not because those programs violated some particular constitutional provision," John Manning writes.[115] Instead, Manning points to the Courts' "new structuralism," which "rests on freestanding principles of federalism and separation of powers [and] is not ultimately tied to the understood meaning of any particular constitutional text."[116] Examining a wide range of cases addressing federalism, state sovereign immunity, presidential removal power, and standing, Manning concludes that what underlies many of the Supreme Court's decisions is a "freeform" version of Charles Black's "method of inference from the structures and relationships created by the Constitution."[117] This method of structural inference, he goes on to summarize, "first shifts the Constitution's level of generality upward by distilling from diverse clauses an abstract shared value—such as property, privacy, federalism, nationalism, or countless others—and then applies that value to resolve issues that sit outside the particular clauses that limit and define the value."[118]

Black applied this structural approach to the First Amendment in the second of his three lectures that comprised *Structure and Relationship in Constitutional Law*, concluding that protection for freedom of speech against state interference finds support from the relationship of citizens to their government that is "quite as strong" as the textual basis normally offered, which rests on the words of the First Amendment and its incorporation through the Fourteenth Amendment's Due Process Clause.[119] Black arrived at this view by examining the relationship between citizens and the state and federal governments, asking: "Is it conceivable that a state, entirely aside from the Fourteenth or for that matter the First Amendment, could permissibly forbid public discussion of the merits of candidates for Congress, or of issues which have been raised in the congressional campaign . . . ?[120] According to Black, the answer is obvious; "I cannot see how anyone could think our national government could run, or was by anybody at any time ever expected to run, on any less openness of public communication than that."[121] From this "hard core" of protection for speech on matters of federal lawmaking, Black expands outward to a general right of communication that "eventuate[s] in

grounded in constitutional text"); James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 5 (1995) (noting "even narrow originalists such as Bork and Scalia today accept the trilogy of 'text, history, and structure' as legitimate sources of constitutional values").

[115] John F. Manning, *Foreword: The Means of Constitutional Power*, 128 HARV. L. REV. 1, 4 (2014) (describing the Supreme Court's "[n]ovel approaches to both statutory interpretation and structural constitutional law").

[116] *Id.* at 4, 31.

[117] *Id.* at 31–32 (quoting BLACK, *supra* note 107, at 7); *see also* Thomas B. Colby, *Originalism and Structural Argument*, 113 NW. L. REV. 1297, 1299 (2019) ("The decisions in these cases are grounded in abstract notions of constitutional structure, rather than the original meaning of the constitutional text.").

[118] Manning, *supra* note 115, at 32.

[119] BLACK, *supra* note 107, at 39.

[120] *Id.* at 42.

[121] *Id.* at 42–43. Robert Bork makes a similar point when he writes that the Constitution establishes a representative democracy, "a form of government that would be meaningless without freedom to discuss government and its policies." Bork, *supra* note 28, at 23.

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the conclusion that most serious public discussion of political issues is really a part, at least in one aspect, of the process of national government, and hence ought to be invulnerable to state attack."[122]

John Hart Ely made a similar argument about looking beyond the Constitution's text in his influential book *Democracy and Distrust: A Theory of Judicial Review*. According to Ely, the Constitution and Bill of Rights were intended to be blueprints for government rather than repositories of specific values.[123] Ely points out that "the body of the original Constitution is devoted almost entirely to structure."[124] It does not "try[ ] to set forth some governing ideology," but instead seeks to "ensur[e] a durable structure for the ongoing resolution of policy disputes."[125]

Black and Ely's focus on supporting the *processes* of deliberative democracy should be distinguished from other scholars who have used structural insights to argue for the recognition of unenumerated rights.[126] For example, Stephen Fleming, expanding on the work of John Rawls and Ronald Dworkin, criticizes Ely for limiting himself to "process-perfecting theori[es]."[127] Applying what he calls "constitutional constructivism," a method of constitutional interpretation that "requir[es] the construction of a substantive political theory (or scheme of principles) that best fits and justifies our constitutional document and underlying constitutional order as a whole," Fleming argues that courts should recognize certain substantive liberties, particularly those associated with individual autonomy, because they are "implicit in our underlying constitutional order."[128]

We need not go this far for purposes of situating the First Amendment within the American constitutional structure. Regardless of where one stands on the subject of *unenumerated* rights, the First Amendment expressly provides protections for speech, press, assembly, and petition—making up what Ashutosh Bhagwat calls the "Democratic First Amendment."[129] Given that these rights are expressly stated in the text of the First Amendment, our task is not to create new rights, but rather to define the scope and substance of the aforementioned enumerated rights.

Moreover, focusing on the First Amendment's role in supporting core democratic processes alleviates much of the concern that can come from in-

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[122] BLACK, *supra* note 107, at 44–45.

[123] ELY, *supra* note 109, at 90.

[124] *Id.*

[125] *Id.*; *see also* Jack W. Nowlin, *The Judicial Restraint Amendment: Populist Constitutional Reform in the Spirit of the Bill of Rights*, 78 NOTRE DAME L. REV. 171, 228 (2002) (citing Ely and remarking that "[n]ot surprisingly, then, the debates in Philadelphia concerning the framing of the Constitution dealt almost entirely with structural-procedural questions of governmental architecture involving these and related principles").

[126] *See, e.g.*, RONALD DWORKIN, LAW'S EMPIRE (1986); JAMES E. FLEMING, SECURING CONSTITUTIONAL DEMOCRACY: THE CASE OF AUTONOMY (2006); James E. Fleming, *Constructing the Substantive Constitution*, 72 TEX. L. REV. 211 (1993).

[127] James E. Fleming, *Securing Deliberative Autonomy*, 48 STAN. L. REV. 1, 5 (1995).

[128] *Id.* at 14.

[129] Ashutosh Bhagwat, *The Democratic First Amendment*, 110 NW. U. L. REV. 1097, 1099 (2016).

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terpreting ambiguous constitutional provisions. Judicial enforcement of the Constitution, Cass Sunstein explains, "is most readily defensible when democratic concerns come to the fore."[130] Citing approvingly to Ely, Sunstein argues that unlike the recognition of unenumerated rights, which he says "are highly contested in our society,"[131] the use of structural insights to ensure that fundamental democratic processes can operate raises fewer concerns: "When courts are protecting democratic deliberation—an ideal built deeply into American constitutionalism and unusually susceptible to both definition and development—the benefits are likely to be great, and the risks are far lower."[132]

For many constitutional scholars, the fact that the Constitution is devoted almost entirely to structure indicates that the First Amendment was intended to support the deployment of this structure: *i.e.*, to ensure the functioning of a representative form of government.[133] For Ely, this insight led him to conclude that the First Amendment was "intended to help make our governmental processes work, to ensure the open and informed discussion of political issues, and to check our government when it gets out of bounds."[134] The First Amendment serves these structural functions in a number of ways. The amendment's speech and press protections prevent the government from stifling criticism of public officials and ensure that debate on public issues can be "uninhibited, robust, and wide-open."[135] Other provisions, such as the rights of assembly, association, and petition, serve similar ends by helping to alleviate collective-action problems that can undermine the effec-

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[130] Cass R. Sunstein, *Liberal Constitutionalism and Liberal Justice*, 72 Tex. L. Rev. 305, 310 (1993).

[131] *Id.* at 311. Sunstein writes:

> It is important in this connection to note that the category of fundamental rights is highly contested in our society . . . Even if we think that Professor Fleming's version of constitutional constructivism has it about right, we might believe that the judicial definition of fundamental rights under the Due Process Clause—a definition operating without much textual or historical help—ought to be very cautious, in part because of the difficulty of obtaining broad social agreement on these questions. When we are dealing with judicial protection of non-democratic rights, the risks of error—its likelihood and cost—are very high, and the potential benefits are highly speculative.

Id.

[132] *Id.*

[133] *See, e.g.,* Amar, *supra* note 105, at 1147 (writing that the First Amendment's limitations on Congress "obviously sounds in structure, and focuses (at least in part) on the representational linkage between Congress and its constituents"); Nowlin, *supra* note 125, at 228, 233 (noting that "the debates in Philadelphia concerning the framing of the Constitution dealt almost entirely with structural-procedural questions" and concluding that the rights enumerated in the First Amendment "are directly related to the healthy functioning of a representative form of government and thus to what the Founders viewed as the fundamental and preeminent right to representation").

[134] Ely, *supra* note 107, at 93–94.

[135] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

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tive exercise of popular sovereignty.[136] Taken together, the interrelated freedoms in the First Amendment serve essential structural purposes in our constitutional system by ensuring a framework for the ongoing resolution of policy and governance disputes.[137]

B. The Preeminent Constitutional Value of Self-Governance

As discussed in the previous section, we gain a much deeper understanding of the First Amendment by examining its role within our constitutional structure. While the marketplace of ideas theory is grounded on the premise that that the amendment's protections for speech and the press were intended solely to safeguard free competition—this ignores the essential role that speech plays in fostering self-governance. Akhil Reed Amar and other constitutional scholars point out that the First Amendment, as originally understood by the Framers, was not designed only "to vest individuals and minorities with substantive rights against popular majorities" but instead reflected the original Constitution's focus "on issues of organizational structure and democratic self-governance."[138] Amar goes on to note:

> A close look at the Bill [of Rights] reveals structural ideas tightly interconnected with the language of rights; states' rights and majority rights alongside individual and minority rights; and protection of various intermediate associations—church, militia, and jury—designed to create an educated and virtuous citizenry. The main thrust of the Bill was not to downplay organizational structure, but to deploy it; not to impede popular majorities, but to empower them.[139]

The First Amendment's role in supporting self-governance is further demonstrated by the "cognate" rights included in the amendment's related clauses.[140] The First Amendment, in its entirety, reads as follows: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Govern-

[136] *See* Tabatha Abu El-Haj, *The Neglected Right of Assembly*, 56 UCLA L. Rev. 543, 543 (2009); Jason Mazzone, *Freedom's Associations*, 77 Wash. L. Rev. 639, 743 (2002); Ozan O. Varol, *Structural Rights*, 105 Geo. L.J. 1001, 1034 (2017).

[137] *See* Nowlin, *supra* note 125, at 233 ("[T]he rights themselves—speech, press, assembly, and petition—are directly related to the healthy functioning of a representative form of government and thus to what the Founders viewed as the fundamental and preeminent right to representation.").

[138] Amar, *supra* note 105, at 1132; *see also* Nowlin, *supra* note 125, at 232.

[139] Amar, *supra* note 105, at 1132.

[140] *See* Thomas v. Collins, 323 U.S. 516, 530 (1945) ("It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable. They are cognate rights."); De Jonge v. Oregon, 299 U.S. 353, 364 (1937) ("The right of peaceable assembly is a right cognate to those of free speech and free press and is equally fundamental.").

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ment for a redress of grievances."[141] Putting aside the Religion Clauses, which were added late in the drafting process,[142] the other clauses were joined together early on and were considered collectively throughout most of the debates over the Bill of Rights.[143] The Supreme Court remarked in *Thomas v. Collins* that this was not coincidental: "It was not by accident or coincidence that the rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peaceably to assemble and to petition for redress of grievances. All these, though not identical, are inseparable."[144] Put simply, the rights expressed in the First Amendment "are fundamentally political in the sense that they are closely tied to democratic citizenship."[145]

In fact, the First Amendment is not the only provision in the Constitution that protects speech in order to facilitate democratic processes. Even before the Bill of Rights was added in 1791, the Framers evidenced concern for an engaged and informed public in a number of the Constitution's provisions. Article I, Section 8, for example, gave Congress the power "[t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[146] In adding this clause, the Framers sought to decentralize and democratize innovation and information production.[147] Article I, Section 8 also gave Congress the power "[t]o establish Post Offices and post Roads."[148] Jack Balkin, who has written that the First Amendment should be understood broadly as "an information policy," notes that the new American republic, extending over such a large area, clearly needed infrastructure to ensure that people could communicate with each other: "Good roads and a good mail system were essential to self-government in a large republic."[149]

We see further evidence of the importance the Framers placed on protecting public discourse in other parts of the Constitution that do not expressly implicate freedom of expression. Ely points out that provisions in the Constitution that appear at first glance to be "primarily designed to assure or preclude certain substantive results seem on reflection to be principally con-

[141] U.S. CONST. amend. I.

[142] *See* Ashutosh Bhagwat, *When Speech Is Not "Speech"*, 78 OHIO ST. L.J. 839, 872 (2017) [hereinafter Bhagwat, *When Speech is Not "Speech"*] (noting that "the Religion Clauses were not combined with the rest of the First Amendment until September 9, 1789, very late in the drafting process, when the Senate did so without explanation").

[143] *Id.* (citing THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS 148 (Neil H. Cogan ed., 2d ed. 2015)).

[144] 323 U.S. 516, 530 (1945).

[145] Bhagwat, *supra* note 142, at 873.

[146] U.S. CONST. art. I, § 8, cl. 8.

[147] *See* Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 289 (1996) ("In adopting the Constitution's Copyright Clause and enacting the first federal copyright statute, the Framers were animated by the belief that copyright's support for the diffusion of knowledge is 'essential to the preservation of a free Constitution.'") (footnote omitted).

[148] U.S. CONST. art. I, § 8, cl. 7.

[149] Jack M. Balkin, *The First Amendment is an Information Policy*, 41 HOFSTRA L. REV. 1, 3 (2012).

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cerned with process."[150] He cites Article III, Section 3, which narrowly defines treason as "consist[ing] only in levying War against [the United States], or in adhering to their Enemies, giving them Aid and Comfort."[151] That provision, Ely writes, can be viewed as "a precursor of the First Amendment, reacting to the recognition that persons in power can disable their detractors by charging disagreement as treason."[152]

The Supreme Court has repeatedly invoked structural insights to interpret the First Amendment. In fact, one cannot make sense of the evolution of First Amendment doctrine without acknowledging the Court's reliance on the structural role of the First Amendment. For more than a century after ratification, the consensus among jurists and scholars was that the First Amendment's reach was quite limited, prohibiting only the government's imposition of prior restraints on speech.[153] Even Justice Holmes, in a decision that predated his strenuous defense of the First Amendment in *Abrams v. United States*,[154] initially believed that the Constitution imposed no limits on the government's power to levy criminal penalties against publishers.[155]

During the 1930s, the Court moved from this cramped understanding of the First Amendment and began striking down criminal penalties directed

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[150] ELY, *supra* note 107, at 90.

[151] U.S. CONST. art. III, § 3. Following passage of the Sedition Act in 1798, which criminalized certain forms of criticism of the federal government, James Madison argued that the Act was unconstitutional because it "exceeded the delegated and enumerated powers of the U.S. Congress, violated the constitutional principle of federalism, and was incompatible with the representative democratic and populist structure of the American constitutional design." Nowlin, *supra* note 125, at 234; James Madison, *Report Accompanying the Virginia Resolution*, reprinted in 4 THE DEBATES IN THE STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 546 (J. Elliot ed., 1866).

[152] ELY, *supra* note 107, at 90. As William Mayton notes, an argument that the treason clause is a free speech provision was made during the debates that led to the "Virginia Remonstrance" against the constitutionality of the Alien and Sedition Acts. William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 129 (1984). According to Mayton, John Taylor, who introduced the remonstrance, "pointed out that sedition was but a 'species constituting that genus called treason' and that the Constitution's treason clause could not therefore be properly avoided by the 'sedition' label." *Id.* at 129–30 (citing THE VIRGINIA REPORT OF 1799–1800, at 121–22 (Richmond 1850)). Otherwise, Taylor warned, Congress might proceed "to punish acts heretofore called treasonable, under other names, by fine, confiscation, banishment, or imprisonment, until social intercourse shall be hunted by informers out of our country; and yet all might be said to be constitutionally done, if principle could be evaded by words." *Id.* at 130.

[153] *See* David S. Ardia, *Freedom of Speech, Defamation, and Injunctions*, 55 WM. & MARY L. REV. 1, 34 (2013) (discussing early American conceptions of the First Amendment).

[154] 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.").

[155] *See* Patterson v. Colorado *ex rel.* Attorney Gen., 205 U.S. 454, 462 (1907) (affirming criminal contempt sanction against the publisher of the Rocky Mountain News and concluding "the main purpose of [the First Amendment's free speech protections] is 'to prevent all such previous restraints upon publications as had been practised by other governments'" (quoting Commonwealth v. Blanding, 20 Mass. 304, 313–14 (1825))).

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at expressive activities.[156] In *Stromberg v. California*, where the Court first held that the First Amendment's protections extend to non-verbal symbolic speech, Chief Justice Hughes explicitly invoked a structuralist approach, remarking that "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people . . . is a fundamental principle of our constitutional system."[157] Six years later, writing for a unanimous Court, Hughes noted in *De Jonge v. Oregon* that "free political discussion" plays an essential role in "our constitutional system" and that in such discussion "lies the security of the Republic, the very foundation of constitutional government."[158]

In the 1960s, the Court further expanded the reach of the First Amendment by imposing constitutional limitations on the common-law of defamation. Explicitly invoking the structural role that speech plays in a democracy, the Court proclaimed in *New York Times Co. v. Sullivan* that the First Amendment embodies "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[159] Quoting extensively from the writings of James Madison, the Court observed in *Sullivan* that the "Constitution created a form of government under which 'The people, not the government, possess the absolute sovereignty.'"[160] Agreeing with Madison about the critical role that speech plays in self-government, the Court concluded: "The right of free public discussion of the stewardship of public officials was thus . . . a fundamental principle of the American form of government."[161]

The Supreme Court has continued to emphasize the structural role that the First Amendment plays in supporting self-governance.[162] In *Snyder v. Phelps*, the Court held that the First Amendment provides a defense to a claim of intentional infliction of emotional distress when the speech at issue

[156] *See* De Jonge v. Oregon, 299 U.S. 353, 365 (1937) (invalidating criminal conviction for subversive speech); Stromberg v. California, 283 U.S. 359, 369 (1931) (overturning conviction for displaying a reproduction of the red flag of the Soviet Union).

[157] 283 U.S. 359, 369 (1931) (holding that displaying a red flag was symbolic speech protected by the First Amendment).

[158] 299 U.S. 353, 365 (1937) (invalidating criminal conviction for subversive speech); *Stromberg*, 283 U.S. at 369 ("The maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system.").

[159] N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[160] *Id.* at 274.

[161] *Id.* at 275.

[162] *See, e.g.*, Knox v. Serv. Emps. Int'l Union, Local 1000, 132 S. Ct. 2277, 2288 (2012) ("Our cases have often noted the close connection between our Nation's commitment to self-government and the rights protected by the First Amendment."); Brown v. Hartlage, 456 U.S. 45, 52 (1982) ("At the core of the First Amendment are certain basic conceptions about the manner in which political discussion in a representative democracy should proceed."); Buckley v. Valeo, 424 U.S. 1, 93 n.127 (1976) (per curiam) ("[T]he central purpose of the Speech and Press Clauses was to assure a society in which 'uninhibited, robust, and wide-open' public debate concerning matters of public interest would thrive, for only in such a society can a healthy representative democracy flourish." (quoting *Sullivan*, 376 U.S. at 270)).

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relates to "a matter of public concern."[163] According to the Court, "[s]peech on 'matters of public concern' . . . is 'at the heart of the First Amendment's protection,'"[164] and "speech concerning public affairs is more than self-expression; it is the essence of self-government."[165]

As this discussion shows, the Supreme Court has not relied solely on the words of the First Amendment to determine its meaning. Instead, the Court has repeatedly applied structural insights to interpret the First Amendment's scope, looking beyond the text to identify constitutional values, especially the preeminent value of self-governance, that the Court uses to resolve issues that the text does not directly address. Put simply, the words of the First Amendment are merely a pointer to the larger role that speech and the other cognate rights in the amendment play in supporting democratic self-governance.

C. The Relationship Between Speech and Self-Governance

Although the precise relationship between speech and self-governance remains contested—as does the definition of democracy itself[166]—few would question that protection for speech (in some form) is essential for self-governance. Even if one holds a rather thin view of democracy as simply "majority rule," protections for speech can have an instrumental benefit by making democracy more effective and resistant to anti-democratic pressures.[167] Thicker conceptions of democracy view freedom of speech as a defining feature of democracy, "such that a society with less freedom of speech is, for that reason, less democratic."[168]

Echoing the Supreme Court's repeated statements that discussion of government affairs is at the core of the First Amendment's protections, an increasing number of constitutional scholars have concluded that the primary purpose of the First Amendment's speech and press clauses is to make self-governance possible.[169] This is not to say, however, that there is unanimity as

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[163] 562 U.S. 443, 451–52 (2011).

[164] *Id.* (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758–59 (1985) (plurality opinion)).

[165] *Id.* at 452 (quoting Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964)).

[166] *See* Martin H. Redish & Abby Marie Mollen, *Understanding Post's and Meiklejohn's Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1304 (2009) (noting that "'democracy' itself is an amorphous concept, both historically and theoretically"); Ingber, *supra* note 67, at 9–11 (discussing competing perspectives on how "democratic governance" takes place).

[167] Schauer, *supra* note 7, at 234 n.23; Redish & Mollen, *supra* note 166, at 1304 ("Every democratic theory of the First Amendment, though, in one way or another, views free speech as a means to a democratic end.").

[168] Schauer, *supra* note 7, at 251 n.23; *see also* Bork, *supra* note 28, at 23 (writing that representative democracy "would be meaningless without freedom to discuss government and its policies.").

[169] *See, e.g.*, BeVier, *supra* note 105, at 502 ("[T]here is one principle [in the First Amendment area] which both commands widespread agreement and is derived from constitutional structure: the core first amendment value is that of the democracy embodied in our constitutionally established processes of representative self-government."); Bhagwat, *supra* note 142, at

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to the exact contours of the self-governance theory. Scholars continue to disagree over the precise relationship between speech and self-governance, with some arguing that speech educates the public and facilitates the informed decision-making that self-rule requires,[170] while others assert that speech furthers democracy by allowing individuals to recognize themselves as self-governing.[171] For example, Alexander Mieklejohn, one of the more influential proponents of the self-governance theory, chose as his model for democratic decision making a New England town meeting, where discussion takes place as part of a moderated sharing of views with strictly enforced rules of procedure.[172] For Meiklejohn, the purpose of such discourse is to educate citizens so that they can be better-informed voters.[173] As he later remarked, "What is essential is not that everyone shall speak, but that everything worth saying shall be said."[174]

Like Meiklejohn, Cass Sunstein also emphasizes the role that speech has in informing and educating the public, preferring the term "democratic deliberation" rather than public discourse.[175] Sunstein insists that a well-functioning system of free expression must be "designed to have an important deliberative feature, in which new information and perspectives influence social judgments about possible courses of action."[176] Echoing Mieklejohn's focus on the rationality of individuals and the benefits of ensuring broad communication about matters of public concern, Sunstein writes that "[t]hrough exposure to such information and perspectives, both collective and individual decisions can be shaped and improved."[177]

Robert Post offers a more nuanced view of the role of public discourse, describing what he calls the "participatory" theory of free speech, which "does not locate self-governance in mechanisms of decision making, but rather in the processes through which citizens come to identify a government

1102 ("[A] broad consensus has emerged over the past half-century regarding the fundamental reason why the Constitution protects free speech: to advance democratic self-governance."); Robert Post, *Participatory Democracy and Free Speech*, 97 VA. L. REV. 477, 482 (2011); Weinstein, *supra* note 28, at 497. *But see* Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283, 285–86 (2011) (rejecting democratic theories of free speech); C. Edwin Baker, *Is Democracy a Sound Basis for a Free Speech Principle?* 97 VA. L. REV. 515, 519–24 (2011) (questioning democracy as the sole basis for the First Amendment); Martin H. Reddish, *The Value of Free Speech*, 130 U. PA. L. REV. 591, 595–96 (1982) (arguing that all other theories of the First Amendment are subsets of "self-realization").

[170] *See, e.g.,* Alexander Meiklejohn, Political Freedom: The Constitutional Powers of the People 26 (1979); Sunstein, *supra* note 28, at 18.

[171] *See, e.g.,* Post, *supra* note 29, at xiii; Post, *supra* note 28, at 2367; Weinstein, *supra* note 28, at 497.

[172] Meiklejohn, *supra* note 170, at 24–25.

[173] *Id.* at 26 (stating that freedom of speech ensures that voters are "made as wise as possible").

[174] *Id.*

[175] Sunstein, *supra* note 28, at 18.

[176] *Id.* at 19.

[177] Sunstein, *supra* note 28, at 19.

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as their own."[178] For Post, the First Amendment's speech and press protections were intended to advance two distinct, but related, values associated with self-government: "democratic legitimation" and "democratic competence."[179] According to Post, democratic legitimation rests on the view that "every person is entitled to communicate his own opinion,"[180] but it encompasses an idea far broader than just protections for majoritarian political decision-making. Post explains:

> [M]ajoritarianism and elections are merely mechanisms for making decisions. American democracy does not rest upon decision-making techniques, but instead upon the value of self-government, the notion that those who are subject to law should also experience themselves as the authors of law.[181]

Freedom of speech is essential, Post contends, because "if persons are prevented even from the possibility of seeking to influence the content of public opinion, there is little hope of democratic legitimation in a modern culturally heterogeneous state."[182]

According to Ashutosh Bhagwat, both of these perspectives miss the mark.[183] Although he concludes that Post and Sunstein's theories are "more convincing and more nuanced than Meiklejohn," they share with Meiklejohn "a myopic focus on speech, ignoring the rest of the Democratic First Amendment."[184] For Bhagwat, "[r]ational discourse is certainly (at least ideally) a part of our system of self-governance, but it is just a part."[185] He goes on to point out that "[o]urs is a representative democracy" and that "[a]side from a handful of narrow exceptions. . . essentially all laws in this country are adopted by legislatures made up of elected representatives."[186] This, Bhagwat says, raises a difficult question: what is the use of protecting public discourse if the public has no direct say over legislation?

[178] Post, *supra* note 28, at 2367; *see also* Robert Post, *Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse*, 64 U. COLO. L. REV. 1109, 1116–18 (1993); Weinstein, *supra* note 28, at 497.

[179] Post, *supra* note 29, at xiii.

[180] *Id.* at xiii.

[181] *Id.* at 17.

[182] *Id.* at 18. According to Post, "democratic competence" involves "the cognitive empowerment of persons within public discourse." *Id.* at 34. In his elaboration of the importance of democratic competence, Post gets at the heart of the problem we face today: "The First Amendment guarantees the free formation of public opinion[;] But public opinion is, in the end, merely opinion." *Id.* at 27. For Post, democratic competence "is necessary both for intelligent self-governance and for the value of democratic legitimation." *Id.* at 34. In other words, the capacity to engage in self-governance is a precondition for democratic legitimacy; without robust and informed public discourse, self-governance is not possible and thus participation in public discourse alone cannot create democratic legitimation. This is a point we will return to in Part III.

[183] Bhagwat, *supra* note 142, at 1113 (writing that Meiklejohn, Sunstein, and Post present a "radically incomplete vision of self-governance").

[184] *Id.* at 1115.

[185] *Id.* at 1118.

[186] *Id.* at 1119.

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In an article that deftly summarizes the founding era debate over the proper role of citizens in a representative democracy, Bhagwat draws insight from two major political crises of the 1790s: the creation of Democratic-Republican societies during the Washington Administration and the controversy over the Sedition Act during the first Adams Administration.[187] In both instances, Federalists, led by John Adams and Alexander Hamilton, asserted that in a representative democracy citizens should elect representatives based on their abilities, "but then leave deliberation over public issues to those representatives."[188] Under this view, "[c]riticism of the work of representatives is generally suspect, and indeed, citizens and the press were not generally expected to consider the wisdom of legislation at all."[189]

On the other side, Republican supporters of the societies and opponents of the Sedition Act, including Thomas Jefferson and James Madison, espoused "a strong vision of citizenship which was much more active."[190] Jeffersonian republicans saw speech and political associations "as vehicles through which citizens could safely and effectively articulate criticism of government policies."[191] In this regard they embraced the view of classical republicanism, which "emphasize[s] the role of the polis as the locus for achieving freedom through active citizenship."[192]

As Bhagwat points out, these two groups articulated very different conceptions of citizenship: "One, the Federalist model, envisioned a largely passive, respectful, and subordinate citizenry. The other, the Republican model, was much more active, collective, disrespectful, and even sometimes incendiary."[193] These competing visions of citizenship—and American democracy—played out in the debate over the First Amendment, where "arguments in support of active citizenship were often tied directly and explicitly to First Amendment rights."[194]

Ultimately, the First Amendment and the Bill of Rights, which was championed by Jefferson and Madison, succeeded in ratification over the objections of the Federalists. Today, one would be hard pressed to find a jurist or scholar who holds the view that American democracy is predicated on a passive and subordinate citizenry.[195] In fact, the idea that citizens should simply defer to their elected representatives was not widely shared even dur-

[187] *Id.* at 1121–23. The Democratic-Republican societies, which existed between 1973 and 1795, "were private groups, supportive of the French Revolution." *Id.*

[188] *Id.* at 1121.

[189] *Id.* (citing James P. Martin, *When Repression is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 129–30, 174 (1999); Robert M. Chesney, *Democratic-Republican Societies, Subversion, and the Limits of Legitimate Political Dissent in the Early Republic*, 82 N.C. L. REV. 1525, 1542–43 (2004)).

[190] *Id.* at 1122.

[191] *Id.*

[192] Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539, 1547 (1988).

[193] Bhagwat, *supra* note 142, at 1123.

[194] *Id.* at 1122

[195] *See id.* at 1123; Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know"*, 72 MD. L. REV. 1, 6 (2012) (concluding that "Madison's view could command widespread adherence today.").

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ing the founding period.[196] To the contrary, as Henry Kammerer argued in 1793, "every citizen should be capable of judging the conduct of rulers, and the tendency of laws," particularly given the "disposition in the human mind to tyrannize when cloathed with power."[197]

Naturally, one's view of the role that speech plays in a democracy will have an impact on how broadly speech relating to self-governance should be defined. Perhaps not surprisingly, even among those who support a self-governance theory, there continues to be disagreement over where to draw the line between speech that is germane to self-governance, which should be subject to rigorous First Amendment protection, and expressive activities outside the sphere of self-governance, which may not need similar protection.[198] At least initially for Meiklejohn such speech had to be explicitly political.[199] This exceedingly narrow definition faced immediate criticism from a number of quarters.[200] What may appear to be primarily personal, for instance artistic and literary expressions, can make important political statements. It is impossible, for example, to imagine that George Orwell's novels or Shakespeare's plays are unprotected by the First Amendment because they are not explicitly political. Meiklejohn ultimately revised his theory, concluding that speech about education, philosophy, science, literature, and the arts also can be necessary for self-governance.[201]

This broad understanding of the scope of speech germane to self-governance is now widely shared.[202] Indeed, speech does not even need to be

[196] *See* Martin, *supra* note 189, at 121 (noting that Federalist theories of citizenship "were already seriously eroding at the time the Sedition Act was passed and were thoroughly disowned in the early nineteenth century").

[197] Henry Kammerer, *Friends and Fellow Citizens*, NAT'L GAZETTE (Philadelphia), Apr. 13, 1793, reprinted in The Democratic-Republican Societies, 1790–1800: A Documentary Sourcebook Of Constitutions, Declarations, Addresses, Resolutions, and Toasts 53–55 (Philip S. Foner ed., 1976).

[198] *See* C. Edwin Baker, *Is Democracy A Sound Basis for A Free Speech Principle?*, 97 VA. L. REV. 515, 516 (2011) (noting the "serious difficulty of identifying when the person is engaged in protected public discourse"); Post, *supra* note 29, at 24 ("Almost all democratic accounts of the First Amendment seek to differentiate a political domain of public opinion creation from non-political domains of civil society.").

[199] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNANCE 105–07 (1948).

[200] *See, e.g.*, Zechariah Chafee, Jr., *Free Speech: And Its Relation to Self-Government. By Alexander Meiklejohn. New York: Harper Bros., 1948*, 62 HARV. L. REV. 891, 899 (1949) (book review) ("The most serious weakness in Mr. Meiklejohn's argument is that it rests on his supposed boundary between public speech and private speech."); Harry Kalven, Jr., *The Metaphysics of the Law of Obscenity*, 1960 SUP. CT. REV. 1, 15–16.

[201] MEIKLEJOHN, *supra* note 199, at 256–57. Alexander Bickel, another proponent of the self-governance theory expanded Meiklejohn's argument, concluding: "The social interest that the First Amendment vindicates is . . . the interest in the successful operation of the political process, so that the country may better be able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth." ALEXANDER M. BICKEL, THE MORALITY OF CONSENT 62 (1975).

[202] *See, e.g.*, Bhagwat, *supra* note 142, at 874 ("Scientific knowledge, cultural sharing and development, and more broadly the shaping of values are surely highly relevant to citizenship, especially if citizenship is defined more broadly than merely voting as the full text of the First Amendment suggests it must be."); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1160 (1983) ("To say that particular information or

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"public" in the sense of being directed at large audiences for it to be relevant to self-governance: "After all, citizens develop and share their political and cultural values at least as much through private conversations as through public discourse."[203] For Robert Post and many other scholars who advance a self-governance theory, "First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion" and "[b]ecause public opinion can direct government action in an endless variety of directions, it is impossible to specify in advance which aspects of public opinion are 'political' and which are not."[204]

III. Bridging Theory and Doctrine to Promote Self-Governance

My aim here is not simply to add another voice to the growing chorus of scholars who embrace a self-governance theory of the First Amendment. Instead, I wish to make three points that I will explicate in greater detail below. First, we must move beyond the idea that the First Amendment's only function is to impose free market ideology on public discourse, but we should retain the core principle underlying the marketplace of ideas theory—that the government must be precluded from enforcing its view of what should and should not be subject to public discussion. Second, the First Amendment does not bar the government from addressing deficiencies in the actual markets in which communication takes place, especially when these deficiencies undermine the public's capacity for self-governance. Third, the capacity for self-governance turns, at least in part, on whether the public has the information it needs to effectively evaluate issues of public policy. Accordingly, the government, which enjoys an outsized role in public discourse, should be prohibited from knowingly disseminating false and misleading information that undermines the public's capacity for self-governance and it should be obligated to disclose information in its possession that makes it possible for the public to understand the actions of government.

ideas are useful in the pursuit and achievement of an ever better understanding, or vision, of reality (which entitles the information or ideas to protection under the epistemic conception) is to say that the information or ideas are useful in the pursuit and achievement of moral vision and therefore of political vision (which entitles the information or ideas to protection under the democratic conception)."); *but see* Bork, *supra* note 28, at 20 (arguing that First Amendment protection should only apply to speech that is explicitly political).

[203] Bhagwat, *supra* note 142, at 874. Bhagwat notes that the Supreme Court has, in the context of speech by government employees, recognized that private conversations can constitute speech relevant to democratic self-governance. *Id.* at 874 n.247 (citing Rankin v. McPherson, 483 U.S. 378, 386 n.11 (1987); Givhan v. W. Line Consol. Sch. Dist., 439 U.S. 410, 414–16 (1979)).

[204] Post, *supra* note 29, at 18–19.

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A. Tempering Our Faith in the Competition of the Market

The marketplace of ideas theory should not be entirely abandoned. At its core, it stands for the proposition that the government must be precluded from enforcing its view of what should and should not be subject to public discussion and by extension, what is true and false. Understood in this way, it is apparent that the desire to ensure a free trade in ideas is not incompatible with a self-governance centered justification for the protection of speech. Nearly all government speech restrictions that limit what topics are open to public discussion also interfere with self-governance. As the social theorist Michael Warner writes, "[i]f it were not possible to think of the public as organized independently of the state . . . the public could not be sovereign with respect to the state."[205] Robert Post makes the same point when he warns that "[t]he public sphere can sustain democratic legitimation only insofar as it is beyond the grasp of comprehensive state managerial control."[206]

Although the self-governance and marketplace theories are in this respect complimentary, they are not coterminous in what they require. While speech that is protected under the marketplace theory would still be protected from government interference under a self-governance theory, the narrow focus on preserving the opportunity to speak is insufficiently protective of the *processes* by which public opinion is constantly being formed and reformed. This limited focus is the natural outgrowth of a theory that took root in the early twentieth century when the primary threat to public discourse was government suppression of anti-war and other anti-government speech.[207] While we should remain vigilant in preventing government censorship of speech, the primary challenge facing society today is the public's ability to make sense of the speech of others and the declining quality of public discourse.

Expanding our attention to the role that speech plays in fostering the conditions for self-governance means that we cannot wash our hands of the problems we are seeing and fall back on the time-worn adage that "the market will sort it out." If the First Amendment is to serve its vital function supporting self-governance, we need to concede that competition in the marketplace of ideas has not been the truth engine many theorists asserted it would be. This should not be a surprise, given that markets of all kinds

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[205] Michael Warner, Publics and Counterpublics 11 (2002).

[206] Post, *supra* note 29, at 18; *see also* Thomas I. Emerson, The System of Freedom of Expression 21 (1970) ("The effort to coerce belief . . . is the hallmark of a feudal or totalitarian society."); Weinstein, *supra* note 28, at 497 ("In its narrowest but most powerful conception, this core precept recognizes the right of every individual to participate freely and equally in the speech by which we govern ourselves."); Marshall, *supra* note 34, at 20 ("'[E]pistemological humility' imposed by the prohibition upon state orthodoxy is necessary for popular sovereignty.").

[207] In fact, First Amendment jurisprudence overall has been shaped to a large extent by conflicts over government efforts to restrict speech critical of the government. *See supra* notes 40–47 and accompanying text.

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invariably require some government intervention to function efficiently.[208] Despite the fact that evidence of market failures has often been employed to justify government involvement in traditional markets, it has not had a similar impact on efforts to improve the functioning of the speech marketplace.[209] Part of the reason for this is the belief that the marketplace for speech, unlike other markets, will take care of itself.

We see the ramifications of this unbridled faith in competition among ideas in a wide range of First Amendment cases, but it is particularly obvious in cases that deal with misinformation and other forms of harmful speech. In fact, other than in a few narrow categories of unprotected or lesser-protected speech,[210] most First Amendment doctrines evidence a surprising ambivalence as to whether speech is actually informative or misleading, or even true or false.[211] Fredrick Schauer writes that this ambivalence is likely due to the assumption that "the power of the marketplace of ideas to select truth was as applicable to factual as to religious, ideological, political, and social truth, but rarely is the topic mentioned."[212] Schauer laments that the consequences of this epistemic agnosticism are clear: "we have . . . arrived at a point in history in which an extremely important social issue about the proliferation of demonstrable factual falsity in public debate is one as to which the venerable and inspiring history of freedom of expression has virtually nothing to say."[213] Phil Napoli puts an even sharper point on this, warning that because

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[208] *See, e.g.*, Clifford Winston, Government Failure Versus Market Failure: Microeconomics Policy Research and Government Performance 73 (2007) ("Economic theory identifies many situations where a market failure may arise and suggests how the government could correct the failure and improve economic efficiency."); James M. Poterba, *Government Intervention in the Markets for Education and Health Care*, in Individual and Social Responsibility: Child Care, Education, Medical Care, and Long-Term Care in America 277, 277–308 (Victor R. Fuchs ed., 1996) (describing the basis for government interventions in the U.S. education and health care markets); Joseph E. Stiglitz, *The Role of the State in Financial Markets*, 7 World Bank Econ. Rev. 19, 20–21 (1993) (noting that "massive interventions in financial markets are common . . . includ[ing] banking and securities regulations as well as direct government involvement in lending activities").

[209] Blocher, *supra* note 34, at 836; Shiffrin, *supra* note 32, at 1281.

[210] The most salient of these categories is commercial speech. *See* 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996); Cent. Hudson Gas & Elec. Co. v. Pub. Serv. Comm'n, 447 U.S. 557 (1980); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

[211] *See* Erwin Chemerinsky, *False Speech and the First Amendment*, 71 Okla. L. Rev. 1, 10 (2018) (concluding that "it always will be impossible to say either that false speech is always protected by the First Amendment or that it never is protected by the First Amendment"); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. Rev. 897, 907 (2010) (noting that "nearly all of the components that have made up our free speech tradition . . . have had very little to say about the relationship between freedom of speech and questions of demonstrable fact"); Post, *supra* note 66, at 556 (concluding that "First Amendment doctrine is not in fact organized around epistemic concerns").

[212] Schauer, *supra* note 211, at 907; *see also* Murchison, *supra* note 7, at 60 (observing that courts "have seldom invoked the [truth-seeking] value in more than a perfunctory way"); Paul Horwitz, *The First Amendment's Epistemological Problem*, 87 Wash. L. Rev. 445, 488 (2012) (noting that "[w]here deep questions about the nature of truth and falsity are concerned, courts will rely on general statements and incompletely theorized agreements and leave the theorizing to others").

[213] Schauer, *supra* note 211, at 908.

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First Amendment doctrine fails to address the relationship between freedom of speech and the goal of increasing public knowledge, "the First Amendment has essentially facilitated the type of speech that, ironically, undermines the very democratic process that the First Amendment is intended to serve and strengthen."[214]

The response to this disturbing state of affairs, however, is not to grant the government greater leeway to *directly* regulate truth. Such an approach would undermine democratic legitimation and thus be anathema to any self-governance centered theory of the First Amendment.[215] Even with regard to demonstrably false factual statements it is likely that "any cure could be substantially worse than the disease."[216] Instead, the response should be to identify ways that the First Amendment can support the processes underlying democratic deliberation, including the creation and dissemination of speech that advances social knowledge. After all, not all speech is equal in fostering an informed and empowered society.

To do this, we must start by addressing some obvious problems in the "speech marketplace." Although neoclassical economic theory pervades much of the rhetoric associated with the marketplace of ideas, the speech marketplace has not been subject to the same degree of critical examination in terms of market failures that the market for goods has received.[217] As Joseph Blocher notes, "[c]ourts have clung to an idealized, neoclassical view of the marketplace of ideas far more tenaciously than economists have . . . when it comes to the 'real-world' market."[218]

Nobel Prize-winning economist Ronald Coase condemned this differential treatment in an influential paper in 1974, writing that "[t]here is no fundamental difference between these two markets, and in deciding on public policy with regard to them, we need to take into account the same considerations."[219] Coase clarified that "[i]t may not be sensible to have the same legal arrangements governing the supply of soap, housing, automobiles, oil, and books . . . [but] we should use the same *approach* for all markets when deciding on public policy."[220] Applying the methodology he advocated, Coase concluded: "if we . . use for the market for ideas the same approach which has commended itself to economists for the market for goods, it is

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[214] Napoli, *supra* note 79, at 88.

[215] *See* Schauer, *supra* note 211, at 915 ("Whatever the harms of public noncommercial factual falsity (and it seems hard to deny that they are many and substantial), there is, in the United States, little basis for arguing that dealing with these harms through government restriction is constitutionally permissible."); Post, *supra* note 28, at 2368 (noting that "the participatory approach [of self-governance] views the function of the First Amendment to be the safeguarding of public discourse from regulations that are inconsistent with democratic legitimacy").

[216] *See* Schauer, *supra* note 211, at 915.

[217] *See, e.g.*, Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 2–3 (1986); R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 385 (1964); Director, *supra* note 99, at 8.

[218] Blocher, *supra* note 34, at 836.

[219] Coase, *supra* note 217, at 389.

[220] *Id.* (emphasis in original).

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apparent that the case for government intervention in the market for ideas is much stronger than it is, in general, in the market for goods."[221]

According to economists, a market failure occurs when the market on its own fails to produce an efficient allocation of resources.[222] Market failure can be caused by many factors, including externalities, barriers to entry, lack of property rights, market power, or the inability to monetize.[223] Markets for public goods, such as journalism, education, and a clean environment, have proven to be especially prone to market failure.[224] These public goods tend to be under-produced relative to their full value to society because individuals have an incentive to "free ride" given that they can enjoy the benefits without helping to produce them.[225] In the language of economists, public goods such as an informed citizenry and a functioning democracy are "positive externalities." Externalities, whether positive or negative, are understood to be a type of market failure because "externalities generally are not fully factored into a person's decision about whether and how to engage in an activity and consequently may have a distorting effect on market coordination and allocation of resources."[226]

Phil Napoli, who has extensively studied the production of journalism, points out that journalism "produces value for society as a whole (positive externalities) that often is not captured in the economic transactions between news organizations and news consumers, and/or between news organizations and advertisers," which he concludes "leads to market inefficiency in the form of the underproduction of journalism."[227] Indeed, the current situation

[221] *Id*. at 389–90. Coase goes on to identify a number of spillover effects or "externalities" in the speech marketplace that he believes would justify government intervention.

[222] *See* N. Gregory Mankiw, Principles of Economics 814 (8th ed. 2017); Kenneth A. Shepsle & Barry R. Weingast, *Political Solutions to Market Problems*, 78 Am. Pol. Sci. Rev. 417 (1984) ("According to the market failure orthodoxy, inefficiency in the marketplace provides a prima facie case for public intervention.").

[223] *See generally* Justin M. Ross, *What Should Policy Makers Know When Economists Say "Market Failure"?*, 14 Geo. Pub. Pol'y Rev. 27 (2009).

[224] *See* Napoli, *supra* note 79, at 89; Brett M. Frischmann, *Speech, Spillovers, and the First Amendment*, 2008 U. Chi. Legal F. 301, 310 (2008).

[225] James T. Hamilton, All the News That's Fit to Sell: How the Market Transforms Information into News 8 (2004) ("A person can consume a public good without paying for it, since it may be difficult or impossible to exclude any person from consumption"); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 Harv. L. Rev. 554, 555 (1991) (observing that "because information is a public good, it is likely to be undervalued by both the market and the political system"); Victor Pickard, *The Great Evasion: Confronting Market Failure in American Media Policy*, 31 Critical Stud. Media Comm. 153, 154 (2014) ("Because public goods are non-rivalrous (one person's consumption does not detract from another's) and non-excludable (difficult to monetize and to exclude from free riders), they differ from other commodities, like cars or clothes, within a capitalistic economy.").

[226] *See* Frischmann, *supra* note 224, at 306. According to Frischmann, "Speech is an activity that regularly generates externalities—costs or benefits realized by parties other than the speaker or listener that are not fully accounted for in the decision to speak or transactions related to the speech." *Id*. at 310.

[227] Napoli, *supra* note 79, at 89; *see also* Hamilton, *supra* note 225, at 13 ("[S]ince individuals do not calculate the full benefit to society of their learning about politics, they will express less than optimal levels of interest in public affairs coverage and generate less than

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for journalism in the United States is dire. Technological and economic assaults have destroyed the for-profit business model that sustained local journalism in this country for two centuries.[228] While the advertising-based model for news has been under threat for many years, the COVID-19 pandemic and the increasing percentage of advertising revenue being captured by a small number of online platforms have created what some experts describe as an "extinction level" threat for local newspapers and other struggling news outlets.[229] Since 2004, more than one-fourth of the country's newspapers have disappeared, leaving residents in thousands of communities living in news deserts.[230] A recent article in the *Harvard Business Review* refers to the market failure of local journalism as a "crisis for democracy."[231]

Coase, to his credit, was clear eyed in his assessment of why economists and policymakers ignore externalities in the marketplace of ideas, writing that there is a general view that if the government were to attempt to regulate the marketplace of ideas, the government "would be inefficient and its motives would, in general, be bad, so that, even if it were successful in achieving what it wanted to accomplish, the results would be undesirable."[232] Coase remarked with some sarcasm that this skepticism regarding the government was bolstered by the belief that "[c]onsumers, on the other hand, if left free, exercise a fine discrimination in choosing between the alternative views placed before them, while producers [of speech], whether economically powerful or weak, who are found to be so unscrupulous in their behavior in other markets, can be trusted to act in the public interest" when it comes to democratic discourse.[233] Joseph Blocher wryly notes that Aaron Director, also a leading figure in the Chicago School of Economics, "argued the same thing a decade earlier, but with a similarly negligible impact" on law and economic policy.[234]

From a self-governance perspective, concern over failures in the speech marketplace go well beyond the desire to increase market efficiency. The Internet has laid bare the deep dysfunction within modern public discourse. Our current media ecosystem produces too little high-quality information, we have a tendency to be attracted to information that confirms our existing biases, and we share this information with little regard for its veracity.[235] The results and aftermath of the 2016 U.S. presidential election have made these

desirable demands for news about government."); Pickard, *supra* note 225, at 155 ("The inadequacy of commercial support for democracy-sustaining infrastructures suggests what should be obvious by now: the systematic underproduction of vital communications like journalistic media.").

[228] Ardia, et al., *supra* note 1, at 13–16.

[229] Abernathy, *supra* note 1, at 9.

[230] *Id.* at 10.

[231] Victor Pickard, *The Big Idea: Journalism's Market Failure Is a Crisis for Democracy*, HARV. BUS. REV. (March 12, 2020), https://hbr.org/2020/03/journalisms-market-failure-is-a-crisis-for-democracy [https://perma.cc/Y39Q-GVKT].

[232] Coase, *supra* note 217, at 384.

[233] *Id.* at 384–85.

[234] Blocher, *supra* note 34, at 837 (citing Director, *supra* note 99, at 6).

[235] *See supra* notes 1–3.

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concerns all the more pressing, as researchers continue to warn about the potential for political bias in the content moderation practices of online platforms,[236] the extent to which public discourse is polluted by the spread of misinformation,[237] and the increasing efforts by some individuals, both inside and outside government, to inflame political discourse.[238]

Even a casual observer of today's speech marketplace can see the proliferation of conspiracy theories, "fake news," and other forms of misinformation.[239] Combined with the declining availability of effective counter

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[236] *See, e.g.*, Juhi Kulshrestha, Motahhare Eslami, Johnnatan Messias, Muhammad Bilal Zafar, Saptarshi Ghosh, Krishna P. Gummadi & Karrie Karahalios, *Search Bias Quantification: Investigating Political Bias in Social Media Web Search*, 22 INFO. RETRIEVAL J. 188, 189 (2019) ("[W]e observe that the top Twitter search results display varying degrees of political bias that depends on several aspects; such as the topic (event/person) being searched for, the exact phrasing of the query (even for semantically similar queries), and also the time at which the query is issued."); Robert Gorwa, Reuben Binns & Christian Katzenbach, *Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance*, BIG DATA & SOC'Y, Jan.–June 2020, at 12 (noting that although Facebook's algorithmic moderation allows for removal of terrorist propaganda, "this elides the hugely political question of who exactly is considered a terrorist group"); Daphne Keller and Paddy Leerssen, *Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation*, in SOCIAL MEDIA AND DEMOCRACY 220, 236 (Nathaniel Persily & Joshua A. Tucker, eds., 2020) (describing leaked information from Facebook revealing the potential for political bias in content moderation, including instructions to employees to "escalate" certain political content in response to public pressure from the Turkish government).

[237] *See* Napoli, *supra* note 79, at 57 (describing the spread of misinformation online and the inability of counter speech to combat it); Michel Martin & Will Jarvis, *Far-Right Misinformation Is Thriving on Facebook. A New Study Shows Just How Much*, NPR (Mar. 6, 2021), https://www.npr.org/2021/03/06/974394783 [https://perma.cc/ZJ3R-6XLR] (reporting that "far-right accounts known for spreading misinformation are not only thriving on Facebook, they're actually more successful than other kinds of accounts at getting likes, shares and other forms of user engagement"),

[238] *See, e.g.,* Alistair Somerville & Jonas Heering, *The Disinformation Shift: From Foreign to Domestic*, GEO. J. INT'L AFFS., (Nov. 28, 2020), https://gjia.georgetown.edu/2020/11/28/the-disinformation-shift-from-foreign-to-domestic/ [https://perma.cc/4Z2M-WBXW] ("Domestic actors, led by the Trump campaign and White House officials, are exploiting [the] uncertainty [about the 2020 election results] by spreading disinformation about supposed electoral fraud, glitches in voting machines, and late voting to muddy the waters and undermine citizens' faith in the electoral process."); Paul M. Barrett, NYU STERN CTR. FOR BUS. & HUM. RIGHTS, *Tackling Domestic Disinformation* 1–4 (March 2019) (reporting that the majority of "junk news" shared on social media in the lead-up to the 2018 midterm elections came from domestic U.S. sources as opposed to foreign actors); Gred Myre & Shannon Bond, *'Russia Doesn't Have to Make Fake News': Biggest Election Threat Is Closer To Home*, NPR: ALL THINGS CONSIDERED (Sept. 29, 2020), https://www.npr.org/2020/09/29/917725209/ [https://perma.cc/3PCL-SNMH] (reporting on the increased threat of domestic disinformation and noting that "would-be foreign meddlers need only amplify falsehoods being spread by U.S. social media users").

[239] *See* FAKE NEWS: UNDERSTANDING MEDIA AND MISINFORMATION IN THE DIGITAL AGE 1–2 (Melissa Zimdars & Kembrew McLeod eds., 2020) (writing that the proliferation of fake news represents "a confluence of issues, including the coordinated politicization and weaponization of information, public distrust of news organizations, and . . . failures of technology and information platforms to acknowledge their role in both exacerbating and solving the spread of misinformation"); Michael Del Vicario, Alessandro Bessi, Fabiana Zollo & Walter Quattrociocchi, *The Spreading of Misinformation Online*, 113 PROC. NAT'L ACAD. SCI. 554, 554 (2015) (noting that the World Economic Forum has deemed digital misinformation as among the main threats to society); Cecilia Kang & Sheera Frenkel, *'PizzaGate' Conspiracy Theory Thrives Anew in the TikTok Era*, N.Y. TIMES (July 14, 2020) https://

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speech and the increasing use of algorithmic "filter bubbles,"[240] there is reason to be concerned that the public sphere, as currently constituted, will not be able to support informed democratic decision-making. Lyrissa Lidsky warns that this would make self-governance impossible:

> The ideal of democratic self-governance . . . makes no sense unless one assumes that citizens will generally make rational choices to govern the fate of the nation. If the majority of citizens make policy choices based on lies, half-truths, or propaganda, sovereignty lies not with the people but with the purveyors of disinformation. If this is the case, democracy is both impossible and undesirable.[241]

It is beyond the scope of this paper to present a detailed analysis of the many failures in the communication markets that facilitate public discourse. Others are already doing this important work.[242] My point in summarizing the more obvious problems is to highlight the fact that even within the economic postulates of the marketplace theory itself, which prizes competition and market efficiency, there are reasons to countenance government interventions to improve the functioning of the speech marketplace. In fact, as Coase points out, the conventional understanding of the First Amendment has tended to obscure the fact that there is already "a good deal of government intervention in the market for ideas."[243]

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www.nytimes.com/2020/06/27/technology/pizzagate-justin-bieber-qanon-tiktok.html [https://perma.cc/B6M4-CH35] (reporting on how the baseless claim that Hillary Clinton and Democratic elites were running a child sex-trafficking ring out of a Washington pizzeria spread across the internet in 2016 and is resurging on new forms of social media); Daniel Romer & Kathleen Hall Jamieson, *Conspiracy Theories as Barriers to Controlling the Spread of COVID-19 in the U.S.*, 263 Soc. Sci. & Med. 1, 1–2 (2020) (concluding that conspiracy theories spread through social and traditional media channels about COVID-19 posed a barrier to responding to the pandemic). As Ari Waldman points out, "fake news" is simply a "new name for an old problem" that has significant social costs. Waldman, *supra* note 99, at 846, 850–51.

[240] *See, e.g.,* Napoli, *supra* note 79, at 90–91 (describing the declining effectiveness of counterspeech in today's media ecosystem); Brent Kitchen, Steven L. Johnson & Peter Gray, *Understanding Echo Chambers and Filter Bubbles*, 44 Mgmt. Info. Sys. Q. 1619, 1620 (2020) (observing that "researchers have long expressed concern about the potential for algorithmic filtering to reduce the diversity of information sources that individuals are exposed to, engage with, or consume); Alessandro Bessi, Fabiana Zollo, Michela Del Vicario, Michelangelo Puliga, Antonio Scala, Guido Caldarelli, Brian Uzzi & Walter Quattrociocchi, *Users Polarization on Facebook and Youtube*, 11(8) PLOS One 1, 1 (2016) (noting how social media algorithms such as Facebook's News Feed and YouTube's Watch Time create "echo chambers" by presenting users with content that reinforces their existing viewpoints).

[241] Lidsky, *supra* note 11, at 839 (2010).

[242] *See generally* Pickard, *The Great Evasion*, *supra* note 225; Frischmann, *supra* note 225; Blocher, *supra* note 34; Bush, *supra* note 51; Napoli, *supra* note 79.

[243] Coase, *supra* note 217, at 390. Although the Supreme Court has generally avoided using the term "market failure" in the First Amendment context, the Court "has long been attuned to the possibility of certain speech-related market failures." Blocher, *supra* note 34, at 833. Joseph Blocher points to a number of cases as examples, including the clear and present danger test announced in *Schenck v. United States*, 249 U.S. 47, 52 (1919); limitations on corporate spending in elections in *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 259 (1986); and the "fighting words" doctrine in *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942).

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B. Potential Market Interventions

Although the marketplace metaphor is an inapt description of how individuals actually participate in public discourse, most speech does take place within a communication ecosystem comprised of profit-seeking entities operating in traditional economic markets. Focusing on these markets should be a central part of any effort to support the public's capacity for self-governance. But what can be done, consistent with the First Amendment, to improve the functioning of these markets? Quite a bit actually. Over the past two years I have worked with social scientists, economists, journalists, lawyers, and others to study potential solutions to the problems plaguing public discourse, particularly the decline of journalism and spread of misinformation. Our work has identified proposals that range from increasing the supply of—and demand for—news to market reforms that respond to the growing power disparities between news producers and online platforms as well as between platforms and their users.[244] I will highlight some of the more significant proposals here.

One of the most frequently mentioned solutions is for the government to increase its support for news organizations so that they can fulfill their historically important role as the "Fourth Estate."[245] As Sonja West explains, "a free press [is] vital to the country's survival by checking government tyranny and corruption and by monitoring laws and public policies through an informed citizenry."[246] Martha Minow, former dean of Harvard Law School, recently championed this approach in her book *Saving the News: Why the Constitution Calls for Government Action to Preserve Freedom of Speech*.[247] This support can range from direct government funding such as the Corporation for Public Broadcasting to indirect support in the form of government subsidies that operate through regulatory, tax, and other government policies that strengthen journalism and allow news organizations to thrive.[248]

In fact, government support for news is as old as the nation itself. One of Congress' first priorities was to pass the Post Office Act of 1792, which, among other things, provided postal subsidies for the distribution of newspa-

[244] *See generally* Ardia et al, *supra* note 1 (summarizing a 2019 workshop and evaluating potential solutions to the decline of local news, rise of platforms, and spread of misinformation).

[245] This term is commonly used to refer to news organizations. Leonard Levy, in his seminal work, EMERGENCE OF A FREE PRESS, writes that a "free press meant the press as the Fourth Estate, or, rather, in the American scheme, an informal or extraconstitutional fourth branch that functioned as part of the intricate system of checks and balances that exposed public mismanagement and kept power fragmented, manageable, and accountable." LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 273 (1985).

[246] Sonja R. West, *Favoring the Press*, 106 CALIF. L. REV. 91, 108 (2018).

[247] MARTHA MINOW, SAVING THE NEWS: WHY THE CONSTITUTION CALLS FOR GOVERNMENT ACTION TO PRESERVE FREEDOM OF SPEECH 138–44 (2021).

[248] *See* Ardia et al, *supra* note 1, at 42–47 (describing proposals to support journalism through changes in tax, bankruptcy, and pension laws).

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pers.[249] Thomas Jefferson felt so strongly about the importance of newspapers that he once wrote: "were it left to me to decide whether we should have a government without newspapers, or newspapers without a government, I should not hesitate a moment to prefer the latter."[250] Jefferson was clearly on to something as studies have confirmed that the decline of local news negatively affects the ability of communities to engage in democratic self-governance.[251]

The disappearance of local news sources not only leads to less engaged communities, it also creates an information vacuum that aids the spread of inaccurate information which can undermine public trust in government and other important institutions.[252] Although misinformation in media is not new, it spreads especially rapidly on social media, which has become a key source of news for most Americans.[253] In her important work examining why

[249] Act of Feb. 20, 1792, 1 Stat. 232, 236 (expired 1794). Anuj Desai writes that these subsidies "were premised on the underlying educational rationale espoused by Rush, Washington, Madison, Jefferson, and others: if the 'people' are to be sovereign, it is vital that they be informed about public affairs, and it is part of the government's affirmative responsibility to ensure that the people can in fact secure access to such information." Anuj C. Desai, *The Transformation of Statutes into Constitutional Law: How Early Post Office Policy Shaped Modern First Amendment Doctrine*, 58 HASTINGS L.J. 671, 694–95 (2007) (quoting RICHARD B. KIELBOWICZ, NEWS IN THE MAIL: THE PRESS, POST OFFICE AND PUBLIC INFORMATION, 1700–1860s, at 16 (1989)).

[250] 5 THOMAS JEFFERSON, THE WORKS OF THOMAS JEFFERSON 253 (Paul Leicester Ford ed. 1905). John Nichols and Robert McChesney calculated that the level of government subsidy given to the press in the 1840s was the equivalent of $30 billion dollars, which far exceeds the support government provided to the press in 2010. JOHN NICHOLS & ROBERT D. MCCHESNEY, THE DEATH AND LIFE OF AMERICAN JOURNALISM: THE MEDIA REVOLUTION THAT WILL BEGIN THE WORLD AGAIN 84–85 (2010).

[251] *See* Jackie Filla & Martin Johnson, *Local News Outlets and Political Participation*, 45 URB. AFFS. REV. 5, 679–92 (2010) (finding that respondents living in suburban Los Angeles County who had access to a daily local newspaper were more likely to vote regularly than those living in communities without one); Jay Jennings & Meghan Rubado, *Newspaper Decline and the Effect on Local Government Coverage*, ANNETTE STRAUSS INST. FOR CIVIC LIFE (2019) (concluding that mayoral elections are less competitive in communities where newspaper staffing cuts are the most severe), https://tinyurl.com/JenningsNewspaperDecline [https://perma.cc/2HZF-5JNF].

[252] *See* VICTOR PICKARD, DEMOCRACY WITHOUT JOURNALISM?: CONFRONTING THE MISINFORMATION SOCIETY 87 (2020); Danny Hayes and Jennifer L. Lawless, *The Decline of Local News and its Effects: New Evidence from Longitudinal Data*, 80 J. POL. 332, 332 (2018); Joshua P. Darr, Matthew P. Hitt & Johanna L. Dunaway, *Newspaper Closures Polarize Voting Behavior*, 68 J. COMM. 1007, 1008 (2018).

[253] In 2019, the Pew Research Center found that over half of Americans (54%) either got their news "sometimes" or "often" from social media. Elisa Shearer & Elizabeth Grieco, *Americans Are Wary of the Role Social Media Sites Play in Delivering the News*, PEW RSCH. CTR. (Oct. 2, 2019), https://www.journalism.org/2019/10/02/americans-are-wary-of-the-role-social-media-sites-play-in-delivering-the-news/ [https://perma.cc/88S6-3TVZ]. Pew also found that Facebook is far and away the social media site Americans use most for news; more than half (52%) of all U.S. adults get news there. *Id.* The next most popular social media site for news is YouTube, which is owned by Google (28% of adults get news there), followed by Twitter (17%) and Instagram, which is owned by Facebook, (14%). *Id.* By 2018, social media had surpassed print newspapers as a news source for most Americans. *See* Elisa Shearer, *Social Media Outpaces Print Newspapers in the U.S. as a News Source*, PEW RSCH. CTR. (Dec. 10, 2018), https://www.pewresearch.org/fact-tank/2018/12/10/social-media-outpaces-print-newspapers-in-the-u-s-as-a-news-source/ [https://perma.cc/MMU7-6SKH].

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people share fake news, Alice Marwick notes that social media have several significant differences from traditional media that aid in the spread of misinformation: "(1) Anyone can produce and distribute content; (2) Content is shared through social networks and in social contexts; and (3) Social media platforms promote content algorithmically, based on complex judgments of what they think will keep you on the platform."[254] As her research and the research of others is showing, we tend to be attracted to information that confirms our existing biases about the world and "problematic information is prioritized on social media sites because it garners more engagement."[255] According to a 2018 study, *The Spread of True and False News Online*, researchers at the Massachusetts Institute of Technology found that false news stories on Twitter "diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information."[256]

Opportunistic actors have been quick to fill the information vacuums left from the decline of traditional news sources by leveraging the affordances of social media to engage in *dis*information campaigns.[257] In early 2021, when Facebook banned users in Australia from sharing news content on the company's social media service, the void was filled by "fringe self-described news websites, some already known for spreading misinformation," leading to concerns about a "spike in vaccine scare stories and anti-vaccine sentiment."[258] The rapid spread of misinformation about the COVID-19 virus has provided researchers with a disturbing window into how information vacuums and networked communication technology can combine to thwart public health initiatives.[259] As this research reveals, it is

[254] Marwick, *supra* note 2, at 503.

[255] *Id.* at 506; *see also* sources cited *supra* in note 2.

[256] *See* Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCI. MAG. 1146, 1146 (2018). The researchers found that falsity traveled six times faster than the truth online, and, while accurate news stories rarely reached more than 1,000 people, false news stories "routinely diffused to between 1,000 and 100,000 people." *Id.* Similarly, a 2017 study found that the lifecycle of political misinformation on social media was longer than that of accurate factual information and political misinformation tended to reemerge multiple times. *See* Jieun Shin, Lian Jian, Kevin Driscoll & Francois Bar, *The Diffusion of Misinformation on Social Media: Temporal Pattern, Message, and Source*, 83 COMP. HUM. BEHAV. 278, 279 (2018).

[257] Generally speaking, misinformation is false information that is created and spread regardless of an intent to harm or deceive, whereas disinformation is deliberately deceptive. *See* Deen Freelon & Chris Wells, *Disinformation as Political Communication*, 37 POL. COMM. 145, 145 (2020) (explaining that disinformation includes "three critical criteria: 1) deception, 2) potential for harm, and 3) intent to harm"). A 2020 report from Jessice Mahone and Philip Napoli warns of the growth of partisan media outlets "masquerading" as local news sources. Jessice Mahone & Philip Napoli, *Hundreds of Hyperpartisan Sites Are Masquerading as Local News. This Map Shows If There's One Near You*, NEIMAN LAB (July 13, 2020), https://tinyurl.com/MahoneNapoli [https://perma.cc/2JFW-5R8C].

[258] James Purtill *Facebook News Ban Sees Anti-Vaccine Misinformation Pages Unaffected and Posting in 'Information Vacuum'*, ABC NEWS (Feb. 18, 2021), https://www.abc.net.au/news/science/2021-02-18/facebook-news-ban-misinformation-spread-covid-vaccine-rollout/13167318 [https://perma.cc/6CGG-HWTB].

[259] *See, e.g.*, Howard A. Zucker, *Tackling Online Misinformation: A Critical Component of Effective Public Health Response in the 21st Century*, 110 AM. J. PUB. HEALTH S269, S269 (October 1, 2020): pp. S269-S269 ("[M]isinformation is especially dangerous today because of

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exceedingly difficult to reverse the harms arising from exposure to misinformation: "Using medical terms, one might say misinformation is widely prevalent, incredibly infectious, and highly resistant to currently available treatment."[260]

While the advertising-based model for local news has been under threat for many years, the growth of online platforms—which are in a unique position to amass and monetize data from their users—has made the competitive environment for news organizations especially challenging.[261] Most online platforms collect extraordinary amounts of personal information and behavioral data from their users that they combine to create detailed profiles on individual users; the platforms use this information to influence the behavior of their users while at the same time offering advertisers the ability to precisely target consumers who are most likely to purchase the advertiser's products or services.[262]

The data-leveraging practices of platforms have several effects on the market for news. First, the ability to precisely target users gives online platforms a significant economic advantage over traditional media outlets, which do not have access to this information and cannot provide the same level of targeting for advertisers.[263] Not surprisingly, a growing proportion of the money advertisers once spent on advertising through newspapers, television and radio is now directed to online platforms. 2019 marked a major milestone in this regard, as online advertising spending for the first-time surpassed advertising spending through traditional media, with most of this digital ad revenue going to Google and Facebook who, together, accounted for about 60% of the digital advertising market in 2019.[264] This shift in advertising spending has been especially disastrous for newspapers, which saw

declining trust in institutions, including government, medical systems, and the press, which has created a vacuum in which science is pushed to the margins and misinformation more easily takes hold.").

[260] *Id.*

[261] *See* Ardia et al., *supra* note 1, at 21–28.

[262] *Id.*

[263] *See Committee for the Study of Digital Platforms*, *Market Structure and Antitrust Subcommittee*, STIGLER CTR. FOR THE STUDY OF THE ECONOMY AND THE STATE 1, 37 (July 1, 2019) [hereinafter "Stigler Report"] (stating that machine learning and big data have transformed the advertising industry to make advertising dollars work more efficiently for online platforms "at a scale that goes far beyond what is possible in traditional markets"), https://tinyurl.com/StiglerMarketStructureReport [https://perma.cc/2PKQ-RTLY]; Staff of H.R. Subcomm. on Antitrust, Com. and Admin. L. of the Comm. on the Judiciary, 116th Cong., Investigation of Competition in Digit. Mkts., at 388 (2020) [hereinafter "Competition in Digit. Mkts."] (concluding that Google and Facebook have monopolized control over the circulation of trustworthy news by "dominating both digital advertising and key communication platforms").

[264] *See* Jasmine Enberg, *Global Digital Ad Spending 2019*, EMARKETER (Mar. 28, 2019) (reporting that in 2019, digital advertising accounted for 50.1% of total media ad spending worldwide), https://tinyurl.com/eMarketerAds2019 [https://perma.cc/XD4Z-Q2BH].

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advertising revenue decline 62% between 2008 and 2018 from $37.8 billion to $14.3 billion.[265]

Second, with a rich revenue stream from advertising, platforms can offer their services to users without charging a fee, giving platforms another advantage over news organizations that typically must rely on a subscription-based model to cover the costs of newsgathering and publication. In the competition for users/viewers/readers, traditional news organizations have had difficulty retaining and attracting subscribers who have become increasingly accustomed to accessing content for free through social media.

In economic terms, online platforms like Facebook and Google operate in "multi-sided markets," where their interactions with users is just one aspect of the company's business model.[266] As the old aphorism goes, "If you are not paying for it, you're not the customer; you're the product being sold."[267] Leveraging their position as an essential intermediary between users, advertisers, news providers, and other parties who seek to gain access to users or their data, online platforms have been able to force these parties into asymmetrical relationships that are highly favorable to the platform and difficult for traditional antitrust models to account for and control.[268]

The problem with pervasive data collection, however, goes far beyond the anti-competitive effects on news organizations. These data make possible a host of powerful algorithms that social media companies employ to retain and influence users. It has long been an open secret that platforms use algorithms to determine what content to display to users and how it is presented.[269] What has been less apparent is that platforms use these algorithms to manipulate users in ways that potentially impact democratic participation. In 2014, it was revealed that Facebook performed experiments on its users without their knowledge by changing its algorithmically curated news feed to reduce the number of positive or negative posts shown to users,

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[265] *See* Elizabeth Grieco, *Fast Facts About the Newspaper Industry's Financial Struggles as McClatchy Files for Bankruptcy*, FACT TANK (Feb. 14, 2020), https://tinyurl.com/FctTnk2020 [https://perma.cc/K9WN-T88U].

[266] *See* Kenneth A. Bamberger & Orly Lobel, *Platform Market Power*, 32 BERKELEY TECH. L.J. 1051, 1053 (2017) (noting that "Amazon, eBay, Facebook and Google . . . use the power and networking capacity of online technology and data analytics to create multisided markets that can quickly scale and achieve market dominance.").

[267] The source of this quote has long been debated, but the idea certainly predates social media. *See* Will Oremus, *Are You Really the Product?*, SLATE (Apr. 27, 2018), https://slate.com/technology/2018/04/are-you-really-facebooks-product-the-history-of-a-dangerous-idea.html [https://perma.cc/7KCY-S8H9].

[268] *See* Orly Lobel, *The Law of the Platform*, 101 MINN. L. REV. 87, 94 (2016) ("Platform companies defy traditional regulatory theory the same way they defy traditional definition—by varying the products, services, and methods they employ to connect buyers and sellers, workers and those in need of services.); David S. Evans, *Multisided Platforms, Dynamic Competition, and the Assessment of Market Power for Internet-Based Firms*, 753 COASE-SANDOR WORKING PAPER SERIES IN L. & ECON. 1, 24–25 (2016).

[269] In fact, a surprisingly large percentage of U.S. adults who use Facebook (53%) say they do not understand why certain posts and not others are included in their news feed. *See* Aaron Smith, *Many Facebook users don't understand how the site's news feed works*, Pew Research Center (Sept. 5, 2018), https://www.pewresearch.org/fact-tank/2018/09/05/many-facebook-users-dont-understand-how-the-sites-news-feed-works/ [https://perma.cc/4KS2-CDMJ].

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which had a measurable impact on users' emotional states.[270] As Zeynep Tufkci explains, "[t]he researchers positively showed that news and updates on Facebook influence the tenor of the viewing Facebook-user's subsequent posts—and that Facebook itself was able to tweak and control this influence by tweaking the algorithm."[271] Tufkci notes that the Facebook experiment raises important questions, "including whether Facebook might algorithmically throw elections—a possibility which, to the alarm of activists and some academics, was revealed in an earlier separate study"[272] in which "Facebook demonstrated that it could alter the U.S. electoral turnout by hundreds of thousands of votes, merely by nudging people to vote through slightly different, experimentally manipulated, get-out-the-vote messages."[273]

Several solutions have been offered to limit the power of the "data oligarchy" comprised of a handful of technology companies, including Google, Facebook, and Amazon, who wield outsize control over public discourse.[274] One approach is to mandate that platforms disclose the data they collect and allow users to access their data and take it with them to another platform or use it on multiple platforms at once, thus opening more opportunities for competition among platforms.[275] This idea, known as "data portability," has been gaining acceptance across the world. In April 2016, the European Union passed the General Data Protection Regulation (GDPR), which includes the right to data portability as one of eight rights enforced by the law.[276] Similarly, the California Consumer Privacy Act (CCPA), which went

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[270] Adam D.I. Kramer, Jamie E. Guillory & Jeffery T. Hancock, *Experimental Evidence of Massive Scale Emotional Contagion Through Social Networks*, 111 PROC. NAT'L ACAD. SCI 8788, 8788–90 (2014), https://www.pnas.org/content/pnas/111/24/8788.full.pdf [https://perma.cc/D2QR-LGV6].

[271] Zeynep Tufekci, *Algorithmic Harms Beyond Facebook and Google: Emergent Challenges of Computational Agency*, 13 COLO. TECH. L.J. 203, 204 (2015).

[272] *Id.* at 204–05 (citing Micah L. Sifry, *Facebook Wants You to Vote on Tuesday. Here's How it Messed with Your Feed in 2012*, MOTHER JONES (Oct. 31, 2014), http://www.motherjones.com/politics/2014/10/can-voting-facebook-button-improve-voter-turnout; Zeynep Tufekci, *Engineering the Public: Big Data, Surveillance and Computational Politics*, 19 FIRST MONDAY 7 (July 7, 2014), http://journals.uic.edu/ojs/index.php/fm/article/view/4901/4097 [https://perma.cc/7LZ9-WGW3]; Jonathan Zittrain, *Engineering an Election*, 127 HARV. L. REV. F. 335 (Jun. 20, 2014); Jonathan Zittrain, *Facebook Could Decide an Election Without Anyone Ever Finding Out*, NEW REPUBLIC (June 1, 2014), http://www.newrepublic.com/article/117878/information-fiduciary-solution-facebook-digital-gerrymandering [https://perma.cc/U8SP-CA85].

[273] Tufekci, *supra* note 271, at 215.

[274] *See generally* Duncan McCann, *The Rise of the Data Oligarchs*, NEW ECON. FOUND. (May 25, 2018), https://neweconomics.org/uploads/files/Rise-of-the-data-oligarchs.pdf [https://perma.cc/W9V9-ECEX].

[275] *See* Ardia, et al., *supra* note 1, at 47–50 (describing proposals to impose data portability requirements that would increase competition and reduce market concentration among online platforms). To be effective, this so called right of "data portability" should be combined with a requirement that platforms allow users to communicate across platforms and networks rather than being locked into a single platform's proprietary architecture (called "interoperability"). *Id.* at 48.

[276] Regulation (EU) 2016/679 of the European Parliament and of the Council of April 27 on the protection of natural persons with regard to processing of personal data and on the free movement of such data and repealing Directive 95/46/EC [2016] OJ L 119/1, art. 20. The GDPR allows data subjects to obtain data related to them that is held by a "data controller"

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into effect on January 1, 2020, provides for data portability for consumers in California.[277]

Data portability can be even more effective in spurring competition if it is implemented in conjunction with comprehensive data privacy protections for users.[278] Robust privacy laws would lessen the pervasive data collection by platforms and reduce the competitive advantage platforms currently enjoy.[279] Moreover, unlike policies designed to directly support journalism, privacy laws can target key parts of the business model of platforms; by limiting the data platforms can collect from their users, privacy regulation would lessen the effectiveness of specific types of microtargeting and potentially loosen the stranglehold data-rich platforms hold over the advertising market.[280]

Many critics of the current media system assert that data portability and privacy protections will not be enough to rein in the power of the dominant platforms.[281] They point to the explosive growth of Google in search and advertising, Facebook in social networking, and Amazon in online retailing as demonstrating that these digital markets have winner-take-all characteristics that tend to leave just one dominant player.[282] Accordingly, even if users are given the right to take their data with them to a new platform, the high degree of concentration in many digital markets means that consumers

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and to reuse it for their own purposes. Individuals are free to either store the data for personal use or to transmit it to another data controller. In addition, the GDPR requires that the data must be received "in a structured, commonly used and machine-readable format." *Id*.

[277] California Consumer Privacy Act of 2018 (CCPA), CAL. CIV. CODE § 1798.100(d).

[278] Although state legislatures have been active in developing new privacy laws, including the recently enacted CCPA, the U.S. currently lacks comprehensive federal privacy rules. Instead, privacy protections in the U.S. are drawn from a complex patchwork of sector-specific and medium-specific privacy laws, including laws and regulations that address telecommunications, health information, credit information, financial institutions, and marketing. *See* David S. Ardia & Anne Klinefelter, *Privacy and Court Records: An Empirical Study*, 30 BERKELEY TECH. L.J. 1807, 1832–34 (2015) (describing the piecemeal U.S. approach to privacy).

[279] *See* Revisiting the Need for Federal Data Privacy Legislation, Hearing Before the Comm. on Com., Sci., and Transp., 116th Cong. (2020); Charlotte Slaiman, *Data Protection is About Power, Not Just Privacy*, PUB. KNOWLEDGE (Mar. 3, 2020), https://www.publicknowledge.org/blog/data-protection-is-about-power-not-just-privacy/ [https://perma.cc/9XUC-6N4H] (describing how privacy protections can reduce the competitive advantage of online platforms).

[280] Privacy legislation could allow users to place specific limits on data collection (for example, opting out of tracking across the Internet or tracking for behavioral advertising) without completely eliminating the ability of news organizations and platforms to monetize the data they collect.

[281] *See* Gene Kimmelman, *The Right Way to Regulate Digital Platforms*, HARV. SHORENSTEIN CTR. (Sept. 18, 2019), https://tinyurl.com/HarvRptDigPlat [https://perma.cc/3F8N-3TYH] ("Based on growing evidence that these [dominant tech] platforms are tipping toward monopoly in key market functions, it is very likely that antitrust is not enough of a solution without targeted regulation that opens markets to new competition."); Lina M. Khan, *The Separation of Platforms and Commerce*, 119 COLUM. L. REV. 973, 1035 (arguing that current antitrust law provides "a highly enfeebled and impoverished set of tools for confronting dominant intermediaries in network industries").

[282] *See* Competition in Digit. Mkts., *supra* note 263, at 37 (noting that digital markets are particularly prone to "winner-take-all economics"); Stigler Report, *supra* note 263, at 11–12 (stating that digital markets "are prone to tipping—a cycle leading to a dominant firm and high concentration").

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would still lack viable alternatives to the small number of technology companies that dominate online communications.

A more ambitious set of policy interventions focus on antitrust and competition laws. Proposals in this area take many forms, ranging from more vigorous use of existing antitrust law to imposing structural separations and prohibiting dominant platforms from entering adjacent lines of business. One proposal that has recently gained traction in Congress is to create an antitrust exemption for news organizations that would permit them to negotiate jointly with the platforms over licensing fees for their content.[283] This would allow these organizations to form a unified negotiating bloc, which would otherwise be an illegal form of collusion, and demand higher licensing fees from platforms that distribute their copyrighted work, thus capturing a larger percentage of the advertising revenue associated with their content.[284]

Other proposals seek to effect broader, systemic change in the American technology and media ecosystem. For example, a recent bill in Congress would instruct federal agencies to presume that acquisitions and mergers by certain platforms are anticompetitive.[285] The dominant positions that the largest platforms enjoy is due in part to their acquiring or merging with potential competitors, with some platforms having built entire lines of business through acquisitions while others used acquisitions to neutralize competitive threats.[286] Because of rapid technological development in online

[283] *See* Journalism Competition and Preservation Act, H.R. 5190, 115th Cong. (2018); Competition in Digit. Mkts., *supra* note 263, at 388 ("To address this imbalance of bargaining power, we recommend that the Subcommittee [on Antitrust, Commercial and Administrative Law] consider legislation to provide news publishers and broadcasters with a narrowly tailored and temporary safe harbor to collectively negotiate with dominant online platforms.").

[284] *See* Jessica Melugin, *It's Time to Exempt News Organizations from Antitrust Restrictions*, NAT'L REV. (May 18, 2021), https://www.nationalreview.com/2021/05/its-time-to-exempt-news-organizations-from-antitrust-restrictions/ [https://perma.cc/KJ6P-AB4D]. Not all commentators think this exemption would actually help local news organizations who would still have difficulty forcing online platforms to pay more. *See, e.g.*, Rachel Chiu, *Media safe harbor bill won't actually help local news*, HILL (May 24, 2021), https://thehill.com/opinion/technology/555043-media-safe-harbor-bill-wont-actually-help-local-news [https://perma.cc/T6D9-4C8N].

[285] *See* Competition in Digit. Mkts., *supra* note 263, at 399 (suggesting that "any acquisition by a dominant platform would be presumed anticompetitive unless the merging parties could show that the transaction was necessary for serving the public interest and that similar benefits could not be achieved through internal growth and expansion").

[286] Facebook's purchase of Instagram and WhatsApp are examples of the elimination of competition through acquisition. With 27 million registered users on iOS alone, Instagram "was increasingly positioning itself as a social network in its own right—not just a photo-sharing app"—when Facebook acquired the company in 2012 and eliminated a nascent competitor. *Facebook Buys Instagram For $1 Billion, Turns Budding Rival Into Its Standalone Photo App*, TECHCRUNCH (Apr. 9, 2012), https://tinyurl.com/FbInstaTC [https://perma.cc/7SNA-5UAB]. Two years later, Facebook purchased WhatsApp for $19 billion even though WhatsApp that made little money; Based on confidential internal company emails and documents subsequently released by the United Kingdom Parliament's Digital, Culture, Media, and Sport Committee which investigated the acquisition, Buzzfeed News reported in 2018 that WhatsApp's rise came at a crucial moment—just as Facebook was attempting to transition to a mobile-first company with messaging as a core service: "WhatsApp was quickly demonstrating that it could compete with Facebook on its most important battleground," which drove Facebook to acquire the company behind the messaging app. Charlie Warzel and Ryan Mac,

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services, competition can often come from innovative upstarts that may take several years to develop. In this context, acquisition by a dominant platform of a smaller firm could be very damaging to competition if, absent the acquisition, the smaller firm would develop into a competitive threat or would lead to significant change in the nature of the market. In a concentrated market structure, potential competition from small entrants may be the most important source of competition faced by the incumbent firm.[287]

Stricter merger controls, however, may not be enough to address the durable monopoly power of the dominant platforms. As a result, a growing chorus of economists have been arguing that antitrust and competition laws should be expanded to deal with the challenges that platforms present for antitrust enforcement.[288] With online platforms like Facebook and Google, it is often difficult to identify and quantify the harms that consumers and other market participants experience as a result of monopolies or near-monopolies, thus making antitrust enforcement difficult.[289]

In October 2020, the Majority Staff of the House Judiciary Subcommittee on Antitrust, Commercial, and Administrative Law ("Judiciary Subcommittee") released a report stating that Congress should affirm that existing antitrust laws limit some of the practices of online platforms, "clarifying that [antitrust laws] are designed to protect not just consumers but also workers, entrepreneurs, independent businesses, open markets, a fair economy, and democratic ideals."[290] The Judiciary Subcommittee also offered a number of specific antitrust reforms, including recommending that the Sherman Antitrust Act be extended to explicitly target the abuses of dominance by online platforms and prohibit the use of monopoly power in one market to harm competition in a second market, even if the conduct does not result in monopolization of the second market.[291] In addition, the Judiciary Subcommittee recommended that Congress apply the "essential facilities" doctrine to online platforms, which would impose a requirement that dominant platforms provide access to their data, infrastructure services, and facilities on a nondiscriminatory basis.[292] The Subcommittee's investigation uncovered several instances in which a dominant platform used the threat of delisting or refusing service to a third party as leverage to acquire more data or to

These Confidential Charts Show Why Facebook Bought WhatsApp, BUZZFEED NEWS (Dec. 5, 2018), https://tinyurl.com/BzfdNwsFB [https://perma.cc/T2Z2-RSDZ].

[287] *See* Stigler Report, *supra* note 263, at 66–68.

[288] *See, e.g.*, Kimmelman, *supra* note 281; Khan, *supra* note 281; Steven Waldman, *Curing Local News for Good*, Colum. Journalism Rev. (Mar. 31, 2020), https://tinyurl.com/WldmnCJR [https://perma.cc/PZ9P-H295]. In a report issued in July 2019 by the George J. Stigler Center for the Study of the Economy and the State ("Stigler Report"), a number of economists and antitrust experts concluded that online platforms present especially difficult challenges for antitrust enforcement and that antitrust law needs better analytical and regulatory tools to adequately deliver competition to consumers. Stigler Report, *supra* note 263, at 8–9.

[289] *See* Stigler Report, *supra* note 263, at 35–44.

[290] Competition in Digit. Mkts., *supra* note 263, at 391, 395.

[291] *See id.* at 395.

[292] *See id.* at 396–98.

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secure an advantage in a distinct market: "Because the dominant platforms do not face meaningful competition in their primary markets, their threat to refuse business with a third party is the equivalent of depriving a market participant of an essential input. This denial of access in one market can undermine competition across adjacent markets, undermining the ability of market participants to compete on the merits."[293]

While many of the initiatives described above face significant industry and political opposition, recent congressional hearings directed at technology companies and the 2020 report on *Competition in Digital Markets* by the Judiciary Subcommittee recommending changes to U.S. antitrust law may mark a turning point in terms of support for significant government action to assist news organizations and limit the power of online platforms to control public discourse.[294] The antitrust lawsuit against Google, which was filed by the U.S. Department of Justice and eleven state Attorneys General in October 2020,[295] is further evidence of this shift to a more aggressive posture by the government.

This sampling of potential market interventions shows the wide range of regulatory and policy options available to the government to support a healthy public sphere.[296] Even under existing caselaw, the First Amendment would not foreclose the government from using antitrust law to address concentrated economic power in the communication markets,[297] expanding and

[293] *Id.* at 396.

[294] *See generally* Competition in Digit. Mkts., *supra* note 263. It should be noted that Republican lawmakers on the Judiciary Subcommittee refused at the last minute to sign the report with their Democratic colleagues. *See* Cecilia Kang and David McCabe, *Big Tech Was Their Enemy, Until Partisanship Fractured the Battle Plans*, N.Y. TIMES (Oct. 6, 2020), https://tinyurl.com/NYTHsComm [https://perma.cc/Q5RX-AD56]. Instead, Rep. Ken Buck (R-CO) issued his own report, with support from Reps. Doug Collins (R-GA), Matt Gaetz (R-FL) and Andy Biggs (R-AZ). Rep. Buck's report largely agrees with the Judiciary Subcommittee's conclusion that Apple, Amazon, Facebook and Google have amassed too much power, but he was unwilling to endorse all of the legislative recommendations offered by the majority. Instead, Buck called on Congress to fund and empower regulatory agencies like the Federal Trade Commission (FTC) and Department of Justice (DOJ) to increase enforcement under existing laws. *See* Press Release, Rep. Ken Buck, *Rep. Buck Pens Antitrust Report that Presents a "Third Way" to Take on Big Tech* (Oct. 6, 2020), https://tinyurl.com/BuckReport2020 [https://perma.cc/5TDP-R6AA].

[295] Complaint, United States v. Google LLC, No. 1:20-cv-03010 (D.D.C. filed Oct. 20, 2020).

[296] In some instances, these non-constitutional approaches may even be preferable to directly invoking the First Amendment. *See* Gregory P. Magarian, *The First Amendment, The Public-Private Distinction, and Nongovernmental Suppression of Wartime Political Debate*, 73 GEO. WASH. L. REV. 101, 168–69 (2004) ("Congress as well as courts can safeguard constitutional values. . .. Statutes have normative and practical advantages over the judicial process because Congress is a politically accountable institution with the mandate and resources to make difficult policy decisions." (footnotes omitted)).

[297] *See, e.g.,* Associated Press v. United States, 326 U.S. 1, 7 (1945) (allowing application of the Sherman Antitrust Act to the publishing activities of the Associated Press); Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 375–77 (1969) (upholding "fairness doctrine" requiring broadcasters to devote airtime to discussing controversial matters of public interest and to air contrasting views regarding those matters).

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enforcing privacy and consumer protection laws,[298] or initiating programs that support journalism and other knowledge institutions within society, such as universities and libraries.[299] As the Supreme Court observed in *Associated Press v. United States*, "[i]t would be strange indeed . . . if the grave concern for freedom of the press which prompted adoption of the First Amendment should be read as a command that the government was without power to protect that freedom."[300]

However, in keeping with the government's necessarily limited role in dictating truth—as required by both the self-governance and marketplace theories—the focus of these interventions should be on the infrastructure and processes that underlie democratic discourse.[301] The government should not be permitted to prescribe which topics are appropriate for public discourse or to dictate the outcomes of public debate.

C. Government Speech that Undermines Self-Governance

Reforming the economic markets where speech takes place is an important starting point, but the government has an even larger role to play in ensuring that citizens have the capacity to exercise their right of self-governance. We must remember that the government itself is an active participant in public discourse. Indeed, in many situations, it is the eight-hundred-pound gorilla in the room. Recognition of this point leads to the conclusion that the First Amendment ought to impose obligations on the government to do what it can as a speaker and contributor to public discourse to ensure that the public has the information it needs to understand and evaluate issues of public policy.

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[298] *See, e.g.,* Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2348 (2020) (noting that "Congress's continuing interest in protecting consumer privacy" can justify restrictions on speech); F.T.C. v. Superior Ct. Trial Laws. Ass'n, 493 U.S. 411, 428 (1990) (affirming that the First Amendment does not preclude regulation of economic activities that have an indirect effect on speech).

[299] *See, e.g.,* U.S. v. Am. Library Ass'n, Inc., 539 U.S. 194, 211–12 (2003) (upholding federal subsidies to libraries for internet access); National Endowment for the Arts v. Finley, 524 U.S. 569, 587-88 (1998) (allowing government to award financial grants to support the arts); Rust v. Sullivan, 500 U.S. 173, 193–94 (1991) ("The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way."). Of course, the government is not free to impose any conditions it wishes on these subsidies. *See generally* Martin H. Redish & Daryl I. Kessler, *Government Subsidies and Free Expression*, 80 MINN. L. REV. 543 (1996).

[300] 326 U.S. at 20–21.

[301] The focus on process echoes the approach of Schauer and Marshall, who argue that the value of preserving a marketplace of ideas is not in defining "truth" itself, but in producing a method of truth-seeking that is comparatively better than any other method. *See* Schauer, *The Problem of Collective Knowledge*, *supra* note 7, at 237 (concluding that the marketplace of ideas does not define truth, but instead provides "a method for doing so that it is superior to any or most other available alternative methods."); Marshall, *supra* note 34, at 4 ("The value that is to be realized is not in the possible attainment of truth, but rather, in the existential value of the search itself.").

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At a minimum, this means that the government should be prohibited from knowingly disseminating false information that undermines self-governance. It should come as no surprise that governments lie. As Helen Norton notes, "[t]hey do so for many different reasons to a wide range of audiences on a variety of topics."[302] She offers a number of examples, including lies about the government's justifications for military action, whether government officials acted in compliance with the law, and the existence or scope of government programs.[303] More recently, we can add to this list government lies about the prevalence of election fraud[304] and the spread of deadly diseases.[305] Some of these lies are harmless, some advance national interests, and some corrode the very fabric of our democracy and undermine the public's capacity for self-governance.

Although scholars have long debated the extent to which the First Amendment permits the government to regulate falsehoods propagated by private speakers,[306] relatively little attention has been paid by either jurists or scholars to the constitutional implications of the government's efforts to mislead.[307] Regulating government speech raises challenging First Amendment issues because the government's actions in spreading misinformation do not involve the traditional exercise of the state's censorial power.[308] In fact, the government's own speech currently gets a pass from First Amendment scrutiny due to what is known as the "government speech doctrine."[309] Under

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[302] Helen Norton, *The Government's Lies and the Constitution*, 91 Ind. L.J. 73, 73 (2015).

[303] *Id.* at 73–74.

[304] *See, e.g.*, Yochai Benkler, Casey Tilton, Bruce Etling, Hal Roberts, Justin Clark, Rob Faris, Jonas Kaiser & Carolyn Schmitt, Mail-In Voter Fraud: Anatomy of a Disinformation Campaign, Berkman Klein Ctr. for Internet & Soc'y at Harv. Univ. (Oct. 1., 2020), https://cyber.harvard.edu/publication/2020/Mail-in-Voter-Fraud-Disinformation-2020 [https://perma.cc/UM5E-TNZF]; Libby Cathey, *Legacy of Lies – How Trump Weaponized Mistruths During his Presidency*, ABC News (Jan. 20, 2021), https://abcnews.go.com/Politics/legacy-lies-trump-weaponized-mistruths-presidency/story?id=75335019 [https://perma.cc/DGX2-6WYR]; Mark Z. Barabak, *Debunking Trump's 'Big Lie,' Scholars and Statistics Show the Facts Don't Add Up*, L.A. Times (Aug. 17, 2021), https://www.latimes.com/politics/story/2021-08-17/trump-big-lie-experts-debunk-voting-fraud-claims [https://perma.cc/2DEH-YJM5].

[305] *See, e.g.*, Sheryl Gay Stolberg & Noah Weiland, *Study Finds 'Single Largest Driver' of Coronavirus Misinformation: Trump*, N.Y. Times (Sept. 30, 2020), https://www.nytimes.com/2020/09/30/us/politics/ trump-coronavirus-misinformation.html [https://perma.cc/HE8H-PEJ4]; Christian Paz, *All the President's Lies About the Coronavirus*, Atlantic (Nov. 2, 2020), https://www.theatlantic.com/politics/archive/2020/11/trumps-lies-about-coronavirus/608647/ [https://perma.cc/X3Y5-SZZ9]; Daniel Funke & Katie Sanders, *Lie of the Year: Coronavirus downplay and denial*, Politifact (Dec. 16, 2020), https://www.politifact.com/article/2020/dec/16/lie-year-coronavirus-downplay-and-denial/ [https://perma.cc/6AQV-7UCZ].

[306] *See supra* Part I.A.

[307] *See* Norton, *supra* note 302, at 74 (noting the dearth of scholarship on this issue). Norton is one of the few exceptions.

[308] *See id.* at 74.

[309] *See* Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550 (2005) (explaining that the government's own speech is exempt from Free Speech Clause scrutiny); Pleasant Grove City v. Summum, 555 U.S. 460, 467 (2009) ("If [government entities] were engaging in their own expressive conduct, then the Free Speech Clause has no application. The Free Speech Clause restricts government regulation of private speech; it does not regulate government speech.").

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this "recently minted" doctrine,[310] the courts have granted government officials "nearly carte blanche ability" to engage in otherwise prohibited speech activities when the government is speaking for itself.[311] This must change if we are to ensure that the government's own speech does not undermine the public's capacity for self-governance; mis- and disinformation that originates from the government is especially harmful precisely because of its governmental source, which often makes it more likely to be believed and less amenable to rebuttal by counterspeech.[312]

Norton is among a small number of scholars who have taken up the charge to develop constitutional doctrines that address the problem of government lies.[313] She argues that certain types of government lies violate the Due Process, Free Speech, and Press Clauses.[314] With regard to the Free Speech Clause, Norton suggests that the government's deliberate falsehoods should be prohibited by the First Amendment when they rise to the level of

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[310] *Summum*, 555 U.S. at 481 (Stevens, J., concurring) ("To date, our decisions relying on the recently minted government speech doctrine to uphold government action have been few and, in my view, of doubtful merit.").

[311] David S. Ardia, *Government Speech and Online Forums: First Amendment Limitations on Moderating Public Discourse on Government Websites*, 2010 B.Y.U. L. REV. 1981, 1983–84 (2010) ("The government speech doctrine . . . grants the government nearly carte blanche ability to exclude speakers and speech on the basis of viewpoint so long as the government can show that it 'effectively controlled' the message being conveyed.") (quoting *Johanns*, 544 U.S. at 560–61).

[312] *See* Norton, *supra* note 302, at 101 ("[G]overnment lies pose especially grave instrumental threats to democratic self-governance in contexts where such deliberate falsehoods are unlikely to be addressed by counterspeech, as can be the case with government lies about information to which it has near-monopoly access, such as national security and intelligence matters."); Leslie Gielow Jacobs, *Bush, Obama and Beyond: Observations on the Prospect of Fact Checking Executive Department Threat Claims before the Use of Force*, 26 CONST. COMMENT. 433, 442 (2010) ("A barrier to achieving this kind of contemporaneous accountability for threat claims asserted by the executive department to build support for the use of force is its superior access to and control over the intelligence information that forms the basis of the claims."); Ho & Schauer, *supra* note 11, at 1169 (observing that the "acceptability of an idea varies with what social psychologists call 'peripheral cues,' which include, among others, the identity, authority, and charisma of the agent expressing the proposition").

[313] *See, e.g.*, Norton, *supra* note 302; Helen Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. 453 (2018); Toni M. Massaro & Helen Norton, *Free Speech and Democracy: A Primer for Twenty-First Century Reformers*, 54 U.C. DAVIS L. REV. 1631 (2021). Other scholars who have taken up this issue include Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815 (2020); Jonathan D. Varat, *Deception and the First Amendment: A Central, Complex, and Somewhat Curious Relationship*, 53 UCLA L. REV. 1107 (2006); and David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334 (1991).

[314] *See* Norton, *supra* note 302, at 89 ("I propose that government lies violate the Due Process Clause when they directly deprive individuals of life, liberty, or property or when they are sufficiently coercive of their targets to constitute the functional equivalent of such deprivations I further propose that even noncoercive government lies may violate the Due Process Clause in those extreme circumstances when they lack any reasonable justification"); *id.* at 103 (proposing "that we understand the Free Speech Clause to constrain the government's lies that are sufficiently coercive of expressive activity to be the functional equivalent of regulating that expression directly"); Helen Norton, *Government Lies and the Press Clause*, 89 U. COLO. L. REV. 453, 469–70 (2018) (asserting that the Press Clause should "protect certain negative rights by prohibiting press-related lies by the government that undermine the press's watchdog and educator functions").

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"coerc[ing] targets' beliefs or expression."[315] In other words, government lies violate the First Amendment when they "are sufficiently coercive of expressive activity to be the functional equivalent of regulating that expression directly."[316] Norton goes on to explain—convincingly in this author's view—how the courts already consider the coercive potential of speech when determining whether the government has violated the Establishment Clause, labor laws, employee speech rights, and other constitutional interests.[317] Caroline Mala Corbin, another proponent of using the First Amendment to restrain government falsehoods, would go farther by making the government's knowing or reckless propagation of false or misleading statements of fact on matters of public concern unconstitutional even if they are not the functional equivalent of government censorship of private speech.[318]

Although the implementation of a right not be lied to by the government requires deeper study, under a self-governance centered theory of the First Amendment the public must be protected from deliberate government falsehoods that undermine self-governance.[319] Like Norton, I would start by delineating a limited subset of government speech for restriction: "false assertion[s] of fact known by the speaker to be untrue and made with the intention that the listener understand it to be true"[320] and intended to influence a matter of public concern. While there are many other ways the government can intentionally or unintentionally mislead the public, this definition captures the most egregious and harmful conduct.[321] It would, for example, reach situations where a government official knowingly publishes incorrect information regarding when the polls will be open in hopes of suppressing turnout, deliberately misstates government data (e.g., unemployment rates, infection rates) to improve the incumbent's reelection prospects, or falsely accuses a company that provides electronic voting machines of having altered the votes in order to sow distrust in election procedures.[322] The

[315] Norton, *supra* note 302, at 103.

[316] *Id*. at 103.

[317] *See id*. at 103–107.

[318] Corbin, *supra* note 313, at 818, 820 n.23.

[319] Support for prohibiting knowing government falsehoods could also be based on the marketplace of ideas theory. *See* Varat, *supra* note 313, at 1132 ("By its nature, government deception impairs the enlightenment function of the First Amendment, limiting the citizenry's capacity to check government abuse and participate in self-governance to the maximum extent."); Norton, *supra* note 302, at 102 ("[G]overnment lies can frustrate the search for truth and the dissemination of knowledge.").

[320] Norton, *supra* note 302, at 77.

[321] *Id*. at 77 ("I chose this narrower scope in large part because the moral and instrumental harms caused by the government's intentional lies are arguably greater than those caused by its nondisclosures and inaccuracies more generally, and thus make more immediate demands for our attention."). Although the requirements I propose raise difficult issues of proof regarding a speaker's state of knowledge and intent, such inquiries are common in defamation law, which provides a well-established doctrinal roadmap for dealing with them.

[322] Some of these examples are not so hypothetical. *See, e.g.*, Gina Heeb, *Fact Check: 3 false claims Trump made about the economy at his State of the Union address*, MARKETS INSIDER (Feb. 5, 2020), https://markets.businessinsider.com/news/stocks/trump-sotu-false-claims-us-economy-state-union-fact-check-2020-2 [https://perma.cc/BS49-H4TK]; Aaron Blake, *The Stampede Away from Trump's Voting-Machine Complaints Continues Apace, As Legal Liability Looms*

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First Amendment would clearly be implicated if the government were to punish a speaker who exposed one of these government lies, but the government need not be so direct in its efforts to undermine democratic self-governance. As David Strauss points out, "it is not implausible to say that the government 'abridg[es] the freedom of speech' when it deliberately lies about a matter of great public concern for the purpose of preventing a full public debate."[323]

It is easy to see how deliberate government falsehoods can undermine self-governance. Without accurate information from the government, the public cannot hold government officials accountable for their actions (or inaction).[324] Government lies frustrate citizens' ability to make informed policy choices and "undermine[ ] the bond of trust between the government and the people that is essential to the functioning of a democracy."[325] While we might think that political checks will keep the government from lying—and they undoubtedly do constrain some government actors—there is reason to be concerned that a government intent on misleading the public can effectively undercut both public and interbranch accountability by continuing to obfuscate and lie.[326] As Eric Alterman writes, "[w]ithout public honesty, the

for Allies, WASH. POST (July 12, 2021), https://www.washingtonpost.com/politics/2021/05/03/slow-painful-death-trump-allies-voting-machine-conspiracy-theories/ [https://perma.cc/ZVP6-M3SE].

[323] Strauss, *supra* note 313, at 358 n.67 (alteration in original); Nat Stern, *Judicial Candidates' Right to Lie*, 77 MD. L. REV. 774, 781 (2018) ("[D]issemination of misinformation to the voting public threatens to defeat the very promise of democratic self-government. The success of this system depends on the ability of citizens to make reasoned choices about the alternative visions they are offered.") Norton, *supra* note 302, at 101 ("Just as a government's criminal sanction or economic reprisal intended to punish or silence those who seek to expose its wrongdoing clearly undermine democratic self-governance, so too can be the case of government lies designed to prevent or deter such exposure.").

[324] *See, e.g.*, JOHN J. MEARSHEIMER, WHY LEADERS LIE 94 (2011); GEOFFREY R. STONE, PERILOUS TIMES 517 (2004); Norton, *supra* note 259, at 82, 101.

[325] ERIC ALTERMAN, WHEN PRESIDENTS LIE 14 (2004); *see also* Mathilde Cohen, *Sincerity and Reason-Giving: When May Legal Decision Makers Lie?*, 59 DEPAUL L. REV. 1091, 1112 (2010) ("If citizens expect public officials to mislead them, they will become wary of arguments offered in public discourse."); Strauss, *supra* note 313, at 358 ("[F]alse statements by the government . . . can seriously hamper the discussion necessary for democratic self-government that, according to the Meiklejohn theory, the first amendment was designed to protect.").

[326] *See* Mary-Rose Papandrea, *Leaker Traitor Whistleblower Spy: National Security Leaks and the First Amendment*, 94 B.U. L. REV. 449, 466 (2014) ("The executive, however, strongly resists Congress's attempts to force the disclosure of information, and there is very limited opportunity for judicial review of these interbranch disputes."); *id.* at 473 ("[T]he ability of IGs to check executive power suffers from significant limitations; importantly, IGs are appointed and removable by the President, and they cannot report even serious wrongdoing to Congress without first giving the relevant agency head the opportunity to delete sensitive information."); Corbin, *supra* note 313, at 881 ("[T]he political process cannot be relied upon to remedy government propaganda because, as detailed earlier, a consequence—if not the point—of government propaganda is to shut down normal political processes."); David Frum, *Disclosure Doesn't Work on a Shameless President*, ATLANTIC (Sept. 25, 2020) ("The Trump presidency has exposed the degree to which presidential compliance with law is voluntary."), https://www.theatlantic.com/ideas/archive/2020/09/disclosure-doesnt-work-on-a-shameless-president/616504/ [https://perma.cc/6ZAE-P2K9]; Steve Coll, *Donald Trump's "Fake News" Tactics*, NEW YORKER (Dec. 3, 2017) ("Trump has brought to the White House bully pulpit a

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process of voting becomes an exercise in manipulation rather than the expression of the consent of the governed."[327]

Regardless of whether the government's lies succeed in misleading a majority of voters, intentional government falsehoods are a threat to the stability of American democracy.[328] David Karpf has written that "disinformation and propaganda do not have to be particularly effective at duping voters or directly altering electoral outcomes in order to be fundamentally toxic to a well-functioning democracy."[329] He notes that disinformation "undermines some of the essential governance norms that constrain the behavior of our political elites" and warns that "[i]t is entirely possible that the current disinformation disorder will render the country ungovernable despite barely convincing any mass of voters to cast ballots that they would not otherwise have cast."[330]

Like other First Amendment rights, the right not to be subjected to intentional falsehoods by the government would not be absolute. As both Norton and Corbin concede, the government should be given the opportunity to demonstrate that its decision to lie meets the requirements of strict scrutiny,[331] a test that is highly developed in First Amendment jurisprudence.[332] Norton explains how this might work:

> The government's decision to lie should fail [strict] scrutiny when motivated by nonpublic (and thus noncompelling) reasons-for ex-

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disorienting habit of telling lies, big and small, without evident shame."), https://www.newyorker.com/magazine/2017/12/11/donald-trumps-fake-news-tactics [https://perma.cc/WR2L-VZDW]

[327] ALTERMAN, *supra* note 325, at 14; *see also* William P. Marshall, *False Campaign Speech and the First Amendment*, 153 U. PA. L. REV. 285, 294 (2004) ("Democracy is premised on an informed electorate. Thus, to the extent that false [campaign] ads misinform the voters, they interfere with the process upon which democracy is based.").

[328] *See* INTERNATIONAL INSTITUTE FOR DEMOCRACY AND ELECTORAL ASSISTANCE, GLOBAL STATE OF DEMOCRACY REPORT 2021 15 (2021) (concluding that Trump's false statements questioning the legitimacy of the 2020 election results were a "historic turning point" that "undermined fundamental trust in the electoral process" in the U.S. and culminated in the Jan. 6 insurrection at the U.S. Capitol), https://www.idea.int/gsod/sites/default/files/2021-11/the-global-state-of-democracy-2021_1.pdf [https://perma.cc/RU8V-JQV2]; Daniel P. Tokaji, *Truth, Democracy, and the Limits of Law*, 64 ST. LOUIS U. L.J. 569, 569–70 (2020) ("Bullshit is deadly to democracy, even deadlier than lies, because democracy depends on a shared commitment to the truth. . . . Bullshitting is the greater enemy of truth than lying, because it represents an abandonment of the commitment to truth. And without this commitment, democracy cannot function."); Aziz Huq & Tom Ginsburg, *How to Lose a Constitutional Democracy*, 65 UCLA L. REV. 78, 156 (2018) (noting "state instrumentalities for antidemocratic epistemic degradation include: the manipulation of government secrecy classifications; erosions in the perceived or actual quality of government data; and outright manipulation," and warning that "the undermining of government data is a way of ensuring there is no authoritative and accurate source of information for the general public about questions of policy significance").

[329] David Karpf, *On Digital Disinformation and Democratic Myths*, SSRC MEDIAWELL (Dec. 10, 2019), https://tinyurl.com/OnDigitalDisinformation [https://perma.cc/MFB7-Y2H7].

[330] *Id.*

[331] *See* Norton, *supra* note 302, at 115; Corbin, *supra* note 313, at 875.

[332] *See* Ardia, *supra* note 17, at 909 (noting the "large, and growing, body of First Amendment case law applying strict scrutiny").

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> ample, when the government has lied to protect itself from legal or political accountability, for its financial gain, or to silence or punish a critic's protected expression. Governmental decisions to lie should also fail this scrutiny even when motivated by compelling public reasons when they are unnecessary to achieve such ends.[333]

Conversely, the government's decision to lie should survive strict scrutiny when necessary for "national security"[334] or to "calm public panic in a public safety emergency or to prevent a criminal from hurting a victim."[335]

Remedies for government lies that undermine self-governance should be tailored to repair the damage to society that the false information has caused. At a minimum, courts must be able to issue declaratory judgments to vindicate the right not to be lied to by the government. But where the harm is sufficient, courts should also have the power to enjoin the government from continuing to make false statements and to provide other forms of equitable relief, including requiring that the government retract the false information or engage in corrective speech.[336] These remedies, however, should apply only to situations where a government official is speaking through government channels or is otherwise acting in his or her official capacity.[337] Unlike private parties, the government does not itself hold First Amendment rights.[338]

While there is some risk that efforts to punish government lies may chill beneficial speech,[339] this concern is diminished if we target only knowing government falsehoods.[340] As Caroline Mala Corbin points out, govern-

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[333] Norton, *supra* note 302, at 115.

[334] Corbin, *supra* note 313, at 875.

[335] Norton, *supra* note 302, at 115.

[336] *See* Michael T. Morley, *Public Law at the Cathedral: Enjoining the Government*, 35 CARDOZO L. REV. 2453, 2465–83 (2014) (arguing that a constitutional right receives the greatest available level of protection when it is secured by an injunction); David S. Han, *Rethinking Speech-Tort Remedies*, 2014 WIS. L. REV. 1135, 1162–74 (2014) (discussing the advantages of flexible remedies in speech-tort cases). Without injunctive relief, some government officials will just continue to lie. *Cf.* Glenn Kessler, *Meet the Bottomless Pinocchio, a New Rating for a False Claim Repeated Over and Over Again*, WASH. POST (Dec. 10, 2018) (referring to Donald Trump as a "Bottomless Pinocchio," a "dubious distinction [ ] awarded to politicians who repeat a false claim so many times that they are, in effect, engaging in campaigns of disinformation"), https://www.washingtonpost.com/politics/2018/12/10/meet-bottomless-pinocchio-new-rating-false-claim-repeated-over-over-again/ [https://perma.cc/7367-HPQP].

[337] *See* Norton, *supra* note 302, at 76 (limiting her proposed limitation on government speech to the "collective speech of a government body or the speech of an individual empowered to speak for such a body"). Government officials acting in their personal capacity would not fall within these restrictions on government speech, although other statutory and common law theories of liability may apply to them.

[338] *See, e.g.*, Columbia Broad. Sys., Inc. v. Democratic Nat'l Comm., 412 U.S. 94, 139 (1973) (Stewart, J., concurring) ("The First Amendment protects the press *from* governmental interference; it confers no analogous protection *on* the Government." (emphasis in original)).

[339] *See* Norton, *supra* note 302, at 86 (noting that requiring government to guarantee truth in its expression might inhibit it from performing important information-gathering and public-communication functions).

[340] *See id.* at 87; Corbin, *supra* note 313, at 870. The Supreme Court remarked on this concern in *New York Times Co. v. Sullivan*, where it held that the actual malice standard would mitigate the danger of chilling otherwise valuable speech. 376 U.S. 254, 282 (1964).

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ment speakers acting in their official capacity "are usually discussing their own domain [and] are well positioned to verify the accuracy of information within their control."[341] Moreover, government, like commercial entities, is less susceptible to chill than private individuals because it has resources and a strong incentive to continue to speak.[342]

As I noted above, the implementation of this right will require more study to determine how best to regulate a pernicious form of government speech that is distressingly common. Recognizing a right under the First Amendment not to be lied to by the government will not eradicate misinformation in the public sphere. In fact, it will not even stop the flow of lies from the government. To make meaningful headway against the flood of misinformation, the right I have described above must be part of a larger government effort—spurred by the Constitution's clear directive to safeguard the public's capacity for self-governance—to develop complementary policies to reduce the harmful effects of mis- and disinformation. This should include enhanced protections for government whistleblowers, robust congressional and inspector general oversight over the executive branch, vigorous enforcement of the Freedom of Information Act, and the recognition of a right of public access to government information.

D. *Government Information that Supports Self-Governance*

First Amendment doctrine should not be blind to how the government attempts to influence public discourse, especially when it impacts citizens' capacity for self-governance. As we have seen, the government can undermine self-governance by spreading misinformation, but it can also support self-governance by disclosing truthful information. The previous section outlined a right not be misled by the government. This section describes a corollary right to information in the government's possession that can assist the public in its efforts to understand and evaluate issues of public policy.

As discussed in Part II, the Constitution creates a system of governance in which the people retain the ultimate authority over the government. In the words of James Madison, "[p]ublic opinion is the real sovereign."[343]

[341] Corbin, *supra* note 313, at 870.

[342] *See, e.g.,* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 772 (1976). As the Supreme Court observed in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*:

> [C]ommercial speech may be more durable than other kinds. Since advertising is the *sine qua non* of commercial profits, there is little likelihood of its being chilled by proper regulation and forgone entirely. Attributes such as these, the greater objectivity and hardiness of commercial speech, may make it less necessary to tolerate inaccurate statements for fear of silencing the speaker.

425 U.S. at 771 n.24 (emphasis in original).

[343] James Madison, *Public Opinion*, NAT'L GAZETTE, Dec. 19, 1791, in 14 JAMES MADISON, THE PAPERS OF JAMES MADISON 170, 170 (Robert A. Rutland, Thomas A. Mason, Robert J. Brugger, Jeanne K. Sisson & Frederika J. Teute. eds., 1977) ("Public opinion . . . is the real sovereign in every free" government.").

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From the perspective of self-governance, there is no more important a category of information than information *about the government*.[344] Jeremy Bentham pointed out this self-evident truth in 1837:

> To conceal from the public the conduct of its representatives, is to add inconsistency to prevarication: it is to tell the constituents, "You are to elect or reject such or such of your deputies without knowing why—you are forbidden the use of reason—you are to be guided in the exercise of your greatest powers only by hazard or caprice."[345]

The link between government information and self-governance is hardly controversial.[346] It sits at the core of nearly all self-governance theories of the First Amendment. Alexander Meiklejohn, for example, writes that the "welfare of the community requires that those who decide issues shall understand them."[347] The influential political scientist Hannah Arendt warns that "[f]reedom of opinion is a farce unless factual information is guaranteed."[348] Robert Post puts an even sharper point on this: "A state that controls our knowledge controls our minds."[349] This has led a number of scholars and commentators to argue that the Constitution must be understood to embody a right of access to government information.[350]

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[344] *See* David Cuillier, *The People's Right to Know: Comparing Harold L. Cross' Pre-FOIA World to Post-FOIA Today*, 21 COMM. L. & POL'Y 433, 438 (2016) (noting that "[c]itizens' right to be informed about their government has been valued for millennia, at least as far back as the Athenians in 330 B.C.").

[345] JEREMY BENTHAM, AN ESSAY ON POLITICAL TACTICS (1837), reprinted in 2 THE WORKS OF JEREMY BENTHAM 299, 312 (John Bowring ed., 1962).

[346] *See, e.g.*, Barron, *supra* note 52, at 1648 ("That public information is vital to the creation of an informed citizenry is, I suppose, unexceptionable."); David M. O'Brien, *The First Amendment and the Public's Right to Know*, 7 HASTINGS CONST. L.Q. 579, 580 (1980) ("An increasing number of constitutional scholars argue that the public's 'right to know' is implicitly guaranteed by the First Amendment and by the general principles of a constitutional democracy."); Mark Fenster, *The Opacity of Transparency*, 91 IOWA L. REV. 885, 895–96 (2006) (noting that sentiments favoring government transparency can be found "in the classic liberalism of Locke, Mill, and Rousseau, in both Benthamite utilitarian philosophy and Kantian moral philosophy.").

[347] MEIKLEJOHN, *supra* note 199, at 26–27. Even Thomas Emerson, who was deeply skeptical of Meiklejohn's self-governance theory, acknowledges that "if democracy is to work, there can be no holding back of information; otherwise ultimate decisionmaking by the people, to whom that function is committed, becomes impossible." Thomas I. Emerson, *Legal Foundations of the Right to Know*, WASH. U. L.Q. 1, 14 (1976).

[348] HANNAH ARENDT, BETWEEN PAST AND FUTURE 238 (1968).

[349] POST, *supra* note 29, at 33.

[350] *See, e.g.*, Harold Cross, *Access to Official Information: A Neglected Constitutional Right*, 27 Ind. L. J. 209, 209 (1952) ("Public business is the public's business. The people have the right to know. Freedom of information is their just heritage."); Emerson, *supra* note 347, at 14 ("[T]he greatest contribution that could be made in this whole realm of law would be explicit recognition by the courts that the constitutional right to know embraces the right of the public to obtain information from the government."); Anthony Lewis, *A Public Right to Know About Public Institutions: The First Amendment as Sword*, 1980 SUP. CT. REV. 1, 2–3 (1980) ("If citizens are the ultimate sovereigns, as the Constitution presupposes, they must have access to the information needed for intelligent decision."); Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 489 (1985) ("If the right to speak is

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Despite the obvious connection between self-governance and government information, the Supreme Court has so far refused to recognize a right under the Constitution to obtain information from the government, seemingly unable to countenance the idea that the government has an obligation to ensure that the public can hold informed opinions.[351] Instead, the public's ability to understand the work of government relies on a patchwork of statutory provisions and customs that allow the government to "selectively reveal[ ] information when it suits its purposes."[352] Compelled only by political forces,[353] Congress, state legislatures, and government officials decide for themselves what information the public is entitled to see. Admittedly, political pressure has led to some successes—at least on paper—including the federal Freedom of Information Act (FOIA)[354] and Government in the Sunshine Act ("Sunshine Act")[355] and their state analogs, which create limited rights to obtain government records and attend certain government proceedings, respectively. But these statutes are narrow in their coverage, contain many exemptions, and have been widely criticized for failing to live up to their transparency and accountability aspirations.[356]

important in large part because of the benefits audiences derive from the information and ideas disseminated by speakers, then a right of potential speakers 'to know,' that is to have access to noteworthy information and events, would seem a natural complement to the right to speak.").

[351] *See* McBurney v. Young, 569 U.S. 221, 233 (2013) ("This Court has repeatedly made clear there is no constitutional right to obtain all the information provided by FOIA laws."); L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 40 (1999) (same). Some states, however, recognize such a right under their state constitutions. *See, e.g.*, Oberman v. Byrne, 445 N.E.2d 374 (Ill. 1st Dist. 1983); Hatfield v. Bush, 572 So. 2d 588 (La. Ct. App. 1st Cir. 1990); Billings Gazette v. City of Billings, 313 P.3d 129 (Mont. 2013).

[352] Mary-Rose Papandrea, *Information is Power: Exploring a Constitutional Right of Access* in National Security, Leaks & the Freedom of the Press: The Pentagon Papers Fifty Years on 434 (L. Bollinger & G. Stone eds., 2021).

[353] *See* Houchins v. KQED, 438 U.S. 1, 12 (1978) (plurality op.) (stating that access to government information is "a legislative task which the Constitution has left to the political processes"); Ctr. for Nat'l Sec. Studies v. Dep't of Justice, 331 F.3d 918, 934 (D.C. Cir. 2003) ("[D]isclosure of government information generally is left to the 'political forces' that govern a democratic republic.").

[354] 5 U.S.C. § 552.

[355] 5 U.S.C. § 552b. The Declaration of Policy and Statement of Purpose accompanying the Sunshine Act states:

> It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decision-making processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.

Pub. L. No. 94–409, §2, 90 Stat. 1241 (1976).

[356] The criticisms of these statutes are legion. *See, e.g.*, David E. Pozen, *Freedom of Information Beyond the Freedom of Information Act*, 165 U. Pa. L. Rev. 1097, 1156 (2017) (writing that FOIA "fall[s] short of its transparency and accountability aspirations"); Margaret B. Kwoka, *FOIA, Inc.*, 65 Duke L.J. 1361, 1363–64 (2016) (noting that FOIA "has been rightly critiqued for failing to live up to its promise, hindered by administrative inefficiency, over withholding of information, and courts' failure to act as a meaningful check on agency secrecy"); William Funk, *Public Participation and Transparency in Administrative Law–Three Examples as an Object Lesson*, 61 Admin L. Rev. 171, 197 (2009) (concluding that the Sunshine Act and the Federal Advisory Committee Act "do not necessarily achieve salutary results" and, to some degree, are counterproductive); *FOIA is Broken: A Report, Committee on Oversight and*

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Moreover, because even these limited rights of public access are not *constitutionally* protected, they are ultimately "ephemeral."[357] Without a constitutional right of access, the government could at any time change or repeal FOIA and the Sunshine Act. It could decide that henceforth, there shall be no public access to congressional proceedings, executive branch agencies, law enforcement records, immigration statistics, and environmental impact statements, to name just a few examples of the information the public has come to rely on.[358] Alternatively, the government could choose to disclose only information that supports its existing policies or that burnishes the image of government officials.[359] Aziz Huq and Tom Ginsburg in their bracing article, *How to Lose a Constitutional Democracy*, provide a chilling illustration of this type of strategic disclosure, based in part on the internment of Japanese-Americans during World War II:

> [I]magine a government that purports to foster public security by extensive use of detention powers targeting discrete minority populations. The government fails to disclose that its policy is not based on evidence that the minority in question in fact includes a meaningful number of individuals who pose a security threat. At the same time, it employs a divisive language of identity-based differences to both vindicate its policy and to raise political support among nonminority voters. The absence of accurate information about the government's policy not only facilitates grave violations of individual rights, but it also allows the government to deploy those grave violations as a means of amplifying public support. Incomplete information thus not only leads voters to erroneous judgments, it also allows government to promote exclusionary ideals and to eliminate dissenting minorities from the electorate.[360]

The refusal to make public access to government information a constitutional right signals that the government's choice to conduct some or all of its work in secret will always trump the public's right to force the govern-

Government, U.S. House of Representatives, 114th Cong. Staff Report, available at https://www.hsdl.org/?abstract&did=789831 [https://perma.cc/XG4G-3V5C].

[357] Papandrea, *supra* note 352, at 449 ("Because these [statutory] access rights are not constitutionally protected . . . they are ephemeral.").

[358] *See* L.A. Police Dep't v. United Reporting Publ'g Corp., 528 U.S. 32, 40 (1999) (rejecting a First Amendment right of access to police records and stating the government could decide "not to give out [police department arrestee] information at all").

[359] *See* Huq & Ginsburg, *supra* note 328, at 155 ("[T]he Constitution imposes little constraint on the selective disclosure (or nondisclosure) of information by the state in ways that can shunt public debate away from questions that would embarrass or undermine political leaders."); David E. Pozen, *The Leaky Leviathan: Why the Government Condemns and Condones Unlawful Disclosures of Information*, 127 HARV. L. REV. 512, 515 (2013) (noting that the government's toleration of leaks "is a rational, power-enhancing strategy").

[360] Huq & Ginsburg, *supra* note 328, at 131–32; *see also id.* at 130–31 ("Where information is systematically withheld or distorted by government so as to engender correlated, population-wide errors, democracy cannot fulfill this epistemic mandate.").

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ment to make a public accounting.[361] In other words, the government has the final say on matters of public oversight. Of course, under any theory of self-governance, this cannot be so. Such a system undermines the very idea of self-governance; permitting the government to decide whether it will deign to disclose information to the public is simply incompatible with the principle that citizens retain ultimate sovereignty over the government.[362]

Fortunately, the seeds for a constitutional right of access to government information already exist in the Supreme Court's First Amendment jurisprudence. In what is now accepted dogma, the Supreme Court held in *Richmond Newspapers, Inc. v. Virginia* that the First Amendment embodies a right of public access to criminal trials.[363] Chief Justice Warren Burger, who wrote the plurality opinion, acknowledged that the First Amendment does not explicitly require public access to the courts, but he concluded nonetheless that the amendment's provisions implied that such a right exists: "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."[364] The First Amendment, Burger wrote, "goes beyond protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw."[365]

Two years later in *Globe Newspaper Co. v. Superior Court*,[366] a majority of the Court adopted the view that the First Amendment protects not just the right to speak, but also the right to acquire information from the courts when it invalidated a Massachusetts statute that excluded the public from the courtroom during the testimony of minors who were victims of certain

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[361] *Cf.* Steven Helle, *The News-Gathering/Publication Dichotomy and Government Expression*, 1982 DUKE L.J. 1, 3 (1982) ("By according news-gathering less protection the Court has given implicit sanction to the presumption that it is the right of the government to deny information to its citizens.").

[362] *See* HAROLD CROSS, THE PEOPLE'S RIGHT TO KNOW xii (1953) (warning that without access to information about the government, "the citizens of a democracy have but changed their kings"); Michael J. Perry, *Freedom of Expression: An Essay on Theory and Doctrine*, 78 NW. U. L. REV. 1137, 1144 (1983) ("To the extent that government manipulates, by interfering with communication of or access to information or ideas useful in evaluating public policy or performance, it manipulates the vote and the other political choices people make."); Blasi, *supra* note 350, at 492 ("It would be anomalous for a constitutional regime founded on the principle of limited government not to impose some fundamental restrictions on the power of officials to keep citizens ignorant of how the authority of the state is being exercised."); Papandrea, *supra* note 352, at 438 (noting that the absence of a right to know "is an unnerving state of affairs for a democracy").

[363] 448 U.S. 555, 580 (1980) (plurality opinion). In a series of cases that followed *Richmond Newspapers*, the Court went on to hold that a First Amendment right of access could apply in other criminal contexts, including preliminary hearings and voir dire proceedings. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1 (1986) (*Press-Enterprise II*) (holding that First Amendment provides a right of access to preliminary hearings); Press-Enterprise v. Superior Court, 464 U.S. 505 (1984) (*Press-Enterprise I*) (finding right of access to jury voir dire).

[364] Richmond Newspapers, Inc., 448 U.S. at 575.

[365] *Id.* at 575–76 (quoting First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 783 (1978)); *see also* Branzburg v. Hayes, 408 U.S. 665, 681 (1972) (noting in dictum that "without some protection for seeking out the news, freedom of the press could be eviscerated").

[366] 457 U.S. 596 (1982).

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sexual offenses.[367] In striking down the statute, Justice William Brennan's majority opinion affirmed that the First Amendment is "broad enough to encompass those rights that, while not unambiguously enumerated in the very terms of the Amendment, are nonetheless necessary to the enjoyment of other First Amendment rights."[368] Underlying the First Amendment right of access to criminal trials, Brennan pointed out, "is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.'"[369] Echoing Burger's plurality decision in *Richmond Newspapers*, Brennan wrote that a right of public access helps to ensure that the "constitutionally protected 'discussion of governmental affairs' is an informed one."[370]

As I pointed out in a prior article, there is no principled way to limit a First Amendment right of access solely to criminal trials.[371] While improving the functioning of criminal trials is undoubtedly an important public good, it is not a First Amendment value. Public access to the courts takes on First Amendment significance because such access supports self-government: "The courts are a central locus where government policies are contested, where rights are recognized or disavowed, and where social change is often implemented or delayed."[372] For the same reason, it makes little sense to limit a First Amendment right of access only to the judicial branch. The Court's recognition of a right of access to criminal proceedings was driven in large part by the structural role the First Amendment plays in the American constitutional system. Brennan explicated this linkage in his *Richmond Newspapers* concurrence:

> [T]he First Amendment embodies more than a commitment to free expression and communicative interchange for their own sakes; it has a structural role to play in securing and fostering our republican system of self-government. Implicit in this structural role is not only "the principle that debate on public issues should be uninhibited, robust, and wide-open," but also the antecedent assumption that valuable public debate—as well as other civic behavior—must be informed. The structural model links the First Amendment to that process of communication necessary for a democracy to survive, and thus entails solicitude not only for communication itself, but also for the indispensable conditions of meaningful communication.[373]

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[367] *Id.*

[368] *Id.* at 604 (citing *Richmond Newspapers*, 448 U.S. at 579–80).

[369] *Id.* (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

[370] *Id.* at 605.

[371] *See* Ardia, *supra* note 17, at 894–900 (arguing that the First Amendment embodies a right of public access to civil proceedings as well as civil and criminal court records).

[372] *Id.* at 900 ("Public access to the courts is essential if the public is to understand the contours and operation of their government.").

[373] *Richmond Newspapers, Inc.*, 448 U.S. at 587–88 (1980) (Brennan, J., concurring) (footnotes and internal citations omitted); *see also* William J. Brennan, Jr., Associate Justice of the Supreme Court of the United States, Address at the Dedication of the S.I. Newhouse Center

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The conclusion that an informed public is a prerequisite for self-governance finds additional support in other parts of the Supreme Court's First Amendment jurisprudence.[374] In *Thornhill v. Alabama*, for example, the Court noted the importance of the First Amendment in "securing of an informed and educated public opinion,"[375] and that "[f]reedom of discussion, if it would fulfill its historic function in this nation, must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period."[376] More recently in *Walker v. Sons of Confederate Veterans, Inc.*, the Court remarked that the First Amendment "helps produce informed opinions among members of the public who are then able to influence the choices of a government that, through words and deeds, will reflect its electoral mandate."[377]

As with the right not to be lied to by the government, a right of public access to government information will require further study and development. We can, however, draw guidance from the court access cases for how a constitutional right to government information could be implemented. As a starting point, the public should have a qualified right of access to all government proceedings, records, and other information in the government's possession that relate to the activities and conduct of government or bear on questions of public policy. This right of access would not be absolute. As with other First Amendment rights, public access can and should yield when countervailing interests are sufficiently compelling to support government secrecy.[378] In evaluating the government's requests for secrecy, courts can look for guidance in the case law interpreting FOIA and the Sunshine Act,[379] which adopt a number of exemptions from public access, including

for Law and Justice in Newark, New Jersey (Oct. 17, 1979) ("[T]he First Amendment protects the structure of communications necessary for the existence of our democracy.").

[374] *See, e.g.*, U.S. Dep't of Justice v. Reporters Comm. for Freedom of the Press, 489 U.S. 749, 772–73 (1989) ("[A] democracy cannot function unless the people are permitted to know what their government is up to."); National Archives and Records Administration v. Favish, 541 U.S. 157, 171–72 (2004) (noting that public access to government information "defines a structural necessity in a real democracy"); *cf.* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 783 (1978) ("[Our precedents have focused] not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.").

[375] 310 U.S. 88, 104 (1940).

[376] *Id.* at 102.

[377] 576 U.S. 200, 207 (2015).

[378] *See* Ardia, *supra* note 17, at 912–15 (describing application of the strict scrutiny test in the context of public access to court proceedings and records).

[379] *See* Emerson, *supra* note 347, at 17:

> Establishment of this much of the constitutional right to know through judicial procedures would, of course, be a long and tedious process. Fortunately, a good start has already been made to achieve the same end through legislation. The Federal Freedom of Information Act adopts much of the basic pattern just outlined. It commences with a blanket requirement that every government agency presented with a request for records "shall make the records promptly available to any person." It then provides for nine exceptions, some of which are excessively broad, but which cover much the same areas set forth above. Equally important, the Act contains detailed provisions for enforcing agency compliance, including judicial review.

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material that relates to national security, personnel rules and practices, commercial and financial information, law enforcement records, and other information the disclosure of which would constitute a clearly unwarranted invasion of personal privacy.[380]

There is no question that the implementation of a constitutional right of access to government information will face significant obstacles,[381] but those obstacles are not insurmountable and the payoff—self-governance—is clearly worth the effort. Over the last fifty years, we have learned a great deal about how open government laws such as FOIA and the Sunshine Act function, including the costs they impose and the benefits they offer. We also have learned a lot about how individuals consume and make sense of information, what prompts them to seek out and share information, and how techno-social institutions and practices influence societal knowledge. This experience will be invaluable as scholars and courts flesh out a right of access to government information.

Conclusion

It is time to move beyond the notion that the First Amendment's only function is to preserve a "marketplace of ideas." While the "marketplace of ideas" is a catchy metaphor, it undervalues the First Amendment's vital role supporting self-governance. When viewed in its larger constitutional context, it is clear that the First Amendment is part of a system of interrelated institutions and practices, both legal and political, that are necessary to support a representative democracy. Indeed, the words of the First Amendment are merely a pointer to the indispensable role that speech plays in facilitating democratic self-governance.

The goal of ensuring that ideas can freely compete with each other, however, need not be entirely abandoned. We can take the core principle underlying the marketplace of ideas theory—that the government must be precluded from enforcing its view of what should and should not be subject to public discussion—as a starting point, but ultimately the Constitution requires more than the hands-off approach such a theory envisions.

What the Constitution requires is that government take an active role in ensuring that citizens are informed and capable of exercising their right of self-governance. The government can do this in many ways. First, it can use direct and indirect subsidies, antitrust law, tax law, privacy law, and intellectual property law to support the creation and dissemination of information that advances social knowledge. Even under existing First Amendment doctrine, such approaches are permissible (and already being implemented to varying degrees).

[380] The exemptions listed in FOIA are at 5 U.S.C § 552(b)(1)–(9). It is important to remember, however, that the current statutory approach is unlikely to be coterminous with what a constitutional right of access would require.

[381] *See generally* Fenster, *supra* note 346; Pozen, *supra* note 356.

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We need to do more than tweak the market, however, if we are to ensure that Americans have the capacity for self-governance. As an influential participant in public discourse, the government should have an obligation to wield its influence in ways that support self-governance, not undermine it by misleading its citizens or starving them of the information they need to understand issues of public policy. At a minimum, the government should be prohibited from knowingly disseminating false and misleading information that undermines the public's capacity for self-governance and it should be obligated to disclose information in its possession that makes it possible for the public to understand the actions of government.

The application of these rights will require more study to determine how best to theorize and implement them, but the past decade has shown that focusing solely on preserving an unfettered marketplace for speech, without also considering what is needed to support an informed and empowered electorate, is shortsighted and naïve. In fact, given the growing problems we are seeing with government misinformation, a toothless Congress that is unable to force disclosure from the Executive branch, and a recent president who declared war on journalists as the "enemy of the American people,"[382] the need to acknowledge that the Constitution compels the government to actively support self-governance is more pressing than ever.

[382] Brett Samuels, *Trump ramps up rhetoric on media, calls press 'the enemy of the people,'* Hill (Apr. 5, 2019), https://thehill.com/homenews/administration/437610-trump-calls-press-the-enemy-of-the-people [https://perma.cc/H44M-GGDN].

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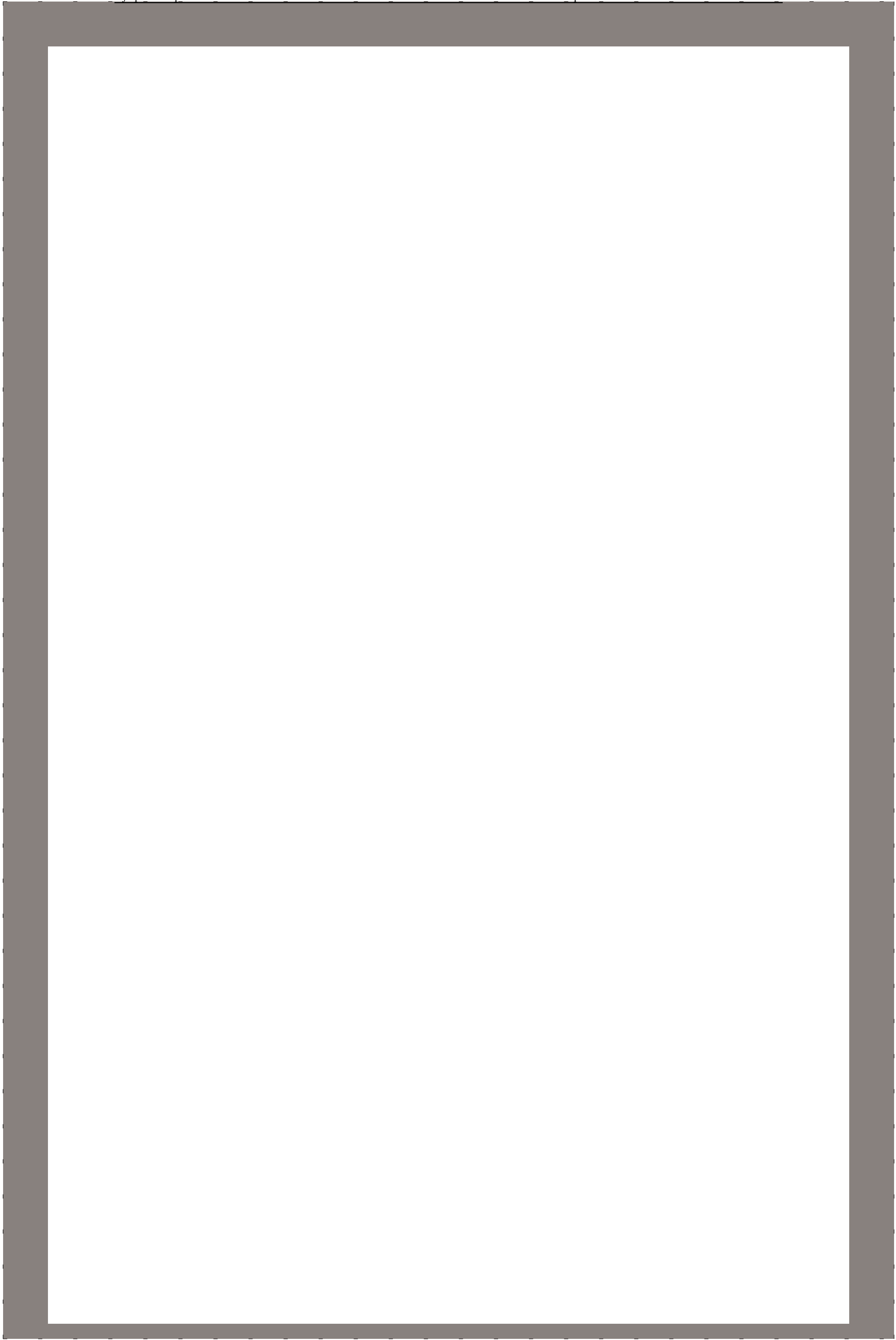

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Censorship of Sexual Assault Survivors in the Educational Context

*Nicole Ligon**

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Introduction

Numerous concerns regarding the negative impacts of bullying have led to the creation of new institutional rules aimed at curbing hate speech and false speech, particularly within the educational setting. While these steps are well-intentioned, authority doling out discipline ought to be concerned with the negative policy impacts of censoring speech that is otherwise protected and of public import. This concern is especially true to the extent that the censored speech relates to exposing or reporting incidents of sexual assault.

This Article explains how the push toward regulating offensive speech has undermined the ability for sexual assault survivors to come forward about their experiences in safe and supportive ways, especially within the educational context. Recent examples of institutional discipline and retaliation exemplify how bullying codes and social agendas originally aimed at censoring hate speech and misinformation can be misconstrued to target important speech of particular public concern.

Part I of this Article will examine how institutional discipline, particularly in school settings, has undermined the goals of bullying codes while silencing survivors of sexual assault. Part II will look at the ways in which retaliatory defamation lawsuits have also been used to censor sexual assault survivors through claims of false speech. While relying on an example outside of the educational setting to illustrate the ways in which defamation plaintiffs have taken aim at survivors more generally, Part II will also explain how students have been particularly targeted by defamation lawsuits and related threats. Part III will discuss the problematic policy consequences that comes from attempting to censor speech on issues relating to sexual assault and will argue that the regulation of speech ought to be tempered where speech of public import is at risk of being silenced. Finally, this Article concludes that any pushes toward regulating more speech should be carefully

* Nicole Ligon is a Clinical Professor of Law at Duke University School of Law. She is the Supervising Attorney of the First Amendment Clinic at Duke Law and a member of the Legal Network for Gender Equity.

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crafted such that these regulations will not pose even more burdens on sexual assault survivors seeking to share valuable information about their own experiences.

I. Institutional Discipline

In recent decades, states and local legislatures have turned their attention toward combatting bullying in school settings, in part as an effort to regulate hate speech in schools. The Centers for Disease Control and Prevention (CDC) define bullying as "any unwanted aggressive behavior(s) by another youth or group of youths . . . that involves an observed or perceived power imbalance and is repeated multiple times or is highly likely to be repeated."[1] From 1990 to 2010, more than 120 bills addressing bullying were enacted nationwide.[2] By 2015, all fifty states had passed laws directing schools districts or individual schools to develop policies that address bullying.[3]

The Supreme Court's rulings around this time provided some additional guidance and push for anti-bullying regulations.[4] For example, in *Davis v. Monroe County Board of Education*, the Supreme Court found that a public elementary school did not do enough to prevent student-to-student sexual harassment in the case of a fifth-grade girl being subjected to sexual advances by her classmate.[5] Over the dissent's acknowledgment that a school's "power to discipline its students for speech that may constitute sexual harassment is . . . circumscribed by the First Amendment," the Court found that schools can incur liability to the extent they fail to police or discourage such kind of conduct through anti-bullying codes or other means.[6]

Although the goals of anti-bullying policies are certainly admirable, research regarding their effectiveness is limited.[7] Even where policies have been well-crafted, however, it is important for schools implementing and applying bullying rules to assess each situation on an individual, case-by-case

[1] *Preventing Bullying*, Ctrs. for Disease Control & Prevention (CDC) (2018), https://www.cdc.gov/violenceprevention/pdf/bullying-factsheet508.pdf [https://perma.cc/8M6W-25C8].

[2] Dewey G. Cornell & Susan P. Limber, *Do U.S. Laws Go Far Enough to Prevent Bullying at School?*, Am. Psych. Assoc. (Feb. 2016), https://www.apa.org/monitor/2016/02/ce-corner [https://perma.cc/MD3Y-YRNH].

[3] *Id.*

[4] *See* Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Scruggs v. Meriden Bd. of Educ., No. 3:03CV2224(PCD), 2005 WL 2072312 (D. Conn. Aug. 26, 2005), *rev'd in part on reh'g on other grounds*, 2006 WL 2715388 (D. Conn. Sept. 22, 2006).

[5] *See Davis*, 526 U.S. at 646–47. The Supreme Court ruled in a 5-4 decision that sexual harassment by one student of another could constitute discrimination under Title IX if they do not attempt to regulate such conduct by adopting anti-bullying codes, creating a shift and impetus for schools to better regulate and guide students' behavior.

[6] *Davis*, 526 U.S. at 667 (Kennedy, J., dissenting); *id.* at 646–47 (majority opinion).

[7] *See generally* William Hall, *The Effectiveness of Policy Interventions for School Bullying: A Systematic Review*, 8 J. Soc'y Soc. Work & Rsch. 45, 45 (2017)

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basis.[8] A failure to do so can not only undermine the goals of these policies but serve to actively counter them. This is especially true where the alleged act of bullying involves speech on a matter of public concern, particularly within the context of reporting sexual assault.

The recent push to combat offensive speech, including bullying, has had the detrimental impact of imposing discipline on and silencing survivors of sexual assault and their allies. Take, for example, *Norris v. Cape Elizabeth School District*.[9] In October 2019, a public high school in Maine suspended Aela Mansmann, a 15-year-old high school student, for speaking up about sexual assault in her school. Mansmann had posted a sticky note in the girls' restroom at school that stated: "There's a rapist in our school and you know who it is." Within minutes of Mansmann placing her message, another student entered the bathroom, removed the note, and took it to school administrators. Word of the sticky note quickly spread; photos of the note were shared across the school and, as a result, students began actively discussing the topic of sexual assault on campus. Grapevine conversation also led to students figuring what, and who, the note was referring to, including which classmate was the perpetrator of the alleged sexual assault. After an investigation by school administrators into the sticky note,[10] Mansmann was identified as being the original writer and was suspended for bullying. She challenged the suspension in court on First Amendment grounds, winning at both the federal trial and appellate levels. But the damage that the school caused with regard to students' willingness to come forward and speak out on such issues in the future is already done.[11] Students who may have been thinking about coming forward or speaking will now likely be reluctant to do so out of the fear that they, too, might be subjected to discipline.

Similarly, in September 2021, allegations surfaced about the University of Montana School of Law's mishandling of sexual assault reports. One student, who reported that her law school friend was sexually assaulted by one of their classmates, shared that the then-Associate Dean—who has since stepped down—threatened to report her and her friend to the bar association

[8] Understandably, this might raise concerns over discriminatory or arbitrary enforcement. Indeed, black students are significantly more likely to face severe discipline then their white peers for misconduct in a school setting. *See* Travis Riddle & Stacey Sinclair, *Racial Disparities in School-Based Disciplinary Actions Are Associated with County-Level Rates of Racial Bias*, 116 PROC. NAT'L.ACAD. SCIS. 8255, 8255 (Apr. 23, 2019). While I do believe case-by-case assessments can help with the evaluation of bullying incidents because each instance will be unique in kind, it is important that evaluators approach each situation with an eye toward due process and, ideally, after receiving implicit bias training. *See generally* THE IMPACT OF IMPLICIT BIAS TRAINING, HANOVER RSCH. (Mar. 2019), https://f.hubspotusercontent00.net/hubfs/3409306/The-Impact-of-Implicit-Bias-Training.pdf [https://perma.cc/5P5C-AT66] (discussing the effectiveness of such training).

[9] 969 F.3d 12 (1st Cir. 2020)

[10] But not the sexual assault.

[11] *See* Powell v. Alexander, 391 F.3d 1, 16–17 (1st Cir. 2004) ("[R]etaliatory actions may tend to chill individuals' exercise of constitutional rights." (quoting *ACLU of Md., Inc. v. Wicomico Cnty.*, 999 F.2d 780, 785 (4th Cir. 1993)).

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for being "vindictive" if they did not "drop the matter."[12] Characterizing speech on sexual assault reporting as "vindictive" and threatening career-impacting punishment as a result has the obvious impact of silencing survivors.

Along the same vein, when a high school sophomore in Georgia was coerced into performing oral sex on a classmate, she reported it to her first-period teacher the following day.[13] The ensuing investigation led the reporting student to be asked a series of unrelated or unprofessional questions (*e.g.*, What were you wearing at the time? Why didn't you just bite your classmate's genitals?).[14] Within days of reporting the incident, the student was told that she would be suspended until the school could conduct a joint disciplinary hearing during which both the victim and her assailant would be able to cross-examine each other.[15] But such a hostile discipline-imposing reaction often makes reporting sexual assault a daunting prospect for students at a time when sexual assault is already vastly unreported. Rather than assuming a student is making up false and offensive accusations and suspending or otherwise punishing them when they come forward about sexual assault, schools ought to react with support—especially given the nature of the sensitive and important speech at issue.

Unfortunately, punishment for reporting sexual assault in a school environment is all too commonplace. Studies show that 15% of survivors who report their experience to their school are threatened with or face punishment for coming forward.[16] This has led to 62.5% of reporting students in higher education programs to either take a leave of absence, transfer schools, or drop out altogether.[17] Allies like student newspapers that have sought to discuss sexual assault in the university context have likewise been censored and silenced. For example, David Rudd, the President of the University of Memphis, was quick to criticize—at a widely-attended university forum—a student newspaper for reporting on an ongoing sexual assault investigation at his university, calling such stories "irresponsible."[18] But beyond mere public

[12] Keilsa Spzaller, *UM Law Students: Deans Discouraged Reports of Sexual Misconduct; Elder Investigated*, Missoula Current (Sept. 27, 2021), https://missoulacurrent.com/montana-today/2021/09/law-students-misconduct/ [https://perma.cc/E3DS-66M6].

[13] Nora Caplan-Bricker, *My School Punished Me*, Slate (Sept. 19, 2016), https://slate.com/human-interest/2016/09/title-ix-sexual-assault-allegations-in-k-12-schools.html [https://perma.cc/M93J-EWTK].

[14] *Id.*

[15] Her request for separate hearings (so the experience would be less traumatizing) was also denied. *Id.*

[16] The Cost of Reporting, Know Your IX Rights 15, https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf [https://perma.cc/YK7M-4V9S], at 15.

[17] *Id.*

[18] Gabriel Greschler, *Criticized, Sued, and Overcharged: Are Barriers to Reporting on Sexual Assault Surmountable for Student Journalists?*, Student Press L. Ass'n (May 8, 2018), https://splc.org/2018/05/barriers-to-reporting-on-sexual-assault-on-campus/ [https://perma.cc/ACA9-JE8G]; Gus Carrington and Mitchell Koch, *Campus leadership answers questions about sexual assault issues*, The Daily Helmsman (Mar. 21, 2018), https://www.dailyhelmsman.

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criticism, colleges have gone so far as to sue newspapers to prevent publication of stories relating to sexual assault investigations on campus.[19]

Just because speech can be offensive, specifies a name, or relates to sexual misconduct does not necessarily make it offensive or hateful speech worthy of censoring[20] via a bullying code or institutional chastisement. Administrators and authority figures dolling discipline or criticism ought to be concerned with the policy impacts of silencing speech of significant public concern.

II. Defamation Lawsuits

Plaintiffs seeking to silence reporting on sexual assaults are unfortunately sometimes able to do so with the threat of a defamation lawsuit—this is especially true in states without anti-SLAPP statutes.[21] Defamation is a cause of tort action designed to prevent the spread of harmful lies and misinformation. Yet, our legal system often permits defamation actions to be used as a sword against well-meaning and protected speech (even if court cases ultimately vindicate the speaker).[22] For instance, retaliatory lawsuits against persons coming forward about their experiences surviving sexual assault are unfortunately all too common.[23] Because many of these lawsuits are charac-

com/news/campus-leadership-answers-questions-about-sexual-assault-issues/article_c21c7f18-b491-11e7-aed0-73bbab360926.html [https://perma.cc/3AFP-PXEG].

[19] Greschler, *supra* note 18.

[20] While the Supreme Court has been clear that we do not generally prohibit "hate speech" under the First Amendment, schools have the ability to set their own rules relating to keeping school environments productive places of learning. *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

[21] Approximately thirty states have anti-SLAPP laws, which are designed to dismiss frivolous claims against free expression in a quick and easy manner. Anti-SLAPP laws provide procedural protections for citizens who find themselves on the receiving end of lawsuits intended to punish them for speaking out on public matters. States with anti-SLAPP laws include Arizona, Arkansas, California, Colorado, Connecticut, Delaware, Florida, Georgia, Hawaii, Illinois, Indiana, Louisiana, Maine, Maryland, Massachusetts, Missouri, Nebraska, Nevada, New Mexico, New York, Oklahoma, Oregon, Pennsylvania, Rhode Island, Tennessee, Texas, Utah, Virginia, Vermont, and Washington. No attempts to enact a federal anti-SLAPP law have been successful yet. *See* Nicole Ligon, *Protecting Local News Outlets from Fatal Legal Expenses*, 95 N.Y.U. L. Rev. Online 280, 289–94 (2020).

[22] *Id.* at 291–92.

[23] *See* Julia Jacobs, *#MeToo Cases' New Legal Battleground: Defamation Lawsuits*, N.Y. Times (Jan. 12, 2020), https://nyti.ms/39uSXXP [https://perma.cc/96JJ-DFUX]; Tyler Kingkade, *As More College Students Are Saying "Me Too," Accused Men Are Suing for Defamation*, Buzzfeed News (Dec. 5, 2017, 11:26 AM), https://bit.ly/2X0pXou [https://perma.cc/88K7-B625]; Alyssa R. Leader, *A "SLAPP" in the Face of Free Speech: Protecting Survivors' Rights to Speak Up in the "Me Too" Era*, 17 First Amend. L. Rev. 441, 443 (2019); Bruce Johnson & Davis Wright Tremaine, *Worried About Getting Sued for Reporting Sexual Abuse? Here Are Some Tips*, Am. C. L. Union Blog (Jan. 22, 2018, 4:00 PM), https://bit.ly/2UTRV2a [https://perma.cc/85V7-DLM6]; Madison Pauly, *She Said, He Sued*, Mother Jones (Mar/Apr. 2020), https://www.motherjones.com/crime-justice/2020/02/metoo-me-too-defamation-libel-accuser-sexual-assault/ [https://perma.cc/BM7N-YNZV]; Kara Fox & Antoine Crouin, *Men Are Suing Women Who Accused Them of Harassment. Will It Stop Others from Speaking Out?*, CNN (June 5, 2019, 4:24 PM), https://www.cnn.com/2019/06/05/europe/metoo-defamation-trials-sandra-muller-france-intl/index.html [https://perma.cc/3GQH-33TY]; Sui-Lee Wee

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terized as "he said, she said," courts are often reluctant to dismiss such actions at the early motion to dismiss stage, opting instead to give the parties the chance to present concrete evidence at the summary judgment level. The result is that survivors are forced to endure time-consuming,[24] expensive,[25] and emotionally draining litigations. This is enough to make many survivors think twice before speaking out about their experiences, causing a self-regulation of speech due to the way in which we allow censoring behaviors to remain unchecked in our legal system.

Take, for example, the lawsuit that California Assemblyman Matt Dababneh brought against lobbyist Pamela Lopez. Lopez attended a wedding celebration in January 2016, where she encountered then-sitting Assemblyman Dabebneh. During the party, Lopez entered the restroom alone, but was followed by Dababneh. Dababneh prevented Lopez from exiting the restroom, exposed himself to her, asked her to touch his penis, masturbated in front of her, and then told her not to tell anyone what had happened.[26] Lopez remained silent until the following year, when she and another woman who had been sexually assault by Dababneh filed a complaint with the Assembly Rules Committee and held a press conference to discuss their experiences.[27]

Dababneh resigned from the legislature in January 2018 and an outside investigator hired by the Assembly Rules substantiated the accusations against him shortly thereafter.[28] But in August 2018, Dababneh sued Lopez for defamation and intentional infliction of emotional distress (IIED) for her testimony accusing him of sexual assault.[29] The trial court was reluctant to dismiss the case against Lopez at the early stages of litigation because Dababneh had claimed that he did not commit the acts he was accused of (i.e. "he said, she said"), and the court saw this as reason to allow the case to proceed into discovery. Lopez, hoping to avoid a lengthy and intense discovery process, appealed. On October 1, 2021, the Third Appellate District

and Li Yuan, *They Said #MeToo. Now They Are Being Sued*, N.Y. Times (Dec. 26, 2018), https://www.nytimes.com/2019/12/26/business/china-sexual-harassment-metoo.html [https://perma.cc/4FML-5GDR].

[24] *See* Thomas A. Waldman, *SLAPP Suits: Weaknesses in First Amendment Law and in the Courts' Responses to Frivolous Litigation*, 39 UCLA L. Rev. 979, 1016 (1992); Nicole Ligon, Protecting Women's Voices: Preventing Retaliatory Defamation Claims in the #MeToo Context, 94 St. John's L. Rev. 961 (2021).

[25] Newspapers sued for defamation lawsuits spend, on average, approximately $500,000 to successfully defend themselves. *See* Ligon, *supra* note 21, at 291.

[26] Melanie Mason, *California Assemblyman Accused of Forcing Lobbyist Into Bathroom and Masturbating*, L.A. Times (Dec. 4, 2017), https://www.latimes.com/politics/la-pol-ca-matt-dababneh-harassment-20171204-story.html [https://perma.cc/YW67-2PAP].

[27] *Id.*

[28] Melody Gutierrez, *Calif. Assembly Investigation Upholds Harassment Allegation Against Dababneh*, S.F. Chron. (Aug. 27, 2018), https://www.sfchronicle.com/politics/article/Calif-Assembly-investigation-upholds-harassment-13186625.php [https://perma.cc/ALV3-99JJ].

[29] Complaint, Dababneh v. Lopez, No. 34-2018-00238699-CU-DF-GDS (Cal. Super. Ct. 2018) https://capitolmr.com/wp-content/uploads/2018/08/2018-08-14-Complaint-in-Dababneh-v.-Lopez_-1.pdf [https://perma.cc/4Y9V-LB5M].

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California Court disagreed with the lower court, finding that California's anti-SLAPP law allowed for the case, which had already been subject to investigative findings, to be dismissed at the motion to dismiss level.[30] The appellate court instructed the lower court to proceed accordingly.

While Lopez was ultimately successful in coming forward and defending herself against defamation accusations, that it took several years for her to lift the claws of Dababneh's lawsuit is concerning. In states where no anti-SLAPP law exists to ward off frivolous defamation suits, such cases can take even longer because defendants may need to endure the entire discovery process.[31] If speaking to the press about one's experiences with sexual assault may lead to retaliation that lasts for years on end, that could have the detrimental impact of silencing survivors' speech, and both personal and public reporting, on important matters of public concern.

Lopez's experience is sadly not unique. Characterizing sexual assault reporting as false or misinformation and taking aim at speakers sharing their experiences via defamation lawsuits has become a disturbing trend in recent years.[32] Because these types of retaliatory actions are all too commonplace,[33] legislatures ought to be mindful to think through whether defendants in defamation suits have sufficient protections from frivolous censorship attempts. States without strong anti-SLAPP laws should seriously consider enacting the Uniform Public Expression Protection Act ("UPEPA")—a uniform anti-SLAPP law gaining traction in a number of state legislatures—in an effort to ensure that survivors and others speaking on important issues of public concern are not unnecessarily censored to the detriment of society at large.[34]

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[30] Dababneh v. Lopez, No. C088848, 2021 WL 4487407 (Cal. Ct. App. Oct. 1, 2021). California's anti-SLAPP law is considered a strong and helpful one from a defendant's perspective. Pursuant to CAL. CIV. PROC. CODE § 425.16 (West 2022), defendants can move to strike a complaint by demonstrating that they are being sued for "any act of that person in furtherance of the person's right of petition or free speech . . . in connection with a public issue." California courts have consistently construed this already-inclusive language broadly, making the statute widely applicable to various speech on diverse issues. *See* Thomas R. Burke, ANTI-SLAPP LITIGATION § 2:5 (Oct. 2021) (listing cases). California's statute also mandates that costs and attorney's fees be awarded to successful anti-SLAPP movants, and California courts have steadfastly adhered to this provision by granting generous awards of attorney's fees to successful anti-SLAPP movants. Likewise, California's statute provides for an immediate discovery stay and a right of appeal (with de novo appellate review), among its many defendant-positive facets.

[31] Ligon, *supra* note 21, at 289–94.

[32] *See supra* note 23.

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[33] *See, e.g.*, Mazzara v. Provencher, No. 19-05026-cag, 2020 WL 7787036 (Bankr. W.D. Tex. Dec. 4, 2020); Elliot v. Donnegan, 469 F. Supp. 3d 40 (E.D. N.Y. 2020). This is also not unique to the United States. Women, even celebrities, in other countries have been censored and retaliated against for coming forward about their experiences with sexual assault. *See, e.g.*, Alexandra Stevenson and Steven Lee Myers, *China Can't Censor Away Growing Anger Over Athlete's #MeToo Accusation*, N.Y. Times (Nov. 17, 2021), https://www.nytimes.com/2021/11/17/world/asia/peng-shuai-zhang-gaoli-china-tennis.html [https://perma.cc/PMQ5-A3Q4].

[34] *See* The Uniform Public Expression Protection Act ("UPEPA") (Unif. L. Comm'n 2020), https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=dcbe7300-b708-66eb-843a-8a66ddf3ad7b&forceDialog=1 [https://

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Students are being particularly affected by the uptick in using defamation actions to silence the reporting of sexual assaults. One lawyer at the Victim Rights Law Center in Boston reports that while only 5% of her cases arouse from alleged campus sexual assaults involved an accuser facing a defamation suit in the early 2010s, about half of her cases could be categorized as such beginning in 2017.[35] This is a trend that other non-profits are likewise seeing,[36] and one that resonates with my own experience as the Supervising Attorney of Duke Law's First Amendment Clinic. Students are especially vulnerable to being silenced by defamation lawsuits because they often lack a primary steady income, making the cost of affording a defense attorney for such an action particularly daunting. As a result, they can be more easily threatened into silence by a demand letter or other threat of a defamation suit before ever entering into litigation. In states where anti-SLAPP laws are lacking, this is particularly concerning because a threat of a defamation lawsuit carries with it the risk of litigating a case for many years with no guarantee of the recovery of attorneys' fees even if the student is ultimately victorious. Anti-SLAPP litigation is therefore needed in states without strong or existing statutes to help ensure that aggressors cannot silence survivors due to the fear of costly and lengthy litigation.

III. Policy Considerations

Punishing speakers who report sexual assault through institutional discipline or defamation lawsuits can have a disastrous chilling effect by discouraging survivors and advocates from coming forward and speaking out. Students are especially likely to experience sexual violence, often at the hands of their classmates. When the authority figures that they report these experiences to retaliate against them and attempt to censor them, or when our legislatures fail to protect them from extensive frivolous lawsuits, it leads to a gross underreporting of this reprehensible conduct.

Reports show that nationally, 9.7% of high schoolers, including 15.2% of young women, have been the victims of sexual violence.[37] Relatedly, one in five women and one in sixteen men are sexually assaulted while in col-

perma.cc/7XKC-HN29]; *see, e.g.*, Jay Adkisson, *Washington State Legislature Passes the Uniform Public Expression Protection Act*, Forbes (Apr. 30, 2021), https://www.forbes.com/sites/jayadkisson/2021/04/30/washington-state-legislature-passes-the-uniform-public-expression-protection-act/?sh=71e5bc8efe96 [https://perma.cc/AS65-ALN4].

[35] As More College Students Are Saying "Me Too," Accused Men Are Suing for Defamation, Buzzfeed News (Dec. 5, 2017, 11:26 AM), https://bit.ly/2X0pXou [https://perma.cc/WQ76-Z9NQ].

[36] *Id.*

[37] Centers for Disease Control and Prevention, Youth Risk Behavior Surveillance – United States, 2017 21 (2018), https://www.cdc.gov/healthyyouth/data/yrbs/pdf/2017/ss6708.pdf [https://perma.cc/4Z4H-MFKM].

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lege.[38] Due to stigma and the potential for retaliation, many young victims tend to suppress or trivialize what has happened to them by blaming themselves or viewing their assaults as normal or unimportant behavior.[39] Punishing a student for speaking out will only create further stigma surrounding sexual assault and dissuade others from speaking on the extremely important topic.

Conclusion

As schools and legislatures consider ways to regulate offensive speech, attention should be given to the public importance of the speech being regulated. Crafting a bullying code to penalize speech just because it causes a classroom disruption and is directed at a classmate fails to take into account the significant potential import that some speech, especially speech relating to sexual assault reporting, might have. And failing to provide defamation defendants legislative coverage or channels to easily dismiss frivolous lawsuits based on someone reporting their sexual assault likewise leads to the silencing of valuable speech on issues of public concern. A push to overregulate speech that might appear offensive or falls into a "he said, she said" categorization can lead to problematic consequences. Reports on sexual assaults provide great value to society; with these policy concerns in mind, it is time to consider the ways in which the push for regulating more speech can ultimately cause sexual assault survivors to face discipline, chastisement, and retaliation at the expense of sharing important information on matters of public concern.

[38] Nat'l Sexual Violence Res. Ctr., Statistics About Sexual Violence 2 (2015), https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf [https://perma.cc/KE68-DSPH].

[39] Karen G. Weiss, *"You Just Don't Report That Kind of Stuff": Investigating Teens' Ambivalence Toward Peer-Perpetrated, Unwanted Sexual Incidents*, 28 Violence & Victims 288, 299–300 (2013).

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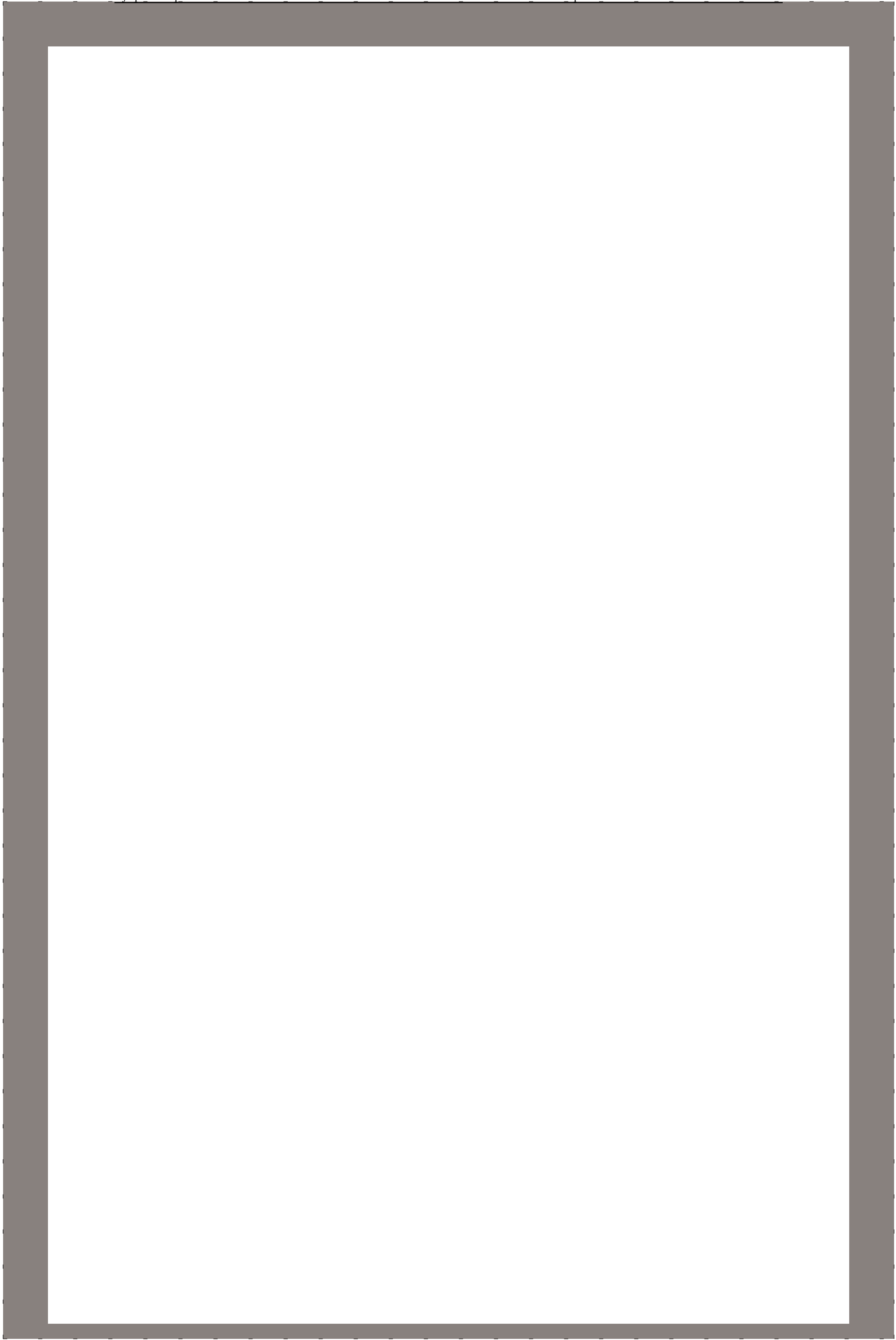

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Anti-Speech Acts and the First Amendment

*Richard K. Sherwin**

Crash on the levy, mama, water's gonna overflow
Swamp's gonna rise, no boat's gonna row . . .
Now, it's king for king, queen for queen,
it's gonna be the meanest flood that anybody's seen . . .[1]

The real opposition is the media. And the way to deal with them is to flood the zone with shit.[2]

Internet political ads present entirely new challenges to civic discourse: machine learning-based optimization of messaging and micro-targeting, unchecked misleading information, and deep fakes. All at increasing velocity, sophistication, and overwhelming scale.[3]

[Y]ou have pushed out your gates the very defender of them, and in a violent popular ignorance, given your enemy your shield . . . [.][4]

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* Wallace Stevens Professor of Law; Director, Visual Persuasion Project, New York Law School. I am grateful to Ed Purcell and Nadine Strossen for their unparalleled intellectual generosity and their instructive comments on the text. I also wish to thank Richard Chused, Steven Winter, Susan Abraham, Lenni Benson, Doni Gewirtzman, and Ben Lieberman for helpful suggestions during various stages of the essay's development. Bill Mills and Michael McCarthy provided invaluable research assistance. It was a pleasure working with editors Peter Merritt, Alex Tobin, and Max Lupin, whose thoughtful suggestions, together with the editorial attentiveness of Justin Gillette, Lica Porcile, Isabel Sistachs, and Maleeha Chida, helped to improve the text. I am indebted to Ida Kovisky who was the initial catalyst for this work. Responsibility for the final text remains mine.

[1] BOB DYLAN, CRASH ON THE LEVEE (DOWN IN THE FLOOD) (Columbia Records 1971).

[2] Sean Illing, *"Flood the zone with shit": How misinformation overwhelmed our democracy*, VOX (Feb. 6, 2020, 9:27 AM), https://www.vox.com/policy-and-politics/2020/1/16/20991816/impeachment-trial-trump-bannon-misinformation [https://perma.cc/D3GY-UQTF].

[3] Jack Dorsey (@jack), TWITTER (Oct. 30, 2019, 4:05 PM), https://twitter.com/jack/status/1189634369016586240 [https://perma.cc/XM72-XLPZ].

[4] WILLIAM SHAKESPEARE, CORIOLANUS *in* THE COMPLETE PELICAN SHAKESPEARE 1701, 1746 (Stephen Orgel & A.R. Braunmuller eds., 2002).

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INTRODUCTION

In many states today, there are laws on the books designed to protect the legitimacy and fairness of elections by barring the knowing or reckless dissemination of demonstrably false statements.[5] Regulating this kind of deliberate deception protects the public against the erosion of First Amendment freedoms—such as the freedom to think and express one's own thoughts and to meaningfully deliberate in an electoral process free from deliberate efforts to flood the zone of public discourse with confusion and mistrust based on deliberate and provable falsehoods. Some of these regulations, however, have been successfully challenged on First Amendment grounds.[6] In what follows, I contend that using First Amendment doctrine to shield illiberal attacks on the electoral process mocks the democratic values for which that doctrine stands.[7]

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[5] *See, e.g.*, ALASKA STAT. ANN. § 15.13.095(a) (West, Westlaw through First Reg. Sess. of 32nd Leg. (2021)); COLO. REV. STAT. ANN. § 1-13-109 (West, Westlaw through First Reg. Sess. of 73rd General Assemb. (2021)); FLA. STAT. ANN. § 104.271 (West, Westlaw through First Reg. Sess. & Spec. "A" Sess. of 27th Leg. (2021)); LA. STAT. ANN. § 18:1463(C) (West, Westlaw through Reg. Sess. & Veto Sess. (2021)); MISS. CODE ANN. § 23-15-875 (West, Westlaw through Reg. Sess. (2021)); N.C. GEN. STAT. ANN. § 163-274(a)(8) (West, Westlaw through Reg. Sess. of General Assemb. (2021)); N.D. CENT. CODE ANN. § 16.1-10-04 (West, Westlaw through Reg. Session of 67th Leg. Assemb. (2021)); OR. REV. STAT. ANN. § 260.532 (West, Westlaw through Reg. Sess. of 81st Leg. Assemb. (2021)); S.D. CODIFIED LAWS § 12-13-16 (West, Westlaw through Sess. Laws (2021)); TENN. CODE ANN. § 2-19-142 (West, Westlaw through First Reg. Sess. of 112th Tenn. General Assemb. (2021)); UTAH CODE. ANN. § 20A-11-1103 (West, Westlaw through First Spec. Sess. (2021)); WASH. REV. CODE ANN. § 42.17A.335 (West, Westlaw through Reg. Sess. of Wash. Leg. (2021)); W. VA. CODE ANN. § 3-8-11(c) (West, Westlaw through 1st Spec. Sess. (2021)); WIS. STAT. ANN. § 12.05 (West, Westlaw through Act 59-79 (2021)). According to Robert Spicer, forty-four statutes in thirty-four states provide some form of regulation of campaign deception. ROBERT N. SPICER, FREE SPEECH AND FALSE SPEECH: POLITICAL DECEPTION AND ITS LEGAL LIMITS (OR LACK THEREOF) 35 (2018). Areas of statutory concern include: the use of deliberate deception to mislead voters concerning polling locations, voting times, ballot authenticity and ballot availability, voting instructions, provably false factual assertions in candidate statements or in claims regarding ballot initiatives or recall petitions, false assertions of incumbency or campaign affiliation, and false information about issues and candidates. *Id.* at 34–41.

[6] *See, e.g.*, 281 Care Comm. v. Arneson, 766 F.3d 774 (8th Cir. 2014), in which the Court of Appeals for the Eighth Circuit struck down Minnesota's ban on false campaign speech as unconstitutional for failing to meet the demands of strict scrutiny. Minnesota's statute made it a gross misdemeanor to "intentionally participate[ ] in the preparation, dissemination, or broadcast of paid political advertising or campaign material . . . that is false, and that the person knows is false or communicates to others with reckless disregard of whether it is false." *Id.* at 778. This analysis reflects the "actual malice" standard announced by the Supreme Court in *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). According to the court in *281 Care Comm.*: "There is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal." *281 Care Comm. V. Arneson*, 766 F.3d at 793. *See* additional cases cited *infra* n. 39.

[7] Ironically, the free speech protection being offered increasingly benefits not real persons but rather digital bots, cyborgs, and trolls that deliberately hide their identity to spread lies and confusion more effectively online. *See* SINAN ARAL, THE HYPE MACHINE: HOW SOCIAL MEDIA DISRUPTS OUR ELECTIONS, OUR ECONOMY, AND OUR HEALTH—AND HOW WE MUST ADAPT 48 (2020) (noting that the initial spreaders of disinformation "are much more likely to be bots than humans").

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Strategies of deception designed to disrupt public discourse in the electoral context constitute a special form of violence against speech and against meaningful engagement in individual and collective deliberation.[8] That is why I call the illiberal practices that cause this harm "anti-speech acts." Anti-speech acts constitute an attack upon the efficacy of communication itself.[9] Their purpose is not to advance opinions or ideas in the service of truth or judgment; rather, their objective is to jam deliberation—to deliberately sow confusion and mistrust—by propagating demonstrably false information upon which others are meant, or are reasonably expected, to rely. Profiting from such false coinage is a fraud upon the public.[10] This danger is particu-

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[8] *See infra* note 137. Acts of violence against speech share kindred effects associated with the strategic infliction of violence against the body. Such tactics not only destroy the victim's ability to engage in meaningful discursive exchange, but also, in so doing, ultimately nullify the victim's normative world. *See* ROBERT COVER, *Violence and the Word*, *in* NARRATIVE, VIOLENCE, AND THE LAW: THE ESSAYS OF ROBERT COVER 205 (Martha Minow, Michael Ryan & Austin Sarat eds., 1995) ("That one's ability to construct interpersonal realities is destroyed by death is obvious, but in this case, what is true of death is true of pain also, for pain destroys, among other things, language itself."). According to Cover, the destruction of language and the capacity for meaningful discursive engagement with others marks "the end of the bonds that constitute the [victim's] community." *Id. See* PETER POMERANTSEV, THIS IS NOT PROPAGANDA: ADVENTURES IN THE WAR AGAINST REALITY 113 (2019) (noting that Vaclav Havel, who served several lengthy prison terms for political dissidence in communist Czechoslovakia before becoming the first president of the Czech Republic, called upon people "to stop repeating official language; it was the repetition of things you didn't believe that helped to break you.").

[9] Rather than advocating on behalf of illiberal ideas (which would be protected by the First Amendment), tactical anti-speech acts constitute an illiberal attack upon speech and meaningful deliberation itself. On the difference between protected speech and prohibited acts, *compare* Collin v. Smith 578 F.2d 1197 (7th Cir. 1978) (holding that racist speech is constitutionally protected) *with* Title VII of the Civil Rights of 1964, 42 U.S.C. § 2000e-2 (prohibiting racist conduct, such as the refusal to hire a prospective employee on the basis of race). *See generally* Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881, 932 (1962–63) (noting that "society must withhold its right of suppression until the stage of action is reached" and that "[t]he crucial principle is that the issue be conceived and its resolution sought in terms of permitting 'expression' and punishing 'action'"). By virtue of the violence they commit against meaning and the practice of efficacious communication, anti-speech acts fail to fulfill—and in fact actively impede—the core justifications Emerson provides for maintaining a system of free expression, namely: "(1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making . . . ." *Id.* at 878. *See* POMERANTSEV, *supra* note 8, at 186 ("What if one were to refocus disinformation from content to behavior: bots, cyborgs, and trolls that purposefully disguise their identity to confuse audiences . . . .").

[10] *See* Rosenbloom v. 704 Metromedia, Inc., 403 U.S. 29, 52 (1971) ("Calculated falsehood, of course, falls outside 'the fruitful exercise of the right of free speech.'") (citing Garrison v. Louisiana, 379 U.S. 64, 75 (1964)); Time, Inc. v. Hill, 385 U.S. 374, 389-90 (1967) ("But the constitutional guarantees can tolerate sanctions against calculated falsehood without significant impairment of their essential function. We held in New York Times that calculated falsehood enjoyed no immunity in the case of alleged defamation of a public official concerning his official conduct."); St. Amant v. Thompson, 390 U.S. 727, 732 (1968) ("Neither lies nor false communications serve the ends of the First Amendment."); Linn v. United Plant Guard Workers of Am., Local 114, 383 U.S. 53, 63 (1966) ("[T]he most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth."); Vanasco v. Schwartz, 401 F. Supp. 87, 93 (S.D.N.Y. 1975) ("[W]e can agree with the Board's argument that calculated falsehoods are of such slight social value that no matter what the context in which they are

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larly acute in a digital communication ecosystem where proprietary algorithms funnel and shape political discourse to advance not truth, but profit derived from maximized attention share online.

The burden of this essay is to make as plain as possible why, in the digital age, traditional doctrinal reliance upon "more speech" as an adequate response to deliberate falsehoods in the electoral context disserves core First Amendment values. Courts that use free speech doctrine to shield those who deliberately or recklessly disseminate demonstrably false statements in pursuit of fraudulent electoral or commercial gain subvert the very values they purport to uphold. Freedom of thought and expression and the continued integrity of the electoral process are served (not hindered) by prudent regulation of anti-speech acts.[11]

In this Article, I rebut the claim that regulating anti-speech acts chills political speech. To the contrary, protecting public discourse and electoral integrity against the corrosive effects of certain kinds of deliberate lying in the electoral context safeguards conditions essential to a robust and varied

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made, they are not constitutionally protected."), *affirmed by* Swain v. Tennessee, 423 U.S. 1041 (1976). *See also* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 803 (1988) (Scalia, J., concurring in part, concurring in judgment) ("Where core First Amendment speech is at issue, the State can assess liability for specific instances of deliberate deception."); Ocala Star-Banner Co. v. Damron, 401 U.S. 295, 301 (1971) (White, J., concurring) ("Misinformation has no merit in itself; standing alone it is as antithetical to the purposes of the First Amendment as the calculated lie.").

Many state courts agree. *See, e.g.,* State ex rel. Hampel v. Mitten, 278 N.W. 431, 435 (Wis. 1938) ("Nothing is more important in a democracy than the accurate recording of the untrammeled will of the electorate. Gravest danger to the state is present where this will does not find proper expression due to the fact that electors are corrupted or are misled . . . . It is . . . possible and feasible to require of candidates that statements of fact known to be false and so substantially bearing upon the fitness of other candidates as to have a tendency to influence votes shall not be made the basis of appeals for votes."); Fellows v. National Enquirer, Inc., 211 Cal. Rptr. 809, 824 (Ct. App. 1985) ("[A] publisher of what the Supreme Court has termed a 'calculated falsehood' . . . enjoys no constitutional protection." (Citations omitted)), *rev'd on other grounds* 721 P.2d 97 (Cal. 1986); Long v. State, 622 So. 2d 536, 537 (Fla. App. 1993) ("The use of calculated falsehoods under any circumstances, even in the criticism of public officials, is not constitutionally protected."); Thibadeau v. Crane, 206 S.E.2d 609, 610 (Ga. Ct. App. 1974) ("There is no privilege protecting the use of calculated falsehood."); People v. Duryea, 351 N.Y.S.2d 978, 988 (N.Y. Sup. Ct. 1974) ("Calculated falsehood is never protected by the First Amendment."); People v. Bloss, 184 N.W.2d 299, 311 (Mich. Ct. App. 1970) ("We see no difference constitutionally between the calculated falsehood and the calculated appeal to prurient interest. Neither is a communication of ideas entitled to constitutional protection."), *rev'd on other grounds*, 201 N.W.2d 806 (Mich. 1972); Theckston v. Triangle Publications Inc., 242 A.2d 629, 631 (N.J. Super. Ct. App. Div. 1968) ("Speech concerning public affairs is the essence of self-government so that, where public officials are concerned, it is only the calculated falsehood which will afford redress."); State v. Powell, 839 P.2d 139, 142 (N.M. Ct. App. 1992) ("[T]he knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.").

[11] As the New York Appellate Division concluded in its decision to suspend Rudolph Giuliani's license to practice law for knowingly disseminating demonstrably false information regarding fraud in the 2020 presidential election: "The hallmark of our democracy is predicated on free and fair elections. False statements intended to foment a loss of confidence in our elections and resulting loss of confidence in government generally damage the proper functioning of a free society." In re Giuliani, 146 N.Y.S.3d 266, 283 (N.Y. App. Div. 2021) (per curiam).

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exchange of opinions and ideas. Tactical anti-speech acts are the kinds of lies that *should* be chilled to avoid significant social and political harms.[12] We do not say that lying to the FBI or to a jury, or deliberately making false claims about corporate earnings or products should not be regulated because it might chill truth telling. Rather, we say that the value to society that this protection affords significantly outweighs the costs.[13] Regulating tactical anti-speech acts follows a similar logic.

There is also an important analytical component in cautioning against overstating the risk of chilling protected speech. It consists in the notion that framing freedom of speech exclusively as a negative right—protecting speakers from impermissible government interference—is insufficient to safeguard core free speech values. To rectify this imbalance, proper scope also must be afforded to the First Amendment's affirmative function to protect the right of citizens to access, and participate in, informed and wide-ranging public discourse.[14] Immoderate anxiety about risks, however remote, of chilling protected speech threatens to eclipse an equally compelling, but at times competing concern, namely: the risk of failing to preserve the minimum conditions essential to a robust marketplace of opinions and ideas.

Laws like the Model Election Integrity Act proposed in Part III of this Article protect the integrity of the public square by regulating deliberately disruptive speech acts that are inimical to the values, institutions, and practices of liberal democracy. In so doing such laws pay heed to the First Amendment's affirmative function. For to what avail is a highly guarded right to speak without meaningful access to reliable information and diverse opinions and ideas?[15]

These are the stakes. The argument for an updated First Amendment framework that upholds the regulation of tactical anti-speech acts follows.

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[12] *See* CASS SUNSTEIN, LIARS: FALSEHOODS AND FREE SPEECH IN AN AGE OF DECEPTION 51 (2021) ("If false statements create serious problems, it is important to ensure that the fear of a chilling effect does not itself have a chilling effect on public discussion or on social practices.").

[13] *Id.* at 65 ("If an approach chills a very large number of very damaging falsehoods and a small number of not-very-important truths, we should probably adopt it.").

[14] *See* Associated Press v. United States, 326 U.S. 1, 20 (1945) (noting that the purpose of the First Amendment is to foster "the widest possible dissemination of information from diverse and antagonistic sources"); Pickering v. Bd. of Educ., 391 US 563, 573 (1968) (noting the "core value" protected by the First Amendment is the individual right to meaningfully participate, either as speaker or as listener, in a "free and unhindered debate on matters of public importance."); Genevieve Lakier, *The First Amendment's Real Lochner Problem*, 87 U. CHI. L. REV. 1241, 1338 (2020) (advocating for a First Amendment "conceived primarily as a safeguard of democratic government, rather than private autonomy."); Genevieve Lakier, *The Non–First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299 (2021) (noting that during the eighteenth and nineteenth centuries legislators expressed a much less laissez-faire understanding of the government's responsibilities in regard to the marketplace of ideas reflecting their deep concern about "the threat that private economic power poses to expressive freedom"—particularly to the "the less powerful, as well as to the well-being of the institutional press"—due to "the concentration of economic power produced by the increasing industrialization of the U.S. economy.").

[15] *See* ARAL, *supra* note 7, at 309–10 ("If our elections lack integrity, no amount of free speech or inclusion can save our democracies because voting protects all other rights.").

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Part I lays out in greater detail why the substantial social and political harms brought about by anti-speech acts cannot be averted through less intrusive (more speech-protective) measures than regulation. Counterspeech, labels or other warnings, as well as independent fact checking, can help stem the tide of harmful falsehoods. But they are insufficient to defend against the harms anti-speech acts pose to free speech, the integrity of the electoral process and, by extension, to liberal democracy itself in the digital age. With the public square's relentless migration online, the orthodox doctrinal claim that counterspeech is the only acceptable ("least intrusive") means of opposing anti-speech acts has become inexorably anachronistic. Part II shows that state regulation of the deliberate or reckless dissemination of provable falsehoods in the electoral context is consistent with core free speech values. Fundamental safeguards designed to preserve individual dignity, autonomy, and expressive liberty require prudent assessment of countervailing harms. Without a legal framework that can guarantee the minimum conditions necessary to maintain a robust marketplace of opinions and ideas, the right to freedom of speech remains a hollow promise. Part III offers a model regulation of anti-speech acts that passes muster within a revised first amendment framework.

I. Why Counterspeech Cannot Adequately Safeguard the Virtual Public Square from the Harms of Tactical Anti-speech Acts

Life online offers much in the way of information, entertainment, market convenience, and commercial opportunity. But it promises no sanctuary for freedom of thought and expression. That prospect ultimately depends upon the dis-equilibration of private commerce and public deliberation. Balanced policy objectives and moral consensus do not spring full grown from the calculative logic of the marketplace. They require informed political debate and public deliberation.[16] This kind of expressive freedom presupposes a protected communication ecosystem to safeguard its operation.[17] Whoever controls that space—including the kinds of expressive interaction the dominant communication infrastructure is designed to encourage and amplify—

[16] *See, e.g.,* Claudio Lombardi, *The Illusion of the Marketplace of Ideas and the Right to Truth*, *in* Am. Affs. (Feb. 20, 2019), https://americanaffairsjournal.org/2019/02/the-illusion-of-a-marketplace-of-ideas-and-the-right-to-truth/ [https://perma.cc/2WCA-6G84] (noting that Justice Holmes's famous dissent in *Abrams v. United States*, 250 U.S. 616, 630 (1919) ["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."] fails to appreciate that "when an idea is tied to an advertisement . . . it becomes more difficult to differentiate between the world of ideas and that of products . . . . Marketing techniques aim exactly at familiarizing consumers with ideas that contradict known truths, all the while behaving as if only their claims were true. To take a classic case, consider the illusion that cigarettes are for happy, athletic, successful people . . . .").

[17] *See* Jack Balkin, *The Future of Free Expression in a Digital Age*, 36 Pepp. L. Rev. 427, 432 (2009) (noting that freedom of speech requires "an infrastructure").

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conditions liberty in the same measure. Ever increasing disparities of wealth and power now dominate the attention economy in which most members of our information society live and work.[18] And just as the constitutional shield that protected the contract rights of gilded industrial barons eroded the social welfare of labor over a century ago, so, too, today the shield of free speech rights protects gilded social media barons—impairing freedom of thought and expression among those subject to their unchecked power.

In his seminal law review article, "The New Property," Charles Reich writes: "The chief legal bulwark of the individual against oppressive government power is the Bill of Rights. But government largess may impair the individual's enjoyment of those rights."[19] Reich worried about public benefits being cut off by administrative policies that were neither "important" nor "wise".[20] Over half a century later, concern has shifted to what is arguably the most fundamental of individual rights: namely, freedom of thought and expression—a right that is increasingly at risk of being impaired by powerful private actors in the service of corporate media policies that are neither as important or wise as the foundational principles upon which that right stands.

A new kind of autocracy, masked by the trappings of democracy,[21] is displacing the capricious administrative state that piqued Reich's concern. The virtual public square online, within which vital functions of democracy are being performed, is algorithmically designed to alienate us from what Justice Brandeis considered to be an indispensable means of discovering and spreading political truth. He had in mind those "deliberative forces" that allow us to "think as we will and speak as we think."[22]

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[18] The idea of an attention economy is often attributed to Herbert Simon who noted, as early as 1971, that "a wealth of information creates a poverty of attention." David E. Pozen, The Perilous Public Square 20 (2020).

[19] *See* Charles Reich, *The New Property*, 73 Yale L. J. 733, 760 (1964).

[20] *Id.* at 769.

[21] *See infra* note 70 (on *skeuomorphs*).

[22] *See* Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("Those who won our independence believed that the final end of the state was to make men free to develop their faculties, and that in its government the deliberative forces should prevail over the arbitrary. They valued liberty both as an end and as a means. They believed liberty to the secret of happiness and courage to be the secret of liberty. They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; that without free speech and assembly discussion would be futile; that with them, discussion affords ordinarily adequate protection against the dissemination of noxious doctrine; that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government."). Brandeis might have had Thomas Jefferson's words in mind: "[T]o preserve the freedom of the human mind. . . [and]freedom of the press, every spirit should be ready to devote itself to martyrdom; for as long as we may think as we will and speak as we think, the condition of man will proceed in improvement." The Papers of Thomas Jefferson, To William Green Munford (2004), https://jeffersonpapers.princeton.edu/selected-documents/william-g-munford [https://perma.cc/RQJ2-66XR]. *Contra* Renee Diresta, *Free Speech Is Not the Same as Free Reach*, Wired (Aug. 30, 2018), https://www.wired.com/story/free-speech-is-not-the-same-as-free-reach/next [https://perma.cc/UW58-2JRK] ("[Invisible algorithms] determine what content billions of internet users read, watch, and share . . . [For example,] YouTube's video-

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The public square is a cultural construct, as are the myriad forms of expressive freedom we perform there. As a political and legal matter, it is a collective choice whether or not we will continue to safeguard this basic element of liberal democracy. Privatizing the dominant deliberative fora in society conditions free speech rights much as administrative discretion has conditioned social welfare rights (Reich's "new property"). These disparate concerns share a common truth: Just as property rights are not necessarily a friend of liberty,[23] free speech rights may become similarly afflicted when wielded as a shield for the powerful few against the exploitable many (i.e., the vast population of information consumers online).[24]

During the first half of the twentieth century, the Supreme Court, after years of seemingly intractable doctrinal inertia, eventually upheld the power of the people through their elected officials to regulate contract obligations in order to protect the health, safety, and welfare of laborers in the workplace. But by the century's end, the pendulum had swung away from welfare state aspirations to a neo-liberal vision of the minimal state, dominated by policies favoring private market deregulation. As a result, the flow of power reversed course, streaming into fewer and fewer hands.

When the private market can no longer perform its liberty and privacy-protective functions, it becomes necessary to regulate that market in order to attain a more optimal balance between property and liberty.[25] Likewise, when an increasingly anachronistic first amendment doctrine is no longer

recommendation algorithm inspires 700,000,000 hours of watch time per day—and can spread misinformation, disrupt elections, and incite violence."). Recommendation engines, search, trending, autocomplete, and other mechanisms predict what social media users want to see. The algorithms used do not understand the difference between disinformation and truth. Their sole function is to surface content deemed relevant to the user. Notable as well is the fact that ranking, filtering, and amplification of selected content discriminates on the basis of content, gender, and race. Studies have shown that because algorithms build on past bias using past data, bias is reified and reinforced in the algorithms. *See generally* Marcelo Prates, Pedro Avelar, and Luis C. Lamb, *Assessing Gender Bias in Machine Translation – A Case Study with Google Translate*, NEURAL COMPUTING & APPLICATIONS J., vol. 32, 6363–81 (2019), https://arxiv.org/pdf/1809.02208.pdf [https://perma.cc/DU5L-J594]; Emily M. Bender, Angelina McMillan-Major, Timnit Gebru & Shmargaret Schmitchell, *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?* FACCT '21 (2021), https://dl.acm.org/doi/pdf/10.1145/3442188.3445922 [https://perma.cc/HX3D-D2U7]; *see also* BLAKE SMITH, *Hannah Arendt's Critique of Social Media*, TABLET (Dec. 4, 2020), https://www.tabletmag.com/sections/arts-letters/articles/hannah-arendt-judgment [https://perma.cc/UFX2-RHDC] ("When we give an opinion on Twitter, we are not inspired by an authentic, personal desire to have our particular relationship to the world enlarged by an encounter with other such relationships, but by a derivative, imitative desire to have the attention that other people seem to enjoy.").

[23] Reich, *supra* note 19, at 772.

[24] *See* SOPHIA ROSENFELD, DEMOCRACY AND TRUTH: A SHORT HISTORY 156 (2018) ("[B]y shielding both abusive trolling and what are known as 'flooding tactics' designed to manipulate what gets heard amidst all the online noise," the dominant laissez-faire (free market) approach to speech "has enabled the silencing of unwelcome or unpopular voices, including disproportionately those of women and members of minority groups.").

[25] *See* Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 285 (1964) (Douglas, J., concurring) ("The institution of private property exists for the purpose of enhancing the individual freedom and liberty of human beings.") (quoting S. Rep. No. 88-2, at 12–13 (1964)).

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able to perform its liberty-protective function, it, too, must give way to a new formulation better adapted to the changed conditions to which it applies.

The current marketplace of opinions and ideas is troubled in particular by a disturbing paradox. Consumers of goods and services in commercial markets are protected against the harmful effects of the knowing and willful dissemination of demonstrably false information.[26] But similar protections for consumers of political information are constitutionally fraught,[27] as are efforts to secure electoral integrity and the digital information infrastructure itself from the harms that flow from deliberate falsehoods.[28] And while the dangers of market distortion resulting from daunting concentrations of wealth and exclusivity of control are subject to antitrust regulation, when it comes to the marketplace of opinions and ideas, similar distortions, based on similarly concentrated forces, are discounted on the discreditable assumption that, left unchecked, this market is capable of self-correction.

The upshot is that a person who takes out a newspaper ad falsely claiming that a bottle of Tylenol has been tampered with may be prosecuted in criminal court and sued for civil damages. But if the same person knowingly makes false claims in campaign advertisements about the impact of a state school bond referendum, say,[29] those falsehoods may garner First Amendment protection. In the campaign case, a court may be expected to say that the best response to false speech is speech that's true. But in the Tylenol case an appropriate legal response might well be an indictment.

The difference in approach is not because economic harm to a company is considered more important than harm to fair and truthful elections. The operative idea in the campaign case is of another sort. The First Amendment claim being made is that barring demonstrably false political speech may chill the truthful kind, so protecting deliberate lies in the political arena is the price we must pay to provide the "breathing space" political discourse needs in a robust democracy.[30] But, in order to flourish, political speech also requires adequate chilling of harms that threaten it.[31] Anti-speech acts constitute such a threat. Their regulation is necessary in order to preserve a space in which robust and diversified expressive speech and deliberation may proceed.

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[26] *See, e.g.*, Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771-72 (1976) ("The First Amendment, as we construe it today does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely.").

[27] *See, e.g., 2*81 Care Comm. v. Arneson, 766 F.3d 774, 787 (8th Cir. 2014).

[28] *See, e.g.*, 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section.").

[29] This was the issue before the court in *281 Care Comm.*, 766 F.3d at 777–78.

[30] *See* NAACP v. Button, 371 U.S. 415, 433 (1963) (Brennan, J.) ("Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.").

[31] *See* SUNSTEIN, *supra* note 12, at 65 ("To know how to think about a chilling effect, we would need to know its size and then the harm produced by chilling truth, along with the benefit produced by chilling falsehood."). For example, "[t]he benefit of learning what others think might be outweighed by the cost of allowing falsehoods to spread." *Id.* at 68.

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Whether they are committed to disrupt voter registration or otherwise block lawful access to the ballot, or to delegitimate a legal ballot count, or to deliberately confuse voters through paid political advertisements or campaign literature, tactical anti-speech acts impede the exercise of fundamental rights, such as the right to think and speak freely and engage in meaningful individual and collective deliberation in conjunction with the right to vote. First Amendment doctrine should support (not prohibit) their regulation.[32]

Yet, the prohibition of such regulations on First Amendment grounds remains the unfortunate consequence of continued judicial reliance upon an outmoded, but highly resilient analytical framework. Under current political, cultural, and technological conditions, the traditional mantra of "more speech"—in the guise of encouraging more competition in the marketplace of ideas—is an ineffectual response to the political and cognitive harms that anti-speech acts present. For one thing, the nation's currently dominant digital communication infra-structure promotes (often by design) strategically amplified and micro-targeted disinformation.[33] Studies confirm that online "falsehood diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information."[34] This state of affairs is consistent with the logic of the marketplace in an attention economy.

[32] *Cf.* Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974) ("[T]here 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 public issues."); Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) ("The right of a man to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."); Garrison v. Louisiana, 379 U.S. 64, 75 (1964); *see also* Karl Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341, 392 (2018) ("So long as the government is not intervening specifically to suppress particular topics or viewpoints, a more deferential standard should apply.").

[33] According to internal company documents, in 2017, Facebook's ranking algorithm treated emoji reactions as five times more valuable than "likes". The underlying idea was that an increased number of reaction emojis would correlate with increased user engagement (and holding users' attention is the key to Facebook's business). In 2019, Facebook's data scientists confirmed that "posts that sparked angry reaction emoji were disproportionately likely to include misinformation, toxicity, and low-quality news." In short, Facebook systematically amplified the worst content on its platform by making it more prominent in users' feeds and spreading it to a much wider audience. As whistleblower Frances Haugen put it, "Anger and hate is [sic] the easiest way to grow on Facebook." *See* Jeremy B. Merrill and Will Oremus, *Five Points for Anger, One for a 'Like': How Facebook's Formula Fostered Rage and Misinformation*, WASH. POST (Oct. 26, 2021), https://www.washingtonpost.com/technology/2021/10/26/facebook-angry-emoji-algorithm/ [https://perma.cc/KL3G-QGR3] (noting that "time and again, Facebook made adjustments to weightings [in their algorithms] after they had caused harm."); *see also* Langvardt, *supra* note 32, at 350 ("Platforms do not, for the most part, effect cultural change through ordinary persuasion. Instead, they effect cultural change through matchmaking and behavioral-modification techniques. A simple change to a sorting algorithm can produce cultural change—for instance, in the overall level of ideological segregation among platform users—essentially overnight.").

[34] *See* Soroush Vosoughi, Deb Roy, & Sinan Aral, *The Spread of True and False News Online*, SCIENCE (Mar. 9, 2018) https://science.sciencemag.org/content/359/6380/1146 [https://perma.cc/QFM3-NTJE].

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The quest for profit in a privatized digital public square demands maximized attention share; attention share, in turn, thrives on enhanced emotion, shock value (favoring extreme viewpoints), and cohesive group identity (filtering out dissonant views). Machine learning-based algorithms designed to maximize attention share online are ill-suited to advance informed deliberation amidst a swirl of diverse ideas and opinions openly competing for acceptance. On social media today, that Holmesian ideal is dead. To stake the continued vitality of free speech on a chimerical "free market of ideas" capable of competition-optimizing self-regulation is disingenuous.

Nevertheless, anachronistic cries for "more speech" as the only permissible ("least restrictive") means to repel the knowing dissemination of demonstrable falsehoods continue to reverberate in contemporary caselaw. Consider, for example, *281 Care Committee*. In a closely divided Eighth Circuit decision, the majority reversed a lower court ruling upholding a Minnesota statute that prohibited the knowing or reckless dissemination of false statements in paid political advertising or campaign material involving ballot initiatives. According to the majority, the law suffered from the constitutional defect of over-inclusiveness: it failed to adopt the least restrictive means available to redress the problem.[35] In the court's words: "There is no reason to presume that counterspeech would not suffice to achieve the interests advanced and is a less restrictive means, certainly, to achieve the same end goal."[36] Justice Holmes's familiar First Amendment mantra immediately follows: "The remedy for speech that is false is speech that is true."[37] Then, for emphasis, the court adds: "[C]ounterspeech, alone, establishes a viable less restrictive means of addressing the preservation of fair and honest elections."[38]

On this view, any statutory effort to counter ill-gotten political or commercial gain from the strategic use of demonstrably false information will not pass constitutional muster if it proposes a remedy other than encouraging "more speech."[39] The idea of a self-regulating market of opinions and

[35] 281 Care Comm. v. Arneson, 766 F.3d 774, 793 (8th Cir. 2014); *see also* United States v. Alvarez, 567 U.S. 709, 726, 729 (2012) (Breyer, J., concurring). For further discussion of Alvarez, *see infra* note 132.

[36] 281 Care Comm., 766 F.3d at 793 (8th Cir. 2014); *see also* Commonwealth v. Lucas, 34 N.E.3d 1242, 1245 (Mass. 2015) ("[I]n the election context, as elsewhere, it is apparent 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 [the people's wishes safely can be carried out.") (quoting Lyons v. Globe Newspaper Co., 612 N.E.2d 1158, 1164 (Mass. 1993)).

[37] *Id.*

[38] *Id.* at 794.

[39] *See, e.g.*, Meyer v. Grant, 486 U.S. 414, 419–20 (1988) (noting that "every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us."); Pestrak v. Ohio Elections Comm'n, 926 F.2d 573 (6th Cir. 1991); McKimm v. Ohio Elections Commission, 729 N.E.2d 364, 375 (Ohio 2000); *see also* Susan B. Anthony List v. Driehaus, 573 U.S. 149 (2014); State ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm., 957 P.2d 691, 696 (Wash. 1998) (stating in the course of overturning Washington statute banning false statements of material fact made with actual

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ideas, notwithstanding compelling evidence against it, remains rutted in the court's imagination.

Afoot here is a free speech orthodoxy that sets before us a stark choice: either we endorse "an unconditional right to say what one pleases"[40] (anti-speech tactics included) or we submit to "Oceania's Ministry of Truth"[41] (referencing George Orwell's fictional state propaganda apparatus). Lost from view in this hyperbolic framing of the issue is the way in which granting anti-speech acts first amendment protection brings the Ministry of Truth closer to reality.[42]

The paradoxical use of free speech doctrine to impede meaningful free speech practice compels reassessment of that doctrine. This need is especially acute in a political environment increasingly choked with anti-speech acts—enhanced by machine learning-based optimization of messaging and microtargeting and the widespread dissemination online of unchecked disinformation—potent enough to poison whatever political breathing space remains.[43] A First Amendment doctrine that overstates the chilling effect of

malice in campaign advertisements that "instead of relying on the State to silence false political speech, the First Amendment requires our dependence on even more speech to bring forth truth"); Rickert v. State, Pub. Disclosure Comm'n, 168 P.3d 826, 850 (Wash. 2007) (asserting the applicable statute "naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech"). The Washington State Legislature subsequently revised the statute, finding that "a violation of state law occurs if a person sponsors false statements about candidates in political advertising and electioneering communications when the statements are made with actual malice and are defamatory." WASH REV. CODE. TIT. 42, § 42.17A.335, n.2. The legislature also found that "in such circumstances damages are presumed and do not need to be established when such statements are made with actual malice in political advertising and electioneering communications and constitute libel or defamation per se." *Id.* at n.3.

[40] Rosenblatt v Baer, 383 U.S. 75, 95 (1966) (Black J., concurring and dissenting).

[41] United States v. Alvarez, 567 U.S. 709, 723 (2012).

[42] *See* Miguel Schor, *Trumpism and the Continuing Challenges to Three Political- Constitutionalist Orthodoxies* SOC. SCI. RSCH. NETWORK (Nov. 16, 2020) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3730945 [https://perma.cc/ZW94-8FL3]. ("The [Alvarez] Court stood Orwell on his head by broadly protecting lies. During the Trump presidency, the United States enjoyed an official ministry of truth in the form of the President's bully pulpit which Trump used to normalize lying. Kellyanne Conway, Donald Trump's political advisor, has a surer grasp on how political speech operates than does the Supreme Court. When she injected the phrase 'alternative facts' into the political lexicon in 2016, sales of George Orwell's *Nineteen Eighty-Four* took off.")

[43] The practical difficulty of contesting deliberately distorted online videos (or "deep fakes"), for example, reinforces the view that counterspeech cannot serve as an adequate counter-measure to certain kinds of harmful falsehoods. *See* SUNSTEIN, *supra* note 12, at 119 (noting that deepfakes and doctored videos are singularly "self-authenticating" and cannot be easily dismissed due to the mind's susceptibility to pre-critical ["System I" or "fast and automatic"] belief); *see also* Dan M. Kahan, David A. Hoffman & Donald Braman, *Whose Eyes are you Going to Believe?* Scott v. Harris *and the Perils of Cognitive Illiberalism*, 122 HARV. L. REV. 837 (2009) (criticizing the Supreme Court for concluding, after watching a police video of a car chase, that no reasonable juror could find lethal force was *not* required under the circumstances). The mental phenomenon of "naïve realism" (also described as "identity-protective cognition") tells us that "people are likely to construe the facts depicted in the tape in a way that reinforces the beliefs that predominate among their peers." *Id.* at 853. *Cf.* Scott v. Harris, 550 U.S. 372, 380–81 (2007) ("Respondent's version of events is so utterly discredited by the record that no reasonable jury could have believed him.").

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government regulation at the expense of safeguarding the conditions essential to a robust marketplace of opinions and ideas disserves core free speech values.

If freedom of speech and the pluralist spirit of informed deliberation amidst tolerance of difference are to be preserved, corporate control of the dominant platforms for public discourse must be redressed. Public square values and practices will have to be secured anew in light of the digital communication infrastructure in which we now live. That infrastructure is part of a growing threat to liberal democracy at home and abroad.

According to a recent study, only 4.5% of the world's population lives in a fully functioning democracy.[44] Over recent years, conditions adverse to democracy appear to be worsening.[45] The confluence of factors at work are cultural, economic, political, and technological in nature:

-huge wealth disparities inspire cynicism about 'rigged' institutions and lost opportunities;

-social media have helped to transform the marketplace of ideas into self-reinforcing echo chambers of the like-minded, displacing the professional ethos of journalism with an overarching drive to maximize attention share which renders all information equivalent and incentivizes the monetization of false information;

-loss of coherent political identity increases anxiety which encourages conspiracy theories pointing to 'enemy' 'Others' responsible for lost opportunities, values, and hope for the future;

-loss of shared facts coincides with the rise of parallel but separate universes ("filter bubbles") fragmenting social/political reality and rendering inoperable a crucial component of democratic life, namely: the capacity to consider alternative viewpoints.

Pronouncements concerning the arrival of a post-truth society have gained significant traction particularly in light of former President Trump's

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[44] Thomas Seifert, *Demokratie weltweit unter Druck*, WIENER ZEITUNG (February 27, 2018), https://www.wienerzeitung.at/nachrichten/welt-europa/weltpolitik/949766_Demokratie-weltweit-unter-Druck.html [https://perma.cc/WAS9-EV3N]; *see Democracy—Demokratieverdrossenheit* SECOND.WIKI (Aug. 17, 2021), https://second.wiki/wiki/demokratieverdrossenheit [https://perma.cc/8KL9-GXS5].

[45] According to a recent Pew Research poll, 46% of US respondents find both democratic *and* nondemocratic alternatives to be acceptable. Richard Wike, Katie Simmons, Bruce Stokes & Janell Fetterolf, *Globally, Broad Support for Representative and Direct Democracy*, PEW RSCH. CTR. (Oct. 16, 2017), https://www.pewresearch.org/global/2017/10/16/globally-broad-support-for-representative-and-direct-democracy/ [https://perma.cc/M8UJ-V5FR]; *see* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM 21 (2019) ("[S]urveillance capitalism is best described as a coup from above, not an overthrow of the state but rather an overthrow of the people's sovereignty and a prominent force in the perilous drift toward democratic deconsolidation that now threatens Western liberal democracies.").

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and his allies' strident renunciations of the press as "enemies of the people" in conjunction with flagrant repudiations of scientific expertise and of the authority of experts more generally.[46] Adding to the increasing destabilization of a shared, fact-based reality is the growing normalization of QAnon, a cult-like web phenomenon that features intensely paranoid, conspiracy-driven discourse.[47] Former President Obama vividly captured the predicament we now face: "If we do not have the capacity to distinguish what's true from what's false, then by definition the marketplace of ideas doesn't work. And by definition our democracy doesn't work. We are entering into an epistemological crisis."[48]

This crisis has been deepened by a flood of disinformation, digitally amplified and strategically targeted (by bots [automated algorithms] and sock puppets [hidden identities behind fake sites and identities online, both foreign and domestic[49]]) within a digital architecture designed to maximize

[46] *See, e.g.*, David Remnick, *Trump and the Enemies of the People*, NEW YORKER (Aug. 15, 2018) https://www.newyorker.com/news/daily-comment/trump-and-the-enemies-of-the-people [https://perma.cc/C9AB-4P52]; *see also* Lee McIntyre, *The Post-Truth Society*, BOOKFORUM (Mar. 14, 2017) https://www.bookforum.com/article/17524 [https://perma.cc/U4XA-LH3Y]; POST-TRUTH, PHILOSOPHY AND LAW (Angela Condello & Tiziana Andina eds. 2019). The 'big lie' regarding the "stolen" Presidential election of 2020 is, of course, yet another reflection of post-truth politics. *See, e.g.*, Jennifer Rubin, *Opinion: We Must End the Post-Truth society*, WASH. POST (Jan. 12, 2021), https://www.washingtonpost.com/opinions/2021/01/12/we-must-end-post-truth-society/ [https://perma.cc/54YR-35ST].

[47] Matthew Hannah, *QAnon and the Information Dark Age*, FIRST MONDAY 26(2) (Jan 15, 2021) ("The information dark age is predominately characterized by the viral spread of unsubstantiated, unverified information (which seems plausible enough on the surface) through unauthorized channels combined with a general reaction against corporate media and academic expertise."); *see* Reed Berkowitz, *A Game Designer's Analysis of QAnon*, MEDIUM (Sep. 30, 2020) ("Q is fictional and acts exactly like a fictional character acts. This is because the purpose of Q is not to divulge actual information, but to create fiction . . . QAnon is an attempt to create a new reality that can be acted on, lived in 'as-if', and manipulated, but it does not match actual reality . . . . [Its message is] to doubt reality. To create the fog of war without the war."); *see also* Julia Carrie Wong, *QAnon explained: the antisemetic conspiracy theory gaining traction around the world*, GUARDIAN (Aug. 25, 2020) https://www.theguardian.com/us-news/2020/aug/25/qanon-conspiracy-theory-explained-trump-what-is [https://perma.cc/KG2M-47MC] (on recurrence of familiar anti-Semitic tropes tracing back to the 'Protocols of the Elders of Zion'). As ongoing evidence of QAnon's increasing 'normalization,' consider the 2020 electoral successes of Congresswomen Marjorie Taylor Greene (R-GA) and Lauren Boebert (R-CO) both of whom have repeated QAnon conspiracy theories. Jack Brewster, *Congress Will Get Its Second QAnon Supporter, As Boebert Wins Colorado House Seat*, FORBES (Nov. 4, 2020), https://www.forbes.com/sites/jackbrewster/2020/11/04/congress-will-get-its-second-qanon-supporter-as-boebert-wins-colorado-house-seat/?sh=628e4c4f568f [https://perma.cc/C7FF-9HTZ].

[48] Jeffrey Goldberg, *Why Obama Fears for Our Democracy*, ATLANTIC (Nov. 16, 2020), https://www.theatlantic.com/ideas/archive/2020/11/why-obama-fears-for-our-democracy/617087/ [https://perma.cc/ZUW9-DRQY]; *see* HANNAH ARENDT, THE PORTABLE HANNAH ARENDT 568 (Peter R. Baehr ed., 2003) ("The result of a consistent and total substitution of lies for factual truth is not that the lies will now be accepted as truth, and the truth defamed as lies, but that the sense by which we take our bearings in the real world – and the category of truth vs. falsehood is among the mental means to this end—is being destroyed.").

[49] *See, e.g.*, *Russian interference in the 2016 United States elections*, WIKIPEDIA, (Aug. 15, 2021) https://en.m.wikipedia.org/wiki/Russian_interference_in_the_2016_United_States_elections [https://perma.cc/2EVC-Q73B] ("The Internet Research Agency (IRA), based

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attention—the coin of the social media realm.[50] As Shoshana Zuboff writes, the business model of Facebook, Google, and Twitter, among other social media platforms, reaps significant rewards from the monetization of all the digital data that flows on their service, including disinformation.[51] Indeed, false claims are more valuable to these platforms because the most dramatic, emotionally intense, and politically extreme assertions online are the most likely to garner the most attention.[52] This means that, within the current attention economy, falsity has greater market value than truth. Little wonder Facebook resisted pressures to more actively weed out verifiably false political content.[53] From a business perspective, all information, whether true or false, whether conducive to rational, deliberative discourse or to irrational anxiety, rage, and confusion, is equivalent: whatever holds attention makes money.

In defense of his laissez-faire approach to political content, Facebook CEO Mark Zuckerberg has relied upon familiar first amendment claims, particularly the idea that, in a democracy, "more speech" is the best remedy against false speech.[54] This defense channels Justice Brandeis's oft-cited con-

in Saint Petersburg, Russia and described as a troll farm, created thousands of social media accounts that purported to be Americans supporting radical political groups and planned or promoted events in support of [Donald] Trump and against [Hillary] Clinton [in the 2016 US presidential elections]. They reached millions of social media users between 2013 and 2017. Fabricated articles and disinformation were spread from Russian government-controlled media and promoted on social media.").

[50] *See* POZEN, *supra* note 18, at 29 ("The [Chinese] government fabricates and posts about 448 million social media comments a year."); *id.* at 30 (noting that in the days leading up to the 2016 US Presidential election, "'[J]unk news was shared just as widely as professional news. . . .'").

[51] ZUBOFF, *supra* note 45, at 509.

[52] According to Zuboff, within the domain of neo-liberal, surveillance capitalism, social media firms are committed to digital designs and techniques that manipulate information and micro-target its delivery to audiences that predictive algorithms, based on a mind-boggling supply of intimate data provided by users of the platform themselves, have identified as the most susceptible to influence. Influence here means both discursive and behavioral in the marketplace of ideas as well as goods and services. As Zuboff documents, the architecture of social media is deliberately designed to bypass reflective decision making in the hope, ultimately, of rendering human autonomy and freedom of choice obsolete. *See* ZUBOFF, *supra* note 45. See also BENNETT, THE DISINFORMATION AGE, 74 (2020) ("Falsehoods were 70 percent more likely to be retweeted. . ."); Rui Fan, Jichang Zhao, Yan Chen, & Ke Xu, *Anger Is More Influential than Joy: Sentiment Correlation in Weibo*, PLOS ONE (Oct. 15, 2014) https://journals.plos.org/plosone/article?id=10.1371/journal.pone.0110184 [https://perma.cc/87N6-LGQW].

[53] *See* Mike Isaac & Cecilia Kang, *Facebook Says It Won't Back Down From Allowing Lies in Political Ads*, N.Y. TIMES (Jan. 9, 2020) https://www.nytimes.com/2020/01/09/technology/facebook-political-ads-lies.html [https://perma.cc/VAA4-K85B] ("Mr. Zuckerberg said he believed in the power of unfettered speech, including in paid advertising, and did not want to be in the position to police what politicians could and could not say to constituents. Facebook's users, he said, should be allowed to make those decisions for themselves: 'People having the power to express themselves at scale is a new kind of force in the world—a Fifth Estate alongside the other power structures of society.'").

[54] *See, e.g.,* Tony Romm, *Zuckerberg: Standing For Voice and Free Expression*, WASH. POST (Nov. 17, 2019) ("I believe we should err on the side of greater expression.") https://www.washingtonpost.com/technology/2019/10/17/zuckerberg-standing-voice-free-expression/ [https://perma.cc/5Y7L-STEV]. Contrast Twitter's January 2021 policy restatement:

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curring opinion in *Whitney*: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the process of education, the remedy to be applied is *more speech*, not enforced silence."[55] The defense of "more speech" is often joined with another free speech staple, namely: Justice Oliver Wendell Holmes's famous concurrence in Abrams: "The best test of truth is the power of the thought to get itself accepted in the *competition of the market*."[56]

There are two problems with these joint claims. For one, there isn't time to counter deliberate falsehoods when digital newsfeeds, tweets, and all manner of online memes almost instantly go viral on a massive scale. For another, it isn't debate in the marketplace of ideas that drives "acceptance" online. Getting accepted in the digital marketplace is increasingly a matter of algorithmic amplification, micro-targeting, and sophisticated techniques of behavioral modification in the service of generating maximum attention share.[57]

Suffice it to say, earlier notions of a public marketplace of ideas, which continue to underpin the Supreme Court's free speech jurisprudence, do not accurately reflect the design and dominant practices of contemporary communication online – whether it is political discourse, or the dissemination of news. Kelly Born cogently captures a key aspect of the shift that has taken place:

> As the public square has moved online, societies have begun to fragment along racial, religious, partisan, and economic lines. Social media platforms, rather than credentialed journalists, now hold significant power not only to communicate with the public but also to highlight key issues and to unite likeminded strangers, enmeshing these new groups in their own distinct (sometimes inaccurate) information systems.[58]

"You may not use Twitter's services for the purpose of manipulating or interfering in elections or other civic processes. This includes posting or sharing content that may suppress participation or mislead people about when, where, or how to participate in a civic process. In addition, we may label and reduce the visibility of Tweets containing false or misleading information about civic processes in order to provide additional context." *Civic Integrity Policy*, TWITTER (Oct. 2021) https://help.twitter.com/en/rules-and-policies/election-integrity-policy [https://perma.cc/2TWV-AFFM].

[55] *See* Whitney v. California, 274 U.S. 357, 376–77 (Brandeis, J., concurring).

[56] Lombardi, *supra* note 16 (emphasis added).

[57] *See, e.g.*, Karl Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 150 (2019) ("Facebook users who 'like,' share, and comment on what they see are given an apparent opportunity to express themselves in public discussions, though the recommendation algorithm determines who will see it and when."); *See* ARAL, *supra* note 7, at 97 ("Social media is designed for our brains. It interfaces with the parts of the human brain that regulate our sense of belonging and social approval. It rewards our dopamine system and encourages us to seek more rewards by connecting, engaging, and sharing online.").

[58] *See* Kelly Born, *Can Digital Disinformation be Disarmed?*, PROJECT SYNDICATE (Jan. 29, 2021), https://www.project-syndicate.org/onpoint/how-to-stop-disinformation-on-social-media-platforms-by-kelly-born-2021-01 [https://perma.cc/V2ZL-5Y3K] ("By 2018, leading platforms such as Twitter and Facebook had surpassed print newspapers in the US as a more frequent news source. In 2020, social media surpassed TV [cable, network, and local] as the

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When "fake news" or "fake commentaries" or "propaganda robots" or "troll armies" can easily and cheaply "flood the zone" in order to drown out disfavored speech "more speech" cannot be regarded as a meaningful remedy to purposeful falsehood.[59] Indeed, as "more speech" increasingly becomes weaponized in an effort "to confuse, blackmail, demoralize, subvert, and paralyze,"[60] rather than serve as an ally in the battle against falsehood, it has become part of the problem.[61] As Tim Wu succinctly puts it: "The [First] Amendment has become increasingly irrelevant in its area of historic concern: the coercive control of coercive speech."[62] Today's mix of neo-liberal (*laissez-faire*) -nomics, surveillance capitalism, and strategic disinformation at scale has created toxic conditions for liberal democracy.

In the current attention-based economy, contrary to Holmes's assumption, truth is neither the operative measure of success nor for that matter a core value. When the key metric is engagement, market value accrues from maximizing the time a platform user spends engaged with whatever happens to draw and hold attention.[63] In such a market, falsehood and the distortions of amplified affect have the upper hand. An exclusive dedication to truth online carries a distinct competitive disadvantage.[64]

primary source of political news in the US. Among US adults under the age of 30, 48% already get most of their political news from social media. As younger age cohorts reach maturity, these numbers will grow accordingly."). According to Langvardt, 62% of Americans get their news from social media. Langvardt, *supra* note 32, at 378.

[59] *See* POZEN, *supra* note 18, at 272.

[60] POMERANTSEV, *supra* note 8, at 273; s*ee also id*. at 171 (describing the current post-Cold War *Zeitgeist* as "a world where spectacle had pushed out sense, leaving only gut feelings to guide one through the fog of disinformation," a state of "radical relativism that implies truth is unknowable").

[61] *See* ZUBOFF, *supra* note 45, at 322 ("Concepts of freedom, privacy, and self-determination inherently conflict with programs designed to control not just physical freedom, but the source of free thought as well. . ."); *see also id*. at 497 ("Total information tends toward certainty and the promise of guaranteed outcomes."); *id.* at 464 ("Life in the hive favors those who most naturally orient toward external cues rather than toward one's own thoughts, feelings, values, and sense of personal identity."); *id.* at 324 ("The First Amendment 'must equally protect the individual's right to generate ideas' and the right to privacy should protect citizens from intrusions into their thoughts, behavior, personality, and identity lest these concepts 'become meaningless.'"). On free speech fundamentalism, *see* Frank Pasquale, *The Automated Public Sphere*, COMM. L. & POL'Y EJOURNAL (November 8, 2017); MARY ANN FRANKS, THE CULT OF THE CONSTITUTION, ch. 3 (2019).

[62] POZEN, *supra* note 18, at 16 (quoting Tim Wu, *Is the First Amendment Obsolete?*, KNIGHT FIRST AMEND. INST. (Sept. 1, 2017), https://knightcolumbia.org/content/tim-wu-first-amendment-obsolete [https://perma.cc/YT2J-UN2J]).

[63] *See* Langvardt, *supra* note 32 ("Essentially everything a user does on Facebook has cash value to the company: clicking 'liking,' sharing, messaging, commenting, even *beginning* to type out a message before retracting it. All of this 'engagement' helps Facebook to build a deeper dossier on the user.").

[64] *See* ARAL, *supra* note 7, at 47 (studies show that because algorithms used by Google, Twitter, Facebook, Youtube, and other social media platforms deliberately amplify stories that trigger outrage and fear, lies spread faster than the truth); *See* Berisha v. Lawson, 141 S. Ct. 2424, 2428 (2021) (Gorsuch, J., dissenting) (Observing with respect to traditional defamation rules: "If ensuring an informed democratic debate is the goal, how well do we serve that interest with rules that no longer merely tolerate but encourage falsehoods in quantities no one could have envisioned almost 60 years ago?").

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In this digital bizarro world, acceptance becomes a better test for falsehood and distortion than for truth,[65] while market outcomes are less indicative of free competition than calculated prediction. Surveillance capitalism facilitates profit-generating commercial behavior by maximizing the acquisition of detailed personal data about every user on the platform in order to accurately predict his or her immediate wants or preferences. This is the art of the nudge on digital steroids.[66]

Three decades ago, Cass Sunstein observed that "New Deal ideas have played remarkably little role in the constitutional law of free speech."[67] This remains true today.[68] At the beginning of the last century, laissez-faire policies stymied New Deal market regulation. In the age of *Lochner*, the Supreme Court relied upon putatively neutral market conditions to justify (as unconstitutionally interventionist) state regulations that called for maximum work hours or minimum wages, or that protected employee health and proscribed child labor. In a similar manner, laissez-faire free speech doctrine threatens to render the state helpless in the face of an increasingly dysfunctional and singularly exploitative private market.[69] Today, rather than contract-based fundamentalism it is free speech orthodoxy that 'naturalizes' the status quo. What we are now seeing are *skeuomorphs*[70] of democracies. Social media technologies are creating—by intent and design[71]—attributes that look and feel democratic but are authoritarian to the core.[72]

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[65] *See, e.g.*, ROSENFELD, *supra* note 24, at 151 (According to a major study in SCIENCE, "on Twitter, falsehood and rumor dominate truth by every metric, reaching more people, penetrating deeper into social networks, and doing so more quickly than do accurate stories.").

[66] *See generally* RICHARD H. THALER & CASS R. SUNSTEIN, NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS (2007).

[67] CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 34 (1993).

[68] *But see* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1221 (2021) (Thomas, J., concurring) ("Today's digital platforms provide avenues for historically unprecedented amounts of speech, including speech by government actors. Also unprecedented, however, is the concentrated control of so much speech in the hands of a few private parties. We will soon have no choice but to address how our legal doctrines apply to highly concentrated, privately owned information infrastructure such as digital platforms.").

[69] ZUBOFF, *supra* note 45, at 519 ("We can now see that surveillance capitalism takes an even more expansive turn toward domination than its neoliberal source code would predict. . . [I]ts antidemocratic collectivist ambitions reveal it as an insatiable child devouring its aging fathers.")

[70] A skeuomorph is a design feature copied from a similar feature in another object, even when not functionally necessary. *See Skeuomorph*, WIKIPEDIA (Aug. 1, 2021) https://en.wikipedia.org/wiki/Skeuomorph [https://perma.cc/2VUX-6F85].

[71] As the saying goes, disinformation isn't a bug, it's a feature. *See* Nicholas Carr, *'It's Not a Bug, It's a Feature.' Trite—or Just Right?*, WIRED (Aug. 19, 2018) https://www.wired.com/story/its-not-a-bug-its-a-feature/ [https://perma.cc/4DUZ-BVTF]. Former Facebook vice-president Chamath Palihapitiya doesn't mince words: "The short-term dopamine-driven feedback loops that we have created are destroying how society works: no civil discourse, no cooperation, misinformation, mistruth. . . It is eroding the core foundations of how people behave by and between each other." Julia Carrie Wong, *Former Facebook Executive: Social Media is Ripping Society Apart,* GUARDIAN (Dec. 12, 2017) https://www.theguardian.com/technology/2017/dec/11/facebook-former-executive-ripping-society-apart [https://perma.cc/R5HN-67RC].

[72] *See, e.g.*, Langvardt, *supra* note 57, at 133 ("The addiction-driven nature of social media probably harms the quality of public discourse and deliberation."); *id.* at 150 ("By serving users'

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Is this an economic problem? A cultural problem? A political problem? A legal problem? No doubt, it is all of these things, though the cultural dimension of the challenge looms especially large. If enough people come to embrace anti-democratic ideas and practices, law will not save us.[73] In an illiberal society, where the threat to freedom of thought and expression is met with indifference, the burdensome challenge to reframe anachronistic legal doctrines may become moot. Taking this grave threat to democracy as our point of departure, a central question arises: What safeguards are essential to preserve the minimum conditions necessary for a robust market of opinions and ideas in the digital age?

II. Preserving the Minimum Conditions Necessary for a Robust Marketplace of Opinions and Ideas Compels the Regulation of Tactical Anti-speech Acts

As an ever-growing literature attests, the profound challenge to democracy presented by disinformation in the digital age may be approached from a variety of angles:[74]

1. Legislative/regulatory responses: Current proposals for regulatory reform target 'upstream', 'midstream', and 'downstream' sectors in the information ecosystem. Upstream regulation focuses on improving the quality of information being disseminated. Midstream regulatory approaches focus on regulating the behavior of the dominant social media platforms (e.g., through content moderation, network curation, and enhanced transparency/ privacy rules[75]) and contemplate a range of anti-trust actions. Downstream

'revealed preferences' rather than their *stated* preferences, user engagement algorithms largely crowd out the individual's role in cultivating a set of interests and values."); *id.* at 158 ("Sometimes simple aesthetics can drive compulsive use.").

[73] Without citizens of courage and conviction, democracy yields to timidity and acquiescence to force. As Judge Learned Hand famously said: "Liberty lies in the hearts of men and women; when it dies there, no constitution, no law, no court can save it." Learned Hand, *The 'Spirit of Liberty' Speech*, Found. for Indiv. Rts. in Educ. (Aug. 15, 2021) https://www.thefire.org/first-amendment-library/special-collections/the-spirit-of-liberty-speech-by-judge-learned-hand-1944/ [https://perma.cc/J49N-DG6E]; *see also* Harold Laski, *The Prospects of Democratic Government,* 33 Wm. & Mary Bull. No. 4, at 4 (1939) ("Democracy is not merely a form of government; it is also a way of life; Richard K. Sherwin, *Character Is a Sacred Bond,* Angelaki: J. Theoretical Humans. 24, 73 (2019) ("[C]haracter may be thought of as a constitutive agent or offshoot of the collective performance through which sovereignty attains [or loses] legitimacy. . . Character is the dark energy of law – the force that binds, or rends, the *nomos*, the given world of meaning, in which we live.").

[74] Commentators such as W. Lance Bennett and Steven Livingston maintain that unless trust can be regained in "the legitimacy of authoritative institutions" no remedy is likely to be fruitful. Bennett, *supra* note 52, at 4.

[75] *See, e.g.*, J. Scott Babwah Brennen and Matt Perault, *Breaking Black Boxes: Roadblock to Analyzing Platform Political Ad Bans,* Duke Ctr. on Sci. & Tech. Pol'y, 3–6 (Mar. 2, 2021), https://scienceandsociety.duke.edu/breaking-blackout-black-boxes/ [https://perma.cc/SGM5-VCJQ] ("The Honest Ads Act, which remains unpassed after first being introduced in the Senate in 2018, requires platforms to establish archives of digital political ads they run. It specifies that the archives include copies of ads along with a series of basic metadata, including: a description of the audience targeted by the advertisement, the number of views generated

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regulations focus on improving audience engagement (e.g., through media literacy training and independent fact checking).

While, taken together, these regulatory measures are likely to provide some improvement within the current information ecosystem, they are highly unlikely to solve the larger problems that we face regarding anti-speech acts online. For one thing, when the core business model is the problem—monetizing disinformation incentivizes its unchecked dissemination—incremental solutions are likely to fall short. Literacy training remains difficult to scale up.[76] Online moderation standards are hard to alter, and difficult to enforce. And susceptibility to disinformation (based on strategic bias confirmation and deliberate micro-targeting of information in the service of maintaining insular tribal identities) remains largely unimpeded. Against this backdrop, breaking up Google, Facebook, and Amazon, will most likely simply distribute their undesirable behaviors among an increased number of players.[77]

2. Legal responses: Proposals on this front include re-assessing safe harbor protections for social media firms under Section 230(c) of the Communications Decency Act of 1996, as well as re-examining core free speech principles and doctrines.[78] As Justice Thomas recently noted, the two most likely justifications for regulating digital platforms consist in treating them either as "common carriers" or "public accommodations."[79] The need to more effectively monitor and remove, or label as false, harmful disinformation online is widely acknowledged.[80] Legislative actions along these and other lines are currently pending. The application of anti-speech act regulations to concentrated social media firms like Facebook, Google, and Twitter, in combination with revisions of current safe harbor provisions, hold out a promising path for reform. The success of this integrated strategy, however, requires reworking an anachronistic self-regulating market framework for free speech doctrine.

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from the advertisement, and the date and time that the advertisement is first displayed and last displayed.") .

[76] *But see Illinois Legislation,* MEDIA LITERACY NOW (Nov. 13, 2021) https://medialiteracynow.org/your-state-legislation-2/illinois-legislation/ [https://perma.cc/F85N-T58G] (Illinois' recent House Bill 234 established mandatory media literacy curriculum in public schools.)

[77] *See, e.g.,* Roger McNamee, *Big Tech Needs to Be Regulated: Here Are 4 Ways to Curb Disinformation and Protect Our Privacy*, TIME (Jul. 29, 2020) https://time.com/5872868/big-tech-regulated-here-is-4-ways/ [https://perma.cc/UYD9-E44M].

[78] *See* 47 U.S.C. § 230(e)(3) ("No cause of action may be brought and no liability may be imposed under any State or local law that is inconsistent with this section").

[79] *See* Biden v. Knight First Amend. Inst. at Columbia Univ., 141 S. Ct. 1220, 1226–27 (2021) ("'It stands to reason that if Congress may demand that telephone companies operate as common carriers, it can ask the same of' digital platforms" (citing Turner) and "Even if digital platforms are not close enough to common carriers, legislatures might still be able to treat digital platforms like place of public accommodation."); *see also* Martha Minow, *Alternatives to the State Action Doctrine in the Era of Privatization*, 52 HARV. C.R.-C.L. L. REV. 145 (2017).

[80] *See, e.g.,* SUNSTEIN, *supra* note 12, at 8 ("[T]elevision networks, newspapers, magazines, Facebook, Twitter, YouTube, and other social media platforms should be doing more than they are now to control the spread of falsehoods.").

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3. Cultural and normative responses: Commentators approaching the challenge of deliberate disinformation from this perspective often focus on the centrality of individual autonomy, privacy rights, and the need for meaningful public discourse in an open society. Recommendations here include: increased funding for public civics education, improved programs for visual/digital literacy, developing independent fact checking agencies, and strengthening the role of professional journalism in public media more generally.

These three approaches to the problem of disinformation are deeply entangled, requiring close attention on both the micro and macro level. Each approach offers a set of tools that can help to ameliorate the various social and political harms associated with disinformation. In this part, I contend that the substantial harms associated with tactical anti-speech acts are egregious enough to require regulation. These are harms that cannot be avoided through less intrusive (more speech-protective) measures. Orthodox free speech doctrine, however, threatens to stymie regulatory actions in this limited domain. That orthodoxy needs to adapt to a changed information ecosystem.

Informed public discussion and reasoned debate among competing ideas and opinions are among the prime casualties of a polluted and dysfunctional information ecosystem.[81] In this respect, regulating anti-speech acts is crucial to preserving the minimum conditions necessary for meaningful individual and collective deliberation and electoral integrity. Subjecting social media firms to additional responsibilities regarding the quality of information that they strategically deliver is an essential part of the remedial equation.

Responsibility follows function. Firms that assume the role of information provider should also assume the professional/ethical responsibility that comes with providing reliable information. The firm's superior knowledge and control of the information archive and transmission network, in conjunction with foreseeable reliance by the information consumer, are precisely the conditions that account for being treated as a fiduciary or trustee.[82] By parity of reasoning, the power to control or significantly influence the flow of information among information consumers likewise generates a fiduciary

[81] *See* Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in* Whitney v. California, 29 Wm. & Mary L. Rev. 653, 677 (1988) ("If we abandon the faith that reason matters, we are left with a society governed exclusively by force."). As Justice Brandeis contended, "It is the function of speech to free men from the bondage of irrational fears." Whitney v. California, 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

[82] *See* Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. Davis L. Rev. 1183, 1207 (2016) ("The client puts their trust or confidence in the fiduciary, and the fiduciary has a duty not to betray that trust or confidence."). *Cf.* Kline v. 1500 Massachusetts Ave. Apartment Corp., 439 F.2d 477, 483 (D.C. Cir. 1970); Tarasoff v. Regents, 551 P.2d 334, 440 (Cal. 1976) (holding that exclusive control and reliance generate responsibility to victims for foreseeable harm due to lack of reasonable care).

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responsibility.[83] It is not an acceptable defense, upon knowingly delivering false information, for a fiduciary to argue 'I gave her what she wanted.'[84] Civil society has the power (and has used it for centuries in the Anglo-American common law tradition) to establish norms of social and commercial conduct. To that end, laws protect consumers from deception in advertising and fraud.[85]

Bad faith communication at scale ("mass dis-communication") poisons public discourse. The issue, therefore, is not whether "the First Amendment assumes the existence of a populace that is reasonably educated, thoughtful, responsible, and intelligent."[86] Intelligence notwithstanding, the cost of obtaining adequate information may exceed its perceived benefit.[87] The real issue is whether and how a liberal democracy provides for informed political

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[83] *See, e.g.*, James Grimmelmann, *Speech Engines*, 98 MINN. L. REV 868, 874, 904 (2014) ("From the user's perspective, a search engine is not primarily a conduit or an editor. Instead, it is a trusted *advisor*"); *Id.* at 904 ("The common themes of fiduciary relationships are dependence, trust, and vulnerability. The search engine provides a valuable service from a position of superior knowledge and superior skill; the user provides it with valuable and often sensitive information, trusting in it to provide suggestions consistent with her interests. Search engines resemble lawyers and investment advisors, both of whom give advice to their clients and are regarded as fiduciaries when they do."); Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 984 (2018) (noting that "digital media companies are *information fiduciaries* who have duties of care and loyalty toward their end-users."); Tim Wu, *Is the First Amendment Obsolete?*, *in* THE PERILOUS PUBLIC SQUARE, *supra* note 19, at 41 (noting that "a law that makes any social media platform with significant market power a kind of trustee operating in the public interest, and requires that it actively take steps to promote a healthy speech environment . . . could, in effect, be akin to a fairness doctrine for social media.").

[84] Compare, for example, the fiduciary obligations of attorneys to their clients. *See* Lisa G. Lerman, *Lying to Clients*, 138 U. PENN. L. REV. 659, 661–62 (1990) ("Lawyers are not supposed to lie to their clients. Ever. The disciplinary rules prohibit all conduct involving 'dishonesty, fraud, deceit or misrepresentation." (quoting MODEL RULES OF PRO. CONDUCT r. 8.4(c) (AM. BAR ASS'N 1989) [hereinafter MODEL Rule]; MODEL CODE OF PRO. RESP. dr 1-102(A)(4) (AM. BAR ASS'N 1981)). A lawyer must 'keep a client reasonably informed about the status of a matter' [quoting MODEL RULE 1.4(a)]and must 'render candid advice.'" [quoting MODEL RULE 2.1]).

[85] Tort law, responding to evolving social norms, has developed civil protections that go beyond the proscription of impermissible bodily invasions to include such non-physical wrongs as intentional (and, more recently, negligent) infliction of emotional distress. In time, the law might well come to recognize the significant social, political, and psychological harm associated with the intentional infliction of *severe cognitive debilitation* stemming from the knowing and willful dissemination of demonstrably false information for an unwarranted gain or advantage.

[86] Geoffrey Stone, *Reflections on Whether the First Amendment Is Obsolete*, *in* THE PERILOUS PUBLIC SQUARE, *supra* note 19, at 47.

[87] *See, e.g.*, James Fishkin, *Deliberative Democracy: What and Why?* OPEN DEMOCRACY (Sept. 25, 2007), https://www.opendemocracy.net/en/what_and_why/ [https://perma.cc/SQ3Q-JSPM] ("If I have only one vote in millions, why should I pay attention to the details of public policy or the positions of parties in elections? My individual vote will not make much difference - and we all have more pressing things to do. . ."). According to the literature on "rational ignorance," "when the cost of [sufficiently] educating oneself about [a public issue]. . . to make an informed decision . . . outweigh[s] any potential benefit one could reasonably expect to gain from that decision," "it would be irrational to waste time" investing in that benefit. *Rational ignorance*, WIKIPEDIA (Aug. 1, 2021) https://en.wikipedia.org/wiki/Rational_ignorance [https://perma.cc/K589-6C5G].

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discourse and robust public exchange. The liberal state is responsible to the public for ensuring equality and autonomy for all participants in the political process. This includes a regulatory responsibility not only to maintain a robust communication infrastructure for individual and collective deliberation,[88] but also a duty to secure that infrastructure against illiberal forces that seek to undermine it.[89]

Making social media firms, among other actors, responsible for harms associated with the knowing dissemination of provably false information requires legislative action. It can hardly be gainsaid that significant shifts in cultural, economic, and technological realities, compared to when the information economy first emerged in the early 1990s, warrant this change in approach. The importance of protecting fledgling social media firms to ensure economic growth and effective global competition has now given way to the overriding importance of regulating a new generation of corporate titans in order to protect democracy itself from the encroachments of surveillance capitalism in alliance with laissez-faire economics in the dominant attention economy.[90]

Imposing on political and commercial actors (including social media firms)—whether through legislation or common law— a duty to take reasonable measures to avoid foreseeable harm to electoral integrity stemming from the knowing or reckless dissemination of demonstrable falsehoods is a vital first step.[91] But it will not suffice if doctrinal obstacles to protecting expressive liberty from the harms that tactical anti-speech acts pose remain in place.

The work of First Amendment reconstruction requires a return to fundamentals. A good place to begin is with the words of Benjamin Cardozo: "*Freedom of thought, and speech . . . is the matrix, the indispensable condition, of nearly every other form of freedom. With rare aberrations a pervasive recognition of this truth can be traced in our history, political and legal*."[92]

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[88] *See generally* BRUCE A. ACKERMAN & JAMES S. FISHKIN, DELIBERATION DAY (2004); JAMES S. FISHKIN, DEMOCRACY WHEN THE PEOPLE ARE THINKING: REVITALIZING OUR POLITICS THROUGH PUBLIC DELIBERATION (2018).

[89] See Genevieve Lakier, *Imagining an Antisubordinating First Amendment,* 118 COLUM. L. REV. 2117, 2154 (2019) (noting that "the Court [has] recognized the possibility that the autonomy of private actors could be constrained, consistent with the Free Speech Tradition, when that autonomy poses a real threat to the robustness and inclusivity of public debate.").

[90] Needless to say, the initial romance with the world wide web is over. *Cf.* John Perry Barlow, *A Declaration of the Independence of Cyberspace*, ELEC. FRONTIER FOUND. (1996), https://www.eff.org/cyberspace-independence [https://perma.cc/B5UT-JGZ9] ("Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind . . . I declare the global social space we are building to be naturally independent of the tyrannies you seek to impose on us. You have no moral right to rule us nor do you possess any methods of enforcement we have true reason to fear.").

[91] As Jack Balkin succinctly puts it: "[O]nline service providers may not act like con men." Balkin, *supra* note 82, at 1224.

[92] Palko v. Connecticut, 302 US 319, 327 (1937). Cardozo immediately adds: "[T]he domain of liberty, withdrawn by the Fourteenth Amendment from encroachment by the states, has been enlarged by latter-day judgments to include liberty of the mind as well as liberty of

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Linda McClain associates this paramount value with "protected inner space."[93] It is not difficult to see why. Freedom of speech presupposes freedom of thought which in turn presupposes sanctuary—the modicum of privacy necessary for the authenticity of being and thinking for oneself.[94] This kind of authentic freedom is also associated with what sociologist Erving Goffman called the "backstage"—that precious region of private sanctuary where the demands of social life, and the responsive public performance that it elicits, loosen their grip.[95] Absent a meaningful opportunity to cultivate real autonomy, the aspiration of free speech— which is to say, the capacity to think and express one's own thoughts—loses both its aspirational as well as its practical meaning.

The promise of freedom without an appropriate legal and political framework to secure it remains hollow. Fundamental safeguards that preserve individual dignity, autonomy, and expressive liberty must be based on prudent assessment of conditions that generate unacceptable levels of social and political harm. Sometimes, unacceptable harm arises in the form of state action that threatens free speech; sometimes, the prevention of unacceptable harm requires laws that limit access to information or that curtail expressive action. Copyright law, defamation law, child pornography law, privacy law, and laws against deceptive advertising are illustrative of information-limiting laws.[96] Laws regulating speech acts that incite imminent violence are

action." *Id. See* Joseph Raz, The Morality of Freedom 372–73 (1980) (noting that in order to be the author of one's life, one's choices "must be free from coercion and manipulation by others.").

[93] *See* Linda McClain, *Inviolability and Privacy,* 7 Yale J. L. & Hum. 195, 203 (1995).

[94] As Jean-Paul Sartre famously observed in his magnum opus, *Being and Nothingness*, "in order to escape bad faith, along with other forms of self-deception, which is to say, in order to attain authenticity, one must freely choose existence for itself ['*Etre-pour-soi*']." Jean-Paul Sartre, Being and Nothingness: An Essay on Phenomenological Ontology 59, 565 (trans. Hazel E. Barnes, Methuen 1958).

[95] See Zuboff, *supra* note 45, at 471 (discussing Goffman's seminal work The Presentation of Self in Everyday Life (1956)).

[96] *See* Grimmelmann, *supra* note 83, at 907 ("We have copyright law, defamation law, child pornography law, privacy law, and other kinds of information-limiting laws for good reasons. They already reflect a considered social judgment that some listeners-users-should be denied access to speech they would like to receive. So users have an interest in consulting search engines to help find information only where it is information of a sort they have a legitimate interest in receiving."); New York v. Ferber, 458 U.S. 747, 762 (1982) (child pornography is minimally valuable speech); Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 68 (1983) ("Advertisers should not be permitted to immunize false or misleading product information from government regulation simply by including references to public issues."); *see also* 18 U.S.C. § 35, "Imparting or conveying false information" (prohibiting false or misleading reports to authorities about crime); 18 U.S.C. §_1038, "False information and hoaxes" (criminalizing "conduct with intent to convey false or misleading information [about the death, injury, or capture of a member of the armed services] under circumstances where such information may reasonably be believed and where such information indicates that an activity has taken, is taking, or will take place that would constitute a violation."]); Friedman v. Rogers, 440 U.S. 1, X (1979) ("The States and the Federal Government are free to prevent the dissemination of commercial speech that is false, deceptive, or misleading); Hustler Mag. v Falwell, 485 U.S. 46, 57 (1988) (distinguishing between false statements not meant or likely to be believed by readers, or false statements about public figures that cannot reasonably be be-

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illustrative of permissible constraints on expressive action.[97]

Anti-speech acts constitute another limit case, namely: the deliberate use of demonstrably false information for the purpose of garnering political or commercial gain in electoral outcomes. Concern about maintaining the integrity of the electoral process transcends political party affiliation.[98] Liberal democratic societies are entitled to take appropriate steps to protect the integrity of elections, including passing laws against knowing and willful efforts to impair freedom of thought and meaningful deliberation. Intolerance of intolerance[99] expresses the basic idea that democracy is not a suicide pact.[100] Indeed, a prime directive of any working Constitution must be to establish and protect the minimum conditions required for that constitutional regime to survive and flourish.[101] As Martha Minow writes:

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lieved—such as satire and parody, and false statements made for the purpose and with the foreseeable consequence of violating a protected right). *See generally* Garrison v. Louisiana, 379 U.S. 64, 75 (1964) ("[T]he use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected."). *But see* Rickert v Pub. Disclosure Comm'n, 168 P.3d 826, 829 (Wash. 2007) (state law prohibiting political candidate from telling deliberate lies about opponent in a political campaign "naively assumes that the government is capable of correctly and consistently negotiating the thin line between fact and opinion in political speech.").

[97] *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (intentionally inciting imminent violence or lawlessness constitutes unprotected speech).

[98] For example, following electoral uncertainties in Florida in the 2000 Presidential election and in Ohio in the 2004 election, democratic former President Jimmy Carter and republican former Secretary of State James A. Baker III founded The Commission on Federal Election Reform. Its mandate was to examine the electoral process in the United States, bringing together leaders from the major political parties, academia, and non-partisan civic groups to explore how to maximize both ballot access and ballot integrity. The commission's panel presented 87 recommendations, including a call for nonpartisan professional and state oversight over elections, developing a "universal voting registration system" led by states rather than local jurisdictions, increasing voter registration efforts by the states, and creating a uniform photo identification method to match the voter to the voting roll while also establishing more offices to all non-drivers to more easily register and acquire photo IDs. *Commission on Federal Election Reform*, WIKIPEDIA (Feb, 18, 2022), https://en.wikipedia.org/wiki/Commission_on_Federal_Election_Reform [https://perma.cc/6HHV-89FW].

[99] *See* KARL POPPER, THE OPEN SOCIETY AND ITS ENEMIES 581 (1945) ("If we extend unlimited tolerance even to those who are intolerant, if we are not prepared to defend a tolerant society against the onslaught of the intolerant, then the tolerant will be destroyed, and tolerance with them . . . [W]e should claim the right to suppress them if necessary even by force; for it may easily turn out that they are not prepared to meet us on the level of rational argument, but begin by denouncing all argument; they may forbid their followers to listen to rational argument, because it is deceptive, and teach them to answer arguments by the use of their fists or pistols. We should therefore claim, in the name of tolerance, the right not to tolerate the intolerant."). *See* RAPHAEL COHEN-ALMAGOR, *Popper's Paradox of Tolerance and Its Modification*, *in* THE BOUNDARIES OF LIBERTY AND TOLERANCE 81 (1994) (asserting that liberal democracies "may be intolerant toward the intolerant" and ought to defend against threats that derive from "wholly different systems of morality within our community").

[100] *See generally* RICHARD POSNER, NOT A SUICIDE PACT: THE CONSTITUTION IN A TIME OF NATIONAL EMERGENCY (2006).

[101] Public servants, culminating in the office of the President, are fiduciaries in this sense. *See* Andrew Kent, Ethan J. Leib & Jed Handelsman Shugerman, *Faithful Execution and Article II*, 132 HARV. L. REV. 2111, 2192 (2019) ("[T]he President—by original design—is supposed to be like a fiduciary, who must pursue the public interest in good faith republican fashion rather than pursuing his self-interest, and who must diligently and steadily execute Congress's

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> "[B]ecause the Constitution depends on informed and active members to make the democracy it establishes work, the Constitution should compel development of the institutional context for democratic self-governance . . . To work, democracy needs: (1) an arena where participants can engage in self-governance; (2) institutions enabling individuals to learn about social needs and personal desires, to deliberate, to express their views, and to select representatives to do the work of governing; and (3) the kind of information that enables people to act to advance their own and society's interests."[102]

Traditional First Amendment doctrine is now in danger of being weaponized by a handful of powerful corporate actors to the disadvantage of the public at large. Left uncontested, this state of affairs leads to skeuomorphs of democracies: societies that have design attributes that look and feel democratic but are authoritarian to the core.[103] To defend against such a fate, a different paradox may be invoked, namely: intolerance of intolerance. Liberal democracies are entitled to safeguard the minimum conditions necessary to maintain the practical requirements, in conjunction with the normative aspirations, of liberal democracy.

III. Regulating Anti-Speech Acts: A Model Election Integrity Law

States have targeted a variety of tactical anti-speech acts in order to protect electoral integrity.[104] Deliberate interference with voter enfranchisement, for example, may occur in various ways, including lying about how to cast a vote or by creating fake ballots,[105] lying about having a campaign affiliation or affiliating with a campaign in order to subvert it or to garner an unwarranted electoral advantage,[106] and lying in campaign statements or po-

commands."); *see also* Brian Finucane, *Presidential War Powers, the Take Care Clause, and Article 2(4) of the U.N. Charter,* 105 Cornell. L. Rev. (2020) (discussing the President's ability to carry out his constitutional obligations to take care that the laws be faithfully executed, to protect national security, to supervise the executive branch, and to execute his authority as Commander in Chief.").

[102] Martha Minow, *The Changing Ecosystem of News and Challenges for Freedom of the Press*, 64 Loy. L. Rev. 499, 543–44 (2018).

[103] *See, e.g.*, *Hungary—Not an Illiberal Democracy But a Pseudo-Democracy*, Democracy Digest (Aug. 16, 2019) https://www.demdigest.org/hungary-not-an-illiberal-democracy-but-a-pseudo-democracy/ [https://perma.cc/RXX9-TXYN].

[104] *See* Spicer, *supra* note 4, at 36–37.

[105] *See, e.g.*, Conn. Gen. State §9-363 (West, Westlaw through all enactments of the 2021 Reg. Sess. and the 2021 June Spec. Sess. (2021)) (criminalizing the dissemination of false or misleading information regarding ballot information).

[106] *See, e.g.*, Treasurer of the Comm. to Elect Gerald D. Lostracco v. Fox, 389 N.W.2d 446, 448 (Mich. Ct. App. 1986) (describing campaign advertisements that misrepresented the candidate as the incumbent); Ohio Democratic Party v. Ohio Elections Comm'n, No. 07AP–876, 2008 WL 3878364, 8 (Ohio Ct. App. Aug. 21, 2008) (upholding a statute that prohibited a candidate's campaign literature from using the title of an office not currently held

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litical advertisements in an effort to deliberately mislead or confuse voters about issues or candidates.[107] To illustrate the gist of an anti-speech act regulation, the following 'Model Election Integrity Law' may be offered:

> Whoever publishes in the course of an election campaign, or in regard to its outcome, a verifiably false factual statement or image pertaining to a candidate or referendum, or an election official or agency operating or overseeing an election, or how to cast a ballot, with knowledge that the statement or image is false, or with reckless disregard for whether it is false, that is intended, or with reasonable probability may be expected, to be relied upon as true, shall be subject to:
>
> (a) a civil suit for damages; and
>
> (b) a criminal prosecution and imprisonment [for not more than {one year}] or a fine of [$10,000], or both;
>
> for having harmed the integrity of an election by distorting the electoral process.[108]
>
> Model Legislative Findings:
>
> Democracy is premised on an informed electorate. To the extent deliberately false statements or visual representations of fact misinform voters they lower the quality of campaign discourse and debate and lead (or add) to voter alienation by fostering voter cynicism and distrust of the political process. Such anti-speech acts constitute a deliberate interference with the process upon which democracy is based and penalize valuable protected rights, such as the right to vote and the right to engage in meaningful deliberation upon competing opinions and ideas.
>
> When electoral communications rely upon knowing or reckless use of false information (including visual and audio-visual

by the candidate); Cook v. Corbett, 446 P.2d 179, 181 (Or. 1968) (describing nonincumbent candidate's campaign advertisements urging voters to "re-elect" her).

[107] *See, e.g.*, WASH. REV. CODE. § 42.17A.335 (West, Westlaw through all effective legis. of the 2021 Reg. Sess. of the Wash. Leg. (2021)) ("Political advertising or electioneering communication—Libel or defamation per se:

> (1) It is a violation of this chapter for a person to sponsor with actual malice a statement constituting libel or defamation per se under the following circumstances:
>
> (a) Political advertising or an electioneering communication that contains a false statement of material fact about a candidate for public office.").

[108] For definition purposes: (a) the term "publish" pertains to the dissemination of any written word, picture, or any other visual symbol in a print or electronic (online or Internet-based) medium for the purpose of influencing voting at a primary or other election; (b) the term "whoever" includes any individual or corporation or other legally recognized organization, political party, or political committee.

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> fakes[109]) in political advertising and other efforts to influence voting, damages are presumed and do not need to be established.[110]
>
> There is a rebuttable presumption that a candidate knows of and consents to any publication or advertisement prohibited by this regulation caused by a political committee over which the candidate exercises any direction and control.[111]
>
> In legal challenges involving the invocation of this law, the court may award the prevailing party reasonable attorney fees at trial and on appeal.

It is well settled that protecting antecedent rights in the service of electoral integrity is a compelling interest.[112] Tactical anti-speech acts threaten the fabric of liberal democratic society by nullifying or significantly disabling the conditions necessary to support a functioning marketplace of opinions and ideas. As such, they are a species of fraud. Fraud operates in both material and moral economies. In material economies, we speak of securities fraud, mortgage fraud, racketeering, and so on.[113] In moral economies, we speak of fraud in terms such as obstruction of justice, perjury, and defamation.[114] Tactical anti-speech acts may be regarded as a species of moral fraud. Just as financial fraud has the power to harm commercial markets, informa-

[109] In an effort to bolster government and industry efforts to identify whether video content is authentic, and to verify its origins, 'The Deepfake Task Force Act' (S.2559) was submitted in the Senate by Sen. Rob Portman on July 29, 2021. S.2599, 117th Cong. (2021–22).

[110] *See* Wayne v. Venable, 260 F. 64, 66 (8th Cir. 1919) (noting that the right to vote "is so valuable that damages are presumed from the wrongful deprivation of it."); *cf.* Carey v. Piphus, 435 U.S. 247, 259 (1978) ("[T]he rules governing compensation for injuries caused by the deprivation of constitutional rights should be tailored to the interests protected by the particular right in question."); s*ee generally* Mark Yudof, *Liability for Constitutional Torts and the Risk-Averse Public School Official*, 49 S. CAL. L. REV. 1322, 1378 (1976) ("The fact that the precise degree of injury may be difficult to calculate should not lead a court to award no damages; rather it should estimate damages, however crudely. Otherwise, the whole notion of an entitlement to dignity becomes a farce.").

[111] The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact. For example, in a child custody case, a rebuttable presumption shifts to the guardian seeking custody the burden of persuasion that an award of custody would not be detrimental to the best interests of the child. To rebut the presumption, the guardian would have to show by a preponderance of the evidence that joint or sole custody to him would not be detrimental to the child's best interest. *See, e.g.*, Jason P. v. Danielle S. 215 Cal. Rptr.3d. 542, 563, 568 (Cal. Ct. App. 2017).

[112] *See* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 228 (1989), ("[T]he State has a legitimate interest in fostering an informed electorate.").

[113] *See, e.g.*, Donaldson v. Read Mag., Inc., 333 U. S. 178, 190 (1948) (explaining that the government's power "to protect people against fraud" has "always been recognized in this country and is firmly established"); *see also* United States v. Alvarez, 567 U.S. 709, 734–35 (2012) (Breyer, J., concurring) (noting that many statutes and common law doctrines make the utterance of certain kinds of false statements unlawful so long as they are adequately tailored to limit restrictions to the harms in question – as in the case of fraud statutes which "typically require proof of a misrepresentation that is material, upon which the victim relied, and which caused actual injury.") (quoting RESTATEMENT (SECOND) OF TORTS § 525 (AM. L. INST. 1976)).

[114] *See id.* at 736 (Breyer, J., concurring) ("In virtually all these instances limitations of context, requirements of proof of injury, and the like, narrow the statute to a subset of lies

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tion fraud in the electoral context harms the exercise of expressive autonomy—including the right to think and express one's own opinions and ideas.

Deliberate violence to language[115] in an effort to gain fraudulent political or commercial advantage in an election represents a significant interference with essential democratic practices and institutions.[116] These are not the kind of lies that warrant First Amendment protection.[117]

Acts of moral fraud have long qualified for regulatory action.[118] These are the kinds of lies that subvert rather than advance first amendment inter-

where specific harm is more likely to occur."); *id*. at 742, (Alito, J., dissenting) ("The lies proscribed by the Stolen Valor Act tend to debase the distinctive honor of military awards.").

[115] There has been a long tradition of treating attacks upon truth or meaning as acts of violence. See, e.g., the following entries in the Oxford English Dictionary for the meaning of *"violence*":

> Improper treatment or use of a word; wresting or perversion of meaning or application; unauthorized alteration of wording. 1596 Lambarde *Peramb. Kent* (ed. 2) 143. Being in some places Adonai cannot be read for Jehovah, without manifest violence offered to the Text. 1662 Evelyn *Chalcogr.* 7 1856 Maurice *Gosp. St. John* vii. 94 Wherever violence is done to the truth of language, I believe more or less of violence is done to some higher truth.

Oxford English Dictionary (1989), https://www.oed.com/oed2/00277885 [https://perma.cc/XBE8-UMRW].

[116] Deliberate violence to language is not only destructive of the individual's capacity for autonomous judgment, but also of the very fabric of liberal democracy itself – a polity founded on, and that only flourishes through, the capacity to defend against freedom-crushing ('illiberal') violence. *See generally* C. Edwin Baker, *Autonomy and Free Speech*, 27 Const. Comment 251, 256 (2011) (describing "manipulative lies" as an "attempt to undermine the integrity of the other person's decision-making authority."); Bruce A. Ackerman, Social Justice and the Liberal State 70–80 (1980) (framing the necessary conditions for citizenship in a liberal state in terms of "dialogic performance"); Richard K. Sherwin, *Law, Violence, and Illiberal Belief* 78 Geo. L. J. 1785, 1788–89 (1989) (proffering "untrammeled discourse" as a core ideal of liberal democracy). Commercial speech, for example, is subject to regulation in order to avoid the coercive effect of falsehoods upon a listener's ability to make informed decisions. *See* Va. Pharmacy Bd. v. Va. Consumer Council, 425 U.S. 748, 764–65 (1976) ("[S]ociety also may have a strong interest in the free flow of commercial information. . .And if it is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.").

[117] Five of the justices in *Alvarez* (the dissenters and the two concurring justices) adopted the view that restrictions on lies should be easier to uphold than restrictions on other kinds of speech. *See* United States v. Alvarez, 567 U.S. 709, 730 (2012) (Breyer, J., concurring) ("The dangers of suppressing valuable ideas are lower where, as here, the regulations concern false statements about easily verifiable facts that do not concern such subject matter. Such false factual statements are less likely than are true factual statements to make a valuable contribution to the marketplace of ideas."); *see also id*. at 739 (Alito, J. dissenting) ("[F]alse statements of fact merit no First Amendment protection in their own right.").

[118] The Supreme Court has recognized that a State has a compelling interest in ensuring that an individual's right to vote is not undermined by fraud in the election process. Akin to protecting an individual's reputation from unjustified invasion and wrongful hurt, protecting individuals from bad faith efforts to achieve political gain based on deceit and manipulation through the strategic use of provably false information, "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty." Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J.,

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ests and values. Regulations of tactical anti-speech acts should be analyzed based not only on the substantive nature of the social and political harm that they cause, but also on the antecedent rights that they protect. Consider, in this regard, the indictment and subsequent arrest on January 27, 2021, of Douglass Mackey (aka Ricky Vaughn, 31). Mackey was charged by criminal complaint in the Eastern District of New York and taken into custody in West Palm Beach, Florida. According to the complaint, the defendant "exploited a social media platform to infringe one of the most basic and sacred rights guaranteed by the Constitution: the right to vote."[119] More specifically, the complaint claims that in 2016, Mackey "established an audience on Twitter with approximately 58,000 followers."[120] A February 2016, analysis by the MIT Media Lab ranked Mackey as the 107th most important influencer of the then upcoming presidential election, ranking his account above outlets and individuals such as NBC News (#114), Stephen Colbert (#119) and Newt Gingrich (#141).[121]

Between September 2016 and November 2016, in the lead up to the November 8, 2016, U.S. Presidential Election, Mackey allegedly conspired with others to use social media platforms, including Twitter, to disseminate fraudulent messages designed to encourage supporters of one of the presidential candidates (the "Candidate") to "vote" via text message or social media, a legally invalid method of voting.[122] For example, on Nov. 1, 2016, Mackey allegedly tweeted an image that featured an African American woman standing in front of an "African Americans for [the Candidate]" sign. The image included a text that read: "Avoid the Line. Vote from Home. Text '[Candidate's first name]' to 59925[.] Vote for [the Candidate] and be a part of history."[123]

The fine print at the bottom of the image stated: "Must be 18 or older to vote. One vote per person. Must be a legal citizen of the United States. Voting by text not available in Guam, Puerto Rico, Alaska or Hawaii. Paid for by [Candidate] for President 2016."[124] The tweet included the typed hashtags "#Go [Candidate]" and "another slogan frequently used by the candidate."[125] By Election Day 2016, at least 4,900 unique telephone numbers

concurring); *see* Eu v. S.F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 231 (noting that a State "indisputably has a compelling interest in preserving the integrity of its election process."); Anderson v. Celebrezze, 460 U.S. 780, 788 n. 9 (collecting cases that uphold even-handed restrictions that protect "the integrity and reliability of the electoral process itself.").

[119] *See* Press Release, Dep't of Just., U.S. Atty's Off., E. Dist. of N.Y. (Jan. 27, 2021) (available at *Social Media Influencer Charged with Election Interference Stemming from Voter Disinformation Campaign*, https://www.justice.gov/usao-edny/pr/social-media-influencer-charged-election-interference-stemming-voter-disinformation [https://perma.cc/V2M9-LX7F]).

[120] *Id.*

[121] *Id.*

[122] *Id.*

[123] *Id.*

[124] *Id.*

[125] *Id.*

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texted "[Candidate's first name]" or some derivative to the 59925 text number.[126]

According to Nicholas L. McQuaid, Acting Assistant Attorney General of the Justice Department's Criminal Division, the complaint "underscores the department's commitment to investigating and prosecuting those who would undermine citizens' voting rights."[127] Seth D. DuCharme, Acting U.S. Attorney for the Eastern District of New York, adds: "There is no place in public discourse for lies and misinformation to defraud citizens of their right to vote . . . . With Mackey's arrest, we serve notice that those who would subvert the democratic process in this manner cannot rely on the cloak of Internet anonymity to evade responsibility for their crimes. They will be investigated, caught and prosecuted to the full extent of the law."[128]

This kind of prosecution should withstand constitutional scrutiny; yet, free speech orthodoxy regarding counterspeech as the only acceptable ("least restrictive") interference with speech[129] leaves the outcome uncertain. That constitutional shadow is not only misplaced in principle, but it also flies in the face of past practice. Under the Enforcement Act of 1870 and subsequent laws, false registration, bribery, voting without legal right, making false returns of votes cast, interference in any manner with officers of election, and the neglect by any such officer of any duty required of him by state or federal law, were made federal offenses.[130] The Supreme Court has affirmed that private conspiracies to violate protected rights, such as the right to vote, are subject to sanction under 18 U.S.C. Section 241, provided adequate proof is presented regarding the accused's intent to violate the right in question.[131]

Regulating economic and moral fraud to protect electoral integrity is not precluded by the Supreme Court's ruling in *United States v. Alvarez*

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[126] *Id.*

[127] *Id.*

[128] *Id.* According to William F. Sweeney Jr., Assistant Director in Charge of the FBI's New York Field Office: "Protecting every American citizen's right to cast a legitimate vote is a key to the success of our republic. What Mackey allegedly did to interfere with this process—by soliciting voters to cast their ballots via text—amounted to nothing short of vote theft. It is illegal behavior and contributes to the erosion of the public's trust in our electoral processes. He may have been a powerful social media influencer at the time, but a quick Internet search of his name today will reveal an entirely different story." *Id.* In response, Zach Thornley, a lawyer for Tim Gionet, one of the alleged co-conspirators, has contended that his client's actions on Twitter are protected free speech. *See* Joseph Menn, *U.S. Steps up Pursuit of Far-Right Activists in 2016 Voter Suppression Probe*, REUTERS (May 26, 2021) https://www.reuters.com/article/us-usa-vote-charges-idCAKCN2D7125 [https://perma.cc/NG3A-A3DA].

[129] *See* 281 Care Comm. v. Arneson, 766 F.3d 774, 793–94 (2014).

[130] *See Enforcement Act of 1870*, 16 Stat. 140; *Force Act of February 28, 1871*, 16 Stat. 433; *Ku Klux Klan Act of April 20, 1871*, 17 Stat. 13.

[131] *See* United States v. Guest 383 U.S. 745, 753, 760 (1966) (stating that section 241 must be given a "sweep as broad as its language," to protect "*all* of the rights and privileges secured to citizens by *all* of the Constitution," but noting that "[a] specific intent to interfere with the federal right must be proved . . . ." (citing Screws v. United States, 325 U. S. 91, 106–07 (1945))).

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(2013). In that case, Xavier Alvarez, an elected official in California, lied about having been awarded the Medal of Honor. This was a violation of The Stolen Valor Act of 2005, under which Alvarez was prosecuted and convicted. Alvarez challenged the Act as a violation of his freedom of speech. The Supreme Court agreed. The plurality opinion, written by Justice Kennedy, adopts a familiar strict scrutiny analysis. If the speech in question does not fall within a specific category of unprotected speech, only a compelling interest will overcome its presumptive First Amendment protection. According to the plurality, lying about the Medal of Honor occupies no such First Amendment carve-out. Moreover, because a lesser restriction—namely, "more speech"—was deemed capable of providing an adequate remedy, Kennedy concluded that the law's burden on free speech was overinclusive.[132]

In a concurring opinion, Justice Breyer, joined by Justice Kagan, determined that intermediate scrutiny was the appropriate test. The question thus becomes how to strike the proper balance between protecting society against a legitimately targeted harm and the associated danger of incidentally suppressing valuable speech. In this respect, Breyer acknowledged the low social value of lies involving "easily verifiable facts," noting that the regulation of social harms such as perjury, defamation, and fraud (including "electoral regulation") do not present insuperable constitutional hurdles. Punishment for lying about the Medal of Honor, however, remains unjustifiable here, in Breyer's view, particularly in light of the law's lack of restrictions regarding the circumstances under which such lies may be uttered.[133]

Justice Alito's dissent, joined by Justices Thomas and Scalia, fails to see any basis for constitutional objection given that "false factual statements possess no intrinsic First Amendment value" and "proscribing them does not chill any valuable speech.[134] Alito goes on to note that the false statements proscribed by the Act "are highly unlikely to be tied to any particular political or ideological message." He adds that even if such a rare ideological association existed it would be effectively nullified by the fact that the Act "applies equally to all false statements, whether they tend to disparage or commend the Government, the military, or the system of military honors."[135]

Alvarez should not be read as posing an obstacle to anti-speech act regulations. Anti-speech act laws do not target specific political ideas or opin-

[132] United States v. Alvarez, 567 U.S. 709, 727–28 (2012) ("The Government has not shown, and cannot show, why counterspeech would not suffice to achieve its interest. . . The remedy for speech that is false is speech that is true.").

[133] In contrast to anti-speech tactics in the electoral fraud context, the Stolen Valor Act of 2005 applied to private as well as public speech contexts. *See id.* at 736 ("As written, it applies in family, social, or other private contexts, where lies will often cause little harm. It also applies in political contexts, where although such lies are more likely to cause harm, the risk of censorious selectivity by prosecutors is also high.") In the aftermath of *Alvarez*, Congress passed a new version of the Stolen Valor Act that narrowed its application. The new law ("The Stolen Valor Act of 2013") only punishes those who make false claims to "receive money, property or other tangible benefit," essentially transforming it into an anti-fraud statute. H.R REP. No. 113-84, *as reprinted in* 2013 U.S.C.C.A.N. 6, 7.

[134] *Alvarez*, 567 U.S. at 746, 749.

[135] *Id.* at 740–41.

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ions.[136] Tactical anti-speech acts are committed in order to stymie rather than advance informed competition among ideas or opinions. They subvert the right to vote as well as the right to participate in informed public deliberation. Protecting these fundamental predicate rights manifestly serves society's compelling interest in maintaining the minimum conditions necessary for a functional marketplace of opinions and ideas. Accordingly, regulations that seek to safeguard these rights and conditions meet the plurality's rigorous standard of review.[137] In any event, to the extent that Justice Breyer's concurring opinion may be considered dispositive in *Alvarez*,[138] the intermediate balancing test that he proffered manifestly embraces (as Breyer's list of examples attests) protecting society from harms to electoral integrity.[139]

In contrast to The Stolen Valor Act scenario, incidental risk to protected speech from the regulation of tactical anti-speech acts is adequately constrained. The specificity of the context is much more restrictively tailored, and the substantive nature of the harm associated with anti-speech

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[136] *Cf. id*. at 716 ("'As a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" (citing Ashcroft v Am. C.L. Union, 535 U.S. 564, 573 (2002)).

[137] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 349 (1995) ("[F]alse statements, if credited, may have serious adverse consequences for the public at large" if made during election campaigns.); Garrison v. Louisiana, 379 U.S. 64, 75 (1964) (noting that application of the *N.Y. Times* actual malice standard allowed adequate "breathing space" because honestly held opinions, no matter how exaggerated or unpleasant, would remain protected by the Constitution, while calculated attempts to mislead voters would not).

[138] *See* Marks v. United States, 430 U.S. 188, 193–94 (1977) (holding that when "a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds. . ."). Intermediate scrutiny of false speech, as held by the *Alvarez* concurrence, is arguably the narrower basis for striking down the Stolen Valor Act since that standard would find fewer statutes unconstitutional. *See* Coe v. Melahn, 958 F.2d 223, 225 (8th Cir. 1992) (holding Justice O'Connor's concurrence in Hodgson v. Minnesota, 497 U.S. 417 [1990], was the narrowest ground for the majority "because her approach would hold the fewest statutes unconstitutional"). For a slightly different take on *Marks*, *see* Planned Parenthood of Se. Pa. v. Casey, 947 F.2d 682, 694 (3d Cir. 1991), *aff'd in part, rev'd in part, and remanded*, 505 U.S. 833 (1992) (instructing lower courts to treat as controlling "the opinion of the Justice or Justices who concurred on the narrowest grounds necessary to secure a majority" even if the opinion reflects the views of only one Justice); *see, e.g.*, Estes v. Texas, 382 U.S. 532, 588–89 (Harlan, J., concurring) (1965) (where Harlan's single concurring opinion, restricting a ban on cameras in the courtroom to sensationalized and chaotic trials such as the one presented on the facts before the court in lieu of the plurality's per se ban, arguably was dispositive since it occupied the narrowest ground among the three concurring opinions). Combining *dissenting* opinions with a concurring opinion to establish precedential authority remains problematic. *See, e.g.*, King v. Palmer, 950 F.2d 771, 781 (D.C. Cir. 1991) (en banc). For an exhaustive treatment of the issue, see Ryan C. Williams, *Plurality Decisions & Precedential Constraint*, 69 Stan. L. Rev. 795, 840 (2017) (urging lower courts to look to the majority's partially overlapping and partially diverging *reasons* for the result that it reached in order to ascertain *why* that result is correct).

[139] This tracks the requirements of United States v. O'Brien, 391 U.S. 367 (1968). Under the O'Brien framework, government regulation that applies to a form of expression is constitutional if: (1) it is within the constitutional power of government, (2) it furthers an important or substantial governmental interest, (3) that interest is unrelated to the suppression of speech, and (4) the restriction it incidentally imposes on speech is no greater than necessary to further that interest. *Id.* at 377.

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acts is much greater, than is the case under The Stolen Valor Act of 2005. Anti-speech act regulations typically narrow their provisions to address impermissible gains, occurring, for example, through the dissemination of paid political advertising or campaign material. As the district court noted in *281 Care Comm*, this limitation "specifically allows 'breathing space' for oral statements made in debates, on television, or on the street corner soapbox that might be made spontaneously or in the heat of the moment . . . .[T]he restrictions only apply against those forms of expression that require deliberation and which also tend to have a greater permanence than unscripted oral statements."[140]

With respect to anti-speech act regulations, therefore, claims of overbreadth are significantly undercut. Moreover, the traditional remedy of "more speech" is not a meaningful "less restrictive" option since it fails as a practical matter to counter the substantial harm that tactical anti-speech acts pose in the digital age. Even under the original terms Justice Brandeis provided in his *Whitney* concurrence, "more speech" in this context fails to qualify as an adequate response. It bears recalling here that Brandeis's preference for more speech came with two limiting conditions. One condition requires that there be time for deliberation to avert the foreseeable evil in question. A second condition requires that the speech that is to be countered contributes to meaningful debate about contested opinions and ideas.[141] Tactical anti-speech acts do not meet either of these requirements.

(1) There is no time: As Miguel Schor notes, new information technologies "facilitate the transmission of false information while destroying the economic model that once sustained news reporting." False information "spreads virally via social networks as they lack the guardrails that print media employs to check the flow of information."[142]

(2) This is not meaningful debate: Tactical anti-speech acts do not, nor are they designed to, contribute to meaningful debate or deliberation about contested ideas or opinions. The demonstrably false information that the regulation of anti-speech acts targets aims to jam (or effectively subvert) meaningful political discussion, and in the specific context of electoral disinformation it aims to disable meaningful participation in the political process itself. This is not a question, as Brandeis's concurrence in Whitney stresses, of popular ideas or viewpoints silencing unpopular ones. Rather, it is a question of silencing deliberation itself. Tactical anti-speech acts are not committed to advance truth, knowledge, or meaningful public debate. The

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[140] 281 Care Comm. v. Arneson, No. 09-5215 ADM/FLN, 2013 WL 308901, at *11 (D. Minn. Jan. 25, 2013).

[141] *See* Whitney v. California, 274 U.S. 357, 377 (1927)

[142] Schor, *supra* note 42, at 5–6 ("Flooding tactics can be used to drown out democratic deliberation 'through the creation and dissemination of fake news, the payment of fake commentators, and the deployment of propaganda robots.' New information technologies, moreover, have cannibalized the revenue streams that once sustained newspapers. . . . Instead of consuming information from shared public spaces, political partisans can now obtain information from sources that echo their views. The algorithms that social media use to sort out user created content reward polarizing content.") (citations omitted)).

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strategic use of provable falsehoods for electoral advantage stymies the electoral process and, in so doing, mocks the liberal democratic discourse ideal.[143]

Society's compelling interest in safeguarding the integrity of elections from verifiable falsehoods outweighs the latter's minimal social value.[144] Legitimate concerns about chilling protected speech may be reasonably offset by common sense and prudent practice. The courts are a reliable resource for enforcing these laws. Seeking the truth in the face of contested factual claims is what our adversarial trial system was designed to do. A variety of institutional, procedural, and substantive safeguards are in place to justify trust in judicial outcomes.[145] Moreover, as Justice Alito importantly observes in *Alvarez*, we are not dealing here with "laws restricting false statements about philosophy, religion, history, the social sciences, the arts and other matters of public concern."[146] Alito's point is that in certain domains, for example, in the arena of disputed ideas, it would be perilous for the state to serve as the arbiter of truth. But facts subject to demonstrable falsification may be distin-

143 *See* Sherwin, *supra* note 116, at 1789 ("As an ideal, discourse embodies both structural checks and emancipatory empowerment. The freedom that untrammeled discourse allows cannot exist without appropriate legal restraints.").

144 A punch purposefully thrown or, for that matter, a child used in the production of pornography, may retain a modicum of communicative efficacy, but it is manifestly outweighed by the social harm that it produces.

145 The bipartisan repudiation, by a broad array of federal courts, of former President Donald Trump's unfounded claims regarding pervasive fraud in the 2020 Presidential election, is illustrative of the judicial process in view. *See, e.g.*, Rosalind S. Helderman and Elise Viebeck, *'The last wall': How dozens of judges across the political spectrum rejected Trump's efforts to overturn the election*, WASH. POST (Dec. 12, 2020) ("In a remarkable show of near-unanimity across the nation's judiciary, at least 86 judges—ranging from jurists serving at the lowest levels of state court systems to members of the United States Supreme Court — rejected at least one post-election lawsuit filed by Trump or his supporters."), https://www.washingtonpost.com/politics/judges-trump-election-lawsuits/2020/12/12/e3a57224-3a72-11eb-98c4-25dc9f4987e8_story.html [https://perma.cc/37MR-JH3H]. Likewise, in the face of a complete absence of evidence in support of former President Trump's lawyers' election fraud claims, a federal judge had no difficulty ruling that sanctions against the lawyers were warranted. *See* O'Rourke v. Dominion Voting Syss., Inc., No. 20-cv-03747-NRN (D. Colo. Filed Nov. 22, 2021) ("Plaintiffs' affidavits are replete with conclusory statements about what must have happened during the election and Plaintiffs' 'beliefs' that the election was corrupted, presumably based on rumors, innuendo, and unverified and questionable media reports. . . . [But] 'belief" alone cannot form the foundation for a lawsuit. An 'empty-head' but 'pure-heart' is no justification for patently frivolous arguments or factual assertions. The belief must be a substantiated belief. . . [E]ven media outlets usually perceived to be supportive of the former President publicly announced that they had seen no information or evidence to suggest that election machine companies were involved in election fraud. . . . Given the volatile political atmosphere and highly disputed contentions surrounding the election both before and after January 6, 2021, circumstances mandated that Plaintiffs' counsel perform heightened due diligence, research, and investigation before repeating in publicly filed documents the inflammatory, indisputably damaging, and potentially violence-provoking assertions about the election having been rigged or stolen. . . [A]long with a law license and the associated privilege to make arguably defamatory allegations in judicial proceedings comes the sworn obligation of every lawyer, as an officer of the court and under Rule 11, not to abuse that privilege by making factual allegations without first conducting a reasonable inquiry into the validity of those allegations." [citations omitted]).

146 United States v. Alvarez, 567 U.S. 709, 751 (2012).

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guished from unfalsifiable ideas.[147] As for opinions that rely on false information, they are only affected if the opinion holder is aware of the falsehood upon which it is based and intentionally circulates the opinion notwithstanding that knowledge.[148]

Believing something that turns out to be false may constitute an error, but it is not a lie. Moreover, while some lies, in some circumstances, may not be devoid of social value, while others, although devoid of social value may lack significant social or political harm, the deliberate lies targeted by the regulation of tactical anti-speech acts are conspicuous for the gravity of harm that they pose. These are political lies that attempt to "poison the stream, to deprive voters of a free choice by diverting the intended exercise of the franchise to an unintended result."[149] To be sure, the effects on electoral matters of knowingly false statements, or statements made with reckless disregard for the truth, may not be readily testable on the basis of empirical evidence.[150] But as the court noted in its decision to suspend Rudolph Giuliani's law license in New York for knowingly disseminating demonstrably false claims regarding fraud in the 2020 presidential election:

> "One only has to look at the ongoing present public discord over the 2020 election, which erupted into violence, insurrection and death on January 6, 2021 at the U.S. Capitol, to understand the extent of the damage that can be done when the public is misled by false information about the elections. . .This event only emphasizes the larger point that the broad dissemination of false statements, casting doubt on the legitimacy of thousands of validly cast votes, is corrosive to the public's trust in our most important democratic institutions."[151]

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[147] *See* Gertz v. Robert Welch 418 U.S. 323, 339–40 (1974) ("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.").

[148] As the Court has noted, merely inserting the words "in my opinion" does not transform a demonstrably false statement into a disprovable opinion. *See* Milkovich v. Lorain Journal, 497 U.S. 1, 20 (1990) ("Unlike the statement, 'In my opinion Mayor Jones is a liar,' the statement, 'In my opinion Mayor Jones shows his abysmal ignorance by accepting the teachings of Marx and Lenin,' would not be actionable.").

[149] *See* Tomei v Finley, 512 F. Supp. 695, 698 (1981).

[150] *See* 281 Care Comm. v. Arneson, 2013 WL 308901, 9 (D. Minn. 2013) ("The State does not and should not engage in the business of polling its citizens regarding what they voted for and why, and then publicly filing the results.") (citing Campaign for Family Farms v. Glickman, 200 F.3d 1180, 1187-88 (8th Cir. 2000), which discussed the importance of the secret ballot to American system of voting)); *see also* Anderson v United States, 417 U.S. 211, 226 (1974) (penalizing "the intent to have false votes cast and thereby to injure the right of all voters in a federal election to express their choice of a candidate and to have their expressions of choice given full value and effect, without being diluted or distorted by the casting of fraudulent ballots."). *But cf.* McIntyre v Ohio Elections Comm'n, 514 U.S. 334, 344 (1995) (deeming unconstitutional state election law mandating non-anonymous political leafletting due to overbreadth given the absence of language limiting the law's application to "fraudulent, false, or libelous statements").

[151] *In re* Giuliani, 146 N.Y.S.3d 266, 25–26 (App. Div. 2021).

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In sum, the regulation of tactical anti-speech acts does not chill the advocacy of unpopular ideas or causes. What it does chill is the deliberate or reckless use of provably false information to gain impermissible political advantage over vulnerable consumers of political information.[152] This standard is not unduly burdensome. Indeed, it is consonant with the minimum standard of civic responsibility appropriate to democratic life. Tactical anti-speech acts lack political or social value precisely because they are calculated to exploit reliance upon demonstrably false information as a strategy for gaining unfair political or commercial gain. This remains so regardless of the ideological or political advantage with which the act may be associated.

While abuse of anti-speech act legislation cannot be ruled out, the reality is there is no guarantee against improper use of legal process. Sanctions, such as compelling lawyers to assume the cost of their opponent's legal fees, among other penalties[153], may help deter frivolous or malevolent legal actions, as may professional ethical codes that require non-compliant attorneys to forfeit their license to practice law. But these are admittedly imperfect remedies. The regulation of anti-speech acts may not be cost free, but as the Court has made clear, when the exigencies we face are severe enough, the balance of acceptable risk shifts.[154] Preserving the minimum conditions necessary for meaningful political deliberation and electoral integrity is fundamental to a functioning liberal democracy. The social and political value of laws in service to that imperative outweighs the incidental costs associated with their enforcement.

Legislators cannot fight every social evil at once. They are entitled, and are expected, to identify and target those social harms that they find to be, and can persuasively justify as being, of compelling concern. Open societies remain uniquely vulnerable to attacks upon freedom that exploit openness for illiberal gain. Such vulnerability may well be the price we pay for living in a free society.[155] But this does not mean free societies are doomed to stand idle before, much less collude in, their own undoing. Democracy is not a suicide pact. Through law we can bend the sword of unfreedom and keep

[152] *See* State ex rel. Pub. Disclosure Comm. v 119 Vote No! Comm., 957 P.2d 691, 707 (Wash. 1998) (Madsen, J., concurring) ("The statute chills only this devious liar, not free speech. In short, 'The actual malice test penalizes only the calculated falsehood.'").

[153] *See, e.g.*, FLA. STAT. § 104.271 (2021). ("False or malicious charges against, or false statements about, opposing candidates; penalty—(1) Any candidate who, in a primary election or other election, willfully charges an opposing candidate participating in such election with a violation of any provision of this code, which charge is known by the candidate making such charge to be false or malicious, is guilty of a felony of the third degree, punishable as provided in s. 775.082 or s. 775.083 and, in addition, after conviction shall be disqualified to hold office.").

[154] *See, e.g.*, United States v. Salerno, 481 U.S. 739, 748 (1987) ("We have repeatedly held that the Government's regulatory interest in community safety can, in appropriate circumstances, outweigh an individual's liberty interest. For example, in times of war or insurrection, when society's interest is at its peak, the Government may detain individuals whom the government believes to be dangerous.").

[155] *See* POPPER, *supra* note 99, at 581 (recalling Plato's claim that only democracy has the potential to lead to tyranny "since it leaves the bully free to enslave the meek").

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freedom's shield from falling into the hands of its foes. The First Amendment requires no less.

Conclusion

Anti-speech acts, properly understood, are acts of bad faith: their objective is not to advance truth or even to disseminate ideas. Rather, like a monkey wrench in the machinery of democracy, tactical anti-speech acts thwart meaningful communication. Liberal democracies are entitled to protect by law the minimum conditions necessary for *freedom of thought* which is, after all, the indispensable condition "of nearly every other form of freedom."[156] To forfeit in the name of free speech the power to regulate illiberal practices that thwart the meaningful exercise of free speech is a paradox we need not, and cannot afford to, accept. A preferable paradox, if paradox there must be, is intolerance of intolerance, which constitutes a baseline condition for tolerance itself.

In the age of social media and surveillance capitalism, laissez-faire free speech policies do not serve core First Amendment values. Self-governance in a democracy cannot survive without a free flow of factual information, access to diverse opinions and ideas, and a meaningful opportunity to speak and listen. As the Court said in *Red Lion*: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market."[157] Prudent regulation of the dominant communication ecosystem in the digital age must proceed with this fundamental purpose foremost in mind.

The need for reform, now as in the first Gilded Age of the late nineteenth century, challenges us anew. Then, as now, "the measure of courage in the civic realm is the capacity to experience or anticipate change—even rapid and fundamental change—without losing perspective or confidence."[158] A century ago, the orthodoxy of contract rights threatened the welfare and subsistence of American labor. Half a century on, "new property" rights were named in order to overcome impairments of governmental largesse based on policies neither "important" nor "wise". Today, free speech orthodoxy, in its defense of illiberal anti-speech acts, places at risk the very principles of expressive freedom, tolerance, and informed public discourse that the First Amendment was meant to preserve.

Tactical anti-speech acts are committed not to advance deliberation, or any form of meaningful discourse, but rather to *jam* the possibility of both.

[156] *See* Palko v. Connecticut, 302 U.S. 319, 327 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969) .

[157] Red Lion Broad. Co. v. FCC, 395 U.S. 357, 390 (1969); *see* Minow, *supra* note 102, at 543-44 ("[B]ecause the Constitution depends on informed and active members to make the democracy it establishes work, the Constitution should compel development of the institutional context for democratic self-governance . . .").

[158] Blasi, *supra* note 81, at 677.

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State regulation of anti-speech acts is not about censoring unpopular ideas, or opinions with which we may disagree or that make us uncomfortable or afraid. It is about securing the infrastructure of democracy in the digital age so that a diverse range of opinions and ideas may freely circulate and informed deliberation, both individual and collective, may meaningfully proceed. It is about safeguarding a communication ecosystem in which all citizens may participate free from deliberate efforts, both foreign and domestic, to rob political communication of meaning. By the same token, it is also about restoring trust in the vital process of deliberation itself.

Those who seek unfair advantage in electoral outcomes by deliberately subverting democratic discourse forfeit the protections to which democratic discourse is entitled. Expressive freedom rights should not serve as a shield in defense of fraudulent political or commercial gain. The preservation of electoral integrity and the democratic ideal of deliberative discourse require no less.

Will an anachronistic First Amendment doctrine continue to protect illiberal practices inimical to freedom itself? The answer depends on our collective capacity to summon the courage and the prudence, as we have at other critical junctures in our history, to work through the doctrinal changes our experiment in democracy needs to survive and prosper. Prudent regulation of tactical anti-speech acts is essential to secure the minimum conditions necessary for a robust and diversified marketplace of opinions and ideas in the digital age.

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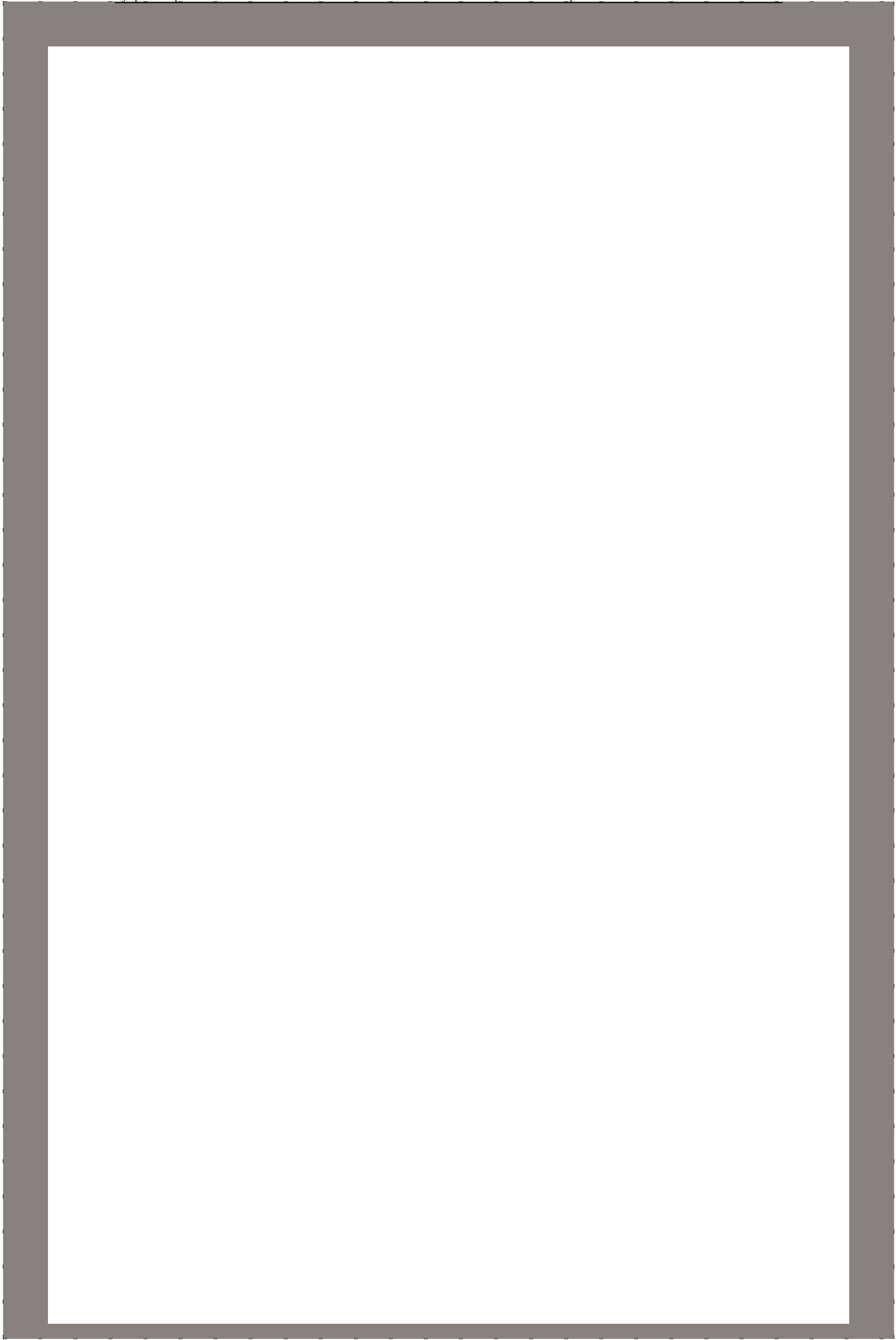

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Perverse & Irrational

*Meghan Boone**

In our system of representative democracy, legislatures are given a great deal of latitude to select and pass laws that they deem to be in the public interest. Assuming that no suspect class or fundamental right is involved, the Constitution has been interpreted to only require legislative action to satisfy rational basis review—a highly deferential standard that requires only that a legitimate purpose exist and the means adopted to achieve that purpose are rationally related to that purpose. Under rational basis review, legislatures can and do enact laws that are significantly over- or underinclusive to the identified problem. They can enact laws that do not even accomplish their intended purpose in most instances. They can even enact laws which are unsupported by any evidence, much less high-quality evidence. And yet . . . courts insist that rational basis review still means something. That it is something other than a blank check for legislatures to do as they will.

This Article explores one example of the outer bounds of rationality—demonstrated perversity. That is, a law that clearly contravenes the overarching legislative intent because the law is solely or primarily responsible for producing the opposite result of that intent. Although often unnamed as such, perversity presents itself across the legislative landscape, from mundane local ordinances to sweeping federal legislation. And while not explicitly recognized as a basis for finding a law unconstitutional, Supreme Court precedent clearly hints at the possibility that demonstrated perversity could be a basis for invalidating laws.

By defining perversity, identifying when and how it occurs, and exploring how it might be used to challenge the constitutionality of various government actions, this Article aims to illuminate an undertheorized corner of the already robust literature on rational basis review. It argues that current rational basis review precedent already employs a type of perversity analysis, although courts fail to explicitly acknowledge it as such. Moreover, it argues that modern changes in scientific and empirical methodologies and the explosion of the information economy demonstrate the need for this type of analysis; without it, rational basis review is meaningless. Ultimately, the Article concludes that while rational basis scrutiny gives legislatures wide latitude, courts must set a constitutional limit by striking down statutes which cause outcomes clearly counterproductive to legislative goals.

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* Associate Professor, Wake Forest University School of Law. The author presented prior versions of this article at the American Constitution Society Constitutional Law Scholars Forum, the Richmond Junior Faculty Forum, the Wake Forest University School of Law Junior Scholars Workshop, and at faculty workshops at UNC School of Law, University of Georgia School of Law and St. John's University School of Law. She would like to thank the participants of those workshops for their helpful critiques, comments, and questions. The author would like to thank all those that took the time to individually comment on this project, including Marie-Amelie George, Tara Leigh Grove, Ben McMichael, Wilson Parker, Lisa Tucker and Ron Wright. Finally, she would like to thank her research assistants Maria Aguilera, Amy Brosnahan, Megan Cobb, Finley Riordan, and Julia Zabinski for their invaluable research support.

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Introduction

In order to be constitutional, laws that do not implicate a fundamental right or suspect classification must survive rational basis review—that is, the law must be rationally related to some legitimate government purpose.[1] As a result of both the plain language of the standard, and decades of deferential interpretation by courts, the canonical conception of rational basis review likens it to review in name only—practically useless as a way to challenge the constitutionality of government action.[2] Recently, scholars have both problematized this canonical conception of rational basis review and suggested a slew of reforms intended to make rational basis review a more significant check on state power.[3] Many of these proposals primarily focus on how rational basis review fails to meaningfully ferret out discriminatory in-

[1] Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end.").

[2] *See* Katie R. Eyer, *The Canon of Rational Basis Review*, 93 Notre Dame L. Rev. 1317, 1318–19 (2018) ("The canonical account of rational basis review under the Equal Protection Clause is familiar. Rational basis review is a form of review that is 'almost empty,' 'enormously deferential,' and 'meaningless.' The plaintiff's burden on rational basis review is 'essentially insurmountable,' and successful challenges 'rare.' So deferential is the standard of rational basis review that it is 'more often a statement of a conclusion that the law is constitutional than a standard of actual evaluation.'").

[3] *See* Randy E. Barnett, *Scrutiny Land*, 106 Mich. L. Rev. 1479 (2008); Vicki C. Jackson, *Constitutional Law in an Age of Proportionality*, 124 Yale L.J. 3094 (2015); Clark Neily, *Litigation Without Adjudication: Why the Modern Rational Basis Test Is Unconstitutional*, 14 Geo. J.L. & Pub. Pol'y 537, 540 (2016); Eyer, *supra* note 2; Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. Cal L. Rev 481, 485 (2004).

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tent, on the theory that state legislators are more likely to be intentionally discriminatory than well-meaning but inadvertently incorrect about the effect any individual piece of legislation will have.[4] Therefore, the focal point has mainly been the legitimacy of the government's *purpose* and not the rationality of the *means* employed.[5]

While identifying and dismantling laws passed as a result of animus towards a disfavored group is undoubtedly an important project, with all due respect to the fine legislators of this country,[6] this focus likely underestimates the incidence of government actors simply failing to correctly identify the likely results of their actions.[7] As a result, they sometimes pass and enforce laws that do not work. And while legislators could amend or repeal these perverse laws, for a variety of reasons they do not always do so. This Article focuses on the importance of rational basis review in this context. Particularly, it focuses on the constitutional arguments available to litigants faced with state actors that pass and enforce laws that have the opposite effect of the legislature's stated intent. I argue that this demonstrated perversity—an unequivocal factual record showing that a law has the *opposite* effect of the

[4] *See* Thomas B. Nachbar, *The Rationality of Rational Basis Review*, 102 VA. L. REV. 1627, 1656–57 (2016) ("It's not clear that this would be a particularly helpful thing for the Court to do, since it is unlikely that a legislature would be so oblivious as to the consequences of its actions as to adopt a means *not* rationally related to its chosen end."); Neily, *supra* note 3, at 540 ("[T]he principal threat to liberty in a representative democracy is not from legislators acting under some collective delusion . . . or temporary loss of sanity . . . . [I]nstead, it comes from policies that are designed—quite rationally—to achieve some constitutionally impermissible end, such as expressing animus towards racial minorities, purging the "socially inadequate" from the gene pool, or punishing people for disfavored political associations. So the rational basis test starts off on the wrong foot by suggesting that it serves one interest—protecting people from well-meaning but delusional or insane policymakers—when in fact its main function is (or ought to be) protecting people from perfectly rational policymakers seeking to advance the constitutionally impermissible ends of private interest groups.").

[5] *See* Nachbar, *supra* note 4, at 1632 ("While the 'rational basis' of rationality review is ostensibly an evaluation of means, the Court uses rationality review almost exclusively to identify and evaluate legislative ends, thus imposing upon legislatures the Court's own understanding of the legitimate objectives of republican government."); Susannah W. Pollvogt, *Unconstitutional Animus*, 81 FORDHAM L. REV. 887, 900 (2012) ("[T]he real concern in many of these [modern rational basis review] cases was with ends and not means—that insufficient tailoring was merely symptomatic of an improper purpose: animus.").

[6] This is not intended facetiously. State legislators are called on to solve a wide variety of complicated problems and sometimes lack the material support—or even the time—necessary to craft thoughtful and comprehensive legislation. *See cf.* Brakke v. Iowa Dep't of Nat. Res., 897 N.W.2d 522, 534–37 (Iowa 2017) ("State legislatures generally meet on a part-time basis. They do not generally employ the mechanisms of extensive public hearings, markups, and staff review that have characterized congressional action in the past. Further, large volumes of state legislation are often passed in the waning hours of a legislative session, with a flurry of last-minute amendments, thus increasing the possibility that legislation may be passed without a full linguistic vetting."); Kristen Underhill, *Broken Experimentation, Sham Evidence-Based Policy*, 38 YALE L. & POL'Y REV. 150, 164 (2019) ("[T]he policy environment itself—with finite time, multiple demands for attention, many decision-makers, and high-stakes choices—affects both rational thinking and the capacity to receive and use nuanced information.").

[7] Cass Sunstein, *Paradoxes of the Regulatory State,* 57 U. CHI. L. REV. 407, 413 (1990) ("[N]early all of the paradoxes are a product of the government's failure to understand how the relevant actors—administrators and regulated entities—will adapt to regulatory programs.").

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legislature's stated or legitimate purpose—should form the basis for a finding that the law is unconstitutional under rational basis review.

While the proposition that a law is irrational if it results in the opposite outcome from lawmakers' intentions likely strikes most as a fairly obvious contention, the Supreme Court has not interpreted the Constitution to require laws to work in any meaningful way to meet the rational basis threshold. Thus, there are examples of laws that have at least an arguably perverse effect—such as mandatory bike helmet laws,[8] laws that increase criminal corporate liability,[9] and even mandatory compensation schemes for government takings and constitutional torts.[10] And while a perverse outcome may result in the law being repealed or simply unenforced, it is rare for such a law to be challenged as unconstitutional through litigation.[11] This is not altogether surprising, as the burden litigants face to show that government action is so irrational as to be unconstitutional is quite high.[12] Further, Supreme Court precedent does not clearly map out how litigants might use a perverse outcome as the basis of a successful challenge under rational basis review, although such a roadmap does exist if one is willing to read between the lines.[13]

To illustrate just how strangely the law responds to perverse outcomes, a brief (albeit hyperbolic) hypothetical may be useful. We could start with a topic on which there is wide popular and scientific consensus—for example,

[8] *See* Piet de Jong, *The Health Impact of Mandatory Bicycle Helmet Laws*, 32 RISK ANALYSIS 782, 782 (2012) ("In jurisdictions where cycling is safe, a helmet law is likely to have a large unintended negative health impact. In jurisdictions where cycling is relatively unsafe, helmets will do little to make it safer. . . .").

[9] Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833, 836 (1994) (arguing that increasing criminal corporate liability may result in increased corporate crime).

[10] Daryl J. Levinson, *Making Government Pay: Markets, Politics, and the Allocation of Constitutional Costs*, 67 U. CHI. L. REV. 345, 415 (2000) (arguing that the deterrence effects of mandatory compensation schemes on government behavior "seem as likely to be perverse as beneficial").

[11] Legal scholars, too, have engaged with the problems of perversity, although generally through the lens of improving law and regulation to avoid perversity—not the constitutional implications of such perversity. *See, e.g.* Sunstein, *supra* note 7, at (stating the article's "general goal" as describing "some [regulatory] reforms by which we might restructure regulatory institutions so as to achieve their often salutary purposes, while at the same time incorporating the flexibility, respect for individual autonomy and initiative, and productive potential of markets").

[12] Jane R. Bambauer & Toni M. Massaro, *Outrageous and Irrational*, 100 MINN. L. REV. 281, 340 (2015) ("Parties urging that government action is irrational must come with their litigation bags overflowing with arguments against actual and even hypothetical justifications for that action.").

[13] *See infra* Section IV.C. Further, the Court, and individual Justices, have sometimes hinted that perversity of outcome is a relevant part of a valid constitutional inquiry. *See North Carolina v. Alford*, 400 U.S. 25, 38–39 (1970) (stating that a complete prohibition on states' ability to allow criminal defendants to represent themselves would be "counterproductive" to the mandates of the 14th amendment, and thus invalid); *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 474 (2010) (Stevens, J., concurring in part) (noting that it would be "perfectly understandable" for the Court to "attend carefully to the choices the Legislature has made" when a regulation might prove to be "counterproductive").

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that smoking increases the risk of developing lung cancer.[14] Leaving aside, for the moment, that there can be divergent opinions on the right way to address this issue, there is overwhelmingly consistent scientific evidence that smoking results in negative health consequences generally, and increased rates of lung cancer specifically.[15] Additionally, there is wide popular and professional consensus to the same effect.[16] Now consider a state legislature in State A. The legislature from State A enacts a law funding a campaign to encourage its citizens to take up smoking as a method to reduce cancer. In fact, the State A legislature conditions the receipt of certain government benefits on individuals' adherence to a strict pack-a-day smoking habit. The legislature states its belief that smoking will help reduce cancer rates because, historically, people used to smoke more,[17] and rates of cancer also used to be lower.[18] Thus, they believe that encouraging smoking will likely reduce cancer.[19] This is, of course, incorrect and dangerous. Smoking will definitely increase cancer. And unsurprisingly, that's what happens in State A—an increase in smoking results in a statistically significant increase in cancer (among other ill effects). At what point could a citizen of the state, deprived of state benefits as a result of her refusal to comply with the smoking mandate (or harmed because of her acquiescence), challenge the law? And under what theory? The state correctly identified a problem (cancer) and attempted to solve it, utilizing its own observations and reasoning to develop a method to do so. Under the prevailing interpretation of rational basis review, the law is not constitutionally deficient.[20]

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[14] *See generally, What Are the Risk Factors for Lung Cancer?*, CTRS. FOR DISEASE CONTROL AND PREVENTION, https://www.cdc.gov/cancer/lung/basic_info/risk_factors.htm#:~:text=people%20who%20smoke%20cigarettes%20are,the%20risk%20of%20lung%20cancer [https://perma.cc/6ADZ-UDXQ] ("People who smoke cigarettes are 15 to 30 times more likely to get lung cancer or die from lung cancer than people who do not smoke.").

[15] *See Health Effects of Cigarette Smoking*, CTRS. FOR DISEASE CONTROL AND PREVENTION, cdc.gov/tobacco/data_statistics/fact_sheets/health_effects/effects_cig_smoking/index.htm [https://perma.cc/X9ZJ-FFML] (explaining that estimates show that smoking increases the risk for coronary heart disease by 2 to 4 times, for stroke by 2 to 4 times, of men developing lung cancer by 25 times, and of women developing lung cancer by 25.7 times).

[16] *Smoking in America: Why More Americans Are Kicking the Habit*, AM. HEART. ASSOC. (Aug. 30, 2018), https://www.heart.org/en/news/2018/08/29/smoking-in-america-why-more-americans-are-kicking-the-habit

[https://perma.cc/F5TG-XER7] ("The overall cigarette smoking rate among U.S. adults has hit an all-time low, according to the Centers for Disease Control and Prevention.").

[17] *Id.* (noting that "fifty years ago . . . roughly 42 percent of American adults" were smokers).

[18] It is true that death rates for lung and bronchus cancer were lower from when these deaths began to be tracked (around 1930) through the mid-1960s—at which point they started to increase, reaching their apex in the mid-1980s through the early 1990s. *See* AM. CANCER SOC'Y., CANCER FACTS AND FIGURES 2001, at 2 (2001), https://www.cancer.org/content/dam/cancer-org/research/cancer-facts-and-statistics/annual-cancer-facts-and-figures/2021/cancer-facts-and-figures-2021.pdf [https://perma.cc/4FJQ-V3RC]. Of course, this doesn't account for the increased *identification* of these deaths as cancer-related.

[19] The old distinction between correlation and causation strikes again.

[20] Dana Berliner, *The Federal Rational Basis Test—Fact and Fiction*, 14 GEO. J.L. & PUB. POL'Y 373, 377 (2016) ("From the way courts often describe the rational-basis test, the analysis could take place in a vacuum, with the government making up the purpose of the law and

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Of course, the law *is* woefully deficient. Can it be that the Constitution provides no shield to such obviously reckless legislative action? That cannot be. While it might be true that the legislature is not required to amass a factual record in support of its lawmaking function,[21] it is still required to act *rationally* to further its articulated interest. Any meaningful definition of rationality, I argue, necessarily includes taking into consideration the widely available, widely accepted, consistent evidence that smoking increases lung cancer.

You may, at this point, *rationally* be wondering why any of this matters because no legislature would ever mandate its citizenry take up smoking. And you would be right—sort of. There are certainly historical and international examples of such perverse laws. Perhaps best known is the "Cobra Effect"—a term coined to describe how the colonial British government in India offered a bounty for dead cobras as a method to decrease the snake population, only to incentivize Indian citizens keen on collecting the bounty to undertake robust cobra breeding programs that resulted in more snakes than ever before.[22] Similarly, a law passed in Mexico City in the 1980s in order to curb air pollution by reducing the number of cars on the road by 20% had the perverse effect of increasing air pollution as citizens forwent their own cars in favor of (more polluting) taxi cabs.[23]

But you don't have to go back in history or overseas for relevant examples. State legislatures across the United States (and the federal government) also pass perverse laws.[24] Some academics have argued that the Americans with Disabilities Act—passed with the intent of increasing employment opportunities for disabled employees—results in *less* employment opportunities as employers avoid the perceived additional costs of hiring disabled employees.[25] Others have claimed that patent laws designed to spur technological innovation might result in a dampening of such innovation.[26] The Endangered Species Act may encourage individual actors to destroy fragile species[27]

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untrue facts that a legislature might have believed that then form a relationship with the made-up purpose. It is a bizarre prospect, but rational-basis cases rarely proceed purely by exercises of imagination.").

[21] Nor, technically, are they required to state their legislative intent. *See* Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) ("To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification."). Although for purposes of this illustration, they have done so.

[22] Stephen J. Dunbar, *The Cobra Effect*, FREAKONOMICS (Oct. 11, 2012, 9:28 AM), https://freakonomics.com/podcast/the-cobra-effect-a-new-freakonomics-radio-podcast/ [https://perma.cc/ZP9A-XXHC].

[23] Lucas W. Davis, *The Effect of Driving Restrictions on Air Quality in Mexico City*, 116 J. POL. ECON. 38, 40 (2008).

[24] *See generally* Sunstein, *supra* note 7 (describing six examples of regulations that result in perverse outcomes).

[25] Daron Acemoglu & Joshua D. Angrist, *Consequences of Employment Protection? The Case of the Americans with Disabilities Act*, 109 J. POL. ECON. 915, 949–50 (2001).

[26] Katya Assaf, *Of Patents and Cobras: Exposing the Problem of Asymmetry*, 35 CARDOZO ARTS & ENT. L.J. 1, 3–4 (2016).

[27] *See* Dean Lueck & Jeffrey A. Michael, *Preemptive Habitat Destruction Under the Endangered Species Act*, 46 J.L. & ECON. 27, 30 (2003).

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and the National Historic Preservation Act may stimulate the destruction of historical buildings.[28] Mandatory disclosures may harm the consumers they were designed to protect.[29]And as my co-author Ben McMichael and I have explored in prior work, laws that aim to protect fetal and infant life by criminalizing risky behavior in pregnancy often result in *higher* levels of fetal and infant death.[30] The laws designed to protect babies actually kills babies.[31] As this last example illustrates, however, perverse laws that concern hot button issues are not generally discussed through the frame of perversity. Because these laws implicate more classic social justice concerns about animus, the legislation of morality, discriminatory effect, and the like, scholars and advocates tend to challenge them on these bases and not focus on the argument that the laws don't work—and often exacerbate the problems they are intended to solve.[32] This strategic choice is understandable considering the lack of rationality that rational basis seems to require. But ceding a discussion of rationality foregoes a potentially fruitful method for challenging such laws that simultaneously avoids some of the thornier problems of identifying unspoken intent or unmasking unconscious bias.

This Article attempts to elaborate on how focusing on the *irrationality* of government action in pursuing perverse policies may be an overlooked and effective tactic in challenging the constitutionality of at least some egregious government action. While the argument about perversity is narrow, its potential impact is large. To demonstrate this potential impact, this Article explores how a perversity-as-irrationality framework might apply in a number of legal arenas, including aspects of the criminal justice system (such as mandatory arrest laws in the domestic violence context) and reproductive rights law (including abstinence-only sex education laws and the targeted regulation of abortion providers).

The Article proceeds in five parts. Part II provides an overview of the current state of rational basis review. Part III more specifically defines perversity and discusses how it is differentiated from non-perverse, but nonetheless potentially undesirable outcomes. Part IV puts the two pieces together, showing how demonstrated perversity, as I define it, should form the basis of a finding that a law is irrational and thus unconstitutional. It also explores how such a suggestion adds to an ongoing scholarly discussion of the proper scope of rational basis review and suggestions for its reform. Part

[28] *See* J. Peter Byrne, *Precipice Regulations and Perverse Incentives: Comparing Historic Preservation Designation and Endangered Species Listing*, 27 GEO. INT'L ENV'T. L. REV. 343, 352–54 (2015).

[29] Molly Mercer & Ahmed E. Taha, *Unintended Consequences: An Experimental Investigation of the (in)effectiveness of Mandatory Disclosures*, 55 SANTA CLARA L. REV. 405, 408 (2015).

[30] Meghan Boone and Benjamin McMichael, *State-Created Fetal Harm*, 109 GEO. L.J. 475, 477–78 (2021). As discussed in the paper, laws that criminalize pregnant women unsurprisingly disincentivize women from seeking prenatal care, resulting in considerably worse health outcomes for themselves and their pregnancies. *Id.* at 487.

[31] *Id.* at 513–14.

[32] Which is not to say they do not sometimes point out this unhappy circumstance, but only that it is rarely the focal point of legal scholarship or analysis.

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V briefly delves into the procedures that could be used to evaluate a claim of perversity-as-irrationality. Part VI explores how this theory might most effectively be put into practice as a method to challenge government action in three areas—abortion, sex education, and mandatory arrest provisions in domestic violence statutes.[33]

I. Rational Basis Review

Rational basis review is the constitutional standard applied for both equal protection and due process claims[34] when the classification does not involve a suspect class (like race) or the infringement of a fundamental right (like the right to marry).[35] As all laws involve classifications,[36] there is always a potential equal protection challenge to all basic economic, social, or public health legislation that utilizes rational basis review. Rational basis review requires only that state action must be rationally related to a legitimate government interest.[37] Such a simple statement, however, belies the deep, sometimes conflicting precedent that exists. As Justice Rehnquist concluded in his majority opinion in *United States Railroad Retirement Board v. Fritz*,[38] the Court "has not been altogether consistent in its pronouncements in this area"[39] and, "[t]he most arrogant legal scholar would not claim that all of [the] cases applied a uniform or consistent [rational basis] test under equal protection principles."[40] Thus, while there is undoubtedly a "canonical" un-

[33] *See infra* Part VI.

[34] The interpretation of the rational basis standard under the Due Process and Equal Protection clauses is identical. *See* Gary v. City of Warner Robins, 311 F.3d 1334, 1339 n.10 (11th Cir. 2002) ("[T]he rational basis test utilized with respect to an equal protection claim is identical to the rational basis test utilized with respect to a substantive due process claim."). The rational basis test, however, precedes the 14th Amendment's requirements of equal protection and due process. *See* Nachbar, *supra* note 4, at 1635 (describing the historical development of rational basis review).

[35] Heightened tiers of scrutiny are reserved for rights specifically outlined in the Constitution, core political rights, or discrimination against "discrete and insular minorities." *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n. 4 (1938).

[36] *See* Toll v. Moreno, 458 U.S. 1, 39 (1982) (Rehnquist, J., dissenting) ("All laws classify, and, unremarkably, the characteristics that distinguish the classes so created have been judged relevant by the legislators responsible for the enactment."); Michael J. Perry, *Modern Equal Protection: A Conceptualization and Appraisal*, 79 Colum. L. Rev. 1023, 1068 (1979) ("Every time an agency of government formulates a rule—in particular, every time a legislature enacts a law—it classifies.").

[37] *See* Jefferson v. Hackney, 406 U.S. 535, 546 (1972); Membreno v. City of Hialeah, 188 So. 3d 13, 22 (Fla. Dist. Ct. App. 2016) ("[C]ourts' power and responsibility to determine whether a law violates substantive due process and equal protection are at their absolute minimum concerning laws, such as business and economic regulations, that do not establish suspect classes and do not infringe fundamental rights."). Though most often applied to legislation, the test also applies to executive action.

[38] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166 (1980).

[39] *Id.* at 174.

[40] *Id.* at 176 n.10. Indeed, some scholars would be considerably less kind to the doctrine of rational basis, instead announcing that it is "nothing more than a Magic Eight Ball that randomly generates different answers to key constitutional questions depending on who happens

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derstanding of rational basis review, such an understanding marks only the beginning and not the end of a complete picture of how rational basis review functions.[41] Recently, scholarly interest in rational basis review has been steadily growing, leading scholars to declare that, '[t]he rational basis test is enjoying a bit of a comeback."[42] In light of these conflicting and evolving understandings of rational basis review, the following sections lay out a fuller picture of the nature and requirements of rational basis review.

A. Canonical Rational Basis Review

It is perhaps only a slight exaggeration to say that the canonical understanding of rational basis review is that the determination that rational basis review is the governing standard amounts to an announcement that the government wins.[43] Instead, it is useful to think of the rational basis test as a "constitutional floor"—a very low bar for the government to overcome, but a bar nonetheless.[44]

The modern rational basis test evolved in part as a reaction against the judiciary's persistent invalidation of economic regulation, including in such cases as the infamous *Lochner v. New York.* [45] Following the repudiation of *Lochner* and its underlying reasoning,[46] the Court shifted from employing a more searching reasonable basis requirement to the modern, extremely deferential rational basis standard.[47] While the former required courts to deter-

to be shaking it and with what level of vigor." Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U J.L. & LIBERTY 897, 897 (2005).

[41] Berliner, *supra* note 20, at 374 ("Like a padded résumé, there is a difference between what the rational-basis test says it is and what the test actually is.").

[42] *See* Bambauer & Massaro, *supra* note 12, at 284.

[43] Lawrence O. Gostin, *Public Health Theory and Practice in the Constitutional Design*, 11 HEALTH MATRIX 265, 310 (2001) ("[T]he Court uses the rational basis test and the government almost invariably wins.").

[44] Bambauer & Massaro, *supra* note 12, at 283 (describing rational basis review as a "constitutional floor[ ] to provide a minimum of decency and order the government must maintain in all of its varied activities," that "trigger non-elevated, highly deferential judicial review" and "provide[s] the lightest of checks on government power").

[45] 198 U.S. 45 (1905). Lochner has cast a long shadow on judicial review ever since its repudiation, becoming a one-word stand-in for alleged "judicial activism." Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 873 (1987) ("The spectre of Lochner has loomed over most important constitutional decisions, whether they uphold or invalidate governmental practices.").

[46] Bambauer & Massaro, *supra* note 12, at 324 ("[Lochner] came to be understood as a low point in the history of judicial restraint because it enticed judges to question the value of labor and economic regulations and to substitute their own policy judgments for that of the legislatures.").

[47] *See* James M. McGoldrick, Jr., *The Rational Basis Test and Why It Is So Irrational: An Eighty Year Retrospective,* 55 SAN DIEGO L. REV. 751, 758–74 (2018) (describing history of reasonable and rational review). It is perhaps overly simplistic to say that it was the repudiation of Lochner and similar cases that led to the creation of the tiers of review, however. As Tara Leigh Grove has argued, the change was also likely related to the need for the Supreme Court to provide additional guidance to lower courts as the Court itself could no longer hear as many cases on direct review. *See* Tara Leigh Grove, *Tiers of Scrutiny in a Hierarchical Judiciary*, 14 GEO. J.L. & PUB. POL'Y 475 (2016).

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mine whether the law actually worked to further the legislature's goals and whether more effective methods could have been employed, the latter does neither.[48] The decision in *United States v. Carolene Products Co.*,[49] is generally understood to be the beginning of the modern era of rational basis review, although versions of the test certainly predated that opinion.[50] The rational basis test reflects, at its core, the idea that the government in a representative democracy should normally be permitted to pass and enforce laws because the government reflects the will of the people and the democratic process.[51] As a result of this necessary deference to the political branches, judicial invalidation of most categories of legislation should be greatly disfavored.[52]

But of course, as this Article explores, such intervention is sometimes necessary in response to legislative action either undertaken for improper motives or that employs patently irrational means (and remains uncorrected by the legislature itself). Most scholars (and judges) thus concede that rational basis review involves two related but distinct inquiries—the legitimacy of the government interest (ends) and the rationality of its action in furthering that interest (means).[53] As to the former, canonical rational basis review only requires that the stated or *inferred* government interest is legitimate.[54] In other words, judges can assume legislative intent—even in the absence of evidence that the legislature was *actually* motivated by a particular goal—if it is "reasonably conceivable" that it could have been so motivated.[55] Likewise,

[48] *Id.*

[49] 304 U.S. 144, 152 (1938).

[50] *See* McGoldrick, *supra* note 47, at 758–74 (describing history of reasonable and rational review).

[51] Erwin Chemerinsky, *The Rational Basis Test Is Constitutional (and Desirable)*, 14 GEO. J.L. & PUB. POL'Y 401, 405 (2016) ("Subjecting all laws that draw a distinction among people—which is virtually all laws—to heightened scrutiny would unduly limit the ability of the democratic process to govern.").

[52] Sunstein, *supra* note 45, at 874 ("[The] basic understanding. . . endorsed by the Court in many cases [that] the lesson of the *Lochner* period [is] the need for judicial deference to legislative enactments.").

[53] *See* Nachbar, *supra* note 4, at 1631 ("Rational basis review not only assumes rationality is the objective of legislation, it makes means-ends rationality a constitutional condition of all legislation."); Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 362 (1993) ("[T]he Due Process Clause should be recognized as imposing a general duty on government officials to behave "rationally" in their selection of both ends and means"). Justice Scalia's opinion in F.C.C. v. Beach Commc'ns, 508 U.S. 307 (1993), complicates this understanding by appearing to suggest that rational basis review is not a two-step inquiry, but instead that "where there are 'plausible reasons' for Congress' action," the court's, "inquiry is at an end." *Beach* at 313–14. In other words, once a legitimate purpose has been identified, it is not for the courts to pass judgment on the "wisdom, fairness, or *logic* of legislative choices" to effectuate those ends. *Id.* at 313. For reasons discussed in Section IV.B, *infra*, even Justice Scalia's opinion in Beach can be read to include an analysis of means, albeit an incredibly deferential one. Regardless, Supreme Court precedent following Beach validates the existence of both an end and means analysis as required in evaluating legislation under rational basis review.

[54] Chemerinsky, *supra* note 51, at 401 ("[T]he government's objective only need be a goal that is legitimate for the government to pursue, which means any objective that it is legal for the government to pursue.").

[55] *See* Berliner, *supra* note 20, at 375 (discussing the modern rational basis test and its willingness to incorporate inferred legislative intent, as well as post hoc rationalizations).

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legislatures can come up with rationalizations *post hoc*.[56] In addition to the leniency in determining what their intentions were, legislatures are also given wide latitude to determine what interests are "legitimate;" only a slight few interests, such as bare animus to a politically unpopular group[57] or a "naked transfer of wealth" unmoored from other public-minded justifications,[58] have been described as impermissible.[59] If multiple government interests are articulated, only one need be legitimate in order to suffice.[60]

The rationality of the means employed by the government to effectuate its purpose is judged on a similarly deferential standard, requiring neither precision[61] nor "mathematical nicety,"[62] but only that the means employed are not "patently arbitrary or irrational."[63] Litigants challenging laws as irrational "must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker."[64] Laws that are underinclusive or overinclusive are permissible, as are laws that address one aspect of an identified problem but not other, related issues.[65]

[56] Williamson v. Lee Optical, 348 U.S. 483, 487–89 (1955).

[57] Conversely, sometimes favoritism to a particular group is likewise found to be illegitimate. *See* Berliner, *supra* note 20, at 383–87.

[58] St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013) ("As we see it, neither precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose, but economic protection, that is favoritism, may well be supported by a post hoc perceived rationale. . . without which it is aptly described as a naked transfer of wealth.").

[59] *See* USDA v. Moreno, 413 U.S. 528, 534 (1973) ("For if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."); Berliner, *supra* note 20, at 376 ("Courts are mortally afraid of saying that something is an illegitimate interest.").

[60] N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff, 669 F.3d 374, 398 (noting a statute "will pass rational basis examination" where one of several stated purposes was not legitimate "as long as it was not the only legitimate purpose underlying the legislation"). If unlawful discrimination is shown to be the but-for cause of legislation, however, it can be invalidated even if there were potential, lawful reasons present, as well. *See* Hunter v. Underwood, 471 U.S. 222, 232 (1985) (invalidating §182 of the Alabama Constitution of 1901, which provided for the disenfranchisement of persons convicted of "crime[ ] involving moral turpitude" because the Court found it would not have been adopted in the absence of a racially discriminatory motivation).

[61] Allied Stores of Ohio, Inc. v. Bowers, 358 U.S. 522, 527 (1959) (noting that the State "is not required to resort to close distinctions or to maintain a precise, scientific uniformity" in its laws in order to suffice for rational basis review).

[62] Dandridge v. Williams, 397 U.S. 471, 485 (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)) ("If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.'").

[63] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 177 (1980).

[64] Vance v. Bradley, 440 U.S. 93, 111 (1979).

[65] *See* Williamson v. Lee Optical, 348 U.S. 483, 487–89 (1955).

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B. The Real Rational Basis Review

Of course, rational basis review is not a static doctrine. Perhaps precisely because rational basis review is utilized to cover such a wide variety of circumstances, the protection it offers falls along a spectrum. In the Equal Protection context, for instance, groups that enjoy popular support seem to enjoy a more vigorous version of rational basis review than do less-favored groups.[66] And despite jurists' claims to the contrary, the socially or politically desirable outcome in any particular case certainly seems to affect the strength of courts' inquiries under rational basis review, as well.[67]

The robustness of the review employed may also evolve. For instance, sometimes the path to greater protection under the Equal Protection or Due Process clauses winds through a more searching form of rational basis review, even if it ultimately ends up at a more heightened level of review. For instance, "many, if not most, of the early victories of the women's rights movement were won on a rational basis framework,"[68] even though sex classifications are now reviewed under an intermediate standard of scrutiny.[69] The right to marry, now understood as an aspect of substantive due process, was also originally reviewed under a deferential rational basis standard before being elevated to a higher—although still somewhat ambiguous—standard in the modern right to marry cases.[70] The rational basis test has also "played a starring role in the modern development of so-called 'gay' constitutional rights"—forcing governments to (try to) explain the rationality of laws that discriminated on the basis of sexual orientation.[71]

There is also a growing group of cases that purport to apply rational basis review but in practice apply a standard that is more stringent than the exceedingly deferential standard traditionally associated with it. These cases—often dubbed "rational basis with bite"—differ from the canonical approach in two ways. First, they pay special attention to the animus that is

[66] *See* Eyer, *supra* note 2, at 1323 ("[T]here has been variation in the availability of meaningful rational basis review: as emerging social movements gain credence, their use of rational basis review tends to expand opportunities—both for their own litigation priorities, and also for others to access more meaningful minimum-tier review.").

[67] *See* Nachbar, *supra* note 4, at 1633 ("Realists might argue that the rational basis test should not be taken seriously and serves only as doctrinal cover for what the Court wishes to do in particular cases."); Clark Neily, *No Such Thing: Litigating Under the Rational Basis Test*, 1 N.Y.U. J.L. & Liberty 898, 910–13 (2005) (describing four cases in which the Supreme Court "strayed from the literal commands of the rational basis test in order to achieve a preferred result").

[68] *See* Eyer, *supra* note 2 at 1328; *see also* Reed v. Reed, 404 U.S. 71, 76 (1971) (using rational basis review to find that a mandatory preference to males over females in deciding the administrator of an estate was "the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment").

[69] Craig v. Boren, 429 U.S. 190, 208 (1976) (announcing the modern intermediate scrutiny approach now applied to sex classifications).

[70] *See* Eyer, *supra* note 2, at 1344–46.

[71] Bambauer & Massaro, *supra* note 12, at 299.

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directed at the group who is being regulated.[72] Second, they require a tighter fit in the means-ends analysis that is at the heart of rational basis review,[73] often striking down laws that are significantly over or underinclusive.[74] The cases dealing with animus towards a disfavored group or that apply "rational basis with bite" are sometimes described as distinct and sometimes as interrelated phenomena.[75] Despite the breadth of cases that fall into this category, they are often derided as not "true" rational basis cases, but instead cases that employ a not-totally-defined heightened scrutiny while only purporting to apply rational basis. Other scholars, notably Katie Eyer, reject this characterization, describing these cases as reflective of a characteristic of—not a departure from—rational basis review.[76]

Clearly, the "canonical" understanding of rational basis review as almost certain to result in a win for the government is incomplete.[77] The meaning of rational basis review has been evolving since its entrance into the constitutional conversation—and continues to evolve to this day.[78] During this evolution, courts have used, and continue to use, rational basis review to strike down laws that lack either a legitimate governmental interest or a rational means of achieving that interest.[79] But despite this nuance, it is still fair to say that courts still regularly employ the canonical version of rational basis review, resulting in validation for government action that is at best misguided and at worst downright foolish.[80]

In the next section, the constitutionality of government action is considered at the nadir of rationality—undertaking an action that is likely to thwart one's own purpose.

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[72] Romer v. Evans, 517 U.S. 620, 632 (1996) ("[The law at issue] has the peculiar property of imposing a broad and undifferentiated disability on a single named group. . . . ").

[73] *Id.* ("[The] sheer breadth [of the challenged law] is so discontinuous with the reasons offered for it that [it] seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.").

[74] *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 450 (1985) (finding that ordinance requiring a special permit for a home for the mentally retarded was both over and underinclusive to its purported goals).

[75] *See* Eyer, *supra* note 2, at 1356–57 ("Sometimes conceived of as working in tandem, and sometimes as distinct theories, together [the animus and rational basis with bite cases] have provided the dominant canonical explanation for those cases not fitting the ultra-deferential model that the canon nevertheless cannot ignore.").

[76] *See generally* Eyer, *supra* note 2.

[77] *See id.* at 1366 ("[T]he reality of rational basis review is far messier, and less consistent, than the canon acknowledges.").

[78] *Id.* ("[T]he reality of the practice of rational basis review is that it is 'up for grabs' in the context of individual cases in a way that few other constitutional doctrines are.").

[79] *See, e.g.*, Berger v. City of Mayfield Heights, 154 F.3d 621, 625 (6th Cir. 1998) (holding a city ordinance that required vacant lots with less than 100 feet of street frontage to be "totally cut" to a height of eight inches failed rational basis review because the means chosen by the city did not rationally promote their purported interest in public peace, health, or safety).

[80] Bambauer & Massaro, *supra* note 12, at 287 ("Judges will continue to confront many scenarios in which they simply hold their noses and uphold government conduct that they find distasteful, stupid, clunky, corrupt, invasive, or worse.")

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II. Demonstrated Perversity

Scholarly attention on the very human problem of trying to do one thing and nevertheless doing something else entirely has a long and illustrious history.[81] A foundational article by Robert K. Merton, *The Unanticipated Consequences of Social Action*, lays out the basic problems, from lacking evidence,[82] to misunderstanding existing evidence,[83] to failing to understand how changing context can create different outcomes,[84] to narrowly focusing on one aspect of a problem such that other obvious consequences are overlooked.[85] Needless to say, many very smart people have set themselves to the task of answering *why* human action is so prone to failing to achieve its intended purpose. Further, legislators are certainly not alone in suffering outcomes different than their intent—doctors and scientists, religious leaders and car salespeople, all must contend with perversity of outcomes, as well as ineffective actions and unintended consequences.[86] Nevertheless, once such perversity occurs, the legal system, with its built-in system of review, is uniquely positioned to rectify such outcomes.

In order to successfully make an argument that legislation is constitutionally deficient as a result of its demonstrable perversity, it is necessary at the outset to have a meaningful and clear definition of what constitutes perversity. For purposes of this project, a perverse law is one that clearly contravenes the overarching legislative intent because the law is solely or primarily responsible for producing the opposite result from the stated or obvious legislative intent.[87] Legislature aims to do X. Instead, the resulting legislation

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[81] *See* Robert K. Merton, *The Unanticipated Consequences of Purposive Social Action,* 1 Am. Socio. Rev. 894, 894 n.1 (1936) (describing how the "unanticipated consequences of purposive action has been treated by virtually every substantial contributor to the long history of social thought" and listing modern theorists who have engaged with this issue including Machiavelli, Adam Smith, Marx, and Pareto, among others).

[82] *Id.* at 898 ("The most obvious limitation to a correct anticipation of consequences of action is provided by the existing state of knowledge.").

[83] *See Id.* at 899–900.

[84] *Id.* at 899 ("We have here the paradox that whereas past experience is the sole guide to our expectations on the assumption that certain past, present and future acts are sufficiently alike to be grouped in the same category, these experiences are in fact different. To the extent that these differences are pertinent to the outcome of the action and appropriate corrections for these differences are not adopted, the actual results will differ from the expected.").

[85] *Id.* at 898 ("A frequent source of misunderstanding will be eliminated at the outset if it is realized that the factors involved in unanticipated consequences are precisely, factors, and that none of these serves by itself to explain any concrete case.").

[86] *See* Merton, *supra* note 81, at 894 (noting the "diversity of context" in which unintended consequences occur which range from "theology to technology"). There is a robust scholarship on how social justice litigation itself—even and perhaps especially when it is successful—creates perverse outcomes to those intended by advocates. *See, e.g.,* Margo Schlanger, *Stealth Advocacy Can (Sometimes) Change the World,* 113 Mich. L. Rev. 897 (2015) (cataloguing scholarly attention to how social justice litigation was the cause of backlash that ultimately undermined plaintiffs' goals).

[87] This definition tracks, but elaborates on, definitions of perversity in prior scholarship. *See* Sunstein, *supra* note 7, at 407 ("By 'paradoxes of the regulatory state,' I mean self-defeating

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does -X. In the following sections, this definition is explored in greater detail.

A. Determining Intent

Of course, it is difficult to determine whether a law results in the opposite of its intended outcome if we do not first clearly ascertain the legislative intent in any particular instance.[88] Legitimate government interests can cover a broad range of traditional actions within the police power of the state, including "[p]ublic safety, public health, morality, peace and quiet, law and order . . . ."[89] In some cases, determining intent is relatively straightforward. Legislatures routinely include statements of purpose either in the preamble or text of legislation. While interpretive issues may arise if these statements are vague or otherwise ambiguous, canons of statutory interpretation can reasonably aid a jurist in determining what the text actually means. As previously mentioned, many scholars rightly question such statements as likely camouflaging actual, more insidious legislative intent, but for purposes of this project and determining legislative perversity, it is not necessary to probe for the "real" purpose of the law.[90] Taking written declarations of intent at face value is sufficient. Certainly, courts routinely espouse the importance of limiting their interpretations of intent to what the legislature actually said—not what the court thinks the legislature should have said or what the court thinks the legislature really meant.[91]

What does demonstrated perversity look like, however, in instances where the legislative intent goes unstated? Indeed, legislatures are not required to provide an explicit purpose when passing laws, and courts can thus infer legislative intent when evaluating whether the law survives rational basis review.[92] In these instances, courts will simply look at whether the law rationally furthers *any* proper purpose, whether the legislature identified such a purpose or not.[93] Thus, laws are constitutionally permissible if there is

regulatory strategies—strategies that achieve an end precisely opposite to the one intended, or to the only public-regarding justification than can be brought forward in their support.").

[88] *See id.* at 412 ("Any statute that fails to produce a net benefit to society can be described as self-defeating if its purpose is described as the improvement of the world. But if a statute's purpose is to benefit a particular group or segment of society, and that purpose is achieved, then the statute is not self-defeating at all.").

[89] Berman v. Parker, 348 U.S. 26, 32 (1954) (listing some of the "conspicuous"—but non-exhaustive—"examples of the traditional application of the police power to municipal affairs.").

[90] And there is some precedent to suggest that such searching is improper. *See, e.g.,* F.C.C. v. Beach Commc'ns,, 508 U.S. 307 (1993).

[91] *See, e.g.*, Langdeau v. Langdeau, 751 N.W.2d 722, 727 (S.D. 2008) (citing US West Commc'ns, Inc. v. Pub. Utilities Comm'n, 505 N.W.2d 115, 123 (S.D. 1993)) ("The intent of a statute is determined from what the legislature said, rather than what the courts think it should have said, and the court must confine itself to the language used.").

[92] *See, e.g.*, Nordlinger v. Hahn, 505 U.S. 1, 15 (1992) ("To be sure, the Equal Protection Clause does not demand for purposes of rational-basis review that a legislature or governing decisionmaker actually articulate at any time the purpose or rationale supporting its classification.").

[93] *Id.*

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"any reasonably conceivable state of facts that could provide a rational basis for the classification."[94] In doing this analysis, the court is allowed to make up potential legislative aims out of whole cloth, although it is constrained in doing so by the mandate that such aims must still be proper—i.e., for an allowable reason. Without a stated intent, it might seem impossible to determine perversity—how can a law have the opposite of an undefined intended effect? But courts are already, in essence, engaging in this inquiry when they look for evidence that the law furthers any proper purpose. If a law is having *no* effects that a legislature would properly seek, but instead resulting (or likely to result) in effects that would frustrate the will of any rational legislature, it could still be "perverse" under the framework laid out here.

One more aspect of legislative intent is worth exploring in further detail. If the goal of a piece of legislation is "poverty reduction" and a subsection of the law intends to provide low-cost housing vouchers to 15% more individuals than currently receive them, does the perversity analysis attach to "poverty reduction" or the goal of providing 15% more vouchers? One could imagine a system that successfully met its target of distributing more housing vouchers but nonetheless resulted in increased poverty.[95] All a government would have to do to arrive at this unhappy outcome would be to hand out more housing vouchers to people who *aren't* experiencing poverty, thus reducing the number of vouchers available to the truly needy.

This concern can be addressed, however, by reference to the regularly applied "whole act rule." The whole act rule instructs jurists to interpret a given piece of legislation in a way that makes sense given the entirety of the legislative text.[96] In the foregoing example, the law would still be perverse if it had a demonstrated effect of increasing poverty, even if the smaller, more technical "goal" was met.[97] The definition of perversity provided at the outset of this section incorporates the basic concept of the whole act rule, as it only labels laws perverse when they "clearly contravene the *overarching* legislative intent."[98] Outcomes that include the opposite effect of smaller, component goals when the overarching intent of the legislature is satisfied would not be the basis, therefore, of a finding that the law is perverse.

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[94] REO Enter. v. Village of Dorchester, 306 Neb. 683, 689 (2020).

[95] *See* Merton, *supra* note 81, at 902 ("[An action can be] rational, in the sense that it is an action which may be expected to lead to the attainment of the specific goal; irrational, in the sense that it may defeat the pursuit or attainment of other values which are not, at the moment, paramount but which none the less form an integral part of the individual's scale of values.").

[96] *See* Richards v. United States, 369 U.S. 1, 11 (1962) ("We believe it fundamental that a section of a statute should not be read in isolation from the context of the whole Act, and that in fulfilling our responsibility in interpreting legislation, we must not be guided by a single sentence or member of a sentence, but [should] look to the provisions of the whole law, and to its object and policy.").

[97] *See* United States v. Kozeny, 541 F.3d 166, 171 (2d Cir. 2008) ("The whole act rule of statutory construction . . . exhorts us to read a section of a statute not in isolation from the context of the whole Act but to look to the provisions of the whole law, and to its object and policy.").

[98] *Cf.* Galindo v. Johnson, 19 F. Supp. 2d 697, 702 (W.D. Tex. 1998) ("Congress cannot be presumed to act in a manner counterproductive to the purposes of the statute as a whole.").

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Thus, whether through the written statements of the legislature itself, an analysis of the potentially proper goals of the legislation, or an assessment of the "whole act" when determining the legislative intent undergirding a multi-part law, courts are more than capable of arriving at a conclusion regarding the legislative purpose that is the necessary first step in assessing constitutionality under rational basis review.

B. Defining Perversity

In the example from the introductory section about the mandatory smoking law, determining perversity would be relatively straightforward. The legislature stated in the text of the law itself that the goal was to reduce lung cancer and the clear effect of the law was to increase lung cancer. Those wishing to challenge the law need only show that it was the law itself, and not some other factor, that created the offensive result. But what if the law simply did nothing to change the lung cancer rate (either because people refused to comply or due to some other reason) or what if the lung cancer rate remained steady (or even slightly decreased), but the rates of chronic obstructive pulmonary disorder (COPD) skyrocketed? These outcomes are not technically perverse, as this project defines it, but instead deal with issues of inefficacy and unintended consequences.

An ineffective law is not necessarily a perverse one. Examples of ineffective legislation abound.[99] Occasional or even frequent inefficacy in lawmaking is actually understandable, considering the wide range of problems that legislatures are called upon to address, the limits of scientific knowledge, and the constraints on budget and political will that they face.[100] Some laws simply do nothing. Legislature aims to effect X. Instead, X is unchanged. But doing nothing is, importantly, distinct from doing the opposite of legislative intent. It at least preserves the status quo as it existed at the time of legislative enactment. As odious as they may be, ineffective laws are not generally unconstitutional.[101]

Another category of outcomes that are not necessarily included in the concept of perversity for purposes of this project are those that result in unintended consequences. Unintended consequences are outcomes that the

[99] *See* LAWRENCE M. FRIEDMAN, IMPACT: HOW LAW AFFECTS BEHAVIOR 229 (2016) (discussing studies that show the ineffectiveness of different methods of increasing compliance with tax laws).

[100] John F. Manning, *The Absurdity Doctrine*, 116 HARV. L. REV. 2387, 2395 (2003) (describing how political realities and unseen bargains sometimes create legislation that may appear irrational); Bambauer & Massaro, *supra* note 12, at 337 ("Political processes do, of course, involve compromises and deals brokered between legislators with disharmonious mindsets.").

[101] *See* Heffner v. Murphy, 745 F.3d 56, 85 (3d Cir. 2014) ("The Constitution does not protect against inefficient, wasteful, or meaningless legislation."). Of course, even inefficacy, taken to the extreme, might present a compelling case for irrationality. One could certainly imagine a rationality challenge to a long-standing, very expensive and burdensome government program that clearly did *nothing*—and had clearly been doing nothing for a very long time. An interesting question for future research.

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legislature did not intend, to be sure, but they are outcomes unrelated to the original intent of the legislation. Legislature aims to do X. It ends up doing Y and Z. But to say a law has unintended consequences does not, standing alone, speak to whether the law was ineffective in its purpose. A law could be perverse and *also* have unintended consequences (-X and Y) or be very effective at its intended purpose but still have unintended consequences that may be abhorrent enough to warrant repeal of the law (X and Z). For instance, taxes on single-use plastic bags have been effective at encouraging consumers to replace these products with reusable bags.[102] But the failure of consumers to regularly launder reusable bags has resulted in a public health risk to consumers via the increased spread of harmful contaminants and bacteria that attach to unwashed reusable bags.[103] Another example are the so-called "fat taxes" that place a monetary tax on products deemed to be unhealthy, like sugary soda.[104] While these taxes have a fairly ambiguous effect in relation to the purpose of encouraging consumers to make healthier choices,[105] they can have other, unwanted effects such as moving revenue to areas not covered by the tax.[106] Because the presence of unintended consequences does not necessarily reveal anything about whether the law was effective in its intended purpose, it also does not help to answer the question of whether it is perverse.[107] Further, because unintended consequences address outcomes outside of the legislative intent, they are ancillary to the means-ends analysis central to rational basis review.[108]

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[102] Rachelle Holmes Perkins, *Salience and Sin: Designing Taxes in the New Sin Era*, 2014 BYU L. Rev. 143, 181 (2014) (noting that plastic bag taxes have been successful in encouraging consumers to replace them with reusable options); Matthew Zeitlin*, Do Plastic Bag Taxes or Bans Curb Waste? 400 Cities and States Tried It Out*, Vox (Aug. 27, 2019), https://www.vox.com/the-highlight/2019/8/20/20806651/plastic-bag-ban-straw-ban-tax [https://perma.cc/4BAT-AST9] ("Before the tax, about 80 percent of Chicago consumers used disposable bags and fewer than 10 percent used no bags at all. In the year after it went into effect, 'the tax led to a large decrease in the proportion of consumers using a disposable bag, with roughly half of consumers switching to reusable bags while the rest opted for no bags at all.'").

[103] Perkins, *supra* note 102, at 181 ("[S]cientists have found that reusable bags can spread harmful contaminants such as e. coli and other bacteria, which can pose severe health risks to consumers.").

[104] L.M. Powell, J.F. Chriqui, T. Khan, R. Wada & F.J. Chaloupka, *Assessing the Potential Effectiveness of Food and Beverage Taxes and Subsidies for Improving Public Health: A Systematic Review of Prices, Demand and Body Weight Outcomes*, 14 Obesity Revs. 110 (2013).

[105] Perkins, *supra* note 102, at 180 ("Research also shows that any attempts to impose sin taxes on food must be done with extreme care, because there is no guarantee that consumers will not consume even less healthful foods as replacements. For instance, consumption patterns suggest that if fat is taxed, then individuals may increase their salt intake, thereby placing themselves at a greater risk of high blood pressure and cardiovascular disease.")

[106] Jean-Francois Minardi & Francis Pouliot, Montreal Econ. Inst., The Unintended Consequences of Taxes on Tobacco, Alcohol, and Gambling 3 (2014), https://www.iedm.org/files/note0214_en.pdf [https://perma.cc/Q8W8-3UP8].

[107] Although if the unintended consequences are desirable, a legislature could always escape constitutional challenge by arguing that the unintended consequences were the real intent of the law—a type of post hoc reasoning explicitly allowed under rational basis review.

[108] *See* Heffner v. Murphy, 745 F.3d 56, 81 (3d Cir. 2014) ("An otherwise rational legislative response to a given concern cannot be invalidated under the Due Process Clause merely because the chosen solution creates other problems while addressing the original concern.").

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This can get tricky when the "unanticipated" consequence should have been exceedingly obvious. For instance, revisiting our hypothetical mandatory smoking law once more, the "unanticipated" consequence of skyrocketing COPD rates could clearly have been anticipated by any legislature even passingly familiar with the voluminous science on the health hazards of smoking. Nonetheless, if the legislature's intent was solely to reduce lung cancer, and the law did not increase lung cancer, it would not technically be a perverse law. It would be a narrow-sighted and bad law. But unanticipated consequences are generally not so obvious (nor are they always negative).

There is one more category of legislative action that must be addressed that might seem perverse to some but does not actually fit the definition as adopted here. These are circumstances where a legislature intends to do something that certain individuals or groups would find objectionable, and then is successful in doing just that. For instance, let us imagine a state legislature that was more forthcoming about the actual purpose of a law targeting abortion providers ("TRAP" laws)—stating in the preamble of the legislative text that the purpose of the legislation was limiting access to abortion services. Unsurprisingly, local reproductive justice advocates immediately challenge the law upon its passage. While litigants might have success arguing that the law was passed for an improper purpose (and would likely be right), they would not have a perversity argument—the law did (or was likely to do) exactly what it was intended to do.[109] Although the *ends* might be widely seen as illegitimate, the means were entirely rational. Similarly, even as opponents of the Prison Litigation Reform Act argue that it has unfairly limited access to justice for incarcerated people, they recognize that the law was devastatingly effective at one of its primary purposes—curbing litigation by prisoners.[110]

The relatively modest scope of this project comes into focus here. While other scholars may persuasively argue that ineffective laws, laws that have unintended consequences, or laws that adopt purposes that are explicitly improper should also be subject to repeal under rational basis review, there is something special about perversity that makes rational basis review a particularly compelling vehicle for challenging legislation.[111] The following section explores this special relationship between perversity and irrationality.

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[109] *Cf.* Romer v. Evans, 517 U.S. 620, 621 (1996) ("The Fourteenth Amendment's promise that no person shall be denied the equal protection of the laws must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons."). *See, e.g., infra* notes 299–305, and accompanying text.

[110] *See* Andrea Fenster & Margo Schlanger, Prison Policy Initiative, Slamming the Courthouse Door: 25 years of evidence for repealing the Prison Litigation Reform Act, (April 26, 2021), https://www.prisonpolicy.org/reports/PLRA_25.html [https://perma.cc/2HYQ-CPDD].

[111] Of course, as we will see, laws that reflect multiple legislative goals can combine elements of perversity, inefficacy, and unintended consequences, as well. *See infra* Section V.A (discussing how abstinence-only education programs are ineffective at achieving certain legisla-

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III. Why Demonstrated Perversity is Per Se Irrational

There are two pieces to rational basis review: legitimate purpose and rational means.[112] For purposes of this project, we assume that the legislature has articulated at least one legitimate purpose.[113] Of course, the mere existence of a purpose does not, by itself, imply rationality. Our intent to have a particular effect does not suggest anything about the adequacy or efficacy of actions taken in furtherance of that goal.[114] I can have an honest intent to increase my children's consumption of vegetables, but it would be patently irrational for me to present them with a plate of plain steamed spinach and expect a successful result. Thus, because the intent to have a particular effect tells us nothing about the rationality of the adopted means, we will now switch to a focus on the second portion of the rational basis test—the rationality of the means adopted.[115]

As a general rule, the "level of skepticism due for factual contentions in a legislative record should follow the corresponding level of deference in a constitutional case."[116] Thus, courts should more searchingly review the factual record relied on by the legislature when heightened or intermediate scrutiny is the appropriate standard of review. This creates an immediate roadblock to the efficacy of rational basis review to address perverse outcomes because it is the standard of review that results in the *highest* level of deference—i.e., when courts are least likely to probe the rationality of the legislative means. But if there is *no* review of the factual record underpinning a legislative action, it amounts to a complete lack of review of the rationality of state action, thereby nullifying the second part of the two-part rational basis test. Clearly, an interpretation that dictates the appropriate application of rational basis review includes a complete abdication of fifty percent of the underlying test cannot be right. There must be something else.[117]

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tive goals, create unintended negative consequences, and create outcomes perverse to legislative intent in other respects).

[112] *See* Chemerinsky, *supra* note 51, at 402 ("That is, the law will be upheld unless the challenger proves that the law does not serve any conceivable legitimate purpose, or that it is not a reasonable way to attain the intended end.").

[113] Or failed to articulate any purpose, in which case the analysis would simply be whether the legislative action is non-perverse to any legitimate purpose. *See supra* notes 90–92, and accompanying text.

[114] *See* Merton, *supra* note 81, at 896 ("Above all, it must not be inferred that purposive action implies 'rationality' of human action [that persons always use the objectively most adequate means for attainment of their end.]"); Friedman, *supra* note 99, at 45 ("[I]mpact and purpose are usually related, but they are analytically distinct. . . .").

[115] *See cf.* Friedman, *supra* note 99, at 45 ("If we want to know if a new law 'works,' we are really asking two separate questions. First, did it have an impact? And second, did that impact further the [presumed] goal of the law?").

[116] Allison Orr Larsen, *Constitutional Law in an Age of Alternative Facts*, 93 N.Y.U. L. Rev. 175, 228 (2018).

[117] *See* Barletta v. Rilling, 973 F. Supp. 2d 132, 136 (D. Conn. 2013) ("If it is a test with meaning—if it has 'teeth'—rational basis review must mean something beyond absolute deference to the legislature; otherwise it is not review at all. . . . [E]ven where a state can identify a legitimate purpose in support of a statute, the state 'may not rely on a classification whose

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Certainly, there is an argument that if irrationality means *anything*, it means that legislatures cannot blithely pass laws that result in the opposite of the legislative intent.[118] Stepping out of the academic treatment of the question momentarily, it is likely that if you asked a person at random if it was "rational" to engage in behavior that almost certainly would result in the opposite of your intended outcome, she would say no. The obviousness of the answer from a layperson's perspective is apparent. But this argument, while appealing from a commonsense perspective, doesn't engage with the body of case law delineating the scope of rational basis review and the theoretical framework underpinning this precedent. This is not to say that such a lay perspective is useless, but only that it is incomplete.

In the following sections, various arguments supporting the contention that demonstrated perversity should form the basis for a successful challenge using rational basis review are described. The first section explores the parallels between a perversity analysis and generally accepted canons of statutory interpretation. The second section looks at how the modern accessibility of knowledge should shift our understanding of the rationality of government action. The final section assesses how existing Supreme Court precedent still requires laws to have a minimum level of rationality that demonstrably perverse laws simply cannot meet.

A. Statutory Interpretation

Courts' regular employment of certain canons of statutory construction lend support to the idea that it is necessary and appropriate for a court to interpret and apply the law in a manner that furthers legislative intent.[119] For instance, courts often use the legislative history and purpose of the law to interpret the meaning of a law and its application to particular facts.[120] By taking into account what the legislature was attempting to achieve when it passed a law, courts can determine whether a given interpretation is likely to further or hinder that overarching goal.[121] Interpretations more likely to do

relationship to an asserted goal is so attenuated as to render the distinction arbitrary and irrational.'" (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 446, (1985)).

[118] Or, in the absence of a stated intent, laws that result in outcomes that no rational, legitimate legislature could hope for.

[119] *See* Wis. Pub. Intervenor v. Mortier, 501 U.S. 597, 612 n.4 (1991) ("As for the propriety of using legislative history at all, common sense suggests that inquiry benefits from reviewing additional information rather than ignoring it. . . . Our precedents demonstrate that the Court's practice of utilizing legislative history reaches well into its past. . . . We suspect that the practice will likewise reach well into the future.").

[120] *See, e.g.*, Reves v. Ernst & Young, 494 U.S. 56, 60–61 (1990) (using legislative history to decide if a note issued by a co-op is a "security" under the Securities Exchange Act of 1934, 15 U.S.C. §73c(a)(10)).

[121] *See* Millsap v. McDonnell Douglas Corp., 368 F.3d 1246, 1263 (10th Cir. 2004) (Lucero, J., dissenting) ("[T]he art of statutory interpretation is to promote Congressional intent while avoiding counterproductive results.").

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the former are, unsurprisingly, preferred over those that do the latter.[122] In this way, the court is aiming to interpret the law in such a way as to best effectuate the intent of the legislature in passing it.

For example, in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*,[123] the Supreme Court rejected an interpretation of the Sherman Act that would require the adoption of a per se rule regarding vertical retail price agreements, noting that such restraints can "have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed."[124] As the "limited empirical evidence" the Court had in front of it did not foreclose the possibility of a the pro-competitive use of such restraints, the Court found that the adoption of a per se rule against their use would be "counterproductive, increasing the antitrust system's total cost by prohibiting procompetitive conduct the antitrust laws should encourage."[125] Stated differently, the Court refused to interpret the Sherman Act to require a ban on certain conduct because such an interpretation might thwart the overarching purpose of Congress to promote competition—*it might result in a perverse outcome*.

Under the absurdity doctrine, courts are even permitted to interpret laws in clear contravention of the plain meaning of the text of the law, if a law's "plain, clear, literal meaning produces an unintended, absurd result."[126] The Supreme Court has even endorsed such counter-textual interpretations if the result is not absurd, but "merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole.'"[127] The application of the conceptual underpinnings of the absurdity doctrine to a law that creates a perverse outcome is relatively straightforward. If courts cannot *construe* even a clearly worded statute so as to create an outcome opposite from the statute's intent, it does not seem wholly different for a court to *enforce* a statute that does just that.[128] In both instances, a court would be permitting a law to thwart its own purpose—either through the operation of the court's interpretation of the text or through the constitutional vindication of an exercise of state power that has resulted, or is likely to result, in perverse outcomes.

While dealing with the interpretation of statutes, and not determining their validity, this employment of canons of interpretation can be analogized to a court faced with a law that was perverse. In this scenario, invalidating the law that would avoid the perverse outcome would arguably better serve the legislative intent in passing the law. In the face of demonstrated perver-

[122] Spilker v. Shayne Lab'ys., Inc., 520 F.2d 523, 525 (9th Cir. 1975) ("It is a cardinal canon of statutory construction that statutes should be interpreted harmoniously with their dominant legislative purpose.").

[123] 551 U.S. 877 (2007).

[124] *Id.* at 879 n. 3.

[125] *Id.*

[126] Norman J. Singer & J.D. Shambie Singer, 2A Sutherland Statutory Construction § 45:12 (7th ed. 2014)

[127] Perry v. Com. Loan Co., 383 U.S. 392, 400 (1966).

[128] *Cf.* Berger v. City of Mayfield Heights, 154 F.3d 621, 625–26 (6th Cir. 1998) (holding that enforcing the statute as written would render it an arbitrary exercise of governmental power in violation of both equal protection and due process).

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sity, in other words, a court may be more faithfully executing the legislative will by actually refusing to enforce legislation. To be clear, employing a canon of statutory construction to interpret statutory language is a distinct enterprise from using the same theories to invalidate a law as irrational and thus unconstitutional. But canons of statutory construction support the acceptability—and desirability—of courts actively engaging with the statutory text and legislative intent in furtherance of ultimate legislative purpose. When courts use rational basis review to strike down legislation that is demonstrably perverse, they are serving the same function that they do in statutory interpretation—in essence, saving the legislature from itself and protecting individuals from the ill effects that would otherwise result if the court allowed the enforcement of the irrational law.

Of course, it is also an accepted feature of constitutional statutory construction that judges will do everything possible to *avoid* a finding that laws are unconstitutional. But this method is only viable if the law's text is susceptible to more than one reasonable construction. Certainly, if a law can reasonably be read to have more than one *intent*—both constitutionally permissible and impermissible—rational basis review allows judges to focus solely on the former. Nevertheless, judges cannot interpret their way out of actual demonstrated perversity, which has more to do with factual realities in the world than textual interpretations. Even if judges allow an interpretation that focuses only on permissible intentions to avoid a constitutional problem, they cannot uphold a law that is perverse to all permissible legislative goals, however broadly interpreted.

B. Changes in the Accessibility and Accuracy of Information

The theoretical underpinnings of rational basis review were developed at a historical moment when no one could know nearly as much about the likely outcome of legislative action as we do today. Deference to legislative reasoning in this context made sense, as legislatures were arguably in a better position to make educated guesses about how particular laws might operate in their home jurisdictions. For many of the laws passed in the present day, however, there is a wealth of evidence easily and *equally* available to both legislative and judicial bodies.[129] Additionally, new empirical and scientific methodologies allow us to better understand causal relationships, isolating the effect of individual factors and enabling more robust comparisons between individual inputs.[130]

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[129] *See* Larsen, *supra* note 116, at 187–88 ("In the last twenty years the world has undergone a revolutionary change in how information is transmitted and received. Factual information is now cheaply manufactured and easily posted to the world with a click of a mouse.").

[130] In Robert K. Merton's foundational 1936 essay, *The Unanticipated Consequences of Purposive Social Action* he notes the difficulty of causal imputation without empirical foundation. While these issues have not been resolved entirely, the increasingly sophisticated empirical modeling available (coupled with the wealth of data now accessible) make such concerns less pressing than they were almost a hundred years ago. Merton, *supra* note 81, at 897; Wolfgang Wiedermann & Alexander von Eye (eds.), STATISTICS AND CAUSALITY: METHODS FOR AP-

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To understand in context the Court's oft-repeated phrase that uncertain scientific evidence requires courts to defer to legislative decisions,[131] it is useful to return to some of the original cases announcing the propriety of such an approach. In some of the earliest cases where the effect of scientific uncertainty on the court's review are discussed, the Court was confronted with questions such as the efficacy of smallpox vaccines[132] and the amount of liquor that physicians could lawfully proscribe their patients to promote well-being.[133] While we cannot necessarily presume to know how any individual judge would view such challenges today, it seems exceedingly likely that a court would no longer ascribe to a view that there is a great deal of uncertainty regarding the public health benefits of smallpox vaccines or the usefulness of prescriptions for alcohol. While uncertainty existed at the time, a century of information on vaccines and alcohol consumption has resulted in a new level of certainty on these matters.[134] If a legislature attempted to pass a law that encouraged physicians to prescribe patients a couple of stiff drinks, for instance, it seems unlikely that a modern-day judge would throw up her hands and exclaim, "Maybe they are right! How can we possibly know?" Instead, they might reasonably strike down this law as unconstitutionally irrational in the face of modern knowledge on the matter. Of course, when presented with *new* problems around which there is uncertainty—such as the Covid-19 pandemic—the Court has indicated that deference to the legislature continues to be appropriate.[135]

Harnessing the power of reliable evidence and utilizing it to promote more effective government action is a normatively desirable goal. The arc of the last century shows an increasing interest in, and reliance on, evidenced-based practices in law and legislation.[136] Thanks to the development of ever-more sophisticated methodologies and hyper-fast information and communications systems, evidence-based governmental action is considerably more

PLIED EMPIRICAL RESEARCH (2016) (describing developments in statistical methods in respect to causality).

[131] Marshall v. United States, 414 U.S. 417, 427 (1974) ("When Congress undertakes to act in areas fraught with medical and scientific uncertainties, legislative options must be especially broad and courts should be cautious not to rewrite legislation, even assuming, arguendo, that judges with more direct exposure to the problem might make wiser choices.").

[132] Jacobson v. Massachusetts, 197 U.S. 11, 30 (1905) (noting the "opposing theories" on the efficacy and potential dangerousness of vaccinations).

[133] Lambert v. Yellowley, 272 U.S. 581, 597 (1926) ("High medical authority being in conflict as to the medicinal value of spirituous and vinous liquors taken as a beverage, it would, indeed, be strange if Congress lacked the power to determine that the necessities of the liquor problem require a limitation of permissible prescriptions, as by keeping the quantity that may be prescribed within limits which will minimize the temptation to resort to prescriptions as pretexts for obtaining liquor for beverage uses.").

[134] *Health Risks and Benefits of Alcohol Consumption*, 24 ALCOHOL RESEARCH & HEALTH 5 (2000).

[135] S. Bay United Pentecostal Church v. Newsom, 140 S. Ct. 1613 (2020) (Roberts, J., concurring) (noting that in the face of the "medical and scientific uncertainties," inherent in the Covid-19 pandemic, legislators' latitude "must be especially broad.").

[136] *See* Edward J. Imwinkelried, *A New Era in the Evolution of Scientific Evidence–A Primer on Evaluating the Weight of Scientific Evidence,* 23 WM. & MARY L. REV. 261, 273 (1981) (discussing the increased use of scientific evidence in criminal prosecutions).

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attainable now than ever before."[137] Both the accumulation of scientific knowledge and the potential for rapid dissemination of knowledge have increased exponentially since the dawn of the internet age. The potential upsides of this new world for increasing the efficacy of government action has not escaped notice, as actors across the political and policy spectrum embrace evidence-based policy making.[138]

Of course, empirical evidence is not always available, nor is it always conclusive.[139] And examples of legislatures' use of questionable evidence—and questionable uses of valid evidence—are not hard to come by.[140] But these problems don't necessarily undermine the potential efficacy of using rational basis review as a way to ferret out potentially perverse governmental action. Instead, they only serve to highlight the important role the judiciary can and should play in determining when the state of the scientific and professional consensus on a given topic results in governmental action being patently irrational.[141] When legislators use evidence to bolster legislative agendas, courts can fulfill their duty of ascertaining whether such use was rational in light of the accuracy and magnitude of the existing evidence.[142]

While determining the rationality of government action was always within the scope of judicial review mandated by our constitutional structure, the changes to the accuracy and accessibility of information that have occurred in the modern era must necessarily alter what that review looks like. For the judiciary to freeze its understanding of rationality in a historical moment when the nature and dissemination of knowledge was very different than it is today would render modern rational basis review meaningless. It would be hard for the jurists in the early 20th century—or even those in the mid- to late-20th century—to have envisioned the scientific knowledge or the information economy that now exists. More so than ever before, we have the ability to accurately determine the likely impact of government action. And as a result of the invention and explosion of the internet, and the availability of ultrafast research tools and search engines, we also now enjoy a

[137] *See* Underhill, *supra* note 6, at 161 ("Empirical evidence can [ ] improve the impact and efficiency of governmental choices.").

[138] *See, e.g.,* FOUNDATIONS FOR EVIDENCE-BASED POLICYMAKING ACT OF 2018, Pub. L. No. 115–435, 132 Stat. 5529 (2019).

[139] *See* Underhill, *supra* note 6, at 152–53 ("Frustration about the weight and direction of empirical evidence across a range of issues—the deterrence effect of the death penalty, the extent to which sanctions and walls deter migration, the extent to which supervised injection facilities reduce opioid overdoses, to name a few—has taken center stage. . . ."); *supra* notes 134, 163 and accompanying text.

[140] *See* Underhill, *supra* note 7, at 154 ("[Q]uestionable uses of evidence and evidence-based policymaking run rampant").

[141] *See* Scott R. Bauries, *Perversity as Rationality in Teacher Evaluation*, 72 ARK. L. REV. 325, 359 (2019) ("Reviewing—actually reviewing—legislation for whether it is rationally directed to serve a proper legislative purpose is therefore the proper and legitimate role for the courts, one they have abdicated over time by gradually ratcheting down the standards for legislative rationality.").

[142] *See, infra* Part V.

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broad ability to access that information. Rational basis review must be updated to reflect this new reality.

IV. Perversity, Precedent, and Rational Basis Review in the Supreme Court

Of course, the wealth of information that exists and the strength of new methodologies still must contend with the reality that the Supreme Court has disavowed a requirement that legislators must base legislation on any factual evidence at all. In Justice Scalia's opinion in *Beach*, he declared that "[l]egislative choice is not subject to courtroom factfinding and may be based on rational speculation unsupported by evidence or empirical data."[143] This reiterates the accepted proposition that a legislature need not, at the outset, supply evidence that a law will be effective at its intended purpose. As *Beach* is generally thought of to be a high-water mark for deferential treatment of statutes under rational basis review,[144] it is a useful starting point to test the validity of the argument that demonstrably perverse laws should be found unconstitutional. If the theory can survive the interpretation of rational basis as it is contained in *Beach*, it can likely survive the less deferential review allowed in other Supreme Court approaches to rational basis review.[145]

Despite the fact that the Supreme Court has been employing rational basis review for decades, there is no Court-validated, generally accepted definition for "rationality."[146] Justice Scalia's majority opinion in *Beach*, however states that legislative choice can permissibly rely on "rational speculation." I will take my cue from Justice Scalia's own fondness for textual interpretation,[147] then, when we consider what "rational speculation" requires.

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[143] F.C.C. v. Beach Commc'ns, 508 U.S. 307, 301 (1993).

[144] *See* Eyer, *supra* note 3 (noting that, along with Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949), *Beach,* 508 U.S., is a touchstone for the "ultradeferential formulation of rational basis review.").

[145] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 445–46 (1985) (invalidating zoning ordinance that prohibited maintenance of group home for the mentally retarded under the theory that ordinance was irrationally over- and underinclusive).

[146] *See* Nachbar, *supra* note 4, at 1632 ("[T]he Court has never comprehensively described, much less defended, the conception of rationality it applies when conducting rationality review."). Justice Stevens, in his concurrence in *Cleburne*, provides a helpful explanation, albeit not one embraced by a majority of the Court, that indicates logic and neutrality are touchstones:

> The term 'rational,' of course, includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word "rational"- for me at least-includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially.

Cleburne, 473 U.S. at 452 (Stevens, J., concurring).

[147] *See* Tara Leigh Grove, *Which Textualism?*, 134 Harv. L. Rev. 265, 273 (2020) (exploring Justice Scalia's defense of textualism and describing its normative justifications).

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The word rational means "based on clear thought and reason."[148] Not all thoughts are rational, just those that follow intelligible principles related in some way to a reasoned engagement with the question at hand. In other words, rationality implies a decision based on some principle that can be ascertained—logic, facts, even inferences. For instance, the statement "it's Tuesday, so I need an umbrella," is not rational, as it lacks the requisite nexus between the first principle ("it's Tuesday") with the second ("I need an umbrella"). There is no principle or system of engagement that fills in the gap between the two statements. On the other hand, the statement, "it's Tuesday, and the weather report said it would rain on Tuesday, so I need an umbrella," undoubtedly *is* rational. The principle used to arrive at the ultimate conclusion is clear—in this case, reliance on outside expertise in the form of the weather report. But even the statement "it's Tuesday, and I've noticed it often rains on Tuesdays, so I need an umbrella," is at least marginally rational because it is based on a principle or inference that connects the first statement to the second—albeit in a considerably less persuasive way. Thus, rationality requires more than thought—it requires a system of thinking. That this definition of rational is the correct one to employ in rational basis review is bolstered by the fact that it is the same inquiry at the heart of the means-ends reasoning that is the *sine qua non* of rational basis review: the requirement that there is a link, a nexus, a demonstrable connection between the goal and the method undertaken to achieve the goal.

But how does Justice Scalia's requirement that legislators must only engage in rational *speculation* change this requirement for rationality? The word "speculation" means "the activity of guessing possible answers to a question *without having enough information to be certain*."[149] Thus, speculation implies a scientific *uncertainty*. It implies that the answer is not known—and possibly that it is unknowable. In this space, where scientific evidence is nonexistent, scant, or conflicting, legislatures are permitted under rational basis review to pass laws that are merely "rough accommodations."[150] A circumstance in which a legislator takes an action that, according to the widely available and credible evidence, will likely result in the opposite of his or her purported intent, however, is not speculation at all. It is something else entirely—a willful failure to engage with the known, likely effects of his or her own actions.

In sum, to act in the face of uncertain information *can* be rational—if the action comports with *some* ascertainable system of thought or logic.[151]

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[148] *Rational*, Cambridge Dictionary, https://dictionary.cambridge.org/dictionary/english/rational [https://perma.cc/EY6L-4ZWJ].

[149] *Speculation*, Cambridge Dictionary, (emphasis added) https://dictionary.cambridge.org/dictionary/english/speculation [https://perma.cc/R63V-CFYQ].

[150] F.C.C. v. Beach Commc'ns, Inc., 508 U.S. 307, 302 (1993). As the Court has stated in other cases, if it is "arguable," that is sufficient to "immunize the legislative choice from constitutional challenge" under rational basis review. Heller v. Doe, 509 U.S. 312, 333 (1993).

[151] *Cf.* FDA v. Am. Coll. of Obstetrics and Gynecologists, 141 S.Ct. 578, 584–85 (2021) (Sotomayor, J., dissenting from denial of stay) (arguing that the Court should not defer to

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But to act in a manner contrary to known information can never be rational because it belies the use of such a system. Thus, although Justice Scalia does not frame it in this way, even his very deferential take on rational basis review in *Beach* supports the idea that while legislators may not need to seek out evidence to support the rationality of their action, they also cannot blithely ignore the existing evidence. A process by which the legislature is still permitted to "guess" that an outcome will occur when overwhelming evidence shows that such an outcome is almost certainly not going to occur undermines the very foundation of rational basis review.[152] Indeed, in the case widely accepted to be the first decided under the modern rational basis review standard, *United States v. Carolene Products Co.*,[153] the Court made clear that "the existence of facts supporting the legislative judgment is to be presumed . . . *unless* in light of the facts made known or generally assumed it is of such a character as to preclude the assumption that it rests upon . . . ."[154] Returning again to our example from the introduction, the hypothetical state legislature's action to mandate citizens take up smoking might, in a vacuum, be marginally rational (as it *is* based on their observations and inferences), it is not rational in the face of the absolute wealth of information and widely-held understanding that smoking causes cancer. The facts "made known or generally assumed" about the association of smoking with cancer, "preclude[s] the assumption" that a smoking mandate is rational.

Thus, while the Supreme Court has never explicitly articulated an approach to evaluating the constitutionality in the face of perversity, its language describing "rationality" certainly implies the existence of such an analysis. Additionally, Justice Brennan's dissent in *Fritz* provides some insight into what such an approach might look like in practice. In *Frtiz*, the Court was presented with a class action brought by former railroad employees arguing that the 1974 Railroad Retirement Act's grandfather provision was unconstitutional because it made irrational classifications between categories of employees entitled to retirement benefits.[155] The majority opinion, authored by Justice Rehnquist, held that the "language of the statute is clear" and that, as a result, the Court was bound to "assume[ ] that Congress intended what it enacted."[156] Justice Brennan, in contrast, noted that the "principal purpose of [the Act], as explicitly stated by Congress, was to preserve

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legislature's determination that it was medically necessary for women to pick up mifepristone in person despite exemptions to many other drugs during the Covid-19 pandemic because the government had failed to "submit[ ] a single declaration" explaining the decision, and as a result "[t]here simply [wa]s no reasoned decision here to which this Court can defer").

[152] Vance v. Bradley, 440 U.S. 93, 111 (1979) ("In an equal protection case of this type . . . those challenging the legislative judgment must convince the court that the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker.").

[153] 304 U.S. 144 (1938).

[154] *Id.* at 152 (emphasis added).

[155] U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 173 (1980).

[156] *Id.* at 179.

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the vested earned benefits of retirees who had already qualified for them."[157] Because the result of the Act was to *deprive* some portion of the retirees of the benefits that Congress had specifically said it intended to protect, Justice Brennan found that "the classification is not only rationally unrelated to the congressional purpose; it is inimical to it."[158] Unpersuaded by the majority's "presuming purpose from result," Justice Brennan argued that when legislation indisputably results in an outcome opposite from the "actual purposes,"[159] as stated by the legislative body that enacted it, such legislation must be struck down as unconstitutionally irrational. His approach in *Fritz*, although not adopted by the majority—who believed that Congress may indeed have intended the approach it adopted despite some of undesirable outcomes—nevertheless provides a roadmap for perversity arguments in the future.[160]

In the end, the existence of facts that undermine the rationality of governmental action through a showing that those actions result in perversity *must* matter, otherwise courts wouldn't have anything to do on the second step of the rational basis test. Courts' unwillingness to grant motions to dismiss or motions for summary judgment in rational basis cases reflect the importance of facts in determining the rationality of government action.[161] And while the Supreme Court has yet to strike down a statute as perversely irrational, its precedents more than support the contention that courts have the power to do just that. Their failure to engage in this type of analysis when it is relevant undermines the basic purpose of rational basis review specifically, and judicial review in a more general sense.[162]

V. Proving Perversity

Having established what constitutes perversity and how such perversity can form the basis of a successful challenge under rational basis review, it is now necessary to move into one of the trickiest portions of the project—delineating how, both substantively and procedurally, a litigant might avail herself of this path. What type and quantum of evidence is necessary to show

[157] *Id.* at 186.

[158] *Id.*

[159] *Id.* at 187–88.

[160] Although not ultimately agreeing that the statute at issue was unconstitutionally perverse to its actual purpose, Justice Stevens wrote a concurrence that supported Brennan's argument that the Supreme Court should not resort to a "mere tautological recognition of the fact that Congress did what it intended to do." *Id.* at 180 (Stevens, J., concurring).

[161] Berliner, *supra* note 20, at 393 ("The failure to grant motions to dismiss shows that courts believe that facts still play a role in rational basis cases. That is why courts allow plaintiffs an opportunity to prove their facts . . . . The role of facts can also be seen from the cases in which plaintiffs win rational basis cases. Many of these trial and appellate rational basis victories occurred after trial or a fact-intensive motion for summary judgment.").

[162] *See* Bauries, *supra* note 141 (discussing cases where courts failed to meaningfully engage with the perverse outcomes of teacher evaluation practices under rational basis review, thus incorrectly upholding them as unconstitutional).

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that a law has, in fact, created a perverse outcome? How should a judge presented with such evidence evaluate it? I argue two conditions must be met—the weight of credible scientific or empirical evidence should firmly support the view that a perverse outcome has or will likely result from the legislative action and the relevant community of experts or professionals should have reached a consensus suggesting the same.

Certainly, the mere *allegation* of perversity is not sufficient. Likewise, anecdotal evidence of perversity is also likely insufficient to substantiate a constitutional challenge. In these circumstances, a claim of irrationality through perversity is not available because perversity simply cannot be "demonstrated" sufficiently to meet the standard.[163] Courts have recognized their inability to invalidate legislation when faced with "uncertain" medical or scientific evidence, instead necessarily deferring to the legislature as the body best situated to select a path when such certainty is not possible.[164] For instance, Justice Breyer, in his concurrence in *Martinez v. Court of Appeal of California*[165] noted that judges "closer to the firing line" had "expressed dismay" about the practical consequences of the Court's ruling in *Faretta v. California*,[166] which had held that a defendant in a state criminal trial has a constitutional right to proceed without counsel when he voluntarily and intelligently elects to do so.[167] In particular, Justice Breyer noted the existence of arguments from lower courts that the right of self-representation protected in *Faretta* necessarily conflicts with the constitutional right to a fair trial.[168] While clearly sympathetic to this concern, Justice Breyer found that he had "found no empirical research . . . that might help determine whether, in general, the right to represent oneself furthers, or inhibits, the Constitution's basic guarantee of fairness." Absent such evidence, Justice Breyer was therefore, "without some strong factual basis for believing that *Faretta*'s holding has proved counterproductive in practice."[169] Thus, because Justice Breyer lacked sufficient verifiable evidence to conclude that *Faretta* had resulted in perversity—hampering as opposed to guaranteeing the constitutional right to a fair trial—he was unwilling to revisit its constitutionality.

There are those who assert we now live in a "post-truth" world[170]—and that courts can always claim "uncertainty" in the face of the conflicting, politically motivated presentation of evidence from either side of any issue.

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[163] *See* Merton, *supra* note 81, at 898 ("The most obvious limitation to a correct anticipation of consequences of action is provided by the existing state of knowledge.").

[164] Planned Parenthood Minn, N.D, & S.D. v. Rounds, 686 F.3d 889, 900–04 (8th Cir. 2012) (noting that medical uncertainty regarding causal link between abortion and suicide is not a basis for invalidating legislation instructing doctors to counsel patients on the possibility of a link.).

[165] 528 U.S. 152 (2000) (Breyer, J., concurring)

[166] 422 U.S. 806 (1975).

[167] *Id.* 835–36.

[168] *Martinez*, 528 U.S. at 164–65.

[169] *Id.*

[170] *See* Larsen, *supra* note 116, at 177–78 (describing the "post-truth" world and stating that "[o]bjective facts – while perhaps always elusive – are now endangered species").

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This manufactured "uncertainty" can thus allow courts to defer to legislators even when the credible evidence weighs heavily in one direction.[171] Certainly, lawmakers can and do select the version of the facts that best supports their own worldview and agenda.[172] But it is a bridge too far to say that there is *no* objective fact or that courts are not actively engaged in ferreting out fact from fiction. One of the central roles of the trial court system is to *find* facts—either by a judge or a jury. The paradigmatic task of the factfinder is to weigh competing evidence and determine the truth of a matter. Courts have engaged in such a task in many high profile constitutional cases in the last century, often heavily relying on social science evidence.[173] Courts have continued to play this vital role in the alleged "post-truth" era and, at least in some instances, have proved adept at separating political spin from reliable evidence.[174] Thus, if it is clear that courts can, should and *do* evaluate the weight of evidence as a matter of constitutional analysis, the question becomes just how to evaluate when there is sufficient evidence to foreclose a rational argument to the contrary. While a legislature would be irrational to conclude that the sun orbits around the earth and perfectly rational to conclude the opposite, such extremes do not represent useful (or particularly likely) examples. Instead, we can look to the methods that courts already employ when assessing evidence in other circumstances.

Courts engage in the weighing of competing scientific or empirical evidence using a variety of techniques, including considering lay and expert testimony, surveying the scientific literature, and determining scientific or professional consensus in the matter. In earlier work, my co-author Ben McMichael and I examined fetal endangerment laws—laws that expose pregnant people to criminal or civil sanction as a result of exposing their fetus to

[171] *See, e.g,* Erica Frankenberg & Liliana M. Garces, *The Use of Social Science Evidence in Parents Involved and Meredith: Implications for Researchers and Schools*, 46 U. LOUISVILLE L. REV. 703, 720 (2008) (arguing that in the school desegregation cases, Justice Thomas "frequently distorts the findings of the large body of research by proposing that there is substantial disagreement in the social science community on issues where there is actually general agreement.").

[172] Joseph Landau, *Broken Records: Reconceptualizing Rational Basis Review to Address "Alternative Facts" in the Legislative Process*, 73 VAND. L. REV. 425, 428 (2020) ("[P]olicymakers today often legitimate the justification for their preferred laws by twisting facts, peddling myths, trafficking in sheer speculation, and promoting conspiracy theories.").

[173] The (in)famous footnote 11 in *Brown v. Board of Education* uses a collection of social science to support its central holding that de jure racial segregation harms Black children. Brown v. Bd. of Ed., 347 U.S. 483, 494 n.11 (1954). And the post-secondary affirmative action cases likewise rely heavily on expert and social science evidence, as well. *See* Frankenberg & Garces, *supra* note 171, at 705–06 (2008) (noting the Court's use of social science evidence in determining the constitutionality of affirmative action programs).

[174] *See, e.g.,* St. Joseph Abbey v. Castille*,* 712 F.3d 215, 223 (5th Cir. 2013) ("[O]ur analysis does not proceed with abstraction for hypothesized ends and means do not include post hoc hypothesized facts. [The court will] examine the State Board's rationale informed by the setting and history of the challenged rule."). *But see* James R. Dillon, *Expertise on Trial*, 19 COLUM. SCI. & TECH. L. REV. 247, 251 (2018) ("Judges, lawyers, and academics have spent more than a century proposing reforms intended to make courts more effective at applying scientific evidence to the resolution of legal disputes.").

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a risk of harm.[175] Legislators consistently pass these laws with the stated intention of protecting fetal and infant life. Our earlier piece, however, used an empirical analysis of fetal endangerment laws to show that such laws resulted in a statistically significant *increase* in fetal and infant death.[176] While this damning empirical evidence was compelling, it was the combination of this evidence with the consistent, credible evidence from other sources and the absolute homogeneity of the professional, medical, and scientific community that fetal endangerment laws were harmful that provided the basis for our argument that the laws should be invalidated under rational basis review as perverse.[177] While that article did not delve deeply into what factors would be required to show perversity in different contexts, it provides a useful guide to factors that courts should consider.

First, the weight of credible scientific or empirical evidence should firmly support the view that a perverse outcome has or will likely result from the legislative action. Second, the relevant community of experts or professionals should have reached a consensus suggesting the same. These are similar to the factors that courts already use in weighing the validity of scientific evidence for purposes of admission in a trial.[178] Of course, weighing the admissibility of scientific evidence for purposes of trial differs in several important respects from the weighing of scientific evidence necessary for purposes of determining constitutional validity.[179] In the following sections, I undertake a more thorough explanation of what type and quantum of evidence might suffice to show that a law has, or will likely have, a perverse outcome.

A. The Weight of Credible Scientific or Empirical Evidence

While judges are not generally empiricists or scientists, they are often called upon to evaluate scientific or empirical evidence. To do so, they employ various methods and standards depending on the stage of proceeding and the actors involved. Across differences in litigants and procedural posture, however, there are consistencies in the type, source and quantum of evidence that courts seek. For instance, courts take into consideration the type of evidence proffered (anecdotal all the way to double-blind studies),

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[175] Boone & McMichael, *supra* note 30.

[176] *Id.*

[177] *Id.*

[178] Federal courts generally consider four factors: (1) whether the evidence can be and has been tested (known as falsifiability or refutability); (2) whether the evidence has been subjected to peer review and publication; (3) the known or potential rate of error for the technique or evidence seeking to be admitted; and (4) the general acceptance of the technique or evidence in the scientific community. *See* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 593–94 (1993).

[179] *See, e,g.,* Allison v. McGhan Med. Corp., 184 F.3d 1300, 1310 (11th Cir. 1999) (noting that judicial *Daubert* inquiries prevent the "dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique").

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the source of the evidence (industry-sponsored studies all the way to peer reviewed academic journals), and the quantum of the evidence (single studies all the way to multi-study meta reviews of data). This method of determining the weight of available evidence is not surprising—it incorporates commonsense ideas about how to sift through available information. The greater the quantum of evidence, from neutral and expert sources, the more trustworthy the conclusions drawn from it. The same method of determining the weight of the available evidence should apply to courts attempting to discern whether a particular law results in a perverse outcome.

While judges are often called upon to assess scientific evidence presented by litigants, however, they are often leery of assessing the scientific evidence relied on (or not) by legislatures.[180] When they do engage in this type of review, however, they are generally effective at determining when the weight of the evidence suggests a particular outcome. For instance, when dismantling the laws that resulted in harsh penalties for juvenile offenders, the Supreme Court relied on the mountain of social science evidence that juvenile offenders were both less able to control their actions and less morally culpable for criminal actions.[181] Thus, while there may be persuasive evidence that the quantum of evidence required to overturn legislative action is higher than to find for an individual litigant, the method courts use to assess evidence is no different.

Other constitutional law scholars have advocated for judges to take a more robust role in reviewing evidence relied on by legislatures, either as part of traditional rational basis review[182] or through new procedural mechanisms that aim to ferret out incorrectly relied on evidence.[183] Of course, there are also well-founded fears that the misuse and manipulation of science and scientific evidence can result in negative outcomes, as well.[184] Even scholars who recognize that appeals to science have their own inherent problems, however, generally advocate only for *better* science, not an abdication of the judiciary's role in determining the real state of scientific evidence.[185]

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[180] Landau, *supra* note 172, at 456 ("[C]ourts, perhaps leery of trammeling on legislative domain, have steered entirely clear of rigorous (or otherwise) inquiry into false or made-up legislative rationales, leaving politically excluded groups exposed to myth-grounded abuse.").

[181] Miller v. Alabama, 567 U.S. 460, 471, (2012) (noting that their decisions in this area "rest[ ] not only on common sense—on what 'any parent knows'—but on science and social science as well.").

[182] Larsen, *supra* note 116, at 181.

[183] Landau, *supra* note 172, at 456.

[184] *See generally* Wendy E. Wagner, *The Science Charade in Toxic Risk Regulation*, 95 Colum. L. Rev. 1613 (1995) (arguing that a "science charade" pervades much of environmental regulation and impedes the ability of agencies to promulgate science-based toxic risk standards); Larsen, *supra* note 116, at 181.

[185] Wagner, *supra* note 184, at 1712 (suggesting reforms, including a meaningful role for the judiciary in reviewing scientific evidence).

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B. Professional or Expert Consensus

The weight of the evidence is also viewed in light of the professional or expert consensus on a particular matter. Courts may accept the widely held beliefs of a relevant professional community[186] as reflective of a strong evidentiary support for a certain proposition even absent a large quantum of consistent evidence.[187] For instance, there is not actually strong scientific evidence that breastfeeding results in demonstrably positive effects for babies.[188] Nevertheless, there is a strong and consistent professional consensus that it is so,[189] and courts have cited professional consensus of this in support of various breastfeeding laws.[190] Beyond consulting individual experts, courts also give weight to the positions of professional organizations.[191] While the Supreme Court has rejected the requirement of a "general acceptance" of experts on a particular scientific approach when evaluating the admissibility of evidence under the Federal Rules of Evidence, in so doing it found such a "general acceptance" can still have "a bearing on the inquiry" because "[w]idespread acceptance can be an important factor in ruling particular evidence admissible, and [scientific techniques which have] been able to attract only minimal support within the community, may properly be viewed with

[186] Defining the relevant professional community, in most instances, should not present too much difficulty, although there are some instances in which multiple communities of professionals should be consulted. *See infra* Section V.A (describing the professional consensus about the ineffectiveness and harm of abstinence-only education by the medical, public health, and education communities).

[187] Indeed, courts can possibly rely on the widely held beliefs of the non-expert community, as well. Jacobson v. Massachusetts, 197 U.S. 11, 35 (1905) ("A common belief, like common knowledge, does not require evidence to establish its existence, but may be acted upon without proof by the legislature and the courts."). And of course, there are circumstances in which deference to relevant professional communities ends up being misplaced. *See, e.g.* Sarah Zhang, *The One-Paragraph Letter From 1980 That Fueled the Opioid Crisis,* ATLANTIC (June 2, 2017), https://www.theatlantic.com/health/archive/2017/06/nejm-letter-opioids/528840/ [https://perma.cc/4EBU-6JSD] (discussing the professional overreliance on a small study regarding the addictiveness of opioids). In these instances, however, it is not irrational for the legislature to rely on the professional community, even if such a community is ultimately proven incorrect.

[188] *See generally* Emily Oster, *Is Breast Really Best? I Looked at All the Data to Find Out*, GUARDIAN (June 20, 2019, 12:07 PM), https://www.theguardian.com/lifeandstyle/2019/jun/20/is-breast-really-best-i-looked-at-all-the-data-to-find-out#:~:text=they%20found%20that%20the%20children,medical%20and%20public%20health%20literature [https://perma.cc/S9Q9-Q7LV]; SUZANNE BARSTON, BOTTLED UP: HOW THE WAY WE FEED BABIES HAS COME TO DEFINE MOTHERHOOD, AND WHY IT SHOULDN'T (2012) (asserting that many of the supposed health benefits of breastfeeding have been overstated).

[189] *See, e.g. Policy Statement: Breastfeeding and the Use of Human Milk*, 129 PEDIATRICS 827 (2012).

[190] *See, e.g.* Gonzales v. Marriott Int'l, Inc., 142 F. Supp. 3d 961, 975 (C.D. Cal. 2015) ("The legislative history notes the health benefits of lactation for a woman who has given birth, for example; these are present whether the woman's own child or another receives the expressed milk. Although Marriott does not mention portions of the legislative history that discuss experts' opinions concerning the health benefits of expressing milk for the woman giving birth, this was clearly an important consideration the legislature took into account.").

[191] Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1252 (2016) (discussing role of professional associations as knowledge institutions).

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skepticism."[192] Thus it is clear that widespread acceptance of a particular position by the relevant professional community is viewed as strong support for such a proposition.

In contrast, the lack of professional consensus allows courts to discount the weight of other types of evidence—using the disagreement among experts as a proxy for uncertainty in the existing evidence. In fact, the Supreme Court has pointed to the divergence of expert or professional opinion as evidence that courts should afford legislatures a wide latitude to take action.[193] Where the line between expert consensus and the lack of such a consensus lies, however, can be tricky. The Court has certainly indicated that a *complete* consensus of experts on a given topic is not required.[194] This is critical, because on almost every topic there are at least some experts—of dubious authority or not—that disagree with the prevailing consensus.[195]

Requiring consensus from the relevant group of professionals is also important because it suggests the relevant evidence is likely widely available. In assessing the rationality of state action, the court cannot consider evidence that was not—and could not be known—by the state;[196] courts must take into account information that state actors were aware of or should have been aware of. While it would be perfectly rational for a state to act if it had no knowledge of information that indicated its action was likely to result in a perversion of its intent, it would not be rational for a state to take the same action if such information was widely and easily available. The Supreme Court has said as much, decreeing, that "[w]hat everybody knows the court must know," including those beliefs commonly held by experts in the field.[197]

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[192] Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579, 594 (1993).

[193] Kansas v. Hendricks, 521 U.S. 346, 360 n.3 (1997) ("[The disagreements between professional organizations] do not tie the State's hands in setting the bounds of its [ ] laws. In fact, it is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting [ ] statutes.").

[194] Jacobson v. Massachusetts., 197 U.S. 11, 34, 35 (1905) (conceding that while "some physicians of great skill and repute" did not believe in the efficacy of the smallpox vaccine, "most members of the medical profession" did and concluding that "[t]he fact that the belief is not universal is not controlling, for there is scarcely any belief that is accepted by everyone").

[195] Frankenberg & Garces, *supra* note 171, at 708 (noting that unanimity of opinion in the social sciences was rare, and Justice Thomas' apparent requirement for unanimity in the school desegregation cases was therefore unwarranted).

[196] *Cf.* Smith v. West, 640 F. Supp. 2d 222, 241 (W.D.N.Y. 2009) ("In applying the rational basis test, [courts] defer to the Legislature, which is presumed to know all the facts that would support a statute's constitutionality—a presumption which must be rebutted beyond a reasonable doubt."); *see also* Rachel Rebouche, *The Public Health Turn in Reproductive Rights* 78 WASH. & LEE L. REV 1355, 1378 (2021) ("[T]he evidentiary record in *June Medical Services* showcases litigators' and public health researchers' coordinated efforts to generate empirical evidence about the costs of navigating state restrictions. Courts cannot know such facts without research to support them.").

[197] *Jacobson*, 197 U.S. at 30 (1905). Indeed, there are echoes of this idea in other areas of the law, including allowing judges to take "judicial notice" of information not submitted to the court by the parties but is widely publicly available and non-controversial. The doctrine of judicial notice allows a court to consider "a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FED. R. EVID. 201; *see also Daubert*, 509 U.S. at 592 n.11 (1993) (taking judicial notice of "firmly

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But if a large proportion of the relevant experts on a particular topic agree, it reflects a high likelihood that this information *is* widely available. That is, if you could ask almost any relevant professional in a given discipline and receive substantially the same answer to a question,[198] a blindness to that information seems to reflect a willful refusal to simply ask the question. Thus, when the relevant professional community has coalesced around a particular viewpoint, it reflects a strong likelihood that the state has reasonably easy access to the information necessary to avoid a perverse outcome—if it would only look.[199]

Legislatures are constitutionally permitted to pass laws even if there is no certainty that a law will have a desired effect.[200] Indeed, prohibiting lawmakers from acting until a positive (or at least neutral) outcome was assured would introduce harms of a different kind.[201] For the purposes of finding that a law creates or will create a perverse outcome, therefore, courts must determine whether the clear weight of the evidence and the presence of professional consensus leads to a high degree of certainty that a perverse outcome will result from a particular legislative action. A stronger showing in one of the categories can compensate for less strength in the other, but both must be present to a reasonable amount. When both criteria are met, however, under the perversity test this Article proposes, I argue courts shirk

established" scientific laws); *Barnes v. Indep. Auto. Dealers of Cal.*, 64 F.3d 1389, 1395 n.2 (9th Cir. 1995) (taking judicial notice of "[w]ell-known medical facts"); Dippin' Dots, Inc. v. Frosty Bites Distrib., LLC, 369 F.3d 1197, 1204 (11th Cir. 2004) (taking judicial notice of the fact that color indicates flavor of ice cream); Seminole Tribe of Fla. v. Butterworth, 491 F. Supp. 1015, 1019 (S.D.Fla.1980), *aff'd*, 658 F.2d 310 (5th Cir.1981) (taking judicial notice that bingo is largely a senior citizen pastime).

[198] While individual professionals may diverge on some topics, there are still large areas where the vast majority of professionals agree. *See* Haupt, *supra* note 191, at 1250 ("Individual professionals 'may differ in their individual judgments about particular issues, [but] their role as professionals traditionally implies their subscription to a body of knowledge that is shared among their peers.'").

[199] Of course, there are instances in which the professional community does *not* coalesce around a position that is nevertheless supported by the evidence because of political, legal, or other concerns. *See* Christopher H. Rosik, *Sexual Orientation Change Efforts, Professional Psychology, and the Law: A Brief History and Analysis of a Therapeutic Prohibition*, 32 BYU J. Pub. L. 47, 60 (2017) (discussing the failed efforts by some inside the American Psychological Association in the 1990s to formally discourage psychologists from engaging in "conversion therapy"). In these instances, a perversity-as-irrationality argument would be harder to successfully mount but, depending on the weight of available evidence, not necessarily impossible.

[200] *See* Planned Parenthood Minn, N.D, & S.D. v. Rounds, 686 F.3d 889, 900 (8th Cir. 2012) (finding that plaintiff challenging abortion law would have "to show that any 'medical and scientific uncertainty' ha[d] been resolved into a certainty *against*" the state's assertion that there was a causal relationship between suicide and abortion. The court went on to say that, "[I]n order to render the suicide advisory unconstitutionally misleading or irrelevant, Planned Parenthood would have to show that abortion has been ruled out, to a degree of scientifically accepted certainty, as a statistically significant causal factor in post-abortion suicides.").

[201] *See* Merton, *supra* note 81, at 901 (noting the argument that "excessive 'forethought'" can "preclude[ ] any action at all").

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their constitutional duty when they fail to rein in patently irrational state action.[202]

C. Timing and Burdens of Proof

While the preceding sections addressed what constitutes perversity and the evidence needed to prove it, they do not give courts or litigants the required level of detail on procedural requirements. To a large extent, these requirements already exist. Those challenging a law on the basis that the law violates the constitutional guarantees of equal protection or due process must allege those claims sufficiently to plausibly state a claim for relief.[203] Laws reviewed under rational basis are presumptively legitimate, requiring challengers to carry the burden of proof that the law is either passed for an improper purpose, employs an irrational means to effectuate the legislative goal, or both.[204] While rational basis places no affirmative burden of proof on the government initially, challengers can still succeed on the merits of a claim by providing their own evidence of irrationality.[205]

Likewise, there is already robust precedent regarding the differences between facial and as-applied constitutional challenges. But because of the unique circumstances surrounding alleged perversity, it is worthwhile to consider how this framework would play out in this context. Immediate challenges to recently enacted laws will be substantially more difficult to bring because litigants will have to show that the law *will* create the perverse outcome in the future without the benefit of the evidence that it already has done so in this particular circumstance. Allowing these facial challenges is important, however, to avoid the harm that might result from allowing a law to take effect that will clearly result in perversity.[206] Of course, challenges to

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[202] *Cf. Jacobson*, 197 U.S. at 25 (1905) (listing the "questions [that] must be answered" as: "What . . . is the scope and effect of the statute?" and "What results are intended to be accomplished by it?").

[203] Timothy Sandefur, *Rational Basis and the 12(b)(6) Motion: An Unnecessary "Perplexity"*, 25 GEO. MASON U. CIV. RTS. L.J. 43, 45 (2014):

> "Courts resolving motions to dismiss in rational basis cases should address the 12(b)(6) motion like any other such motion: if it appears on the face of the complaint that the plaintiff could, if given the opportunity, prove that the challenged law is not rationally related to a legitimate government interest, Rule 12(b)(6) entitles her to gather and introduce the evidence to do so. So long as the pleading itself is not flawed, a plaintiff in a rational basis case must have the chance to meet her difficult, but not impossible, burden of proving that the challenged law is irrational."

[204] Heller v. Doe, 509 U.S. 312, 320 (1993) ("A statute is presumed constitutional [ ] and the burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." (internal quotations and citations omitted)).

[205] St. Joseph Abbey v. Castille, 712 F.3d 215, 223 (5th Cir. 2013) ("[A]lthough rational basis review places no affirmative evidentiary burden on the government, plaintiffs may nonetheless negate a seemingly plausible basis for the law by adducing evidence of irrationality.").

[206] Bambauer & Massaro, *supra* note 12, at 337 ("[The rational basis test focuses] on the fallout of the messy political process and allow[ing] individuals who bear the brunt of that fallout to seek judicial relief if political negotiations have been exploited to serve ends that add no value to society.").

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laws that have already gone into effect and resulted in a perverse outcome will be easier to bring because evidence of the actual perverse effect can be included in the overall evidence presented.[207] Here, litigants would challenge the continued enforcement of the law as violative of equal protection or due process.

There is also the opportunity to argue that a law that once may have survived rational basis review can no longer do so because changed factual circumstances have resulted in demonstrated perversity.[208] For instance, new information or changed factual circumstances can make the continued enforcement of a law invalid, even if it was valid at the moment it was passed. This approach was countenanced in *Carolene Products*. In that case, the Court held that the enforcement of a law when the factual premises for the law are no longer relevant can form the basis of a successful argument for invalidation under rational basis.[209]

VI. Perversity in Practice

Hopefully, the foregoing sections have led to the inescapable conclusion that demonstrated perversity should form the basis for a finding that a law is irrational and thus unconstitutional. Perhaps such an assertion now seems obvious, unproblematic, and possibly a little dull. But the potential applications of such a framework are considerably less banal—and the following sections detail how large swaths of the criminal justice system and much of the state regulation of sex and reproductive rights might be susceptible to successful equal protection challenges on the basis that such state action is perverse and thus patently irrational.

Each of the following sections explores briefly how perversity arguments could be made in various contexts. Obviously, a full exploration of each could constitute an article on its own.[210] But applying the criteria for

[207] *See, e.g.*, Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2306 (2016), as revised (June 27, 2016) ("When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference.").

[208] *See* Nashville, Chattanooga & St. Louis Ry. v. Walters, 294 U.S. 405, 415 (1935) ("[A] statute valid when enacted may become invalid by change in the conditions to which it is applied.").

[209] United States v. Carolene Prods. Co., 304 U.S. 144, 153 (1938) ("[T]he constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist."); *see also* Berliner, *supra* note 21, at 392 (discussing cases where changed circumstances resulted in a different outcome under rational basis review). The Court has also used changes in scientific knowledge to invalidate laws previously deemed constitutional under stricter tiers of scrutiny, as well. *See, e.g.*, Brown v. Bd. of Ed., 347 U.S. 483, 494 (1954) (stating that "[w]hatever may have been the extent of psychological knowledge at the time of *Plessy v. Ferguson*," the finding that segregation harmed Black citizens was "amply supported by modern authority" and citing modern social science evidence to that effect).

[210] And, indeed, constitutes the entirety of my co-authored article on fetal endangerment laws. *See generally* Boone & McMichael, *supra* note 30.

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perversity, as described above, to these government actions reveals some common themes and as of yet unexplored opportunities. While a perversity-as-irrationality argument may or may not ultimately be successful in each circumstance, they serve to illustrate the types of arguments that are contemplated by this framework.

A. Abstinence-Only Sex Education

Support for sex education in schools has enjoyed widespread support for over fifty years.[211] The best approach to providing sex education in schools, however, has been the subject of sometimes fierce public debate since the 1980s.[212] While public health organizations have consistently favored a comprehensive approach to sex education that includes both information about sexual health and contraception, other groups have advocated for instruction that discusses abstinence before marriage as the only safe and appropriate option.[213] The proponents of the latter often expressed concern that a more comprehensive approach would signal to students that sex outside of marriage is safe and/or morally permissible and thus would have the effect of increasing sexual activity among young people.[214] Proponents of abstinence education argue that teaching abstinence instead will delay teens' first sexual encounter, reduce the number of partners they have, and reduce rates of teen pregnancy and sexually transmitted diseases.[215] As youth are particularly vulnerable to sexually transmitted diseases and US youth in particular lead the world in adolescent pregnancy, there is no doubt that the goals of abstinence education are valid.[216]

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[211] *History of Sex Education in the U.S.*, PLANNED PARENTHOOD (Nov. 2016) https://www.plannedparenthood.org/uploads/filer_public/da/67/da67fd5d-631d-438a-85e8-a446d90fd1e3/20170209_sexed_d04_1.pdf [https://perma.cc/H5SH-D8D3].

[212] *Id.*

[213] Abstinence-only programs, in addition to obviously stressing abstinence before marriage as the only safe and moral option, also often contain factually incorrect information about the efficacy and safety of various methods of contraception. For instance, two abstinence-only programs in Ohio—"Me, My World, My Future" and "Sex Respect"—incorrectly report that condoms have a high failure rate and that condom use can lead to death. The latter program explicitly tells teens who have sex before marriage that they should "be prepared to die." *See* SCOTT H. FRANK, REPORT ON ABSTINENCE-ONLY-UNTIL-MARRIAGE PROGRAMS IN OHIO (2005) [hereinafter OHIO REPORT], https://www.researchgate.net/profile/Scott_Frank3/publication/266456924_Report_on_Abstinence-Only-Until-Marriage_Programs_in_Ohio/links/5564c33508ae94e95720517e/Report-on-Abstinence-Only-Until-Marriage-Programs-in-Ohio.pdf [https://perma.cc/YY65-AEY2].

[214] *See* Aaron E. Carroll, *Sex Education Based on Abstinence? There's a Real Absence of Evidence*, N.Y. TIMES (Aug. 22, 2017) https://www.nytimes.com/2017/08/22/upshot/sex-education-based-on-abstinence-theres-a-real-absence-of-evidence.html [https://perma.cc/J8ME-5V4B] ("Religious conservatives worry that teaching teenagers about birth control will encourage premarital sex.").

[215] *Abstinence Education Programs: Definition, Funding, and Impact on Teen Sexual Behavior*, WOM. HEALTH POL'Y. (Jun 01, 2018) https://www.kff.org/womens-health-policy/fact-sheet/abstinence-education-programs-definition-funding-and-impact-on-teen-sexual-behavior/ [https://perma.cc/2UEK-BETK].

[216] AM. PUB. HEALTH ASS'N, ABSTINENCE AND U.S. ABSTINENCE ONLY EDUCATION POLICIES, POLICY STATEMENT NO: 200610 (Nov. 8, 2006); Lisa T. McElroy, *Sex on the*

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Decisions about sex education are made at the state and local level.[217] In addition to state laws promoting or mandating abstinence-only education,[218] the federal government, under the Abstinence-Only-Until-Marriage program (AOUM) of Title V of the 1996 Social Security Act,[219] provides funding for abstinence education, the purpose of which is to "enable the State to provide abstinence education, and at the option of the State, where appropriate, mentoring, counseling, and adult supervision to promote abstinence from sexual activity, with a focus on those groups which are most likely to bear children out-of-wedlock."[220] Since 1996 when the Act was passed, billions of federal dollars have been spent on abstinence-only education programs.[221] In addition, in 2018, Congress passed a Consolidated Appropriations Act, which included a $10 million funding increase for the abstinence-only Sexual Risk Avoidance Education grant program first established in 2012, bringing the total expenditures for this program to $25 million a year—a 67% increase.[222] Federal funding for this program bypasses state authority by granting funds directly to community organizations.[223] Further, the U.S. Department of Health and Human Services under the Trump administration provided funding under the Teen Pregnancy Prevention (TPP) Program—a grant program created by the Obama administration in 2010 to reduce teen pregnancy rates in the United States—solely to organizations promoting abstinence-only approaches.[224]

After multiple decades where some states and localities offer comprehensive sex education curriculum and others offer abstinence-only programs, the state of the professional consensus and empirical evidence has reached an interesting inflection point. As they have been almost since the inception of the abstinence-focused programs, the relevant professional organizations are

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Brain: Adolescent Psychosocial Science and Sanctions for Risky Sex, 34 N.Y.U. Rev. L. & Soc. Change 708, 713-14 (2010).

[217] *History of Sex Education*, *supra* note 211 ("Decisions are made at the state and local level about which specific sex education programs are offered in U.S. schools, but the federal government influences programs in local schools and communities by offering some grant support for school-based efforts."); Alyssa Varley, *Sexuality in Education*, 6 Geo. J. Gender & L. 533, 534 (2005) (" Sex-education statutes vary widely throughout the fifty states and the District of Columbia. Each state has different limitations and requirements on what must be, may be and cannot be taught in public schools. Many states specifically regulate topics such as abstinence, homosexuality, sexually transmitted disease prevention, and HIV/AIDS education.").

[218] *See, e.g.*, Tex. Educ. Code Ann. § 28.004(e) (West 2021) (requiring "present[ing] abstinence from sexual activity as the preferred choice of behavior in relationship to all sexual activity for unmarried persons of school age").

[219] Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104–193, August 22, 1996, 110 Stat 2105.

[220] *Id.*

[221] The program was allowed to lapse briefly in 2009 but was reinstated during the Obama administration.

[222] *Abstinence Education Programs*, *supra* note 215.

[223] *Id.*

[224] Sarah Shapiro and Catherine Brown, *Sex Education Standards Across the States*, Ctr. for Am. Prog (May 9, 2018) https://www.americanprogress.org/issues/education-k-12/reports/2018/05/09/450158/sex-education-standards-across-states/ [https://perma.cc/65PM-89ES].

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uniformly opposed to abstinence-only education as ineffective and potentially harmful. There is also significant evidence that abstinence-only programs either have no effect on youth behavior or, in some incidences, lead to counterproductive outcomes—namely, increasing STD rates and teen pregnancy.[225] On the other hand, there is now substantial evidence that comprehensive sex education programs promote sexual health, reduce sexually risky behavior, and do *not* increase the incidence of sexual activity of young people.[226] As the empirical evidence begins to coalesce around the long-standing professional consensus regarding the negative outcomes of abstinence-only education, the moment may soon be ripe to challenge laws that mandate abstinence-only education programs as irrationally perverse.

1. *Evidence of Perversity*

There is a large and growing body of evidence that abstinence-only programs are completely ineffective at a number of their intended goals—including meaningfully delaying age of first sexual encounter or reducing numbers of sexual partners.[227] Study after study—and meta-reviews of those studies[228]—conclude that abstinence-only education has no identifiable effect on the desired outcomes.[229] There is also evidence that the laws have a number of negative unintended consequences, such as increasing the spread of inaccurate information about the methods and effectiveness of various

[225] *See infra* Sec. VI(A)(1).

[226] *See* HB Chin, Theresa Ann Sipe, Randy Elder, Shawna L. Mercer, Sajal K. Chattopadhyay, Verughese Jacob, Holly R. Wethington, Doug Kirby, Donna B. Elliston, Matt Griffith, Stella O. Chuke, Susan C. Briss, Irene Ericksen, Jennifer S. Galbraith, Jeffrey H. Herbst, Robert L. Johnson, Joan M. Kraft, Seth M. Noar, Lisa M. Romero & John Santelli, *The Effectiveness of Group-Based Comprehensive Risk-Reduction and Abstinence Education Interventions to Prevent or Reduce the Risk of Adolescent Pregnancy, Human Immunodeficiency Virus, and Sexually Transmitted Infections*, 42 AM. J. PREVENTATIVE MED. 272 (2012).

[227] Douglas B. Kirby, *The Impact of Abstinence and Comprehensive Sex and STD/HIV Education Programs on Adolescent Sexual Behavior*, 5 SEXUALITY RESEARCH & PUB. POL'Y 18 (2008); Christopher Trenholm, Barbara Devaney, Ken Fortson, Ken Quay, Justin Wheeler & Melissa Clark, *Impacts of Four Title V, Section 510 Abstinence Education Programs: Final Report*, MATHEMATICA POL'Y RESEARCH (Apr. 2007).

[228] KRISTEN UNDERHILL, DON OPERARIO & PAUL MONTGOMERY, ABSTINENCE-ONLY PROGRAMS FOR HIV INFECTION PREVENTION IN HIGH-INCOME COUNTRIES, COCHRANE DATABASE SYSTEMATIC REVS. (2007); DEBRA HAUSER, FIVE YEARS OF ABSTINENCE-ONLY-UNTIL-MARRIAGE EDUCATION: ASSESSING THE IMPACT, ADVOCATES FOR YOUTH (2004).

[229] Jillian B. Carr and Analisa Packham, *The Effects of State-Mandated Abstinence-Based Sex Education on Teen Health Outcomes*, 26 HEALTH ECON. 403 (2017) (concluding that abstinence-only education programs have no statistically significant effect on teen pregnancy rates, although not rejecting the possibility of more modest negative effects). There are a few studies that show some abstinence-only education programs have short term positive effects in delaying sexual debut, but that these positive effects do not endure. *See* HAUSER, *supra* note 228, at 4 (noting that in one of the state programs reviewed there was a "demonstrate[d] short-term success in delaying the initiation of sex," but that "*none* of the[ ] programs demonstrates evidence of long-term success in delaying sexual initiation among youth exposed to the programs or any evidence of success in reducing other sexual risk-taking behaviors among participants").

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contraceptive methods,[230] increasing gender stereotyping,[231] increasing stigma associated with sexuality generally and sexual orientation specifically,[232] and resulting in increased rates of teens engaging in oral or anal sex in order to maintain technical "virginity."[233]

Importantly for our purposes, a small but growing body of research shows that abstinence-only education policies are not only ineffective, but they result in outcomes that are opposite of the legislative intent. First, research increasingly shows that abstinence-only education is positively correlated with increases in teenage pregnancy and birth rates.[234] This trend remains significant even after accounting for socioeconomic status, education, ethnicity, and other factors. In other words, the programs funded by the federal government to the tune of billions of dollars—and which are specifically intended to reduce out-of-wedlock and teen pregnancy—instead may increase the incidence of these pregnancies. Additionally, there is growing research that suggests that abstinence-only programs also increase the rates of sexually transmitted diseases.[235] This outcome makes sense, as these

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[230] H.R. COMM. GOV'T REFORM, THE CONTENT OF FEDERALLY FUNDED ABSTINENCE ONLY EDUCATION PROGRAMS (2004) (finding that 11 out of the 13 most commonly used abstinence-only education curriculum funded by federal monies contained false, misleading, or distorted information on contraception, abortion, or other scientific facts).

[231] John S. Santelli, Leslie M. Kantor, Stephanie A. Grilo, Ilene S. Speizer, Laura D. Lindberg, Jennifer Heitel, Amy T Schalet, Maureen E. Lyon, Amanda J. Mason-Jones, Terry McGovern, Craig J. Heck, Jennifer Rogers & Mary A. Ott, *Abstinence-Only-Until-Marriage: An Updated Review of U.S. Policies and Programs and Their Impact*, 61 J. ADOLESCENT HEALTH 273, 278 (2017) ("Policies or programs offering abstinence as a single option for unmarried adolescents are scientifically and ethically flawed. [Abstinence Only Until Marriage] programs have little demonstrated efficacy in helping adolescents to delay intercourse, while prompting health endangering gender stereotypes and marginalizing sexual minority youth.").

[232] SOC'Y FOR ADOLESCENT HEALTH & MED., *Abstinence-Only-Until-Marriage Policies and Programs: An Updated Position Paper of the Society for Adolescent Health and Medicine,* 61 J. ADOLESCENT HEALTH 400, 402 (2017) ("Abstinence-only programs] do not meet the needs of and may be harmful to sexual minority youth, as these programs are largely heteronormative and often stigmatize other sexualities as deviant.").

[233] FRANK, *supra* note 213 (noting the possibility that teens in abstinence-only programs are "more likely to participate in sexual behaviors other than vaginal intercourse, such as oral and anal sex, presumably in an effort to maintain 'virginity.'").

[234] Kathrin F. Stanger-Hall and David W. Hall, *Abstinence-Only Education and Teen Pregnancy Rates: Why We Need Comprehensive Sex Education in the U.S.,* 6 PLOS ONE (2011); Pamela Kohler, Lisa Manhart & William Lafferty, *Abstinence-Only and Comprehensive Sex Education and the Initiation of Sexual Activity and Teen Pregnancy*, 42 J. ADOLESCENT HEALTH 344 (2008); Anthony Paik, Kenneth J. Sanchagrin & Karen Heimer, *Broken Promises: Abstinence Pledging and Sexual and Reproductive Health*, 78 J. MARRIAGE & FAM. 546, 556 (2016) (finding that 30% of teens who had taken an abstinence pledge experienced a non-marital pregnancy within six years of their sexual debut, whereas only 18% of non-pledgers did).

[235] Carr & Packham, *supra* note 229 (finding a significant positive effect on STD rates in Maine and Colorado following implementation of abstinence-only education programs); M. Hogben, H. Chesson & S. O. Aral, *Sexuality Education Policies and Sexually Transmitted Disease Rates in the United States of America*, 21 INT'L J. STD & AIDS 293 (2010) (finding states with mandates emphasizing abstinence had the highest rates of gonorrhea and chlamydia infection); Paik, et al., *supra* note 234, at 556 (finding that teens who had taken an abstinence pledge experienced a greater risk of contracting HPV when controlling for number of sexual partners).

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programs intentionally focus on the ineffectiveness and unreliability of contraception, likely leading some teens to forgo contraceptive use.[236] As one researcher noted:

> "If adolescents either are provided inaccurate information about condom use or contraception or are socialized to be hostile to these practices, they could be in a bind when they break [abstinence] pledges, as almost all of them do. Even though this research focuses on the effects of abstinence pledging, a direct implication is that abstinence-only beliefs, more generally, can have perverse unintended consequences."[237]

There is also a large body of research showing that comprehensive sex education programs *are* extremely effective at furthering the legislative goal of reducing teen pregnancy.[238] But of course, under rational basis review, legislatures are not required to select the best or most comprehensive means of achieving their end. Although the availability of highly effective alternatives proven to achieve legislative goals certainly bolsters the argument that selecting ineffective methods or methods that actually undermine legislative intent is patently irrational. Further, states that switch from a comprehensive sex ed curriculum to an abstinence-based curriculum are not preserving the status quo, but instead moving affirmatively to programs that ensure legislative goals will be undermined.

2. *Professional Consensus*

It is difficult to find a non-faith-based organization that supports abstinence-only education.[239] From the medical community, the American Medical Association, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, and the American Public Health Association, among many others, have disavowed abstinence-only education as

[236] *See* FRANK, *supra* note 213, at 14 ("[In abstinence-only programs in Ohio] contraceptives are portrayed as ineffective in preventing pregnancy and STDs, and are mentioned only to convey a negative message about birth control and HIV/STD risk reduction, and to provide another reason to avoid remain abstinent until marriage."); Paik et al., *supra* note 234, at 559 ("Young adults are slow to adapt their scripts and habits regarding contraceptive use and often fall back on previously acquired information, such as the mistrust of contraceptives conveyed by abstinence-only programs. This cultural context sets the stage for increased risk of nonmarital pregnancies and STIs.").

[237] Paik et al., *supra* note 234, at 559.

[238] Kohler et al., *supra* note 234, at 344; Chin et al., *supra* note 226 (finding that comprehensive sex education was associated with favorable outcomes for all of the identified goals—including reducing unprotected sex, teen pregnancy, and rates of sexually transmitted infections).

[239] There are a number of faith-based organizations that reject abstinence-only education, as well. *See, e.g.*, *Religious Support for Comprehensive Sexuality Education in Public Schools*, THE RELIGIOUS INST., http://www.religiousinstitute.org/religious-support-for-comprehensive-sexuality-education-in-public-schools/ [https://perma.cc/GU58-GSK3] (last accessed May 20, 2014).

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ineffective and harmful.[240] In a position paper by the Society for Adolescent Health and Medicine, it states that abstinence only programs, "undermine public health goals and the safe transition of young people into sexually healthy adults."[241] Even the organization created by Congress to advise the nation on scientific and medical issues, the Institute of Medicine, released a report calling on Congress "to eliminate requirements that public funds be used for abstinence-only education."[242] But the medical community is not the only relevant community when assessing an issue of education. Organizations that represent educators like the National Education Association and The American Federation of Teachers,[243] too, have come out in support of comprehensive sex education. Even the National Association of School Nurses rejects abstinence-only education as harmful.[244]

The research around abstinence-only education has long shown its inefficacy. Professional consensus has been likewise consistent in its rejection of abstinence-only education as ineffective at best, and harmful at its worst. Of course, there are well-founded arguments that the "real" intent of these programs is to teach a Christian morality about sex.[245] Evidence of this motivation could form the basis for an argument that abstinence-only programs have an improper goal.[246] But in addition, the moment may be ripe to bring a claim that state and local laws that require abstinence-only education—and the federal laws that fund them—are irrational because they employ methods that are likely to have perverse outcomes from the stated legislative intent.[247]

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[240] Mary A. Ott & John S. Santelli, *Abstinence and Abstinence-Only Education*, 19 Current Ops. Obstetrics & Gynecology 446, 449–50 (2007).

[241] Soc'y for Adolescent Health & Med., *supra* note 232, at 402–03.

[242] Comm. HIV Prevention Strategies in the U.S., Inst. of Med., No Time to Lose: Getting More from HIV Prevention 120 (2000).

[243] In Good Company: Support for Comprehensive Sexuality Education, Sexuality Info. and Ed. Council of the U.S. (2014) https://siecus.org/wp-content/uploads/2018/08/In-Good-Company-2014.pdf [https://perma.cc/9E6U-H8DF].

[244] *Sexual Health Education in Schools*, Nat. Ass'n of School Nurses (June 2017) https://www.nasn.org/advocacy/professional-practice-documents/position-statements/ps-sexual-health [https://perma.cc/4X42-NCZC](advocating for comprehensive sex education to be taught in schools).

[245] Am. Pub. Health Ass'n, *supra* note 216 (stating that the federal requirements of abstinence-only education programs "have little to do with public health priorities; instead they reflect[ ] the moral and ideological viewpoint of the majority of members of Congress at the time of the program's authorization.").

[246] The constitutionality of "morals" legislation is not completely clear, as some Supreme Court cases seem to suggest it is not a legitimate government interest and others support its continuing viability. *Compare* Romer v. Evans, 517 U.S. 620 (1996) and Lawrence v. Texas, 539 U.S. 558 (2003) with Washington v. Glucksberg, 521 U.S. 702 (1997) and Gonzales v. Carhart, 550 U.S. 124 (2007).

[247] Indeed, this is a question that the scientific community is already asking. *See* Paik et al., *supra* note 234 ("A key question centers on the possibility that abstinence-promotion efforts have perverse unintended consequences on the sexual and reproductive health of teenagers and young adults.")

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B. Domestic Violence and Mandatory Arrest Requirements

For most of human history, domestic violence has been seen as a private matter, with a focus on a man's control over his wife.[248] The problem (and prevalence) of domestic violence was rarely scrutinized until the Battered Women's Movement began in the 1960s.[249] In the intervening decades, there has been increased focus on domestic violence and, as a result, the development of special shelters, hotlines, and prevention programs—along with changes to both statutes and common law approaches.[250] But it was not until the mid-1970s that the response to domestic violence began to focus on the arrests of abusers as the best—and most necessary—intervention to curb domestic violence.[251] In the decades to follow, this carceral approach gained steam, drowning out the voices of communities who doubted efficacy of a criminal law response to the problem of intimate violence.[252]

In 1994, Congress passed the Violence Against Women's Act (VAWA); the statute "outlined funding initiatives and proposed policy measures that jurisdictions should implement to better address domestic violence."[253] Amongst the many provisions in the Act designed to curb and combat domestic violence was the suggestion that states implement mandatory arrest laws for accused offenders.[254] These mandatory arrest laws require a police officer to make an arrest when responding to a domestic violence call. Under VAWA, jurisdictions that implemented mandatory arrest laws would become eligible for federal grant money.[255] The reauthorization of VAWA in 2005 included a change to a "pro-arrest" as opposed to a "mandatory arrest" policy. Nevertheless, mandatory arrest laws for perpetrators of domestic violence are still utilized heavily in at least 22 states.[256]

1. Evidence of Perversity

Obviously, the overarching goal of mandatory arrest provisions is to decrease domestic violence. The early advocates for mandatory arrest provisions believed that they would do so in two main ways—by serving an expressive function about the seriousness of the offense as well as a deterrence function.[257] They had little empirical evidence for these claims, as there were

[248] Allessandra DeCarlo, *No Drop Prosecution & Domestic Violence: Screening for Cooperation in the City that Never Speaks*, 25 J.L. & Pol'y 357, 361–62 (2016).
[249] *Id.* at 362.
[250] *Id.* at 362–63.
[251] *See* Aya Gruber, The Feminist War on Crime 67–93 (2021).
[252] *Id.*
[253] Alayna Bridgett, *Mandatory Arrest Laws and Domestic Violence: How Mandatory-Arrest Laws Hurt Survivors of Domestic Violence Rather Than Help Them*, 30 Health Matrix 438, 444 (2020).
[254] *Id.* at 445.
[255] *Id.* at 444–45. This Act was renewed in 2000, 2005, and 2013 and kept similar provisions to encourage mandatory arrest statutes.
[256] *Id.* at 449.
[257] *See* Gruber, *supra* note 251 at 68, 90.

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no jurisdictions that had utilized them.[258] And the earliest studies did seem to support an argument that mandatory arrest may be effective in reducing domestic violence.[259]

Since the implementation of mandatory arrest provisions beginning in the 19070s, however, research has shown that mandatory arrest laws are not an effective means of encouraging victims to leave their abusers[260] or of keeping victims safe from domestic violence.[261] Research does not show that these laws reduce rates of domestic violence generally.[262] Mandatory arrest provisions also have the effect of increasing the lethality of the violence that does occur—resulting in increased homicides. Researchers who have studied the effect of mandatory arrest provisions on intimate partner homicides have found that such laws increase this type of homicide by up to 60%.[263] In contrast, researchers who have studied *discretionary* arrest provisions have found that they can reduce rates of homicide, particularly among married partners.[264]

Unfortunately, mandatory arrest provisions may also have a perverse effect on domestic violence reporting. Under-reporting of domestic violence is extremely widespread.[265] But research shows that reporting declined by 12% in states where mandatory arrest laws had been implemented.[266] This reluctance to report in the face of mandatory arrest laws does not only affect victims of abuse. Third parties are also less likely to report in states with mandatory arrest provisions.[267]

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[258] *Id.* at 68, 76, 90.

[259] *Id.* at 82–89 (detailing early study that showed mandatory arrests provisions might be successful at reducing violence and the many studies, including some by the authors of the original studies, that eventually concluded the opposite).

[260] Radha Iyengar, *Does the Certainty of Arrest Reduce Domestic Violence? Evidence from Mandatory and Recommended Arrest Laws*, 93 J. PUB. ECON. 85, 97 (2009).

[261] J. David Hirschel & Ira W. III Hutchinson, *Female Spouse Abuse and the Police Response: The Charlotte, North Carolina Response*, 83 J. CRIM. L. & CRIMINOLOGY 73, 102 (1992); Ruth E. Fleury-Steiner, Deborah Bybee, Cris M. Sullivan, Joanne Belknap, Heather C. Melton, *Contextual Factors Impacting Battered Women's Intentions to Reuse the Criminal Legal System*, 34 J. COMM. PSYCHOL. 327, 335 (2006); A. M. Pate, & E. E. Hamilton, *Formal and Informal Deterrents to Domestic Violence: The Dade County Spouse Assault Experiment*, 57 AM. SOCIO. REV. 691 (1992).

[262] Leigh Goodmark, *Should Domestic Violence Be Decriminalized?,* 40 HARV. J.L. & GENDER 53, 55–56 (2017) ("No reliable social science data ties the drop in the rates of intimate partner violence to criminalization or to the increased funding and criminal legal system activity spurred by the Violence Against Women Act.").

[263] Iyengar, *supra* note 261, at 85.

[264] Yoo-Mi Chin & Scott Cunningham, *Revisiting the Effect of Warrantless Domestic Violence Arrest Laws on Intimate Partner Homicides*, 179 J. PUB. ECON. 1, 4 (2019).

[265] JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T. OF JUST., NONFATAL DOMESTIC VIOLENCE 1 (2014), https://www.bjs.gov/content/pub/pdf/ndv0312.pdf [https://perma.cc/VG8D-7L5F] (stating that from 2003 until 2012, only fifty-sex percent of domestic violence was reported to the police).

[266] Iyengar, *supra* note 260. Reporting in states where there were only *recommended* arrest provisions increased as well, but less significantly. *Id.*

[267] Laura Dugan, *Domestic Violence Legislation: Exploring Its Impact on the Likelihood of Domestic Violence, Police Involvement, and Arrest*, 2 CRIMINOLOGY & PUB. POL'Y 283, 303 (2003).

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It is not surprising that mandatory arrest provisions result in increased underreporting in light of the fact that such provisions have an additional perverse outcome—they often increase arrests of domestic violence victims themselves.[268] When police officers are required to make an arrest, they can be forced to arrest both parties, because it is unclear who is the primary aggressor.[269] These "dual arrests" are consistently associated with the passage of mandatory arrest laws.[270] For example, in 1987, Connecticut implemented a mandatory arrest policy for domestic violence offenders and, after the implementation of the policy, reported that thirty-three percent of the 25,000 family violence arrests in 1989 were dual arrests.[271] Already marginalized populations are at a greater threat of being swept up in these dual arrest scenarios.[272]

2. *Professional Consensus*

Many organizations and activists working to combat domestic violence in the 1960s supported an increased criminal justice response to domestic violence, often on the theory that such crimes were being underenforced. Organizations working within communities of color, however, recognized early on that increased involvement of the criminal justice system was unlikely to improve outcomes for victims of domestic violence, particularly for those people already over policed.[273] As mandatory arrest laws were put into place, however, and the perverse results chronicled here began to emerge, professional consensus came to reflect an understanding that the original detractors were correct—while the laws might have served the expressive purpose of signaling the seriousness of domestic violence, the outcomes for actual victims were demonstrably poorer. The Battered Women's Justice

[268] Meghan A. Novisky & Robert L. Peralta, *When Women Tell: Intimate Partner Violence and the Factors Related to the Police*, 21 VIOLENCE AGAINST WOMEN 65, 67 (2014).

[269] Susan L. Miller, *The Paradox of Women Arrested for Domestic Violence*, 7 VIOLENCE AGAINST WOMEN 1339, 1364 (2001).

[270] Sherman, L. W., Smith, D. A., Schmidt, J. D., & Rogan, D. P., *Crime, Punishment, and Stake in Conformity: Legal and Informal Control of Domestic Violence*, 57 AM. SOCIO. REV., 680–90 (1992). Although mandatory arrest laws also increase incidence of single arrests of domestic violence victims, as well.

[271] Margaret E. Martin, *Double Your Trouble: Dual Arrest in Family Violence*, 12 J. FAM. VIOLENCE 139, 142, 147 (1997).

[272] Sarah Deer & Abigail Barefoot, *The Limits of the State: Feminist Perspectives on Carceral Logic, Restorative Justice and Sexual Violence*, KAN. J.L. & PUB. POL'Y, 505, 511 (2019) ("Mandatory arrest policies have resulted in an expanded oppressive police presence in many communities, which has led to higher arrest rates of women of color and lesbians compared to white and heterosexual peers, even when the victims initiate the call for police assistance.").

[273] Deborah M. Weissman, *The Community Politics of Domestic Violence*, 82 BROOK. L. REV. 1479, 1512 (2017) ("Women of color challenged mandatory arrest policies promoted by white feminists working in the movement who ignored other recommendations that were removed from the criminal justice system."); GRUBER, *supra* note 251, at 62–63. Some law enforcement officers, too, recognized that mandatory arrest provisions might escalate violence. *See id.* at 45, 72.

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Project[274] and the Center for Survivor Agency and Justice[275] are just two of the organizations that have come out as opposed to mandatory arrest policies.[276] Legal scholars, too, have a long history of opposition to mandatory interventions in the domestic violence sphere.[277] Professor Aya Gruber argues persuasively in her book *The Feminist War on Crime* that these laws don't work, increase violence, and disproportionately harm people of color and other marginalized communities.[278]

Mandatory arrests in the domestic violence context are not the only aspects of the criminal justice system vulnerable to an argument that government action that seeks to achieve one end actually achieves the opposite. For example, there are sound arguments that criminalizing the possession or use of drugs results in riskier drug use,[279] as well as more crime and social instability. There are arguments that criminalizing the use of technology for trafficking purposes increases human trafficking.[280] Mandatory segregation policies for suicidal inmates might increase suicides.[281] Three-strike laws meant to deter crime might result in increased violent crime against police officers, as those who seek to avoid a third criminal prosecution are incentivized to resist arrest.[282] A perversity-as-irrationality framework opens up additional possibilities for challenging these approaches.

C. Targeted Regulation of Abortion Providers

There are few topics in the 21st century as politically fraught as abortion. While the constitutional right to abortion remains technically in place, those opposed to legal abortion have waged a decades-long battle at the state

[274] *Mandatory Arrests*, BATTERED WOMEN'S JUST. PROJECT, https://www.bwjp.org/our-work/topics/mandatory-arrests.html [https://perma.cc/SVT9-HFMQ].

[275] Erika Sussman, *Reflections On Police Violence and the Implications for Survivors*, CTR. FOR SURVIVOR AGENCY & JUST. (Jul. 13, 2016) https://csaj.org/news/view/we-are-reeling-after-last-week https://perma.cc/CKN4-2QG8].

[276] *National Domestic Violence Organizations*, NAT'L CTR. ON DOM. VIOLENCE, TRAUMA & MENTAL HEALTH, http://www.nationalcenterdvtraumamh.org/resources/national-domestic-violence-organizations/ [https://perma.cc/8PUB-WRF5].

[277] Natalie Nanasi, *Disarming Domestic Abusers*, 14 HARV. L. & POL'Y REV. 559, 572 (2020) ("Scholars have long criticized mandatory interventions as a means for the legal system to disempower survivors of domestic violence and remove from them a sense of agency and autonomy.").

[278] See generally AYA GRUBER, THE FEMINIST WAR ON CRIME (2021).

[279] *Every 25 Seconds: The Human Toll of Criminalizing Drug Use in the United States*, HUMAN RIGHTS WATCH (Oct. 12, 2016) https://www.hrw.org/report/2016/10/12/every-25-seconds/human-toll-criminalizing-drug-use-united-states# [https://perma.cc/CTJ8-9PPN] ("[C]riminalization tends to drive people who use drugs underground, making it less likely that they will access care and more likely that they will engage in unsafe practices that make them vulnerable to disease and overdose.").

[280] *See generally,* Lura Chamberlain, FOSTA: *A Hostile Law with A Human Cost,* 87 FORDHAM L. REV. 2171, 2205 (2019).

[281] *See generally* Margo Schlanger, *Regulating Segregation: The Contribution of the ABA Criminal Justice Standards on the Treatment of Prisoners*, 47 AM. CRIM. L. REV. 1421, 1438 (2010) ("[E]xperts agree that isolation is convenient but counterproductive.").

[282] Jeffry L. Johnson & Michelle A. Saint-Germain, *Officer Down: Implications of Three Strikes for Public Safety*, 16 CRIM. JUSTICE POLICY REV. 443, 454-55 (2005).

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level to enact ever more restrictive laws. Despite many legal challenges, these campaigns have had significant success—at least 38 states now have at least one law that restricts access to abortion or targets abortion providers with additional, often onerous, regulatory requirements.[283] Many states have multiple such laws, including requiring waiting periods to access abortion,[284] parental consent laws,[285] mandatory ultrasound requirements,[286] special licensing or admitting requirements for abortion providers,[287] and requirements for the buildings that house abortion clinics.[288] The stated intention of such abortion restrictions is often the protection of women's health,[289] although one does not have to search too far for evidence that these restrictions are intended to decrease rates of abortion by making it practically inaccessible.[290] The latter goal is, at least for the moment, constitutionally impermissible.[291] In light of the tenuousness of the abortion right at the federal level, however, the following sections will address *both* of these legislative goals and how restrictions on abortion care create perverse outcomes regardless of whether the focus is on decreasing abortion or promoting the health of women and children. Therefore, even if the Court decides that abortion is no longer a constitutionally protected fundamental right, these arguments under rational basis review would still be viable avenues for advocates to use in attacking the constitutionality of abortion restrictions.

[283] *An Overview of Abortion Laws*, GUTTMACHER INST. https://www.guttmacher.org/state-policy/explore/overview-abortion-laws [ ]https://perma.cc/H3UJ-3UF4 (last updated Dec. 1, 2021).

[284] *Id.*

[285] *Id.*

[286] *Id.*

[287] *Id.*

[288] *Id.* This is to say nothing of the laws—currently unenforceable as unconstitutional—that prohibit abortion entirely or do so at a certain number of gestational weeks.

[289] Rachel Benson Gold & Elizabeth Nash, *TRAP Laws Gain Political Traction While Abortion Clinics—and the Women They Serve—Pay the Price*, GUTTMACHER POL'Y REV., Spring 2013, at 7, 11–12. ("For example, regulations in South Carolina say that 'health licensing has the ultimate goal of ensuring that individuals . . . are provided appropriate care and services in a manner and, in an environment that promotes their health, safety, and well-being.' In Pennsylvania, the state's regulations set standards that are intended to 'promote the health, safety and adequate care of the patients.'"). Of course, people who do not identify as women may also seek abortion care, although the language of these laws rarely takes that into account.

[290] Katrina Trinko, *Will Mississippi's Last Abortion Clinic Close*?, NAT'L REV. ONLINE (Dec. 18, 2012), http://www.nationalreview.com/article/335814/will-mississippis-last-abortion-clinic-close-katrina-trinko [https://perma.cc/58J5-XJDZ] (quoting Mississippi governor Phil Bryant, at the time he signed Mississippi's TRAP bill into law in 2012, stating that "Today you see the first step in a movement to do what we campaigned on . . . . to try to end abortion in Mississippi.").

[291] Planned Parenthood Se. Pa. v. Casey, 505 U.S. 833, 877–78 ("Unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right.").

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1. *Evidence of Perversity*

The stated goal of many laws restricting abortion or regulating abortion providers is to protect women's health.[292] The history of abortion, as well as voluminous current research, all compellingly paint a picture of how it is the *restriction* of abortion, and not abortion itself, that is most damaging to women's health.[293] Historically and cross-culturally, prohibiting access to safe and legal abortion has led to increased risks of serious medical complications and even death.[294] As just one example, for many decades abortion was basically illegal in Romania and, during this time, the country had the highest maternal mortality rates in all of Europe.[295] In the year after abortion was legalized and the procedure started to become available again, the maternal mortality rate nearly halved.[296] A similar story occurred in South Africa when abortion became legal.[297] Research from around the world suggests a similar picture—the more restricted abortion is, the higher the maternal mortality rate.[298]

But it is not necessary to look beyond our own borders and our own time to see how restrictions on abortion harm women's health and endanger their lives. States with the highest number of abortion restrictions match those with the worst maternal health outcomes.[299] Indeed, as restrictions grow, so too does maternal mortality.[300] Using a difference in difference analysis, researchers found that reducing the number of Planned Parenthood

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[292] Caitlin E. Borgmann, *Borrowing from Dormant Commerce Clause Doctrine in Analyzing Abortion Clinic Regulations*, 26 HEALTH MATRIX 41, 49–51 (2016). This focal point reflects a shift in the rhetoric—if not the priorities—of the pro-life community following years of mostly unsuccessful campaigns that focused on the sanctity of fetal life.

[293] Philip D. Darney, Marcos Nakamura-Pereira, Lesley Regan, Feiruz Serur & Kusum Thapa, *Maternal Mortality in the United States Compared with Ethiopia, Nepal, Brazil, and the United Kingdom: Contrasts in Reproductive Health Policies,* 135 OBSTETRICS & GYNECOLOGY 1362, 1363 (2020) ("Before legalization in the United States, there were at least 200 maternal deaths yearly from illegal abortion").

[294] Lisa B. Haddad & Nawal M. Nour, *Unsafe Abortion: Unnecessary Maternal Mortality*, 2 REV. OBSTETRICS & GYNECOLOGY 122, 124 (2009).

[295] G. Benagiano & A. Pera, *Decreasing the need for abortion: challenges and constraints*, 70 INT'L J. GYNECOLOGY & OBSTETRICS 35, 44 (2000).

[296] *Id.*

[297] Haddad & Nour, *supra* note 294, at 124 ("[I]n South Africa, after abortion became legal and available on request in 1997, abortion-related infection decreased by 52%, and the abortion mortality ratio from 1998 to 2001 dropped by 91% from its 1994 level.").

[298] Su Mon Latt, Allison Milner & Anne Kavanagh, *Abortion Laws Reform May Reduce Maternal Mortality: An Ecological Study in 162 Countries*, 19 BOS. MED. CTR. WOMEN'S HEALTH 1 (2019) ("Our findings suggest that the liberalization of abortion laws will reduce maternal mortality.")

[299] CTR. FOR REPRODUCTIVE RTS., II EVALUATING PRIORITIES: MEASURING WOMEN'S AND CHILDREN'S HEALTH AND WELL-BEING AGAINST ABORTION RESTRICTIONS IN THE STATES 3 (2017), https://www.reproductiverights.org/sites/default/files/documents/USPA-Ibis-Evaluating-Priorities-v2.pdf [https://perma.cc/6QMJ-7KEQ].

[300] A. Addante, D. Eisenberg, & J. Leonard, M. Hoofnagle, *The Association of Restricted Abortion Access and Increasing Rates of Maternal Mortality within the United States*, 100 CONTRACEPTION 305, 498–99 (2019) ("Restrictive states had a higher [maternal mortality rate] than protective states" in 2017 and the maternal mortality rate "decreased or remained stable for all races in protective states and increased for all races in restrictive states").

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clinics in a state by 20% increased the maternal mortality rate by 8% and the enactment of legislation to restrict abortions based on gestational age increased the maternal mortality rate by a shocking 38%.[301] These results were consistent across different race and ethnic groups.[302] This research is admittedly new, but as this body of evidence grows, it could form the basis for an argument that TRAP laws and similar abortion restrictions result in perverse outcomes.[303] Considering the crisis in maternal health that is currently occurring in the United States,[304] it is not only permissible—but critical—for state legislators to pass laws designed to promote and preserve maternal health. But laws restricting abortion access clearly do not do this. And it is becoming increasingly clear that they actively harm pregnant people —and even contribute to their deaths.[305]

Further, TRAP laws are also associated with perverse outcomes for fetal and infant health.[306] In fact, the more state level abortion restrictions in place, the higher the rates of infant mortality.[307] Pregnant people who seek but are denied abortion care are also more likely to delay or forgo prenatal care, negatively affecting both child and maternal health.[308] As one researcher concluded, "the increase in the legal abortion rate is the single most important factor in reductions in [the neonatal mortality rate]."[309]

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[301] Summer Sherburne Hawkins, Marco Ghiani, Sam Harper, Christopher F. Baum & Jay S. Kaufman, *Impact of State-Level Changes on Maternal Mortality: A Population-Based, Quasi-Experimental Study*, 58 AM. J. PREVENTATIVE MED. 165, 172 (2020).

[302] *Id.*

[303] Nisha Verma & Scott A. Shainker, *Maternal Mortality, Abortion Access, and Optimizing Care in an Increasingly Restrictive United States: A Review of the Current Climate*, 44 SEMINARS PERINATOLOGY Aug. 2020, at 1, 4 ("Although limited, the current data does support the connection between restricting abortion access and the rising maternal mortality rate in the U.S.").

[304] *Id* at 1 (noting that the pregnancy-related mortality rate has steadily climbed in the years between 1987 and 2016).

[305] In fact, it has been clear for quite some time. *See* Sunstein, *supra* note 7 at 428 ("[R]estrictions on the availability of abortion, defended as a means of protecting human life, appear to have resulted in the death of many women per year and at the same time not to have protected a large percentage of fetuses from the practice of abortion.").

[306] Roman Pabayo, Amy Ehntholt, Daniel M. Cook, Megan Reynolds, Peter Muennig, & Sze Y. Liu, *Laws Restricting Access to Abortion Services and Infant Mortality Risk in the United States*, 17 INT. J. ENV'T RSCH. PUB. HEALTH May 2020 1, 5 (noting that each of the five most common types of TRAP laws was significantly associated with an increased odds for infant mortality, although only one type —parental involvement laws —remain significantly statistically related to negative infant mortality standing on its own).

[307] *Id.* (finding that infants born in states with more restrictive laws had greater risk for infant mortality than those born in states with no restrictive laws). Inversely, states with the most funding for abortion services had lower rates of infant mortality. *See* N. Krieger, Sofia Gruskin, Nakul Singh , Matthew V. Kiang , Jarvis T. Chen, Pamela D. Waterman , Jason Beckfield & Brent A. Coull, *Reproductive Justice & Preventable Deaths: State Funding, Family Planning, Abortion, and Infant Mortality, US 1980-2010*, 2 SSM POPULATION HEALTH 277, 278 (2016).

[308] See Jenna Jerman, Lori Frohwirth, Megan L. Kavanaugh and Nakeisha Blades, *Barriers to Abortion Care and their Consequences for Patients Traveling for Services: Qualitative Findings from Two States*, 49 PERSPS. ON SEXUAL & REPRODUCTIVE HEALTH 95, 96 (2017).

[309] Michael Grossman, *Government and Health Outcomes*, 72 AM. ECON. REV. 191, 193 (1982)

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As previously stated, however, legislators who introduce and pass laws restricting abortions may not actually be motivated by protecting the health of women.[310] There is abundant evidence that these laws aim to reduce or eliminate abortions altogether, by making it more difficult or impossible access abortion care.[311] The research shows, however, that while the laws *do* make it more difficult for people to access abortion care, they *don't* reduce the incidence of abortion[312]—and in fact some research shows that restrictive abortion laws are associated with an increase in the abortion rate.[313] Part of the reason that laws restricting access to abortions are so damaging to public health is because, while they do not decrease abortions, they do result in pregnant people having abortions later in pregnancy as a result of the impediments to access that such laws create. Later term abortions are, in general, associated with higher risks to maternal health and life.[314]

Of course, there is one additional legislative "goal" of state-level abortion restrictions: promoting the "sanctity of life."[315] Even if one could argue that these laws serve this more amorphous, expressive goal, it would be difficult to argue that a law serves such an expressive function when it results in

[310] Verma & Shainker, *supra* note 303, at 4 ("Many of these restrictions, instead of being grounded in science, are built on religious and/or political belief systems.").

[311] For instance, Justice Ruth Bader Ginsburg's questioning during the oral argument for *Whole Women's Health v. Hellerstedt* focuses on how the state's actions cannot be squared with the goal of maternal health. *See* Mark Joseph Stern, "The Most Important Exchange of Wednesday's SCOTUS Abortion Arguments," SLATE (March 2, 2016) https://slate.com/news-and-politics/2016/03/ruth-bader-ginsburg-asks-the-most-important-question-of-oral-arguments-in-whole-womans-health-v-hellerstedt.html [https://perma.cc/9NZ6-VBQH].

[312] Nichole Austin & Sam Harper, *Quantifying the Impact of Targeted Regulation of Abortion Provider Laws on US Abortion Rates: A Multi-State Assessment*, 100 CONTRACEPTION 374, 374 (2019) (finding that two common state TRAP laws has no statistically significant effect on rates of abortion.)

[313] Elizabeth Nash & Joerg Drewke, *The U.S. Abortion Rate Continues to Drop: Once Again, State Abortion Restrictions Are Not the Main Driver*, 22 GUTTMACHER POL'Y REV. 41, 43 (2019) ("While 32 states enacted 394 restrictions between 2011 and 2017, nearly every state had a lower abortion rate in 2017 than in 2011, regardless of whether it had restricted abortion access. Several states with new restrictions actually had abortion rate increases."); Jonathan Bearakn, Anna Popinchalk, Bela Ganatra, Ann-Beth Moller, Özge Tunçalp, Cynthia Beavin, Lorraine Kwok & Leontine Alkema, *Unintended Pregnancy and Abortion by Income, Region, and the Legal Status of Abortion: Estimates from a Comprehensive Model for 1990–2019*, 8 LANCET GLOB. HEALTH e1106, e1159 (2020) ("In countries that restricted abortion, the percent of unintended pregnancies ending in abortion increased in every 5 year period in our analysis. . . . By contrast, in countries where abortion is broadly legal, excluding China and India, there was a 13% [ ] decrease in the percent of unintended pregnancies ending in abortion."); Haddad & Nour, *supra* note 294, at 124 ("Less restrictive abortion laws do not appear to entail more abortions overall. The world's lowest abortion rates are in Europe, where abortion is legal and widely available").

[314] Linda Bartlett, Cynthia J. Berg,, Holly B. Shulman, Suzanne B. Zane, Clarice A. Green, Sara Whitehead & Hani K. Atrash, *Risk Factors for Legal Induced Abortion-Related Mortality in the United States*, 103 OBSTETRICS & GYNECOLOGY 729, 736 (2004) ("Currently, gestational age at the time of the abortion is the strongest risk factor for death. If women who terminated their pregnancies after 8 weeks of gestation had accessed abortion services during the first 8 weeks of gestation, up to 87% of deaths might have been avoided.").

[315] This more amorphous, moral goal is likely still a constitutionally permissible one. S*ee* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992). Although, the legitimacy of morals legislation more generally is somewhat unsettled. *See supra* note 247.

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increases in abortion, harm to women's and infants' health, and ultimately, increased death. The strong weight of the credible scientific evidence shows us that laws restricting abortion are perverse—resulting in *more* abortion and *poorer* maternal and infant health.[316] Such outcomes are perverse to even the professed expression of the importance for life.

2. *Professional Consensus*

While there are many organizations that identify as explicitly anti-abortion, mainstream medical organizations are uniformly opposed to the sort of abortion restrictive laws described here.[317] In May 2019, a coalition of physicians groups, including American Academy of Family Physicians, the American Academy of Pediatrics, the American College of Obstetricians and Gynecologists, the American College of Physicians, the American Osteopathic Association, and the American Psychiatric Association released a statement that they are "are firmly opposed to efforts in state legislatures across the United States that inappropriately interfere with the patient-physician relationship, unnecessarily regulate the evidence-based practice of medicine and, in some cases, even criminalize physicians who deliver safe, legal, and necessary medical care."[318] The statement was made in response to Alabama legislation that would have made abortion unavailable in all cases except where the mother's life was endangered.

The World Health Organization has recognized that access to safe and legal abortion services is an important aspect of decreasing maternal mortality rates.[319] At the International Federation of Gynecology and Obstetrics' World Congress in 2018, the American College of Obstetricians and Gynecologists convened a panel of representatives from five national societies focused on reducing maternal mortality rates, in order to consider potential interventions that could be successful in reducing the United States' truly abysmal maternal mortality rate. The panel identified "expanded access to reproductive health care, particularly contraception and safe abortion, as key

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[316] Pabayo et al., *supra* note 306 (noting that there are "unintended, and differentially strong adverse effects associated with abortion policies that restrict women's reproductive decision-making").

[317] Allison Limmer, *Physicians for Life Attracts Opposing students with Diverse Lectures and Topics*, TEXAS RIGHT TO LIFE (July 24, 2018), https://www.texasrighttolife.com/physicians-for-life-attracts-opposing-students-with-diverse-lectures-and-topics/ [https://perma.cc/59LC-ULNU] ("In medicine today, there is hardly a belief more unpopular than being Pro-Life.").

[318] *Frontline Physicians Call on Politicians to End Political Interference in the Delivery of Evidence Based Medicine* (May 15, 2019), AM. ACAD. OF FAM. PHYSICIANS https://www.aafp.org/news/media-center/more-statements/physicians-call-on-politicians-to-end-political-interference-in-the-delivery-of-evidence-based-medicine.html [https://perma.cc/JA59-EWZ7].

[319] WHO, MATERNAL MORTALITY: FACT SHEET (2014), https://apps.who.int/iris/bitstream/handle/10665/112318/WHO_RHR_14.06_eng.pdf?sequence=5&isAllowed=Y [https://perma.cc/LQ6D-W82S] ("To avoid maternal deaths, it is also vital to prevent unwanted and too-early pregnancies. All women, including adolescents, need access to family planning, safe abortion services to the full extent of the law, and quality post-abortion care.").

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interventions that had proven effective in decreasing maternal mortality rates worldwide."[320] Whatever the political arguments surrounding abortion restrictions might suggest, the scientific and medical community seem firmly convinced that laws that reduce access to abortion are public health losers—resulting in the harms that they purportedly seek to redress.[321]

Of course, restrictions on previability abortion are not currently analyzed under the rational basis standard. Instead, they are governed by the "undue burden" standard originally announced in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[322] as interpreted by *Whole Women's Health v. Hellerstedt*.[323] But following the appointment of Amy Coney Barrett to the Supreme Court, Chief Justice Roberts' lukewarm embrace of abortion rights in *June Medical Services, LLC v. Russo*,[324] and the grant of certiorari in *Dobbs v. Jackson Women's Health Organization*,[325] it seems likely that, at very least, the constitutional right to abortion will be significantly eroded by the current Court. The arguments contained herein envision a world in which abortion advocates can use the standard reserved for the *lowest* level of scrutiny—rational basis review—to nonetheless argue that restrictions on abortion providers are perverse and thus irrational and unconstitutional. While a majority of the current Court is unlikely to be convinced that abortion is a fundamental right or for the need to evaluate the benefit of abortion restrictions in light of their burdens,[326] even some conservative members of the Court have signaled both their willingness to consider evidence-based claims of how abortion restrictions create harm in the real-world—including those that undermine state legislature's claims that no such harm exists.[327]

[320] See Darney et al., *supra* note 293, at 1362.

[321] *See* NAT'L ACADS. SCI., ENG'G, AND MED., ABORTION CARE AND THE SIX ATTRIBUTES OF QUALITY HEALTH CARE (2018), www.nap.edu/resource/24950/03162018AbortionCareinsert.pdf https://perma.cc/JGJ4-S6PJ (detailing how state-level abortion restrictions negatively affect the quality of medical care). *But see* Aziza Ahmed, *Medical Evidence and Expertise in Abortion Jurisprudence*, 41 Am. J.L. & Med. 85, 87 (2015) (arguing that because medical and scientific expertise has been used to effectively undermine abortion rights, pro-choice advocates should no longer put such expertise at the center of their prochoice advocacy).

[322] 505 U.S. 833 (1992).

[323] 136 S. Ct. 2292 (2016), as revised (June 27, 2016).

[324] 140 S. Ct. 2103 (2020).

[325] 945 F.2d 265 (5th Cir. 2019), *cert. granted*, 141 S. Ct. 2619 (2021) (No. 19-1392).

[326] *June Medical Servs.,* 140 S. Ct. at 2136 (Roberts, J., concurring) (rejecting the interpretation of *Casey* that the case required a balancing of costs and benefits, but instead only required an analysis of whether the laws create a "substantial obstacle" in the path of a patient seeking an abortion).

[327] *See* Rebouche, *supra* note 196, at 1377 (discussing Chief Justice Roberts' consideration—and acceptance of— evidence-based claims concerning the burden placed on pregnant people through abortion restrictions). As Professor Rebouche argues, even in the face of a Supreme Court that is likely willing to erode the foundation for the constitutional right to abortion, the Court will still have to contend with the large—and growing—body of evidence compiled since the Court's questionable use of scientific evidence in *Gonzales v. Carhart* that shows the negative public health consequences that flow from many of the existing state restrictions on abortion. *See id.* at 1367–70 (discussing the proliferation of social science evidence compiled since the Court's deference to the legislative findings in *Gonzales*, including the evidence relied on in *Whole Women's Health* that showed a Texas law restricting abortion services was likely to harm women's health).

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Conclusion

There is a rich literature on *why* perversity of outcomes occurs. Unsurprisingly, psychology and the social sciences can tell us a great deal about why laws designed to have one effect end up having the opposite effect. While continuing to learn more about why perversity happens, the law still must address what to do when it occurs.

In many ways, arguing that demonstrated perversity should form the basis for an argument that a law is irrational is low-hanging fruit. It represents only the most obviously irrational legislative behavior that might be addressed by courts wielding rational basis review. But in doing so, it allows advocates to focus on an overlooked way to think about the litigation of hot button social issues—one that is divorced from the often weighty moral or political questions about legislatures' motivations.[328] If there were a solid body of precedent that established that legislators were not constitutionally permitted to pass laws that resulted in demonstrable perverse outcomes, such precedent might be used to great effect in areas where litigants are instead trapped making difficult arguments about intent and animus.

Moreover, there is something inherently appealing about moving the argument away from the "real" intent of laws that harm marginalized or politically unpopular groups, and instead forcing legislatures to defend laws *on the terms that they themselves have set.* This strategy would allow advocates to accept for purposes of argument that TRAP laws are designed to protect women's health, that abstinence-only education is intended to reduce STD rates and teen pregnancy, and that harsh criminal sentencing laws are intended to reduce recidivism and deter criminality—and then to show that each of these laws is perverse—that it creates outcomes demonstrably at odds from the legislatures' intent.[329] In so doing, it might even allow for a more robust focus on the reality of the often devastating effect of these laws on real peoples' lives.[330]

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[328] *Developments in the Law: Confronting the New Challenges of Scientific Evidence*, 108 Harv. L. Rev. 1481, 1484 (1995) (contrasting law with science, and describing the latter as "a descriptive pursuit, which does not define how the universe should be but rather describes how it actually is.").

[329] In so doing, advocates will need to focus not only on amassing the relevant scientific evidence, but also presenting it to jurists in a way that can be understood and incorporated into legal opinions. *See* Frankenberg & Garces, *supra* note 171, at 745 ("Justices—and the legal community more broadly—may not have had any research training and they may not be necessarily inclined to consider social science evidence unless they can unambiguously understand: (1) the findings; (2) the strength of the research; and (3) how particular findings relate to an issue under consideration.").

[330] There is also a risk that assuming the "good intent" of legislators may obscure the root of problems that systematically disadvantage marginalized groups, including obscuring the dynamics between law and power. *See* Martha T. McCluskey, *How the "Unintended Consequences" Story Promotes Unjust Intent and Impact,* 22 Berkeley La Raza L.J. 21, 30 (2012) ([T]he 'unintended consequences' message tends to attribute bad effects to the general powerlessness of law in the face of uncertainty and complexity, rather than to the foreseeable power of particular policy choices to lead to harm."). However, perversity arguments can be made without *agreeing* that legislatures act with permissible intentions—but only assuming that intention for

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The approach to rational basis review I advocate is at once radical and mundane. Courts are not currently reviewing laws for perversity as part of a standard rational basis review. And yet, I argue that the current understanding of rational basis review as it already exists contemplates courts doing just that. Existing frameworks for rational basis review require courts to invalidate laws that clearly contravene the overarching legislative intent because the law is solely or primarily responsible for producing the opposite result from legislative intent. Such an interpretation of rational basis review squares with the proper judicial role in interpreting and applying the law in light of legislative intent, reflects the modern information economy in which courts have equal access to a wealth of highly relevant information, and faithfully follows Supreme Court precedent that requires all government action to be non-arbitrary and, well, rational.

purposes of engaging in the specific perversity analysis. Arguments about impermissible intent can and should exist alongside perversity arguments, which are not meant in any way to excuse evidence of bad intent. *See id.* at 49 ("[J]ustice requires careful attention to both harmful intent and to complex harmful effects.").

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Addressing Periods at Work

*Marcy L. Karin**

Structural workplace changes are needed to acknowledge, anticipate, and accommodate menstruation, without harming equity or economic security for current and former menstruators. The biological process of menstruation does not stop at work, but workplaces are not designed to support needs related to periods, perimenopause, or menopause. Specifically, some workers who menstruate have needs related to menstrual accommodations like time away from work or access to menstrual products and private and sanitary spaces to dispose of menstrual discharge and the products that absorb it. Workers also have needs related to working free from indignities and harassment because of menstruation. Yet, periods and blood are stigmatized, gendered, and subject to taboos. The corresponding shame, lack of menstrual education, gender composition and power dynamics of workplaces, and overall structural mismatch makes some menstruators susceptible to discrimination and harassment at work.

This article explores this landscape of menstruation, menopause, and work. After identifying and categorizing menstrual needs at work, it analyzes employer-provided policies and existing legal requirements that offer some protections and supports to current and former menstruators at work. It then explores how these existing policies and law fail to comprehensively address menstrual needs or corresponding problems such as absenteeism, lost wages, privacy violations, health implications, harassment, and other menstrual indignities. Building on available menstrual experiences, voluntary employer policies, international models, and analysis of applicable federal law and related litigation, the article recommends public policy interventions to minimize menstrual injustices and acknowledge that menstruation and menopause at work matter.

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* Marcy Karin is the Jack & Lovell Olender Professor of Law & Director of the Legislation/Civil Rights Clinic at the University of the District of Columbia David A. Clarke School of Law. Thanks to the individuals who shared their menstrual experiences with the Clinic when it represented Bringing Resources to Aid Women's Shelters on public policy efforts to advance menstrual equity. Thanks also to Margaret Johnson, Monica Bhattacharya, Liz Cooper, Robin Runge, Leslie Mullins, Naomi Cahn, Bridget Crawford, Emily Gold Waldman, Muneer Ahmad, Sameer Ashar, Courtney Cross, Saleema Snow, Laurie Morin, Holly Seibold, Alexis Soterakis, Galina Abdel Azis, Pete Kimbis, Asia Hartsgrove, Chaz Hendrix, Tamara McGuire and participants in the Colloquium on Scholarship in Employment and Labor Law, AALS Clinical and Clinical Law Review works-in-progress reviewers, Southern Clinical Conference, New England Clinical Conference, UDC Law, and Mid-Atlantic Clinical Writing Workshop.

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INTRODUCTION

"Every woman dreads getting period symptoms when they're not expecting them, but I never thought I could be fired for it." – Alicia Coleman.[1]

Alicia Coleman was fired for damaging workplace property after she bled on a company chair and later on the carpet.[2] Sharone Hubert experienced heavy menstruation that required her to change her menstrual products regularly, which caused her to be late for work, leave work early, or "drench" her uniform with menses.[3] Becky White's supervisor asked her "How's the hot flash queen [and] the menopause today?"[4] Coleman, Hubert, White, and countless other American workers have been placed in the untenable position of having to choose between safely managing their menstruation, being subjected to discrimination, or harming their economic security.

Around the globe, employers have denied menstrual accommodations and violated workers' dignity and privacy. In Norway, workers were required to wear red bracelets when menstruating to notify a supervisor why they needed to use the bathroom more frequently.[5] In Spain, female factory workers had to wear a red sign with the word "toilet" on it "in a bid to humiliate them into taking less breaks."[6] The German supermarket Lidl spied on their staff to monitor menstrual cycles "to prevent shoplifting," and according to an internal memorandum, menstruating workers in the Czech Republic were required to wear a headband to "enjoy this [bathroom use] privilege."[7] And

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[1] Alanna Vagianos, *Georgia Woman Claims She Was Fired Because of Her Period*, HUFF. POST (Aug. 22, 2017, 12:04 PM), https://www.huffpost.com/entry/georgia-woman-claims-she-was-fired-because-of-her-period_n_599c34f0e4b04c532f445e76 [https://perma.cc/9Y4A-B7GU] (describing Coleman v. Bobby Dodd Inst., Inc., No. 4:17-CV-29, 2017 WL 2486080 (M.D. Ga. June 8, 2017), *appeal dismissed*, No. 17-13023-BB, 2017 WL 6762403 (11th Cir. Nov. 6, 2017)).

[2] *Coleman*, 2017 WL 2486080, at *1; *see infra* Section II.C.1 (citing *ACLU Appeals Case of Georgia Woman Fired for Getting Her Period at Work*, ACLU (Aug. 17, 2017), https://acluga.org/aclu-appeals-case-of-georgia-woman-fired-for-getting-her-period-at-work/ [https://perma.cc/S22C-K55M]).

[3] Hubert v. Dep't. of Corr., No. 3:14-CV-476 (VAB), 2018 WL 1582508, at *5 (D. Conn. March 30, 2018) (dismissing sex-discrimination claims for failure to exhaust administrative remedies).

[4] White v. Twin Falls Cnty., No. 1:14-CV-00102-ELJ-REB, 2016 WL 1275594, at *2, *8-9 (D. Idaho, Mar. 31, 2016) (allowing a hostile work environment claim to proceed).

[5] Sarah House, Thérèse Mahon & Sue Cavill, *Menstrual Hygiene Matters: A Resource for Improving Menstrual Hygiene Around the World*, WATERAID 174 (2012) (noting that the supervisor was fined); Rosemary Black, *Outrageous! Women Must Wear Red Bracelets When It's Their Time of The Month at Company in Norway*, NY DAILY NEWS (Dec. 2, 2010), https://www.nydailynews.com/life-style/outrageous-women-wear-red-bracelets-time-month-company-norway-article-1.473656 [https://perma.cc/48KN-V4MD] (sharing that workers "quite justifiably feel humiliated by being tagged in this way").

[6] House, Mahon & Cavill, *supra* note 5, at 175.

[7] *Period Power: Periods in the Workplace,* Lunette, https://www.lunette.com/blogs/news/period-power-periods-in-the-workplace [https://perma.cc/RL6F-3ATV]; Kate Connolly, *German Supermarket Chain Lidl Accused of Snooping on Staff*, GUARDIAN (Mar. 26, 2008, 20:54 EDT), https://www.theguardian.com/world/2008/mar/27/germany.supermarkets [https://perma.cc/JD6D-BZVW].

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when menstruating workers at an Indonesian factory were regularly denied bathroom access at work, they started wearing dark clothing to make it harder to see menstrual stains.[8]

As these stories demonstrate, a myriad of menstrual indignities happen at work. The reality is that workers have needs related to menstruation, its cessation, and menstrual management that regularly go unmet. Periods do not stop when menstruating individuals are at work. Nor do needs or workplace harassment stop when periods do for workers in perimenopause or menopause. Of course, many workers have no problem addressing this biological reality—they have access to workplace structures and income that allow timely and safe access, application and disposal of menstrual products, for example. There is growing recognition, however, that this is not everyone's reality.

Workplaces are not universally designed to support menstrual needs. Some workers lack access to menstrual accommodations—be it paid breaks, time off, flexible scheduling, or telework; affordable menstrual products and safe spaces to apply them; or modifications like uniform changes, fans, or workstations placed in closer proximity to restrooms. Collectively, this access gap may lead to decreased productivity, absenteeism, privacy violations, or cause workers to risk their health or exacerbate pre-existing medical conditions with makeshift products. It also may cause some workers to stain their clothes, especially if one's period arrives unexpectedly or differently than it has in the past or over one's lifetime, which is common after pregnancy, for young menstruators, and during perimenopause.

Further, periods and blood are stigmatized, gendered, and subject to religious, social, and other lore. The corresponding shame and lack of menstrual education about who menstruates, the individualized nature of the biological process, and its evolution over one's lifespan makes some workers susceptible to discrimination, intimidation, and harassment.[9] For example, a worker was repeatedly subjected to menstruation-related jokes and comments about premenstrual syndrome and "The Gift."[10] Another worker was barred from work post-maternity leave until her cycle was "normal" again.[11]

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[8] L. Kretsu, *Labour Rights in Indonesia: What is Menstruation Leave Labour Rights in Indonesia: What is Menstruation Leave*? CLEANCLOTHES.ORG (2000).

[9] Kids are taught to keep their menstrual needs secret to prevent boys from being uncomfortable. *See e.g.*, BRAWS & UNIV. OF D.C. DAVID A. CLARK SCH. OF L. LEGIS. CLINIC, PERIODS, POVERTY, AND THE NEED FOR POLICY: A REPORT ON MENSTRUAL INEQUITY IN THE UNITED STATES (2018) (sharing students' schooling to ask for turtles and penguins, not tampons and pads).

[10] Robyn M. Duponte, Arnold Rubin, Gerard Thomson & Aina Watkins, *Hostile Work Environment Based on Gender*, in U.S. EQUAL EMP. OPPORTUNITY COMM'N, DIG. EQUAL EMP. OPPORTUNITY L. VOL XV, NO. 2 (2004), https://www.eeoc.gov/federal/digest/xv-2.cfm [https://perma.cc/3N7N-PBCY]; Margaret E. Johnson, *Menstrual Justice*, 53 U.C. DAVIS L. REV. 1, 33–34 (2019).

[11] Harper v. Thiokol Chem. Corp., 619 F.2d 489, 490 (5th Cir. 1980); *see* Hiebert v. Sec'y, Dep't of Transp., EEOC DOC 01A05253, 2003 WL 21302525, at *1–2 (May 30, 2003) (reversing the decision to find a hostile work environment based on menstrual references and jokes, resulting in EEO training being imposed on the agency and the claimant receiving $11,590.09 for medical and $31,000 in non-pecuniary damages).

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Someone with a disorder related to menstruation was fired after she disclosed it to her supervisor, based on an unsubstantiated belief that it would impact her work.[12] Additionally, menstrual needs at work are further complicated for transgender, genderqueer/nonconforming, or intersex workers— who may not be out at work or whose experiences are counter to managers understanding of who menstruates and/or has menstrual needs.

Currently, most workplaces fail to acknowledge, anticipate, and/or accommodate menstruation. As a result, some menstruators have been forced to choose between their health, dignity, and economic security. This catch-22 situation is indicative of the structural mismatch where workplace systems and cultures do not accommodate workers needs to safely address periods at work nor work in a place free from menstrual discrimination. Indeed, workplace structures often ignore the adverse employment decisions that are made on the basis of menstruation or otherwise against current or former menstruators. Workers need to be able to manage menstruation and be a menstruator at work without (fear of) harassment, discipline, termination, or other retaliation. Until then, workplace justice is not achieved and equity and economic security for current and former menstruators remains out of reach.

Existing law does afford limited period-related workplace protections.[13] The provisions create an imperfect pairing that leave some needs unaddressed, however; they simply were not designed to affirmatively address menstrual or menopausal needs. Relatedly, the workplace has largely been ignored in the American menstrual movement, including policy reform campaigns, the media, and scholarship.[14] Although activists (and others) often mention work as a place in need of reform, providing products at work is generally the only identified solution, if one is mentioned at all. There is no question that this reform is needed. By itself, however, it is not enough. Additional interventions are necessary to comprehensively address the mismatch of how workplaces are structured and the needs of menstruating individuals. Beyond products, workers need access to paid and job-protected time away from work as needed, toilets, running water, trash disposal, col-

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[12] EEOC v. The Goodyear Tire & Rubber Co., Civil Action No. 5:11-cv-00468, (E.D.N.C. 2011); *see* Press Release, EEOC, The Goodyear Tire & Rubber Company to Pay $20,000 to Settle EEOC Disability Discrimination Suit (July 23, 2012), https://www.eeoc.gov/newsroom/goodyear-tire-rubber-company-pay-20000-settle-eeoc-disability-discrimination-suit [https://perma.cc/9A67-EFGJ].

[13] See *infra* Section II.

[14] Some seminal legal scholarship related to this movement and its theoretical, historical, and pedagogical impacts does mention work. *See* Bridget J. Crawford, Margaret E. Johnson, Marcy L. Karin, Laura Strausfeld & Emily G. Waldman, *The Ground on Which We All Stand: A Conversation About Menstrual Equity Law and Activism*, 26 MICH. J. GENDER & L. 341, 360–61, 379 (2020) (articulating the workplace as the next frontier for menstrual advocacy, and containing the author's early call for a policy response); Johnson, *supra* note 10 (naming menstrual injustices at work); JENNIFER WEISS-WOLF, PERIODS GONE PUBLIC: TAKING A STAND FOR MENSTRUAL EQUITY 16 (2017) (mentioning menstrual inequities at work). Recently, Professors Crawford, Johnson, and Waldman organized a cutting-edge symposium that explored menstruation and the law, including some workplace essays. *See* Symposium, *Are You There Law? It's Me, Menstruation*, 41 COLUM. J. GENDER & L. i (2021).

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leagues and supervisors educated about menstruation, work with dignity, and a worksite free from menstrual harassment.

This article contributes to the burgeoning scholarship area of menstruation and the law by exploring periods at work. It centers experiences and needs related to menstruation and menopause at work in voluntary employer policies and applicable existing employment law. Building on early policy campaigns and experiences from litigation and laws around the globe, it then offers a proposal to revise the law to remove systemic barriers that create menstrual indignities. Unlike existing law, the policy proposal would explicitly cover menstruation, require employers to provide access to menstrual accommodations, and afford workers the right to work free from menstrual indignities, harassment, and discrimination.

Part I addresses the realities of menstruation at work and identifies and categorizes worker needs related to periods. It also introduces actions that workers have taken to bargain for structural changes and that employers have voluntarily adopted to address periods at work. Because those bargained for and voluntary workplace practices cover only a small percentage of workers, Part II provides an overview of how existing workplace laws impose requirements on employers that apply to each category of menstrual need. It also explores how existing laws fail to adequately address menstrual equity or otherwise live up to their promised protections for all current and former menstruators. It then looks internationally to explore how other countries' movements and laws are addressing menstrual accommodations and antidiscrimination protection. Finally, Part III offers a proposal to amend and clarify existing laws to rectify this mismatch, investigates additional reasons for it, and counters some anticipated critiques.

I. Periods at Work

Many workers have no problems with menstruation at work. They have access to workplace structures that allow on-demand and safe use of menstrual products, and they work at places and with people who have been educated about menstruation and do not stigmatize, harass, or prevent opportunities because of it. To understand why the ability to safely address menstruation at work is not a universal reality and the need for public policy to intervene, this section starts with an overview of menstruation, perimenopause, and menopause. It then explains menstrual needs at work related to the biological process of menses, and how those needs are exacerbated by the culture of silence and lack of accurate menstrual education. Finally, it concludes with an overview of workers' collective action to change traditional workplace structures that acknowledge menstruation and the development of employer practices to support workers' needs to address periods at work.

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A. The Biological Process and Culture Surrounding Menstruation

Approximately once a month, some people with uteruses experience the biological process of menstruation, which consists of the shedding of uterine lining causing the average discharge of two to five tablespoons of blood and tissue for around five days.[15] Colloquially, this process is called a "period."[16] Periods are experienced by menstruators—people with a uterus and at least one ovary who have reached puberty and are not yet in menopause.[17] Most menstruators, including those experiencing pere-menopause or in menopause,[18] are cis girls and women. Transgender boys, transgender men, and persons who are genderqueer/nonbinary or intersex also may be menstruators or in peri-menopause or menopause.[19]

Menopause is the permanent cessation of menstruation, measured at the point of twelve months after a person's last period.[20] Perimenopause is the approximately seven years before that moment during which the transi-

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[15] *What Happens During the Typical 28-Day Menstrual Cycle?*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle [https://perma.cc/ZP3S-ZFFJ] (last visited Jan. 31, 2021); Marcy L. Karin, Margaret E. Johnson & Elizabeth B. Cooper, *Menstrual Dignity and the Bar Exam*, 55 UC DAVIS L. REV. 1, 22 (2021); *Menstrual Cycle*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/menstrual-cycle/your-menstrual-cycle [https://perma.cc/49V6-RANB] (last visited July 18, 2021); House, Mahon & Cavill, *supra* note 5, at tble.1.3, 33.

[16] Abigail Durkin, *Profitable Menstruation: How the Cost of Feminine Hygiene Products is a Battle against Reproductive Justice*, 18 GEO. J. GENDER & L. 131, 135 (2017); *Menstrual Cycle*, *supra* note 15.

[17] Karin, Cooper & Johnson, *supra* note 15, at 22 (citing Johnson, *supra* note 10, at 9) (explaining use of the term "menstruator").

[18] Unless otherwise specified, the term "menstruator" is used to refer to people who currently or formerly experienced menstruation including people who are in perimenopause and menopause. Similarly, "menstruation" is used as an umbrella term to refer to menstruation, perimenopause, and menopause.

[19] Johnson, *supra* note 10, at 30–38; *Hysterectomy*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, https://www.womenshealth.gov/a-z-topics/hysterectomy [https://perma.cc/B6QZ-CTWQ] (periods are not possible if the uterus or both ovaries are removed). *See* Sarah E. Frank, *Queering Menstruation: Trans and Non-Binary Identity and Body Politics*, 90 SOCIO. INQUIRY 371, 382 (2020) (describing menstruation by people with diverse gender identities); Chris Bobel & Breanne Fahs, *The Menstrual Mark: Menstruation as Social Stigma*, *in* PALGRAVE HANDBOOK OF CRITICAL MENSTRUATION STUDS. 1009 (Chris Bobel, Inga T. Winkler & Breanne Fahs. eds., 2020) [hereinafter PALGRAVE HANDBOOK] (explaining why the gendered notion that "*all women menstruate*" is wrong, including reasons that women do not menstruate and "*some* men do menstruate") (emphasis in original); Margaret E. Johnson, Emily G. Waldman & Bridget J. Crawford, *Title IX & Menstruation*, 43 HARV. J. L. & GENDER 225, 268 (2020) ("not all girls and women menstruate, and not all who menstruate are girls or women, but all who do have 'female biology'"); Beth Goldblatt & Linda Steele, *Bloody Unfair: Inequality Related to Menstruation-Considering the Role of Discrimination Law*, 41 SYDNEY L. REV. 293, 295 (2019) (exploring why "feminine hygiene" is "problematically termed"); Cass Bliss, *Here's What It's Like to Get Your Period When You're Not A Woman*, HUFF. POST (Aug. 20, 2018, 8:30am), https://www.huffingtonpost.com/entry/nonbinaryperiod-menstruation_us_5b75ac1fe4b0182d49b1c2ed [https://perma.cc/A9D4-3DAM] (sharing some experiences of a nonbinary trans menstruator).

[20] *The Takeaway: Why are Workplace Menopause Polices Being Pushed for in the UK and Not the US?*, WNYC Studios (Sept. 3, 2019), https://www.wnycstudios.org/story/workplace-menopause-polices-uk-us [https://perma.cc/92M7-8VJS] (remarks of Chris Bobel).

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tion of one's cycle changes, usually starting sometime between 44 and 55.[21] Regardless of age, hysterectomies and other procedures also cause menopause.[22] Most former menstruators spend as much time at work in menopause as they did while menstruating or in perimenopause.[23]

1. *Menstrual Cycles, Symptoms, and Conditions*

On average, menstruators experience 480 menstrual cycles over a lifetime.[24] Each cycle's length and discharge level vary depending on the person and a series of factors such as stress and age. A minority of menstruators have a "regular" twenty-eight day cycle.[25] Others may have shorter, more frequent cycles characterized by heavy bleeding, "[p]assing blood clots larger than the size of quarters," and "[b]leeding that often lasts longer than eight days."[26] Further, menstruators may experience any number of medical conditions that co-occur or relate to periods, which may increase pain or flow significantly, such as dysmenorrhea or endometriosis.[27] Some of these conditions disproportionality impact certain groups of menstruators. For example, Black menstruators are more prone to uterine fibroids and undergo hysterectomies and myomectomies at substantially greater rates.[28]

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[21] *What is Menopause?*, National Institute on Aging, https://www.nia.nih.gov/health/what-menopause [https://perma.cc/CRS8-ELDV] (last visited Aug. 15, 2021); Leslie Mullins, *Is It Hot in Here or is It Just Me?: A Call for Menopause Equity in the Workplace* (May 8, 2021) (ALWR, UDC Law) (manuscript at 2–3) (on file with author) (describing the menstrual lifespan and characteristics of menopause). Perimenopause can last between 4–12 years; the average age of menopause is 51. Kate Whiting, MENOPAUSE SURVIVAL GUIDE (Aug. 22, 2017, 10:03 AM), Belfast Tel., https://www.belfasttelegraph.co.uk/life/health/5-point-survival-guide-to-getting-through-the-menopause-36053786.html [https://perma.cc/BFQ5-3ZMN].

[22] *What is Menopause?*, *supra* note 21.

[23] Naomi Cahn, *Justice for the Menopause: A Research Agenda*, 41 COLUM. J. GENDER & L. 27, 28 (2021).

[24] Astrid Krenz & Holger Strulikz, *Menstruation Hygiene Management and Work Attendance in a Developing Country* (2018), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3305598 [https://perma.cc/24AN-CMDX].

[25] *Menstrual Cycle*, *supra* note 15; ELISSA STEIN & SUSAN KIM, FLOW: THE CULTURAL STORY OF MENSTRUATION 189 (2009) (61% of menstruators experienced at least one unpredictable period).

[26] Johnson, *supra* note 10, at 10.

[27] *Id.* at 14–15; House, Mahon & Cavill, *supra* note 5, at tbl.1.3 (defining common medical situations associated with menstruation, including menorrhagia, polymenorrhagia, amenorrhea, oligomenorrhea, dysmenorrhea, and spotting); *see also* MAYO CLINIC, *Endometriosis*, https://www.mayoclinic.org/diseases-conditions/endometriosis/symptoms-causes/syc-20354656 [https://perma.cc/VH6H-JSPM] (explaining that endometriosis exists when uterine tissues grows outside the uterus, which can cause significant pain during menstruation); Jyothsna Latha Belliappa, *Menstrual Leave Debate: Opportunity to Address Inclusivity in Indian Organizations*, 53 INDIAN J. INDUS. RELS. 604, 606 (2018) (noting that 10% of women of menstruating age are diagnosed with endometriosis); Mayo Clinic, *Menstrual Cramps*, https://www.mayoclinic.org/diseases-conditions/menstrual-cramps/symptoms-causes/syc-20374938 [https://perma.cc/9G4R-HVNC] (explaining that dysmenorrhea, also known as menstrual cramps, consists of lower abdomen pains and ranges in severity).

[28] *See* Elizabeth A. Stewart, Wanda K. Nicholson, Linda Bradley & Bijan J. Borah, *The Burden of Uterine Fibroids for African-American Women: Results of a National Survey*, 22 J. WOMEN'S HEALTH 807, 807 (2013) (noting that African American women report greater rates,

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Absent medical intervention or suppression, periods are often unpredictable. This characteristic inevitably causes some menstruators to be unprepared and in need of products and a bathroom to avoid leakage of menses onto clothes and other items, among other consequences.[29] Over the course of a menstruator's lifespan, however, it seems inevitable that one or the other will not be available at some point. This could be a result of a changing cycle or period poverty, which includes the lack of access to facilities, education, or finances to buy menstrual products.[30]

Menstrual products include those items used to absorb discharge such as pads, tampons, menstrual cups, sponges, or period underwear, and those used to manage pain such as acetaminophen, ibuprofen, or heating pads.[31] The type of absorption product a menstruator uses—and how often it is replaced—depends upon the menstruator's body at that particular time and the product's absorbency and size.[32] On average, menstrual products using "absorbents" need to be changed every two to six hours.[33] If a menstruator's flow is heavier, as is true for twenty percent of menstruators, a tampon or

risks and earlier onsets of fibroids, and have a "higher likelihood of preoperative anemia[,] more severe pelvic pain," and "2.4 times more likely to undergo hysterectomy and have an 6.8-fold increase of undergoing uterine-sparing myomectomy"); Heba M. Eltoukhi, Monica N. Modi. Meredith Weston, Alicia Y. Armstrong & Elizabeth A. Stewart, *The Health Disparities of Uterine Fibroids for African American Women: A Public Health Issue*, 210 AM. J. OBSTETRICS & GYNEC. 1, 4 (2014) (reporting that African Americans experience fibroids more frequently, with more severity, increased needs for surgical responses, and larger numbers of postoperative complications than other racial groups); Nancy E. Avis, Sybil L. Crawford & Robin Green, *Vasomotor Symptoms Across the Menopause Transition: Differences Among Women* 45(4) OBSTETRICS & GYNECOLOGY CLINICS OF N. AM. 1, 7 (2018) ("[B]lack and Hispanic women are more likely. . .to report" vasomotor symptoms", which "are the primary menopausal symptoms").

[29] Karin, Cooper & Johnson, *supra* note 15, at 35; Johnson, Waldman & Crawford, *supra* note 19, at 232, 242, 244; Margaret E. Johnson, Marcy L. Karin & Elizabeth B. Cooper, *Stop the Stigma Against Menstruation: Starting with the Bar Exam,* NAT'L JURIST (July 28, 2020, 3:31 PM), https://www.nationaljurist.com/national-jurist-magazine/stop-stigma-against-menstruation-starting-bar-exam; *see* Elizabeth Montano, *The Bring Your Own Tampon Policy: Why Menstrual Hygiene Products Should Be Provided for Free in Restrooms*, 73 U. MIA. L. REV. 370, 373 (2018) (noting that 86% "of menstruators will unexpectedly start their period while in public without the necessary. . .products").

[30] Karin, Cooper & Johnson, *supra* note 15, at 23; Alexandra Alvalrez, *Period Poverty*, AM. MED. WOMEN'S ASS'N (Oct. 31, 2019), http://amwa-doc.org/period-poverty/ [https://perma.cc/7RNQ-NJ7K] (articulating why it is important to have menstrual products in all restrooms as "a necessary supplement to—but not a replacement for—the personal menstrual products the menstruator chooses to carry to attend to their individual menstruation experience").

[31] Karin, Cooper & Johnson, *supra* note 15, at 23 (citation omitted); *Period Products, What are the Options?*, INT'L PLANNED PARENTHOOD FED'N (Nov. 18, 2020), https://www.ippf.org/blogs/period-products-what-are-options [https://perma.cc/8BQC-ZKML]; *see* Montano, *supra* note 29, at 370 n.1.

[32] Karin, Cooper & Johnson, *supra* note 15, at 24.

[33] Julie Hennegan & Paul Montgomery, *Do Menstrual Hygiene Management Interventions Improve Education and Psychosocial Outcomes for Women and Girls in Low and Middle Income Countries? A Systematic Review*, 11 PLoS ONE (2016), https://doi.org/10.1371/journal.pone.0146985 [https://perma.cc/EX26-K7JP]. Tampons must be changed as often as every four hours to avoid the rare risk of toxic shock syndrome. Durkin, *supra* note 16, at 135.

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pad may need to be changed more frequently, such as every hour.[34] Menstruators also must determine which products are the safest for them in terms of size, absorbency, applicator, and material.[35] Sixty-two percent of American menstruators generally use disposable menstrual pads,[36] which means that proper waste disposal is needed too. It also means that menstruators spend significant money paying for products.[37] Some menstruators elect medical suppression, such as the use of birth control pills or hormonal medication, to reduce costs or for other reasons.[38]

At some point during the menstrual cycle, many menstruators experience "period pains" including "abdominal cramps, nausea, fatigue, feeling faint, headaches, back ache and general discomfort."[39] A significant minority of menstruators (approximately 20%) experience migraines.[40] Fluctuations in hormones also may cause "emotional and psychological changes"[41] and premenstrual syndrome ("PMS").[42] PMS manifestations include anxiety and a range of "physical symptoms" including "constipation or diarrhea[,] bloating and gassy feeling[,] cramping[,] headache[s,] or backache[s.]"[43] Menstruation also correlates with susceptibility to infection.[44]

Perimenopause may cause erratic and heavy bleeding.[45] Menopause often leads to hot flashes, palpitations, sleep disturbances, fatigue, poor concentration, urinary complaints, and mood changes.[46] It is often "control[led]"

[34] *Id.* at 133 (medical conditions may exacerbate bleeding); *Period Problems*, U.S. DEP'T HEALTH & HUM. SERVS., OFF. ON WOMEN'S HEALTH, https://www.womenshealth. gov/menstrual-cycle/period-problems [https://perma.cc/7CBK-FXTA].

[35] Johnson, Karin & Cooper, *supra* note 29.

[36] Alexandra Geertz, Lakshmi Iyer, Perri Kasen, Francesca Mazzola & Kyle Peterson, *An Opportunity to Address Menstrual Health and Gender Equity*, FSG, 6 (FIG. 1) (2016), https://www.fsg.org/sites/default/files/An%20Opportunity%20to%20Address%20Menstrual%20Health%20and%20Gender%20Equity_0.pdf [https://perma.cc/FRF8-Q7R9]

[37] Given educational opportunities, job insecurity, and other social determinants of health, the cost of these products disproportionately impacts menstruators of color. Letter from Grace Meng (and 27 other MOCs) to Joe Biden, Jr. (March 5, 2021), https://meng.house.gov/sites/meng.house.gov/files/Letter%20to%20Biden.pdf [https://perma.cc/RZ98-6KE7].

[38] STEIN & KIM, *supra* note 25, at 23–27, 30; Bobel & Fahs, PALGRAVE HANDBOOK, *supra* note 19, at 1009 (some trans men engage in menstrual suppression to counter distress about mixed messages surrounding menstruation and masculinity); Gina Shaw, *The No-Period Pills: The Newest Birth Control Pills Suppress Women's Menstrual Cycles. But Is This Wise?*, WEBMD, https://www.webmd.com/sex/birth-control/features/no-period-pills [https://perma.cc/9636-F5PN] (last visited on July 21, 2021) (exploring the impact of period suppression).

[39] House, Mahon & Cavill, *supra* note 5, at 24; Karin, Cooper & Johnson, *supra* note 15, at 24–25 (quoting Johnson, *supra* note 10, at 14).

[40] Laura A. Payne, Andrea J. Rapkin, Laura C. Seidman, Lonnie K. Zeltzer & Jennie Ci Tsao, *Experimental and Procedural Pain Responses in Primary Dysmenorrhea: A Systematic Review*, 10 J. PAIN RES. 2233, 2234 (2017); *Period Problems*, *supra* note 32.

[41] House, Mahon & Cavill, *supra* note 6, at 24.

[42] Johnson, *supra* note 10, at 14–15.

[43] *Id.*, at 14.

[44] House, Mahon & Cavill, *supra* note 5, at 36.

[45] *What is Menopause?*, *supra* note 21; Initial Brief of Plaintiff-Appellant at n.1, *Coleman v. Bobby Dodd Inst.*, No. 17-13023-BB (11th Cir. Aug. 14, 2017).

[46] *Dealing with Symptoms of Menopause*, Harvard Health, https://www.health.harvard.edu/womens-health/dealing-with-the-symptoms-of-menopause [https://perma.cc/D76S-EH6M] (last visited Oct. 29, 2019); UNISON, *The Menopause and Work. A Guide for UNISON Safety*

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with hormone replacement therapy, which may lead to heart disease and other complications.[47] The age at onset, occurrence, and severity of these symptoms vary, often significantly; relatedly, not all menstruators or people in menopause experience all symptoms all the time, and some experience more severe levels and frequency of symptoms or have them manifest differently over time.[48]

2. *Lack of Information and the Culture of Silence about Menstruation*

Historically, Americans (and others) are undereducated about menstruation.[49] Few states have a requirement to teach medically accurate information about menstruation, perimenopause, menopause, or how to safely, adequately, and appropriately manage them.[50] In addition to providing critically important information about people's bodies and choices, medically-accurate menstrual education helps combat related stigma.[51] Menstrual distress increases without it and some remain unaware how to address menstruation when not at home.[52] Compounding the problem, schools that do include menstrual education in their curriculum often do so too late or in sex-segregated capacities. This deepens misunderstandings about how menstruation enters the workplace and workers' potential menstrual needs, further fosters hiding menstruation, and tells non-menstruators that they do not need to engage with, learn about, or discuss menstruation. Collectively, this facilitates a culture of silence around menstruation (and menopause) that nurtures harassment, including at work.

Reps (December 2011), https://www.unison.org.uk/content/uploads/2013/06/On-line-Catalogue204723.pdf [https://perma.cc/C7H4-6QZD].

[47] Cahn, *supra* note 23, at 2; *see* Mullins, *supra* note 21, at 3 (discussing acceptance and common complications with hormone therapy); ROBERT WILSON, FEMININE FOREVER (1968) (characterizing menopause as a "disease" to treat with estrogen replacement); *Hormone Therapy: Is it Right for You?*, MAYO CLINIC, https://www.mayoclinic.org/diseases-conditions/menopause/in-depth/hormone-therapy/art-20046372 [https://perma.cc/M7GB-SFDH].

[48] *What is Menopause?*, *supra* note 21.

[49] *See* Ann Herbert, Ana Maria Ramirez, Grace Lee, Savannah J. North, Melanie S. Askari, Rebecca L. West & Marni Sommer, *Puberty Experiences of Low-Income Girls in the United States: A Systematic Review of Qualitative Literature From 2000 to 2014*, 60 J ADOLESC HEALTH. 363, 366, 376–77 (2016); Margaret L. Schmitt, Christine Hagstrom, Azure Nowara, Caitlin Gruer, Nana Ekua Adenu-Mensah, Katie Keeley & Marni Sommer, *The Intersection of Menstruation, School and Family: Experiences of Girls Growing Up in Urban Cities in the U.S.A*, 26 INT'L J. OF ADOLESCENCE & YOUTH 94 (2021).

[50] Johnson, Waldman & Crawford, *supra* note 19, at 258; Guttmacher Institute, *Sex and HIV Education*, https://www.guttmacher.org/state-policy/explore/sex-and-hiv-education (summarizing existing requirements).

[51] Johnson, Waldman & Crawford, *supra* note 19, at 260; Julie Hennegan, Amy O. Tsui & Marni Sommer, *Missed Opportunities: Menstruation Matters for Family Planning*, 45 INT'L PERSPECTIVES ON SEXUAL & REPRO. HEALTH 55, 57 (2019); Coshandra Dillard, Equity, Period., 61 TEACHING TOLERANCE (Spring 2019), https://www.tolerance.org/magazine/spring-2019/equity-period.

[52] Johnson, Waldman & Crawford, *supra* note 19, at 259. This is further compounded for unhoused menstruators. Marni Sommer, Caitlin Gruer, Rachel Clark Smith, Andrew Maroko, & Kim Hopper, *Menstruation and Homelessness: Challenges Faced Living in Shelters and on the Street in New York City*, 66 HEALTH & PLACE 1 (2020) (identifying barriers from the lived experiences of unhoused menstruators in New York City).

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Few talk about menstruation, and those that do may be spreading misinformation.[53] Problems stemming from the lack of menstrual education are made worse by religious customs,[54] taboos, and a broader cultural norm of silence, shame, and stigma.[55] Menstruation (and menstruators) also may be viewed as "dirty" or othered. Further, while the stigma does not end when menstruation does, the stereotypes and related assumptions alter for menopause.[56] Plus, the voices and experiences of some menstruators (including some in menopause)—such as those with disabilities who may experience menstruation differently—are often missing altogether.[57] Collectively, these practices restrict current and former menstruators from being fully visible and out in society, including at work.[58]

Indeed, menstruation, menopause, and the ways in which they are managed often involve complicated issues that intersect with sex, gender, disability, age, race, nationality, religion, class, housing, health, environment, and other components of people's lives. Accordingly, an intersectional lens is needed to fully understand menstruators' experiences.[59] As Professor Margaret Johnson recently explained, society must remember to ask "the menstruation question" to understand intersectional menstrual oppression and experiences.[60] The rest of this article explores potential answers to that question with respect to work.

[53] U.N. Women & Water Supply & Sanitation Collaborative Council, Menstrual Hygiene Management: Behavior and Practices in the Louga Region, Senegal (2014), https://www2.unwomen.org/-/media/field%20office%20africa/attachments/publications/2015/07/louga_study_en_lores.pdf?la=EN&vs=2335 [https://perma.cc/5W2W-GW6Y] [hereinafter U.N. Women].

[54] *See generally* House, Mahon & Cavill, *supra* note 5, at 25–27 (explaining how Buddhism, Christianity, Hinduism, Islam, and Judaism view menstruation).

[55] *See id.* at 27 (module on "Evil spirits, shame and embarrassment" explaining the connection between culture, religious taboos, evil spirits, shame, embarrassment, and menstruation).

[56] Mullins, *supra* note 21, at 1, 3–6; Johnson, *supra* note 10, at 10, 26; *see also* Jennifer Weiss-Wolf, *The Fight for Menstrual Equity Continues in 2021*, Marie Claire (Jan. 27, 2021), https://www.marieclaire.com/politics/a35280718/menstrual-equity-2021-goals/ [https://perma.cc/RCF6-SDMP] (advocating for the role that the "other M-word" can play as a catalyst from lawmaking).

[57] *See* BRAWS, *supra* note 9; Palgrave Handbook, *supra* note 19, at 193; Cahn, *supra* note 23 at 3; U.N. Women, *supra* note 53, at 34 (sharing that some visually impaired menstruators' have a hard time knowing when their periods start).

[58] *See* Johnson, *supra* note 10, at 28–36; House, Mahon & Cavill, *supra* note 5, at 25; Julie Hennegan, Alexandra K. Shannon, Jennifer Rubli, Kellogg J. Schwab & G. J. Melendez-Torres, *Women's and Girls' Experiences of Menstruation in Low-and Middle-Income Countries: A Systematic Review and Qualitative Metasynthesis*, 16 PLoS Med 1, 17 (2019), https://doi.org/10.1371/journal.pmed.1002803 [https://perma.cc/5XBV-NKC8] (explaining that menstrual stigma, shame, and distress exists and is a "pervasive influence" across cultures, and may result in "self-imposed expectations to keep menstrual status hidden").

[59] Kimberlé Crenshaw, *Mapping the Margins: Intersectionality, Identity Politics, and Violence Against Women of Color*, 43 Stan. L. Rev. 1241, 1265 (1991); Margaret E. Johnson, *Asking the Menstruation Question to Achieve Menstrual Justice*, Colum. J. Gender & L. 158 (2021); U.N. Women, *supra* note 53, at 3; *see generally* Palgrave Handbook, *supra* note 19 (exploring menstruation and the experiences of menstruators in multiple aspects of society around the world).

[60] Johnson, *supra* note 59.

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B. Naming Menstrual Needs and Developing Period Policies

Given that women currently constitute approximately half of the global workforce,[61] and 46.8% of American workers in 2020 were women aged 16 and over,[62] biology dictates that periods happen at work. Indeed, on any given day, more than 800 million people aged 15-49 are menstruating in the world.[63] The percentage of workers experiencing perimenopause or in menopause has grown, and approximately 61 million American workers are in perimenopause or menopause.[64] Especially given these numbers, workers' lived menstrual experiences must be considered in the structure of work and the laws governing it.

Currently, the realities of these lived experiences, the impact of menstruation on specific problems and needs, and potential structural reforms to support menstruators at work all are understudied.[65] The data that does exist, however, clearly demonstrates that menstruation and menopause impact work.[66] For example, multiple international surveys report findings that menstruators report to work with menstrual pain, even when it impacts their work.[67] Other surveys similarly found that menopausal workers experience

[61] Marni Sommer, Sahani Chandraratna, Sue Cavill, Therese Mahon & Penelope Phillips-Howard, *Managing Menstruation in The Workplace: An Overlooked Issue in Low-and Middle-Income Countries*, 15 INT'L J. FOR EQUITY HEALTH 86, at 2 (2016).

[62] *Household Data Annual Averages 18. Employed Persons by Detailed Industry, Sex, Race, and Hispanic or Latino Ethnicity*, U.S. BUREAU LAB. STATS. (July 30, 2021), https://www.bls.gov/cps/cpsaat18.htm [https://perma.cc/KY9P-5GAQ]. The data in this paragraph does not include transgender, genderqueer/nonbinary, or intersex workers who menstruate.

[63] Sommer, Chandraratna, Cavill, Mahon & Phillips-Howard, *supra* note 61, at 2; Geertz, Iyer, Kasen, Mazzola & Peterson, *supra* note 36, at 5.

[64] Mullins, *supra* note 21, at 6 (citing Hilary Weaver, *Menopause Discrimination Affects Millions of American Women*, Supermajority Ed. Fund (Feb. 7, 2020), https://supermajority.com/2020/02/menopause-discrimination-affects-millions-of-american-women/ [https://perma.cc/3P2Y-MSMX]). About 20% of the current workforce are women who are at least 45 years old, just under half of whom are 50–59. *See The Takeaway*, *supra* note 20; *Employee Status of The Civilian Noninstitutional Population by Age, Sex, & Race*, U.S. BUREAU LAB. STATS. (2020), https://www.bls.gov/cps/cpsaat03.pdf [https://perma.cc/D4Z5-R4AX] (the 2018 civilian workforce includes 14.6 million women in this age group).

[65] *See* Hennegan, Shannon, Rubli, Schwab & Melendez-Torres, *supra* note 58, at 32 (these experiences are under-researched); Jonah E. Rockoff & Mariesa A. Herrmann, *Does Menstruation Explain Gender Gaps in Work Absenteeism?* NBER WORKING PAPER SERIES, at 12 (2010), http://www.nber.org/papers/w16523.pdf [https://perma.cc/TXA6-TMSK] (acknowledging "the link between menstruation and absenteeism," but calling for more research into the impact of menstruation on the gender gap related to absenteeism); House, Mahon & Cavill, *supra* note 5, at 176 (more research is needed on "workers' rights in relation to menstruation and sanitation"); Rachel B. Levitt & Jessica L. Barnack-Tavlaris, *Addressing Menstruation in the Workplace: The Menstrual Leave Debate*, *in* PALGRAVE HANDBOOK, *supra* note 19, at 561–62 (more studies are needed, especially vis-à-vis impact on discrimination and wages).

[66] Few studies have measured the reduction of menstrual harms from specific policies, however. *See* Hennegan & Montgomery, *supra* note 33, at 1, 5, 11 (a literature review failed to find menstrual management interventions that reduce the impact on attendance and absenteeism).

[67] *See e.g.*, Suzannah Weiss, *A Shocking Number of Women Deal with Period Pain at Work*, GLAMOUR (Oct. 3, 2016), https://www.glamour.com/story/a-shocking-number-of-women-deal-with-period-pain-at-work [https://perma.cc/5CNL-N459] (over half of BBC survey participants noted that menstrual pain impacted their work); Valentin Etancelin, *French Women*

symptoms that impact work.[68] Further, few workers felt comfortable disclosing to their supervisors that they were "struggling" in whole or part due to menstruation or menopause.[69] The rest of this section offers a typography of menstrual and menopausal needs to explain how periods impact work and supports needed to minimize any negative consequences. It also contains an overview of voluntary actions taken by employers to address periods at work.

1. *Categorizing Menstrual Needs*

Menstrual needs at work fall into two broad categories: (1) menstrual accommodations, including the ability to temporarily leave work to address menstruation and to access the physical products and structures needed to safely manage menstruation; and (2) access to a workplace free from menstrual indignities and discrimination.

2. *Menstrual Accommodations*

Structurally, accommodations are needed to engage in proper menstrual health management.[70] At a minimum, effective menstrual management requires access to: time, products, and menstrual-friendly restrooms.[71] Without this access, some menstruators will leave the workforce, be forced to forgo certain opportunities, or experience poor attendance, decreased productivity, exacerbated medical conditions, or other negative consequences.

3. *Access to Paid Time Away from Work*

Workers need the ability to take time during a work shift to address menstruation without fear of harm or retaliation. Policies such as paid break time, other paid time off, flexible schedules, or telework provide some workers with the ability to meet this need. But not all workers are able to take a

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Get Real About Periods in the Workplace, HUFF. POST (March 14, 2019), https://www.huffpost.com/entry/french-women-periods-workplace_n_5c894ac3e4b0fbd7662047d3 [https://perma.cc/2BHD-JRUJ] (82% of 18–24-year-olds and 53% of people aged 54+ in a YouGov/HuffPost survey of over 1000 adults responded that menstruation impacted work; further sharing overwhelming support for menstrual accommodations, almost 75% of 18–24-year-olds and 36% of 54+ support menstrual leave).

[68] *See e.g.*, Jennifer Wolff, *What Doctors Don't Know About Menopause*, AARP THE MAGAZINE (Aug. 2018), https://perma.cc/GZ6U-KJ25 (AARP survey finding that 84% of 50–59-year-old women reported menopause symptoms impacting their work).

[69] *See e.g.*, Weiss, *supra* note 64 (only 27% of participants that reported work impact shared why with supervisors).

[70] *See e.g.*, Vilayphone Choulamany, *Menstrual Health Management: A South Korean Case Study*, THE ASIA FOUND. 3 (2018), http://asiafoundation.or.kr/annual-report/annual-report-2017/documents/MHM-A-South-Korean-Case-Study.docx [https://perma.cc/94AS-SZC3]; Bonnie Keith, *Girls' and Women's Right to Menstrual Health: Evidence and Opportunities,* OUTLOOK ON REPROD. HEALTH 2 (2016), https://path.azureedge.net/media/documents/RH_outlook_mh_ 022016.pdf [https://perma.cc/5M6D-TYDP] (sharing the UNICEF/WHO definition of "good" menstrual management).

[71] *See infra* Section I.B.1B.

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break from work without penalty.[72] As a result, as global studies have demonstrated, people miss work when they are menstruating.[73] Andrea Ichino and Enrico Moretti conducted one of the most well-known studies of menstruation and absenteeism.[74] It analyzed the absences of full-time employees at an Italian bank from 1993–1995 to study whether biology explained "the male-female difference in earnings."[75] The study found a significant gender-gap difference in absences for workers aged 45 years or younger, about a third of which were taken in 28-day cycles.[76] Finding this to be statistically significant, they concluded that there is "evidence that the menstrual cycle increases female absenteeism," with 1.5 days of absences relating to the 28-day menstrual cycle.[77] As the authors appropriately cautioned, reliance on one firm's information is not necessarily transferable;[78] however, this study is cited widely to justify menstruation-specific workplace policies and the results are consistent with other data linking menstruation to absenteeism.[79]

Presenteeism, when someone goes to work sick or distracted, may be a larger menstruation-related problem than absenteeism. Eighty-one percent of respondents in a Dutch survey reported that they were less productive at work or school due to characteristics of their menstruation.[80] On average, the

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[72] *See e.g.*, Klara Rydström, Rebecka Hallencreutz & Antonia Simon, *It's Time to Bring Menstrual Awareness to Workplaces*, Soc. Eur. (April 9, 2019), https://socialeurope.eu/menstrual-awareness-workplaces [https://perma.cc/EPK7-7JLU] ("Only 25.4[%] of [800] respondents [to an online survey of Swedish workers] said they were able to rest when necessary. . .").

[73] *See* U.N. Women, *supra* note 53, at 57 (96.4% of surveyed women "regularly" missed work, "prefer[ing] to stay at home because their periods made them weaker, because they experienced pain, stomachache or cramps, or because. . .they had nowhere to wash or to change their sanitary protection").

[74] Andrea Ichino & Enrico Moretti, *Biological Gender Differences, Absenteeism, and the Earnings Gap*, 1 Am. Econ. J. Applied Econ. 183 (2009).

[75] *Id.* at 184, 187.

[76] *Id.* at 184.

[77] *Id.* at 183, 200 (noting this does not include lost productivity from presenteeism).

[78] *Id.* at 213.

[79] For example, a study of American women about menstruation's impact on lost work found that it caused weeks of absences annually, with "heavier bleeding" having "a considerable impact on work loss." Isabelle Côté, Philip Jacobs & David Cumming, *Work Loss Associated with Increased Menstrual Loss in the United States*, 100 Obstet. & Gynecol. 683, 683, 686 (2002). Responses from 3,133 women aged 18-64-years-old who did not take medication containing estrogen, never had reproductive cancer, and had a "natural" period for the past year were counted. *Id. See* Geertz, Iyer, Kasen, Mazzola & Peterson, *supra* note 36, at 5; Annakeara Stinson, *A New Survey Says Period Pain Affects Your Ability to Work & Women Are Like "Duh,"* Elite Daily (Oct. 13, 2017), https://www.elitedaily.com/p/period-pain-at-work-can-be-super-distracting-according-to-a-new-survey-women-are-like-duh-2911368 [https://perma.cc/LVH7-5PHX] (62% of over 1,000 Australian women surveyed reported that they have had to leave work early or not attend when they were on their period).

[80] Katie Hunt, *Period Pain Linked to Nearly 9 Days of Lost Productivity for a Woman in a Year*, CNN (June 27, 2019, 9:01 PM EDT), https://www.cnn.com/2019/06/27/health/period-pain-productivity-study-intl/index.html [https://perma.cc/8DVC-M7H6] (over 32,000 15–45 year old women were surveyed); Gabrielle Moreira, *Period Pain Causes Almost 9 Days of Productivity Loss at Work or School for Women, Study Suggests*, Fox29 Phila. (June 29, 2019), https://www.fox29.com/news/period-pain-causes-almost-9-days-of-productivity-loss-at-work-or-school-for-women-study-suggests [https://perma.cc/VDV4-AGJK] (citing Mark Schoep, Eddy Adang, Jacques Maas, Bianca De Bie, Johanna W. M. Aarts & Theodoor E. Nieboer,

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study determined that workers lost just under nine days of productivity annually due to menstruation-related presenteeism or absenteeism, with presenteeism being the "bigger contributor."[81] The survey also illustrated that menstruators' needs are not the same every cycle as only 3.5% of respondents said they needed or took leave every month.[82] A 2011 ten-country study of workers with endometriosis estimated the lost productivity to be about 11 hours weekly during menstruation, averaging _6,300 annually per worker.[83] In addition to lost productivity and its financial costs, presenteeism may result in mistakes in the work itself.[84]

Restrictive policies that prevent workers from taking time away from work to address menstruation without penalty also can impact a worker's internal response to menstruation, causing irregularities or exacerbating preexisting conditions.[85] Moreover, the lack of job security or control over schedules and worksites correlates with a higher risk of menstrual pain—and menstrual pain is often linked to other physical responses such as headaches, sweating, and nausea.[86]

These policies also impact menopausal workers. One third of British women surveyed by the Chartered Institute of Personnel and Development experiencing menopausal symptoms took sick leave, only a quarter of whom told their supervisor the reasons for the leave.[87] Another study from the

Productivity Loss Due to Menstruation-Related Symptoms: A Nationwide Cross-Sectional Survey Among 32,748 Women, 9 BMJ OPEN, Mar. 12, 2019)).

[81] Hunt, *supra* note 80 (68% of respondents wanted scheduling flexibility during their period); Moreira, *supra* note 80.

[82] Hunt, *supra* note 80.

[83] *Period Power*, *supra* note 7; Personnel Today, *Report Calls for Action on Women's Health Issues at Work*, OCCUPATIONAL HEALTH & WELLBEING PLUS (Jan. 4, 2018), https://www.personneltoday.com/hr/report-calls-for-action-on-womens-health-issues-at-work/ [https://perma.cc/75R5-EPB5] (calculating the cost of the survey's results).

[84] For example, one early study examined whether menstruation had a role in accidents involving female pilots. Katharina Dalton, *Menstruation and Accidents*, BRIT. MED J. 1425, 1426 (1960) (52% of women studied "were involved in an accident" during or around menstruation). The study "suggested that the increased lethargy of menstruation and the premenstruum is responsible for both a lowered judgment and slow reaction time." *Id.* at 1426; *see* Racheal Yeager, *HERproject: Health Enables Returns. The Business Returns from Women's Health Programs,* BUS. FOR SOC. RESP. 7 (2011) (data from a health intervention found production errors resulting from menstruation's effect on work).

[85] *See* Karen Messing, Marie-Josèphe Saurel-Cubizolles, Madeleine Bourgine & Monique Kaminski, *Menstrual-Cycle Characteristics and Work Conditions of Workers in Poultry Slaughterhouses and Canneries*, 18 SCANDINAVIAN J. WORK, ENV'T & HEALTH 302, 303–07 (1992) (1980s study of 726 female workers in French canneries and slaughterhouses found menstrual irregularities and amenorrhea related to work schedules and factory temperatures). Breaks also promote productivity, help workers overcome fatigue, and provide freedom. MARC LINDER & INGRID NYGAARD, VOID WHERE PROHIBITED: REST BREAKS AND THE RIGHT TO URINATE ON COMPANY TIME 5 (1998).

[86] Krisztina D. László, Zsuzsa GyÖrffy, Szilvia Ádám, Csilla Csoboth & Mária S. Kopp, *Work-Related Stress Factors and Menstrual Pain: A Nation-Wide Representative Survey*, 29 J. PSYCHOSOMATIC OBSTET. & GYNECOL. 133, 133 (2008).

[87] Megan Reitz, Marina Bolton & Kira Emslie, *Is Menopause a Taboo in Your Organization*, HARV. BUS. R. (Feb. 4, 2020), https://hbr.org/2020/02/is-menopause-a-taboo-in-your-organization [https://perma.cc/48XY-G78Z] (citing *Majority of Working Women Experiencing the Menopause Say It Has a Negative Impact on Them at Work,* CHARTERED INST. OF PERS.

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United Kingdom reported that more than half of workers in menopause had trouble obtaining the workplace flexibility they needed to address their symptoms.[88] There is room for additional study of these needs, corresponding costs, and potential policy interventions.

4. *Access to Menstrual-Friendly Facilities and Products*

In addition to a lack of break time or other flexibilities, workers report not having the tools for proper menstrual management at work such as consistent access to menstrual-friendly bathrooms, menstrual products, and other accommodations.[89]

Menstrual-friendly restrooms provide "safe and conveniently located" facilities that: offer privacy; are accessible; contain toilets, soap, water, and disposal options; and contain an adequate and varied supply of menstrual products.[90] This design, however, is contrary to the configurations of many workplace bathrooms, which disproportionally impacts "productivity, well-being and attendance."[91] Indeed, studies document limited access to restrooms (of any design), menstrual products, or other needed menstrual health tools.[92] A third of respondents in a 200 person study in the United Kingdom uncovered that a third of respondents work without "constant access to a toilet" and a quarter do not have trash cans in the toilets they can

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DEV. (Mar. 26, 2019), https://www.cipd.co.uk/about/media/press/menopause-at-work [https://perma.cc/BK2N-H93A]); Mullins, *supra* note 21, at 14–15.

[88] UNISON, *supra* note 46, at 5 ("The survey showed that it was the working environment that was responsible for making these symptoms worse. Two-thirds of the safety representatives reported that high workplace temperatures were causing problems for menopausal women, and over half blamed poor ventilation. Other complaints were about poor or non-existent rest facilities or toilet facilities, or a lack of access to cold drinking water.").

[89] Academics and activists have used the phrase "period-friendly," "female-friendly," and "menstrual-friendly" to describe structural restroom designs that support menstrual management. *See* Swarnima Bhattacharya, *Menstruation at Work: Why We Must Have Period-Equipped Workplaces in the 21st Century*, THEACARE 6, 13 (2021), https://thea.care/wp-content/uploads/2021/03/Menstruation-At-Work.pdf [https://perma.cc/G6E7-KJ3K] (defining period-friendly toilets); Colum. Univ. Mailman Sch. of Pub. Health, *Period Posse Presents: "Changing the Norm: Mainstreaming Female Friendly Toilets,"* YOUTUBE (Nov. 13, 2019), https://youtu.be/zudAyQgVqv8 (defining a "female-friendly toilet").

[90] Margaret L. Schmitt, David Clatworthy, Tom Ogello & Marni Sommer, *Making the Case for a Female-Friendly Toilet*, 10 WATER 1193, 1194–99 (2018) (supporting access to female-friendly toilets is significant for economic empowerment, health, and gender).

[91] *See* Colum. Univ. Mailman Sch. of Pub. Health, *supra* note 89. The development community has focused on facility design and its impact on menstrual management, especially for "vulnerable groups." *See e.g.*, U.N. WOMEN, *supra* note 53, at 29–33 (finding that menstruators with motor impairments have difficulty navigating wheelchairs and crutches through narrow door frames; further noting additional aggravations if workers of different genders share toilets).

[92] *See e.g.*, OSHA, U.S. DEP'T OF LAB., WOMEN IN THE CONSTRUCTION WORKPLACE: PROVIDING EQUITABLE HEALTH AND SAFETY PROTECTION (1999), https://www.osha.gov/advisorycommittee/accsh/products/1999-06-01 [https://perma.cc/VK4R-SVP6] (including "restricted access to sanitary toilets as a core safety issue for women in construction trades;" further observing the "lack of water for washing[,] especially during monthly menstrual cycles").

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access.[93] Moreover, lack of access to menstrual management tools is exacerbated in certain occupations such as construction and transportation trades. For example, an online study of Swedish workers found that bus drivers, outdoor workers, and those with multiple worksites considered accessing bathrooms a "big obstacle during days of bleeding."[94] Even those with bathroom access reported being denied the ability to use and/or travel to them.[95]

Further, 72% of respondents shared that they cannot obtain menstrual pads and tampons at work if they did not bring them.[96] Another recent study found that approximately a third of menstruating workers leave to find these types of products.[97] There also is a need for menstrual products beyond tampons and pads. Workers report that they do not have the ability to regulate the temperature of their worksites, for example, which significantly impacts perimenopausal and menopausal workers experiencing hot flashes.[98] This need also disproportionally impacts occupations with strict rules against opening windows, leading this to be one of the "biggest problems" reported by menopausal teachers.[99] Other reported needs include access to fans, heating pads for cramps, wellness rooms, and pain relievers.[100] Exceptions to uniform rules to minimize anxiety around leakage also may be needed.

Providing these accommodations would increase productivity,[101] and additional access to tools to facilitate menstrual management, including menstrual-friendly restrooms and menstrual products (broadly defined), is needed.

C. Workplace Free from Menstrual Indignities, Harassment, and Discrimination

Menstruators should have the right to work free from dignitary harm, harassment, or discrimination. Indeed, the ability to engage in proper management—with or without accommodations—impacts workers' dignity and

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[93] Theresa Mayne, *Overcoming Period Stigma in the Workplace*, DBG Blog (May 14, 2019), https://www.dpgplc.co.uk/2019/05/overcoming-period-stigma-in-the-workplace [https://perma.cc/VA9P-KD4Z].

[94] *See e.g.*, Linder & Nygaard, *supra* note 85, at 8 (1996 study showed that problems accessing restrooms prevented two out of five teachers from changing menstrual products as needed and caused absences for one in twenty respondents "on their heaviest flow day").

[95] *See* Rydström, Hallencreutz & Simon, *supra* note 72.

[96] Mayne, *supra* note 93.

[97] Bhattacharya, *supra* note 89, at 7, 13 (sharing Harris Interactive study results).

[98] Gavin Jack, Marian Pitts, Kathleen Riach, Emily Bariola, Jan Schapper & Philip Sarrel, *Women, Work and the Menopause: Releasing the Potential of Older Professional Women*, La Trobe Univ. (Sept. 2014), https://womenworkandthemenopause.files.wordpress.com/2014/09/women-work-and-the-menopause-final-report.pdf; British Occupational Health Research Foundation, *Work and the Menopause: A Guide for Managers* (2010), https://www.som.org.uk/sites/som.org.uk/files/BOHRF_Menopause_Guide_Managers.pdf.

[99] *See* Virginia Matthews, *Menopause at Work: How Employers Can Help Staff Manage "The Change*," Pers, Today (April 29, 2015), http://www.personneltoday.com/hr/menopause-at-work-how-employers-can-help-staff-manage-the-change/ [https://perma.cc/6ANH-GBRF].

[100] *Id.*

[101] Weiss-Wolf, *supra* note 14, at 199.

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sense of self-worth. Among other things, bleeding is a bodily expression and menstruators are rarely indifferent to the process;[102] without menstrual management, workers may suffer a menstrual indignity. This individual response may be amplified by the general shame, culture of silence, and lack of awareness surrounding menstruation that permeates workplaces. Further, general societal pressures to keep female bodies covered and other menstrual stigma flow into the workplace.[103] For example, almost three out of every four menstruating workers in a United Kingdom study reported that they had to "hide" menstrual products at work.[104] Collectively, this makes it harder to discuss periods or potential workplace responses to them, and it causes some individuals to be subjected to harassment and discrimination.

This reality is further complicated by power dynamics at work. Menstruators are rarely in management or positions of power to change workplace cultures and policies.[105] Moreover, non-menstruators usually control access to breaks, and supervisors who do not menstruate may not understand the biology, needs, or variances to menstrual experiences over time or people.[106] Relatedly, most menstruators do not want to talk about periods with their (primarily) non-menstruating supervisors or in front of colleagues.[107] Menopausal workers similarly decline to discuss their symptoms or needs with managers.[108]

Non-menstruating supervisors also are uncomfortable talking about periods. More than being uncomfortable, 51% of men in a Thinx study reported that it was "inappropriate" for someone to "openly mention" menstruation at work.[109] Consequently, it is not surprising that one out of ten respondents to a United Kingdom survey reported that they were directly

[102] *See generally* Elizabeth B. Cooper, *What's Law Got to Do with It? Dignity and Menstruation*, 41 COLUM. J. GENDER & L. 39, 41 n.10 (2021) (discussing how menstruators are "rarely ambivalent" about their periods; further explaining how menstrual management is an act of personal autonomy); Karin, Cooper & Johnson, *supra* note 15, at 26 (observing that "institutional policies directly affect menstruators' ability to engage equally in the external world [and] an affront to [menstrual] dignity. . .reinforces the negative [body] messages[,]" reiterating that people who bleed "do not belong").

[103] *See e.g.*, Rydström, Hallencreutz & Simon, *supra* note 72 (sharing results from an online Swedish survey that confirmed that workplace menstruators "were still affected by stigmas, taboos and adverse norms").

[104] Mayne, *supra* note 93.

[105] *See* WEISS-WOLF, *supra* note 14, at 198 (noting that women hold only 5.8% of CEO positions of Fortune 500).

[106] *See supra* Section I.B.1.A.

[107] Stinson, *supra* note 79 (just over a third of Austrian women studied shared the impact of menstruation on work with their employer); Hunt, *supra* note 75 (only one in five respondents that reported taking sick leave informed their employer it was for their periods in a Dutch survey); Bhattacharya, *supra* note 89, at 7 (Clue reported that 68% of women did not feel comfortable speaking to men at work about their period).

[108] *See e.g.*, UNISON, *supra* note 46, at 4 (only half of menopausal workers participating in a 2011 British Foundation study who took time off to address their symptoms informed their managers about the underlying reason).

[109] MENSTRUAL HYGIENE DAY, *Nearly Half of US Women Have Experienced 'Period Shaming'*, http://menstrualhygieneday.org/nearly-half-us-women-experienced-period-shaming [perma.cc/SCG7-DPNA] (last visited Aug. 14, 2021).

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subjected to derogatory menstrual-related comments.[110] These comments ranged from justifying behavior "because she's on the rag" to "you're just lazy" and "it's just an excuse to act like a bitch."[111] Others were told to "man up" and handle their pain.[112] Stereotypes about menopause also foster workplace taunts, often related to temperature or an inability to remain productive.[113] Among other things, being subject to harassment and discrimination at work impacts physical and mental health (including stress and related conditions) and one's ability to concentrate, engage with colleagues, or otherwise successfully perform tasks.[114]

Periods are viewed as an invisible problem for individuals to both hide and handle,[115] these experiences reflect a need for a systematic response.

1. The Development of Employer Provided Period Policies

Employer recognition and responses to these needs for menstrual accommodations and workplaces free from menstrual indignities, harassment, and discrimination have varied significantly over time and industry. Historically, some workplaces were segregated or prohibited women from working while on their periods.[116] For example, female pilots were prevented from flying during World War II when they were menstruating.[117] Today, American employers do not outright ban menstruators from holding a particular class of jobs. In practice, however, numerous policies exist that continue to harm them. Some employers have affirmatively developed positive period policies–either in response to workers who have collectively acted to improve conditions or to otherwise support and retain workers. The rest of this section covers the role of collective action and the creation of workplace period policies.

[110] Mayne, *supra* note 93 (47% of 2000 UK respondents answered that "there is a definite stigma around periods in the workplace").

[111] *Id.*

[112] *Id.*

[113] *See* Katie Grant, *Women in Midlife are The Butt of Jokes: How Ignorance Around the Menopause is Driving Women out of Work*, iNews (Mar. 20, 2021), https://inews.co.uk/news/long-reads/menopause-women-jokes-ignorance-workplace-921945 [https://perma.cc/54PC-C4CF]; *see also* Reitz, Bolton & Emslie, *supra* note 87, at 8 (observing that cultural stereotypes at the intersection of age and sex "are so pervasive and accepted as the norm").

[114] *See* APA, Stress in America: The Impact of Discrimination (March 10, 2016), https://www.apa.org/news/press/releases/stress/2015/impact-of-discrimination.pdf [perma.cc/N98A-6KXW]; Ellyn Maese & Camille Lloyd, *Understanding the Effects of Discrimination in the Workplace*, Gallup (May 26, 2021), https://www.gallup.com/workplace/349865/understanding-effects-discrimination-workplace.aspx [perma.cc/4RUD-2D48].

[115] Johnson, *supra* note 10, at 2.

[116] Robin Hilmantel, *A History of How Employers Have Addressed Women's Periods, Time* (March 3, 2016, 2:43 PM EST), https://time.com/4246662/period-policies-at-work/ [perma.cc/6HAV-G2MM].

[117] Aneri Pattani, *In Some Countries, Women Get Days Off For Period Pain*, N.Y. Times (July 27, 2017), https://www.nytimes.com/2017/07/24/health/period-pain-paid-time-off-policy.html [perma.cc/ZE3J-28BA].

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D. Collective Action Leads to Improved Menstrual Policies

The scope and frequency of menstrual-related collective active is unknown, but personal narratives, public grievances, and other cases demonstrate the power of organizing on these issues. Organizing by SEIU Local 925 in the 1970s provides an excellent example. A group of female employees of a Boston company walked out of work in frustration and asked to speak with management. In preparing for the negotiations, the workers considered an agenda that would lead to needed structural reforms like pay equity, access to promotions, and eliminating sexual harassment. Rather than move forward with those (yet), the workers elected to strategically bargain for tampon machines in the bathrooms, which galvanized their colleagues and demonstrated they mattered and had some power—without causing management to leave the table.[118]

Tampon dispensers had recently been removed from company restrooms as a "cost-cutting measure," and the bargaining team knew that workers wanted them back. While some "people used it against [them, workers] need tampons in the bathroom" [and they knew it would] just drive [male managers] insane" to talk about it.[119] Using the cultural discomfort and silence around menstruation to their advantage, the workers obtained 15 machines to be placed back in restrooms of their choice.[120]

Negotiations between labor and management have resulted in the creation of menstrual-friendly provisions in collective bargaining agreements (CBAs), which contain the agreed upon workplace rules and policies. Even if they do not mention menstruation specifically, many CBAs have provisions that allow workers governed by them to address some menstrual needs. For example, Section 13.03 of the AFSCME Local 11 CBA with Ohio State authorizes flex time "for a given day to accommodate personal

[118] 9 TO 5: THE STORY OF A MOVEMENT at 17:48 (PBS television broadcast Feb. 1, 2021), https://www.pbs.org/independentlens/documentaries/9to5-the-story-of-a-movement/ [https://perma.cc/H785-JMYP] ("What kind of a union are you that you're bargaining about tampon machines? It wasn't like the number one issue. . .but. . ."); Heiela Salhieh & Salha El-Shwehdi, Film Review, *Lessons Learned From 9to5: The Story of a Movement, on How to Generate a Human Rights-Based Social Movement*, UNIV. DAYTON BLOG (March 26, 2021), https://udayton.edu/blogs/udhumanrights/2021/2021-03-25-lessons-from-9to5.php [perma.cc/TH7A-GH2R] (noting, "[t]he women were unapologetic in their identity [and] in control of their own agenda").

[119] 9 TO 5, *supra* note 118, at 17:48.

[120] *Id.* (sharing, "[w]e had people who would knit while they were in the bargaining meetings, just drive these guys crazy."). This success led other workers to join and the bargaining team evolved into District Council 925 (and later SEIU Local 925). Sherry Halbrook, *Women in the Workplace Ignored No More*, Communicator, Apr. 2021, at 25, https://www.pef.org/media-center/ the-communicator/women-in-the-workplace-ignored-no-more [perma.cc/6FHZ-W6WH] (postulating that the bargaining team was able to use this win to demonstrate the need for organizing).

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needs,"[121] which presumably includes menstrual management. Other CBAs provide for bathroom breaks or more paid time off.[122]

Of course, organizing campaigns are not always successful. For example, the Australian Manufacturing Workers' Union campaigned for 12 days of menstrual leave a year for Toyota workers in 2005.[123] According to the union, "standing, welding, painting and other production line work was especially tough. . .during [workers'] menstrual cycle[s]."[124] Toyota declined to agree to this leave, despite workers' support for it.[125]

Nonetheless, when successful, CBAs offer structured mechanisms to enforce their provisions, often through a grievance process. Grievances have been filed to enforce CBA provisions related to menstruation on both collective and individual bases. Local 315 of the Retail, Wholesale and Department Store Union offers an example of a group grievance, which was filed against Cagle's Poultry and Egg Company alleging that a new policy limiting toilet access denied production workers promotion opportunities.[126] It was filed after the plant manager issued a verbal warning to a member for using the restroom too much, telling her that she should "train herself to go to the bathroom" outside of work hours; he knew she could do it because his dog was trained not to relieve himself for eight hours.[127] In response, the company's expert justified the policy because menstrual cycles had "elements of predictability."[128] Ultimately, the policy was changed, but the union accurately described it as "manifestly unfair," "undignified," and "not in keeping with. . . .biological variances."[129]

Palmitessa v. Dep't of Navy offers an individual grievance example. Here, the Merit Systems Protection Board ("MSPB") ruled for a menstruator who was removed from work after using the restroom to address menstrual cramps and related nausea without obtaining supervisory approval.[130] Palmitessa took two restroom breaks (for under 15 minutes each); she also was "seen eating 'corn curls[,]' to alleviate her discomfort."[131] The Navy

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[121] Collective Bargaining Agreement between AFSCME Local 11 and Ohio State (Contract Beginning March 25, 2012) (on file with author).

[122] *See Labor Project for Working Families CBA Database*, Family Values @ Work, https://familyvaluesatwork.org/laborproject/resource-network [perma.cc/WLA5-LSV9] (last visited Feb. 8, 2019).

[123] Hazel Sheffield, *Should Women Have the Right to Take Time Off During Their Periods?*, Indep. (Mar. 2, 2016), https://www.independent.co.uk/news/business/news/menstrual-leave-period-pain-womens-rights-a6907261.html [https://perma.cc/S9HX-GGF7].

[124] *Id.*

[125] *Id.*

[126] Marc Linder, Void Where Prohibited Revisited: The Trickle-Down Effect of OSHA's At-Will Bathroom-Break Regulation 256, 264–65 (2003). According to management, the policy was created in response to "abuse[s] of emergency restroom privileges." *Id.* (further alleging that it was directed by white male management to Black women line workers).

[127] *Id.* at 267.

[128] *Id.* at 271.

[129] *Id.* at 268.

[130] Palmitessa v. Dep't of Navy, 22 M.S.P.B. 220 (MSPB 1984).

[131] *Id.* at 222.

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claimed that the CBA's sick leave provision required workers who became ill to obtain approval to leave their worksite, including to address menstruation.[132] The MSPB disagreed, instead finding that the CBA was not practically enforced and coping with "menstrual discomfort on . . . restroom breaks" was not leaving work.[133]

Especially with the increase of menstruators in unions and those serving in leadership roles, such as the election of Liz Schuler as President of the AFL-CIO,[134] organized labor will continue to play a role in advancing menstrual justice at work in negotiations and by encouraging employers to voluntarily develop better policies that enhance workers dignity and offer menstrual accommodations and antidiscrimination protections.[135]

1. *Employer Provided Period Policies and Practices*

In addition to CBA provisions, voluntary business practices have the potential to address menstrual and menopausal needs at work. Indeed, some high profile examples of best practices exist. For example, during the Obama Administration, a tampon dispenser was installed in the West Wing.[136] Some Members of Congress also provide free menstrual products in their office.[137] And the U.S. Women's Soccer Team tracked their periods to enhance collective peak performance during the 2019 World Cup[138]—a practice called "menstruality."[139] Other employers offer paid time off for any reason, scheduling flexibility, wellness rooms, and other menstrual accommodations.

Recently, there has been a global push to promulgate workplace policies in this space and new policies from Australia, India, and the United King-

[132] *Id.*

[133] *Id.*

[134] AFL-CIO Pass the #PROAct (@AFLCIO), Twitter (Aug. 20, 2021, 10:32AM), https://twitter.com/AFLCIO/status/1428726627115143168 [https://perma.cc/5BLS-63CS].

[135] Julie Anderson, Ariane Hegewisch & Jeff Hayes, *Union Advantage for Women*, IWPR R409 (2015), http://statusofwomendata.org/wp-content/uploads/2015/08/R409-Union-Advantage.pdf [https://perma.cc/LW67-Z8XS].

[136] Jennifer Weiss-Wolf, *Could Your Period Get You Fired?*, Marie Claire (Oct. 12, 2017), https://www.marieclaire.com/politics/a12832430/workplace-menstrual-equity/ [https://perma.cc/W2B4-T3RC] (quoting Alyssa Mastromonaco, former White House Deputy Chief of Staff) ("If we were truly serious about running a diverse operation and bringing more women in[,] we should give the office a basic level of comfort[. It is] better than menstruating all over the Oval.").

[137] *See* Letter from Zoe Lofgren, Chair, Committee on House Administration, to U.S. Reps. Debbie Wasserman Schultz, Sean Patrick Maloney & Grace Meng (Feb. 11, 2019), http://cdn.videos.rollcall.com/author/2019/02/2.11.19-zl-to-dws-meng-spm-re-menstrual-products.pdf [https://perma.cc/6NHV-CW8U] (instructing Congress's Office Supply Store to stock products).

[138] Katie Kindelan, *How Tracking Their Periods Helped USA Women's Soccer Team Win the World Cup*, GMA (Aug. 8, 2019), https://www.goodmorningamerica.com/wellness/story/uswnt-period-tracking-win-world-cup-64709450 [https://perma.cc/V3MC-CTSR].

[139] Menstruality "leverage[s] women's cycles" to match work needs and tasks with the natural effects of certain hormones present at different stages in menstrual cycles. Weiss-Wolf, *supra* note 136 (identifying antidiscrimination and privacy concerns with applying a menstrual mapping practice to maximize productivity).

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dom in particular have received international attention. In Australia, the Victorian Women's Trust created a *Menstrual Leave Policy Template* to help "shift attitudes and behaviors"[140] The policy provides for up to twelve days of paid leave annually, telework, or "stay[ing] in the workplace under circumstances which encourage the comfort of the employee" such as taking a break in a wellness room.[141]

Wet & Dry Personal Care was the first Indian company to offer menstrual leave or telework.[142] In 2017, Culture Machine created a *First Day of Period Leave* ("FOP Leave") policy to provide one paid leave day a month that does not count as sick or vacation leave.[143] Also in 2017, Gozoop, a digital communications agency, enacted a one day a month telework policy for menstruators "to take away the stress of travel, crowded environments, uncomfortable chairs, [and] fear of stains."[144] Over 75% of the company's female workers have worked from home under the policy since it began.[145]

In 2016, British social enterprise Coexist created a worker driven period policy after a manager saw colleagues in pain at receptions, including someone "doubled over. . .and white as a sheet" and realized that "something ha[d] to shift."[146] Coexist invited all employees to a "closed-door meeting," which resulted in a new menstruation policy that affords workplace flexibility and time off for painful menstruation-related moments.[147] The goal was to

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[140] Victorian Women's Trust, *Menstrual Leave Policy Menstrual Policy Template* https://www.vwt.org.au/menstrual-policy-2/ [https://perma.cc/V8J3-PQ2Y] (last visited Aug. 1, 2021); *see* Jacqueline Howard, *Employer's Paid Period Leave Policy in Australia Stirs World Debat*e, CNN (Oct. 4, 2018), https://edition.cnn.com/2018/10/03/health/period-leave-australia-explainer-intl/index.html [https://perma.cc/6K4Z-6DSX] (describes the voluntary period policy, which does not cut into sick leave).

[141] Howard, *supra* note 140; Goldblatt & Steele, *supra* note 19, at 308.

[142] Ratna Bhushan, *Breaking Paradigm: Wet & Dry Personal Care to Start 'Menstrual Leave' for Staff*, ECON. TIMES (March 6, 2016) (policy offered two days unpaid leave monthly or telework from home). Other Indian companies then followed. *See* Supriya Dedgaonkar, *City Firm Allows Menstrual Leave*, PUNE MIRROR (July 2, 2020), https://punemirror.indiatimes.com/pune/civic/city-firm-allows-menstrual-leave/articleshow/76737946.cms [https://perma.cc/9MLF-JP6K] (announcing two days of paid menstrual leave and noting that employees "are not mandated to give any kin[d] of notice in advance").

[143] Belliappa, *supra* note 27; Somya Abrol, *Do Women in India Need Period Leave? Will it Ostracize Women in the Work Space?*, INDIA TODAY (July 13, 2017), https://www.indiatoday.in/lifestyle/health/story/india-period-leave-culture-machine-menstruation-cramps-debate-lifest-1024164-2017-07-13 [https://perma.cc/6RKA-H5JQ]. It provided one paid day monthly, apart from sick or vacation leave. Pattani, *supra* note 117.

[144] Levitt & Barnack-Tavlaris, *supra* note 65, at 564.

[145] *Id.*

[146] Juliette Astrup, *Bringing Period Policy Up to Date*, Cmty. PRAC. at 15 (Nov. 2018); Bex Baxter, *Ending a Workplace Taboo. Period.* YOUTUBE https://www.youtube.com/watch?v=0wWUAx_1JDw [https://perma.cc/Y3C5-G4K4]; Kayleigh Lewis, *Company Gives Women "Period Leave" to Make Them More Productive*, INDEP. (Mar. 1, 2016), https://www.independent.co.uk/life-style/health-and-families/period-leave-menstruation-work-employment-uk-women-a6905426.html [https://perma.cc/9A5B-8NXC]; Steven Morris, *UK Company to Introduce "Period Policy" for Female Staff*, GUARDIAN (Mar. 2, 2016), https://www.theguardian.com/lifeandstyle/2016/mar/02/uk-company-introduce-period-policy-female-staff [https://perma.cc/Y9C8-7LW4] (explaining the anticipated return on investment).

[147] Eun Kyung Kim, *Britain's Coexist to Offer Flexible 'Period Policy' For Women With Painful Cycles*, TODAY (Mar. 4, 2016), https://www.today.com/health/britain-s-coexist-offer-flexi-

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destigmatize menstruation, normalize it, and empower workers by respecting them and their bodies.[148] It also led to increased productivity.[149] A few years later, approximately half of Coexist's menstruating workers reported using the policy by leaving early, using flextime, or teleworking.[150]

Leaders of these companies also successfully supported broader campaigns to encourage other local employers to create menstrual supports.[151] For example, some Indian teachers are now offered FOP Leave,[152] as are employees of Zomato (an Indian food delivery company).[153] In an email to employees, Zomato's founder and CEO shared, "There shouldn't be any shame or stigma attached to applying for a period leave. You should feel free to tell people. . .that you are on your period leave for the day."[154]

Employers have implemented other innovative policies too. For example, every time someone purchases menstrual products from Aunt Flow LLC, the company supplies a pack of menstrual products to a business that voluntarily provides them for free in their restrooms.[155] There also is an international push—led by U.K. politicians, business leaders, and advocacy groups—for voluntary employer practices to address menopause at work, including by providing accommodations like fans and water.[156]

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ble-period-policy-women-painful-cycles-t77941 [https://perma.cc/NFS9-AJY3]; Morris, *supra* note 146. Coexist was not the first UK business to offer menstrual leave. Since 2008, the standard contract of the Women's Environmental Network provides menstruating workers with one paid leave day each cycle. Astrup, *supra* note 146, at 16.

[148] Astrup, *supra* note 146, at 15–16. Bex Baxter posits that it is "good for business" to have workers take leave; it "empower[s] workers to be their optimum selves." Morris, *supra* note 146 (noting a goal of "break[ing] down that shame").

[149] Lewis, *supra* note 146.

[150] Hamilton House, Ending a Workplace Taboo. Period. (Jan 11, 2018) (Coexist's primarily female workers have "created a contingency agreement to accommodate staff needing time off").

[151] *See* Howard, *supra* note 140 (describing efforts by the Victorian Women's Trust to advocate for other employers to provide the same); Blush Originals, *First Day of Period Leave*, YouTube (Dec. 1, 2017), https://www.youtube.com/watch?v=AVPgUxGC1Sg [https://perma.cc/VD85-74FH] (Culture Machine staff discussing their FOP policy to "legitimate [it] across the country" and pitch a petition asking the Indian government to create a FOP leave law); Josie Cox, *Menstrual Leave: Indian Company Offers Women Day Off on First Day of Their Periods*, Indep. (July 11, 2017), https://www.independent.co.uk/News/business/news/mestrual-leave-indian-company-culture-machine-period-women-workers-first-day-off-holiday-a7834796.html [https://perma.cc/MSH9-K7V4] (noting that Culture Machine wants other women in India "to have the same right"); Belliappa, *supra* note 27, at 604 (FOP leave has prompted a "[n]ew convo").

[152] NDTV, *Now Some Kerala Schools Offer Teachers 'First Day of Period Leave,'* YouTube (Aug. 2, 2017), https://perma.cc/5DQS-4FQV (sharing a new FOP policy for teachers and describing the taboo-breaking experience of discussing periods).

[153] Julia Hollingsworth, *Should Women Be Entitled to Period Leave?*, CNN (Nov. 20, 2020), https://perma.cc/3CUE-M583.

[154] *Id.*

[155] Montano, *supra* note 29, at 393–94 (sharing that a college student created the company after she missed a networking event because she had no products). It also created an app that displays a map of nearby businesses with products available to the public and staff. *Id.*; *see also* Belliappa, *supra* note 27, at 614 (describing a "menstrual flexibility" proposal that allows menstruators to take leave during their cycle and make up later).

[156] Mullins, *supra* note 21, at 13–14.

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This increase in voluntary employer practices and collective action is important. Unfortunately, many workplaces and period needs continue to go unmet. Thus, the next section examines how existing laws address menstruation at work.

II. Existing Employment Law for Current and Former Menstruators

Existing workplace laws can—and sometimes do—cover the needs identified in the last section by offering current and former menstruators limited rights related to menstrual accommodations and menstrual antidiscrimination protection. But that coverage is neither explicit in the relevant statutory text nor comprehensive in scope. Nonetheless, this section explains the complicated patchwork of relevant existing laws. Specifically, Part A covers the promise—and ultimate failure of existing labor standards and tort law to require menstrual accommodations on demand.[157] Similarly, Part B tackles the partial application of existing antidiscrimination statutes to menstrual discrimination. Part C explores how international movements and menstrual accommodation and discrimination laws have developed and offer variations on the models outlined in the rest of this section.

A. Menstrual Accommodations

No American labor standard offers designated rights to menstrual accommodations. Employers are not required to provide paid menstrual breaks, leave, or scheduling flexibility qua menstruation. Nor are employers required to offer physical accommodations like access to menstrual-friendly bathrooms, menstrual products, uniform modifications, or other items. Nonetheless, employers may be required to provide some of these accommodations for other reasons that de facto cover some menstrual needs.

1. Access to Job-Protected Time Away from Work

Structurally, the last section demonstrated a need for menstruators to access work breaks. The Fair Labor Standards Act ("FLSA"), which governs some time-related obligations, is silent on breaks for workers, with one notable exception.[158] The exception is a 2010 FLSA amendment that requires that some workers be provided "reasonable," job-protected break time and private space accommodations for breastfeeding "each time" a covered

[157] *See infra* Section II.A.

[158] *See* 29 U.S.C. § 203–209; *see also* Linder & Nygaard, *supra* note 85, at 9 (only workers "whose fatigue might cause them to injure or kill nonworkers," such as pilots and truck drivers, are subject to mandatory breaks).

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worker "has need."[159] These expression breaks, along with any other breaks of twenty minutes or less, are deemed work time, which means they must be paid if provided.[160]

No other federal law generally requires bathroom breaks.[161] Workers must be provided designated, paid breaks under some state laws, however.[162] For example, California requires workers be given a 10-minute uninterrupted, paid break after someone works three and half hours in the same day and a second 10-minute paid break after six hours.[163] Washington entitles workers to 10-minutes of break every three hours.[164] Menstrual management presumably could occur during these covered breaks, although doing so means that workers would not have the ability to use that time to rest as other workers are able to do.

Under the Family and Medical Leave Act ("FMLA"), certain employers must provide up to twelve weeks of job-protected, unpaid leave to some workers to address the birth of a child or a serious health condition, among other reasons.[165] Menstruation, which normally stops during pregnancy and childbirth, and menopause, during which time pregnancy is biologically not possible, are not explicitly covered leave reasons. Relatedly, a "serious health condition" is "an illness, injury, impairment or physical or mental condition" that requires inpatient care or "continuing treatment by a health care provider."[166] Neither menstruation nor menopause fall squarely in this definition, but some menstruation-related conditions, such as endometriosis, may be covered if menstruators meet the FMLA's other eligibility requirements and can afford unpaid leave. If those conditions are met and it is medically necessary, covered workers may take FMLA leave intermittently in one hour blocks of time.[167] Breaks of shorter increments are not required.

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[159] 29 U.S.C. § 207(r)(1); *see generally* Marcy Karin & Robin Runge, *Breastfeeding and a New Type of Employment Law*, 63 CATH. L. REV. 329 (2014) (exploring these accommodations and situating them in other employment laws with a health purpose).

[160] *See* 29 C.F.R. § 785.18 (breaks under 20 minutes "must be counted as hours worked"); *Breaks and Meal Periods*, U.S. DEP'T OF LABOR, (last visited Aug. 1, 2021), https://perma.cc/S8ZF-3GT9. Neither menstruation nor menopause are mentioned in the FLSA or implementing regulations.

[161] *See OSHA Restroom Break Laws*, OSHA EDUC. CENT., (2019), https://perma.cc/62K6-JU47.

[162] *See* Matthew Fritz-Mauer, *Lofty Laws, Broken Promises: Wage Theft and the Degradation of Low-Wage Workers*, 20 EMP. RTS. & EMP. POL'Y J. 71, 91 (2016) (nine states required paid breaks in 2016); LINDER & NYGAARD, *supra* note 85, at 4 (observing that required breaks used to be more prevalent).

[163] Cal. Indus. Welfare Comm'n Wage Order 9-2001 § 12(A), https://www.dir.ca.gov/IWC/IWCArticle09.pdf [https://perma.cc/QK89-73ZG].

[164] Wash. Admin. Code § 296-126-092(4) (2021).

[165] 29 U.S.C. § 2612(a)(1)(D). The FMLA's eligibility criteria is notoriously limiting. *See e.g.*, Nicole Buonocore Porter, *Finding a Fix for the FMLA: A New Perspective, A New Solution*, 31 HOFSTRA LAB. & EMP. L.J. 327, 327–28 (2014) (cataloguing critiques with the FMLA due to eligibility limitations and not requiring pay).

[166] 29 U.S.C. §§ 2611(2), (4), 2612(a). These conditions require: at least two visits with a medical provider; an overnight stay in a facility; or incapacity for more than three consecutive days with ongoing medical treatment. 29 C.F.R. §§ 825.113-.115.

[167] 29 U.S.C. § 2612(b)(1) (authorizing intermittent leave to care for a serious health condition or for other FMLA-qualifying reasons with the employer's permission); 29 C.F.R.

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Compliance with the FMLA's technical requirements have stymied more than one menstruator's claim. For example, an African American tractor-trailer driver successfully obtained FMLA leave a few days a month for the serious health condition of menorrhagia and fibroid tumors in *Taylor v. Giant of Md.*[168] She later lost access to it after a dispute over the need to comply with the employer's absence notification procedures.[169]

In *Stephens v. Treasury*, the MSPB upheld the suspension of a worker who failed to follow the employer's procedures for requesting FMLA leave.[170] The worker notified her employer of a "menstrual problem." She then submitted medical paperwork that said she might "occasionally" be late or miss work for menstrual bleeding and suggested that she stay home during menses until after surgery rectified her condition. No formal medical certification was provided. The Administrative Law Judge ("ALJ"), who did not apply the serious health condition standard, held that Stephens needed significantly more time away from work than the medical note suggested, finding the paperwork insufficient to demonstrate "that her menstrual cycle difficulties incapacitate her from work. . .more than a few days per month."[171] These cases show that FMLA leave may be available, but only to eligible workers who can navigate the complicated threshold requirements, which is much harder to do if someone has an unpredictable period.

Most states have medical leave laws that parallel the FMLA or offer greater protections.[172] Coverage thresholds are often lower, which means that these leave protections may apply to more workers.[173] Other state and local laws also offer protections. For example, 36 jurisdictions require paid sick leave and others provide small necessities leave, i.e., time off for needs that are not covered under other laws such as taking a child to be vaccinated or attending a parent/teacher conference.[174] Even when they offer broader coverage, these laws also have strict access requirements. For example, in *Turner v. Newark Housing Authority*, a security guard was fired for absences, including some related to "menstrual problems. . .exacerbated by [job] stress."[175] The guard only explained that she "wasn't feeling well," which did

§ 825.203(d) ("[A]n employer may limit leave increments to the shortest period of time that the employer's payroll system uses[,] provided it is one hour or less."). This means that eligible workers may need to forgo pay for time spent on the remaining part of an hour if they needed less time to address their covered menstrual/menopausal needs.

[168] 33 A.3d 445 (Md. 2011).

[169] *Id.*

[170] Stephens v. Treasury, No. CH-0752-05-0258-I-1, 2005 WL3593348 (MSPB Sept. 28, 2005).

[171] *Id.*

[172] NCSL, *Family Medical Leave* (updated Dec. 2014), https://www.ncsl.org/research/labor-and-employment/state-family-and-medical-leave-laws.aspx [https://perma.cc/VK5T-LFEQ].

[173] *Id.*; *see e.g.*, D.C. Code § 32–501.

[174] NAT'L P'SHIP FOR WOMEN AND FAMS., *Chart-Paid Sick Days Statutes* (July 2021), https://www.nationalpartnership.org/our-work/resources/economic-justice/paid-sick-days/paid-sick-days-statutes.pdf[https://perma.cc/GMM6-Z36S]; *see e.g.*, MASS. GEN. LAWS ch. 149, § 52D (1998).

[175] 92 N.J.Admin. 2d 403 (1992).

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not satisfy the employer's policies.[176] In upholding the ALJ's decision, the Office of Administrative Law agreed that the termination was justified for failure to follow leave-notification policies.[177] Essentially, these laws only offer limited protections to some menstruators at work.

2. *Additional Protections for Menstruation-Related Disabilities*

Though the Americans with Disabilities Act ("ADA") requires limited time and space accommodations for some menstruation or menopause-related disabilities, it does not offer universal accommodations for all menstruating or menopausal workers.[178] Specifically, under the ADA, as amended by the ADA Amendments Act ("ADAAA"), covered employers must furnish reasonable accommodations to qualified individuals with a disability if doing so does not impose an undue hardship on business operations.[179]

An individual with a disability is someone with a physical or mental impairment that substantially limits one or more major life activities, has a record of such an impairment, or is regarded as having such an impairment.[180] A physical or mental impairment includes "[a]ny physiological disorder or condition. . .affecting one or more body systems," including reproduction.[181] Major life activities include "caring for oneself[,] concentrating[,] working[,]" and "the operation of a major bodily function, including. . .bowel, bladder[,] and reproductive functions."[182] Only qualified individuals with an actual disability or a record of having one are entitled to reasonable accommodations.[183]

Before the ADAAA, courts uniformly denied disability-status to people alleging that menstruation, perimenopause, or menopause were qualifying disabilities. For example, Iris Klein, who had bleeding, sleeping, and nausea problems at the start of menopause, asked for and was denied flex time ac-

[176] *Id.* at 403.
[177] *Id.*
[178] 42 U.S.C. § 12101 *et seq.*; *see infra* Section II.C.2.
[179] 42 U.S.C. § 12111(a); 29 C.F.R. § 1630.9(a). *See also* 42 U.S.C. § 12112(B) (defining discrimination as the failure to provide reasonable accommodations).
[180] 42 U.S.C. § 12102(1).
[181] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. § 1630.2(h)(1)–(2) (2021); Price v. UTI Inc., No. 4:11-CV-1428CAS, 2013 WL 798014, at *3 (E.D. Mo. Mar. 5, 2013) ("'physical impairment' includes. . .an impairment or complication related to pregnancy").
[182] 42 U.S.C. § 12102(2)(A)–(B); *see Summary of the ADAAA*, THE ADA PROJECT http://www.adalawproject.org/summary-of-the-adaaa#anchor-link1[https://perma.cc/44N9-XKK3] (noting the ADAAA's instruction to generously interpret the law to find a disability).
[183] 42 U.S.C. §§ 12112–13; 29 C.F.R. § 1630.2(o); EEOC, ENFORCEMENT GUIDANCE ON REASONABLE ACCOMMODATION AND UNDUE HARDSHIP UNDER THE AMERICANS WITH DISABILITIES ACT, Notice No. 915.002 (Oct. 17, 2002), http://www.eeoc.gov/policy/docs/accommodation.html [https://perma.cc/WRC5-CZX3]. An undue hardship is something that requires significant difficulty or expense given the employer's size, industry, and resources. 42 U.S.C. § 12111(10). An interactive process or conversation between employer and employee must be used to find an appropriate accommodation. 29 C.F.R. §§ 1630.2(o), 1630.9.

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commodations to arrive at work after 8am.[184] The Southern District of Florida held that Klein's menopause-related complications, which admittedly "temporarily interfere[d] with [her] ability to satisfactorily perform employment tasks," was not a disability. After acknowledging that "complicated menopause" may be a disability, the court noted that "[m]enopause, generally, is not a handicap or disability."[185]

Linda McGraw faced the same fate. McGraw told her supervisor that "she was in early menopause" in response to allegations of poor work performance. Interpreting federal law, a Minnesota court recognized that the inability to have children is a cognizable disability, but it declined to read precedent as requiring *every* menopausal worker—especially those in menopause due to an "entirely normal consequence of human aging" to be deemed disabled.[186] This "unremarkable proposition" was then used by the Southern District of New York to find that an infertile store manager who had a miscarriage was not disabled.[187] After citing *McGraw*, the decision declared, seemingly out of nowhere, that this was "a proposition that enlightened women have been espousing for centuries."[188] Then, in dicta, the decision stated that "[a] post-menopausal woman. . .is not 'disabled' [as] her. . .non-reproductive system—is in fact functionally normally."[189]

Post-ADAAA, courts have been more generous covering period-related conditions. With respect to menstruation, in *Schmidt v. Solis*, the District Court for the District of Columbia found that the U.S. Department of Labor failed to accommodate and retaliated against an employee with endometriosis.[190] Her endometriosis, which caused "abnormal, painful" menstrual cycles that were "often accompanied by profuse and uncontrollable bleeding," was considered a disability.[191] For some time, Schmidt obtained scheduling flexibility or telework.[192] Then, after she cited privacy concerns and declined to submit a "revised medical report" directly to a new supervisor, Schmidt ultimately had her work hours decreased and was required to be in

[184] Klein v. Florida, Dept. of Child. & Fam. Serv., 34 F. Supp. 2d 1367, 1369 (S.D. Fla. 1998).

[185] *Id.* at 1368, 1371–72.

[186] McGraw v. Sears, 21 F. Supp. 2d 1017, 1021 (Minn. 1998) ("The Court takes judicial notice of menopause as an entirely normal consequence of human aging. As such, it is clearly distinguishable from early loss or impairment of childbearing resulting from a communicable viral illness.").

[187] Saks v. Franklin Covey Co., 117 F. Supp. 2d 318, 326 (S.D.N.Y. 2000), *aff'd in part, remanded in part*, 316 F.3d 336–37 (2d Cir. 2003); *see also* Kelley v. Yeutter, No. 03900092, 1990 WL 1111023, at *1–4 (EEOC 1990) (interpreting the Rehabilitation Act, the MSPB held that there was no handicap discrimination for a terminated government auditor for "bleeding and other manifestation of irregular menstruation" because "her headaches, bleeding or depression" had not substantially limited a major life activity).

[188] *Saks*, 117 F. Supp. 2d at 326.

[189] *Id.* at 326.

[190] 891 F. Supp. 2d 72, 75–76, 89–93 (D.D.C. Sept. 18, 2020) (analyzing a disability discrimination claim under the Rehabilitation Act).

[191] *Id.* at 76–77.

[192] *Id.*

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person at times.[193] When yet another set of supervisors asked for additional medical records, the anxiety this produced caused her to change jobs. In upholding her damages award, the court chided the employer for repeatedly failing to properly engage in the interactive process, changing accommodations without reason, and inappropriately using the fact that she would not disclose personal medical information to a supervisor against her.[194]

Chipman v. Cook provides an example of better coverage of menopause post-ADAAA.[195] Here, the Eastern District of Arkansas allowed the ADA claim of a terminated office manager to proceed because there was a question about whether her "severe and debilitating symptoms related to menopause," which made her tired for two to three days at the start of her cycle, constituted a disability.[196] In analyzing whether this constituted a disability, her employer conceded and the court observed that Chipman's menstrual cycle may "temporarily impact [her] ability to stand, lift, walk, and work because she needed to lay down when her symptoms required it." Accordingly, the court was unwilling to say that she did not have a disability as a matter of law.[197]

In *Mullen v. New Balance*, the District of Maine allowed a 35-year-old's claim to proceed to determine whether she had a disability after a hysterectomy to remove ovarian cysts induced early menopause.[198] Mullen alleged that she was pressured to resign after crying, experiencing hot flashes, and having an "outburst" at a feedback meeting.[199] The parties agreed that a hysterectomy generally impacts the major life activity of reproduction, but the employer argued that should not govern here because Mullen had eliminated her reproductive capacity with tubal ligation a decade earlier.[200] In response, the court noted that tubal ligation is not permanent, while hysterectomies represent a permanent reproductive-impairment.[201] In allowing the case to proceed, the court focused on her young age, the reality that the condition was the result of a medical procedure, and the impact it has on child-rearing.[202]

Even under the ADAAA's expanded definition of disability, a "regular" period—or "being in menopause"—without associated symptoms or condi-

[193] *Id.* at 78–85.

[194] *Id.* at 89–93. Damages were statutorily capped at $300,000 and back pay. *Id.*

[195] No. 3:15-CV-143, 2017 WL 1160585 (E.D. Ark. Mar. 28, 2017) .

[196] *Id.* at 1, 5, 7–8 (also alleging gender, age, and disability discrimination; noting that management explained that "female issues" were the reason for her conduct).

[197] *Id.* at 8.

[198] No. 17-CV-194-NT, 2019 WL 958370, at *5 (D. Me. Feb. 27, 2019) (mentioning multiple cases finding disability after a hysterectomy, given its impact on reproduction or support of an inference that someone was regarded as disabled).

[199] *Id.* at *1–2.

[200] *Id.* at *5.

[201] *Id.*

[202] *Id.* at *1–2; Cahn, *supra* note 23, at 7–8 (concluding, her case was different "from that of a person in menopause due to regular aging"); Mullins, *supra* note 21, at 11 (arguing that this case showed a broader bias against "older menopausal individuals").

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tions likely would not be deemed a disability.[203] Nonetheless, these cases collectively demonstrate that the ADAAA made it easier for some qualified workers with menstruation- or menopause-related impairments to meet their burden of demonstrating a covered disability for ADA protection.

Assuming some period-related impairments constitute a disability, the next question is whether reasonable accommodations must be provided.[204] Reasonable accommodations are changes to the work environment that provide an equal opportunity, such as scheduling flexibility, part-time opportunities, or modifying existing facilities.[205] As discussed above, the most common anticipated accommodations here include: time (e.g., break time, leave, or scheduling flexibility);[206] space (e.g., menstrual-friendly facilities such as toilets, temperature modifications, or location of work); and other menstrual management tools (e.g., the provision of products, uniform changes). Employers and employees must engage in an interactive process to determine if/what accommodations are reasonable given circumstances.[207]

In *Brown v. Georgia Dep't of Driver Servs.*, a customer service examiner ultimately was denied accommodations for menorrhagia under the Rehabilitation Act.[208] Menorrhagia led to heavy bleeding and an elongated period, which in turn "caused fatigue; mental confusion; and loss of memory, appetite, and sleep."[209] Her menstrual discharge also covered her clothing and work furniture, "causing her intense embarrassment."[210] This impairment required her to sit during her period, especially cycles where the "heaviest bleeding" could last for nine days and "sudden blood flows" could be triggered by essential work tasks.[211] Eventually, Brown was hospitalized, underwent a hysterectomy, and needed six weeks of post-surgery recovery. She exhausted her FMLA leave and lost her job after complications with her hysterectomy caused her to stay away from work longer. The court held it was not discrimination because she could not perform the essential functions of the job.[212] Thus, even if someone meets the burden of demonstrating a disability, they may not be able to prove other required elements to obtain liability for failing to provide menstrual accommodations.

[203] 42 U.S.C. §§ 12102(2), 12111(8); Karin, Cooper & Johnson, *supra* note 15, at 65 n.309; *see also* Cahn, *supra* note 23, at 6 (exploring how menopause differs from menstruation under the ADA).

[204] 42 U.S.C. § 12111(10)(A)–(B); *Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act,* 29 C.F.R. § 1630.2(o)(i–iii), (p) (2021).

[205] 42 U.S.C. § 12111(9).

[206] EEOC, *supra* note 183 (explaining that a reasonable accommodation may include a modified or part-time schedule that "adjust[s] arrival or departure times, provid[es] periodic breaks, alter[s] when certain functions are performed, allow[s] an employee to use accrued paid leave, or provid[es] additional unpaid leave").

[207] Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act, 29 C.F.R. §§ 1630.2(o), 1630.9.

[208] Brown v. Georgia Dep't of Driver Servs., 2014 WL 1686833, at *5–6 (M.D. Ga. April 29, 2014).

[209] *Id.* at 8.

[210] *Id.*

[211] *Id.* at 19–23.

[212] *Id.* at 9–11.

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In addition to the ADA, some state and local laws offer broader rights to accommodations.[213] For example, in *Martinell v. Montana Power Co.*, a Montanna court held that endometriosis was a covered disability in a discrimination lawsuit related to a constructive discharge.[214] Before she resigned, the employer denied Martinell's request to cap work at 40 hours per week or provide sick leave, and then refused to talk further. After she left the job, Martinell underwent a hysterectomy and sued. In response, the employer claimed that endometriosis was not a disability since it "was at all times curable by means of a hysterectomy, and that the curable character of her illness defies classification. . .because her activities were limited only to the extent she wished them to be limited."[215] The employer further claimed that Martinell's "choice of living with" endometriosis instead of "abating her symptoms temporarily by becoming pregnant" was fatal to her claim.[216] The court found this position "untenable" and "unreasonable," holding that endometriosis "substantially limited [the] major life activity [of] work."[217] Accordingly, it should have been reasonably accommodated.[218]

In *Sipple v. Crossmark, Inc.*, the Eastern District of California, which relied on pre-ADAAA cases, declined to find menopause to be a per se disability under either the ADA or California's Fair Employment and Housing Act[219] Without disclosing why, Sipple asked for a dress code modification after she began experiencing menopause. Ultimately, she submitted a medical certification justifying the change. The court declined to find a disability, observing that Sipple alleged only that "she cannot work wearing the particular uniform for this particular position."[220] Nonetheless, it left open the possibility that "the effects of menopause" may be a disability if they "affect a body system. . .and sufficiently limit a major life activity."[221]

In addition to disability accommodations, state and local Pregnant Worker Fairness Acts may require accommodations for some menstrual needs like "more frequent or longer breaks" and temporarily altered or restructured job duties to alleviate strain or hazard.[222] For example, D.C.'s Protecting Pregnant Workers Fairness Act requires employers to provide reasonable accommodations to workers whose ability to perform the essen-

[213] *See e.g.*, D.C. Code § 2-1401.02(1).
[214] 886 P.2d 421 (1994).
[215] *Id.* at 428.
[216] *Id.*
[217] *Id.* at 428–29. The decision relies on *Illinois Bell Tel. Co. v. Hum. Rts. Comm'n*, 190 Ill. App. 3d 1036, 1047 (1989), which found that endometriosis was a covered "handicap," but dysmenorrhea was "transitory and insubstantial." Martinell, 886 P.2d at 428–30 ("We are mindful of the plight. . .of women who are afflicted by severe menstrual pain, and we recognize that all such conditions are not necessarily physical handicaps, but must be determined from the facts of each case.").
[218] *Id.* at 431–35.
[219] No. 10–cv–00570, 2012 WL 2798791, at *1, *5 (E.D. Cal. July 9, 2012).
[220] *Id.* at *7.
[221] *Id.* at *5.
[222] D.C. Off. of Hum. Rts, *Protecting Pregnant Workers Fairness Act* (rev'd Jan. 3, 2019), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/PregnantWorkers_WorkplacePoster_rev010319.pdf [https://perma.cc/8URB-6G6N].

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tial functions of their jobs are limited due to "pregnancy, childbirth, breastfeeding, *or a related medical condition*."[223] Unless it causes an undue hardship, employers arguably already must provide menstrual accommodations in those states that require pregnancy accommodations. Taken together, these federal, state, and local laws provide a right to disability or reproductive-related menstrual accommodations to some workers, but gaps remain.

3. *Workplace Health and Safety Rules Require Access to Menstrual Safety and Physical Accommodations; But Menstruation is Usually an Afterthought, Ignored, or Harmed*

In addition to time and disability related accommodations, menstruators may need physical accommodations to ensure a safe work environment such as access to menstrual-friendly facilities, menstrual products, fans, and ventilation.[224] Employers have a general duty to provide a safe work environment; the failure to do so may impose liability under occupational safety and health, workers compensation, or tort laws. Without these protections as explored below (and sometimes even with them), periods will cause some workers to experience bodily harm and/or menstrual indignities. This section explores current obligations to specific physical accommodations to comply with existing safety and health laws.

Under the Occupational Safety and Health Act ("OSH Act"), employers must provide a workplace environment that conforms to subject-specific safety standards and meets a general duty to provide a worksite free from recognized harms.[225] Some of the OSH Act's regulations clearly apply to menstrual management at work—even if the words menstruation and menopause are absent from the promulgated standards and guidance disclaims agency responsibility by giving employers discretion over menstrual blood exposure. Workers compensation and tort law also impose safety-related duties on employers.

a. *Access to Toilets as Needed*

The OSH Act is silent on menstruation and menstrual products. Similarly, the regulations promulgated by the Occupational Safety and Health Administration ("OSHA," the agency responsible for enforcing the OSH Act) do not mention menstruation, menopause, or related products.[226] De-

[223] *Id.* (emphasis added); *see infra* Section II.C.1 (explaining why the italicized phrase covers menstruation and menopause).

[224] *See supra* note 89 and accompanying text.

[225] 29 U.S.C. §§ 651, 654(a)(1) (employers must provide worksites that are "free from recognized hazards that are causing or are likely to cause death or serious physical harm").

[226] *See* 29 C.F.R. § 1910.141. Despite providing a list of products that must be provided (e.g., soap, toilet paper), "[m]enstrual products are conspicuously excluded." Jennifer Weiss-Wolf, *U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda*, *in* PALGRAVE HANDBOOK, *supra* note 19, at 497; WEISS-WOLF, *supra* note 14, at 202 (asking why OSHA

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spite this gap, the OSH Act and its standards govern components of menstrual management at work. Specifically, employers must provide access to clean water and safe, sanitary, sex-segregated bathroom facilities.[227] OSH Act standards also prevent employers from creating "unreasonable restrictions on the facilities' use," in recognition that "individuals need[s] to use [the] facility var[y] significantly."[228]

Given the culture of silence and shame around menstruation generally and in the law specifically, the lack of inclusion is not surprising. However, it is noteworthy, given the topics were explicitly part of the regulatory history that led to these rules. For example, the toilet access standard was developed at least in part from a desire to "prevent workers from urinating, *menstruating* or defecating in their pants on the grounds that it creates health and safety problems."[229] High profile litigation involving the inability of women in non-traditional jobs to access toilets also influenced the rule's creation.

A class of street cleaners brought one of these cases against New York City, alleging non-compliance with an earlier rule that required employers to provide mobile crews with transportation to "nearby toilet facilities.[230] As part of that litigation, the named plaintiff shared that there was nowhere to go to change products during her period. Instead, she had "to wait until the end of [the] shift and by then [her] clothes [were] soaked with blood."[231] In 1997, the case ended with a preliminary injunction that prevented the city from having workers outside if toilets could not be provided. The NPRM for the current OSHA rule, which requires that bathroom access be provided "when [workers] need to use them," was published a week later.[232]

Soon thereafter, in 1999, OSHA's Health and Safety of Women in Construction workgroup included menstrual experiences and lack of access to sanitary facilities—including washing water and toilets—as "[s]afety and health problems in construction [that] create barriers to women entering and remaining in this field."[233]

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fails to consider the "hygiene impact of blood running down the leg of workers" in calculating risk exposure to bloodborne pathogens at work).

[227] 29 C.F.R. § 1910.141(c)(1)(i) (bathrooms for each sex "shall be provided"); *see* OSHA, Interpretation Letter on 29 C.F.R. § 1910.141(c)(1)(i): Toilet Facilities (April 6, 1998), https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0 [https://perma.cc/EG3D-4A59] (confirming that "employers [must] make toilet[s] available so that employees can use them when they need to do so"); Weiss-Wolf, *supra* note 226, at 539, 541.

[228] OSHA, Interpretation Letter on 29 C.F.R. § 1910.141(c)(1)(i): Toilet Facilities (April 6, 1998), https://www.osha.gov/laws-regs/standardinterpretations/1998-04-06-0 [https://perma.cc/R3X3-MBS6].

[229] Linder, *supra* note 126, at 242–43 (emphasis added) (providing examples of problems from denying toilet access, including "accidents and injuries attendant on workers' being inattentive and preoccupied with their wet, soggy, and smelly pants").

[230] *Id.* at 8, 16–17 (describing Capers v. Giuliani, No. 97-402894 (Sup. Ct. N.Y. Cnty, 1997)).

[231] *Id.* at 17 (citing Capers's affidavit).

[232] *Id.*

[233] OSHA, U.S. Dep't of Lab., *supra* note 92 (mentioning judicial holdings that "the lack of appropriate sanitary facilities is discriminatory and violates OSHA standards").

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These rules have been enforced against at least some employers, who have been cited for denied bathroom access after incidents that led to menstrual leaking and other dignitary harms. For example, a ConAgra subsidiary's Marshalltown, Iowa plant settled a June 2000 citation for a $1,000 penalty. Toilet access was delayed or denied to workers who "urinated and menstruated on themselves."[234] In 2001, the John Morell & Company of Sioux City Iowa paid an uncontested penalty of $2,000 to resolve a series of OSHA citations issued in response to employees being denied timely bathroom access, causing "urination, defecation, and/or a heavy menstruation in their clothing."[235]

The following year, a Morell supervisor prevented another worker from using the restroom by telling her that she did not need to go, even though the worker explain that she had to "deal with menstrual bleeding." The threat of another OSH Act complaint from the union—coupled with the poor publicity the company received after the first citation went public, caused the company to discipline the supervisor instead of the worker.[236]

A worker at another Iowa Morrell plant took a bathroom break while experiencing a heavy menstrual flow but realized that she did not have a quarter to purchase a pad from the restroom's dispenser. She went back to the line to ask a colleague for money, and then returned to the restroom. Upon seeing her return to the restroom so quickly, her supervisor told her to get back to work and made a reference to the "'hog' blood" with which they worked. By the time this exchange finished, the worker leaked through her clothes.[237] There is no record of whether she was paid for this time and OSHA did not cite the plant as it could not prove a violation.[238] However, John Morrell & Co. faced Title VII liability for related conduct, including damages of over $1.5 million dollars on disparate treatment, hostile work environment, and other related violations.[239]

Menstrual indignities also were at the center of a two-day Kentucky Occupational Safety and Health Review Commission hearing when Jim Beam Bourbon Company contested a citation about its bathroom policy. Jim Beam created the policy after estimating that some workers were taking up to four "mini breaks" daily to use the bathroom for an average of 28 minutes total.[240] According to the union, workers were told to "train their blad-

[234] LINDER, *supra* note 126 (citing Iowa Occupational Safety and Health Administration, In the Matter of Swift and Company, IOSH No. 300378031 (Oct. 13, 2000)). A settlement led to a $1,000 penalty. *Id.*

[235] *Id.* at 188–94.

[236] *Id.* at 306 (citing Bill Buckholtz, the secretary-treasurer of UFCW Local 1142 of the slaughter plant in Sioux City, Iowa).

[237] *Id.* at 308 (citing Oct. 14, 2002 telephone interview with Ron Brown, the president of UFCW Local in Ottumwa, about bathroom breaks).

[238] *Id.* at 309 (citing OSHA personnel).

[239] Baker v. John Morrell & Co., 382 F.3d 816, 819 (8th Cir. 2004) (affirming a jury award of $839,470 in compensatory damages, $33,314 in back pay and $650,000 in punitive damages as well as $38,921 in front pay that was judicially added).

[240] LINDER, *supra* note 126, at 246–47 (alleging 29 C.F.R. §1910.141(c) was violated).

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ders. . .or face discipline, including dismissal."[241] One worker described this as "the potty police" because the company tracked bathroom use on a spreadsheet.[242]

At the hearing, Jim Beam's HR director testified that some temporary illnesses such as diarrhea were accommodated. The state's lawyer asked whether workers with "an onset of menses [and] heavy flow" would be treated the same, and uncovered that menstruation required a case-by-case determination.[243] The HR director then was asked if it was "a bit personal" for a worker who had "a menstrual accident" and received a counseling for taking a "very rapid trip so as to prevent embarrassment" had to "explain [this] to the gentleman in personnel" to avoid discipline.[244] The answer was yes, but the company believed that this could be done "in a way that even a man would understand without having to get terribly embarrassed . . . ."[245]

Next, a local Kentucky urologist testified in support of Jim Beam's policy. According to the doctor, menstruation did not require an accommodation. He said it "was [n]ot likely" that a menstruating worker would take longer to use the bathroom, "because younger women tend to use tampons, while older women tend to use sanitary napkins and when they urinate, they would probably change their napkin but not a tampon."[246] Despite this testimony, the doctor admitted that "menstrual needs" were not included in his analysis of the "normal" length of time needed for a restroom break.[247]

By contrast, the state's expert, Dr. Ingrid Nygaard, explained six reasons that the policy was wrong, including the impact on "menstruating women" who "require restroom breaks to change menstrual. . .products" perhaps "as frequently as every 30 minutes on the first day of their period and up to every eight or 12 hours on later days."[248] Ultimately, Jim Beam removed the policy after bad publicity.[249]

Another company's policy required employees "to register with their foremen when leaving for and returning from relief" so management could "exercise proper control of personal time" and avoid the "disastrous" consequences of workers "taking too much time off[.]"[250] In a decision interpreting this policy, the arbitrator notes that it is "well known in industrial relations" that this leads to "workplace embarrassment" and "the virtually inevitable

[241] Sandy Smith, *Bourbon Maker Fights Citation for Denial of Bathroom Access*, EHS TODAY (Aug. 29, 2002) https://www.ehstoday.com/archive/article/21914262/bourbon-maker-fights-citation-for-denial-of-bathroom-access [https://perma.cc/4BU5-TSU3] (quoting the union's president: "It's a shame when you feel you have the need to go to the bathroom, but [ask] 'Do I soil myself or do I protect my job?'").

[242] *Id.*

[243] LINDER, *supra* note 126, at 246–47.

[244] *Id.* (citing Aug. 29, 2000 Hearing Transcript at 242, 245–46).

[245] *Id.*

[246] *Id.* at 214 (citing Stivers Deposition at 40–41).

[247] *Id.*

[248] *Id.* at 215–16 (citing Nygaard Deposition at 58–59) (continuing, "the most typical range is every one to three hours").

[249] *Id.*

[250] *Id.* at 200 (citing Detroit Gasket & Mfg. Co., 27 LAB. ARB. REPS. (BNA) 717 (1956)).

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affront to the sensitivities of these workers which administration of the rule entails."[251] Despite this industry knowledge, these cases demonstrate that both the OSH Act and OSHA can do more to facilitate employer practices related to safe access to menstrual-friendly toilets at work as needed.

b. Limiting Exposure to Menses and Proper Disposal of Menstrual Discharage

In addition to toilet access, safety provisions theoretically apply to menstruation designed to limit exposure to bloody. Unfortunately, neither the OSH Act nor any other law specifically requires employers to provide products to absorb menstrual discharge or otherwise limit exposure to it. OSHA does regulate exposure to and disposal of bloodborne pathogens, which are the "infectious microorganisms in human blood that can cause disease."[252] OSHA requires that "appropriate" personal protective equipment ("PPE") be provided to anyone with blood exposure at work at no cost to the worker.[253] PPE is "only [deemed acceptable] if it does not permit blood. . .to pass through to or reach the employee's work clothes, street clothes, undergarments. . .under normal conditions of use[.]"[254] PPE must be provided in "appropriate sizes" and be "readily accessible at the worksite." Hypoallergic (or other) PPE must be provided to counter any worker allergies,[255] and some PPE—like gloves—must be made available to any worker who wants to use them, even if they must be disposed of after a single use.[256] Although the reasons underlying these PPE and bloodborne pathogen rules apply to the need, use, and disposal of menstrual products; OSHA has declined to interpret the rule in a way that universally and clearly applies it.

Instead, OSHA has issued a series of non-binding interpretations that exclude menstruation from protection. For example, in response to employer questions, OSHA has explained that "discarded [menstrual] products, used to absorb menstrual flow, [are not] regulated waste."[257] Each employer must decide for itself if anything rises to the level of occupational exposure that

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[251] *Id.*

[252] *Bloodborne Pathogens and Needlestick Prevention*, OSHA, https://www.osha.gov/bloodborne-pathogens [https://perma.cc/Q7XK-KQDR]; *see e.g.*, 29 C.F.R. § 1910.1030(a) (containing a command that "applies to all occupational exposure to blood"); § 1910.1030(d)(2)(xi) (work exposed to blood "shall be performed in such a manner as to minimize splashing, spraying, spattering, and generation of droplets of these substances"); § 1910.1030(d)(3)(vi) (clothing "penetrated by blood. . .shall be removed immediately or as soon as feasible").

[253] 29 C.F.R. § 1910.1030(d)(3)(i).

[254] *Id.*

[255] *Id.* § 1910.1030(d)(3)(iii).

[256] *Id.* § 1910.1030(d)(3)(ix).

[257] *See e.g.*, OSHA Response Letter to Employer Regarding 29 C.F.R. § 1910.1030 to Feminine Hygiene and Incontinence Products (Oct. 23, 2015), https://www.osha.gov/laws-regs/standardinterpretations/2015-10-23 [https://perma.cc/4GNL-6FVT] ("OSHA stands by its current policy."). According to OSHA, "[t]he intended function of products such as sanitary napkins is to absorb and contain blood; the absorbent material of which they are composed would, under most circumstances, prevent the release of liquid or semi-liquid blood or the flaking off of dried blood. . ." OSHA Response to Application of Bloodborne Pathogen Standard Number 1910.1030 to Feminine Hygiene Products, Q37 (Oct. 8, 1992), https://

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must be addressed.[258] Further, OSHA does not prevent employers from providing menstrual products; however, it also does not require them, despite reserving the authority to do so on a case-by-case basis.[259]

Even absent this guidance, the OSH Act offers little solace to individually harmed menstruators. First, OSHA primarily takes reactionary responses to accidents or complaints. Many workers are unaware that the OSH Act might protect against certain employer-created harms from a lack of access to safe and dignified menstrual management harms. Or that they have the ability to file a complaint notifying OSHA of an alleged safety or health violation. Second, the OSH Act does not contain a private right of action that allows workers to hold employers responsible for any standard violations.

No other existing law requires employers to provide free menstrual products either. The Menstrual Equity for All Act of 2021, introduced by Congresswoman Grace Meng, would amend the OSH Act to require employers with at least 100 workers to supply them at no cost.[260] It also would require every federal agency to stock free menstrual products in restrooms that are open to the public, which would provide products to workers in those buildings too.[261]

Some local legislators are also moving access to menstrual products at work in legislation. For example, in New York, the proposed Total Access to Menstrual Products ("TAMP") Act would require employers to make menstrual products available in restrooms.[262] According to the Committee Report, this proposal responds to menstruators "report[ing] missing days from work. . .or being late as a result of unexpected menstruation or the inability to access or afford menstrual hygiene products, such as tampons or sanitary napkins."[263] The TAMP act aims to minimize this impact by treating menstrual products similar to toilet paper, since both address biological functions.[264]

Similarly, no state law requires that menstrual products be available in public buildings or facilities. However, New York's TAMP Act aims to provide menstrual products in every bathroom in the state, including public buildings.[265] A few other states also have proposed legislation to provide

www.osha.gov/laws-regs/standardinterpretations/1993-02-01-0 [https://perma.cc/Q6JG-XAW4].

[258] *See* OSHA Response (Oct. 8, 1992), *supra* note 257 ("[T]hese products [should] be discarded into waste containers which are lined in such a way as to prevent contact with the contents. [But] it is the employer's responsibility to determine" who is exposed and "procedures" for exposure.).

[259] *See id.* ("If OSHA determines, on a case-by-case basis, that sufficient evidence exists of reasonably anticipated exposure, the employer will be held responsible for providing the [OSH Act's protections] to the employees with occupational exposure.").

[260] Menstrual Equity for All Act of 2021, H.R.3614, § 7 (117th Cong. 2021).

[261] *Id.* at § 8.

[262] A.B. 137, 244th Leg. Sess. (N.Y. 2021).

[263] N.Y. State Assembly Memo in Support of A.B. 137, 244th Leg. Sess. (N.Y. 2021).

[264] *Id.*

[265] *Id.*

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products in public buildings.[266] On the local level, Brookline, Michigan was the first jurisdiction to enact a law requiring menstrual products in public bathrooms.[267] Others have followed suit with menstrual access laws for public buildings or recreational facilities, and more are coming.[268] Currently, however, neither the OSH Act nor any other law requires employers to provide menstrual products to minimize exposure to blood—or for any other reason.

c. Limited Employer Liability for Failing to Provide Menstruators with a Safe Workplace that is Free from Harm

Beyond the OSH Act's protections, workers compensation and tort law offer limited avenues to someone subjected to menstruation-related harm at work to obtain compensation. A description of each follows.

Workers' compensation is a no fault insurance scheme that is funded by mandatory employer contributions and offers wage replacement and the cost of medical care to workers who obtain an injury—including one related to menstruation—in the course of employment. Although the scope is limited, workers compensation could be available if workplace injuries cause "menstrual disturbances" or impact the path to menopause.[269]

When it is available, workers' compensation usually provides the exclusive remedy for injuries that occur at work, but state tort law may provide relief if an injury was the result of an intentional act. The most applicable workplace tort is intrusion upon seclusion—also known as invasion of privacy. Intentional infliction of emotional distress ("IIED") and negligent in-

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[266] *See e.g.*, H.4784, 123rd Sess., Gen. Assemb. (S.C. 2019); A.B. 381, 104th Leg. Sess. (Wisc. 2019).

[267] Town of Brookline, Mass. Town Meeting, Warrant Art. 20 29, 31 (May 21, 2019), https://www.brooklinema.gov/DocumentCenter/View/18846/2019-Annual-Town-Meeting-Article-Explanations [https://perma.cc/32V7-B6XG]; Ally Jarmanning, *Student Spurs Brookline, Mass., to Offer Free Tampons and Pads in Public Buildings,* NPR (June 9, 2019), https://www.npr.org/2019/06/09/730885382/student-spurs-brookline-mass-to-offer-free-tampons-and-pads-in-public-buildings [https://perma.cc/W3VJ-VHSE].

[268] *See e.g.*, *City Council Approves Free Hygiene Products,* SALT LAKE CITY BLOG (June 18, 2019), https://www.slc.gov/blog/2019/06/18/council-city-council-approves-free-hygiene-products/ [https://perma.cc/EXZ6-FZDU] (city appropriated money for free products in some city facilities and public buildings); Dane Cty., Wisc. Res. 317 (2015) (authorizing provision of menstrual products in county building public restrooms); Bob Blumenfeld, Motion, L.A., Cal. City Council (Aug. 6, 2019), http://clkrep.lacity.org/onlinedocs/2019/19-0882_mot_08-06-2019.pdf [https://perma.cc/8V3K-GZMT] (reporting that LA provided products in public camps and other places "where young women may find themselves in unexpected situations" and announcing a feasibility/cost study to provide them in all public facilities); Jennifer Weiss-Wolf, *U.S. Policymaking to Address Menstruation: Advancing an Equity Agenda*, 25 WM. & MARY J. RACE, GENDER & SOC. JUST. 493, 510–11 (2019) (mentioning a 2016-2018 Columbus, Ohio pilot that provided products in recreational facilities).

[269] *See* Burton v. Hilltop Care Ctr., No. 5019412, 2007 WL 3264013, at *3 (Iowa Workers' Comp. Comm'n, Oct. 26, 2007) (claimant uncovered that bleeding and incontinence problems were related to work); Am. Emp. Ins. Co. v. Kellum, 185 S.W.2d 113, 114–15 (Tex. Civ. App. 1944) (exploring whether a total disability jury verdict was supported by conflicting medical evidence on if a workplace injury caused menstruation, pain, and potential early-onset menopause to justify the workers compensation judgment).

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fliction of emotional distress ("NIED") also may be available to some menstruators who have been harmed at work.

Intrusion upon seclusion holds liable someone "who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concern. . .to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person."[270] Thus, both a privacy interest and a "highly offensive" intrusion are needed.[271]

There are two recognized privacy interests in attending to "personal hygienic needs arising out of [one's] menstruation."[272] First, there is a privacy interest in protecting one's body against unwanted exposure to others. Second, the autonomy to prevent shame related to disclosing what a body does is a privacy interest. This interest includes protecting the sounds, sights, smells, and frequency of use in the restroom as well as what products one does (or does not) use while there.[273]

Garces v. R & K Spero Co. offers an example. Management required a fast food worker, who was menstruating heavily, to beg to use the restroom and explain the personal details of her menstruation to gain access to it.[274] In response, her former manager "mocked and [ultimately] refused [her bathroom] access" multiple times, resulting in menstrual blood leaking onto her clothing.[275] In denying the employer's motion to dismiss, the court observed, "[o]ne strains to conjure up an activity more private than the changing of a sanitary napkin."[276] In so doing, it applied Constitutional principles that find searches can violate an individual's expectation of privacy during menstruation to workplace torts. After recognizing this interest at work, the court allowed the invasion of privacy tort to proceed.[277]

IIED and NIED are the other relevant torts.[278] To establish liability for IIED, the worker must demonstrate that a supervisor committed outrageous conduct that a reasonable person would expect to cause the employee severe emotional distress, and that the conduct did indeed cause emotional distress.[279] For example, in 1995, an account specialist alleged that her supervi-

[270] Restatement (Second) of Torts § 652B (Am. L. Inst. 1977).
[271] Prosser and Keeton on Torts § 117 (William Lloyd Prosser, W. Page Keeton, Dan B. Dobbs, Robert E. Keeton & David G. Owen eds., 5th ed. 1984).
[272] Garces v. R & K Spero Co., No. CV095025895S, 2009 WL 1814510, at *9 (Conn. Super. Ct. May 29, 2009). *But see* Laura Portuondo, *The Overdue Case Against Sex-Segregated Bathrooms*, 29 Yale J.L. & Feminism 465, 518 (2018) ("Feminist theorists have long critiqued the privacy interest more generally, in part because they have recognized that privacy?and particularly its heightened association with women?has long been a means of perpetuating inequality.").
[273] Portuondo, *supra* note 272, at 519.
[274] *Garces*, 2009 WL 1814510, at *1.
[275] *Id.* at *1.
[276] *Id.* at *9 (citing *Wilkes v. Clayton*, 696 F. Supp. 144, 147 (N.J. 1988)).
[277] *Id.*
[278] *See generally* Marcy L. Karin & Paula Shapiro, *Domestic Violence at Work: Legal and Business Perspectives, Sloan Work & Fam. Network* (2009), https://wfrn.org/wp-content/uploads/2018/09/Domestic_Violence_and_Work-encyclopedia.pdf [https://perma.cc/QSY9-77XB] (exploring the application of various torts to gender-based indignities at work).
[279] *Id.*

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sors and coworkers intentionally caused harm by engaging in sex-based harassment that led to emotional distress and required medical care.[280] Among other acts, her supervisors and colleagues made comments about "menstruation [and] stereotyped emotional behavior due to [it.]"[281] Although recognizing that it may fail later, the IIED claim survived the employer's motion to dismiss.[282]

In *Garces*,[283] both IIED and NIED claims survived a motion to strike. With respect to IIED, the court noted that some of the complaint's allegations were "indeed heinous and are seemingly more analogous to a form of cruel torture," especially given the supervisor's role in the conduct.[284] For NIED, the court said that conduct need only be "unreasonable and create an unreasonable risk of foreseeable emotional harm" to survive.[285] Collectively, in theory, these torts offer some privacy and dignity protections to current and former menstruators. Given the costs of litigation and relatively low likelihood of success absent significant harm, however, the protection is limited to all but the most egregious safety and privacy harms in practice.

B. Menstrual Discrimination

The corresponding shame, lack of menstrual education, and power dynamics in American workplaces collectively enhance the likelihood that some workers are susceptible to intimidation, harassment, and discrimination, because of menstruation or as menstruators—some of which violates existing statutory discrimination protections. This section explains how some menstrual discrimination is already covered under federal and state sex/gender/pregnancy, disability, and age discrimination laws as well as gaps in current coverage. It also reviews theories of discrimination that victims of menstrual discrimination could use to prove employer liability and some difficulty enforcing these protections in practice.

1. Menstrual Discrimination as Sex/Gender/Pregnancy Discrimination

Title VII of the Civil Rights Act of 1964 prevents employers from taking adverse employment actions at work "because of. . .sex."[286] While the words menstruation and menopause are not found in the law, as explained in Section A below, discrimination on these bases is *per se* sex discrimination. In addition, in 1972, the Pregnancy Discrimination Act ("PDA") changed Title VII's definition of "on the basis of sex" to include "pregnancy, child-

[280] Goodstein v. Bombardier Capital, Inc., 889 F. Supp. 760, 763 (D. Vt., 1995).
[281] *Id.* at 767.
[282] *Id.*
[283] *See supra* notes 272–75 and accompanying text.
[284] Garces v. R & K Spero Co., No. CV095025895S, 2009 WL 1814510, at *2–4 (Conn. Super. Ct. May 29, 2009)
[285] *Id.* at *4–*6, 12.
[286] 42 U.S.C. § 2000e-2.

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birth, and related medical conditions."[287] As explained in Section B, "sex" includes other conditions related to women's reproductive capacity, including menstruation.[288] Further, after the PDA, people with these "related" medical conditions must "be treated the same for all employment-related purposes. . .as other persons not so affected but similar in their ability or inability to work."[289]

a. *Menstruation, Perimenopause, and Menopause are Sex-Linked Conditions*

As Elizabeth Cooper, Margaret Johnson, and I make clear in *Menstrual Dignity and the Bar Exam*, "[d]iscrimination against [current or former] menstruators or because of menstruation is discrimination on the basis of sex. . .because it is based on the menstruator's reproductive 'female' sex organs, such as the uterus, which is the situs of the menses that is discharged during the menstrual cycle."[290] Further, any "[s]uch discrimination may also be on the basis of sex, gender, gender identity, or any combination of these three based on the discriminator's expectations for a person's conformity with sex, gender, or gender identity."[291] This reinforces the law's goal to pro-

[287] 42 U.S.C. § 2000e(k).

[288] Initial Brief of Plaintiff-Appellant at *9–14, *Coleman v. Bobby Dodd Inst.*, No. 17-13023, 2017 WL 6762403 (11th Cir. Nov. 6, 2017), 2017 WL 3500308 ("it is well established that [sex] includes. . .regularity of the menstrual cycle. . . . This inclusive language. . . constitute[s] a non-exhaustive list.").

[289] 42 U.S.C. § 2000e(k); *see* EEOC, Enforcement Guidance on Pregnancy Discrimination and Related Issues (2015), https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#IA4a [https://perma.cc/Y2EJ-GA57]; Cahn, *supra* note 23 at 7 (noting that "menstruation" does not appear in the EEOC's PDA guidance).

[290] Karin, Cooper & Johnson, *supra* note 15, at 58 and Part I.C; Johnson, *supra* note 10, at 28–37 (menstrual discrimination is sex discrimination under Title VII); Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 14, at 355–56 (2019) (menstruation is covered under existing employment discrimination laws); Johnson, Waldman & Crawford, *supra* note 19, at 226, 263 (menstrual discrimination is sex discrimination under Title IX, 20 U.S.C. 1681 *et seq.*); *see also* Deborah A. Widiss, *Menstruation Discrimination and the Problem of Shadow Precedents*, 41 Colum. J. Gender & L. 235, 242 (2021) ("[M]enstruation discrimination is sex discrimination, full-stop."); Initial Brief of Plaintiff-Appellant, *supra* note 288, at 19 ("This condition, which by definition affects only those with female reproductive organs, is per se sex linked.").

Menstrual discrimination is also protected under the Constitution. *See* Karin, Cooper & Johnson, *supra* note 15, at 54–62 (analyzing menstrual discrimination under the Equal Protection Clause and applying the analysis to product, bathroom, and accommodation policies of state boards of law examiners to conclude that there is a strong argument that the "differential treatment of menstruators cannot survive the heightened constitutional scrutiny provided to sex-based classifications"); Bridget J. Crawford & Emily Gold Waldman, *Tampons and Pads Should Be Allowed at the Bar Exam*, N.Y.L.J. (July 22, 2020, 2:29PM), https://www.law.com/newyorklawjournal/2020/07/22/tampons-and-pads-should-be-allowed-at-the-bar-exam/ [https://perma.cc/LE7M-4JDY] (applying Constitutional analysis to bar exam policies that prevent examinees from bringing their own products into the exam).

[291] Karin, Cooper & Johnson, *supra* note 15, at 58; *cf.* Widiss, *supra* note 290, at 243 ("Menstruation, like pregnancy, is a condition linked to female biology and associated with stereotypical assumptions about women's proper role in society.").

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vide "equal opportunities in employment by eradicating 'stereotypical assumptions about women's reproductive roles.'"[292]

Relatedly, transgender, genderqueer/nonconforming, and intersex individuals may menstruate. In *Bostock v. Clayton County*, the Supreme Court defined "on the basis of sex" to include discrimination against transgender individuals, finding it "impossible to discriminate against a person for being. . .transgender without discriminating against that individual based on sex."[293] Thus, harassment and other discrimination against someone for not meeting the stereotypes and expectations that society has about who is—or is not—a menstruator also is covered under Title VII.[294] The same holds true for who is—or is not—experiencing perimenopause or in menopause.

Dozens of available cases have included allegations of menstrual or menopausal sex-discrimination in violation of Title VII, leading to mixed results.[295] Some decisions follow our analysis, finding that discrimination on the basis of menstruation (or menopause) is actionable sex-based discrimination. For example, *Taylor* upheld a $644,750 jury verdict for sex discrimination.[296] Taylor was an African American tractor-trailer driver who had to obtain an independent medical examination to work with menorrhagia and fibroids that could cause unexpected hemorrhaging.[297] None of the white, male comparators were required to get an exam.[298] The employer also informed Taylor that she would need to see an employer-selected gynecologist and get a hysterectomy to be "rehired," if that doctor recommended it.[299]

Coleman v. Bobby Dodd Institute has received the most notoriety.[300] After a decade of work with a private call center, 911-operator Alicia Coleman

[292] *See* Brooks Land, *Battle of the Sexes: Title VII's Failure to Protect Women from Discrimination Against Sex-Linked Conditions*, 53 GA. L. REV. 1185, 1188, 1198 (2019).

[293] Bostock v. Clayton County, 590 U.S. 1, 8–10 (2020).

[294] Karin, Cooper & Johnson, *supra* note 15, at 58.

[295] Marcy L. Karin, Remarks on Periods and Workplace Policy, University of Nevada Las Vegas Boyd School of Law Colloquium on Scholarship in Employment and Labor Law (Oct. 11, 2019) (categorizing and describing this litigation). No plaintiff identified as being transgender, genderqueer/nonconforming or intersex in court filings.

[296] Taylor v. Giant of Md. LLC, 33 A.3d 445 (Md.2011); Giant of Md., LLC v. Taylor, 981 A.2d 1, 12 (Md. Ct. Spec. App. 2009). *See supra* note 168–69 and accompanying text; Lindy Korn, *Workplace Issues: Female Employee Subject to Disparate Treatment*, NY DAILY REC. (Dec. 28, 2011), https://nydailyrecord.com/2011/ 12/28/workplace-issues-female-employee-subject-to-disparate-treatment/ (exporting this case's requirements to analyze disparate treatment for "gender specific ailments"); Johnson, *supra* note 10, at 54–55 (explaining how this case shows a workplace injustice).

[297] Taylor, 33 A.3d, at 447–48.

[298] *Id.* at 459–63.

[299] *Giant of Md.*, 188 Md. App. at 16.

[300] No. 4:17-CV-29, 2017 WL 2486080 (M.D. Ga. June 8, 2017). *See* Vagianos, *supra* note 1 (citing Andrea Young, executive director, Georgia's ACLU, "Firing a woman for getting her period at work is offensive. . .A heavy period is something nearly all women will experience, especially as they approach menopause[.]"); Michael Alison Chandler, *This Woman Said She Was Fired for Leaking Menstrual Blood at Work. The ACLU is Suing for Discrimination*. WASH. POST (Sept. 11, 2017) (quoting Sean Young, legal director, Georgia's ACLU, "No woman should have to go to work worrying about whether her boss is monitoring her" period), https://www.washingtonpost.com/local/social-issues/ga-woman-said-she-was-fired-for-leaking-during-her-period-at-work-the-aclu-is-suing-for-discrimination/2017/09/08/50fab924-

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was fired when menstrual blood from her "unpredictable" and "pre-menopausal" periods damaged company property twice.[301] After the first incident during which she "accidentally soiled an office chair," she was discipled and warned that she would be fired if it happened again.[302] Despite taking precautions (including having menstrual products with her), she "accidentally soiled the carpet."[303] Coleman was terminated her next day at work for "failing to maintain high standards of personal hygiene."[304]

She sued, claiming that her termination for "a uniquely feminine condition" demonstrated direct evidence of impermissible sex discrimination.[305] She argued that it was enough to show that her firing would not have occurred but for the menstruation.[306] The court disagreed. Despite acknowledging that she was terminated for being "unable to control the heavy menstruation and soiling herself and company property,"[307] the court found that this was not by itself sufficient; Title VII does not validate "such a broad interpretation."[308] Essentially, periods are not a covered sex-linked condition.[309] Coleman appealed, after which the case settled.[310]

Menopause also is sex-linked, but courts have waffled on whether it triggers Title VII protection. For example, in support of her sex-discrimination claim, a worker offered evidence that someone described a building she previously managed as "Menopause Manor" during her job interview.[311] The court held that this was not direct evidence of discrimination nor "clearly indicative of discriminatory animus towards women" even if it "was made in poor taste."[312]

These cases demonstrate that, despite a strong argument and some precedent to do so, courts do not uniformly find that menstruation, perime-

8d97-11e7-8df5-c2e5cf46c1e2_story.html [https://perma.cc/2YZF-266G]; Areva Martin, *This Woman Was Fired for a Heavy Period Leak*, TIME (Oct. 26, 2017, 2:35PM), https://time.com/4999185/woman-fired-for-period-leak/ [https://perma.cc/LY6E-7ZRZ].

[301] *Coleman*, 2017 WL 2486080, at *1 (noting that Coleman was experiencing "periods of uncontrollably heavy menstrual bleeding"); Initial Brief of Plaintiff-Appellant, *supra* note 288, at 9 (using the term "pre-menopausal" for perimenopause).

[302] *Coleman*, 2017 WL 2486080, at *1.

[303] *Id.*

[304] *Id.*

[305] *Id.*

[306] *Id.* at *2. This decision does not preclude future claims that menstruation or menopause were treated differently than other conditions that impact all or have a male comparator. *See id.* ("There is no allegation that male employees who soiled themselves and company property due to a medical condition, such as incontinence, would have been treated more favorably.").

[307] *Coleman*, 2017 WL 2486080, at *2.

[308] *Id.* at *1; Initial Brief of Plaintiff-Appellant, *supra* note 288, at 5.

[309] *Coleman*, 2017 WL 2486080, at *1-2; *see* Jay-Anne Casuga, *Firing Over a Sex-Linked Condition: Is it Discrimination*, 222 Daily Lab. Rep. (BL) 5, Nov. 20, 2017 (exploring whether firing someone for a sex-linked condition violates Title VII).

[310] Katheryn Hayes Tucker, *Woman Allegedly Fired Over Having a Period at Work Settles*, DAILY REPORT LAW.COM (Nov. 10, 2017, 2:00PM), https://www.law.com/dailyreportonline/2017/11/10/woman-allegedly-fired-over-having-a-period-at-work-settles/?slreturn=20210707192943 [https://perma.cc/GJL2-8MZD] (reporting on Coleman's settlement).

[311] Carver v. Michigan, No. 11-CV-583, 2012 WL5397124, at *1 (W.D. Mich. Nov. 5, 2012) (unpublished).

[312] *Id.* at *2, *4.

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nopause, or menopause are sex-linked conditions for purposes of coverage under Title VII's "because of sex" language.

b. Menstruation and Menopause are Covered Reproductive Conditions

As noted, the PDA amended Title VII to define sex to include "other related conditions."[313] While neither the statutory text nor legislative history mentions menstruation or menopause,[314] application here is the logical next step for the Equal Employment Opportunity Commission ("EEOC") and case law. This is because interpreting this phrase to include menstrual discrimination builds directly on guidance and decisions that confirm Title VII coverage for lactation, termination of pregnancy, and conditions related to potential or intended pregnancy such as infertility treatment or use of contraception (both of which also may medically suppress or alter menstruation).[315] Specifically, menstruation "plays a key role in fertility" and menstrual irregularities "may be symptoms of infertility due to another cause."[316] Relatedly, menopause signals the time when a body is no longer able to get pregnant, e.g., the end of the "female" reproductive cycle.[317]

Given this medical reality and keeping the law's purpose in mind, some courts have interpreted menstruation and menopause to be other conditions related to pregnancy and some have relied on the connection between lactation and menstrual harassment. For example, in *Powers v. Chase Bankcard Servs., Inc.*, the Southern District of Ohio allowed a hostile work environment claim to survive summary judgment based on multiple incidents of both menstrual and lactation-related harassment.[318]

[313] *See supra* notes 287–288 and accompanying text.

[314] Land, *supra* note 292, at 1201, 1204 (describing that "Congress intended the PDA to cover . . . pregnancy-related physiological conditions that occur post-pregnancy").

[315] *See* EEOC, *supra* note 289; Initial Brief of Plaintiff-Appellant, *supra* note 288, at 9 (capturing a list of relevant cases); EEOC v. Houston Funding II, Ltd., 717 F.3d 425, 428 (5th Cir. 2013) ("any physiological condition" is an "other medical condition"); Hicks v. Tuscaloosa, 870 F.3d 1253 (11th Cir. 2017) ("[B]reastfeeding is a sufficiently similar gender-specific condition [that] 'clearly imposes upon women a burden that male employees need not—indeed, could not—suffer.'"); Megan Boone, *Lactation Law*, 106 CALIF. L. REV. 101 (2018); Casuga, *supra* note 309 (observing the similarities to lactation discrimination including the link to pregnancy).

[316] *How Menstruation Relates to Fertility*, WOMEN & INFANTS, https://fertility.womenandinfants.org/services/women/irregular-periods-fertility [https://perma.cc/WF3K-8FH5]; *Trying to Conceive*, U.S. DEP'T HEALTH & HUM. SERVS. https://www.womenshealth.gov/pregnancy/you-get-pregnant/trying-conceive [https://perma.cc/TAT5-F5ED] (explaining the relationship between menstruation, fertility, age, and menopause).

[317] *Menopause Basics*, U.S. DEP'T HEALTH & HUM. SERVS., https://www.womenshealth.gov/menopause/menopause-basics [https://perma.cc/ACY8-R9ZQ]; Mullins, *supra* note 21, at 9 (criticizing the silence around the "last stage" of reproductive capabilities).

[318] No. 2:10-CV-332, 2012 WL 1021704 (S.D. Ohio Mar. 26, 2012) (unpublished). The hostile work environment allegations included one colleague "graphically" describing someone's menstrual cycle after calling the plaintiff and a coworker "bloody cunt" and "bloody whores." *Id.* at 3. When the employer claimed that the plaintiff opened the door for these comments by discussing menstruation at work, the court responded, "Whether a person discusses normal bodily functions with co-workers has no bearing on their rights. . .to be protected from a hostile work environment." *Id.* at 9.

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Other courts, however, have not covered menstruation, finding instead that menses normally stops during pregnancy and Title VII's "protection ends when pregnancy ends."[319] For example, in 1992, in *Jirak v. Fed. Express Corp.*, the Southern District of New York dismissed a sex-discrimination claim from a part-time courier who was fired after missing or being late to work for back pain and menstrual cramps.[320] The court declined to hold that this was sex-discrimination, observing that "menstrual cramps are not a medical condition related to pregnancy or childbirth [and any such claim otherwise] is supported neither by federal statute nor by pertinent case authority."[321] According to the court, an employer may enforce a policy that treats absences the same regardless of their reason, so long as any such policy is "applied equally to all employees."[322]

Coleman offers another example.[323] The court held that the 911-operator's "excessive menstruation" was neither related to pregnancy, childbirth, nor "treated less favorably than similar conditions affecting both sexes."[324] Specifically, the court acknowledged earlier cases that applied the PDA to "uniquely feminine conditions beyond pregnancy, such as pre-menopausal menstruation." The decision continued, "a non-frivolous argument" is possible if an employer "treat[s] a uniquely feminine condition, such as excessive menstruation, less favorably than similar conditions affecting both sexes, such as incontinence."[325] But here, the court was troubled that Coleman did not allege a comparator, even though she was not required to do so for her direct evidence case.[326] Regardless, the decision left a door open for future cases, which is helpful if an employer allows workers with other conditions to take breaks, but does not allow them for menstruation.[327]

Given the potential class of coverage under Title VII's because of sex and "other related conditions" language, the next section reviews available theories to potentially hold an employer liable for menstrual discrimination.

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[319] *See* Land, *supra* note 292, at 1208 (citations omitted).

[320] 805 F. Supp. 193, 194 (S.D.N.Y. 1992).

[321] *Id.* at 195. For purposes of the motion, the court presumed that Jirak met the prima facie case. The employer then articulated a legitimate non-discriminatory reason of a "poor attendance record." *Id.* at 195. Jirak unsuccessfully argued that this was pretextual. *Id.*

[322] *Id.*

[323] *See supra* notes 300–310 and accompanying text.

[324] Coleman v. Bobby Dodd Inst., No. 4:17-CV-29, 2017 WL 2486080, at *1-2, *6 (M.D. Ga. June 8, 2017).

[325] *Id.* at *1. *But see* Emily Gold Waldman, *Compared to What? Menstruation, Pregnancy, and the Complexities of Comparison*, 41 COLUM. J. GENDER L. 218, 219 (2021) (demonstrating difficulties with the comparator requirement for menopause discrimination); Mullins, *supra* note 21 at 17 (exploring why "similarly situated" male comparators are difficult for menopause).

[326] *See* Karin, Cooper & Johnson, *supra* note 15, at 65 n.315.

[327] Casuga, *supra* note 309 (exploring whether firing someone for a sex-linked condition violates Title VII); *see* Initial Brief of Plaintiff-Appellant, *supra* note 288 at *8 ("[S]ex-linked traits related to women's reproductive capacity are covered.").

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c. Theories to Prove Menstrual Discrimination

Finding that menstrual and menopausal discrimination constitutes sex discrimination is not the end of the inquiry, workers still must prove and an adverse employment action was taken because of it. This section explores three theories of discrimination to hold employers liable for period-related discrimination: disparate treatment; disparate impact; and harassment.[328]

First, disparate treatment requires someone to demonstrate, with direct or circumstantial evidence, that adverse act(s) were taken against them, at least in part, with discriminatory animus. Sometimes disparate treatment analysis results in awards for menstruating workers such as in *EEOC v. H. S. Camp & Sons, Inc.*[329] Here, the Middle District of Florida found that an employer's proffered non-discriminatory reason for firing a Black female worker who "experienced severe pain due to menstrual cramps" and left work to sleep was pretextual.[330]

And sometimes it does not. In *Ayala-Gonzalez v. Toledo-Davila*, the District Court for Puerto Reco reversed a jury award for a police officer who was fired for refusing to take a drug test because she was menstruating at the time and could not urinate when it was administered.[331] The employer proffered that it was a legitimate non-discriminatory reason to require drug tests to uncover illegal substances in this safety-sensitive position. When experts failed to connect plaintiff's menstruation with a medical reason not to urinate, the court found that the employer's reason for firing the plaintiff was justified.[332]

Similarly, the employer's desire to uphold an absence policy was considered a legitimate non-discriminatory reason in a sanitation worker's case. In *Pritchard v. Earthgrains Baking Co.*, the plaintiff asked her supervisor for permission to leave to get a menstrual product.[333] The request was denied for three hours and she ultimately "soiled" her uniform. She then asked to leave to get clean clothes and was told that she could go as soon as a replacement arrived, which took another three hours.[334] Pritchard was not able to counter the employer's need to enforce attendance and her case was dismissed.[335] These cases demonstrate that even when courts include menstruation as part of Title VII's protected coverage, plaintiffs still need to prove causation, which is hard to do under the existing disparate treatment analysis. Conse-

[328] Retaliation claims are also available and alleged in some of these cases.

[329] 542 F. Supp. 411, 435, 449, 450 (M.D. Fla. 1982).

[330] *Id.* Despite claiming that leave to address menstruation was prohibited, the employee followed company procedures. *Id.*

[331] 739 F. Supp. 2d 84 (D.P.R. 2010). The parties agreed that the plaintiff demonstrated a prima facie case of sex discrimination. *Id.*

[332] *Id.* at 87–89, n.4.

[333] Pritchard v. Earthgrains Baking Cos., Case No. 7:98CV0536, 1999 U.S. Dist. LEXIS 21069 (W.D. Va. Mar. 5, 1999).

[334] *Id.* at *3.

[335] *Id.* at *5.

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quently, some menstrual discrimination persists without any likelihood that employers will be held liable for it.

Second, a disparate impact claim exists when an employer's facially neutral policy disproportionally impacts menstruators. To find liability, the employer cannot have a legitimate business reason for the policy, or if one is claimed, there cannot be an alternative policy that would be just as effective and have less of an impact on the protected group.[336] Applying this theory in *Harper v. Thiokol Chem. Corp.*, the Fifth Circuit determined that an employer's return to work policy was illegal sex discrimination. There was no justification for requiring women to demonstrate their menses had restarted and was back to "normal" as a condition of returning to work after pregnancy; this imposed a burden on women that "clearly deprive[d them] of employment opportunities" and was not imposed on men.[337]

Third, the most common menstrual discrimination claim alleged is hostile work environment. Under this theory, an employer may be held responsible for sex-based harassment when a menstruating or menopausal worker is subject to unwelcome, severe or pervasive harassment that unreasonably impacts the work environment.[338] For example, a factory worker proved a hostile work environment claim in *Conner v. Schrader-Bridgeport Int'l Inc.*[339] Here, Conner produced a wide range of evidence of sex discrimination at trial, including that her supervisor asked her, between 10-20 times a month, in front of colleagues, if she was "on the rag today [and whether she got] any last night[.]"[340] Also, after she was hospitalized for uterine hemorrhaging, Conner had multiple unexpected bleeding moments at work. Despite "visible bloodstains on her paints," she was only allowed to leave to change if she "show[ed her supervisor] that [she's] bleeding" in a room with a large glass window that faced the factory floor.[341] In finding that this conduct was "clearly of sufficient severity," the court observed that it was "unnecessary

[336] Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971) (creating disparate impact); *see e.g.*, Berger v. Pennsylvania Dep't of Transp., No. 5:16-cv-06557, 2018 WL 1918733, at *1, *11 (E.D. Pa., Apr. 24, 2018) (granting summary judgment for an employer who changed a bathroom access policy that placed "a greater burden and hygienic demand on females during their menstrual cycle").

[337] 619 F.2d 489, 491–92 (5th Cir. 1980). After a miscarriage, Harper tried to return to work, but was informed that she needed a "normal menstrual cycle" and medical clearance first. She did not have a "normal" period again until months after her doctor cleared her to return and she was fired. *Id.* at 490–92. This also was illegal disparate treatment under recent "sex plus" decisions because Harper was singled out for discriminatory treatment as a postpartum woman whose menstrual cycle had not resumed. *Id.* at 493.

[338] *See* LeBoy v. Brennan, No. 14C3287, 2017 WL 2868952 (N.D. Ill. July 5, 2017) (overruling an ALJ decision to allow a former mail carrier's hostile work environment claim to proceed, based in part on her being subjected to frequent jokes and embarrassing comments about her menstrual cycle, and in part on the reality that every supervisor to whom she could have turned participated in the allegedly sexist comments).

[339] 227 F.3d 179 (4th Cir. 2000).

[340] *Id.* at 185, 188.

[341] *Id.* at 188.

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and deeply invasive" to require her to show bloody pants in front of coworkers under any definition.[342]

In another case, Lisa Petrosino alleged that her general work culture, including "disparaging remarks" about her menstrual cycle, constituted a hostile work environment.[343] Multiple supervisors commented that she must be "on the rag" if she disagreed with their opinion or asked her not to "give [them] a hard time just because [she's] on the rag."[344] The Second Circuit observed that her male supervisors "routinely [connected] their perceptions of [her work] and her anatomy, especially [with] vulgar references to her breasts and menstrual cycle."[345] The decision concluded, "as a matter of law," that this "gender-hostile environment was sufficiently severe and pervasive."[346]

Finally, period discrimination also likely violates state and local antidiscrimination laws.[347] Even though these laws do not explicitly include menstruation or menopause as protected categories, sex is included in every state law and gender identity or expression is protected in just under half of them.[348] Pregnancy and related medical conditions also are explicitly covered under some state laws.[349] Further, while it is not included in the ordinance's text,[350] the New York City Human Rights Commission has issued guidance unequivocally stating, "discrimination based on menstruation is a form of gender discrimination."[351]

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[342] *Id.* at 197–98 (noting that "[a] senseless mandate from a supervisor that an employee expose symptoms of a deeply private reproductive system dysfunction is simply humiliating, especially when, as here, that mandated display must occur within eyesight of other employees"). Ultimately, the jury verdict of $20,000 in compensatory and $500,000 in punitive damages was reinstated. *Id.* at 184.

[343] Petrosino v. Bell Atl., 385 F.3d 210, 215 (2d Cir. 2004) (alleging this violated Title VII and New York law).

[344] *Id.* at 215.

[345] *Id.* at 224 (further observing that this "communicated that her gender would always stand as a bar to full acceptance within the workplace").

[346] *Id.* at 224. The Fourth Circuit also reversed summary judgment in a hostile work environment claim in *Smith v. First Union Nat'l Bank*, 202 F.3d 234 (4th Cir. 2000). One of many things that demonstrated a sufficiently severe or pervasive environment was the supervisor's regular comments that an upset female employee was either "menstruating or. . .needed a 'good banging.'" *Id.* at 238, 243 n. 5.

[347] Karin, Cooper & Johnson, *supra* note 15, at 65–66 (providing examples of menstruation-discrimination under state human rights laws). *But see* D'Ambrogia v. Prudential Ins. Co., NASD No. 96-04768 (FINRA), at *3 (a "one-time offensive utterance" by a supervisor related to menstruation "may have temporarily embarrassed Claimant," but it was not enough to "unreasonably interfere" with work).

[348] Karin, Cooper & Johnson, *supra* note 15, at 64; Iris Hentze & Rebecca Tyus, *Sex and Gender Discrimination in the Workplace*, NCSL (Aug. 12, 2021), https://www.ncsl.org/research/labor-and-employment/-gender-and-sex-discrimination.aspx) [https://perma.cc/4LPE-PCNE].

[349] *See, e.g.*, NCLS, *supra* note 348 (capturing the states that cover discrimination on the basis of pregnancy and related medical conditions in their human rights laws).

[350] 47 R.C.N.Y. § 2-01.

[351] NYC Comm'n on Hum. Rts., *NYC Commission on Human Rights Legal Enforcement Guidance on Discrimination on the Basis of Pregnancy, Childbirth, Related Medical Conditions, Lactation Accommodations, and Sexual or Reproductive Health Decisions 3* (July 2021), https://www1.nyc.gov/assets/cchr/downloads/pdf/publications/Preg-

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Collectively, this analysis demonstrates some antidiscrimination coverage for menstruation. Explicit statutory coverage, or guidance from the EEOC and equivalent local agencies, would help expand its application in practice.

2. Some Menstrual Discrimination is Disability Discrimination

In addition to the accommodation requirement,[352] the ADA and related local laws generally protect qualified individuals with a disability from discrimination on the basis of disability, including from hostile work environments. This includes protection against adverse employment actions taken on the basis of any of the categories of disability described above, e.g, workers with an actual menstruation-related disability, a record-of having a menstruation-related disability, or someone who is regarded as having one.[353] For example, the EEOC settled an actual disability discrimination claim for a worker who was fired after disclosing that she had menorrhagia, a bleeding disorder affiliated with the menstrual cycle, despite obtaining medical clearance that she could safely work with the condition.[354]

Given the cultural stereotypes, inaccuracies, and misperceptions about menstruation and menopause, the "regarded as" disabled prong plays a vital role in protecting against some menstrual and menopausal discrimination.[355] Even though reasonable accommodations are not available if a worker is regarded as having a disability, the purpose of this category of disability coverage is to prevent employers from relying on stereotypes about actual or perceived limitations.[356] For example, *Mullen v. New Balance* analyzed a "regarded as claim" in addition to the actual disability claim described above.[357] In so doing, the court pointed out that an impairment that is both transitory (lasting less than six months) and minor may not serve as the basis of a perceived disability claim.[358]

This exception also was addressed in *Hart v. Malabar Pharm*.[359] Here, the plaintiff was fired after returning from surgery for polycystic ovary syndrome ("PCOS"), which was diagnosed after she experienced a "prolonged,

nancy_InterpretiveGuide_2021.pdf [https://perma.cc/J4B6-8JU3]. Importantly, this proclamation comes immediately after a statement that pregnancy discrimination is sex discrimination and using the transition "Similarly." *Id.* This guidance accurately and directly connects menstrual discrimination to pregnancy, reproductive, and other sex discrimination.

[352] *See supra* Section II.A.

[353] *Id.*

[354] *See* Press Release, *supra* note 12 (the case settled for $20,000 and rehiring Adams).

[355] 42 U.S.C. § 12102(3)(A).

[356] The ADA Project, *Summary of ADAAA* http://www.adalawproject.org/summary-of-the-adaaa#anchor-linkC [https://perma.cc/6KKG-RWXM].

[357] No. 17-CV-194-NT, 2019 WL 958370, at *4 (D. Me. Feb. 27, 2019).

[358] *Id.* at *5 (quoting 42 U.S.C. § 12102(3)(B)). *See also* 29 C.F.R. §§ 1630.2(1)(iii), (j)(1)(ix); 1630.15(f). *But see* 42 U.S.C. § 12102(3)(b) (an impairment that lasts under six months may be substantially limiting).

[359] No. 19-cv-2347-Orl-31LRH, 2020 WL 1665869 (M.D. Fla. Apr. 3, 2020).

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five-month period of menstruation."[360] The employer argued that Hart failed to prove she had an actual or perceived disability because menstruation is "transitory and minor." The court disagreed, finding that "regardless of whether the period of menstruation itself was minor and transitory, it appears the PCOS is not."[361] Further, medical documentation showed that she had to avoid strenuous activity, which supports the claim that PCOS substantially limits a major life activity and constitutes a disability.[362] Ultimately, it may be harder to demonstrate that a menstruator is regarded as having a disability due to the transitory and minor exception; however, it does not preclude perceived disability claims based on stereotypes of menstruation or menopause, nor does it prevent menstruators from meeting their burden on actual or record of disability for menstrual-related impairments.[363] Thus, some menstrual discrimination is disability discrimination; in practice, more guidance is needed to facilitate enforcement and fully address menstruation-related disability discrimination.

3. *Some Menstrual Discrimination is Age Discrimination*

The intersection of age and menstruation offers some menstruators another potential avenue of existing antidiscrimination protection. Under the Age Discrimination in Employment Act ("ADEA"), employers may not treat workers aged forty and older differently at work because of their age.[364] Leslie Mullins argues that menopause discrimination is *per se* age discrimination, "[b]ecause naturally occurring menopause (i.e., where there is no surgical or medical intervention that causes early onset) occurs later in life."[365] Unfortunately, no cases have addressed this question squarely yet.

Nonetheless, a number of peri-menopausal or menopausal workers have alleged intersecting age, disability, and sex discrimination claims to mixed results.[366] In *Ward v. Nicholson*, for example, the EEOC 's Office of Federal Operations reversed an agency decision against a worker whose supervisor referred to her and a coworker as "post-menopausal bitches," among other things.[367] The EEOC found this sufficient to state a harassment claim under the ADEA and Title VII.[368] By contrast, in *Mesias v. Cravath*, a 59-year-old woman alleged age (and other) discrimination after her supervisor told a colleague that "he was tired of working with menopausal women" and that "this

[360] *Id.* at 1. PCOS is a common hormonal disorder that causes prolonged or infrequent periods. *Polycystic Ovary Syndrome (PCOS)*, Mayo Clinic, https://www.mayoclinic.org/diseases-conditions/pcos/symptoms-causes/syc-20353439 [https://perma.cc/L559-9YYJ].

[361] 2020 WL 1665869, at *2.

[362] *Id.*

[363] *Id.* (citing *Sine v. Rockhill Mennonite Home*, 275 F. Supp. 3d 538, 545 (E.D. Pa. 2017) ("The temporal nexus between [a] request for leave [for a hysterectomy] and her termination is sufficient to support the inference that she was regarded as disabled.").

[364] 29 U.S.C. § 621(a).

[365] Mullins, *supra* note 21, at 20.

[366] *Id.* at 20–21; *see* Cahn, *supra* note 23 at 8–9.

[367] No. 0120070147, 2007 WL 556805 (E.E.O.C. 2007).

[368] *Id.*

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is the last time I'm working with menopausal women!"[369] The employer was not held liable, despite the supervisor's negative remarks.[370]

These types of "stray remarks" have been analyzed in other cases too. Without additional evidence of discriminatory animus, courts generally dismiss cases involving supervisors' references to "older" workers and menopause-status.[371] Essentially, courts have deemed that these remarks are not close enough in time or specificity to constitute actionable discrimination. Thus, a 52-year-old woman could not hold her employer liable for a pattern of age-based hostility, despite repeatedly being called derogatory names such as "la bruja" (the witch) and "la menopausica" (the menopausal one).[372] A sexual harassment claim did proceed in *Bailey v. Henderson*,[373] however. Vanessa Bailey alleged that her second-line supervisor told her direct supervisor not to step in when she was being harassed by coworkers, "because the problems were attributable to 'just some black women going through menopause.'"[374] The court held that the supervisor's conduct, including the menopause comment, could collectively demonstrate harassment.[375]

Even though there are only a few age discrimination cases involving menstruation, claims at the intersection of the ADEA, ADA, Title VII, and state human rights acts remain important. This area is also ripe for litigation—especially if the EEOC clarifies existing intersectional protection and includes examples of it in relevant guidance. Until then, as the next section explores, there is significant international activity to provide guidance.

C. International Standards and Models

A robust, ongoing international menstrual movement has resulted in laws and proposals to address some menstrual needs at work. This section outlines the push for international standards and provides an overview of the laws, proposals, and lessons learned from them.

As a preliminary matter, no international treatise or convention imposes specific workplace requirements about periods. Over the last decade, however, the United Nations ("UN") has incrementally recognized the importance of menstrual management in particular and embedded menstruation into public health, gender equity, economic security, and other human rights.[376] Importantly, this UN work has focused on dignity and equity with

[369] 106 F. Supp. 3d 431, 435, 438 (S.D.N.Y. 2015).
[370] *Id.*
[371] *See* Mullins, *supra* note 21, at 21.
[372] Acevedo Martinez v. Coatings Inc., 251 F. Supp. 2d 1058 (D.P.R. 2003) (also dismissing a Title VII claim for the same reasons).
[373] 94 F. Supp. 2d 68, 71 (D.D.C. 2000).
[374] *Id.*
[375] *Id.* at 75–76 (denying disparate treatment sex and disability discrimination claims).
[376] *See e.g.*, Convention on the Rights of Persons with Disabilities, G.A. Res. 61/106 (Dec. 13, 2006). *See generally* Bridget J. Crawford & Carla Spivack, *Tampon Taxes, Discrimination, & Human Rights*, WISC. L. REV. 491 (2017) (explaining how the tampon tax is gender discrimination and violates human rights).

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respect to sanitation, menstrual education, obtaining physical and mental health, and the right to make a living.[377] Menstruation and menopause also are relevant to multiple millennium and sustainable development goals designed to reduce poverty and promote gender equality.[378] Relatedly, the International Labour Organization ("ILO") addresses sanitation in its occupational safety and health standards.[379] While these UN and ILO instruments have little direct impact on American workers, they influence the way menstruation is addressed globally, including at work. They also encourage member states to support menstrual management and related dignity and safety needs. Further, menstrual accommodations and antidiscrimination protection are required by some countries' laws. Others are currently debating them. This section provides an overview of the development and substance of these laws and pending period policy campaigns.

1. Early Labor Standards Related to Menstruation

Formal menstrual leave began in the former Soviet Union, over a hundred years ago, when women were experiencing high unemployment levels after World War I.[380] In 1921, a Bolshevik reformer claimed that industrial work negatively impacted women's health and reproduction.[381] In 1922, Ts. Pik wrote an article suggesting menstrual leave, which formed the basis of industry specific protective legislation.[382] For five years, beginning with a 1922 decree, garment industry workers were provided two days of paid leave at the start of each menstrual cycle, provided they obtain a medical certificate

[377] Human Rights to Safe Drinking Water and Sanitation, G.A. Res. 70/169 (Dec. 17, 2015); Convention on the Elimination of All Forms of Discrimination Against Women, G.A. Res. 34/180, art. 14(2)(h) (Dec. 18, 1979); Convention on the Rights of the Child, G.A. Res. 44/25, art. 24(2)(e) (Nov. 20, 1989); International Covenant on Economic, Social and Cultural Rights, G.A. Res. 2200A (XXI), art. 11 (Dec. 16, 1966).

[378] *See e.g.*, Lyla Mehta, Interactive Expert Panel, U.N. Comm'n on the Status of Women, *Challenges and Achievements in the Implementation of the Millennium Development Goals for Women and Girls* (Mar. 2013), https://www.un.org/womenwatch/daw/csw/csw57/panels/otherpanels-paper-lyla-mehta.pdf [https://perma.cc/E6QP-H3HT]; *see also* House, Mahon & Cavill, *supra* note 5, at 18 tbl. 9.1 (observing that six of the millennial goals cannot be met without understanding menstrual health management); Keith, *supra* note 70, at 3 (containing a chart showing how menstruation and menstrual management are linked to sustainable development goals and targets).

[379] *See* ILO Conv. No. 161, Occupational Health Services Convention (1985); ILO, *WASH@Work: A Self-Training Handbook,* at III (2016), https://www.ilo.org/wcmsp5/groups/public/—-ed_dialogue/—-sector/documents/publication/wcms_535058.pdf [https://perma.cc/A56W-UQZA] (illustrating that menstrual management must be addressed at work to advance two sustainable development goals); *see also* Sommer, Chandraratna, Cavill, Mahon & Phillips-Howard, *supra* note 61, at 4 (describing the ILO's leadership opportunity to guide member states to adopt relevant standards). The United States is not a signatory to all of these, and thus, not subject to their obligations. Further, these instruments have notoriously weak enforcement mechanisms on the individual level.

[380] Melanie Ilic, *Soviet Women Workers and Menstruation: A Research Note on Labour Protection in the 1920s and 1930s*, 46 Eur-Asia Studs. 1409 (1994).

[381] Izumi Nakayama, Periodic Struggles: Menstruation Leave in Modern Japan 160 (2007) (Ph.D. dissertation, Harvard University) (Proquest).

[382] Ilic, *supra* note 380, at 1411–12.

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and at least 21 days had passed since their last menstrual leave.[383] In 1924, three days of leave were provided to certain classes of female artistic workers "[i]n view of the intensely physical and highly emotional nature of their work."[384] In 1926, the regulations restricted leave to workers with confirmed menstrual pain and folded menstrual leave into sick leave.[385] Moving beyond leave, in 1931, 57,000 "[w]omen tractor-drivers [were provided] temporary disability during menstruation or—if they submit[ted] a medical certificate—transfer to light duty work without a reduction in pay."[386]

Around the same time, classes of primarily younger Japanese workers—especially those with harsh work conditions and without regular access to safe facilities—were calling for paid menstrual leave.[387] In 1927, with knowledge of the Soviet Union's provisions, the "Establish Five Laws" fight was launched to obtain: (1) minimum wage; (2) an eight-hour workday; (3) health insurance; (4) unemployment benefits; and (5) a "youth and women protection law" that consisted of a prohibition against night work, maternity leave, "*menstruation leave of three days and benefits*," and break time for breastfeeding.[388]

Soon thereafter, in response to a 1928 strike of Tokyo Municipale Bus Company conductors who hoped to gain access to toilets during long shifts, women began organizing and the movement for menstrual accommodations began.[389] In 1931, the National Labor Federation favored requiring men-

[383] *Id.* at 1411–12 (citing the Decree of the Labour Protection Department of the Trade Union Organisation, or VTsSPS); *MM, Menstrual Leave; What Lies Beneath. . .Part 1-Origins*, MENSTRUAL MATTERS (2021), https://www.menstrual-matters.com/blog/ml-origins-1 [https://perma.cc/G53U-U595]; Choulamany, *supra* note 70, at 19; Marian Baird, Elizabeth Hill & Sydney Colussi, *Mapping Menstrual Leave Legislation and Policy Historically and Globally: A Labour Entitlement to Reinforce, Remedy or Revolutionize Gender Equality at Work?*, 42.1 COMPAR. LAB. & POL'Y J. 1, 6 (forthcoming 2021) ("The Bolshevik menstrual policy was directed at women working in factory jobs[.]").

[384] Ilic, *supra* note 380, at 1412 (describing how the regulations stated that "acrobats, tight-rope walkers, women horse riders, dancers and gymnasts" should get leave, but not "jugglers, impersonators and impressionists").

[385] *Id.* at 1411–12; Choulamany, *supra* note 70, at 19. Another study found that 87% of women working in "textiles, leather, print, and medical-sanitary industries" claimed "menstrual irregularities." Nakayama, *supra* note 381, at 150–51.

[386] Ilic, *supra* note 380, at 1414 (reporting on the People's Commissariat of Labour decision to offer menstrual accommodations).

[387] Choulamany, *supra* note 70, at 18; Emily Matchar, *Should Paid "Menstrual Leave" be a Thing?*, ATLANTIC (May 16, 2014), https://www.theatlantic.com/health/archive/2014/05/should-women-get-paid-menstrual-leave-days/370789/ [https://perma.cc/QV7D-RB33] ("[W]omen were entering the workforce in record numbers, and. . .factories, mines and bus stations had little. . .sanitary facilities."); Nakayama, *supra* note 381, at 253 (noting that unions also used menstrual leave to court young women workers). The menstrual leave push started in Japan with an 1872 geisha strike, which sought excused leave for "monthly visits." *Id.* at 144–45.

[388] Nakayama, *supra* note 381, at 144–45 (emphasis in original) (offering a detailed account of this fight and other early calls for menstrual leave in Japan).

[389] *Id.* at 153–54, 171, 178 (over 500 women participated in the strike; noting that the conductor's "uniform was the[ir] first western-styled clothing" and most did not own underwear for it); MM, *Menstrual Leave; What Lies Beneath. . .Part 3–Sweatshop Labour*, MENSTRUAL MATTERS (Aug. 25, 2019), https://www.menstrual-matters.com/blog/ml-sweatshop-3 [https://perma.cc/KW6J-ZECU]; Baird, Hill & Colussi, *supra* note 383, at 7.

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strual leave as a "symbol for women's emancipation[, a representation of their] ability to speak openly about their bodies, and to gain recognition for their role as workers."[390] The unions saw menstrual leave as a gateway to organizing broader women's issues like paid leave.[391] CBAs started including menstrual leave provisions, and there were 70 documented menstrual leave provisions in 1946.[392]

In the 1930s, Tamino Setsu, the only female Japanese work inspector, surveyed over 1100 women workers in 19 factories after she received complaints about "menstrual irregularities."[393] The overwhelming majority of respondents reported complications from menstruation at work.[394] In response, Setsu recommended "changing facilities, work content, and work schedules to accommodate the female body" as well as "installing a resting room for breaks, equipped with a toilet[, sink, and] an additional room where workers suffering from menstrual pains could rest."[395]

Then, after World War II, American forces relied on Setsu's work, joined the unions' efforts, and "encouraged" Japan to provide menstrual leave.[396] Enacted in 1947, Japan's Labor Standards Act ultimately created *seirikyuuka* leave (translated as "physiological leave"). Under this still valid law, any worker suffering from painful periods or whose job might exacer-

[390] Alice Dan, *The Law and Women's Bodies: The Case of Menstruation Leave in Japan*, 7 Health Care for Women Int'l 1, 8 (1986) (unions pushed for leave to advance women's role as worker and to "dramatize[ ] the need for better working conditions").

[391] *Id.* at 8 ("menstruation [was seen] a 'barometer' for reproductive ability, and that even women without symptoms ought to take leave to protect their future motherhood").

[392] Nakayama, *supra* note 381, at 243 n.77, 254 (observing that this was less than 10% of executed CBAs at the time). By 1954, 122 out of 162 CBAs negotiated menstrual leave, which was 11 more than had negotiated maternity leave. *Id.* at 249–50.

[393] *Id.* Captured in Menstruation and Work Ability (1943), Kirihara Shigemi also researched menstruation's impact on work in Japan. Shigemi found that efficiency was worse at the start of menstrual cycles and that pain and other factors varied depending on the "type and structure" of work. *Id.* at 144–45. From 1946-1947, Tsuchiya Hitoshi and Sugi Midori surveyed menstrual experiences at work, resulting in recommendations to offer a "changing room, bathroom, and rest area[,] have ample supply of aspirin, codeine, and other pain killers that alleviate menstrual cramps[, and] provide medical knowledge concerning menstruation." *Id.* at 236.

[394] *Id.* at 227.

[395] *Id.* at 227, 231.

[396] The US Advisory Committee on Labor in Japan made the recommendation. *Id.* at 237–42; Dan, *supra* note 390, at 8; Levitt & Barnack-Tavlaris, *supra* note 65, at 532; *see also* Sherry Yajima Keller, *Sex Discrimination in Employment: The Legal Status of the Working Woman in Japan*, 3 Loy. L.A. Int'l & Comp. L. Rev. 83, 93 (1980) (some believe that the Japanese Constitution "was forced" and does not represent "Japanese social norms"); Baird, Hill & Colussi, *supra* note 383, at 7 (noting that the "collective demands for menstrual leave" were not formalized until after WW-II "when inadequate workplace sanitation emerged as a national labour concern").A debate ensued that included allegations that women "would manipulate" this leave to travel to "rural areas to purchase food," an expressed "fear that female workers would all take leave together," and business arguments that it was too much. *Id.* at 237–42, 240. The UN suggested removing menstrual leave, but unions and local women's groups fought to keep it. Dan, *supra* note 390, at 8. There also was a failed amendment to cover only dysmenorrhea—as opposed to any "difficulty." Nakayama, *supra* note 381, at 237–42, 240, 272–73.

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bate period pain may take leave.[397] *Seirikyuuka* need not be paid; nor is there a prescribed ceiling of how much leave may be taken.[398]

2. *Additional Menstrual Accommodation Models*

Building on these early efforts, new variations of international menstrual accommodation laws—primarily in the form of job-protected leave—were enacted. In 1953, South Korea began requiring employers to provide one day of unpaid "physiologic" leave to workers.[399] After a series of changes and litigation from 5,100 menstruating workers who sought pay for leave taken,[400] the Korea Labor Standards Law reverted to its original form in 2014.[401] Around then, the former head of a South Korean airline denied "136 [leave] requests from 15 flight attendants," claiming that they did not demonstrate that they were on their cycles, and thus, eligible for leave.[402] In 2017, a South Korean appeals court found that it "infringe[s] upon privacy and human rights" for an employer to ask workers to "prove" menstruation to take leave.[403]

In 2003, Indonesia revised its 1948 paid menstrual leave law to excuse workers "who feel pain during their menstruation period" from work during the first two days of their cycle if they "notify the entrepreneur."[404] The 2003 amendment made pay optional and required a workplace agreement or CBA to implement menstrual leave.[405] In effect, workers now must negotiate for menstrual leave with individual employers and unions, which created an ac-

[397] Labor Standards Act, 1947, Chapter VI, Art. 68, (Act No. 49/1947) (Japan). According to the Japanese Ministry of Labor Women's Division, the law reflects three changes from the original proposal to: (1) clarify that pain was required for menstrual leave; (2) recognize that one size does not fit all by giving the worker discretion about the amount of unpaid time needed; and (3) allow flexibility for shorter blocks of time to be taken if an entire day's absence is not needed. Nakayama, *supra* note 381, at 283.

[398] Labor Standards Act, Art. 68. In 1971, three menstruators had their attendance bonuses reduced after taking two days of leave from NBC Industry. The women sued, seeking the bonus they would have received but for menstrual leave. The Hachioji Regional Court dismissed the case, finding that *paid* menstrual leave is not required. Both the Tokyo Higher and Supreme Courts affirmed. Nakayama, *supra* note 381, at 277–80.

[399] Labor Standards Act, 2012, Art. 73 Monthly Physiologic Leave (Act No. 11270/2012) (S. Kor.); Baird, Hill & Colussi, *supra* note 383, at 11 (noting there is no "discretion to deny menstrual leave").

[400] In 1989, the law changed to automatically entitle workers to this leave. Choulamany, *supra* note 70, at 7, 18. In 2004, the provision was eliminated but later reinstated in 2006 due to litigation. Katy Waldman, *Thanks, But We Will Pass on Paid Menstrual Leave*, SLATE (May 16, 2014), https://slate.com/human-interest/2014/05/paid-menstrual-leave-not-a-good-idea-period.html [https://perma.cc/53QT-MVN9].

[401] Choulamany, *supra* note 70, at 7, 18.

[402] *Menstrual Leave: South Korea Airline Ex-CEO Fined for Refusing Time Off*, BRIT. BROAD. CORP. (April 25, 2021), https://www.bbc.com/news/world-asia-56877634 [https://perma.cc/XC3E-CNQA].

[403] *Id.*

[404] Art. 81(1), Act of the Republic of Indonesia Concerning Manpower, 2003 (Act No. 13/2003).

[405] *Id.* at Art. 81(2).

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cess class divide given the power dynamics involved with negotiations.[406] Some employers also require workers to prove eligibility by displaying their underwear or undergoing a medical exam.[407]

Established in 2002 and amended in 2013, Taiwan provided a "[f]emale employee having difficulties in performing her work during [a] menstruation period" the right to ask for one day leave monthly.[408] Under the original law, menstrual leave counted as sick leave.[409] But a group of legislators deemed this "inconsiderate and unfair toward women in the workplace."[410] Under the revised law, up to three additional days of menstrual leave could be taken on top of the standard 30 days of sick leave (at half-pay) that is provided to all workers annually.[411] Due to litigation, "probes into privacy," such as requiring a worker to come in to demonstrate the need for menstrual leave, are not allowed.[412]

Other relatively recent menstrual leave laws include Zambia's "Mother's Day" law, which formally took effect in 2015, but for which some employers provided informally since the 1990s.[413] Under this law, all women (even if they are not mothers) are provided one leave day monthly to take at their discretion, neither proof nor advanced notice are required).[414] In 2017, Mex-

[406] *Id.*; Kuntala Lahiri-Dutt & Kathryn Robinson, *'Period Problems' at the Coalface,* 89 FEMINIST REV. 102, 108 (2008); Baird, Hill & Colussi, *supra* note 383, at 8 (the 2003 changes "weakened" the right and decreased its ability to create "worker solidarity").

[407] Matchar, *supra* note 387 (some employers "have even been accused of forcing women to drop trough and 'prove' their need for time off"); Baird, Hill & Colussi, *supra* note 383, at 9 ("supervisory 'health staff' in Indonesian factories may require workers to remove their underwear and 'prove' they are menstruating"). Nike factories have gained "notoriety for workplace exploitation," including claims of denying menstrual leave. *Id.*

[408] Act of Gender Equality in Employment, Chapter IV, Art. 14 (2013) (Taiwan).

[409] CHINA POST, *Gender Equality in Employment Act Revised* (Nov. 27, 2013), https://www.proquest.com/newspapers/gender-equality-employment-actrevised/docview/1461974543/se-2?accountid=2890 [https://perma.cc/R2SM-CYCV].

[410] *Id.*; Matchar, *supra* note 387 (discussing how the inclusion of menstrual leave in the pre-existing right to take 30 days of sick leave "prompt[ed] a gender-diverse coalition of politicians to claim a violation of women's basic rights").

[411] Act of Gender Equality in Employment, Chapter IV, Art. 14 (2013) (Taiwan); *see* CHINA POST, *supra* note 409 (explaining the regulation and why it was revised); Baird, Hill & Colussi, *supra* note 383, at 11 (pointing out that any leave taken over the 30 days?of either menstrual or sick leave?is unpaid).

[412] While the Taiwanese Supreme Administrative Court dismissed the case on other grounds, it ruled that employers may not engage in this eligibility certification. *See* Alex Liao, Lee Tsai & Partners, *If an Employer Makes the Leave Application for Menstrual Leave Extremely Difficult, it is Still Deemed an Unfavorable Measure Under the Taiwan Law*, LEXOLOGY (2020), https://www.lexology.com/library/detail.aspx?g=b9417686-e89a-49de-897b-6fac39b47a5e [https://perma.cc/9N6F-X9HP].

[413] Employment Act, Cap. 269 (1997) § 54(2) (Zam) (the law provides women a day off when menstrual symptoms become painful); Kennedy Gondwe, *Zambia Women's 'Day Off For Periods' Sparks Debate*, BBC News (Jan. 4, 2017), https://www.bbc.co.uk/news/world-africa-38490513 [https://perma.cc/F5J6-RCV8] (mentioning that the country's main workers' rights union supports the law and encourages women "to rest and not even go shopping or do other jobs [when on menstrual leave] because that is wrong").

[414] Employment Act, Cap. 269 (1997) § 54(2) (Zam); Gondwe, *supra* note 413 (the law recognizes that "women are the primary care-givers. . .regardless of whether they are married"); Levitt & Barnack-Tavlaris, *supra* note 65 at 562 (observing the name "stresses [its] relationship to becoming mother").

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ico provided court personnel one rest day per month for physiological complications.[415] And, while China has considered national menstrual leave requirements, three Chinese provinces (Anhui, Hubei, and Shanxi) currently require it and Hainan recommends it.[416] Packaged with other protections related to childbirth, these laws generally require workers be provided one or two days per cycle, with menstrual certification.[417]

Proposals also have been introduced in Chile (paid leave for "disabling period paid," especially workers with endometriosis and dysmenorrhea),[418] India (two days of paid menstrual leave monthly),[419] Italy (three days of paid leave monthly for painful periods with medical note),[420] the Philippines (one day per month at half pay for "premenstrual or menstrual tension"),[421] and Russia (two days in addition to sick and vacation leave).[422] These accommodation laws and pending proposals vary in terms of menstrual needs covered, length of time provided, certification requirements, and pay.

3. Other International Period Provisions and Pending Campaigns

Menstrual leave is not the only workplace policy intervention present in international models. Some countries have promulgated specific safety, education, or other workplace flexibility provisions. For example, in 1992, China

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[415] Tribunal de lo Contencioso Adminstrativeo del Estado de Mexico, *Cuerdo Por El Que Se Concede a Las y Los Servidores Públicos Adscritos a Este Tribunal "Licencia De Ausencia" De Un Día De Descanso al Mes, a Causa De Complicaciones De Tipo Fisiológico*, 119 GACETA DEL GOBIERNO [GG] 2–5 (Jun. 29, 2017).

[416] Baird, Hill & Colussi, *supra* note 383, at 14 (sharing that menstrual leave was considered in 2011 as a safety and health measure); Chen Xia, *Paid Menstrual Leave Provokes Controversy in China*, CHINA.ORG.CN. (Feb. 16, 2016), http://www.china.org.cn/china/2016-02/16/content_37800348.htm [https://perma.cc/RR7G-6MUU] (describing the local laws and their variances).

[417] Xia, *supra* note 416 (reporting on the Anhui regulations); Shen Lu & Elaine Yu, *Chinese Province Grants Women Leave for Menstrual Pain*, CNN (Feb. 16, 2016, 1:06AM EST), https://www.cnn.com/2016/02/16/asia/china-menstruation-leave/index.html [https://perma.cc/6A9T-YMDQ] (sharing that Guandong also was considering a proposal).

[418] El Mastrador Braga, *Proponen "Ley Menstrual" en Chile: Qué dice la experiencia en el mundo?,* ELMOSTRADOR (Aug. 31, 2017), https://www.elmostrador.cl/braga/2017/08/31/proponen-ley-menstrual-en-chile-que-dice-la-experiencia-en-el-mundo/ [https://perma.cc/LDY5-4DH4] (further mentioning that Argentina and Columbia are considering menstrual leave).

[419] The Menstruation Benefits Bill, Bill No. 249 (Nov. 27, 2017) (India); *see Two Days Leave During Periods?*, FIN. EXPR. ONLINE (Jan. 2, 2018), http://www.financialexpress.com/india-news/two-days-leave-during-periodsparliament-may-discuss-menstruationbenefit-bill-for-the-1st-time-know-whatit-is/999091 [https://perma.cc/UYM9-HRNX]; Belliappa, *supra* note 27, at 604 (sharing that Parliament tabled the bill).

[420] Proposta di Legge 27 aprile 2016, Camera Dei Deputati n.3781 (It.); Anna Momigliano, *Italy Set to Offer 'Menstrual Leave' for Female Workers*, INDEP. (March 25, 2017), https://www.independent.co.uk/news/world/europe/italy-menstrual-leave-reproductive-health-women-employment-a7649636.html [https://perma.cc/4CKQ-V3PP] (reporting that Italy may be "the first Western country with an official 'menstrual leave' policy for working women").

[421] Menstruation Leave Act, Rep. Act No. 1687 (Aug. 10, 2004) (Phil.), http://legacy.senate.gov.ph/lisdata/29312471!.pdf [https://perma.cc/TCM6-AAQU]; Baird, Hill & Colussi, *supra* note 373, at 12.

[422] Baird, Hill & Colussi, *supra* note 383, at 6; Astrup, *supra* note 146, at 15.

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enacted the Protection of Rights and Interests of Women law to ensure that employers are educated about "women's characteristics. . .during menstrua[tion,] pregnancy, obstetrical[,] and nursing period[s]" that may require "safety and health" protections.[423] During menstruation, the law dictates that workers "shall not [be] assign[ed] any work. . .that is not suitable to women."[424] Although the substance and cultural context are very different, the United Kingdom also has long regulated related workplace safety, including related to menstruation.[425]

Beyond safety, the UK's Equality Act covers menstrual discrimination.[426] Over the last decade, cases have illustrated coverage and defined the scope of this protection. In *Jackson v. Network Rail Infrastructure Ltd*., for example, an employer was held liable for sex discrimination for a range of bad acts, references to sex or sex characteristics, and unwanted conduct related to menstruation.[427] In awarding over £20,000, the tribunal specifically concluded that being told, "you're grumpy, is it your time of the month?" was "related to sex. . .highly personal and embarrassing, and it either violated [the worker's] dignity or created an offensive humiliating demeaning environment for [her] in front of her [mostly male] peers."[428]

In *Merchant v. BT*, a manager ignored a medical report about how menopause impacted work and relied on his spouse's experience with menopause.[429] In addition to not following proper procedures for medical evidence, the tribunal held this was sex discrimination, because the manager would not have treated a male comparator with failed concentration in the same way.[430] Menopausal workers also have brought successful, interrelated claims of sex and age discrimination under this United Kingdom law.[431]

[423] Law on the Protection of Women's Rights and Interests (promulgated by Nat'l People's Cong., Apr. 3, 1992, rev'd Aug. 28, 2005, effective Dec. 1, 2005), art. 26, P.R.C. Laws (China).

[424] *Id.*; *see* Baird, Hill & Colussi, *supra* note 383, at 10 (positing that the law situates menstruation in a larger "pre and post-natal health policy platform;" further reporting that available media implies that the law has not been enforced and "rollout was unsuccessful").

[425] Health and Safety at Work Act of 1974 (UK), UK Pub. Gen. Acts 1974 c. 37; *see Gov't. Equals. Off. & Equal. & Hum. Rts. Comm.*, *Equality Act 2010: Guidance* (Feb. 27, 2013) (UK), https://www.gov.uk/guidance/equality-act-2010-guidance [https://perma.cc/59AZ-EVUZ].

[426] Equality Act 2010 (U.K.), U.K. Pub. Gen. Acts. 2010, c.15; *See* Jog Hundle, *Employment Law and Menopause*, HENPICKED (June 21, 2020), (revieing UK laws that govern menopause at work) https://menopauseintheworkplace.co.uk/employment-law/menopause-and-employment-law/ [https://perma.cc/Y8H6-BBKX].

[427] Jackson v. Network Rail Infrastructure Ltd., Emp. Trib. Case No. 2301702/2017, ¶ 3(b) (Eng.).

[428] *Id.* at ¶ 105.

[429] Merchant v. British Telecomms. Emp. Trib. Case No: 1401305/11 (Feb. 27, 2012) (Eng.).

[430] *Id.*

[431] *See* Hundle, *supra* note 426 (describing *A v. Bonmarche Ltd*, a 2019 case where a senior supervisor was awarded £28k for successful age and sex discrimination claims against a company that allowed a manager to engage in a bullying campaign that focused on A's status as "a dinosaur" who "was going through menopause").

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In *Davies v. Scottish Courts & Tribs. Serv.*, a perimenopausal court officer was reinstated and awarded £19,000 for disability discrimination. Davies was fired after she mistakenly alleged that two men drank her water, which she thought was diluted with her prescription medicine to treat cystitis.[432] As part of a disciplinary investigation, Davies admitted that she was confused and must have made a mistake. She also disclosed that she had been having memory and concentration problems connected to being perimenopausal. The liability for workplace discrimination stemmed from the employer's failure to consider the impact menopause had on her actions.[433]

The Equality Act also offers "reasonable workplace adjustments. . .to ensure workplace equality."[434] For example, before the illegal termination, Davies obtained menstrual accommodations to work in the courtroom closest to the restroom and to take additional bathroom breaks.[435]

Even with this existing statutory protection and robust litigation practice, the Labour Party's equity platform includes proposals to further respond to menopausal needs. The goal is to "end the stigma and ensure that no woman is put at a disadvantage, from menstruation to menopause."[436] Announced on World Menopause Day in 2019, the proposed interventions include requiring large employers to provide menstrual accommodations like flexible scheduling and improved ventilation; safety assessments to ensure that work does not aggravate symptoms; and mandating education and training for supervisors on how menopause impacts work.[437] It also proposes flexible leave and a recognition that "menopause is not an illness" and should not be the reason for penalizing workers.[438]

Across the pond, Canada also has workplace policy proposals related to periods. In 2000, Liberal MP Peter Fragiskatos sponsored an e-petition asking the Canadian government to provide menstrual products in washrooms at all federally regulated workplaces.[439] The effort failed, but it was reintroduced almost two decades later. In 2019, Canada's Labor Minister kickstarted a regulatory process to consider whether the government should require federally regulated employers—with a combined workforce of over

[432] Davies v. Scottish Courts & Tribs. Serv., Emp. Trib. Case No. S/4104575/2017 (May 9, 2018) ¶¶ 14–15 (Scot.).

[433] *Id.*; *see* Hundle, *supra* note 426 (sharing that £14,000 of damages was back pay and £5,000 due to injury of feelings).

[434] Equality Act 2010, c.15 § 20 (UK).

[435] Davies, Emp. Trib. Case No. S/4104575/2017, at ¶¶ 11–12.

[436] Dawn Butler, *Labour Announces Plans to Break the Stigma of the Menopause at Work*, LABOUR (Sept. 20, 2019), https://labour.org.uk/press/labour-announces-plans-break-stigma-menopause-work/ [https://perma.cc/RH4C-DJ23].

[437] *Id.* (employers should engage in worker specific assessments that consider environment, temperature, ventilation and "welfare issues such as toilet facilities").

[438] *Id.*

[439] Zi-Ann Lum, *No Consensus' on Free Menstrual Products in Federal Workplaces, Says Labour Minister*, HUFF. POST (Nov. 17, 2000, 02:46PM EST), https://www.huffpost.com/archive/ca/entry/canada-free-menstrual-products_ca_5fb41defc5b6d878180b9e14 [https://perma.cc/PJ5Z-SKBE]; *see Paid Menstrual Leave Debate Resurfaces*, CBC NEWS (Dec. 4, 2014), https://www.cbc.ca/news/health/paid-menstrual-leave-debate-resurfaces-1.2860589 [https://perma.cc/E5Y6-PKU9].

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1,207,000 employees in public industries like transportation, banks, telecom, national defense, police—to provide free menstrual products.[440] Canada's existing Labour Code requires employers to provide other occupational safety and health tools such as toilet paper, soap, and a way to dry hands. To "blow open the door on this conversation," the government sought comments about whether to add menstrual products to that list.[441]

Finally, in 2015, Vietnam decreed that employers must provide some workers paid breaks of at least 30 minutes per day for three days a month to address menstruation.[442] The length of break time is subject to an interactive negotiation consistent with employer and employee needs.[443]

Each of these laws has strengths and weaknesses to explore in future scholarship; collectively, however, they represent a broad range of countries and cultures that have recognized that there is a need for policy to address periods at work. They also demonstrate multiple options for potential American legislation to clarify and expand existing menstrual accommodation and discrimination protections to afford real menstrual justice at work.

III. Proposal for Menstrual Justice at Work

In recognition that the laws explained in Section II fail to explicitly address or comprehensively support the menstrual needs categorized in Section I, this section contains a policy proposal for menstrual justice at work. Building on the analysis of existing international, federal, and local laws, legislative and regulatory proposals, cases, and currently available data, the proposal contains three components to create or affirm existing rights to menstrual accommodations and antidiscrimination protection. Specifically, it requires (1) accommodations such as reasonable, paid and job-protected

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[440] Lab. Program of the Dept. of Emp. & Soc. Dev., Notice of Intent, *Proposed Amendments to Certain Regulations Made Under Part II of the Canada Labour Code to Require the Provision of Free Menstrual Products in the Workplace*, (May 4, 2019), https://canadagazette.gc.ca/rp-pr/p1/2019/2019-05-04/html/notice-avis-eng.html#ne1 [https://perma.cc/E5Y6-PKU9]; *see* Marie-Danielle Smith, *Liberals to Make Menstrual Products Free in Federally Regulated Workplaces*, Nat'l Post (May 3, 2019), https://nationalpost.com/news/politics/liberals-to-make-menstrual-products-free-in-federally-regulated-workplaces [https://perma.cc/KTJ8-PFCG] (noting this triggered the 60 day rulemaking period, but the process will take 18-24 months).

[441] Lab. Program of the Dept. of Emp. & Soc. Dev., *supra* note 440; Smith, *supra* note 440; *Menstrual Leave; supra* note 383 (researcher Yara Doleh also proposed that Canada create an optional menstrual leave law to help remove menstrual stigma).

[442] The Labour Code of the Socialist Republic of Vietnam and Implementation Documents (1994), art. 115–18; Decree Detailing a Number of Articles The Labor Code in Terms of Policies for Female Employees, 2015, Ch. II, Art. 7.2, Female Employee's Healthcare Services (Act. No: 85/2015/ND-CP /2015) (Vietnam); Wendy N. Duong, *Gender Equality and Women's Issues In Vietnam: The Vietnamese Woman—Warrior And Poet*, 10 Pac. Rim L. & Pol'y J. 191, 191, 245 (2001) (analyzing this protection in the context of Vietnamese feminism more broadly).

[443] Contained in the Vietnamese Labor Code, it only applies to contractual workers that are at least fifteen and implies that the employer provides sex-specific "inspectors." Duong, *supra* note 442, at 245 (noting that menstrual breaks may lead to age and disability discrimination or privacy concerns by "unnecessarily call[ing] attention to. . .gender").

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menstrual management breaks and access to other tools that facilitate workers' ability to menstruate however they so choose, like menstrual products and safe and dignified spaces to use them; (2) without being harassed or discriminated against on the basis of menstruation (or being a current or former menstruator); and (3) without fear of retaliation or retribution for doing so.

Four changes are needed to implement these components. First, federal labor standards must be amended to provide current and former menstruators the ability to alter work schedules to address menstruation, as needed. This could be accomplished in any number of ways. For example, the words "manage menstruation or menopause" could be added to the FLSA's 2010 breastfeeding amendment, which would then provide job-protected "reasonable break time" and "reasonable access" to a sanitary, safe menstrual-friendly space.[444] Until federal legislation is enacted, the Department of Labor could publish guidance demonstrating that menstrual and menopausal conditions may be serious health conditions under the FMLA, which would immediately help more people take (unpaid) job-protected time off to address biology.[445]

Second, OSHA should revise its regulations to clearly require menstrual products, access to menstrual-friendly bathrooms that properly address blood exposure and disposal, and proper ventilation at worksites.[446] Until new regulations are promulgated, OSHA should acknowledge that protections already exist under the existing statutory and regulatory language by immediately rescinding the conflicting informal interpretations of the OSH Act's general duty and blood at work standards. OSHA also should start enforcing these protections by citing non-compliant employers and engaging in a public education campaign to facilitate knowledge of safe menstrual management at work and compliance with related safety standards.

Third, antidiscrimination laws should be amended to explicitly cover menstruation and eliminate any confusion to the contrary. In the meantime, the EEOC should issue guidance that confirms that menstrual and menopausal discrimination are covered under Title VII as sex/gender-linked conditions and as "other related conditions" to pregnancy. Relatedly, guidance should clarify that some menstrual and menopausal impairments constitute a protected disability under the ADA and Rehabilitation Act, including when menstruators are perceived to be disabled. The EEOC also should affirmatively acknowledge the application of the ADEA to menopause discrimination, and the intersecting nature of these claims for menstruators and

[444] *E.g.*, 29 U.S.C. §207 could be amended with the following italicized text: "An employer shall provide—a reasonable break time for an employee to *manage menstruation or menopause or* express breast milk. . .."

[445] *See supra* section II.A.1.

[446] *E.g.*, "Menstrual products shall be provided" could be promulgated as a new 29 C.F.R. § 1910.141(d)(2)(v); menstrual products alternatively could be recognized as the PPE that they are in § 1910.141(d)(3)(i).

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workers in menopause that may demonstrate violations of multiple laws with the same bad acts.

Finally, the government should enact a coordinated, two-track public education campaign about addressing periods at work. One track should educate employers and menstruators about the patchwork of existing employment laws that address one or more menstrual needs. The other track should fund research and study: (1) these needs—including capturing the experiences of a diverse range of menstruators working in a cross-section of industries and occupations; (2) understanding and enforcement of existing protections; and (3) the impact of these policy interventions.

If implemented, this proposal would support current and former menstruators and normalize menstruation, menstrual management, and menopause at work. The rest of this section explains how and situates the recommendations in larger workplace and menstrual movements.

A. Addressing Multiple Menstrual and Menopausal Needs

This proposal addresses multiple needs to keep current and former menstruators at work in a way that also works for employers. It strategically uses menstrual accommodations to counteract bargaining inequality and level the playing field for workers who are not able to individually negotiate for them, are not subject to CBA provisions, and do not work for an employer that has voluntarily created period policies. Along those lines, it responds to the failure of the free market and other public policies to alter workplace structures to keep menstruators connected to work. Moreover, it promotes social justice by eliminating economic barriers to accessing products and creating a minimum requirement of paid break time to address biology and support public health.

Similar underlying goals have been used to justify other workplace policies, including accommodations for pregnant, breastfeeding, or disabled workers. This is the next application of employment law as a public health measure that supports bodily autonomy, dignity, and economic security. It acknowledges that all current and former menstruators might have menstrual needs at work, but not all needs are the same–and those needs may change over one's lifespan or in response to intervening events like stress, diet, or impairment.[447] It also provides adaptable access to needed spaces and items to address menstrual injustices in both traditional and non-traditional occupations in ways that also protect employers.

In that regard, the proposal imports the interactive process found in the FLSA's breastfeeding requirements, state pregnant worker fairness acts, and the ADA. It also utilizes the "reasonableness" language from the breastfeeding accommodations, which provides a flexible floor under which employers may not fall, while simultaneously allowing menstruators to manage their

[447] *See* Belliappa, *supra* note 27, at 607.

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own bodies. By not requiring specific times and frequency, workers can limit their time away from work to only what is needed at that moment, and employers will have present, engaged workers for longer.

This proposal also provides a return on investment for employers by decreasing presenteeism and absenteeism, increasing productivity and engagement, and minimizing worker distractions from menstrual needs and harassment.[448] At the same time, it provides better bathroom access, improved sanitation and menstrual products to some who need them, which is an important action to combat health disparities, period poverty, and menstruated-related class issues.[449]

Further, the suggested study evaluates which policy interventions are working, and which—due to implementation, enforcement, or other challenges—need to be revisited. This data will be instrumental; for years, workplaces have been mentioned generally as a site of menstrual inequity, but the intricacies of workers experiences, best practices, and existing policies have largely been absent. Relatedly, the narrative has been that research about menstruation at work does not exist. Data has been collected; however, it is under-researched, piecemeal and focused on identifying problems broadly. Comprehensive study is needed to capture the range of menstrual-experiences at work and the effectiveness of specific policy interventions to address these experiences—or how they may impact groups of workers differently. Research also could support critical innovation on potential interventions moving forward. For example, it could help stakeholders understand whether state unemployment insurance programs should be amended to define the lack of access to menstrual accommodations as a compelling personal reason that proves someone is unemployed through no fault of their own. Or whether period-related workplace training requirements or other employer education effort should be created. Or the potential impact of shareholder activism. Or an executive order or regulations for public sector experimentation or government contractor requirements. Or should unions bargain for more menstrual-friendly CBA provisions or support members by creating a fund to replace soiled uniforms or purchase needed menstrual products. Or something else.

Collectively, the components of the proposal acknowledge that menstruation happens at work and some policy experimentation is needed to fully address the evolving nature of work and the mismatch between menstruators' needs and different workplace structures.

[448] *See e.g.*, *id.* at 614 (explaining that FOP leave offers the chance to have more connected workers).

[449] Johnson, *supra* note 59; Baird, Hill & Colussi, *supra* note 383, at 14 (citation omitted) ("[I]n this emerging economy context, menstrual leave is instrumental in addressing inadequate sanitation and the economic cost of workplace absenteeism.").

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B. Normalizing Menstruation and Addressing Dignitary Harms

Consistent with the purpose underlying existing antidiscrimination laws, this proposal helps workers overcome systemic barriers with stigma and subordination because of menstruation and menopause.[450] As the above stories demonstrate, menstrual discrimination at work is not about just one bad actor. It is much broader and existing structures foster discrimination and inadequate and unsafe menstrual management. This proposal counters that by acknowledging that menstruation matters—both to individuals and to society. Yet, menstruation is currently viewed as an individual experience for which the menstruator is solely responsible.[451] While menstrual experiences are individualized, society can no longer ignore menstruation or barriers that existing structures impose on menstruators—including at work.

Thus, this proposal enables current and former menstruators to remove themselves from the catch-22 situation of having to choose between engaging in safe menstrual management and a paycheck. A choice that remains harder for low-income workers without access to menstrual accommodations or the bargaining power to obtain them. The proposal changes that reality, acknowledging and addressing both dignitary and tangible harms to menstruators. It directly tackles menstrual/menopausal taboos and historic discrimination, sending the counter-narrative that current and former menstruators are welcome at work.[452] Plus, it may empower transgender, genderqueer/non-binary and intersex workers to neutralize uneducated and outdated stereotypes about who is and is not a menstruator or in menopause.

Like other employment laws, this proposal addresses discrimination experienced by a group of workers or about specific acts. Here, the group and acts intersects "with multiple other attributes of self-identity."[453] Having a law that mentions menstruation and menopause is important—but that law also needs to acknowledge the various intersecting ways in which periods build on or hamper sex, gender, gender identity, reproduction, health, disability, race, age, and socio-economic class.[454] Recognizing (and destigmatizing) this intersection—at the location where menstruators spend the majority of their waking hours—is critical.[455]

Further, improving accommodations for menstruators—including those experiences that are also characteristic of related impairments—might help

[450] Karin & Runge, *supra* note 159, at 352 (citing Stephen F. Befort, *Labor and Employment Law at the Millenium: A Historical Review and Critical Assessment*, 43 B.C. L. REV. 351, 369 (2002)).

[451] Johnson, *supra* note 10, at 2.

[452] *See* Karin, Cooper & Johnson, *supra* note 15, at 29 n.144 (citing CLAUDE STEELE, WHISTLING VIVALDI 22 (2011) (explaining stereotype threat in the context of the bar exam, including "the ways in which negative stereotypes about one's capacities, especially when based on race, gender, or other aspects of identity, can lead one to underperform").

[453] *Id.* at 79.

[454] *Id.*; Johnson, *supra* note 59, at 3 (citing Crenshaw, *supra* note 58, at 1265).

[455] Karin, Cooper & Johnson, *supra* note 15, at 79.

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improve communication, transparency, and destigmatize the provision of accommodations more broadly.

Some may criticize the proposal for seeking a "special" protection. Indeed, critiques of existing international laws argue that they "[u]ndermine gender equality,"[456] invite discrimination by creating another reason not to hire, promote, or create opportunities for menstruators,[457] and contradict earlier feminist theory that argued against highlighting differences.[458] For these (and other) reasons, not all workers feel comfortable taking menstrual leave, even if their national law allows it. Some are concerned about being viewed as "weak" or advancing negative perceptions about menstruators needing to rest.[459] Others know some international unions and "management attitudes" do not support it.[460]

This is a valid critique, which also applies to existing legal rights to breastfeeding breaks, family leave, disability accommodations, and other group-specific labor standards. Realistically, the law must sometimes acknowledge difference, however, to address specific needs. This also demonstrates why accommodations—by themselves—are not enough to address periods at work. Providing break time does not solve product or toilet access problems.[461] Nor do breaks or bathroom access necessarily remove stigma.[462] Over time, they may help normalize talking about periods, but it cannot immediately eliminate existing biases. It could out someone as having a menstrual need to managers or coworkers that creates space for discrimination if the menstruator does not conform with the "ideal worker" stereotype.[463] The combination of provisions, however, should minimize these potential harms; collectively, it also should help take menstruation and menopause out of the shadows and menstrual products out of workers' sleeves.[464]

Relatedly, lost from some retellings of the international menstrual movement is the broader campaign for which the push for leave was only one part. For example, the original Japanese strategy was for leave and other protections related to menstruation and gender justice. The 1917 National

[456] Belliappa, *supra* note 27, at 604.

[457] Dan, *supra* note 390, at 3; Astrup, *supra* note 146, at 15 (citations omitted); Duong, *supra* note 433, at 245.

[458] *See* Lahiri-Dutt & Robinson, *supra* note 406, at 102 (Menstrual leave "brings into focus the presumed tensions between gender equity and gender difference. . .").

[459] Matchar, *supra* note 387; Choulamany, *supra* note 70, at 22; *see* Pattani, *supra* note 117 (quoting Purdue Professor Sharra L. Vostral) ("societal pressures frown upon its use").

[460] Dan, *supra* note 390, at 9; *see also* Choulamany, *supra* note 70, at 22 (noting the effectiveness of "workplace pressure to not take the leave" in Korea and Japan).

[461] *See* Belliappa, *supra* note 27, at 607, 611 (noting that FOP leave alone is not enough; it does not address differences in menstrual management access between unskilled, semiskilled, and skilled workers or for different occupations).

[462] *Id.* at 610 (explaining that the Indonesia experience shows that stigma and secrecy surrounding periods at work remains, which is one reason people do not take FOP leave).

[463] *See The Takeaway*, *supra* note 20, at 08:48 (noting menstrual leave may be regressive because we still view the ideal worker as male); Hollingsworth, *supra* note 153 ("If you tell people you're taking [period] leave. . .you're not as good as men[.]").

[464] Belliappa, *supra* note 27, at 607 (recognizing that international conversations have shown that menstruation is "not a cause of embarrassment").

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Primary School Female Teacher's Assembly strike sought better treatment of menstruation, maternity leave, access to part-time work, and other items.[465] The 1928 Tokyo Municipal Bus Company conductors sought menstrual leave and antidiscrimination protection.[466] Consistent with what feminist scholars have long argued, more than one policy is needed to address societal inequalities, recognize that sex-based workplace discrimination begins with pregnancy and continues through parenthood, and integrate and keep women at work.[467] Just as pregnancy accommodations and anti-discrimination are needed to obtain meaningful workforce attachment[468]—both are needed here for menstruators.

C. Advancing Worker and Menstrual Justice Movements

This proposal also complements ongoing, broader workplace and menstrual justice movements. Menstrual needs are not the only problems for menstruators may have at work. Rather they are a component of larger systemic discrimination and bias for workers who are also women, transgender, genderqueer/nonbinary, or intersex, disabled, people of color, and/or older.[469] Accordingly, the proposal is consistent with calls for broader labor standards, accommodations, and discrimination protections. If existing campaigns for paid breaks, sick or medical leave, scheduling flexibility, pregnancy/lactation accommodations, and expanded discrimination protections succeed, additional menstrual needs will be addressed, at least in part, by those new laws.

Some may posit that campaigns for period protections could undermine these broader efforts. This proposal is designed to strategically complement—and not supplant—them, however. It is the next logical application of recent advances supporting public health at work and moves the pendulum toward universal workplace design that responds to a variety of workers' needs without requiring employers to ask highly medical and technical questions about workers cycles. It allows current and former menstruators to have some type of accommodation, even those with "normal" cycles, but also is flexible to provide more supports to those that need more than break time. Additionally, menstruation already is viewed as an "entry point" and "gateway" for other reproductive and public health conversations.[470] Until univer-

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[465] Nakayama, *supra* note 381, at 156.

[466] *Id.* at 171.

[467] Karin & Runge, *supra* note 156, at 338; *see e.g.*, Samuel Issacharoff & Elyse Rosenblum, *Women and the Workplace: Accommodating the Demands of Pregnancy*, 94 COLUM. L. REV. 2154 (1994).

[468] Issacharoff & Rosenblum, *supra* note 467, at 2154.

[469] *See e.g. supra* notes 20 and 64 and accompanying text; *see also* WEISS-WOLF, *supra* note 14, at 198.

[470] Weiss-Wolf, *supra* note 226, at 539, 542 (menstruation may kick-start the conversation about "wider implications"); Geertz, Iyer, Kasen, Mazzola & Peterson, *supra* note 36, at 3, 5, 37 (lamenting the lost opportunity to use menstrual management to impact other positive public and sexual health outcomes).

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sal design is normalized, this proposal acknowledges that menstruation and menopause need not be equated with sickness, disability, or age to be supported.[471]

It also moves the menstrual movement to the next level. The "year of the period" in 2015 represented the rebirth of public menstrual consciousness and launched a movement seeking public policy that recognizes that menstruation matters and systemic barriers must be removed.[472] Around this time, Jennifer Weiss-Wolf and others led efforts to integrate menstrual reform into societal zeitgeist with campaigns to eliminate the "tampon tax" (the application of sales tax to menstrual products).[473] Designed to be an "entry point" issue leading to broader reforms, the tampon tax provided a clear message about eliminating a discriminatory policy that disparately impacted menstruators and which, if removed, would "inch toward a model of economic parity and gender equality."[474] A second wave of menstrual policy reform involves calls to improve access and affordability of menstrual products in schools,[475] in carceral spaces,[476] and for people experiencing homelessness.[477] Today, these calls continue and are joined by efforts to require medically-accurate menstrual education,[478] address periods during the pandemic,[479] improve menstrual dignity around bar exams and standardized tests,[480] and re-classify menstrual products as eligible for tax-exempt reimbursements.[481] It is past time to correct the failure of existing law to comprehensively address menstruation and to center policy interventions related to work in the menstrual movement.

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[471] *See supra* notes 410–11 and accompanying text for an international comparison.

[472] *See e.g.*, Johnson, *supra* note 10, at 15–22; BRAWS, *supra* note 9; *see generally* Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 14, at 5–6 (describing advocacy campaigns and new menstrual equity laws); PALGRAVE HANDBOOK, *supra* note 19 (comprehensive exploration of menstruation, menopause, and the experiences of menstruators and people in menopause in multiple aspects of society around the word).

[473] Jennifer Weiss-Wolf, *Raising the Bar for Menstrual Equity. Period.*, MS. MAG., (July 23, 2020), https://msmagazine.com/2020/07/23/raising-the-bar-for-menstrual-equity-period/ [https://perma.cc/V9SM-H4ZV]; Bridget J. Crawford & Emily Gold Waldman, *The Unconstitutional Tampon Tax*, 53 U. RICH. L. REV. 439, 439–40, 474–82 (2019).; Holly Seibold, *D.C. Moves One Step Closer to Menstrual Equity*, WASH. POST (April 28, 2018).

[474] Weiss-Wolf, *supra* note 226, at 539, 542; Maria Carmen Punzi & Mirjam Werner, *Challenging the Menstruation Taboo One Sale at a Time: The Role of Social Entrepreneurs in the Period Revolution*, *in* PALGRAVE HANDBOOK *supra* note 19, at 833, 834 (noting that "[s]treet marches and protests against the 'tampon tax' [led to] campaigners calling for free menstrual products for girls in need").

[475] Johnson, Waldman, & Crawford, *supra* note 19, at 255–57.

[476] *See* Johnson, *supra* note 10, at 47–49, 62–64; Marcy L. Karin & Valeria Gomez, *Menstrual Justice in Immigration Detention*, 41 COLUM. J. OF GENDER & LAW 123, 131-32 (2021).

[477] *See* Crawford, Johnson, Karin, Strausfeld & Waldman, *supra* note 14, at 1, 39, 41; BRAWS, *supra* note 9.

[478] *See e.g.*, *The "Expanding Student Access to Period Products Act of 2020"*: *Hearing on D.C. B23-0887*, *Before the Comm. of the Whole and the Comm. on Educ.*, D.C. Council (Nov. 23, 2020) (statement of Marcy L. Karin and Galina M. Abdel Aziz).

[479] *See* Bridget J. Crawford & Emily Gold Waldman, *Period Poverty in a Pandemic: Harnessing Law to Achieve Menstrual Equity*, 98 WASH. U. L. REV. 1569, 1569 (2021).

[480] *See* Karin, Cooper & Johnson, *supra* note 15.

[481] 26 U.S.C. § 223; *see* Jennifer Weiss-Wolf, *The ERA Campaign and Menstrual Equity*, 43 HARBINGER 168, 171-73 (2019).

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Congresswoman Grace Meng is leading the federal movement with a "whole of government" approach and her Menstrual Equity for All Act, which does include two workplace-related product access provisions.[482] Led by Congresswoman Meng, Members of Congress also urged President Biden to address period poverty and affirm the human and health care right to access menstrual products.[483] These efforts are important, elevate space for menstruation in national discourse, and advance specific workplace (and other) menstruation-related rights. This article's proposal supplements the existing legislative one by also addressing other categories of menstrual needs at work, integrating menopause into the conversation, and building on lessons learned from union and international experiences.

Finally, although there have been some exceptions during the pandemic, new workplace laws are usually subject to extreme partisanship. The same is generally true for reproductive and health care measures. There are early signs that the menstrual movement might not be subject to the same pre-existing, long-entrenched positions, however. Consequently, it may offer a bipartisan opportunity, bolstered by Republicans and Democrats having sponsored and signed state measures and Trump-era legislation and twice-issued guidance that included product access provisions in carceral facilities.[484]

Conclusion

This paper explored the landscape of menstruation, menopause, and work. After naming and categorizing menstrual and menopausal needs, it systematically reviewed how a series of laws and systems, which were created to deal with other workplace problems, provide some relief to menstruators. It also analyzed how these laws fail to address a multitude of menstrual injustices and the resulting problems ranging from absenteeism to privacy violations, health implications from poor menstrual management, harassment, and dignitary harms. Building on experiences with these laws and international models, the article recommends policy interventions to minimize menstrual injustice and acknowledge that menstruation matters at work.

[482] Menstrual Equity for All Act of 2021, H.R.3614 (117th Cong. 2021). *Id.* at § 7 (amend the OSH Act to require some employers to provide products); *id.* at § 8 (agencies must provide products in public restrooms); *see also* Menstrual Products in Federal Buildings Act, H.R.2478, § 2(a) (117th Cong. 2021).

[483] Letter from Grace Meng (and 27 other MOCs) to Joe Biden, Jr. (Mar. 5, 2021), https://meng.house.gov/sites/meng.house.gov/files/Letter%20to%20Biden.pdf [https://perma.cc/B2QM-YETF].

[484] *See e.g.*, Fed. Bureau of Prisons, U.S. Dep't of Justice, Operations Memorandum 003-2018, Provision of Feminine Hygiene Products (Aug. 1, 2018); 35 Ill. Comp. Stat. Ann. 105/3-5(37) (2016); *see also* Weiss-Wolf, *supra* note 226, at 539, 542 (explaining how the tampon tax campaign involves "persuasive perspectives from all sides—left, right, libertarian—variously focused on social justice, gender equity, tax relief, and/or limiting the scope of government reach").

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Reassessing the Mythology of Magnuson-Moss: A Call to Revive Section 18 Rulemaking at the FTC

*Kurt Walters**

America faces twin crises of metastasizing corporate power and foundering government capacity to respond. Calls for fundamental reforms to the economic system have grown louder as corporate consolidation reaches record levels and "informational capitalism" systematically shifts power from individuals to large, data-rich firms. Americans are left vulnerable to "dark patterns" that extract customers' wealth, to gig work companies that siphon tips away from workers, and to algorithmic decision-making that exhibits racial and gender bias. But many rightfully doubt that America's elected branches of government remain functional enough to handle these emerging challenges, and the Supreme Court continues to impede efforts that Congress and the President do undertake.

The Federal Trade Commission is well-positioned to step into this breach. Section 18 of the FTC Act grants the agency the authority to issue new consumer protection rules to police against unfair or deceptive business tactics, backed by tough penalties and consumer redress. Yet, this power sat virtually dormant for the past thirty-eight years after a "Reagan Revolution" at the agency decisively ended its rulemaking activity. For the first time in decades, a majority of FTC Commissioners supports using this tool, but long-unchallenged received wisdom stands in the way. This common narrative holds that Congress saddled the FTC with almost impossibly onerous "Magnuson-Moss" procedural requirements for rulemaking in reaction to overbroad and politically unpopular regulations. This article argues that the conventional story is mistaken. A review of the history, statutory text, and judicial constructions of section 18 show that this pessimistic view confuses a historical decline in rulemaking—which was driven by non-statutory factors including an ascendant corporate lobby, changing congressional pressures, and a deregulatory ideological moment—with supposed flaws in section 18.

Puncturing the mythology that has grown up around the Magnuson-Moss Act provides a more clear-eyed view of the FTC's authorities. Doing so makes apparent that the Commission can—and should—pick back up its powerful tool of consumer protection rulemaking. Future rules can rein in marketplace misconduct such as unfair privacy abuses, deceptive online "drip pricing," and much more. Reinvigorating the FTC's regulatory program can restore the agency as a champion of American consumers and a cornerstone of an administrative state able to counterbalance dominant corporations and establish a more just economy.

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Introduction

America faces twin crises of metastasizing corporate power and foundering government capacity to respond. Corporate consolidation has spiked in recent decades, and wealth inequality has surged alongside it.[1] This concentration of market power has led to harms to consumers, workers, and entrepreneurs alike.[2] A breathtaking fifty-four percent of Americans report having experienced corporate abuse over the past decade.[3] Unsurprisingly, then, seventy percent of the country believes "the economic system unfairly favors

[1] Jan De Loecker, Jan Eeckhout & Gabriel Unger, *The Rise of Market Power and the Macroeconomic Implications*, 135 Q.J. Econ. 561, 562–63 (2020).

[2] Austan Goolsbee, *Big Companies Are Starting to Swallow the World*, N.Y. Times (Sept. 30, 2020), https://www.nytimes.com/2020/09/30/business/big-companies-are-starting-to-swallow-the-world.html [https://perma.cc/96DT-4Q9N].

[3] Katie Porter & Jill Habig, *Corporations Are Abusing People. Here's How to Better Protect Workers and Consumers.*, USA Today (Aug. 23, 2019, 7:00 AM), https://www.usatoday.com/story/opinion/2019/08/23/protect-workers-consumers-from-corporate-abuse-we-can-do-more-column/2060655001/ [https://perma.cc/K9JY-SCAM].

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powerful interests."[4] These stunning statistics came before the COVID-19 pandemic saw the most powerful companies collect unprecedented profits as millions of Americans lost their jobs and many more struggled under the strain of quickly rising prices.

Calls for fundamental reforms to the economic system are gaining strength in the face of these growing imbalances of power. The rise of "informational capitalism" has systemically shifted control from individuals to large, data-rich companies.[5] Americans are left vulnerable to "dark patterns" that exploit psychological vulnerabilities to extract wealth from customers, to gig work companies that deceptively siphon tips away from workers, and to algorithms that cloak racial or gender biases in seeming mathematical neutrality. The now-routine occurrence of data breaches exposing highly sensitive personal information can have devastating effects. Through it all, consumers are less able than ever to defend themselves against these types of technologically sophisticated harms.

Yet, many Americans do not believe that their elected branches of government remain functional enough to handle these challenges. A sense of democratic degradation is pervasive, from scholars to ordinary voters.[6] Even if the national legislature did not exhibit historic levels of chronic gridlock, besides a few exceptional emergency packages, Americans believe four-to-one that their government works more for wealthy donors than for people like them.[7]

The Federal Trade Commission ("FTC") is far better positioned to step into this breach and beat back abuses in the marketplace than many observers realize. Section 18 of the Federal Trade Commission Act grants the agency the authority to issue binding consumer protection rules to police against unfair or deceptive business tactics across nearly the entire economy, backed by tough penalties and consumer redress. This is a potent tool. As former FTC Chair William Kovacic remarked, "no regulatory agency in the United States matches the breadth and economic reach of the Commission's mandates."[8] But this rulemaking power has sat nearly unused in the past

[4] Ruth Igielnik, *70% of Americans Say U.S. Economic System Unfairly Favors the Powerful*, Pew Rsch. Ctr. (Jan. 9, 2020), https://www.pewresearch.org/fact-tank/2020/01/09/70-of-americans-say-u-s-economic-system-unfairly-favors-the-powerful/ [https://perma.cc/2M95-VH25].

[5] *See* Amy Kapczynski, *The Law of Informational Capitalism*, 129 Yale L.J. 1460, 1462–63 (2020).

[6] *See, e.g.*, Sarah Binder, *The Dysfunctional Congress*, 18 Ann. Rev. Pol. Sci. 86, 95–96 (2015).

[7] Michael W. Traugott, *Americans: Major Donors Sway Congress More Than Constituents*, Gallup (July 6, 2016), https://news.gallup.com/poll/193484/americans-major-donors-sway-congress-constituents.aspx [https://perma.cc/C6HN-5JKA].

[8] Letter from Rep. Lee Terry, Chairman, Subcomm. on Com., Mfg. & Trade of the H. Comm. on Energy & Com., to Daniel A. Crane, Senior Professor of Law, Univ. of Mich. 2 (Oct. 2, 2014), https://docs.house.gov/meetings/IF/IF17/20140228/101812/HHRG-113-IF17-Wstate-CraneD-20140228-SD001.pdf [https://perma.cc/KN2X-8WWQ].

The agency has both a competition mandate, to protect against "unfair methods of competition," and a consumer protection mandate, to bar "unfair or deceptive acts or practices." *See* 15 U.S.C. § 45(a)(1). Both stretch across nearly the entire U.S. economy, save for a few excep-

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thirty-eight years, ever since the agency encountered a backlash to a flurry of regulation in the late 1970s.

Reinvigorating the agency's rulemaking program can restore the FTC to its one-time role as a champion of American consumers. An energetic FTC can also serve as a cornerstone of an administrative state able to counterbalance the power of dominant market actors. Section 18 rulemaking offers benefits to consumers, with tough penalties deterring corporate misconduct; to the agency, with rules allowing for more efficient enforcement; and to companies, which gain greater clarity and notice regarding their legal responsibilities. Now, for the first time in four decades, a majority of FTC Commissioners supports picking up this tool once again.[9] President Biden has also urged the agency to use its consumer protection rulemaking powers, calling for restrictions on surveillance-style data collection.[10]

The agency's renewed openness to section 18 rulemaking has run up against a conventional wisdom, solidified and nearly unexamined for decades, that such rulemaking is next to impossible. This narrative holds the Congress saddled the FTC with cumbersome and onerous procedural requirements, the so-called "Magnuson-Moss procedures," in response to politically controversial rulemakings. At best, this prevailing story continues, using this authority to craft new rules would be a poor use of agency time and resources; at worst, it is something that Congress has "virtually prohibit[ed]."[11]

This Article presents evidence that this conventional wisdom is mistaken. The prominence of this story is largely the result of observers conflating section 18's statutory requirements with the agency's historical experience. The FTC's regulatory activity in the 1970s crashed against an ascendant corporate lobby, changing political pressures from Congress, a fading consumer movement, and agency leadership that was ideologically committed to putting a permanent end to the agency's assertive rulemaking.

Puncturing the mythology that has grown up around the Magnuson-Moss Act provides a more clear-eyed view of the agency's authorities: The burden of section 18's statutorily mandated procedures has been dramatically overstated, while the potential benefits of using the rulemaking power to intervene against consumer abuses are under-recognized. It becomes appar-

tions such as prudentially regulated financial institutions and common carriers. *See id.* § 45(a)(2).

[9] *See infra*, Part II.D.

[10] *See* Exec. Order No. 14,036 § 5(h)(i), 86 Fed. Reg. 36,987, 36,992 (July 9, 2021) (urging the Commission to promulgate rules to restrict "unfair data collection and surveillance practices that may damage competition, consumer autonomy, and consumer privacy"). Substantial rules on these topics would likely need to be promulgated under section 18. *See* Rebecca Kelly Slaughter, *Algorithms and Economic Justice: A Taxonomy of Harms and a Path Forward for the Federal Trade Commission* 54–55 (August 2021) (White Paper for the YALE INFO. SOC'Y PROJECT & YALE J.L. & TECH.), https://law.yale.edu/sites/default/files/area/center/isp/documents/algorithms_and_economic_ justice_master_final.pdf [https://perma.cc/EP6F-B6ZN]; *see also* Note, *infra* note 239.

[11] *Ask the Commissioner: Federal Trade Commissioner Christine Varney*, 14 ACCA DOCKET 36, 36 (1996).

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ent that the FTC can and should move beyond pleading with a sclerotic Congress to provide the agency with different rulemaking procedures. The Commission should begin taking dearly needed action using the broad rulemaking authority that is already on the books.

This piece makes several novel contributions to the existing scholarship. First, because scholarly study of section 18 faded as the authority fell into disuse, this is among the first articles to have the historical distance to situate the FTC's retreat from rulemaking within the broader deregulatory fervor that swept American government in the 1980s. Second, it is the first piece of public scholarship in decades to analyze deeply the statutory bases of section 18 rulemaking and disentangle the effects of statutory requirements from those of inefficient, self-imposed agency rules and an ideological aversion to regulation. In so doing, this article rebuts the core arguments and pieces of scholarship underlying the conventional understanding that section 18 procedures are unworkable. Moreover, this discussion makes clear the importance of the Commission's recent removal of several agency-imposed sources of delay in its rulemaking proceedings. Third, this article provides a robust roadmap for approaching the issue of cross-examination in informal hearings—the feature of section 18 that many observers credit with undermining FTC proceedings in the past. It explains how the agency can embrace the statute's text and legislative history, which show that Congress left open numerous avenues for the Commission to prevent cross-examination from becoming a source of delay.

The remainder of the Article is organized as follows. Part I describes the value of substantive rule-writing at the FTC, combining arguments about the general virtues of rulemaking with those unique to the FTC due to its weak remedial powers when proceeding by adjudication alone. Part II follows with an abbreviated history of the Commission's rulemaking activity from the agency's founding in 1914 to the present day, charting shifts due to changes in legal powers, external pressures, and internal prioritization. Part III conducts a granular comparison of section 18's procedures with those required in Administrative Procedure Act ("APA") notice-and-comment proceedings, identifying the ways in which recent legislative, presidential, and judicial dictates have minimized the significance of their differences. Part IV analyzes how the Commission's recent administrative reforms to its rulemaking procedures eliminate agency-imposed sources of delay and provides new recommendations for how the agency can prevent cross-examination from undermining efficient rulemaking. Finally, Part V considers two promising candidates for section 18 rulemaking: data privacy and online "drip pricing."

I. The Role of Rules at the FTC

Longstanding FTC rules are centerpieces of American consumer protection law. A return to discretionary rulemaking could deliver a range of benefits to consumers, the agency, and businesses alike. Rulemaking and

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case-by-case adjudication play complementary roles in the toolbox of any administrative agency. As explained by generations of judges and administrative law scholars, adjudication offers flexibility and tailoring to a specific fact pattern, whereas rulemaking can better deter unlawful abuses, provide greater clarity for regulated parties, streamline enforcement proceedings, and incorporate public input.[12] The choice between these tools thus "lies primarily in the informed discretion of the administrative agency."[13]

The Supreme Court accentuated the urgency of the FTC moving to rulemaking when it eliminated one of the agency's primary tools for safeguarding consumers, in *AMG Capital Management, LLC v. FTC*.[14] The Court invalidated the Commission's four-decade-long use of section 13(b) of the FTC Act, a provision defining the agency's injunctive remedial powers, to secure restitution for consumers and disgorgement of wrongdoers' ill-gotten gains.[15] The Commission's Acting Chair responded by saying that the Court had "deprived the FTC of the strongest tool we had to help consumers."[16] Two examples illustrate the chill that *AMG Capital* casts on agency enforcement. As a result of the ruling, the Commission dropped its efforts to secure nearly $500 million in relief for consumers harmed by a pharmaceutical giant blocking access to lower-cost drugs; it also saw the Eleventh Circuit vacate an asset freeze the agency had secured on $85 million held by operators of fake government-benefit websites.[17] The decision can be expected to severely undermine the agency's ability to secure monetary relief for violations of the FTC Act's prohibition on "unfair or deceptive acts or practices" ("UDAP"), at least if the conduct is not also covered by a trade regulation rule or prior cease-and-desist order.[18]

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[12] *See, e.g.*, Katie R. Eyer, *Administrative Adjudication and the Rule of Law*, 60 ADMIN. L. REV. 647, 649–51 (2008); David L. Shapiro, *The Choice of Rulemaking or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921, 928–42 (1965).

[13] SEC v. Chenery Corp., 332 U.S. 194, 203 (1947).

[14] 141 S. Ct. 1341 (2021).

[15] *Id.* at 1347.

[16] Press Release, Fed. Trade Comm'n, Statement by FTC Acting Chairwoman Rebecca Kelly Slaughter on the U.S. Supreme Court Ruling in AMG Capital Management LLC v. FTC (Apr. 22, 2021), https://www.ftc.gov/news-events/press-releases/2021/04/statement-ftc-acting-chairwoman-rebecca-kelly-slaughter-us [https://perma.cc/GK8K-5EU3].

[17] Press Release, Fed. Trade Comm'n, Federal Trade Commission Withdraws Remaining Case against AbbVie after Supreme Court Decision Strips Consumers of Relief (July 30, 2021), https://www.ftc.gov/news-events/press-releases/2021/07/ftc-withdraws-remaining-case-against-abbvie-after-supreme-court-decision [https://perma.cc/GD9E-AVUP]; Morgan Conley, *11th Circ. Undoes $85M Asset Freeze in Fake Gov't Site Suit*, LAW360 (Nov. 4, 2021, 8:59 PM), https://www.law360.com/articles/1437881/11th-circ-undoes-85m-asset-freeze-in-fake-gov-t-site-suit [https://perma.cc/CSU8-Q6PS].

[18] Section 19(b) allows the FTC to pursue equitable relief for first-time section 5 violations only if the violation has already been litigated to final judgment in the agency's administrative tribunals— including appeals by right to the full Commission and a U.S. court of appeals—and the agency can later establish scienter in federal court. *See* David C. Vladeck, *The Erosion of Equity and the Attack on the FTC's Redress Authority*, 82 MONT. L. REV. 159, 178–79 & n.151 (2021).

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Yet before *AMG Capital*, the FTC's UDAP enforcement already earned frequent criticism for resolving in "no-money, no-fault" settlements, which critics say create a "first time free" dynamic for initial violations.[19] Even if one were to believe that Congress will restore the FTC's equitable remedial powers to their pre-*AMG Capital* state—and unusually swiftly for the contemporary, gridlocked Congress—the status quo ante was far from ideal. The Commission often described the difficulty of quantifying the scale of consumer harm as a barrier to securing equitable relief in case-by-case enforcement.[20] Furthermore, without civil penalties, the deterrent effect of restitution or disgorgement is discounted by the proportion of offenses that go undetected.[21]

Section 18 of the FTC Act offers a means to begin responding to these deficiencies.[22] This authority empowers the agency to promulgate "rules which define with specificity acts or practices which are unfair or deceptive acts or practices in or affecting commerce" and to impose "requirements prescribed for the purpose of preventing such acts or practices."[23] The reach of section 18 rules spans the FTC's nearly economy-wide jurisdiction, and the Commission may pursue civil penalties[24] and equitable remedies[25] for rule violations.

Such rulemaking offers a range of benefits, even beyond patching up the damage done to FTC enforcement by the Supreme Court. First, it will create a much stronger deterrent effect than the agency's past approach of relying on case-by-case adjudication and informal guidance. Equitable remedies for violations of trade regulation rules have solid textual grounding in section 19 of the Act, leaving them unaffected by *AMG Capital*. Moreover, the civil penalties for rule violations are quite substantial.[26] These remedial powers can make section 18 rules a far stronger deterrent to first-time offenses.

Second, trade regulation rules provide valuable clarity. Firms benefit because "clear rules mean that it is less costly for regulated parties to inform themselves of the law's requirements."[27] Well-defined rules also strengthen

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[19] *See, e.g.*, Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter Regarding Final Approval of the Sunday Riley Settlement 6 (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/cases/final_rchopra_sunday_riley_statement_dated_11.6.pdf [https://perma.cc/XEM6-GRJH].

[20] *See id.* at 5.

[21] *See id.*

[22] 15 U.S.C. § 57a.

[23] *Id.* § 57a(a)(1)(B).

[24] *Id.* § 45(m)(1)(A).

[25] *Id.* § 57b(a)–(b).

[26] The civil penalty for each violation of a trade regulation rule is $46,517. *See* Press Release, Fed. Trade Comm'n, FTC Publishes Inflation-Adjusted Civil Penalty Amounts for 2022 (Jan. 6, 2022), https://www.ftc.gov/news-events/press-releases/2022/01/ftc-publishes-inflation-adjusted-civil-penalty-amounts-2022 [https://perma.cc/28PN-75GF]. Each day of a continuing violation is considered to be a separate violation. *See* 15 U.S.C. § 45(m)(1)(C).

[27] John F. Manning, *Constitutional Structure and Judicial Deference to Agency Interpretations of Agency Rules*, 96 COLUM. L. REV. 612, 655 (1996).

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agency enforcement efforts by removing the "first, and probably best, line of argument to defend against an FTC construction of Section 5 . . . that it violates constitutional notice and Due Process requirements."[28]

Third, rules permit more efficient enforcement proceedings. When bringing an enforcement action based on a trade regulation rule, the agency can establish liability simply by showing that a given rule was violated. In contrast, even before *AMG Capital* undercut the FTC's remedial powers, liability for a UDAP violation under a bare section 5 theory required proving that a specific party's particular act or practice met the test either for unfairness or deception.[29] Having to meet the evidentiary burden to prove anew that an act or practice is likely to harm consumers or to mislead them as to material facts is an inefficient use of agency resources at best. At worst, it creates avenues for wrongdoers to avoid accountability. Trade regulation rules allow for more straightforward and less resource-intensive enforcement.

Fourth, and finally, proceeding by rulemaking strengthens the democratic legitimacy of agency action by providing greater opportunities for input by regulated parties and regulatory beneficiaries.[30] Public engagement is especially important given Congress's intent for the agency to update its conceptions of unfairness and deception regularly to keep pace with evolving abuses in the marketplace.[31]

Alternative approaches have some merit but fail to recreate the full set of benefits offered by rulemaking. The agency's current, adjudication-centric program has created a sort of "common law" built from consent orders and complaints. While this approach offers flexibility—and informal guidance about agency enforcement priorities can provide notice to regulated firms[32]—it is hamstrung by the FTC's remedial shortcomings. It is also unstable. An adjudication-first enforcement strategy can be altered abruptly by new Commission leadership, and the dearth of binding precedent in the FTC's UDAP "common law" leaves it vulnerable to unfriendly courts if litigants choose to resist agency enforcement.[33]

The recent call by then-Commissioner Rohit Chopra and his attorney-advisor Samuel Levine to reinvigorate the FTC's use of its Penalty Offense Authority provides a complement to rulemaking, rather than a replace-

[28] Justin (Gus) Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 209, 267 (2014) (discussing notice in the antitrust context).

[29] *See* 15 U.S.C. § 45(n) (test for unfairness); Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Rep. John D. Dingell, Chairman, H. Comm. on Energy & Com. (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/MZ49-J6YV] (test for deception).

[30] *Cf.* K. Sabeel Rahman, *Reconstructing the Administrative State in an Era of Economic and Democratic Crisis*, 131 HARV. L. REV. 1671, 1675–76 (2018).

[31] *See* FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 243 (3d Cir. 2015) ("Congress designed the term [unfairness] as a 'flexible concept with evolving content' . . . and 'intentionally left [its] development . . . to the Commission.'" (quoting FTC v. Bunte Bros., 312 U.S. 349, 353 (1941) and Atl. Ref. Co. v. FTC, 381 U.S. 357, 367 (1965))).

[32] *See, e.g.*, 16 C.F.R. pt. 255 (2022).

[33] *See, e.g.*, LabMD, Inc. v. FTC, 894 F.3d 1221, 1237 (11th Cir. 2018).

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ment.[34] This authority was created by the same Magnuson-Moss Act that defined the FTC's discretionary consumer protection rulemaking power[35] and involves the distribution of past cease-and-desist orders against one firm to other companies in the same industry. Firms put on notice in this way can face civil penalties if they commit similar UDAP violations.[36] These civil penalties serve as a valuable deterrent and a stopgap after *AMG Capital* eviscerated the agency's ability to secure equitable monetary relief in most cases. With Samuel Levine now as its Director, the Bureau of Consumer Protection has begun to distribute Notices of Penalty Offenses to put firms in particular industries on notice.[37] However, it may be difficult to put every potential malefactor on notice, particularly for newly founded firms and the types of misconduct prevalent among them.[38] Moreover, Penalty Offense Authority does not support equitable relief, while section 18 trade regulation rules unlock both civil penalties and the full suite of equitable remedies.[39]

The value of new trade regulation rules is not a matter of speculation. The track record of existing rules issued under the FTC's discretionary rulemaking power demonstrates their potential for preventing significant harm to consumers. The "earth-moving" Credit Practices Rule, for example, was promulgated under section 18 and prohibits a wide range of damaging contractual terms for consumer credit, including "confessions of judgment, exemption waivers, irrevocable wage assignments, non-purchase security interests in household goods, pyramiding late charges, and deceptive cosigner practices."[40] One need only look to an adjacent area that is unprotected by this rule, small business loans, to see the devastation that could result if practices such as confessions of judgment remained permissible in consumer loans.[41] The FTC still holds the power to make such transformative changes to the imbalanced relationship between corporation and consumer. But to do

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[34] *See* Rohit Chopra & Samuel A.A. Levine, *The Case for Resurrecting the FTC Act's Penalty Offense Authority*, 170 U. Pa. L. Rev. 71, 98–104 (2021).

[35] *See id.* at 94.

[36] 15 U.S.C. § 45(m)(1)(B).

[37] *See, e.g.*, Press Release, Fed. Trade Comm'n, FTC Puts Hundreds of Businesses on Notice About Fake Reviews and Other Misleading Endorsements (Oct. 13, 2021), https://www.ftc.gov/news-events/press-releases/2021/10/ftc-puts-hundreds-businesses-notice-about-fake-reviews-other [https://perma.cc/9B5R-GBMA] (announcing the mailing of a Notice of Penalty Offenses to more than 700 companies).

[38] *Cf.* Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter Regarding Final Approval of the Sunday Riley Settlement 6 (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/cases/final_rchopra_sunday_riley_statement_dated_11.6.pdf [https://perma.cc/XEM6-GRJH].

[39] *See* Chopra & Levine, *supra* note 34, at 84–85 tbl.1.

[40] Margot Saunders, Nat'l Consumer Law Ctr., Time to Update the Credit Practices Rule: CFPB Should Modernize FTC Rule Addressing Abusive Creditor Collection Practices 2 (2010), https://www.nclc.org/images/pdf/debt_collection/credit-practices-rule-update.pdf [https://perma.cc/LWL3-V9QD].

[41] Zachary R. Mider, Zeke Faux, David Ingold & Demetrios Pogkas, *"I Hereby Confess Judgment,"* Bloomberg (Nov. 20, 2018), https://www.bloomberg.com/graphics/2018-confessions-of-judgment/ [https://perma.cc/B3T6-87NL].

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so, it must shake off the now-longstanding cultural aversion to assertive regulation that swept over the agency in the wake of past controversy.

II. A Brief History of FTC Rulemaking

The effort dedicated to FTC rulemaking has waxed and waned in response to popular pressure, legislative reforms, and internal culture change at the agency. It has ranged from a flurry of rulemakings across the agency's expansive purview to more recent disuse. Discretionary rulemaking at the FTC can be broken into three broad eras: entrepreneurial invocation of section 6(g) of the FTC Act from 1962 to 1974, active section 18 rulemaking beginning in 1975 with the passage of the Magnuson-Moss Act, and a retreat from regulation cemented by the advent of the Reagan Administration in 1981. Perhaps, we see a new era emerging today.

A. Controversial Claim of Rulemaking Authority: 1962–74

The FTC's experience with rulemaking started slowly. Over its first five decades, the FTC had promulgated rules only when authorized by specific acts of Congress, starting with the Wool Products Labeling Act of 1939.[42] Instead, the agency in that period shaped industry practice primarily with voluntary Trade Practice Rules, now known as "guides."[43] Rulemaking related to the agency's competition mandate was rarer still. The Robinson-Patman Act of 1936 gave the agency the authority to set "quantity limit" rules on the sales of commodity products to help the Commission to police price discrimination, which was seen as promoting monopoly. The agency did not use that authority until 1949 when it set limits on the quantities of rubber tires sold, and only then at the persistent prodding of a U.S. House of Representatives committee.[44]

The Commission began its move into discretionary rulemaking during the early 1960s, as the administrative state entered an "age of rulemaking."[45] Legal scholars began to advocate for increased use of rulemaking starting in the late 1950s and early 1960s.[46] These thinkers emphasized that, relative to case-by-case adjudication, rules offered clarity, more predictable and consis-

[42] Act of Oct. 14, 1940, ch. 871, §?2, 54 Stat. 1128 (codified at 15 U.S.C. §§ 68–68j). The Act supported the agency's 1941 promulgation of the Wool Products Labeling Rules. *See* 16 C.F.R. pt. 300 (2022); 6 Fed. Reg. 3426 (July 15, 1941).

[43] *See Trade Rules and Trade Conferences: The FTC and Business Attack Deceptive Practices, Unfair Competition, and Antitrust Violations*, 62 Yale L.J. 912, 925 (1953); Stephanie W. Kanwit, Federal Trade Commission § 5:6 (rev. ed. 2018).

[44] *See* 17 Fed. Reg. 113 (Jan. 4, 1952); Alan Buxton Hobbs, *Clayton Act Quantity Limit Proceedings*, 7 Wash. & Lee L. Rev. 131, 138 (1950).

[45] J. Skelly Wright, *The Courts and the Rulemaking Process: The Limits of Judicial Review*, 59 Cornell L. Rev. 375, 375 (1974).

[46] *See* Reuel E. Schiller, *Rulemaking's Promise: Administrative Law and Legal Culture in the 1960s and 1970s*, 53 Admin. L. Rev. 1139, 1146–51 (2001).

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tent application, and efficient enforcement proceedings that reduced agency caseloads.[47]

The Commission embraced these arguments in 1962 when it claimed broad rulemaking authority under the loosely worded section 6(g) of the FTC Act.[48] It established a Division of Trade Regulations and Rules and issued an internal rule stating that it would promulgate binding trade regulation rules under APA notice-and-comment rulemaking procedures.[49] Covering subjects ranging from retail food advertising to door-to-door sales tactics, the agency then engaged in thirty-five rulemaking proceedings over its first twelve years of discretionary rulemaking,[50] finalizing dozens by 1974.[51] Many of these rules were framed as applying to both the FTC's consumer protection and competition mandates, restricting both "unfair or deceptive acts or practices" and "unfair methods of competition."[52] The Commission's rulemaking was spurred forward from the outside. A pair of hard-hitting reports issued in 1969 by affiliates of Ralph Nader and by the American Bar Association assailed the agency's assertedly meek approach, and powerful members of the FTC's oversight committees in Congress continuously pressed for greater regulatory action.[53]

This assertion of rulemaking power proved controversial. Commentators vigorously debated whether the legislative history of the FTC Act and section 6(g)'s text and placement within a section devoted largely to internal agency organization could support this type of substantive rulemaking.[54] That legal uncertainty was effectively resolved by the U.S. Court of Appeals

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[47] *See id.* at 1150.

[48] 15 U.S.C. § 46(g) (empowering the agency to "[f]rom time to time classify corporations and . . . make rules and regulations for the purpose of carrying out the provisions of this subchapter," subject to certain exceptions). The agency also asserted inherent authority to issue substantive rules due to its adjudicative powers, although this received less attention. *See* Glen O. Robinson, *The Making of Administrative Policy: Another Look at Rulemaking and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485, 493 n.33 (1970).

[49] *See Developments in the Law—Deceptive Advertising: VI. The Federal Trade Commission: Modes of Administration*, 80 HARV. L. REV. 1063, 1091 (1967); Schiller, *supra* note 46 at 1147.

[50] ADMIN. CONF. OF THE U.S., RECOMMENDATION 79-1: HYBRID RULEMAKING PROCEDURES OF THE FEDERAL TRADE COMMISSION 2 (1979), https://www.acus.gov/sites/default/files/documents/79-1-with-table.pdf [https://perma.cc/7KXW-STXU] [hereinafter ACUS 1979 RECOMMENDATION].

[51] *See* MILES W. KIRKPATRICK, JOAN Z BERNSTEIN, ROBERT PITOFSKY, MICHAEL F. BROCKMEYER, JAMES F. RILL, NANCY L. BUC, EDWIN S. ROCKEFELLER, CALVIN J. COLLIER, J. THOMAS ROSCH, KENNETH G. ELZINGA, ALAN H. SILBERMAN, ERNEST GELHORN, CASS R. SUNSTEIN, CASWELL O. HOBBS III, WILLIAM L. WEBSTER, BASIL J. MEZINES, ALAN B. MORRISON, TIMOTHY J. MURIS & STEPHEN CALKINS, REPORT OF THE AMERICAN BAR ASSOCIATION SECTION OF ANTITRUST LAW SPECIAL COMMITTEE TO STUDY THE ROLE OF THE FEDERAL TRADE COMMISSION 64 (1989) [hereinafter 1989 ABA REPORT].

[52] *See, e.g.*, Care Labeling of Textile Wearing Apparel, 36 Fed. Reg. 23,883, 23,884 (Dec. 16, 1971) (codified as amended at 16 C.F.R. pt. 423).

[53] *See* Barry R. Weingast & Mark J. Moran, *The Myth of Runaway Bureaucracy: The Case of the FTC*, REGULATION, May/June 1982, at 33, 34–36; Robert E. Freer, Jr., *The Federal Trade Commission—A Study in Survival*, 26 BUS. LAW 1505, 1505–06 (1971).

[54] *See* Richard A. Wegman, *Cigarettes and Health: A Legal Analysis*, 51 CORNELL L. REV. 678, 740 n.280 (gathering arguments for and against).

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for the D.C. Circuit, which in 1973 upheld the FTC's power to regulate, in a paean to the virtues of rulemaking.[55] Nonetheless, a broader debate continued in Congress over whether to codify the agency's rulemaking power and whether to impose greater procedural requirements and oversight over the process.

B. Use of Sweeping Powers Draws Backlash: 1975–80

The FTC's rulemaking powers saw a seismic shift with the enactment of the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act ("Magnuson-Moss Act") in January 1975.[56] In the face of present-day mythology, it is critical to recall that the Act was both intended to be and received as a means to empower the agency's regulatory program. The Magnuson-Moss Act created a new section 18 of the FTC Act, which made explicit the agency's authority to issue rules prohibiting unfair or deceptive acts or practices and laid out procedural requirements for such rulemaking proceedings.[57] These procedures included informal oral hearings with a limited right of cross-examination, reflecting best practices recommendations by the Administrative Conference of the United States ("ACUS") during that era.[58] The Act also provided for civil penalties and consumer redress in cases of rule violations,[59] made those remedies apply to extant rules issued under section 6(g) as well as to future rules promulgated under section 18,[60] and expanded the agency's UDAP jurisdiction to be coterminous with Congress's Commerce Clause power.[61]

The "chief architect" of that legislation was Michael Pertschuk, top counsel to the Senate Commerce Committee chaired by a lead sponsor of the legislation, Senator Warren Magnuson.[62] *Newsweek* reported that "[i]t was mainly as a result of Pertschuk's prodding that Congress passed the Magnuson-Moss Act of 1974" and that "his most conspicuous accomplishment [was] his use of legislative clout to transform the FTC from a somnolent backwater . . . into an activist agency."[63] The victory was a triumph of Pertschuk's legislative maneuvering—he was able to secure his desired FTC

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[55] Nat'l Petroleum Refiners Ass'n v. FTC, 482 F.2d 672, 698 (D.C. Cir. 1973).

[56] Magnuson Moss Warranty-Federal Trade Commission Improvements Act of 1975, Pub. L. No. 93-637, 88 Stat. 2183 (1975) (codified as amended in scattered sections of 26 U.S.C.).

[57] However, the Act explicitly left unchanged the Commission's authority to promulgate rules restricting unfair methods of competition. Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 U. Chi. L. Rev. 357, 378 (2020).

[58] *See* 38 Fed. Reg. 19,782, 19,792 (July 23, 1973).

[59] *See* 15 U.S.C. §§ 45(m)(1)(A), 57b(b).

[60] *Id.* § 45(m)(1)(A).

[61] Magnuson Moss Warranty-Federal Trade Commission Improvements Act of 1975, Pub. L. No. 93-637, § 201(a), 88 Stat. 2183, 2193 (1975) (codified at 15 U.S.C. § 45).

[62] Morgan Norval, *Kept Critics*, Reason (July 1981), https://reason.com/1981/07/01/kept-critics/ [https://perma.cc/2MBV-DGUH].

[63] Allan J. Mayer & James Bishop, Jr., *Regulation: A Tough Man for the FTC*, Newsweek, Mar. 7, 1977, at 61.

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reform package by tying it to measures that responded to public uproar regarding deceptive warranties.[64] Pertschuk then was appointed Chairman of the FTC in early 1977 and bolstered his reputation as a "hero of the consumer movement" and a strong proponent of regulatory action.[65]

During the decade after its passage, the Magnuson-Moss Act was viewed as substantially increasing the agency's rulemaking powers. In 1979, a *New York Times* contributor stated that the bill was responsible for "sending new waves of energy through the commission, dramatically increasing its power."[66] The authors of a leading treatise on the FTC shared this view, writing that the Magnuson-Moss Act "has transformed the FTC into one of the most powerful of government agencies by confirming its authority to prescribe . . . rules."[67] This common understanding of Magnuson-Moss continued through at least 1984, when the *Washington Post* described the bill as having "liberalized the commission's rulemaking authority."[68]

The FTC also viewed section 18 as empowering and responded with a flurry of activity. It began a stunning sixteen rulemaking proceedings within sixteen months of the passage of the Magnuson-Moss Act, adding four more by 1978[69]—perhaps the most expansive suite of rulemakings ever pursued at once by a single agency. The Eyeglass Rule was the first rule to be finalized of those proposed after the passage of the Magnuson-Moss Act.[70]

The pace of action and breadth of affected industries prompted attacks by an ascendant business lobby as the energy of the consumer movement faded. Newly aggressive entities such as the U.S. Chamber of Commerce joined with networks of anti-regulation scholars to take aim at the agency for allegedly trying to become "the second most powerful legislative body in the United States."[71] In so doing, they employed the approach advocated in the famous memorandum to the Chamber from later Supreme Court Justice Lewis Powell.[72] The most vitriolic opposition came in response to a rulemaking that proposed blocking television advertisements aimed at young children and advertisements for sugary foods on programs reaching a wider range of children, nicknamed the "Kidvid" rule. Despite initially strong public support for restricting advertising to young children, business-led resistance and a "Stop the FTC" campaign funded to the then-unprecedented

[64] *See id.*; MICHAEL PERTSCHUK, WHEN THE SENATE WORKED FOR US: THE INVISIBLE ROLE OF STAFFERS IN COUNTERING CORPORATE LOBBIES 150–51 (2017).

[65] Peter Passel, Opinion, *Is Consumerism Dead?*, N.Y. TIMES, Nov. 22, 1982, at A18.

[66] A.O. Sulzberger Jr., *Should the F.T.C. Be Reined?*, N.Y. TIMES, Nov. 5, 1979, at D1.

[67] STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 6:3 (rev. ed. 2018) (internal citation omitted).

[68] Mark Potts & Michael Isikoff, *Pertschuk Exits FTC With Guns Blazing*, WASH. POST (Sept. 26, 1984), https://www.washingtonpost.com/archive/business/1984/09/26/pertschuk-exits-ftc-with-guns-blazing/5e9c7df9-e639-41af-8c8c-202fcdb55eca/ [https://perma.cc/A835-MGVB].

[69] *See* ACUS 1979 RECOMMENDATION, *supra* note 50, at 6–8.

[70] *See* 43 Fed. Reg. 23,992, 23,992 (June 2, 1978) (codified at 16 C.F.R. pt. 456).

[71] J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2228 (2015) (quoting Jean Carper, *The Backlash at the FTC*, WASH. POST, Feb. 6, 1977, at C1).

[72] *See* Luke Herrine, *The Folklore of Unfairness*, 96 N.Y.U. L. REV. 431, 491–92 (2021).

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tune of $30 million saw enormous success in the media and in Congress. The blowback culminated with a *Washington Post* editorial that famously decried the rulemaking as a "preposterous intervention that would turn the agency into a great national nanny."[73]

As politically influential groups mobilized against the FTC, Congress took several temporary steps to slow the agency's rate of regulation. These moves escalated to the point that a late 1979 funding rider imposed a thirty-day prohibition on finalizing trade regulation rules or engaging in "any new activities."[74] In May 1980, Congress briefly let funding for the agency lapse entirely.[75] In a scarring experience for agency staff, the Commission was forced to initiate procedures to shutter the agency.[76] These measures, and tough oversight committee hearings, served as "shock therapy for bureaucrats."[77]

Despite the tumult, the Federal Trade Commission Improvements Act of 1980[78] ("1980 Act") that followed this controversy was "compromise legislation" between FTC boosters and detractors that held few lasting statutory restrictions.[79] The Act's most notable check on the agency was a two-year experiment with a legislative veto power over FTC rules—cut short when the D.C. Circuit struck the provision down as unconstitutional and the Supreme Court foreclosed legislative vetoes in *I.N.S. v. Chadha*.[80] The legislation also impeded the agency's ability to continue three specific rulemakings, including the children's advertising rule, although it did not foreclose future action in all of those areas.[81] The 1980 Act also required the agency to issue Advance Notices of Proposed Rulemaking for section 18 rulemakings and added a bevy of minor revisions to section 18 that were either temporary or of marginal significance.[82] A former FTC Chair remarked with surprise,

[73] Editorial, *The FTC as National Nanny*, WASH. POST, Mar. 1, 1978, at A22.

[74] *See* William J. Baer, *Where to from Here: Reflection on the Recent Saga of the Federal Trade Commission*, 39 OKLA. L. REV. 51, 54 (1986).

[75] *See id.*

[76] *See id.*

[77] Weingast & Moran, *supra* note 53, at 34.

[78] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, 94 Stat. 374 (1980).

[79] *See* Earl W. Kintner, Christopher Smith & David B. Goldston, *The Effect of the Federal Trade Commission Improvements Act of 1980 on the FTC's Rulemaking and Enforcement Authority*, 58 WASH. U. L.Q. 847, 847 (1980).

[80] 462 U.S. 919 (1983). *See* Consumers Union of U.S., Inc. v. FTC, 691 F.2d 575, 577 (D.C. Cir. 1982), *aff'd sub nom.* Process Gas Consumers Grp. v. Consumer Energy Council of Am., 463 U.S. 1216 (1983).

[81] *See* Kintner et al., *supra* note 79, at 848.

[82] In addition to the ANPRM requirement, *see supra* note 79, the amendments included mandatory submission of NPRMs to Congress thirty days before publication in the *Federal Register*, *id.*, a requirement that presiding officers be independent of other FTC staff, *id.* § 9, 94 Stat. at 377, further restrictions to ex parte communications, *id.* § 12, 94 Stat. at 379, limitations on subpoena power in rulemakings, *id.* § 13, 94 Stat. at 380, and an obligation to produce regulatory analyses, *id.* § 15, 94 Stat. at 388. The Act also restricted section 18 rulemaking governing standard-setting by private bodies and compelled substantive changes to the Funeral Rule through conditions on funding. *Id.* § 7, 19, 94 Stat. at 376, 391–93. As discussed in Part III.A, these revisions around the edges of FTC's authority ought not be considered fatal to effective rulemaking.

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"[p]retty clearly . . . no fundamental changes have been imposed by the 1980 amendments."[83] The lasting threat to FTC rulemaking came not from statutory restrictions but from the personnel who would soon assume control of the agency.

C. The Enduring "Reagan Revolution": 1981–Present

The advent of the Reagan Administration proved the most influential step toward ending the FTC's focus on rulemaking—far outstripping any legislative changes. The transition memo produced during President Reagan's 1980–81 transition effort is a revealing guide to the ensuing transformation in FTC self-image, personnel, and culture.[84] The document attacked the agency's actions during the 1970s as "misguided," "counterproductive," and "overly aggressive," and argued that "President Reagan can and should point this agency in a new direction."[85] Crucially, the memorandum's authors recognized that "[t]he bulk of our specific recommendations could be carried out under existing legislative authority," and did not require intervention by Congress.[86] Three focuses stand out as most relevant to orienting the agency away from rulemaking: establishing a strong presumption in favor of voluntary guidance rather than binding regulation, due to perceived costs to industry; installing personnel committed to the Reagan Administration's deregulatory vision; and elevating the role of economists in agency action.

The transition memo called for a radical reduction in rulemaking. It urged a shift from agency regulation to the "enlightened use" of industry self-regulation, aiming to minimize "the emotive content of the adversarial relationship with business that is indigenous to much of the FTC's work."[87] Accordingly, rulemaking staff was cut precipitously. Staff hours dedicated to rulemaking dropped from 89 "workyears" in 1976 to 25 in 1982 and only 12 in 1988.[88] Meanwhile, the number of FTC presiding officers dwindled from nine immediately after the passage of the Magnuson-Moss Act to just one by the late 1980s.[89]

The memo also highlights the importance of a visionary Chairman to change the FTC's culture. This focus matches the credo of ideological conservatives within the Reagan Administration that "personnel is policy."[90] The

[83] *Debate: The Federal Trade Commission Under Attack: Should the Commission's Role Be Changed?*, 49 ANTITRUST L.J. 1481, 1482 (1980).

[84] *See generally Conclusions and Recommendations from Federal Trade Comm'n Transition Team Report Submitted to Reagan Adm'n* [sic], *reprinted in* ANTITRUST & TRADE REG. REP. (BNA) NO. 999, at G-1 [hereinafter *FTC Transition Memo*].

[85] *Id.* at G-1, G-3.

[86] *Id.* at G-1.

[87] *Id.*

[88] 1989 ABA REPORT, *supra* note 51, at 154 fig.17.

[89] William D. Dixon, *Rulemaking and the Myth of Cross-Examination*, 34 ADMIN. L. REV. 389, 400 n.41 (1982); 1989 ABA REPORT, *supra* note 51, at 89 n.96.

[90] Stewart Lawrence, Opinion, *"Personnel Is Policy": To Get Back on Track, Trump Must Recall Reagan's Example*, DAILY CALLER (Feb. 17, 2017), https://dailycaller.com/2017/02/17/personnel-is-policy-to-get-back-on-track-trump-must-recall-reagans-example/.

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transition team urged the President to choose a "Chairman from outside the agency . . . who is committed to filling key staff positions with qualified persons who share a new vision for the agency."[91] They perceived, correctly, that the adoption of their proposals "depend[ed] critically on strong leadership from the Commission and, especially, its Chairman."[92] President Reagan delivered by selecting the author of the transition report, James Miller, as his first FTC Chairman in 1981. Within three years, the agency had executed twenty-five of the twenty-nine recommendations in the transition memo, with "substantial progress" toward another two.[93]

Economists hostile to regulation were put in charge at the FTC, both literally and figuratively. In Miller, the agency had its first Chairman with a background as an economist rather than as an attorney.[94] The transition memo aimed to raise the influence of economists throughout the agency. It urged the agency to reallocate prized space in its small, central headquarters building to Bureau of Economics staff and to increase the power of economists to shape which matters were considered by the Commission.[95] Despite its air of neutrality, this push to elevate economic thinking had a marked anti-regulation slant. The transition team sought to require that agency economists focus greatly on any costs imposed by government action or regulation, with less emphasis given to the corresponding benefits.[96] This approach dovetailed with efforts rooted in the Chicago School of economics to limit rulemaking by mandating quantified "cost-benefit analysis."[97] Industry helped to fund the cultivation of this intellectual development precisely because costs to regulated parties, such as industrial pollution controls, are systemically easier to quantify than benefits to regulatory beneficiaries, such as improved health outcomes for children.[98] While seeking to raise the influence of economists, the transition team sought to reduce the power of the rest of the agency—it requested that Congress cut the FTC's budget by twenty-five percent, provide a "sorely needed" reduction in the agency's legal authority, and eliminate many of its regional offices.[99]

The push to halt rulemaking was a dramatic success. After the rapid pace of the previous decade, the agency promulgated only two rules during the 1980s.[100] Upon his departure from the agency he had once chaired, then-

[91] *FTC Transition Memo*, *supra* note 84, at G-2.

[92] *Id.* at G-1.

[93] Pete Sepp, FTC: A Three-Letter Way to Spell "Nanny"?, Nat'l Taxpayers Union 4 (2015), https://www.ntu.org/library/doclib/NTU-PP-135-FTC.pdf [https://perma.cc/4UJV-R8JC].

[94] Eleanor M. Fox, *Chairman Miller, the Federal Trade Commission, Economics, and Rashomon*, 50 L. & Contemp. Probs. 33, 33 (1987).

[95] *FTC Transition Memo*, *supra* note 84, at G-2.

[96] *See id.* at G-2.

[97] *See* Herrine, *supra* note 72, at 498–99.

[98] *See* Elizabeth Popp Berman, *Let's Politicize Cost-Benefit Analysis*, L. & Pol. Econ. (Oct. 5, 2021), https://lpeproject.org/blog/lets-politicize-cost-benefit-analysis/ [https://perma.cc/YCD5-FCBL].

[99] *FTC Transition Memo*, *supra* note 84, at G-1, G-3.

[100] 1989 ABA Report, *supra* note 51, at 89 n.96 (In fairness, the few rules that emerged from the new internal order found more success in court, although it is difficult to distinguish

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Commissioner Michael Pertschuk stated of the Reagan appointees, "Part wittingly, part unwittingly, they have crippled the FTC."[101] Reporters also noted this "turnabout in the commission's approach to industry regulation, from what many characterized as an adversarial position to one of accommodation."[102]

The fundamental reorientation of the FTC's approach during the Reagan years had remarkable durability over ensuing decades. Tim Muris, who led the Bureau of Consumer Protection during the Reagan years and was Chairman from 2001 to 2004, recalled the staff purge at the root of the agency's metamorphosis: "Many FTC staff, with a different vision of the FTC, were asked to leave or left on their own accord. There really was a Reagan Revolution in antitrust and consumer protection. As I like to say, my side won."[103] He credits the staying power of this philosophical shift to key Reagan-era staff continuing to lead the Bureau of Consumer Protection into the 2000s.[104] Later Chairmen continued to extend Chairman Miller's legacy decades later: "The FTC Chairmen from 1995–2004, Robert Pitofsky and Timothy Muris, both had worked at the agency in the 1970s [and 1980s]; [and] both shared the market-oriented vision of the FTC."[105]

This longevity was by design. At a conference "to celebrate the 30th anniversary of the Reagan Revolution at the FTC,"[106] former Chairman Miller recounted his efforts to create a lasting transformation in agency culture:

> [W]e also recognized that reforms could be undone after we left. Accordingly, we went about trying to prevent recidivism in a number of ways. We endeavored to teach the highly motivated career staff that the approach that we advocated to competition and consumer protection matters was the one most efficient and serving the true interest of consumers.[107]

how much of this change is due to learning from earlier legal setbacks from how much was due to the greater length of proceedings during the Reagan years); *see generally* Harry & Bryant Co. v. FTC, 726 F.2d 993 (4th Cir. 1984); Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957 (D.C. Cir. 1985); Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417 (D.C. Cir. 1986).

[101] Potts & Isikoff, *supra* note 68.

[102] Irvin Molotsky, *It Sometimes Seems Like the Federal Tirade Commission*, N.Y. TIMES, June 5, 1984, at E5.

[103] Kirstin Downey & Kirk Victor, *FTC at 100: Reagan Revolution Transforms FTC in the 1980s*, FTCWATCH (Feb. 13, 2015), https://www.mlexwatch.com/articles/1788/ftc-at-100-reagan-revolution-transforms-ftc-in-the-1980s [https://perma.cc/B6W6-ZFNC]; *Looking Back on the Muris Years in Consumer Protection: An Interview with Timothy J. Muris*, 18 ANTITRUST, Summer 2004, at 9, 10; FED. TRADE COMM'N, *Timothy J. Muris: Former Chairman*, https://www.ftc.gov/about-ftc/biographies/timothy-j-muris [https://perma.cc/L6R6-UGBX].

[104] *See* J. Howard Beales III & Timothy J. Muris, *FTC Consumer Protection at 100: 1970s Redux or Protecting Markets to Protect Consumers?*, 83 GEO. WASH. L. REV. 2157, 2228 (2015).

[105] *See id.*

[106] Transcript of Lessons Since the Reagan Revolution at the FTC: A 30-Year Perspective on Competition and Consumer Policies 1 (Sept. 30, 2011), https://masonlec.org/site/rte_uploads/files/LEC_AM.pdf [https://perma.cc/9L9C-4EQR].

[107] *Id.* at 4.

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New administrations brought little change to the agency's approach to discretionary rulemaking. At the end of the George H.W. Bush presidency, the FTC adopted a plan to review each of its rules every ten years, training the agency's efforts on repeal of old rules considered outdated rather than promulgation of new rules to respond to consumer harm.[108] In keeping with President Clinton's deregulatory mantra that the "era of big government is over,"[109] this move only accelerated in the mid-1990s. The agency's regulatory activity centered on cutting back existing trade regulation rules, including six section 18 rules that were repealed in just seven months.[110] Rulemaking did continue under some specific acts of Congress,[111] although other grants of APA notice-and-comment rulemaking authority sat unused for decades.[112]

The Federal Trade Commission Act Amendments of 1994 made some minor tweaks to section 18, eliminating a long-defunded program to compensate rulemaking participants and adding a non-justiciable requirement that the agency have reason to believe that industry misconduct is "prevalent" before beginning a rulemaking.[113] But the much more significant pressure against rulemaking during that era was the continuation of a twenty-year shift in agency self-conception, from regulatory agency to law-enforcement agency,[114] which continued through the George W. Bush, Obama, and Trump Administrations. Yet, because the agency's turn away from rulemaking was caused by changes in culture rather than statute, "the basic authorization for substantive rulemaking remain[s] in place to be reawakened in a more receptive political climate."[115]

D. A New Era?

There is a palpable sense that the FTC is on the precipice of a new, more assertive era after President Biden designated pioneering antitrust scholar Lina Khan to be FTC Chair.[116] In recent years, a growing set of scholars have urged the FTC to resuscitate long-underutilized authorities across both its competition and consumer protection mandates, including

[108] *See* Lydia B. Parnes & Carol J. Jennings, *Through the Looking Glass: A Perspective on Regulatory Reform at the Federal Trade Commission*, 49 ADMIN. L. REV. 989, 997 (1997).

[109] William J. Clinton, *Address Before a Joint Session of the Congress on the State of the Union*, 1 PUB. PAPERS 79, 79 (Jan. 23, 1996).

[110] *See* Parnes & Jennings, *supra* note 108, at 997.

[111] *See, e.g.*, 16 C.F.R. pts. 309, 315 (2021).

[112] *See* 15 U.S.C. § 45a (Made in the USA labeling); 42 U.S.C. § 16471(a)–(d) (consumer energy); 21 U.S.C. § 355 note (generic drug applicant agreements); 12 U.S.C. § 5519(d) (motor vehicle dealer practices).

[113] *See* Pub. L. No. 103-312, §§ 3, 5; 108 Stat. 1691, 1691–92 (1994).

[114] Parnes & Jennings, *supra* note 108, at 999 ("Over the past twenty years, the Commission has gradually shifted its focus from regulation to law enforcement.").

[115] DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 12:13 (rev. ed. 2018).

[116] *See* David McCabe & Cecilia Kang, *Biden Names Lina Khan, a Big-Tech Critic, as F.T.C. Chair*, N.Y. TIMES (June 15, 2021), https://www.nytimes.com/2021/06/15/technology/lina-khan-ftc.html [https://perma.cc/PD6U-323S].

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Khan's own calls to reinvigorate competition rulemaking.[117] The impression of an imminent return to FTC rulemaking grew even stronger when, in its first meeting under Chair Khan, the Commission issued a suite of administrative reforms to streamline section 18 proceedings.[118]

Interest in a renewed embrace of section 18 rulemaking has grown to a greater level today than at any time in the past forty years. In 2019, Commissioner Rebecca Slaughter broke a decades-long taboo by beginning to discuss seriously the possibility of brand-new section 18 rulemakings—calling for a data protection rule [119] and a regulation to prevent consumer harm from AI-powered algorithms that exhibit racial or gender bias.[120] The following year, then-Commissioner Rohit Chopra started to advocate the use of section 18 to create "restatements" of existing precedents to unlock civil penalties for first-time offenders, listing imposter fraud and tip-theft by gig work companies as prime areas for rulemaking.[121] Then, in 2021, Commissioner Christine Wilson—who, unlike Slaughter and Chopra, occupies a Republican seat on the Commission—voiced her tentative support for a section 18 rulemaking to address data privacy.[122] Regardless of bipartisan support, the recent confirmation of privacy expert Alvaro Bedoya to the Commission, filling the seat vacated by Chopra, gives the Commission a majority that observers expect will pursue a privacy rulemaking.[123] The agency signaled its seriousness with the creation of a new rulemaking group in the Office of General Counsel.[124] Just days before the start of 2022, the

[117] *See* Chopra & Khan, *supra* note 57, at 378.

[118] *See* Revisions to Rules of Practice, 86 Fed. Reg. 38,542 (July 22, 2021).

[119] Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at Silicon Flatirons: The Near Future of U.S. Privacy Law 8–9 (Sept. 6, 2019), https://www.ftc.gov/system/files/documents/public_statements/1543396/slaughter_silicon_flatirons_remarks_9-6-19.pdf [https://perma.cc/37VJ-NVCA].

[120] Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at UCLA School of Law: Algorithms and Economic Justice 15–16 (Jan. 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf [https://perma.cc/49L9-UM65].

[121] Statement of Comm'r Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers 2 (Oct. 19, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581862/p144400choprastatementolderamericansrpt.pdf [https://perma.cc/6SAP-HAQQ]; Statement of Comm'r Rohit Chopra Regarding the Deception of Delivery Drivers by Amazon.com 2 n.12 (Feb. 2, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587003/20200102_final_rchopra_statement_v2.pdf [https://perma.cc/Z8HP-R8Q2].

[122] *FTC Commissioner Wilson Signals Openness to Data Privacy Rulemaking*, ELEC. PRIVACY INFO. CTR. (Feb. 12, 2021), https://epic.org/ftc-commissioner-wilson-signals-openness-to-data-privacy-rulemaking/.

[123] *See* Andrea Vittorio, *New Data Privacy Rules Loom for Businesses as Bedoya Joins FTC*, BLOOMBERG L. (May 12, 2022, 4:50 AM), https://news.bloomberglaw.com/privacy-and-data-security/new-data-privacy-rules-loom-for-businesses-as-bedoya-joins-ftc [https://perma.cc/33Z9-E3XL].

[124] Press Release, Fed. Trade Comm'n, FTC Acting Chairwoman Slaughter Announces New Rulemaking Group (Mar. 25, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/03/ftc-acting-chairwoman-slaughter-announces-new-rulemaking-group [https://perma.cc/L3AP-24HL].

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full Commission took its first formal step toward a new rulemaking by requesting public input on a rule to restrict government and business impersonation fraud;[125] a similar step for false future-earnings claims followed a few months later.[126]

The agency has also begun to see outside pressure to re-engage with its rulemaking authority. President Biden has called for an FTC rule to restrict surveillance-style data collection,[127] which would likely be issued under section 18.[128] So, too, a sizeable contingent of U.S. Senators has written the agency to urge it to begin a section 18 rulemaking on digital privacy,[129] an appeal echoed by a coalition of more than forty civil society groups.[130] The Build Back Better Act that the U.S. House of Representatives passed in November 2021 included $500 million over eight years to fund a new privacy bureau at the FTC.[131] Even if the fate of that legislation remains unclear as this article goes to print, it is apparent that many in Congress seek to press the agency into action.

The Commission's renewed interest in rulemaking has run headlong into a longstanding, if weakly supported, conventional wisdom that section 18's "Magnuson-Moss procedures" are almost impossibly onerous. This mythology arose as part of the "hangover" that followed harsh congressional criticism of the agency's substantive priorities in the 1970s.[132] It has received scant scrutiny since that point. In fairness, before Commissioner Slaughter began to signal interest in section 18 rulemaking in 2019,[133] there was little practical reason for deep scholarship on the topic. The FTC had not initiated an entirely new section 18 rulemaking in the thirty-eight years since it finalized the Credit Practices Rule.[134] The scholarly conversation is accordingly thin and, unfortunately, flawed, as discussed in Part III.C. Indeed, Professor Chris Hoofnagle has noted that the FTC is the subject of many "zombie ideas" with curiously strong staying power, "bad arguments that resurface in the face of disconfirming evidence," which he credits to the con-

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[125] *See* Trade Regulation Rule on Impersonation of Government and Businesses, 86 Fed. Reg. 72,901, 72,901 (Dec. 23, 2021).

[126] Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13,951, 13,951 (Mar. 11, 2022).

[127] *See* Exec. Order No. 14,036 § 5(h)(i), 86 Fed. Reg. 36,987, 36,992 (July 9, 2021).

[128] *See* Slaughter, *supra* note 10, at 54–55.

[129] Letter from Richard Blumenthal, Brian Schatz, Ron Wyden, Elizabeth Warren, Christopher A. Coons, Ben Ray Luján, Amy Klobuchar, Cory A. Booker & Edward J. Markey, Senators, U.S. Senate to Lina Khan, Chair, Fed. Trade Comm'n (Sept. 20, 2021), https://www.blumenthal.senate.gov/imo/media/doc/2021.09.20%20-%20FTC%20-%20Privacy%20Rulemaking.pdf [https://perma.cc/VB9A-4PZX].

[130] Press Release, Free Press, 45 Civil-Rights, Media-Democracy and Consumer-Advocacy Groups Urge FTC to Act Against Data Abuses and Discrimination (Oct. 27, 2021), https://www.freepress.net/news/press-releases/45-civil-rights-media-democracy-and-consumer-advocacy-groups-urge-ftc-act [https://perma.cc/QS5H-UUJE].

[131] H.R. 5376, 117th Cong. § 31501 (as passed by the House of Representatives, Nov. 19, 2021).

[132] *See* Terrell McSweeny, *Psychographics, Predictive Analytics, Artificial Intelligence, & Bots: Is the FTC Keeping Pace*, 2 Geo. L. Tech. Rev. 514, 526 (2018).

[133] Slaughter, *supra* note 120, at 8–9.

[134] However, the Business Opportunity Rule was spun off from the Franchise Rule in 2011. 76 Fed. Reg. 76,816, 76,816 (Dec. 8, 2011).

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fluence of business influence and the work of then-budding conservative scholars before and during the Reagan era.[135] The need for a clear-eyed assessment of section 18 could not be more apparent.[136]

The moment is ripe for debunking the unsupported mythology surrounding Magnuson-Moss. No observer appears to have attempted to distinguish the effects of the statutory requirements of the Magnuson-Moss Act from those wrought by shifts in partisan and ideological control of the Commission or by inefficient, self-imposed agency rules of practice. This omission is peculiar when one considers the twenty-one-month Residential Thermal Insulation Rule proceeding, conducted solely under the chairmanship of consumer champion Michael Pertschuk, in comparison to the nine-year proceeding leading to the finalization of the complex Credit Practices Rule under deregulation-minded Chairman Miller.[137] A deep statutory analysis of section 18 reveals that skeptics greatly over-emphasize the differences between the FTC's rulemaking authority and contemporary APA notice-and-comment rulemaking. The FTC's discretionary consumer protection rulemaking authority thus presents an important, untapped opportunity to prevent consumer abuses and promote a fairer economic system.

III. A Fresh Look at Section 18

A. Comparing Section 18 with APA Rulemaking

While section 18 of the FTC Act establishes a rulemaking process specific to the FTC, one should not exaggerate the extent of its departure from informal rulemaking under the Administrative Procedure Act ("APA"). The APA was enacted in 1946 as the "armistice of a fierce political battle over administrative reform" following the New Deal, a fight that ended favorably for New Deal supporters.[138] The Act is a "quasi-constitution" of the administrative state that sets the default rules for agency action throughout the government.[139] It broadly classifies all administrative actions either as case-by-case adjudications or generally applicable rules. Then, the Act further

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[135] Chris Jay Hoofnagle, Federal Trade Commission: Privacy Law and Policy 351 (2016).

[136] *See* Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at the Cybersecurity and Data Privacy Conference: FTC Data Privacy Enforcement: A Time of Change 6 & n.11 (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf [https://perma.cc/5C63-Y6NY].

[137] *See* 49 Fed. Reg. 7740, 7740 (Mar. 1, 1984); 44 Fed. Reg. 50,218, 50,218 (Aug. 27, 1979) (note, though, that only three of the nine years of the Credit Practices Rule proceeding occurred under Chairman Miller).

[138] George B. Shepherd, *Fierce Compromise: The Administrative Procedure Act Emerges from New Deal Politics*, 90 Nw. U. L. Rev. 1557, 1561, 1680 (1996).

[139] Christopher J. Walker, *The Lost World of the Administrative Procedure Act: A Literature Review*, 28 Geo. Mason L. Rev. 733, 733 (2021).

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divides each category into informal and formal modes, with the formal mode carrying elevated procedural requirements.

Section 18 builds upon the foundation of informal APA rulemaking.[140] It thus does not trigger the more demanding requirements of many adjudicative processes or formal APA rulemaking.[141] While now uncommon, formal rulemaking has led to notoriously lengthy proceedings, such as the rulemaking for the Food and Drug Administration's infamous "peanut butter rule," which took nine years to complete.[142]

Informal rulemaking, also commonly labeled "notice-and-comment" rulemaking, is defined by 5 U.S.C. § 553. It requires (1) a notice of proposed rulemaking ("NPRM"),[143] (2) a written comment period,[144] and (3) publication of the rule and a "concise general statement of [its] basis and purpose" thirty days before the rule becomes effective.[145] Rules issued using these procedures are subject to judicial review under the APA, most notably the "arbitrary or capricious" standard.[146] In addition to these explicit statutory requirements, there are further steps effectively mandated by judicial review,[147] presidential proclamation,[148] or various statutes.[149] Agencies also frequently engage in a range of discretionary measures such as issuing advance notices of proposed rulemaking ("ANPRMs") and holding informal public workshops.

Thus, it is not uncommon for a section 553 rulemaking at another agency to involve a staff investigation of a relevant industry or practice, placement of the potential rule on a regulatory agenda, ANPRM with com-

[140] *See* 15 U.S.C. § 57a(b)(1) (referencing 5 U.S.C. § 553).

[141] *See id.* § 57a(b)(1), (e)(5)(C); *see also* FTC v. Brigadier Indus., 613 F.2d 1110, 1116 (D.C. Cir. 1979) ("The drafters of the Magnuson-Moss Act, however, were quite explicit that the inclusion of these new procedural safeguards had not turned rulemaking proceedings into adjudicatory proceedings." (internal quotation marks omitted)); Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers II*), 617 F.2d 611, 633 (D.C. Cir. 1979) (Wright, J., concurring) ("Any attempt to characterize [FTC rulemaking] as an 'adjudication' or 'adversarial process' completely disregards the congressional mandate in Section 18 requiring informal rulemaking.").

[142] *See New Paper by the Coalition for Sensible Safeguards Exposes the Dangers of the Regulatory Accountability Act*, PUB. CITIZEN (Nov. 17, 2011), https://www.citizen.org/news/new-paper-by-the-coalition-for-sensible-safeguards-exposes-the-dangers-of-the-regulatory-accountability-act-congress-public-safeguard/ [https://perma.cc/7483-85MP]. Trial-like procedures may also have contributed less to the length of the FDA's proceeding than did unrelated dysfunction in the agency. One commentator writes, "out of eleven years total time, the trial-type hearing was responsible for a little over one quarter of one year." Dixon, *supra* note 89, at 420.

[143] 5 U.S.C. § 553(b).

[144] *Id.* § 553(c).

[145] *Id.* § 553(b)–(d).

[146] *Id.* § 706(2); *See generally* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29 (1983).

[147] *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144, 1155–56 (D.C. Cir. 2011); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

[148] *See* Exec. Order No. 13,563, 76 Fed. Reg. 3821 (2011).

[149] Rulemaking must comply with cross-agency rules such as the Regulatory Flexibility Act, Small Business Regulatory Enforcement Fairness Act, and Paperwork Reduction Act. *See* 5 U.S.C. §§ 601–612; 44 U.S.C. §§ 3501–3521.

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ment period, informal workshop, NPRM with detailed proposed rule along with alternatives, written comment period, "reply comment" period, agency staff analysis of comments and submitted data, robust cost-benefit analysis, review by the Office of Information and Regulatory Affairs ("OIRA"), rule revision, publication of a Final Rule in the Federal Register, and judicial review. Significant rulemakings take an average of between two and four years.[150] Indeed, a number of scholars have criticized the procedural requirements courts have imposed on APA rulemaking—which they characterize as creating a phenomenon of "ossification," undermining agency action with a "rigid and burdensome" regulatory process.[151]

Section 18 rulemaking must be considered in context. Whether compared to judicially mandated "hybrid rulemaking" and FTC practice prior to passage of the Magnuson-Moss Act or to present-day mandates, section 18's variations on APA notice-and-comment rulemaking are far more modest than generally presumed. The D.C. Circuit, administrative law's most important circuit court of appeals, had imposed elevated "hybrid rulemaking" requirements on many administrative proceedings beginning in the mid-1960s. By 1974, the D.C. Circuit had reversed a section 553 rulemaking for lack of adjudicative procedures and asserted its power to require oral presentations and cross-examination in rulemaking—essentially the same procedures found in section 18.[152] Perhaps for this reason, the FTC had already chosen to institute essentially all of the procedures of section 18 before the Magnuson-Moss Act was passed, with the exception of cross-examination.[153] The Supreme Court beat back the D.C. Circuit's hybrid requirements only in 1978, several years after Magnuson-Moss.[154]

Today, too, courts impose relatively tough standards for section 553 rulemaking. These proceedings involve so-called "paper hearings" with demands to explicitly consider and respond to public comments,[155] engage in quantified cost-benefit analysis,[156] consider reasonable alternative rules,[157]

[150] Gov't Accountability Office, GAO-09-205, Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews 19 (2009) (finding an average length of four years for major rules analyzed between 2006 and 2008); Michael Tanglis, Pub. Citizen, Unsafe Delays 7 (2016), https://www.citizen.org/wp-content/uploads/unsafe-delays-report.pdf [https://perma.cc/U2QN-R9C6] (finding economically significant rules issued during a twenty-year period to have an average length of 2.4 years).

[151] Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 Duke L.J. 1385, 1385–86 (1992); *see* Nicholas Bagley, *The Procedure Fetish*, 118 Mich. L. Rev. 345, 357 (2019) (collecting examples of criticism).

[152] *See* Antonin Scalia, Vermont Yankee*: The APA, the D.C. Circuit, and the Supreme Court*, 1978 Sup. Ct. Rev. 345, 348–52 (1978).

[153] Dixon, *supra* note 89, at 393.

[154] *See* Vt. Yankee Nuclear Power Corp. v. Nat. Res. Def. Council, 435 U.S. 519, 524 (1978).

[155] *See* United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

[156] *See* Bus. Roundtable v. SEC, 647 F.3d 1144, 1155–56 (D.C. Cir. 2011).

[157] *See* Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 46–49 (1983).

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and meet the standards of "hard look" judicial review[158]—each of which is reminiscent of one of section 18's provisions. Presidential orders have also demanded that executive agencies' rules provide robust cost-benefit analyses and survive a pre-promulgation review by OIRA.[159] The following pages provide the first concerted comparison of contemporary APA rulemaking practice with the FTC Act's section 18 procedures.

1. *Pre-Proposal*

The first step that section 18 requires the FTC to take before commencing a rulemaking is to publish an ANPRM in the *Federal Register* and share it with a committee in each chamber of Congress.[160] The ANPRM must contain a "brief description of the area of inquiry under consideration," the "objectives which the Commission seeks to achieve," any "possible regulatory alternatives under consideration by the Commission," and an invitation for public comment on the rulemaking.[161]

The APA does not mandate this step,[162] but agencies often release ANPRMs, particularly for complex or significant rules.[163] Critics of the practice emphasize that rulemakings that begin with an ANPRM take an average of 1.3 to 2.2 years longer to complete than those that do not.[164] These commentators offer no causal story for why the fact of issuing an ANPRM would create delays of this length, though, rather than the intuitive explanation that agencies take this step during more complex rulemakings.

There is little reason to think that section 18's pre-proposal requirements of an ANPRM and notice to Congress need add dramatically to the time required to promulgate a rule. There is no mandatory length of time for acceptance of public comment[165] and the ANPRM may be shared with Congress simultaneously with or even after publication in the *Federal Register*.[166]

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[158] *See id.*

[159] *See* Exec. Order No. 12,291, 46 Fed. Reg. 13193 (Feb. 17, 1981); Exec. Order No. 12,866, 58 Fed. Reg. 51735 (Sept. 30, 1993); Exec. Order No. 13,563, 76 Fed. Reg. 3821 (Jan. 18, 2011).

[160] *See* 15 U.S.C. § 57a(b)(2)(A); 16 C.F.R. § 1.10(b)–(c) (2021).

[161] *Id.* § 57a(b)(2)(A).

[162] *See* 5 U.S.C. § 553.

[163] *See, e.g.*, 77 Fed. Reg. 30,923 (May 24, 2012) (Consumer Financial Protection Bureau Electronic Fund Transfers Rule).

[164] Michael Tanglis, Pub. Citizen, Unsafe Delays 17 (2016), https://www.citizen.org/wp-content/uploads/unsafe-delays-report.pdf [https://perma.cc/945F-8ENH].

[165] In recent rulemaking proceedings to amend trade regulation rules under section 18, the Commission has frequently announced ANPRM comment periods of sixty days. *See, e.g.*, 82 Fed. Reg. 29,256, 29,256 (June 28, 2017); 81 Fed. Reg. 19,936, 19,936 (Apr. 6, 2016). It likely would be reasonable to establish shorter comment periods in light of the many opportunities for public input.

[166] *See* 15 U.S.C. § 57a(b)(2)(A); 16 C.F.R. § 1.10(c) (2021).

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2. *Proposal & Written Input*

The phase of officially initiating a rulemaking and collecting written comments is also nearly indistinguishable between APA notice-and-comment rulemaking and section 18. Both types of rulemaking formally commence with the publication of an NPRM.[167] The content of those documents is also quite similar. An NPRM for a notice-and-comment rulemaking must include details of the proposed rule, the legal authority under which it is proposed, and a description of the rulemaking proceedings.[168] A section 18 NPRM must also "stat[e] with particularity the text of the rule, including any alternatives," and include "the reason for the proposed rule."[169] While this is superficially more demanding than the corresponding text in section 553,[170] judicial doctrines such as the "logical outgrowth" test disincentivize any agency from issuing an NPRM without concretely articulating the proposed rule, alternatives, and the agency's reasoning.[171] Presidential and statutory directives also require agencies to consider reasonable alternatives when engaged in notice-and-comment rulemaking.[172] NPRMs released under either authority invite the public to submit written comments, typically for periods of sixty days.[173]

Section 18 also has two ersatz requirements that lack judicial enforceability. Observers sometimes portray the requirement that the FTC issue an NPRM "only where it has reason to believe" that the conduct to be restricted by the rule is "prevalent" as a foreboding barrier to rulemaking.[174] While no court has construed this provision, its text and legislative history do not support this interpretation. The Senate Report that accompanied the 1994 legislation creating this requirement made clear that the "reason to believe"

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[167] *See* 5 U.S.C. § 553(b); 15 U.S.C. § 57a(b)(1)(A). The FTC Act also requires the agency to place its rules on a "regulatory agenda" before releasing an NPRM, which is common practice across agencies due to the Regulatory Flexibility Act. *See Fall 2020 Unified Agenda of Regulatory and Deregulatory Actions*, OFF. INFO. & REG. AFF., https://www.reginfo.gov/public/do/eAgendaMain [https://perma.cc/G99R-5T5F].

[168] 5 U.S.C. § 553(b)(1)–(3).

[169] 15 U.S.C. § 57a(b)(1)(A).

[170] Section 553 provides that the notice shall include "either the terms or substance of the proposed rule *or a description of the subjects and issues involved*." 5 U.S.C. § 553(b)(3) (emphasis added).

[171] *See, e.g.*, Chocolate Mfrs. Ass'n of U.S. v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985).

[172] Exec. Order. No. 13,563 § 1(b), 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) (directing that "each agency must . . . choos[e] among alternative regulatory approaches" and "identify and assess available alternatives to direct regulation"). All executive agencies must comply with cross-agency requirements such as the Regulatory Flexibility Act, which requires consideration of alternatives to economically significant rules. *See* 5 U.S.C. § 603(c).

[173] *See, e.g.*, 84 Fed. Reg. 13,150, 13,150 (Apr. 4, 2019) (opening sixty-day comment period). The FTC extends its comment periods frequently. The most recent new section 18 rulemaking featured four extensions of comment periods. *See* 74 Fed. Reg. 29,149, 21,149 (June 16, 2009); 73 Fed. Reg. 34,895, 34,895 (June 19, 2008); 71 Fed. Reg. 46,878, 46,878 (Aug. 15, 2006); 71 Fed. Reg. 31,124, 31,124 (June 1, 2006).

[174] 15 U.S.C. § 57a(b)(3); *see* STEPHANIE W. KANWIT, FEDERAL TRADE COMMISSION § 6:3 (rev. ed. 2020) (describing the requirement as having "bite"); Parnes & Jennings, *supra* note 108, at 996 (crediting the "prevalence" requirement as a principal reason why the agency rarely uses its section 18 rulemaking power).

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language was intentionally selected to *preclude* judicial review of a prevalence determination,[175] a fact that has not previously been cited in the literature. So, too, the content of the Preliminary Regulatory Analysis is expressly exempted from judicial review unless "the Commission has failed entirely to prepare a regulatory analysis."[176]

The one truly distinct statutory requirement during this phase of section 18 rulemaking is a mandate that the Commission share a copy of its NPRM with two congressional committees thirty days before it is published in the *Federal Register*.[177] This relic of the days in which Congress actively meddled in the agency's substantive priorities adds only slightly to the length of the rulemaking process.

3. *Informal Hearings*

Sections 18's most meaningful addition to APA notice-and-comment rulemaking is a period for informal oral hearings following the NPRM comment period. In fact, the Chief Presiding Officer during the 1970s considered the addition of limited cross-examination rights to be the *only* difference from the procedures that the agency followed before 1975.[178] The other procedures required by the Magnuson-Moss Act, including informal oral hearings without cross-examination, had already been imposed by agency discretion before 1975.[179] But while informal oral hearings with cross-examination are unfamiliar to many practitioners of administrative law, they are far from prohibitive. With reforms such as the new method for selecting presiding officers, informal oral hearings can be a relatively brief portion of a section 18 proceeding.

Interested persons have the right to make an oral presentation at an informal hearing conducted by the agency.[180] Because the statute requires only that the opportunity for an informal oral hearing be provided,[181] recent practice has seen the agency frequently conduct section 18 rulemakings for rule amendments or repeals without a hearing when no participant requests one.[182] Still, any meaningful new rule will be sure to garner enough opposition from the affected industry to trigger a hearing.

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[175] *See* S. Rep. No. 103-30, at 10 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 1776 ("The 'reason to believe' standard is intended to bar any judicial review.").

[176] 15 U.S.C. § 57b-3(c)(1).

[177] *Id.* § 57a(b)(2)(C).

[178] *See* Dixon, *supra* note 89, at 393; *see also Report of the Section Concerning FTC Trade Regulation Rulemaking Procedures Pursuant to the Magnuson-Moss Act*, 49 Antitrust L.J. 347, 370–72 (1980) [hereinafter *1980 ABA Report*].

[179] This fact is relevant to the "before and after" comparisons of rulemaking length provided by Professor Lubbers. *See infra* Part III.C.

[180] *See* 15 U.S.C. § 57a(c)(2)(A).

[181] *See id.* § 57a(b)(1)(C).

[182] *See, e.g.*, 83 Fed. Reg. 2934, 2947 (Jan. 22, 2018) (listing procedures for a trade regulation rule amendment proceeding, including "holding an informal hearing such as a workshop, if requested by interested parties").

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The first steps at this stage of the process are the selection of a presiding officer and issuance of a notice of informal hearing. This hearing notice is not mentioned in the statute, but the FTC Rules of Practice describe an "initial notice of informal hearing" that specifies the time and location of the hearing, the Commission's designation of any issues that are subject to cross-examination or rebuttal, and an invitation for requests to cross-examine or rebut another presenter.[183] A "final notice of informal hearing" then identifies any interested persons who will be allowed to cross-examine other participants or to make rebuttal submissions.[184] After historically deferring to the presiding officer on designation of issues subject to cross-examination or rebuttal and on requests to exercise those rights, the Commission has recentered itself in these determinations with recent administrative reforms to its rulemaking procedures.[185] However, it is likely inevitable that the presiding officer will receive numerous requests to exercise cross-examination or rebuttal rights after publication of the final notice of informal hearing. That circumstance is particularly likely if the agency publishes the final notice of informal hearing before participants must disclose the contents of their oral presentations. A court may blanch at a timeline that requires a participant to decide whether to ask to cross-examine or rebut a particular presenter prior to knowing what she will assert in her presentation.

Next is the informal oral hearing itself. The Commission and its presiding officer are empowered by statute to make rules or issue rulings for these informal hearings "as may tend to avoid unnecessary costs or delay."[186] This power expressly includes "reasonable time limits" on presentations, and a federal court of appeals affirmed the power of the presiding officer to limit the number of witnesses making presentations.[187] These are critical tools to foreclose attempts at delay by flooding a hearing with an unmanageable number of witnesses.

Finally, there is the aspect of the proceeding that initially raises the hackles of many administrative lawyers: cross-examination. Section 18 provides a qualified right for participants to present rebuttals to others' presentations or to cross-examine those who gave oral presentations. However, this right arises only if a number of precedent conditions are satisfied. It is also subject to extensive discretionary limits and rules set by the presiding officer. Section 18 cross-examination should not be considered nearly as intimidating as one might imagine if envisioning a courtroom during a criminal trial.

First, the cross-examination right applies only "*if* the Commission determines that there are disputed issues of material fact it is necessary to resolve."[188] As detailed in Part IV, this frequently ought not to be the case,

[183] 16 C.F.R. § 1.12(a) (2021).
[184] *Id.* § 1.12(c) (2021).
[185] *See infra* Part IV.A.
[186] 15 U.S.C. § 57a(c)(3).
[187] *See* Harry & Bryant Co. v. FTC, 726 F.2d 993, 997 (4th Cir. 1984).
[188] 15 U.S.C. § 57a(c)(2)(B) (emphasis added).

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particularly if the agency releases guidelines outlining the rare circumstances in which such a designation is appropriate. The history of this provision makes clear that Congress intended the Commission only to designate "issues of specific fact in contrast to legislative fact."[189] While serving as Chairman of ACUS, future Supreme Court Justice Antonin Scalia explained to a lead sponsor of the Magnuson-Moss Act that these issues of "specific fact" should only "arise occasionally" in rulemakings of general applicability such as those conducted by the FTC.[190] The Commission has at times employed a "no designated issues" format. In this type of rulemaking, the Commission can pose questions for public comment in the NPRM with a disclaimer such as "[t]he list of questions is not intended to be a list of 'disputed issues of material fact that are necessary to resolve.'"[191] Such questions create no right to cross-examination.

Second, anyone wishing to qualify for rebuttal or cross-examination must persuade the Commission or presiding officer that the particular rebuttal or cross-examination is "*required* for the resolution of a designated issue."[192] Moreover, full cross-examination is only permitted if the interested person can demonstrate that a "full and true disclosure with respect to the issue can *only* be achieved through cross-examination" rather than written rebuttals or additional oral presentations.[193] These are exacting standards.

Third, the presiding officer can organize participants granted cross-examination rights into groups with the "same or similar interests," with each group entitled to a single representative who can conduct cross-examination.[194] The group members may either select this representative or have one selected for them by the presiding officer.[195] The presiding officer may also elect to conduct cross-examination on behalf of those who were granted cross-examination rights, working off of questions submitted by those individuals. The statute explicitly lists this last approach as an example of a power that may be invoked "to avoid unnecessary costs or delay."[196]

Fears about judicial review of the informal hearings stage of section 18 rulemaking are likely overblown. A unique judicial review provision allows a reviewing court to vacate a rule based upon decisions regarding cross-examination or rebuttal, but several factors make the bite of this provision less than it first appears. Courts have soundly rejected attempts at interlocutory chal-

[189] Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers III*), 627 F.2d 1151, 1163 (D.C. Cir. 1979) (quoting H.R. Rep. No. 93-1606, at 33 (1974) (Conf. Report)).

[190] *Id.* at 1164.

[191] 50 Fed. Reg. 43,224, 43,226 (Oct. 24, 1985).

[192] 16 C.F.R. § 1.12(b)(3) (2021) (emphasis added).

[193] *Id.*

[194] 15 U.S.C. § 57a(c)(4)(A).

[195] *See id.*; 16 C.F.R. §§ 1.12(d), 1.13(a)(3) (2021). An individual who dissents from the choice of group representative may conduct cross-examination individually only if he can "satisf[y] the Commission that he has made a reasonable and good faith effort to reach agreement" with the other group members and the "the Commission determines that there are substantial and relevant issues which are not adequately presented by the group representative." 15 U.S.C. § 57a(c)(4)(B).

[196] *Id.* § 57a(c)(3)(B).

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lenges to these sorts of decisions.[197] Even for timely challenges, the standard of review is favorable to the agency. Only "preclud[ing] disclosure of disputed material facts which was *necessary* for fair determination by the Commission of the rulemaking proceeding *taken as a whole*" will jeopardize a rule.[198] The presiding officer was historically empowered to set limits on the length of presentations or even the number of witnesses when many "seek to present essentially repetitious comments, views, or arguments."[199] The Fourth Circuit upheld numerous assertive exercises of discretion by the presiding officer in the Funeral Rule proceeding against challenge in *Harry & Bryant*.[200] Section 18 also immunizes these decisions against standard APA challenges that assert a rule is arbitrary, capricious, or made without observance of procedure required by law.[201]

On the whole, there is little reason to believe that the informal hearings stage of a section 18 rulemaking must add substantially to the length of that rulemaking. Recently instituted rules now limit informal hearings to no more than five hearing days, to take place within a thirty-day period.[202] Moreover, technological developments since the 1980s have lessened the significance of adding oral presentations to the record. A historical complaint about informal hearings was that they produced a lengthy record to analyze.[203] Yet, digital submissions have allowed comment dockets for APA notice-and-comment rulemaking to swell into the millions of public comments,[204] a surge in scale that would not transfer to in-person proceedings. In fact, a digitized record with searchable text would make analysis of the rulemaking record more straightforward than it was in the 1970s and 1980s.

4. *Agency Analysis & Promulgation*

In APA notice-and-comment rulemaking, an agency must consider material comments submitted by the public and weigh whether to finalize the proposed rule as-is, revise it, or end the proceeding. Courts police the thoroughness of the agency's consideration by reviewing the "concise general

[197] *See* Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers I*), 565 F.2d 237, 239 (2d Cir. 1977) (finding presiding officer determinations to be procedural and not final agency actions); Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers II*), 617 F.2d 611, 620–21 (D.C. Cir. 1979) (dismissing attacks on procedural adequacy of trade regulation rulemaking based on lack of ripeness).

[198] 15 U.S.C. § 57a(e)(3)(B) (emphasis added).

[199] Fed. Trade Comm'n, FTC Operating Manual § 7.3.19.3.3.1 (1991).

[200] Harry & Bryant Co. v. FTC, 726 F.2d 993, 997–99 (4th Cir. 1984).

[201] *See* 15 U.S.C. § 57a(e)(5)(C).

[202] *See* 16 C.F.R. § 1.13(a)(2)(ii) (2021). The *FTC Operating Manual* from when trade regulation rulemaking was common suggested holding no more than three informal oral hearings over a maximum of five weeks. Fed. Trade Comm'n, *supra* note 199. Even this may be more than the literal text of the statute requires: "an informal hearing," singular. 15 U.S.C. § 57a(b)(1)(C).

[203] *See 1980 ABA Report*, *supra* note 178, at 376.

[204] *See* Michael A. Livermore, Vladimir Eidelman & Brian Grom, *Computationally Assisted Regulatory Participation*, 93 Notre Dame L. Rev. 977, 988 (2018).

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statement" of basis and purpose that accompanies a Final Rule—these are misleadingly named, as they frequently run in the hundreds of pages.[205] Failure to consider and respond to material public comments can lead to a rule being set aside as arbitrary or capricious.[206] Meaningful revisions to the rule can also require an additional written comment period in order to abide by the logical outgrowth doctrine.[207]

Section 18 adds only a few steps after the close of public input. The statute requires the public release of a written transcript of any oral hearings and a "recommended decision" of the presiding officer regarding the "relevant and material evidence" illuminated by the rulemaking proceeding.[208] Then, the Commission may issue a Final Rule "based on the matter in the rulemaking record" along with a statement of basis and purpose[209] and Final Regulatory Analysis.[210] That statement of basis and purpose must include statements as to the prevalence of the acts or practices restricted by the rule, how that conduct is unfair or deceptive, and the economic effects of the rule.[211] Similar to the prevalence requirement and Preliminary Regulatory Analysis at the NPRM stage, the contents of the statement of basis and purpose and Final Regulatory Analysis are exempt from judicial review.[212] Furthermore, even if those requirements did not exist at all, the agency would still need to demonstrate that the acts or practices regulated by a rule are unfair or deceptive to show them to be within the agency's regulatory authority. Rigorous empirical analysis might also be required by the general demands of many reviewing courts[213] and government-wide mandates such as the Regulatory Flexibility Act and Small Business Regulatory Enforcement Fairness Act.[214]

Until recently, internally set agency rules added substantially to what the statute requires. Those rules had provided for the public release of a formal staff report summarizing the rulemaking record before the presiding officer's recommend decision was released,[215] required at least sixty days of a

[205] *See, e.g.*, 77 Fed. Reg. 30,923 (May 24, 2012) (454 pages).

[206] *See* 5 U.S.C. § 706(2)(A); United States v. Nova Scotia Food Prods. Corp., 568 F.2d 240, 252 (2d Cir. 1977).

[207] *See, e.g.*, Chocolate Mfrs. Ass'n of U.S. v. Block, 755 F.2d 1098, 1105 (4th Cir. 1985).

[208] *See* 15 U.S.C. § 57a(c)(1)(B), (5).

[209] *See id.* § 57a(b)(1)(D).

[210] *See id.* § 57b-3(b)(2).

[211] *See id.* § 57a(d)(1).

[212] *See id.* §§ 57a(e)(5)(C), 57b-3(c)(1); S. Rep. No. 93-1408 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7755, 7764 (stating that, while a statement of basis and purpose must exist, "its contents are not to be subject to court review on any basis at any time"). *But see* Pa. Funeral Dirs. Ass'n v. FTC, 41 F.3d 81, 86–89 (3d Cir. 1994); Am. Optometric Ass'n v. FTC, 626 F.2d 896, 906 (D.C. Cir. 1980) (finding the exemption of the statement of basis and purpose to contradict other judicial review provisions in section 18 and resolving to "consult[ ] the statement of basis and purpose where the statement is helpful in understanding the Commission's reasoning, but, nevertheless, be[ ] careful not to impose upon the statement the unreasonable demands about which Congress was concerned").

[213] *See, e.g.*, Bus. Roundtable v. SEC, 647 F.3d 1144 1150–51 (D.C. Cir. 2011).

[214] *See* 5 U.S.C. §§ 601–612.

[215] 16 C.F.R. § 1.13(f) (2020). The statute indirectly encourages the agency to make some staff analysis public. Section 18(j) prohibits ex parte communication regarding facts not on the

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post-record comment period on this staff report and the presiding officer's recommended decision,[216] and gave the Commission the option to hear again from a person who previously participated in the proceeding.[217] In total, the agency provided eight distinct opportunities for public input—only four of which were required by the statute.[218] After reducing the large number of agency-imposed procedural steps in July 2021, this stage of a section 18 rulemaking no longer must take substantially longer than APA notice-and-comment procedures. Now, the only time-additive requirements will be the presiding officer's report—which the revised rules mandate must issue within sixty days of the close of informal hearings[219]—and the non-justiciable Final Regulatory Analysis.

Taken as a whole, the preceding comparison of section 18's requirements with the underlying procedures of the APA is strikingly incongruous with the conventional understanding of FTC rulemaking. The text of the statute provides little support for assertions that the variations section 18 adds around the edges of the APA notice-and-comment rulemaking process make the process exceedingly onerous. Turning next to section 18's record in court, we will see that judicial construction of the statute does little more to justify the conventional story—rather, it shows that the primary hurdles confronting an FTC rule are the same ones faced by any agency's administrative rulemaking.

B. *Lessons from Case Law*

Proponents of FTC rulemaking should be heartened by the relevant case law. After a few setbacks in 1979 and 1980, courts have largely upheld FTC rules against challenges under the judicial review provisions of section 18 and the APA. While the Commission's later aversion to section 18 rulemaking has left this case law somewhat dated, the agency's track record during the 1980s suggests that appropriately crafted rules do not face a materially greater legal risk than those promulgated using APA notice-and-comment procedures.

Judicial review for section 18 rules is quite standard in one respect: A court can review nearly all aspects of the rule on the familiar bases of 5

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rulemaking between any Commission employee with "responsibility relating to any rulemaking proceeding" and any Commissioner or their staff. 15 U.S.C. § 57a(j).

It is not evident why making staff analysis public ought to cause such work to take substantially longer to complete. Yet, in the promulgation of the agency's most recent section 18 rule, sixteen months passed between the close of public input and publication of the staff report. *See* 75 Fed. Reg. 68,559, 68,559 (Nov. 8, 2010); 74 Fed. Reg. 29,149, 29,150 (June 19, 2009).

[216] 16 C.F.R. § 1.13(h) (2020).

[217] *See id.* § 1.13(h)–(i) (2020).

[218] The ANPRM comment period, NPRM comment period, oral presentations, and rebuttals and cross-examination are required by statute. The post-comment-period solicitation of proposals for designated disputed issues of material fact, petition period, post-record comment, and discretionary option to permit oral appeals to the Commission were not. *See* 16 C.F.R. §§ 1.11(a)(4), 1.13(b), (h)–(i) (2020).

[219] *See* Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,549 (July 22, 2021).

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U.S.C. § 706(2), with the exception of decisions regarding cross-examination or rebuttal.[220] Would-be litigants have sixty days after a section 18 rule is promulgated to file a petition in a federal circuit court challenging the rule.

However, there are also a few less traditional aspects to the process. One is that petitioners can "appl[y] to the court for leave to make additional oral presentations or written submissions."[221] If the petitioner can persuade the court that the information would be material and there were reasonable grounds not to have made the submission earlier, the court can remand back to the Commission to accept that submission. This provision does not appear to have been litigated. Another is the requirement that the agency's action be "supported by substantial evidence in the rulemaking record . . . taken as a whole."[222] A final sub-section allows attack on Commission decisions denying cross-examination or rebuttal rights or limiting their exercise, although it imposes a daunting standard of review—and such decisions are immune to challenge under the APA or any other provision of law.[223]

Numerous parts of the proceeding are not subject to any judicial review whatsoever. Some are explicitly immunized from judicial review by the text of the statute, including the Preliminary and Final Regulatory Analyses, and the Final Rule's statement of basis and purpose, which includes the statement as to the prevalence of the conduct governed by the rule.[224] Other requirements feature legislative history evincing an intent that they not be judicially enforceable, including the mandate that the Commission have "reason to believe" the actions to be restricted by a proposed rule are prevalent before issuing an NPRM.[225] Returning to the aspects of section 18 rulemaking subject to judicial scrutiny, case law provides valuable insight into how courts might analyze future FTC rules.

Substantial-Evidence & Arbitrary-or-Capricious Review—The D.C. Circuit has held the standard for finding that the FTC's actions were not supported by substantial evidence in the record to be effectively identical to the arbitrary-or-capricious standard applicable to all APA rulemaking. The arbitrary-or-capricious standard at its essence assesses whether agency action was the "product of reasoned decisionmaking."[226] The D.C. Circuit wrote that the section 18 substantial-evidence standard requires "the same degree of evidentiary support needed to satisfy the arbitrary and capricious standard," thereby reversing the court's earlier "flirt[ation]" with a heightened standard.[227] The FTC has had numerous rules upheld under these substantial-evidence and arbitrary-or-capricious standards. These include the

[220] *See* 15 U.S.C. § 57a(e)(3) (invoking 5 U.S.C. § 706(2)(A)–(D)).
[221] *Id.* § 57a(e)(2).
[222] *Id.* § 57a(e)(3)(A).
[223] *Id.* § 57a(e)(3)(B), (5)(C).
[224] *Id.* §§ 57a(e)(5)(C), 57b-3(c)(1).
[225] S. Rep. No. 103-130, at 10 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 1776 ("The 'reason to believe' standard is intended to bar any judicial review.").
[226] Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 52 (1983).
[227] Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417, 422 (D.C. Cir. 1986).

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agency's Funeral Rule,[228] Credit Practices Rule,[229] and portions of its Eyeglass Rule.[230] A future court making a substantial-evidence determination would likely adopt the Supreme Court's directed-verdict standard articulated in *Allentown Mack*,[231] although its application "is essentially the same as review under the arbitrary and capricious standard."[232]

The agency's biggest concerns would come from recent decisions applying the APA, not section 18. For example, the D.C. Circuit held that numerous authorities show "no basis" in section 18 to require the agency to conduct a "rigorous, quantitative" cost-benefit analysis to satisfy the substantial-evidence standard.[233] It is instead contemporary APA arbitrary-or-capricious review cases, such as *Business Roundtable v. SEC*,[234] that have sometimes demanded such quantified analysis. This imposition would apply equally to rules issued pursuant to section 18 or to APA notice-and-comment procedures.

Section 18's standards still have some bite, however. The Second Circuit in *Katharine Gibbs* invalidated an agency rule after finding no rational connection between specific examples of unfair or deceptive enrollment practices of vocational schools in the rulemaking record and the challenged rule's provisions making it easier for all students to obtain tuition refunds.[235] Shifts in the legal landscape can also undermine the Commission on substantial-evidence grounds—the D.C. Circuit remanded the Eyeglass Rule after holding that a Supreme Court decision issued during the rulemaking process had changed the "core" circumstances to which the rule responded.[236]

Presiding Officer Discretion—Courts have broadly upheld presiding officers' decisions to streamline the section 18 rulemaking process, confirming the capacious discretion suggested by statutory text. The Fourth Circuit in *Harry & Bryant v. FTC* affirmed that presiding officers can not only set time limits on individual presentations but also may limit the number of individuals permitted to present at all—even if this limitation affects unequal numbers of pro-rule and anti-rule witnesses.[237] The court stated, "Section 18 does not guarantee every person a right to testify . . . [and] the right to testify is expressly subordinated to the Commission's authority under Section 18(c)(3) to make rulings for the purpose of avoiding unnecessary costs or delay."[238]

The same case also supports the broad application of presiding officer discretion regarding cross-examination. For example, the court upheld the

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[228] Pa. Funeral Dirs. Ass'n v. FTC, 41 F.3d 81, 92 (3d Cir. 1994); Harry & Bryant Co. v. FTC, 726 F.2d 993, 999 (4th Cir. 1984).
[229] Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 986–88 (D.C. Cir. 1985).
[230] Am. Optometric Ass'n v. FTC, 626 F.2d 896, 915 (D.C. Cir. 1980).
[231] Allentown Mack Sales & Serv., Inc. v. NLRB, 522 U.S. 359, 366 (1998).
[232] Thomas J. Miles & Cass R. Sunstein, *The Real World of Arbitrariness Review*, 75 U. Chi. L. Rev. 761, 764 & nn.25–26 (2008).
[233] *Am. Fin. Servs. Ass'n*, 767 F.2d at 986.
[234] Bus. Roundtable v. SEC, 647 F.3d 1144, 1155–56 (D.C. Cir. 2011).
[235] Katharine Gibbs Sch. (Inc.) v. FTC, 612 F.2d 658, 664 (2d Cir. 1979).
[236] Am. Optometric Ass'n v. FTC, 626 F.2d 896, 907, 909–11 (D.C. Cir. 1980).
[237] *See* Harry & Bryant Co. v. FTC, 726 F.2d 993, 997 (4th Cir. 1984).
[238] *Id.*

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presiding officer's choice to personally conduct the cross-examination of one class of participants (consumers) while permitting other classes of participants to be cross-examined in a more traditional fashion.[239] In the twelve reported cases challenging section 18 trade regulation rules, it does not appear that *any* procedural determination by a presiding officer or the Commission regarding the oral hearings has ever failed judicial review.[240] Recall as well that these determinations are not subject to review under the APA's "observance of procedure required by law" requirement, making other precedents inapt.[241]

Specificity of the Regulation—An aspect of section 18 that caused trouble in early rulemakings is the requirement to "define with specificity" the unfair or deceptive acts or practices that a rule serves to prevent. The agency misstepped in its Vocational Schools Rule by merely stating that violations of its rules requiring improved tuition refund policies and disclosure of job-placement rates would be considered unfair, rather that identifying the unfair industry practices to which its rulemaking responded.[242] The agency's success satisfying this requirement in several other rulemakings[243]—and the judicial skepticism that the *Katharine Gibbs* court's interpretation received[244]—suggest that the agency has a viable path to meeting this requirement.

Ripeness—Section 18 proceedings are generally secure against any sort of challenge outside of the sixty days following promulgation. Courts have rejected attempted interlocutory challenges to Commission actions as unripe when coming before this sixty-day window.[245] Attacks coming after these sixty days are also foreclosed.[246]

Other Issues—A variety of other, smaller questions have come before courts in challenges to section 18 rules. Among them, the D.C. Circuit handled allegations on two different occasions that chairmen participating in rulemaking were impermissibly biased. The court announced a demanding standard: Commissioners may be disqualified only if a litigant can make a clear and convincing showing that the Commissioner has "an unalterably closed mind."[247] Unsurprisingly, this standard was met in neither case.[248]

[239] *See id.* at 997; *accord* Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers I*), 565 F.2d 237, 240 (2d Cir. 1977).

[240] Note, though, that the D.C. Circuit expressed "serious doubts about the validity" of the Commission's "experiment[al]" procedures announced under 16 C.F.R. § 1.20 for the Children's Advertising Rule, albeit in dicta in an opinion settled by questions of ripeness. Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers II*), 617 F.2d 611, 620–21 (D.C. Cir. 1979).

[241] *See* 5 U.S.C. § 706(2)(D).

[242] Katharine Gibbs Sch. (Inc.) v. FTC, 612 F.2d 658, 664 (2d Cir. 1979).

[243] Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 984 (D.C. Cir. 1985); *Harry & Bryant Co.*, 726 F.2d at 999.

[244] *Am. Fin. Servs. Ass'n*, 767 F.2d at 984 & n.30.

[245] *See* Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers I*), 565 F.2d 237, 239 (2d Cir. 1977) (finding presiding officer determinations not to be final agency actions); *Nat'l Advertisers II*, 617 F.2d at 620–21 (dismissing attacks on procedural adequacy of trade regulation rulemaking as unripe).

[246] Mono-Therm Indus. v. FTC, 653 F.2d 1373, 1378 (10th Cir. 1981).

[247] Ass'n of Nat'l Advertisers, Inc. v. FTC (*National Advertisers III*), 627 F.2d 1151, 1170 (D.C. Cir. 1979).

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Courts also limited the effect of FTC rules on state law, resisting field pre-emption of state regulation[249] and restrictions on states' ability to legislate on a subject.[250] Narrower pre-emption of state regulations survived challenge in 1985 when it provided a regulatory floor above which states could add their own requirements,[251] aligning with the trend in American law toward conflict pre-emption.[252]

A few other issues' treatment in judicial review is still undetermined. One is prevalence. The non-justiciability of the discussion of prevalence in a Final Rule's statement of basis and purpose earned judicial validation in a challenge to the FTC Funeral Rule.[253] However, the challenged rulemaking had concluded before the 1994 enactment of a second prevalence requirement, that the agency have "reason to believe" acts or practices are prevalent before issuing an NPRM.[254] Despite the clear legislative intent to exclude this determination from judicial review,[255] no new section 18 rules have faced challenge after 1994.[256] Thus, it is possible that a circuit court panel averse to legislative history could demand more, as the 1994 prevalence requirement lacks explicit *statutory* exemption from judicial review.

Another untested area is the boundary between a "rule with respect to unfair or deceptive acts or practices," which must use section 18 procedures, and a rule "with respect to unfair methods of competition," which could be conducted using APA notice-and-comment procedures under the FTC's section 6(g) authority.[257] Many issues, such as data privacy, arguably implicate both consumer protection and competition concerns. The potential cost could be extreme if a court reviewing a Final Rule held that the Commission had wrongly declined to satisfy section 18's requirements. Such a ruling could effectively require a redo of the entire proceeding if the agency had never completed pre-proposal steps such as issuing an ANPRM or notifying the relevant congressional committees.

[248] Consumers Union of U.S., Inc. v. FTC, 801 F.2d 417, 427 (D.C. Cir. 1986); *Nat'l Advertisers III*, 627 F.2d at 1154.

[249] *See* Am. Optometric Ass'n v. FTC, 626 F.2d 896, 910 (D.C. Cir. 1980); Katharine Gibbs Sch. (Inc.) v. FTC, 612 F.2d 658, 664, 666–67 (2d Cir. 1979).

[250] *See* Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 981 (D.C. Cir. 1990).

[251] Am. Fin. Servs. Ass'n v. FTC, 767 F.2d 957, 991 (D.C. Cir. 1985).

[252] *See, e.g.*, O'Melveny & Myers v. FDIC, 512 U.S. 79, 85 (1994).

[253] *See* Pa. Funeral Dirs. Ass'n v. FTC, 41 F.3d 81, 86–89 (3d Cir. 1994).

[254] Pub L. No. 103-312, § 15(b), 108 Stat. 1691, 1698 (1994).

[255] *See* S. Rep. No. 103-130, at 10 (1993), *as reprinted in* 1994 U.S.C.C.A.N. 1776 ("The 'reason to believe' standard is intended to bar any judicial review.").

[256] The only new section 18 rule commenced after this requirement came into force was not challenged. *See* 16 C.F.R. pt. 437 (2021).

[257] 15 U.S.C. § 57a(a)(2). This issue arose after the FTC purported to switch from conducting a proceeding under both sections 6(g) and 18 to relying on section 6(g) alone after legislation barred the agency from issuing rules relating to product certifications and standards under section 18. *See* Am. Nat'l Standards Inst., Inc. v. FTC, No. 79-CV-1275, 1982 WL 20106, at *1 (D.D.C. Feb. 4, 1982). The court found it lacked jurisdiction due to final action doctrine and the inapplicability of interlocutory review. *Id.* at *3, *6. The rule was abandoned before promulgation, leaving the line between sections 6(g) and 18 unclear.

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C. Responses to Section 18 Skepticism

In contemporary conversation about the Commission's powers, a bevy of adjectives often stops consideration of section 18 rulemaking before it starts. Take, for instance, the debate about possible revisions to FTC authorities following the 2008 financial crisis. The full Commission described section 18's "Magnuson-Moss" procedures as "onerous" and "burdensome" processes,[258] which the Chairman believed leave the agency "hamstrung" in the face of rapidly evolving misconduct in the economy.[259] Perhaps the language employed in this advocacy was strategically overstated to some degree, in an unavailing attempt to persuade Congress to replace section 18 with standard APA notice-and-comment rulemaking authority.[260] But still, outside observers have called section 18 procedures "too slow to be of much use"[261] and "unworkable."[262] This understanding could hardly be more different from that shown in the 1970s and early 1980s when the popular press wrote that the bill had "sen[t] new waves of energy through the commission, dramatically increasing its power."[263]

Once one moves beyond mere rhetoric, three arguments against the use of section 18 rulemaking emerge. Two are from those who would favor greater FTC regulation but are under the impression that it would not be practicable under the so-called Magnuson-Moss procedures. The third comes from those who are skeptical of FTC rulemaking in principle, fearful of a supposed roving bureaucracy.

The first form of section 18 skepticism can be labeled "the argument from inaccurate history." Conventional wisdom in Washington has consolidated around a narrative that Congress, reacting to an agency it perceived as out of control, enacted the Magnuson-Moss Act in an effort to constrain the

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[258] *Consumer Credit and Debt: The Role of the Federal Trade Commission in Protecting the Public: Hearing Before the Subcomm. on Com., Trade & Consumer Prot. of the H. Comm. on Energy & Com.*, 111th Cong. 21, 23 n.56 (2009) (statement of the Fed. Trade Comm'n.).

[259] *Id.* (response of Jonathan Liebowitz, Chairman, Fed. Trade Comm'n, to the question of Rep. Bobby Rush, Chairman, Subcomm. on Com., Trade & Consumer Prot. of the H. Comm. on Energy & Com.).

[260] *See, e.g.*, *Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the S. Comm. on Com., Sci. & Transp.*, 111th Cong. 3 (2010), https://www.commerce.senate.gov/public/_cache/files/1481149b-1f5d-4f17-92f3-a06396fdedcd/406BAF26B63F093A9DBC85CC43C45834.pridgen-testimony.pdf [https://perma.cc/FTT5-QD64] (statement of Prof. Dee Pridgen, Univ. of Wyo. Coll. of Law); Jeffrey S. Lubbers, *It's Time to Remove the "Mossified" Procedures for FTC Rulemaking*, 83 GEO. WASH. L. REV. 1979, 1979 (2015). Standard APA notice-and-comment rulemaking has also come under criticism for becoming "ossified." *See* Thomas O. McGarity, *Some Thoughts on "Deossifying" the Rulemaking Process*, 41 DUKE L.J. 1385, 1386 (1992).

[261] DEE PRIDGEN & RICHARD M. ALDERMAN, CONSUMER PROTECTION AND THE LAW § 12:14 (2021).

[262] Mike Swift, *FTC's 'Mag-Moss' Rulemaking Authority Could Break Logjam on US Privacy Legislation*, MLEX (Mar. 8, 2021, 12:00 AM), https://mlexmarketinsight.com/news-hub/editors-picks/area-of-expertise/data-privacy-and-security/ftcs-mag-moss-rulemaking-authority-could-break-logjam-on-us-privacy-legislation [https://perma.cc/CDT7-HQNX].

[263] Sulzberger, *supra* note 66.

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agency in a procedural straitjacket. Few batted an eye when a representative of a prominent trade organization included in her written congressional testimony a chronology in which the Commission launched the "Kidvid" rulemaking to restrict television advertising to children, this effort garnered massive pushback, and "[a]s a result, Congress took steps to curb such FTC overreaching by enacting the Magnuson-Moss Act."[264] Magnuson-Moss, of course, was enacted in January 1975, more than twenty-seven months before the Kidvid proceeding began.[265] This is no isolated error. Worryingly, the Obama-era Director of the Bureau of Consumer Protection—who would largely have determined whether the agency engaged in section 18 rulemaking—seems to share this misconception, recently writing that "[t]hese hurdles were imposed by Congress precisely because Congress was concerned about regulatory overreach in the 1970s."[266] Advocates and scholars have referred to Congress's "Magnuson-Moss shackles"[267] or the "Mag-Moss albatross,"[268] connoting either punishment or penance. Even one of the most-cited scholarly considerations of section 18 in the past decade writes of an agency that had been "saddled" with these procedural requirements.[269]

The history does not match this narrative. As detailed above, the 1975 Magnuson-Moss Act was architected by the very members of Congress and staffers who had spent nearly a decade prodding the agency to take a *more* active role on rulemaking. The mainstream press, too, framed the Act as having "liberalized the commission's rulemaking authority"[270] and "dramatically increasing its power."[271] Industry-led pushback to the agency's rulemaking, such as the "Stop the FTC" campaign, only began to change the approach of many in Congress several years later. Charitably, adherents to the conventional wisdom may invoke "Magnuson-Moss" as a shorthand for all of the FTC's rulemaking procedures, including those from the Magnuson-Moss Act and from later legislation. But this does no better to

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[264] *Financial Services and Products: The Role of the FTC in Protecting Consumers, Part II: Hearing Before the Subcomm. on Consumer Prot., Prod. Safety & Ins. of the S. Comm. on Com., Sci. & Transp.*, 111th Cong. 7 (2010), https://www.commerce.senate.gov/services/files/A8A7E41C-C291-44B9-ACAC-380EACAEBE5E [https://perma.cc/KNS5-GNAA] (statement of Linda A. Woolley, Exec. Vice President, Direct Marketing Ass'n).

[265] The Kidvid rulemaking began in April 1978 in response to a 1977 petition for rulemaking. *See* 43 Fed. Reg. 17,967, 17,968 (Apr. 27, 1978).

[266] Jessica Rich, Laura Riposo VanDruff, Alysa Z. Hutnik & William C. MacLeod, *FTC Chair Khan's Vision for Privacy—and Some Dissents*, AD L. ACCESS (Oct. 3, 2021), https://www.adlawaccess.com/2021/10/articles/ftc-chair-khans-vision-for-privacy-competition-and-big-tech-and-some-dissents/ [https://perma.cc/8ECZ-2Y2K].

[267] Randy Milch & Sam Bieler, *A New Decade and New Cybersecurity Orders at the FTC*, LAWFARE (Jan. 29, 2020, 8:00 AM), https://www.lawfareblog.com/new-decade-and-new-cybersecurity-orders-ftc [https://perma.cc/QSJ2-J7RX].

[268] *Improving Consumer Protections in Subprime Home Lending: Hearing Before the Subcomm. on Interstate Com., Trade & Tourism of the S. Comm. on Com., Sci. & Transp.*, 110th Cong. 8 (2008), https://www.commerce.senate.gov/services/files/02286A86-532A-4F2D-A4BE-A0B461DCECBE [https://perma.cc/M3QG-4J9Y] (statement of Kathleen E. Keest, Senior Policy Counsel, Center for Responsible Lending).

[269] Lubbers, *supra* note 260, at 1980.

[270] Potts & Isikoff, *supra* note 68.

[271] Sulzberger, *supra* note 66.

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align history and narrative. The 1980 Act, passed at the apex of backlash to the Commission, contained procedural requirements that were temporary, relatively trivial, or held unconstitutional.[272] Former FTC Chairman Miles Kirkpatrick expressed surprise afterward that, despite threats from Congress, "now that the legislation has been finally approved and the dust has settled, most people seem to agree that no real damage has been done . . . [and] no fundamental changes have been imposed by the 1980 amendments."[273] It was the 1975 legislation—designed by proponents of greater FTC rulemaking—that added the informal hearings and limited cross-examination that are most associated with section 18.

This brings up a second thread of pessimism, which can be called "the argument from misjudged empirics." Its adherents could concede the first point. Perhaps Congress did not *intend* to compromise the FTC's ability to issue rules, they say, but its well-meaning efforts to promote greater public participation in rulemaking were a failure. Whatever the intention, the end result was a set of impracticable and onerous statutory requirements.

This group of pessimists point to the observed length of rulemakings under section 18 procedures. Professor Jeffrey Lubbers conducted the most prominent version of this analysis, comparing the duration of FTC rulemakings that were or were not conducted under section 18.[274] In addition to typifying the conventional skepticism of section 18, this piece plays a central role in advocacy against the use of the FTC's discretionary rulemaking power. Voices from law firms and trade groups representing companies likely to be subject to new FTC rules point to the article as evidence of the "slow and cumbersome nature" of section 18 procedures.[275] Numerous scholars also cite the piece as support for the proposition that section 18 rulemaking is impractical, with one going so far as to write that the article demonstrates that section 18 "has been shown to lengthen the rulemaking process by more than five times."[276] This is not so. Given the prominence of Professor Lubbers's piece in the debate, a rebuttal is necessary.

Professor Lubbers's article shows a set of correlations. Rules completed after the passage of Magnuson-Moss took an average of 5.57 years, while rules completed beforehand averaged 2.94 years.[277] Rule amendments conducted under section 18 took an average of 5.26 years, whereas recent rules issued under APA notice-and-comment authority averaged only 287 days.[278]

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[272] *See supra*, Part II.B.

[273] *Debate*, *supra* note 83, at 1481–82.

[274] Lubbers, *supra* note 260, at 1982.

[275] Andrew Smith & Christina Higgins, *Prospects for FTC Privacy Rules*, PRIV. L. & BUS., Aug. 2021, at 15, 15, https://www.cov.com/-/media/files/corporate/publications/2021/08/prospects-for-ftc-privacy-rules.pdf [https://perma.cc/B6F4-C4D7]; *see also* MAUREEN K. OHLHAUSEN & JAMES RILL, U.S. CHAMBER OF COM., PUSHING THE LIMITS?: A PRIMER ON FTC COMPETITION RULEMAKING (2021), https://www.uschamber.com/assets/archived/images/ftc_rulemaking_white_paper_aug12.pdf [https://perma.cc/AU26-U7UH].

[276] Ganesh Sitaraman, *The Political Economy of the Removal Power*, 134 HARV. L. REV. 352, 368 (2020).

[277] Lubbers, *supra* note 260, at 1997.

[278] *Id.* at 1997–98.

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Ipso facto, many readers think, something about Magnuson-Moss must substantially slow down rulemaking. But what the Lubbers piece does not demonstrate is causation. By failing to engage with four critical points, the article produces a misleading picture.

First, the comparisons elide political context. While Lubbers acknowledges in introduction that "the agency became less activist due to congressional pressure" during the late 1970s,[279] the piece does not consider whether fervent pushback from business, media, and Congress—including budget gamesmanship and briefly shutting down the FTC—might be responsible for any portion of the observed difference in rulemaking length after the late 1970s. Nor is it noted that the three rules initiated under Magnuson-Moss procedures and finalized before President Reagan entered office took an average of 2.84 years—slightly *quicker* than their APA notice-and-comment predecessors—while the three finalized in the 1980s after Reagan installed an ideological foe of rulemaking as FTC Chairman took an average of 8.28 years.[280]

Second, the article does not consider fundamental differences between rules promulgated according to a specific legislative grant of authority and those issued under discretionary rulemaking power. Indeed, the 287-day average of the APA notice-and-comment rules analyzed should raise an eyebrow; the Government Accountability Office has found significant rules to take an average of four years across agencies.[281] When Congress passes legislation mandating that the FTC promulgate a particular rule, the investigative steps to determine whether that policy is prudent have effectively been outsourced to the legislature. Additionally, many of the twelve FTC regulations issued pursuant to specific acts of Congress are simple "implementing rules" that require little more than a transcription of statutory text into regulation.[282] A discretionary rule based on a general rulemaking power is necessarily more involved, regardless of procedural requirements. Furthermore, numerous of these congressional grants included statutory deadlines by which to promulgate rules.[283] As a matter of agency prioritization, it is hard to imagine the wisdom in delaying a task ordered by the body that controls the FTC's budget.

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[279] *Id.* at 1981 (emphasis omitted).

[280] *Id.* at 1987–88 & nn.63, 65. Commissioner Pertschuk recounted that the rules completed during this period faced withering opposition from the FTC Chair and Director of the Bureau of Consumer Protection and demands to repeat prior steps of the process—which seem to have added substantially to the length of rulemakings. *See* Michael Pertschuk, Fed. Trade Comm'n, FTC Review (1977–84), at 153–61 (1984).

[281] *See* Gov't Accountability Office, GAO-09-205, Federal Rulemaking: Improvements Needed to Monitoring and Evaluation of Rules Development as Well as to the Transparency of OMB Regulatory Reviews 19 (2009).

[282] The Contact Lens Rule provides an example of such near-verbatim transcription. *Compare, e.g.*, 15 U.S.C. § 7601(a)(1)–(2), *with* 16 C.F.R. § 315.3(a)(1)–(2) (2021). The Health Breach Notification Rule provides another. *Compare, e.g.*, 42 U.S.C. § 17937(a)–(b), *with* 16 C.F.R. § 318.3(a)–(b) (2021).

[283] *See, e.g.*, 15 U.S.C. § 7607 (setting a 180-day deadline to promulgate the Contact Lens Rule).

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Third, the article does not attempt to disentangle the time required by statutorily mandated procedural steps from delays produced by self-imposed agency rules. As just one example, the "Mail or Telephone Order Merchandise Amendment I" proceeding saw more than twelve months pass between two interested parties requesting the opportunity to give post-record oral presentations to the Commission and those presentations taking place—more than one-quarter of the 3.81 year proceeding.[284] This procedural step was required not by statute, but by an agency rule that was revoked in 2021. It is difficult to consider internally set agency rules to be statutory shackles. The piece's discussion of the seven-year-long Funeral Rule proceeding similarly fails to note that (1) a judicial setback for the Vocational Schools Rule in *Katharine Gibbs* forced the agency to fundamentally rework the similarly structured Funeral Rule,[285] (2) congressional gamesmanship regarding funding for the rule compelled the agency to make further substantive revisions,[286] and (3) Congress imposed additional procedural hoops for the Funeral Rule, in particular.[287] None of those features is a standard part of a section 18 rulemaking.

Fourth, the analysis does not consider the relevance of the agency's broader move away from regulation during this era. Penalty Offense Authority fell into disuse beginning in the 1980s.[288] Similarly, competition rulemaking under section 6(g) has been unexplored since the 1970s despite operating under APA notice-and-comment procedures.[289] Several specific grants of standard APA rulemaking authority for consumer protection issues have sat unused for as long as a quarter-century.[290] These parallel moves away from regulation cannot be explained by the Magnuson-Moss Act or the 1980 Act. They underscore, instead, that the FTC's reticence to regulate during the decades studied came irrespective of the applicability of section 18. The imprints of a scarring blowback to energetic rulemaking and an ideological takeover by deregulatory leadership seem necessary to an accurate causal story of the retreat from section 18 rulemaking.

A final argument against engaging in section 18 rulemaking is what might be called "the argument from institutional role." It comes from those at the other end of the ideological spectrum, who would prefer limited levels of administrative rulemaking by the FTC. As former FTC Chair William Kovacic observed, "no regulatory agency in the United States matches the breadth and economic reach of the Commission's mandates."[291] Some worry that the agency lacks the expertise to issue prescriptive rules whose reach

[284] Lubbers, *supra* note 260, at 1990.
[285] *See* 47 Fed. Reg. 42,260, 42,263 (Sept. 24, 1982).
[286] Federal Trade Commission Improvements Act of 1980, Pub. L. No. 96-252, § 19(b), (c)(1), 94 Stat. 374, 392 (1980).
[287] *Id.* § 19(b), (c)(2)(A).
[288] *See* Chopra & Levine, *supra* note 34, at 98.
[289] *See* Chopra & Khan, *supra* note 57.
[290] *See* 15 U.S.C. § 45a. The FTC first invoked this authority twenty-six years after it was enacted. *See* Notice of Proposed Rulemaking, 85 Fed. Reg. 43,162, 43,162 (July 16, 2020).
[291] Letter, *supra* note 8, at 2.

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spans nearly the entire U.S. economy—or that a single, unelected body with such broad rulemaking authority would not be democratically accountable.

The Republican Commissioners at the agency were singing from this hymnal when they dissented from the recent administrative reforms to section 18 rulemaking. They expressed fears that these reforms presage "a sweeping campaign to replace the free market system with [the Commission's] own enlightened views of how companies should operate."[292] These types of prudential and normative concerns are raised about all manner of administrative rulemaking and go beyond the scope of this article.[293] Critically, they are also distinct from the descriptive question of whether section 18 procedures are particularly time-consuming.

IV. Administrative Reforms for Efficient Rulemaking

As just discussed, the FTC Act does not impose dramatically greater procedural requirements for section 18 rulemaking than are found in APA notice-and-comment procedures. Thus, the common impression that Congress had restrained FTC rulemaking in a straitjacket of onerous procedural requirements is unfounded as a matter of history and of statutory interpretation. Until recently, though, many of the agency's internally set Rules of Practices imposed procedural demands above those required by the FTC Act itself.

Reflecting a new moment at the FTC, one of the Commission's first acts under its new Chair, Lina Khan, was to streamline its internal procedures governing section 18 rulemaking. The Commission stripped away decades of rules that imposed red tape with little benefit. But while these reforms will be critical to making future rulemaking more efficient, the Commission should continue to consider additional reforms to ensure that its rulemaking is both timely and robust in judicial review. Certainly, in making any reform, the Commission must be sure to avoid "preclud[ing] disclosure of disputed material facts which was necessary for fair determina-

[292] Dissenting Statement of Comm'rs Christine S. Wilson and Noah Joshua Phillips Regarding the Commission Statement on the Adoption of Revised Section 18 Rulemaking Procedures 1 (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591702/p210100_wilsonphillips_joint_statement_-_rules_of_practice.pdf [https://perma.cc/G25X-74LK].

[293] The Roberts Court's 6–3 conservative majority has moved to constitutionalize similar concerns with expansive conceptions of the non-delegation doctrine and major questions doctrine. There is little principled basis to think either doctrine should pose a significant threat to FTC rulemaking. Tellingly, a prominent scholarly call to strengthen the non-delegation doctrine portrays the FTC's "unfairness" authority as an impermissible delegation—but seems entirely to overlook the fact that Congress codified a statutory test for unfairness in 1994. *See* Cary Coglianese, *Dimensions of Delegation*, 167 U. Pa. L. Rev. 1849, 1885–86 (2019).

Regarding major questions doctrine, it would take an extraordinary reading of history to believe that Congress "spoke unclearly" when it expressly codified the agency's ongoing practice of promulgating economy-wide trade regulation rules. *Cf. Nat'l Fed'n of Indep. Bus. v. Occupational Safety & Health Admin.*, 142 S. Ct. 661, 667 (2022) (Gorsuch, J., concurring).

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tion . . . of the rulemaking proceeding taken as a whole."[294] The Commission should nonetheless err on the side of making its valuable tool of consumer protection rulemaking as efficient as possible. The agency would gain nothing by being so risk-averse that it continues to allow section 18 to gather dust.

A. Recent Amendments to Agency Rules

In its first meeting under Chair Khan, the Commission made well-advised amendments to its Rules of Practice. The changes to the section 18 rulemaking process eliminated several unnecessary constraints that the Commission had imposed upon itself, over and above the requirements of the FTC Act. Selecting more appropriate presiding officers and harmonizing the agency's internal rules with the statute's less-imposing demands will lead to substantially streamlined rulemaking proceedings.

1. Reforming the Role of Presiding Officer

The Commission's most consequential rulemaking reform of July 2021 ended the requirement that the agency's Chief Administrative Law Judge ("Chief ALJ") supervise rulemaking proceedings. Prior rules had designated the Chief ALJ as Chief Presiding Officer, outsourced to him the selection of presiding officers for individual proceedings, and implied that those positions should be filled with ALJs.[295]

Presiding officers are essential to an effectively run proceeding. Participants in an informal hearing can make dilatory requests of the presiding officer that are as varied as lawyers are creative, from pushing for discovery to moving to re-open comment periods. The presiding officer's capacity to drive forward a rulemaking in a self-sufficient fashion is vital because non-public correspondence between the presiding officer and FTC Commissioners and staff regarding issues of fact is limited during the rulemaking.[296]

The earlier practice of naming ALJs as presiding officers created an inappropriate impediment to rulemaking. Given their training, ALJs are likely to apply their discretion in ways that create a more formal and trial-like rulemaking process than the one intended by Congress.[297] The vast ma-

[294] 15 U.S.C. § 57a(e)(3)(B); *see also id.* § 57a(e)(2).

[295] *See* 16 C.F.R. §§ 0.14, 1.13(c)(1) (2021). These rules sharply limited the pool of potential presiding officers—there is only one ALJ at the FTC. *Administrative Law Judges: ALJs by Agency*, U.S. Off. of Pers. Mgmt. (Mar. 2017), https://www.opm.gov/services-for-agencies/administrative-law-judges/#url=ALJs-by-Agency [https://perma.cc/EVY4-2AJJ].

[296] *See* 15 U.S.C. § 57a(c)(1)(C).

[297] Note that during the agency's era of active rulemaking, presiding officers were drawn from the Bureau of Consumer Protection staff from 1975–78 and Office of General Counsel from 1978–80, *see* Edwin S. Rockefeller, Desk Book of FTC Practice and Procedure 143 (3d ed. 1979), then the Office of Presiding Officers after the passage of the 1980 Federal Trade Commission Improvements Act, *see* 45 Fed. Reg. 36,338, 36,341 (May 29, 1980).

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jority of ALJs conduct formal APA adjudications in Social Security Administration ("SSA") benefits hearings,[298] and other agencies usually hire their ALJs from those at SSA.[299] These adjudications "provid[e] the full measure of due process"[300] and are "unusually protective" of non-governmental parties.[301] Section 18 explicitly distinguishes informal FTC rulemaking proceedings from those formal processes.[302] Yet commenters have noted that, in FTC rulemakings, "ALJs seem unable or unwilling to distinguish between adjudicative and legislative fact" and provided cross-examination rights on far too many topics.[303] Most ALJs have little or no experience with rulemaking. Thus, they are ripe targets for financially interested parties seeking to hinder a rulemaking by abusing section 18 procedures. Considering their obstructive effects, it is unsurprising that the rules so empowering ALJs in FTC rulemaking came under President Reagan's final appointee as FTC Chair.[304]

In a brilliant stroke, the Commission in 2021 re-assigned the Chief Presiding Officer role to the FTC Chair.[305] By statute, the Commission may select anyone it pleases as presiding officer, so long as he or she is responsible to a Chief Presiding Officer who is not responsible to "any other officer or employee of the Commission."[306] This rule change permits the Chair herself to act as Chief Presiding Officer or to delegate the role to someone who is broadly in support of consumer protection rulemaking.

The rule revisions further empower presiding officers by affording them all powers "useful to" the end of "the orderly conduct of the informal hearing."[307] This new language expands beyond the prior grant of powers "neces-

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[298] *See* Brief for William A. Araiza et al. as Amici Curiae in Support of Neither Party at 9, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1156622 ("The vast majority of ALJs, 1,655 out of 1,926, work for the Social Security Administration (SSA).").

[299] *See* Brief of Association of Administrative Law Judges as Amicus Curiae in Support of Respondent at 19, Lucia v. SEC, 138 S. Ct. 2044 (2018) (No. 17-130), 2018 WL 1638089 ("[M]ost ALJs start at the Social Security Administration before moving to positions at other agencies.").

[300] Robin J. Arzt, *Adjudications by Administrative Law Judges Pursuant to the Social Security Act Are Adjudications Pursuant to the Administrative Procedure Act*, 22 J. NAT'L ASS'N ADMIN. L. JUDGES 279, 318 (2002), http://digitalcommons.pepperdine.edu/naalj/vol22/iss2/1 [https://perma.cc/2ETC-TMK9] (quoting Letter from Kenneth S. Apfel, SSA Comm'r, to Judge Ronald G. Bernoski, President, Association of Administrative Law Judges (Jan. 9, 2001)).

[301] Heckler v. Day, 467 U.S. 104, 106 (1984).

[302] *See* 15 U.S.C. § 57a(b)(1); *see also* Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers III*), 627 F.2d 1151, 1161 (D.C. Cir. 1979).

[303] Cooper J. Spinelli, *Far from Fair, Farther from Efficient: The FTC and the Hyper-Formalization of Informal Rulemaking*, 6 LEG. & POL'Y BRIEF 129, 146 n.116 (2014) (citing KENNETH CULP DAVIS & RICHARD J. PIERCE, ADMINISTRATIVE LAW TREATISE § 7.7 (3d ed. 1994)).

[304] *See* Caroline E. Meyer, *Daniel Oliver*, WASH. POST (Apr. 27, 1987), https://www.washingtonpost.com/archive/politics/1987/04/27/daniel-oliver/d53bb117-8327-4de8-bcff-265ad9ee8093/ [https://perma.cc/7P7B-8VE2].

[305] Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,543 (July 22, 2021) (codified at 16 C.F.R. § 0.8).

[306] *See* 15 U.S.C. § 57a(c)(1)(A)–(B).

[307] Revisions to Rules of Practice, 86 Fed. Reg at 38549.

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sary to" such a goal.[308] The Chair should select presiding officers with significant rulemaking experience who will use their authority to create an efficient regulatory proceeding rather than the adversarial atmosphere of a trial. It will also be valuable to choose presiding officers with expertise in the subject matter of the proposed rule, whether they are drawn from the Office of General Counsel's new rulemaking group, the Bureau of Consumer Protection, or outside the FTC. Presiding officers with relevant experience will be able to weigh the evidence more effectively if the Commission designates any disputed issues of material fact and to ascertain more easily when participants seek to make an excessive number of duplicative presentations or cross-examinations. Prior to the next informal hearing under section 18, the Commission ought also to use its power to "prescribe such rules . . . concerning proceedings in such hearings as may tend to avoid unnecessary costs or delay" by releasing guidelines to ensure that the hearings reflect Congress's intent to create a workable rulemaking power.[309]

The July 2021 reforms also re-established boundaries around the role of the presiding officer. The presiding officer's ambit had expanded far beyond that required by the Magnuson-Moss Act or 1980 Act—or the "fact testing" objective those statutes set for informal hearings.[310] Under the revised rules, presiding officers will no longer designate disputed issues of material fact in the first instance or be able to lengthen the informal hearing period unilaterally.[311] Nor will they expend enormous amounts of time on "recommended decision" reports. Such reports will now be cabined to determinations regarding any designated disputed issues of material fact and will have to be issued within sixty days of the end of the informal hearing period.[312] Past presiding officer reports were far more sweeping and could take more than fifteen months to complete after the close of informal hearings.[313]

2. *Harmonizing Agency Procedures with Statutory Requirements*

Until recently, the FTC's internal Rules of Practice had imposed numerous procedural burdens on rulemaking beyond what is required by statute. The Commission's July 2021 reforms included several changes to

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[308] 16 C.F.R. § 1.13(c)(2)(i) (2020).

[309] 15 U.S.C. § 57a(c)(3).

[310] Barry B. Boyer, Admin. Conf. of the U.S., Executive Summary of Barry B. Boyer Report: Trade Regulation Rulemaking Procedures of the Federal Trade Commission 46 (1979), https://www.acus.gov/sites/default/files/documents/1979-01%20Hybrid%20Rulemaking%20Procedures%20of%20the%20Federal%20Trade%20Commission.pdf [https://perma.cc/498S-NN6M].

[311] Revisions to Rules of Practice, 86 Fed. Reg. at 38,549.

[312] *Id.*

[313] *See* 44 Fed. Reg. 53,538, 53,538 (Sept. 14, 1979); ACUS 1979 Recommendation, *supra* note 50, at 7.

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harmonize the FTC's administrative procedures with the statute's less demanding requirements.[314]

In the early stages of a section 18 rulemaking, these reforms removed the agency-imposed requirement that an NPRM state the reasons for a rule "with particularity"—which could have been interpreted to demand greater evidence-gathering before issuance of the NPRM.[315] During informal hearings, the new rules toughen the standard for when a participant may dissent from the selection of a group representative for cross-examination and can exercise cross-examination rights individually.[316] They also eliminated references to "examination," which may have erroneously implied that participants should operate with a lawyer in a format resembling direct examination during trial.[317] Moreover, the reforms eliminated procedures for the presiding officer to exercise a subpoena-like power, a move away from the inappropriate litigation-style motion practice that caused heated conflict during early proceedings.[318]

The Commission also removed extra-statutory periods for public comment and set limits on stages of proceedings that had proven lengthy in the past. It discontinued the stand-alone comment period for participants to propose disputed issues of material fact for designation.[319] Instead, the Commission will decide which, if any, issues to designate on the basis of input gathered during the ANPRM and NPRM comment periods.[320] The post-record comment period was cut, as well. This appears to be a calculated risk given the potential cost of a court remanding a finalized rule back to the Commission for additional presentations.[321] The reformed rules also no longer require publication of a formal staff report before the Commission may finalize a regulation,[322] although the statute's ex parte provisions will still require any staff input to be placed on the rulemaking record.[323]

Finally, the amendments imposed strict limits on several forms of appeals to the Commission. Participants will have only ten days after an infor-

[314] *See generally* Revisions to Rules of Practice, 86 Fed. Reg. at 38,542. Numerous of these reforms were proposed in previous iterations of this article. *See* Kurt Walters, *FTC Rulemaking: Existing Authorities & Recommendations* 26–28 (July 31, 2019), https://ssrn.com/abstract=3794346.

[315] *Compare* Revisions to Rules of Practice, 86 Fed. Reg. at 38,548, *with* 16 C.F.R. § 1.11(a)(3) (2020).

[316] *See* Revisions to Rules of Practice, 86 Fed. Reg. at 38,548.

[317] *See id.*; *see also* William Funk, *Requiring Formal Rulemaking Is a Thinly Veiled Attempt to Halt Regulation*, Reg. Rev. (May 18, 2017), https://www.theregreview.org/2017/05/18/funk-formal-rulemaking-halt-regulation/ [https://perma.cc/9KMN-S85U] (noting attorneys' ability to use direct examination to "tie up" a rulemaking proceeding).

[318] *See* Lionel Kestenbaum, *Rulemaking Beyond APA: Criteria for Trial-Type Procedures and the FTC Improvement Act*, 44 Geo. Wash. L. Rev. 679, 709 (1976); Boyer, *supra* note 310, at 65 (explaining that "discovery requests were the largest and most important category" of motions witnesses attempted to make).

[319] *Cf.* 16 C.F.R. § 1.13(b), (c)(3)(ii) (2020).

[320] *See* Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,544 (July 22, 2021) (codified at 16 C.F.R. pt. 1).

[321] *See* 15 U.S.C. § 57a(e)(2).

[322] Revisions to Rules of Practice, 86 Fed. Reg. at 38,544.

[323] 15 U.S.C. § 57a(j).

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mal hearing to petition the Commission to review a presiding officer's decision and the Commission will have thirty days to resolve any such appeals that it chooses to accept.[324] The streamlined rules omit a provision that strongly favored granting leave for participants to make another set of oral presentations directly to the Commission after the completion of all statutorily required steps,[325] a process that added significantly to the length of some past rulemakings.[326]

B. Recommendations for Further Reforms

The Commission should treat its mid-2021 reforms to the section 18 rulemaking process as a foundation for further improvements. In several respects, the FTC of 2022 is better positioned to make effective use of section 18 than the FTC of 1975 or 1980. Bodies such as ACUS and the American Bar Association synthesized a series of best-practices recommendations for FTC rulemaking around 1980, following the trial and error that inevitably accompanies a new procedural framework.[327] By that point, though, the agency had ceased beginning new section 18 proceedings and its incoming leadership had more interest in halting ongoing rulemakings than adopting these recommendations as agency practice. Today's FTC can put to good use the insights gained from real-world experience during the agency's era of frequent rulemaking.

The Commission can also leverage judicial developments that came after the decline in FTC rulemaking to prevent informal hearings from becoming a roadblock. Agency interpretations of the procedural requirements imposed by the FTC Act are entitled to *Chevron* deference, a doctrine announced only in 1984.[328] By that point, the FTC had essentially ceased new rulemaking activity. Articulating agency interpretations of ambiguous aspects of section 18 can strengthen the agency's hand in later litigation.

1. Restoring the Cross-Examination Compromise

As recounted above, informal oral hearings with cross-examination were section 18's significant departure from the baseline of APA notice-and-comment procedures.[329] The drafters of the Magnuson-Moss Act built in several features intended to ensure that these informal hearings would not "hamstring" rulemaking and to "assure that rulemaking conducted by the Commission will be a far cry from the formal trial-type procedures under sections 554 and 556 of the Administrative Procedure Act."[330] The legisla-

[324] Revisions to Rules of Practice, 86 Fed. Reg. at 38,550.
[325] *Compare id.*, *with* 16 C.F.R. § 1.13(i) (2020).
[326] *See* Lubbers, *supra* note 260, at 1990 and text accompanying *supra* note 284.
[327] *See* Dixon, *supra* note 89; *1980 ABA Report*, *supra* note 178; Boyer, *supra* note 310.
[328] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 842–43 (1984).
[329] *See supra* Part III.A.3.
[330] 120 Cong. Rec. 40,711 (1974) (statement of Sen. Moss).

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tion's architect thus saw the provision calling for informal hearings as only a "modest compromise" from a proposal for APA notice-and-comment rulemaking.[331] Yet, presiding officers and outside observers quickly found that it was difficult during rapid-fire analysis of motions and pleadings to insist on the distinction between the issues of "specific fact" that were meant to be subject to cross-examination and the issues of policy or "legislative fact" that were not.[332]

The Commission can apply past experience to better effectuate congressional intent and prevent informal hearings from impeding rulemaking. It can do so with a two-tiered approach. On the front end of the process, the agency should insist on the narrow meaning of "specific fact" that Congress intended—and designate "disputed issues of material fact" far more sparingly than it did in the 1970s. Later, during the informal hearing stage, presiding officers should impose a strong presumption for allowing rebuttal submissions rather than cross-examination. But when participants do conduct cross-examination, presiding officers should learn from the "freedom for time" tradeoff developed in early section 18 proceedings. They should focus on the overall length of the proceeding rather than tightly policing the content of particular presentations or cross-examinations.

First, the Commission should clearly define criteria establishing when the agency is to designate issues for cross-examination. The FTC's recently reformed Rules of Practice carried over a long-standing provision that stated that an issue is appropriate for cross-examination when it "is an issue of specific fact in contrast to legislative fact."[333] Leaving these terms undefined is a missed opportunity to earn *Chevron* deference for the agency's interpretation of critical language in the FTC Act: "disputed issues of material fact it is necessary to resolve," which defines the scope of cross-examination.[334]

The Magnuson-Moss Act's sponsors portrayed that phrase as a key to orderly proceedings. Congressional skeptics, in turn, complained it "severely limited" cross-examination.[335] Tracing the provenance of this provision illustrates clearly that Congress intended for cross-examination only to "arise occasionally."[336] The Commission has considerable flexibility to come to a "reasonable interpretation" of this admittedly ambiguous phrase that streamlines the rulemaking process.[337]

The Magnuson-Moss Act's imposition of limited cross-examination relied upon a distinction between "specific fact" and "legislative fact" that was introduced in a 1972 ACUS recommendation:

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[331] MICHAEL PERTSCHUK, WHEN THE SENATE WORKED FOR US: THE INVISIBLE ROLE OF STAFFERS IN COUNTERING CORPORATE LOBBIES 151 (2017).

[332] *See* Kestenbaum, *supra* note 318, at 709; *see also* Dixon, *supra* note 89, at 399.

[333] Revisions to Rules of Practice, 86 Fed. Reg. 38,542, 38,548 (July 22, 2021) (codified at 16 C.F.R. § 1.12(b)(1)).

[334] 15 U.S.C. § 57a(c)(2)(B).

[335] 120 Cong. Rec. 40,724 (1974) (statement of Sen. Taft).

[336] Ass'n of Nat'l Advertisers, Inc. v. FTC (*Nat'l Advertisers III*), 627 F.2d 1151, 1164 (D.C. Cir. 1979).

[337] *See* Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 844 (1984).

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> [W]hen it has special reason to do so, [Congress] may appropriately require opportunity for . . . trial-type hearings on issues of specific fact. . . . Congress should never require trial-type procedures for resolving questions of policy or broad or general fact. Ordinarily, it should not require such procedures for making rules of general applicability.[338]

ACUS based this distinction on Professor Kenneth Culp Davis's foundational taxonomy of "adjudicative facts" and "legislative facts."[339]

Then-ACUS Chairman Antonin Scalia intervened to ensure that Congress hewed closely to this framework. Scalia warned that the language in an early version of Magnuson-Moss, which provided for cross-examination "as may be required for a full and true disclosure of all disputed issues of material fact," was unworkable—it would have led to routine use of "a procedural technique designed for the resolution of particularized factual disputes" in crafting generally applicable rules.[340] The conference committee then revised that passage, and the final language in the Act requires cross-examination only "if the Commission determines that there are disputed issues of material fact it is necessary to resolve."[341] The Conference Report emphasized that this change embraced the "specific fact" distinction: "[t]he only disputed issues of material fact to be determined for resolution by the Commission are those issues characterized as issues of specific fact in contrast to legislative fact."[342] Finally, the Office of Management and Budget asked for ACUS's interpretation of the Act's language before President Ford would sign it. ACUS's Executive Secretary responded, "[s]ince consideration of many, if not most proposed rules of general applicability involve exclusively questions of legislative fact, the Commission would often be able to dispense with cross-examination entirely."[343]

The Commission should formally embrace the understanding that cross-examination is appropriate for FTC rulemaking only in limited circumstances. One, the Commission should more clearly emphasize that "disputed issues of material fact it is necessary to resolve" (*i.e.*, issues of "specific fact") are distinct from issues of policy, issues of general fact, "distractive technical issues," or issues that blend categories.[344] Two, it should specify that such designated disputed issues should be capable of proof or disproof with evidence, precluding matters of prediction or issues whose definitive

[338] 38 Fed. Reg. 19,782, 19,792 (July 23, 1973).

[339] *Cf.* Kenneth Culp Davis, *An Approach to Problems of Evidence in the Administrative Process*, 55 HARV. L. REV. 364, 365–66 (1942); Kenneth Culp Davis, *Facts in Lawmaking*, 80 COLUM. L. REV. 931, 932 (1980) (outlining a continuum from circumstances in which added procedure is appropriate in rulemaking to those in which it is not).

[340] *Nat'l Advertisers III*, 627 F.2d at 1164 n.29.

[341] 15 U.S.C. § 57a(c)(2)(B).

[342] H.R. REP. NO. 93-1606, at 33 (1974) (Conf. Rep.), *as reprinted in* 1974 U.S.C.C.A.N. 7755, 7765.

[343] *Nat'l Advertisers III*, 627 F.2d at 1164 n.29.

[344] *See* PERTSCHUK, *supra* note 331, at 152; 38 Fed. Reg. 19,782, 19,792 (July 23, 1973).

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"resolution" is unrealistic.[345] Three, it should state that an issue is appropriate for cross-examination only if definitive resolution of that particular issue is "essential to the formulation of the rule."[346] Four, it can clarify that issues that pertain to a large number of firms are more likely to be issues of general fact—and thus inappropriate for cross-examination—than those whose resolution requires information known only to a small number of entities. Last, the Commission should express its view that these conditions will be met only rarely, reflecting Congress's original intent.[347] Most rulemaking proceedings would thus have few or no issues designated for cross-examination. These guidelines should prevent situations such as the Mobile Homes rulemaking, which had nineteen designated issues, including policy-laden questions of the "adequacy" or "reasonableness" of the industry's actions and a request for predictions of "the probable economic effect" of the rule—inquiries incapable of definitive proof.[348]

Second, the agency can streamline the informal hearings by applying a strong presumption in favor of rebuttal submissions over cross-examination. A Commission decision regarding cross-examination or rebuttal submissions is a ground for judicial reversal only if it "precluded disclosure of disputed material facts which was necessary for fair determination by the Commission of the rulemaking proceeding taken as a whole."[349] This standard will rarely be met if a participant is allowed to make a rebuttal submission. It is difficult to portray credibility attacks and impeachment of opposing presenters, the focus of cross-examination in past FTC rulemakings, as themselves "*disclosure* of disputed material facts" rather than attempts to undermine a prior disclosure. Only when a cross-examination would induce the *cross-examinee* to make a new "disclosure of disputed material fact" would the agency need to allow cross-examination rather than a rebuttal submission.

Third, when cross-examination is permitted, presiding officers should embrace the "freedom for time" tradeoff innovated in the 1970s.[350] This was the practice by presiding officers of imposing strict time limits on cross-examination but not attempting to police tightly whether questioning crossed the line between designated issues and other subject matter. Presiding officers found this approach manageable while not adding to the length of proceedings. In fact, reducing some of the attempts at procedural appeals resulted in hearings "taking very little longer than previous hearings [before

[345] *See* Admin. Conf. of the U.S., Recommendation 80-1: Trade Regulation Rulemaking Under the Magnuson-Moss Warranty-Federal Trade Commission Improvement Act 7 (1980) (separate statement of Kenneth Culp Davis), https://www.acus.gov/sites/default/files/documents/80-1-ss.pdf [https://perma.cc/YN9R-CSP9].

[346] *See id.*

[347] *See Nat'l Advertisers III*, 627 F.2d at 1164 n.29.

[348] Mobile Home Sales and Service, 42 Fed. Reg. 26,398, 26,399–400 (proposed May 23, 1977) (codified at 16 C.F.R. pt. 441).

[349] 15 U.S.C. § 57a(e)(3)(B).

[350] Dixon, *supra* note 89, at 400, 427 ("Once the right sort of atmosphere is created, hearings can then proceed free of any fear of cross-examination, for with the unused residual powers lurking in the background, the technique can be used, subject to the one simple limitation of time.").

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passage of the Magnuson-Moss Act] without cross-examination."[351] When the Commission designates only a few issues and clearly communicates reasonable time limits, it will be up to participants to focus their cross-examination on designated issues. If participants engage in questioning on issues of policy or general fact, this would belie later arguments that the agency's time limit precluded disclosure of disputed material facts. The experience of the 1970s also shows that the agency can affect the tenor of proceedings for the better by carefully considering the physical space in which informal oral hearings are held. A room with a panel-style layout may foster a less adversarial atmosphere than one modeled on a courtroom, with a single adjudicator raised above participants who are seated below.[352]

2. *Additional Steps*

The FTC should also embrace *Chevron* with respect to the meaning of "prevalence." Although the legislative history is clear that both provisions relating to prevalence in section 18 are intended to be non-justiciable,[353] some courts have overlooked this fact and examined the issue closely.[354] The agency could limit uncertainty by releasing an interpretive rule with a non-exhaustive list of factors and types of data that support a belief that a certain practice is "prevalent."

Because section 18 does contain some added procedural requirements, agency leadership should start the clock for these proceedings as early as possible. One key way to do so is to err on the side of publishing an ANPRM quickly rather than waiting for bulletproof evidence that a challenged act or practice is "prevalent." The agency must have reason to believe a practice is prevalent only by the time it publishes an NPRM. The ANPRM comment period should be an important source of data with which to determine the prevalence of particular types of misconduct.

Finally, Commissioners interested in effective rulemaking should recognize that dedicating resources to rulemaking will create a virtuous feedback loop. Placing a priority on issuing well-crafted rules will build experience with section 18 among agency personnel. This internally developed institutional knowledge, in addition to staffing the new Office of Rulemaking with veterans of rulemaking from other federal agencies, will make future rulemakings even more timely and efficient.

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[351] *Id.* at 400.

[352] *See 1980 ABA Report*, *supra* note 178, at 362 ("The layout of the hearing room gives the unexperienced witness the impression that the presiding officer has a role similar to that of a judge in a formal adjudication.").

[353] *See supra* Parts III.A.1, III.A.4.

[354] *See* Compassion Over Killing v. U.S. Food & Drug Admin., 849 F.3d 849, 855 (9th Cir. 2017); Pa. Funeral Dirs. Ass'n v. FTC, 41 F.3d 81, 86–89 (3d Cir. 1994); *see also* Am. Optometric Ass'n v. FTC, 626 F.2d 896, 906 (D.C. Cir. 1980) (considering the statement of basis and purpose, despite legislative history indicating its contents are not subject to judicial review).

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V. Opportunities for Regulation

Reviving consumer protection rulemaking would equip the FTC to better address the disconcertingly broad range of business misconduct harming consumers. The public is ill-served if the Commission attempts to fight economic wrongdoing with only a subset of its authorities—employing the full range of the FTC's powers will allow the Commission to select the right instrument for each job.[355]

A spring 2021 FTC workshop on digital "dark patterns" suggests one topic ripe for rulemaking.[356] Dark patterns are manipulative design techniques that induce consumers to part with more money or more personal data than they would if presented with an intuitive and fair user-experience design. One common example is a service that makes it very easy for a user to confirm a default option to share her data publicly but buries options to limit data sharing or close her account beneath layers of confusing and difficult-to-navigate menus.[357] A rule restricting the use of dark patterns would emulate the Cooling-Off Rule promulgated in 1972, which strengthened consumers' hands against the high-pressure sales tactics of the day used by door-to-door salespeople.[358] That regulation provides consumers with up to three days to cancel a transaction made at their door—after the potentially aggressive salesperson has left their property. [359] Other relatively thorough proposals of substantive topics appropriate for rulemaking include cyber-security and algorithmic transparency and fairness.[360]

Each of the types of misconduct identified by former Commissioner Chopra and Samuel Levine as suitable for Penalty Offense Authority could also be addressed through rulemaking. Rulemaking on these subjects would offer advantages of stronger equitable relief[361] and could remove legal de-

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[355] Rebecca Kelly Slaughter, Acting Chairwoman, Fed. Trade Comm'n, Remarks at the Future of Privacy Forum: Protecting Consumer Privacy in a Time of Crisis 3–4 (Feb. 10, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587283/fpf_opening_remarks_210_.pdf [https://perma.cc/VA4H-D6FG].

[356] Press Release, Fed. Trade Comm'n, FTC to Hold Virtual Workshop Exploring Digital "Dark Patterns" (Feb. 24, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-hold-virtual-workshop-exploring-digital-dark-patterns [https://perma.cc/WSQ4-NN62]; *see also* Justin (Gus) Hurwitz, *Designing A Pattern, Darkly*, 22 N.C. J.L. & Tech. 57, 97 (2020) (suggesting an FTC rulemaking on this topic).

[357] *See* Thomas Germain, *How to Spot Manipulative 'Dark Patterns' Online*, Consumer Reps. (Jan. 30, 2019), https://www.consumerreports.org/privacy/how-to-spot-manipulative-dark-patterns-online-a7910348794/ [https://perma.cc/M53E-36DL].

[358] Cooling-Off Period for Door-to-Door Sales, 37 Fed. Reg. 22,933, 22,934 (Oct. 26, 1972).

[359] *See* 16 C.F.R. § 429.1 (2021).

[360] *See* Ian M. Davis, Note, *Resurrecting Magnuson-Moss Rulemaking: The FTC at a Data Security Crossroads*, 69 Emory L.J. 781, 813 (2020); Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at UCLA School of Law: Algorithms and Economic Justice 15–16 (Jan. 24, 2020), https://www.ftc.gov/system/files/documents/public_statements/1564883/remarks_of_commissioner_rebecca_kelly_slaughter_on_algorithmic_and_economic_justice_01-24-2020.pdf [https://perma.cc/W5YD-S552].

[361] *Compare* 15 U.S.C. § 57b(b), *with id.* § 53(b).

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fenses of inadequate notice by upstart firms that have not been noticed with copies of relevant FTC cease-and-desist orders.[362] Penalty Offense Authority and section 18 rulemaking might be viewed as complementary tools on these topics, which include deceptive for-profit college recruitment, false earning claims in recruiting workers, fake-review fraud and other online disinformation, and illegally targeted advertising using data protected by federal law.[363] Early indications suggest that the Bureau of Consumer Protection is moving toward this multi-pronged approach, laying the groundwork to use both Penalty Offense Authority and section 18 rulemaking to target specific categories of wrongdoing.[364]

Each potential rulemaking can be classified into one of two broad categories, based on the extent of prior agency enforcement. The first is the "restatement rulemaking" suggested by former Commissioner Chopra.[365] In such a case, there are sufficient past FTC cease-and-desist orders, settlement agreements, or judicial precedents to synthesize into a set of clear proscriptions.[366] The rulemaking process then effectively operates as a complement to case-by-case adjudication, unlocking greater remedial power for the Commission. The FTC has issued two ANPRMs in recent months that signal it intends to begin its return to section 18 rulemaking by crafting rules in this archetype. The Commission is gathering and reviewing public comments on potential rules to restrict government and business impersonation fraud and to bar false future-earnings claims; each practice is the subject of an extensive

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[362] *Cf.* Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter Regarding Final Approval of the Sunday Riley Settlement 3 (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/cases/final_rchopra_sunday_riley_statement_dated_11.6.pdf [https://perma.cc/U3HY-RVGV].

[363] *See* Chopra & Levine, *supra* note 34, at 104–21.

[364] Two of the first three Notices of Penalty Offenses that the Commission distributed in October 2021 relate to false claims about future earnings or career prospects by for-profit colleges and misleading claims of potential earnings by multi-level marketing firms or gig work companies. *See* Press Release, Fed. Trade Comm'n, FTC Puts Businesses on Notice that False Money-Making Claims Could Lead to Big Penalties (Oct. 26, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-puts-businesses-notice-false-money-making-claims-could-lead-big-penalties; Press Release, Fed. Trade Comm'n, FTC Targets False Claims by For-Profit Colleges (Oct. 6, 2021), https://www.ftc.gov/news-events/news/press-releases/2021/10/ftc-targets-false-claims-profit-colleges.

A few months later, the Commission released its second section 18 ANPRM under Chair Khan, which signaled interest in promulgating a rule barring false future-earnings claims. *See* Deceptive or Unfair Earnings Claims, 87 Fed. Reg. 13,951, 13,951 (Mar. 11, 2022). That notice explicitly noted the complementary nature of Penalty Offense Authority and section 18 rulemaking. *See id.* at 13,952 ("While the Commission recently issued a Notice of Penalty Offenses concerning earnings claims, which will permit the Commission to seek civil penalties for misleading earnings claims in some cases, this authority does not provide a basis for the Commission to recover funds to return to injured consumers.").

[365] *See* Statement of Comm'r Rohit Chopra Regarding the Report to Congress on Protecting Older Consumers 2 (Oct. 19, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581862/p144400choprastatementolderamericansrpt.pdf [https://perma.cc/6PJG-XLT6].

[366] The recently issued ANPRM regarding Deceptive or Unfair Earnings Claims provides an illustrative example. *See* 87 Fed. Reg. at 13,951–52 & nn.3–15 (collecting precedents and synthesizing their core principles).

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body of past agency actions.[367] Because there is a smaller amount of novel substantive ground to cover in such a proceeding, a restatement rulemaking is a prudent option for a first new section 18 rulemaking. The agency will be able to fine-tune its use of the recently amended FTC Rules of Practice and rebuild institutional experience with section 18. Meanwhile, work on more ambitious rules can begin.

The second category is proactive rulemaking, comparable to the types of rules promulgated by most agencies. In areas in which enforcement activity has been held back by evidentiary challenges or the difficulties of providing adequate notice before beginning enforcement, there may not be much precedent to restate. Moving expeditiously to a section 18 proceeding may prove more efficient in many instances than crafting informal guidance and waiting years for enforcement efforts to generate a critical mass of precedents before initiating a rulemaking. Furthermore, section 18 empowers the agency not only to specify acts or practices that violate section 5's UDAP prohibition, but additionally to impose "requirements prescribed *for the purpose of preventing* such acts or practices."[368] Under the FTC Act, a violation of a rule's preventive requirements is itself an unfair or deceptive act or practice.[369] These provisions are explicit authorization by Congress for FTC rules to reach conduct that the agency could not proscribe solely through case-by-case adjudications under its section 5 authority. It certainly may be wise to avoid rulemaking regarding topics with which the agency has no experience whatsoever. Still, the same tools that agency staff use when creating industry guides or setting enforcement strategy—such as public workshops and section 6(b) industry studies[370]—can inform rulemaking as well. Among the wide range of candidates for rulemaking, a discussion of one that typifies each of these categories follows.

A. Data Privacy

An area that calls out for a section 18 rulemaking is data privacy. It is a rare issue on which a bipartisan majority of Commissioners has agreed that a rulemaking may be warranted.[371] Action could be imminent—the Commission recently submitted a notice to OIRA indicating that it is "considering initiating a rulemaking under section 18 of the FTC Act to curb lax security practices, limit privacy abuses, and ensure that algorithmic decision-making does not result in unlawful discrimination."[372] The FTC has become the

[367] *See* Trade Regulation Rule on Impersonation of Government and Businesses, 86 Fed. Reg. 72,901, 72,903 & nn.25–27 (Dec. 23, 2021); 87 Fed. Reg. at 13,951–52 & nn.3–15.

[368] 15 U.S.C. § 57a(a)(1)(B) (emphasis added).

[369] *Id.* § 57a(d)(3).

[370] *See id.* § 46(b).

[371] Swift, *supra* note 262. R

[372] Becky Burr, Walter Anderson & Landyn Rookard, *What To Expect From FTC Unfair, Deceptive Acts Rule Plans*, LAW360 (Feb. 17, 2022, 5:24 PM), https://www.law360.com/arti-

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country's "de facto Data Protection Authority"[373] by enforcing the UDAP prohibition that fills the gaps in the United States' fragmented, sectoral approach to privacy and holding implementing authority over several specific privacy laws.[374] Based on its experience as the leading American data privacy enforcer and the breadth of its legal authority, the FTC is the agency best-positioned to establish a national approach to data privacy.[375]

The FTC's adjudications have formed what scholars have persuasively labeled a "common law" of privacy. [376] The Commission's standards go far beyond enforcing privacy promises; it also challenges data collection with inadequate notice or through pretextual means, retroactive alteration of the terms governing data use, and meager data security measures.[377] Unlike traditional common law, though, the FTC's variant generally does not involve binding judicial precedent: "Respondents in FTC proceedings settle almost all matters. Thus, FTC online privacy law is largely a body of complaints and consent decrees."[378] Through incremental, case-by-case evolution, the standards applied by the Commission "have become so specific they resemble rules."[379]

But rules they are not. For that reason, the agency acts from a substantially weaker position in attempting to secure relief for the public. Dissenting Commissioners criticized FTC settlements with Zoom[380] and Facebook[381] as inadequate even before *AMG Capital* eliminated the leverage provided by the prospect of section 13(b) equitable remedies.[382] Furthermore, the agency recently received a bracing reminder that its common law–style body of settlements and complaints does not have binding effect when, in a rare privacy matter that failed to settle, a federal appellate court held one of the FTC's standard cease-and-desist orders to be unenforceable.[383]

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cles/1465949/what-to-expect-from-ftc-unfair-deceptive-acts-rule-plans [https://perma.cc/TYG6-F5TC].

[373] Daniel J. Solove & Woodrow Hartzog, *The FTC and the New Common Law of Privacy*, 114 Colum. L. Rev. 583, 584 (2014).

[374] *See* Woodrow Hartzog & Daniel J. Solove, *The Scope and Potential of FTC Data Protection*, 83 Geo. Wash. L. Rev. 2230, 2252, 2269 (2015).

[375] *Id.* at 2271 ("[T]he FTC is the only agency currently capable of responding to a number of vexing privacy issues.").

[376] Solove & Hartzog, *supra* note 373, at 584. R

[377] *See id.* at 628–43.

[378] Hoofnagle, *supra* note 135, at 159.

[379] Solove & Hartzog, *supra* note 373, at 586.

[380] Dissenting Statement of Comm'r Rohit Chopra Regarding Zoom Video Communications, Inc. 6 (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/public_statements/1582914/final_commissioner_chopra_dissenting_statement_on_zoom.pdf [https://perma.cc/9CUJ-URWQ].

[381] Dissenting Statement of Comm'r Rebecca Kelly Slaughter in the Matter of FTC vs. Facebook 5–6 (July 24, 2019), https://www.ftc.gov/system/files/documents/public_statements/1536918/182_3109_slaughter_statement_on_facebook_7-24-19.pdf [https://perma.cc/TQT3-RV5F].

[382] *See* AMG Capital Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1344 (2021).

[383] LabMD, Inc. v. FTC, 894 F.3d 1221, 1237 (11th Cir. 2018). *But see* FTC v. Wyndham Worldwide Corp., 799 F.3d 236, 247, 256 (3d Cir. 2015) (affirming the FTC's authority to police data security lapses and holding that the firm had adequate notice on the basis of cease-and-desist orders issued to others).

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The FTC also faces challenges due to the nature of its deception and unfairness authorities. The great majority of the agency's past privacy actions have been premised on a deception theory, which necessarily involves an interaction between the harmed individual and the offending party. A required element of deception is "a representation, omission or practice that is likely to mislead [a] consumer."[384] Many privacy harms are only accessible through an unfairness theory. A large proportion of actors in the data ecosystem, such as data brokers, have no direct interaction with individuals whose data they handle. They are therefore unlikely to mislead consumers, as is necessary for a deception theory. Another hurdle is that the FTC's unfairness authority restricts conduct only if it causes or is likely to cause substantial harm to consumers that is not outweighed by benefits to consumers or competition. [385] Privacy harms are notoriously confounding for courts[386] and pose challenges for this test. First, "the injury may appear small when viewed in isolation," even if the aggregate harm is significant "when done by hundreds or thousands of companies."[387] Second, "privacy harms often involve increased risk of future harm," a concept "the law struggles mightily to grapple with."[388] Both features of privacy harms may make it more difficult to establish a substantial injury in an adjudication against a single company than in an industry-wide rulemaking that takes a broader view and builds a more robust record. Perhaps for this reason, a recent analysis found that the Commission brought enforcement actions on a standalone unfairness theory only four times over ten years, compared to sixty-one actions premised solely on its deception authority.[389]

A solution to both the remedial and litigation challenges is to issue a new trade regulation rule governing data privacy. A starting point for such a rule is former Commissioner Chopra's concept of a restatement rulemaking. As Chopra noted, the Commission has entered into "scores of settlements that address deceptive practices regarding the collection, use, and sharing of personal data," which mark out conduct that is indisputably illegal.[390] Synthesizing the Commission's privacy pseudo-precedents into a binding sec-

[384] Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Rep. John D. Dingell, Chairman, H. Comm. on Energy & Com. 1 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/X3RF-V6US].

[385] *See* 15 U.S.C. § 45(n).

[386] *See* Danielle Keats Citron & Daniel J. Solove, *Privacy Harms*, 102 B.U. L. Rev. (forthcoming 2022) (manuscript at 2).

[387] *Id.* at 3.

[388] *Id.* at 19.

[389] *See* Gov't Accountabilty Office, GAO-19-52, Internet Privacy: Additional Federal Authority Could Enhance Consumer Protection and Provide Flexibility 43–50 (2019).

[390] *See* Statement of Comm'r Rohit Chopra in the Matter of Everalbum and Paravision 2 (Jan. 8, 2021), https://www.ftc.gov/system/files/documents/public_statements/1585858/updated_final_chopra_statement_on_everalbum_for_circulation.pdf [https://perma.cc/Q6K3-JQM8].

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tion 18 rule would open the door to civil penalties and enhanced equitable remedies.

The FTC should also go further. Section 18 rulemaking presents an opportunity to extend beyond the notice-and-consent privacy regime, which has been roundly criticized as inadequate to respond to contemporary privacy harms.[391] Under the proceduralist notice-and-comment model, nearly any use of data is permissible so long as an information collector discloses the ways it plans to use an individual's information (often in an unreadably long or dense "notice") and offers the chance for the individual to decline those terms (frequently an illusory "choice," due to the ubiquity of take-it-or-leave-it policies imposed by critical services).[392] Rulemaking can be an effective means of moving toward substantive limits on the collection and use of data. [393]

Policymakers and advocates have proposed a bevy of approaches that a new data privacy rule could take. Chief among them is "data minimization." Such a rule could limit data collection, use, and retention to that which is reasonably necessary for the core functionality of an application or service.[394] In a variation to this approach, the Commission could deem the use of an individual's data beyond that person's reasonable expectations to be an unfair act or practice.[395] A rule provision of this kind would be an analogue to the purpose limitation found in Europe's General Data Protection Regulation ("GDPR").[396]

An alternative model for a rule would restrict secondary uses of a more narrowly defined category of data. Representatives Katie Porter and Jamie

[391] *See, e.g.*, John A. Rothchild, *Against Notice and Choice: The Manifest Failure of the Proceduralist Paradigm to Protect Privacy Online (or Anywhere Else)*, 66 CLEV. ST. L. REV. 559, 608 (2018).

[392] *See id.* at 561–62.

[393] *See* Statement of Chair Lina M. Khan Regarding the Report to Congress on Privacy and Security (Oct. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597024/statement_of_chair_lina_m_khan_regarding_the_report_to_congress_on_privacy_and_security_-_final.pdf.

[394] *See* CONSUMER REPS. & ELEC. PRIVACY INFO. CTR., HOW THE FTC CAN MANDATE DATA MINIMIZATION THROUGH A SECTION 5 UNFAIRNESS RULEMAKING 16 (2022), https://advocacy.consumerreports.org/wp-content/uploads/2022/01/CR_Epic_FTCDataMinimization_012522_VF_.pdf; Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Keynote Address to the National Advertising Division Annual Conference: Disputing the Dogmas of Surveillance Advertising (Oct. 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1597050/commissioner_slaughter_national_advertising_division_10-1-2021_keynote_address.pdf.

[395] Rebecca Kelly Slaughter, Comm'r, Fed. Trade Comm'n, Remarks at the Cybersecurity and Data Privacy Conference: FTC Data Privacy Enforcement: A Time of Change 5–6 (Oct. 16, 2020), https://www.ftc.gov/system/files/documents/public_statements/1581786/slaughter_-_remarks_on_ftc_data_privacy_enforcement_-_a_time_of_change.pdf [https://perma.cc/FZ92-LUZ2]; *see also* HOOFNAGLE, *supra* note 135, at 345–46; Dennis D. Hirsch, *From Individual Control to Social Protection: New Paradigms for Privacy Law in the Age of Predictive Analytics*, 79 MD. L. REV. 439, 448 (2020).

[396] *See Principle (b): Purpose Limitation*, INFO. COMM'R'S OFF., https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/principles/purpose-limitation/ [https://perma.cc/P6WW-V4AK].

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Raskin led more than forty members of Congress to urge the FTC to issue a section 18 rule limiting the use of geolocation data. Their proposed rule would define as an unfair practice "the sale, transfer, use, or purchase of precise location data collected by an app for purposes other than the essential function of the app" and establish as a deceptive practice "app developers' mislabeling of users' location data as 'anonymous,'" because of the ease with which data can be de-anonymized.[397] Two civil society groups have floated the possibility of a similar rule restricting the processing of facial recognition or other biometric data and the practice of "cross-device tracking" for secondary purposes.[398]

These proposals merely scratch the surface. Other concepts include bans of particular harmful applications of data, such as the use of discriminatory, data-fueled algorithms;[399] a requirement for companies to honor global "do not track" opt-out signals;[400] and a prohibition of unequal treatment of users who choose to exercise a right to restrict the use of their data.[401] A mandate that companies grant each user a right to access or delete data that pertain to that user seems like it could qualify as a "requirement[ ] prescribed for the purpose of preventing" unfair or deceptive acts or practices such as the use of data beyond a person's reasonable expectations.[402] A rule with such a requirement could function similarly to the GDPR right of access and right to erasure.[403] The flowering of ideas just summarized occurred after the FTC reformed its approach to section 18 rulemaking and started sending signals that it was seriously considering a privacy rule. The prospect of section 18 rulemaking ought to prompt similarly vibrant discussions among policymakers and advocates in a number of consumer protection fields.

Promulgating a privacy rule will also simplify the FTC's task in enforcement. The agency will then only have to demonstrate a violation of the rule to prevail. In contrast, the FTC currently must engage in the factual development necessary to prove every element of deceptiveness or unfairness is satisfied by the specific conduct found in a particular case. Because challenges of section 18 rules can occur only within the first sixty days after

[397] Letter from Rep. Katie Porter, Congresswoman, U.S. House of Representative, et al. to Lina Khan, Chair, Fed. Trade Comm'n 2–3 (Dec. 9, 2021), https://raskin.house.gov/_cache/files/b/b/bba089eb-7b97-4b74-a7ad-f44cef5fd1bc/EA1DAC0E56C44CC379A28B713093351B.porter-raskin-location-data-privacy-letter-to-ftc-fcc.pdf [https://perma.cc/CHM4-5LAD].

[398] *See* Consumer Reps. & Elec. Privacy Info. Ctr., *supra* note 394, at 19.

[399] Slaughter, *supra* note 10, at 51–55.

[400] Letter, *supra* note 129, at 2.

[401] Consumer Reps. & Elec. Privacy Info. Ctr., *supra* note 394, at 19.

[402] *See* 15 U.S.C. § 57a(a)(1)(B).

[403] *Cf. Right of Access*, Info. Comm'r's Off., https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-of-access/ [https://perma.cc/85DL-C9HH]; *Right to Erasure*, Info. Comm'r's Off., https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/individual-rights/right-to-erasure/ [https://perma.cc/LP4V-UZXB].

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promulgation,[404] a privacy rulemaking would also limit the possibility of future adverse surprises in court.[405]

B. Drip Pricing

A candidate for a rulemaking that is more purely in the paradigm of proactive rulemaking is online drip pricing. Drip pricing is the practice of a seller first disclosing a low "base" price to a consumer and later revealing additional mandatory fees in subsequent "drips" after a customer has taken steps toward completing the transaction. An advocate shared an illustrative example: For a particular major league baseball game in 2021, ticket sales website Ticketmaster showed consumers prices as low as $15, but then—only after consumers chose their seats and reached the final payment stage—revealed a mandatory surcharge of $7.50 for a "service fee" and "processing fee." [406] The total price was *fifty percent* higher than initially shown. But many frustrated consumers may simply give up and complete the transaction rather than bearing the time cost to search out an entirely new alternative. This dark pattern is particularly common in online sales of lodging and live event tickets, and presents a straightforward opportunity for section 18 rulemaking.

Consumers experience considerable harm from the process, paying approximately twenty percent more when faced with drip pricing rather than its opposite, "all-in" pricing.[407] The tactic exploits psychological biases such as the tendency to "anchor" on the first prominent piece of information one perceives about a potential transaction, such as the initially displayed price, and to be unable to sufficiently adjust that internal estimate afterward.[408] Drip pricing appears to clearly meet the first two prongs of the FTC's three-part test for unfairness. That test is satisfied by conduct that (1) "causes or is likely to cause substantial injury to consumers," (2) which "is not reasonably avoidable by consumers themselves," and (3) which is "not outweighed by countervailing benefits to consumers or to competition."[409] The often-daunting third prong is even more straightforward. Not only do hidden fees fail to provide any benefit to consumers, they undermine the transparency required for comparison shopping between competing merchants.[410] Similarly, drip

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[404] 15 U.S.C. § 57a(e)(1)(A).

[405] *Cf.* LabMD, Inc. v. FTC, 894 F.3d 1221, 1237 (11th Cir. 2018) (holding language frequently used by FTC in cease-and-desist orders to be unenforceably vague).

[406] Max Sarinsky, *Stop the Hidden-Fee Rip-Off*, N.Y. TIMES (Aug. 2, 2021), https://www.nytimes.com/2021/08/02/opinion/consumers-drip-pricing.html [https://perma.cc/J5N6-2BVZ].

[407] Tom Blake, Sarah Moshary, Kane Sweeney & Steve Tadelis, *Price Salience and Product Choice* 10 (working paper) (July 7, 2020), http://faculty.haas.berkeley.edu/stadelis/AIP.pdf [https://perma.cc/38ZK-Q23J].

[408] David Adam Friedman, *Regulating Drip Pricing*, 31 STAN. L. & POL'Y REV. 51, 67–68 (2020).

[409] *See* 15 U.S.C. § 45(n).

[410] Ticket seller StubHub attempted to move to all-in pricing by default but abandoned the feature after hemorrhaging sales to competitors that continued to use drip pricing. *See*

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pricing seems to satisfy the agency's elements for deception: a representation, omission, or practice that (1) is "likely to mislead the consumer," (2) when examined "from the perspective of a consumer acting reasonably in the circumstances," and (3) is material.[411]

A section 18 proceeding to restrict drip pricing would be a proactive rulemaking, as the FTC has not yet brought an enforcement action directly against the practice. But one benefit of rulemaking in this area is that much of the preliminary work is already complete. The FTC held a public workshop in 2012 on the general issue of drip pricing, one of its Bureau of Economics staff members published an economic analysis in 2017 surveying hotels' use of drip pricing to impose mandatory "resort fees,"[412] and agency staff held another workshop in 2019 dedicated to the pricing practices of the ticketing industry.[413] In addition to this fact-gathering, attorneys general in the District of Columbia and Nebraska have sued hotel operators Marriott and Hilton over drip pricing of mandatory "resort fees," using their jurisdictions' versions of the FTC Act.[414]

The Commission could build from this foundation to promulgate a rule prohibiting drip pricing. Such a rule can establish it to be both unfair and deceptive to display an upfront price for a product or service that fails to include all mandatory surcharges added by the company. [415] The Commission might learn from the example of the Department of Transportation's 2011 regulation that bars airlines from using drip pricing to obscure mandatory fees.[416] Several foreign regulators already restrict drip pricing more broadly and may also provide helpful models for FTC action. These include the Australian Competition and Consumer Commission and the

Ethan Smith, *StubHub Gets Out of 'All-In' Pricing*, WALL ST. J. (Aug. 31, 2015), https://www.wsj.com/articles/stubhub-gets-out-of-all-in-pricing-1441065436 [https://perma.cc/XDM4-K7MZ].

[411] Letter from James C. Miller III, Chairman, Fed. Trade Comm'n, to Rep. John D. Dingell, Chairman, H. Comm. on Energy & Com. 1 (Oct. 14, 1983), https://www.ftc.gov/system/files/documents/public_statements/410531/831014deceptionstmt.pdf [https://perma.cc/X3RF-V6US].

[412] MARY W. SULLIVAN, BUREAU OF ECON., FED. TRADE COMM'N, ECONOMIC ANALYSIS OF HOTEL RESORT FEES (2017), https://www.ftc.gov/system/files/documents/reports/economic-analysis-hotel-resort-fees/p115503_hotel_resort_fees_economic_issues_paper.pdf [https://perma.cc/KX5M-JX6J].

[413] *See* Kaitlyn Tiffany, *How Ticket Fees Got So Bad, and Why They Won't Get Better*, VOX (June 12, 2019, 1:30 PM), https://www.vox.com/the-goods/2019/6/12/18662992/ticket-fees-ticketmaster-stubhub-ftc-regulation [https://perma.cc/5RYF-SR3G].

[414] *See* Press Release, Off. of the Att'y Gen. for the D.C., AG Racine Sues Marriott for Charging Deceptive Resort Fees and Misleading Tens of Thousands of District Consumers (July 9, 2019), https://oag.dc.gov/release/ag-racine-sues-marriott-charging-deceptive-resort [https://perma.cc/2YSG-JTU3]; Press Release, Neb. Att'y Gen., AG Peterson Sues Hilton on Behalf of Nebraska Consumers (July 23, 2019), https://ago.nebraska.gov/news/ag-peterson-sues-hilton-behalf-nebraska-consumers [https://perma.cc/6VFG-HVSV].

[415] One proposal of language for such a rule has been submitted to the Commission as a formal petition for rulemaking. *See* Inst. for Pol'y Integrity, Petition for Rulemaking Concerning Drip Pricing (July 7, 2021), https://downloads.regulations.gov/FTC-2021-0074-0002/content.pdf [https://perma.cc/3RJQ-JCPW].

[416] *See* 14 C.F.R. § 399.84 (2022).

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Canadian Competition Bureau,[417] each an FTC analogue. Both bodies have proceeded through enforcement, although they may not face the same remedial limitations as their American counterpart. In section 5 enforcement actions, the FTC often encountered difficulty in demonstrating consumer harm with enough precision to support equitable relief, even before *AMG Capital* undermined the agency's remedial powers. This challenge is particularly acute when the harm includes inducing consumers to make purchases that they would not otherwise have made.[418] The civil penalties made available by a trade regulation rule would accordingly be invaluable to deterring drip pricing in the United States.

Conclusion

With new FTC leadership at the outset of the Biden Administration, there could not be a more fitting time to revive the Commission's consumer protection rulemaking program. The imbalance between increasingly concentrated corporate actors and individual consumers—starker in many ways than it has been since the last Gilded Age—makes a change of course desperately needed.

Restoring the use of section 18 rulemaking will return a powerful tool to the agency's arsenal. American consumers and honest businesses alike will benefit when the country's consumer protection watchdog embraces all of its powers in the fight against bad actors' use of unfair and deceptive tactics. While any regulatory action takes time and carries costs, the pessimistic view of section 18 has held back rulemaking activity to an unfounded degree. This article's review of the FTC's history of rulemaking, its statutory authorities, and the relevant case law shows that this pessimism about the FTC's statutory powers is based more in myth than in fact. The Commission's rulemaking program instead fell victim to ideologically driven shifts in agency culture and self-imposed norms. Reagan-era leadership at the FTC decisively turned the agency away from putting its regulatory powers to use. The current Commission can learn from this example in carrying out a similar, but converse, transformation.

The potential value of new FTC rules is difficult to overstate. A section 18 rule governing data privacy could finally roll back the near-inescapable commercial surveillance at the heart of informational capitalism. A rulemaking to bar drip pricing could save consumers hundreds of millions or billions of dollars each year. Changes like stopping tip theft of gig workers and imposing real consequences for online fake review fraud can make the marketplace a more fair environment for customers, workers, and honest businesses. Standards for algorithmic decision-making and penalties for the deceptive

[417] *See* Friedman, *supra* note 408, at 85.

[418] *See* Statement of Comm'r Rohit Chopra Joined by Comm'r Rebecca Kelly Slaughter Regarding Final Approval of the Sunday Riley Settlement 6 (Nov. 6, 2020), https://www.ftc.gov/system/files/documents/cases/final_rchopra_sunday_riley_statement_dated_11.6.pdf [https://perma.cc/R7RS-WZ2K].

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use of emerging "deep fake" technology can protect against technologically driven harms that are growing at exponential rates.

In a time of persistent legislative dysfunction and rampant corporate predation, waiting for intervention by Congress is tantamount to a knowing abdication of the FTC's mission. An agency that fails to use the authorities at its disposal leaves consumers and good faith businesspeople at the mercy of economic bad actors. The Commission's broad jurisdiction and latent rulemaking powers thus create not just an opportunity but a responsibility. Leaders at the FTC who wish to stand up assertively for the American consumer will find the authority to do so is already on the books, waiting to be used.

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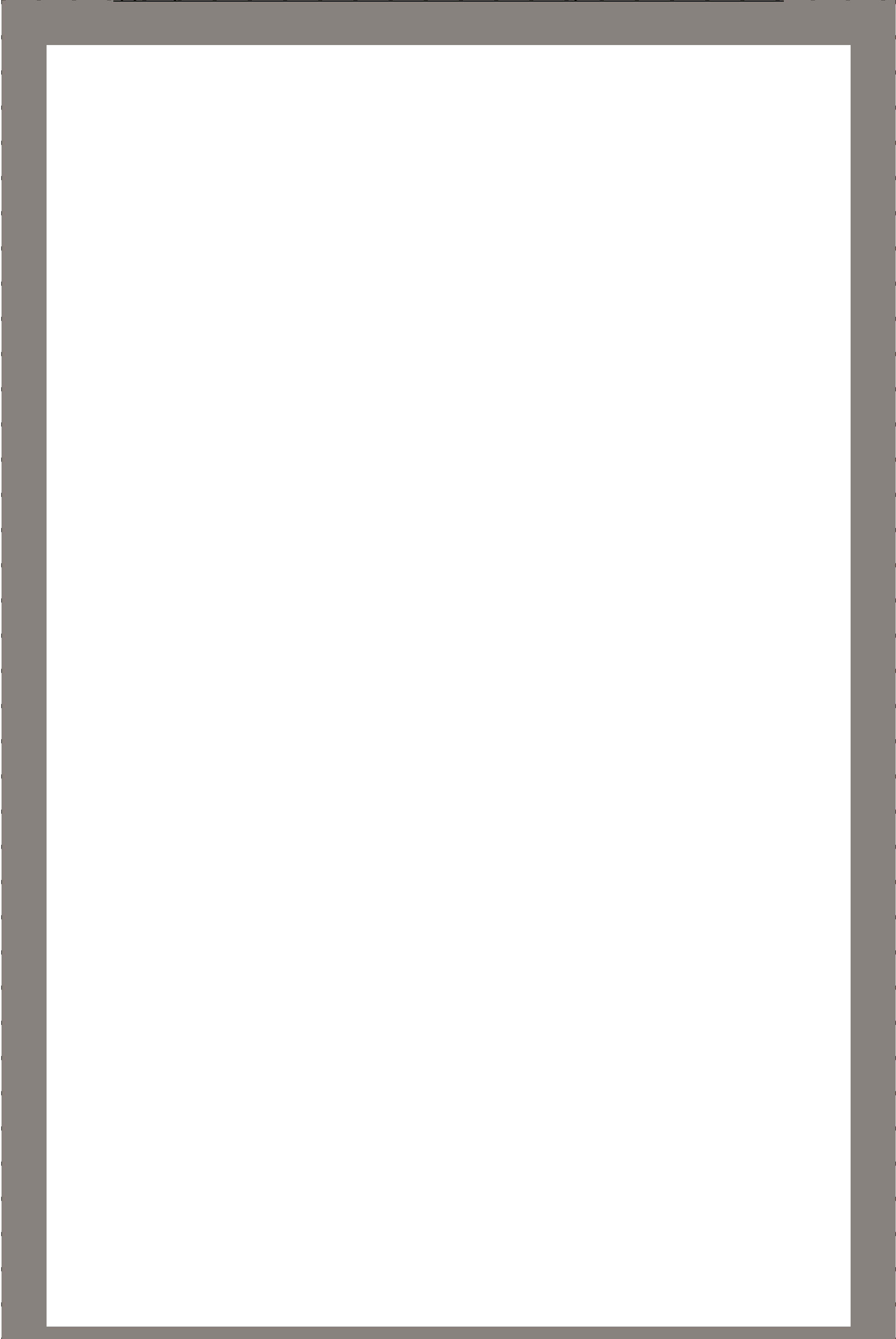

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Can You Please Send Someone Who Can Help? How Qualified Immunity Stops the Improvement of Police Response to Domestic Violence and Mental Health Calls

*Bryan Castro**

Society interacts with the police in many ways. However, there is a great deal of tension between the police and the public at large. This paper focuses on the tension between domestic violence victims, persons with signific

ant psychological conditions ("PWSPC"), and the police. Currently, police spend equal amounts of time with these two groups as any other activity they do but spend disproportionately less time training on how to deal with them. Victims of domestic violence and PWSPC are often left empty-handed *after being wronged by the police. Victims of domestic violence whom the police have created or worsened their position through their actions try to sue under the State Created Danger doctrine. When PWSPC experience excessive use of force, they file claims against the police for excessive use of force under the Fourth Amendment. Both standards are high enough, and even if these standards are met, the officers are likely covered under qualified immunity. As it stands, litigants would have to establish sufficient facts to prove that their constitutional rights have been violated and that their constitutional right was clearly established.*

This paper recognizes that abolishing qualified immunity is unlikely to happen and proposes a different approach. Qualified immunity could be abolished by the United States Supreme Court or Congress, but this outcome is unlikely to happen. Recently, several states and cities have created different methods for citizens to sue police officers, making qualified immunity not a defense, and switching liability to police departments. Similarly, some police departments have put strategies in place to better their mental health and domestic violence responses. This paper argues that while shifting the liability to police departments will not affect officers directly, it is the most feasible approach given the large amount of opposition to abolishing qualified immunity. Thus, my recommendation is based on shifting liability to police departments for police departments to keep implementing these strategies and improve training.

* J.D. Candidate, 2022, Seton Hall University School of Law; B.A., 2017, Kean University. I am extremely grateful to Professor Brian Murray for his help throughout all the stages of this process. I also want to thank Professor Jessica Miles for her zealous advocacy for victims of domestic violence that inspired me to pursue the domestic violence part of this paper.

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Introduction

Repeat after me,

> I, [insert your name], do solemnly swear (or affirm) that I will support the Constitution of the United States and the Constitution of the State of [insert the state], and that I will bear true faith and allegiance to the same and to the Governments established in the United States and in this State, under the authority of the people So help me God.[1]

These are the words by someone who has just sworn to protect you and your loved ones. But whom do you call when they cannot help? Whom do you call when they are not qualified to help you? What if you are a victim of domestic violence looking for help? What if you are calling because your family member who is a PWSPC[2] is having an episode?

The police as an institution have a complicated history in our country. Initially, in the North, the original idea behind the police was to create a night watch, but in the South, the police's sole purpose was the preservation of slavery.[3] Through the years, the police have disproportionately targeted people of color through their various duties.[4] Today, we frequently come in contact with the police. In 2019, there were 697,195 full-time law enforcement officers in the United States.[5] Standing alone, this number would be the sixth largest military in the entire world.[6]

Consider the stories of Jane Doe and John Doe.[7] Jane Doe is a victim of domestic violence, who after several instances of domestic violence, has decided to call the police. When the police arrive, instead of arresting the abuser, they downplay the situation and maybe even tell Jane that everything seems okay. The next time that the police come, Jane displays traits consistent with being a victim of domestic violence, but she is scared to tell them anything else because her abuser is sitting five feet away from her, so the police tell her that she needs to stop calling as she has repeatedly called "for

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[1] N.J. Rev. Stat. § 41:1-1 (2013).

[2] Throughout this paper, PWSPC will refer to people experiencing symptoms of schizophrenia, bipolar disorder, major depression, or some other significant psychological condition both in a singular and a plural manner. SPC will only refer to the condition itself.

[3] Olivia B. Waxman, *How the U.S. Got Its Police Force*, Time (May 18, 2017), https://time.com/4779112/police-history-origins/ [https://perma.cc/7CPC-2B3T].

[4] *See* Tracey Maclin, *Race and the Fourth Amendment*, 51 Vand. L. Rev. 333, 333–-36 (1998).

[5] See Erin Duffin, Number of Full-Time Law Enforcement Officers in the United States 2004 to 2018, Statista (Sept. 30, 2019), https://www.statista.com/statistics/191694/number-of-law-enforcement-officers-in-the-us/ [https://perma.cc/VAL9-Q65B].

[6] *See* Magdalena Szmigiera, *Largest Armies in the World by Active Military Personnel 2021*, Statista (Mar. 30, 2021), https://www.statista.com/statistics/264443/the-worlds-largest-armies-based-on-active-force-level/ [https://perma.cc/92EP-2FFA].

[7] The following two scenarios were created based on the author's research for this paper. While these scenarios are fictitious, they accurately represent how interactions between victims of domestic violence or PWSPC and the police. Application of case law to real scenarios could be seen below. *See infra* Section II.B.

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no reason." The next time that Jane got abused she went ahead and got a temporary restraining order.[8] After seeing how the police were reluctant to help Jane, her abuser ends up abusing her again.[9]

As to John Doe, he is a 30-year-old schizophrenic who is having a panic attack. John is locked in his room or the bathroom. His mother, not knowing what to do, calls the police. While it is not their first encounter with John, his mother tells the police about his condition, and reassures them that he is not a dangerous person. When the police arrive to their house, they tell John how they are going to come in and they are his friend. "We are only here to help," they say. John, who has no control over his emotions, does not cooperate. Finally, the officers go into the room where john is, find him agitated and confused so he starts running towards the officers, who resort to shooting him.

If you were Jane Doe or John Doe's mother, what would you do? The answer is probably to sue the police. Unfortunately, suing the police for a violation of civil rights comes with obstacles like finding an attorney who is willing to get paid based on the award, if any, and to do it for a case that is likely to get dismissed due to qualified immunity.[10] Sadly, if you do decide to sue the police, you would be among the very few that do, given that people who feel that they have been harmed by the police only sue about 1% of the time.[11] Some of the reasons why people do not sue include "ignorance of their rights, poverty, fear of police reprisals, or the burdens of incarceration."[12]

This paper contributes to the ample world of qualified immunity academia by exploring its intersection with domestic violence and PWSPC. Other scholars have focused their qualified immunity studies on different and often broader topics. For example, Professor Chen focused on how both courts and commentators of qualified immunity usually fail to appreciate the unique issues of fact that are inherent to qualified immunity cases.[13] Similarly, Professor Schwartz, who has written several articles on qualified im-

[8] *Restraining Order*, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION ("A restraining order is an order that . . . [forbids] the defendant from certain listed actions that . . . pose a risk of unlawful conduct. In particular, a restraining order is used to limit a person with a propensity for threatening or harming another person from contact, communications, or proximity with that person.").

[9] Currently jurisdictions are split as to what acts by the police are enough to complete this fact pattern. The general idea is that the police officers would need to "communicate[. . .], explicitly or implicitly, official sanction of private violence." Romero v. City of N.Y., 839 F. Supp. 2d 588, 619 (E.D.N.Y. 2012).

[10] *See generally* Tyrrell v. Seaford Union Free Sch. Dist., 792 F. Supp. 2d 601, 634 (E.D.N.Y. 2011).

[11] *Id.* at 863 (citing Matthew R. Durose, Erica L. Schmitt & Patrick A. Langan, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., CONTACTS BETWEEN POLICE AND THE PUBLIC: FINDINGS FROM THE 2002 NATIONAL SURVEY, at V (2005).

[12] *Id.* (citing Daniel J. Meltzer, *Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General*, 88 COLUM. L. REV. 247, 284 (1988)).

[13] Alan K. Chen, *The Burdens of Qualified Immunity: Summary Judgment and the Role of Facts in Constitutional Tort Law*, 47 AM. U.L. REV. 1, 6 (1997).

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munity, usually focuses on the viability of qualified immunity, how police departments deal with lawsuits, and other quantitative studies.[14]

This paper follows a descriptive and evaluative approach. First, this paper identifies the current tension between the police and the public, and how it specifically affects victims of domestic violence and PWSPC. Second, it tries to show how victims are left emptyhanded by detailing the process in which victims would seek remedy when wronged by the police. Qualified immunity serves as a barrier to incentivizing police officers to do better when dealing with the public and attempts to provide a solution.

This paper is organized as follows. Part I outlines the current tension between the police and the public by exploring different concepts that *could* influence such tension. It aims to illustrate some of the reasons as to why the tension exists without alleging correlation or causation. Recognizing qualified immunity as a problem, Part II provides an outline of how a claim in which qualified immunity is raised transpires by first, laying out and then applying to two recent newsworthy cases the current relevant case law relating qualified immunity, the Fourth Amendment, and the State Created Danger exception. Part III explores different ways to solve the problem of qualified immunity as a barrier for reform. The first two Sections of Part III address how the Supreme Court and Congress are the only bodies that can end or modify the doctrine, focusing specifically on how Congress is currently in the process of implementing a new bill. The third Section describes how some states are currently passing statutes creating new ways for citizens to sue to "end" qualified immunity. Lastly, it describes how local police departments can address the tension through the implementation of task forces, recruitment, and training. Since all the possible solutions are either in the process of being implemented or have been recently implemented, Part IV is divided into two parts. First, Part IV analyzes possible reactions and oppositions to the different solutions described in Part III. Then, considering the reactions and oppositions, I propose a course of action that involves a combination of all the possible solutions.

I. The Tension Between the Public and the Police

It *should not* surprise anyone either reading this paper or any other paper that there is tension between the police and the public. Section A seeks to show how the public feels about police by exploring a couple of theories that could create tension. Section B focuses on the police's view on the public's opinion of the police, what the police think of themselves, and what they think about their training. Finally, while this paper is intended to show a

[14] *See* Joanna C. Schwartz, *What Police Learn from Lawsuits*, 33 Cardozo L. Rev. 841, 863–64 (2012) (examining how police departments gather information to identify problems within the force); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 Yale L.J. 2, 9–10 (2017) (exploring how qualified immunity does not usually end cases involving civil rights, including summary judgment, interlocutory appeals, and final judgments resulting on appeals).

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larger issue of distrust between the public and the police, Part C focuses on the two specific police-public encounters that are the primary focus of this paper — domestic violence and mental health related calls.

A. The apparent tension between the public and the police

Distrust in the police is not a new phenomenon. Police intrusions in relation to searches and seizures can be traced back to the colonies when the British had the power to search and seize personal property.[15] Today, we face other problems with the police as the public experiences more and more encounters with the police. 58% of respondents in a study answered that there need to be major changes in policing practices in the United States.[16] While support for different reforms varied, 97% of respondents agreed that we should require officers to have a good relationship with the public.[17]

Encounters with police can lead to threats or excessive use of force. In 2018, approximately 61.5 million people had some type of contact with the police,[18] compared to 40 million in 2008.[19] In 2018, 2% of these people with contacts experienced some threat or use of force, which amounts to 1.25 million people.[20] A U.S. Department of Justice ("DOJ") study of the Seattle police department found that 20% of uses of force were excessive.[21] Similarly, another DOJ study found most shootings by the police in the city of Albuquerque unconstitutional or unjustified.[22]

Prosecution of police for actions that take place in the line of duty is rare, which leads to public distrust because the public feels like the failure to prosecute means enabling future misconduct.[23] The failure to prosecute police officers shifts the public view of police from protectors to adversaries.[24] Failure to prosecute does not include private actions by citizens under Section 1983.[25] Instead, failure to prosecute refers only to prosecutors failing to prosecute officers in their jurisdiction; prosecuters are reluctant to even

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[15] *See* William J. Cuddihy, The Fourth Amendment: Origins and Original Meaning 377–402 (2009).

[16] Steve Crabtree, *Most Americans Say Policing Needs "Major Changes"*, Gallup (July 22, 2020), https://news.gallup.com/poll/315962/americans-say-policing-needs-major-changes.aspx. [https://perma.cc/RAY7-RMRR].

[17] *Id.*

[18] Erika Harrell & Elizabeth Davis, Bureau of Just. Stat., U.S. Dep't of Just., Contacts Between Police and the Public, 2018, at 1 (2020), https://www.bjs.gov/content/pub/pdf/cbpp18st.pdf [https://perma.cc/ZCM4-NX9R].

[19] Christine Eith & Matthew R. Durose, Bureau of Just. Stat., U.S. Dep't of Just., Contacts Between Police and the Public, 2008, at 1 (2011), https://www.bjs.gov/content/pub/pdf/cpp08.pdf [https://perma.cc/76VD-8ZAT].

[20] *Id.* at 5.

[21] U.S. Dep't of Just., C.R. Div., Investigation of the Seattle Police Department 17 (Dec. 16, 2011) https://www.justice.gov/sites/default/files/crt/legacy/2011/12/16/spd_findletter_12-16-11.pdf [https://perma.cc/Z9KU-AZUU].

[22] U.S. Dep't of Just., C.R. Div., Re: Albuquerque Police Department 2 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/04/10/apd_findings_4-10-14.pdf.

[23] John V. Jacobi, *Prosecuting Police Misconduct*, 2000 Wis. L. Rev. 789, 804 (2000).

[24] *See id.* at 789.

[25] 42 U.S.C. § 1983. *See infra* Part II.A.

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charge an officer because of their desire to maintain working relationships.[26] This has led to 66% of the population wanting the power to sue police officers as a way of holding them accountable for excessive use of force or police misconduct.[27]

The public cannot rely solely on internal investigations. Internal complaints are reviewed by officers in the same police department as the officers being complained about.[28] A 2002 study showed that police departments received about 6.6 complaints of officer use of force per every 100 officers.[29] Out of the 26,000 citizen complaints in the study: 34% were not followed because there was insufficient evidence; 25% were found not to be based on actual facts; 23% of the time the officers were exonerated of any liability; 8% of the complaints were found to have sufficient evidence to justify disciplining the officer; and 9% of the complaints had other outcomes.[30]

Some departments actively engage in practices to deter the public from filing complaints. A DOJ investigation of the city of Ferguson argues that the city's practice of making it difficult for the community to file any complaints worsens the trust the community has in the police.[31] The report also found that the department was making it harder for employees to take complaints from the public.[32] For example, a lieutenant criticized a sergeant for taking a complaint from a person who was not the victim, which is against the department's policy, and a captain did the same to another city employee for taking complaints from a citizen.[33] In Newark, New Jersey, the DOJ found that only 5 percent of complaints were sustained over a period of three years and that the department engaged in discriminatory practices when reviewing complaints.[34] When citizens would complain, the investigating officers would interview the person regarding their own criminal history and use that information to mark the person as untruthful.[35] In contrast, the

[26] Alexa P. Freeman, *Unscheduled Departures: The Circumvention of Just Sentencing for Police Brutality*, 47 HASTINGS L.J. 677, 688–89 (1996).

[27] *See Majority of Public Favors Giving Civilians the Power to Sue Police Officers for Misconduct*, PEW RSCH. CTR. (July 9, 2020) [hereinafter Power to Sue Police Officers], https://www.pewresearch.org/politics/2020/07/09/majority-of-public-favors-giving-civilians-the-power-to-sue-police-officers-for-misconduct/ [https://perma.cc/Y58B-SLKL].

[28] *Symposium, Exploring Police Accountability in America: IN POLICE WE TRUST*, 62 VILL. L. REV. 953, 972 (2017).

[29] Mark J. Hickman, BUREAU OF JUST. STAT., U.S. DEP'T OF JUST., *Citizen Complaints About Police Use of Force*, at 1 (2006), https://www.bjs.gov/content/pub/pdf/ccpuf.pdf [https://perma.cc/TD3C-HQH6].

[30] *Id.*

[31] C.R. DIV., U.S. DEP'T OF JUST., INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 1 (2015), https://www.justice.gov/sites/default/files/opa/press-releases/attachments/2015/03/04/ferguson_police_department_report.pdf. [https://perma.cc/499Q-9JKL].

[32] *Id.*

[33] *Id.*

[34] U.S. DEP'T OF JUST., C.R. DIV., INVESTIGATION OF THE NEWARK POLICE DEPARTMENT 39 (2014), https://www.justice.gov/sites/default/files/crt/legacy/2014/07/22/newark_findings_7-22-14.pdf [https://perma.cc/5GPS-DV9].

[35] *Id.*

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investigators would not put any weight on the officers' past conduct, even if the officers had been named in numerous previous complaints.[36]

Public trust in the police can decrease after a display of police use of force. A study found that after the police beating of a man went viral, the police received about 17% fewer 911 calls the following year because people dealt with their problems themselves.[37] A series of polls taken after the deaths of Michael Brown[38] and Eric Garner[39] showed that about half of the community had little to no confidence in the investigation of Brown's shooting.[40] 42% of the white community trusted that police-involved deaths were properly investigated while only 19% of the Black community did.[41]

The events of 2020 brought the tension to new levels. The killings of George Floyd[42] and Breonna Taylor[43] sparked the outrage that we saw during the year towards police brutality.[44] Those events have given rise to many initiatives, including defunding the police, a movement to reallocate police funding into other programs.[45] It seems that the majority of the public wants to see the reallocation of police funds into other programs but are less willing to support the slogan "defund the police."[46] Ultimately, while the public's view of the police is a broader issue, this Paper will try to further explore a

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[36] *Id.* at 40.

[37] *See* Matthew Desmond, Andrew V. Papachristos & David S. Kirk, *Police Violence and Citizen Crime Reporting in the Black Community*, 81 Am. Soc. Rev. 857, 865 (2016), https://assets.documentcloud.org/documents/3114813/Jude-911-Call-Study.pdf [https://perma.cc/3QKP-AFKS]. *But see* Lenese C. Herbert, *Can't You See What I'm Saying? Making Expressive Conduct a Crime in High-Crime Areas*, 9 Geo. J. On Poverty L. Pol'y 135, 143 (2002) (discussing a different view in middle-class or predominantly white neighborhoods).

[38] *Timeline of Events in Shooting of Michael Brown in Ferguson*, AP News (Aug. 8, 2019), https://apnews.com/9aa32033692547699a3b61da8fd1fc62 [https://perma.cc/NSD2-P4Z8].

[39] *Eric Garner Dies in NYPD Chokehold*, History, (July 17, 2014), https://www.history.com/this-day-in-history/eric-garner-dies-nypd-chokehold [https://perma.cc/B4LB-G8VK].

[40] *See* Stark Divisions in Reactions to Ferguson Police Shooting, Pew Research Ctr., 2 (Aug. 18, 2014), https://www.pewresearch.org/politics/wp-content/uploads/sites/4/2014/08/8-18-14-Ferguson-Release.pdf [https://perma.cc/2WFT-8797].

[41] *See* Peter Moore, *Poll Results: Police*, YouGov (Aug. 14, 2014), http://cdn.yougov.com/cumulus_uploads/document/vl0h3on24q/tabs_OPI_police_force_20140814.pdf [https://perma.cc/FS2X-YT87].

[42] *See George Floyd: What Happened in the Final Moments of His Life*, BBC News (July 16, 2020), https://www.bbc.com/news/world-us-canada-52861726 [https://perma.cc/7S5V-2N9W].

[43] *See* Richard A. Oppel Jr., Derrick Bryson Taylor & Nicholas Bogel-Burroughs, *What to Know About Breonna Taylor's Death*, N.Y. Times (Apr. 26, 2021), https://www.nytimes.com/article/breonna-taylor-police.html [https://perma.cc/YU99-F9JP].

[44] *See* Serena Bettis & Laura Studley, *Black Lives Matter: A 2020 protest timeline*, The Rocky Mountain Collegian, (June 10, 2020), https://collegian.com/2020/06/category-news-black-lives-matter-a-2020-protest-timeline/ [https://perma.cc/UY4U-WTCG].

[45] *See* Rashawn Ray, *What Does "Defund the Police" Mean and Does it Have Merit?*, Brookings Inst. (June 19, 2020), https://www.brookings.edu/blog/fixgov/2020/06/19/what-does-defund-the-police-mean-and-does-it-have-merit/ [https://perma.cc/PSZ5-3UBT].

[46] *See* Nathaniel Rakich, *How Americans Feel About 'Defunding The Police'*, FiveThirtyEight (June 19, 2020, 5:58 AM), https://fivethirtyeight.com/features/americans-like-the-ideas-behind-defunding-the-police-more-than-the-slogan-itself/ [https://perma.cc/HW6N-CH5J].

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narrow aspect of it — police interaction with PWSPC and victims of domestic violence.[47]

B. Police perspectives on the issue

Police officers have different perspectives than the public on the ongoing tension. Officers call exposure to battered or dead children, line of duty killings, uses of force, and physical attacks on their person the most stressful parts of their job.[48] When questioned about police and the public's current trust with them, one officer pointed out that police do not tend to admit their fault and instead "tend to be protective of [their] industry."[49]

The use of force is one of the most controversial topics. A study by the Department of Justice surveyed 925 random officers from 121 different police departments.[50] The study found that 75.5% of officers do not believe it is acceptable to use more force than is legally allowed to control someone, even if that person has assaulted an officer.[51] Further, 62.4% of those officers answered that their fellow officers seldom used more force than necessary when making an arrest, and 53.5% of them seldom used more force than necessary when responding to verbal abuse.[52] Regarding whistleblowing, 67.4% of officers said that they would be given the cold shoulder if they were to report a fellow officer's misconduct, and 52.4% of them believe that it is usual for officers to turn a blind eye on each other's improper conduct.[53]

There is a disconnect between officer and public perspective as to the police's job and the risks it entails. When surveyed, 86% of officers think that the public simply does not understand the different risks and challenges that officers must face.[54] By contrast, the same study found that 83% of adults think that they do understand the challenges of being a police officer.[55] The researchers found this single issue to be where most of the dis-

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[47] *See* discussion *infra* section I.C.

[48] *See* John M. Violanti, Deska Fekedulegan, Tara A. Hartley, Luenda E. Charles, Michael E. Andrew, Claudia C. Ma & Cecil M. Burchfiel, *Highly Rated and Most Frequent Stressors Among Police Officers: Gender Differences*, 41 AM. J. CRIM. JUST., 645, 655–56 (2016).

[49] *See* Boer Deng & Jessica Lussenhop, *George Floyd death: What US Police Officers Think of Protests*, BBC NEWS (June 26, 2020), https://www.bbc.com/news/world-us-canada-53159496 [https://perma.cc/HNG4-YDGB].

[50] DAVID WEISBURD, ROSANN GREENSPAN, EDWIN E. HAMILTON, HUBERT WILLIAMS & KELLIE A. BRYANT, NAT'L INST. OF JUSTICE, POLICE ATTITUDES TOWARD ABUSE OF AUTHORITY: FINDINGS FROM A NATIONAL STUDY 1 (2000).

[51] *Id.* at 2.

[52] *Id.* at 3.

[53] *Id.* at 5.

[54] *See* RICH MORIN, KIM PARKER, RENEE STEPLER & ANDREW MERCER, BEHIND THE BADGE: AMID PROTESTS AND CALLS FOR REFORM, HOW POLICE VIEW THEIR JOBS, KEY ISSUES AND RECENT FATAL ENCOUNTERS BETWEEN BLACKS AND POLICE, PEW RESEARCH CTR. 9 (Jan. 11, 2017), https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2017/01/Police-Report_FINAL_web.pdf [https://perma.cc/3U9A-Q6YG]. This study does a deep dive on several key questions regarding policing and the public. This specific study focused on surveying 8,000 police officers, all of which were part of police departments of 100 officers or more.

[55] *Id.*

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parity is placed among both groups.[56] However, while officers felt that the public did not understand the risk involved with being a police officer, 61% of them believed that the public still held respect for the police.[57]

C. Tension Between the Police, Domestic Violence Victims, and PWSPC

The tension described above is also present in scenarios where the police respond to domestic violence calls and calls involving PWSPC. Subsection 1 of this section discusses some of the aspects of domestic violence calls and attempts to show how some of these factors amounts to tension. Subsection 2 gives a brief description of SPC and shows how police encounters with PWSPC disproportionally end in fatalities.

1. Domestic violence

Domestic violence is a big problem in our society. Approximately, every minute about 20 people experience physical violence at the hands of an intimate partner, which totals around 10 million people a year.[58] The National Coalition Against Domestic Violence reports that there are more than 20,000 calls to domestic violence hotlines on a single day.[59] However, when looking for protection under the law, victims may not be so willing to seek help.

Domestic violence is rarely reported to the police. In fact, only 27% percent of women and 13.5% of men report domestic violence episodes to the police.[60] Victims tend not to call the police as doing so angers the abuser, possibly leading to even more abuse.[61] Further, a victim's belief of whether the police will be able to help is one of the most important factors when a victim is considering seeking help, but victims assume that police assistance, if any, would be inadequate.[62] Domestic violence victims express how officers do not usually inform them of the available options that victims have and often lean towards the side of not interfering.[63]

While victims often fail to report, domestic violence remains a key player in police activity. Some officers see domestic violence calls as frustrat-

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[56] *Id.* at 20.

[57] *Id.* at 48.

[58] *See National Statistics*, NCADV, https://ncadv.org/statistics [https://perma.cc/FUK6-ZN63]. This and all figures used in this section are in reference to studies done in the United States.

[59] *Id.*

[60] *See* Andrew R. Klein, Practical Implementations of Current Domestic Violence Research: For Law Enforcement, Prosecutors and Judges, Nat'l Inst. Of Just. 5 (2009).

[61] *See* James Walter, *Police in the Middle: A Study of Small City Police Intervention in Domestic Disputes*, 9 J. Police Sci. & Admin. 243, 259 (1981).

[62] *Id.*

[63] Terry Davidson, Conjugal Crime-Understanding and Changing the Wife Beating Pattern 7–8 (1978).

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ing, dangerous, and, in some cases, not real police work.[64] These calls are considered dangerous because they tend to result in an officer being assaulted at a higher rate than any other police activity.[65] Domestic violence takes as much of the police's time as any other activity does.[66] However, police officers spend less time training for domestic violence scenarios compared to others.[67] While the typical police officer spends 840 hours training in the police academy, they only spend 13 hours learning how to deal with domestic violence scenarios.[68]

If a victim does decide to seek help, it may not lead to a solution. When help arrives, victims may be reluctant to allow police to intervene for reasons including not wanting their children to see their parent being taken away and concerns about job security and household income.[69] When fathers are taken away and incarcerated, a family's income declines by an average of 22%, and 65% of some families cannot meet household needs.[70] Even if the victim does allow the police to intervene, victims often refuse to press charges or to testify, and officers tend not to make an arrests in these situations because the victim, who would be the witness, may not testify.[71]

Some studies have found that about 24% to 40% of police officer engage in domestic violence.[72] Studies have also found that some officers would be fired for a positive drug test but would not receive the same result if they were to engage in domestic violence.[73] Similarly, roughly 20% of officers who have been found to engage in some type of domestic violence have also been named in a lawsuit under Section 1983 at some point in their career.[74]

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[64] Michael G. Breci & Ronald L. Simons, *An Examination of Organizational and Individual Factors that Influence Police Response to Domestic Disturbances*, 15 J. POLICE SCL. & ADMIN. 93, 94 (1987).

[65] FBI, UNIFORM CRIME REPORTS, LAW ENFORCEMENT OFFICERS KILLED AND ASSAULTED 41 (1986).

[66] *See* Walter, *supra* note 63.

[67] *See* BRIAN A. REAVES, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., STATE AND LOCAL LAW ENFORCEMENT TRAINING ACADEMIES, 2013 1 (2016) [hereinafter Academy Study, 2013].

[68] *Id.*

[69] Amy Eppler, *Battered Women and the Equal Protection Clause: Will the Constitution Help Them When the Police Won't?*, 95 YALE L. J. 788, 807 (1986).

[70] *See* ANNIE E. CASEY FOUNDATION A SHARED SENTENCE: THE DEVASTATING TOLL OF PARENTAL INCARCERATION ON KIDS, FAMILIES AND COMMUNITIES 3 (2016).

[71] EVE. S. BUZAWA, CARL G. BUZAWA & EVAN D. STARK, RESPONDING TO DOMESTIC VIOLENCE: THE INTEGRATION OF CRIMINAL JUSTICE AND HUMAN SERVICES 412 (2012); *see also* Aya Gruber, *A "Neo-Feminist" Assessment of Rape and Domestic Violence law reform*, J. GENDER RACE & JUST. 15, 583–84 (2012) (discussing government actors ignoring domestic violence victim's pleadings to stay out of court).

[72] Conor Friedersdorf, *Police Have a Much Bigger Domestic-Abuse Problem Than the NFL Does*, ATLANTIC (Sep. 19, 2014), https://www.theatlantic.com/national/archive/2014/09/police-officers-who-hit-their-wives-or-girlfriends/380329/ [https://perma.cc/DE7T-K4Y4].

[73] Sarah Cohen, Rebecca R. Ruiz & Sarah Childress, *Departments Are Slow to Police Their Own Abusers*, N.Y. TIMES, (Nov. 23, 2013), https://www.nytimes.com/projects/2013/police-domestic-abuse/index.html [https://perma.cc/NSD5-MHCA].

[74] *See* Philip M. Stinson, Sr. & John Liederbach, *Fox in the Henhouse: A Study of Police Officers Arrested for Crimes Associated with Domestic and/or Family Violence*, 24 CRIM. JUST. POL'Y REV. 601, 607 (2013).

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Lastly, officers give a great amount of deference to fellow officers under investigation for acts of domestic violence compared to the general public.[75]

2. *Mental health calls*

There is tension between the police and PWSPC. In 2019, approximately 5.2% of adults living in the United States suffered from a "serious mental illness" ("SMI").[76] An SMI is defined as a mental, behavioral, or emotional disorder that causes serious functional impairment leading to limits or interfere on one or more major life activities.[77] 65.5% of individuals with SMI received mental health services, which leaves close to five million receiving no treatment.[78] When it comes to interactions between police and PWSPC, scholars have described the relationship as a burden, claiming that police are unfairly criticized by mental health professionals.[79] Some have labeled police as "street corner psychiatrist[s]" or "amateur social workers."[80]

Police receive high amounts of mental health related calls. Data from the New York City Police Department shows that their officers respond to an estimated 400 calls related to mental health per day, or 12,000 per month.[81] These numbers increased for ten years in a row before dropping for the first time in 2019 by 8,000 fewer calls during that year.[82] An Arizona police department reported more calls regarding SMI than about crimes like burglaries or auto theft.[83]

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[75] Friedersdorf, *supra* note 72.

[76] NAT'L INST. OF MENTAL HEALTH, *Mental Illness*, https://www.nimh.nih.gov/health/statistics/mental-illness.shtml#:~:text=mental%20illnesses%20are%20common%20in,mild%20to%20moderate%20to%20severe [https://perma.cc/TR4A-RYHY]. The national institute of mental health also recognizes "Any Mental Illness" which cover mental, behavioral, or emotional disorder ranging from various degrees, and which affect 20% of all adults in the United States. Id. This paper will not differentiate between "serious" or "any" "mental illnesses" when discussing scenarios involving PWSPC.

[77] *Id.*

[78] Beth Han, *Key Substance Use and Mental Health Indicators in the United States: Results from the 2019 National Survey on Drug Use and Health*, SAMHSA, 5 (Sept. 2020), https://www.samhsa.gov/data/sites/default/files/reports/rpt29393/2019NSDUHFFRPDFWHTML/2019NSDUHFFR1PDFW090120.pdf [https://perma.cc/XH87-VSXT].

[79] Pauletter M. Gillig, Marian Dumaine, Jacqueline Widish Stammer, James R. Hillard & Paula Grubb, *What Do Police Officers Really Want from the Mental Health System?* 41 HOSP. & CMTY PSYCHIATRY, 663–65 (2006).

[80] Linda A. Teplin & Nancy S. Pruett, *Police as Street Corner Psychiatrists: Managing the Mentally Ill*, 15 INT'L J.L. & PSYCH. 139 (1992).

[81] DEP'T OF INVESTIGATION'S OFF. OF THE INSPECTOR GENERAL FOR THE NEW YORK CITY POLICE DEP'T, DOI'S OFFICE OF THE INSPECTOR GENERAL FOR THE NEW YORK CITY POLICE DEPARTMENT RELEASES A REPORT AND ANALYSES ON THE NYPD'S CRISIS INTERVENTION TEAM INITIATIVE 2 (Jan. 19, 2017), https://www1.nyc.gov/assets/doi/reports/pdf/2017/2017-01-19-OIGNYPDCIT-Report.pdf [https://perma.cc/7KF4-BU87].

[82] Dean Meminger, *Exclusive: There Were 8,000 Fewer 911 Calls Regarding People in a Mental Health Crisis Last Year*, SPECTRUM NEWS (Oct. 28, 2020), https://www.ny1.com/nyc/all-boroughs/public-safety/2020/10/29/nypd—-health-clinician-talk-about-working-with-mentally-ill [https://perma.cc/A3KC-54BR].

[83] Darren DaRonco & Carli Brosseau, *Many in Mental Crisis Call Tucson Police Health Agency to Help TPD Prioritize Queries Starting this Summer*, ARIZ. DAILY STAR (Apr. 14,

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Training seems disproportionately low compared to the high amount of time the police spend responding to mental health related calls. In 2004, a survey of police departments in Pennsylvania showed that about half of the officers did not feel like they were qualified to handle PWSPC.[84] A DOJ study of 664 state and local police departments showed that 90% of them had SMI as a topic in their academy curriculum.[85] The same study showed that those academies devoted 10 hours of total training involving SPC.[86] By contrast, the recruits received 71 hours total on firearm skills.[87]

Police encounters with PWSPC often lead to fatalities. In the past year, 1,422 PWSPC have died via gunshot wound by the hands of the police.[88] That number constitutes 22% of all people who have been shot and killed by the police.[89] Similarly, an accounting of the people who were shot by the police in the state of Maine between 2000 and 2011 found that nearly half of all victims had an SMI.[90] A study of all people killed by police between 2005 and 2013 showed that 60% of them had a SPC that contributed to the incident.[91] The risk of being killed by police during an incident is 16 times higher for PWSPC than the average member of the public.[92]

II. Qualified immunity reinforces the tension between the police and the public

Qualified immunity reinforces the tension between the police and the public by leaving people wronged by the police without a remedy and leaving police officers unpunished after their wrongdoing. In addition, qualified immunity leaves PWSPC and domestic violence victims that have been harmed by the police empty handed.

2013), https://tucson.com/news/local/crime/many-in-mental-crisis-call-tucson-police/article_a03800d9-6608-5907-9fc4-74ad7f9c441a.html [https://perma.cc/8P5D-AWQ5].

[84] Jim Ruiz & Chad Miller, *An Exploratory Study of Pennsylvania Police Officers' Perceptions of Dangerousness and Their Ability to Manage Persons with Mental Illness*, 7 Police Q. 359, 368 (2004).

[85] Reaves, *supra* note 67, at 7.

[86] *Id.*

[87] *Id.* at 5.

[88] Julie Tate, Jennifer Jenkins & Steven Rich, *Fatal Force*, Wash. Post (updated April 27, 2021) https://www.washingtonpost.com/graphics/investigations/police-shootings-database/ [https://perma.cc/HM29-9GZC].

[89] *Id.*

[90] Portland Press Herald, *Maine Police Deadly Force Series: Day 1*, https://www.pressherald.com/interactive/maine_police_deadly_force_series_day_1/ [https://perma.cc/3JFN-MP7D].

[91] Alex Emslie & Rachael Bale, *More Than Half of Those Killed by San Francisco Police Are Mentally Ill*, KQED (Sep. 30, 2014), https://www.kqed.org/news/147854/half-of-those-killed-by-san-francisco-police-are-mentally-ill [https://perma.cc/3S47-G57S].

[92] *See* Doris A. Fuller, H. Richard Lamb, Michael Biasotti & John Snook, Treatment Advocacy Ctr., Overlooked in the Undercounted: The Role Of Mental Illness in Fatal Law Enforcement Encounters 12 (Dec. 2015), https://www.treatmentadvocacycenter.org/storage/documents/overlooked-in-the-undercounted.pdf [https://perma.cc/H7QU-PHEV].

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This Part focuses on the relevant case law involving qualified immunity as well as its application to relevant cases today. Section A outlines the qualified immunity framework and the substantive claims which are brought by domestic violence victims and PWSPC who are looking for remedy for acts committed by the police. Section B applies the caselaw from Part A to two different scenarios from that received public attention recently to show how the law dictates the possible outcomes of the parties involved.

A. Current case law

Current case law provides that qualified immunity is a defense to substantive claims alleging civil rights violations. Qualified immunity is often invoked in response to claims brought under 42 U.S.C. Section 1983 ("Section 1983"), a statutory source of law that originated under Reconstruction.[93] Enacted as part of the Civil Rights Act of 1871, otherwise known as the Ku Klux Klan Act, Section 1983 was enacted to enforce the Fourteenth Amendment and firm up protections for formerly enslaved people who had been living under the strictures of the Black Codes.[94] Section 1983 provides a remedy for persons who have suffered a deprivation of a right, privilege or immunity protected under the law by someone acting under the color of the law.[95] Acting under the color of the law means that the defendant in question was clothed with the power of law and acting in service of their position, i.e., a police officer making an arrest.[96]

Since qualified immunity is an affirmative defense,[97] the analysis of the relevant case law is split in two parts. The discussion that follows unfolds in three parts. Subsection 1 analyzes the current qualified immunity doctrine. It begins by discussing potential targets of suits brought under Section 1983; the two-part test that claimants must meet to successfully defeat a qualified immunity defense: (1) that the facts amount to a violation of a protected right and (2) that the right was clearly established; and the current circuit split as to what constitutes clearly established law. Subsection 2 focuses on Fourth Amendment doctrine in the context of qualified immunity as it deals with cases of domestic violence and PWSPC. The Fourth Amendment is implicated when PWSPC sue for excessive use of force and in scenarios involving police search when dealing with domestic violence.[98] Lastly, Subsection 3 focuses on the state created danger exception to the Due Process

[93] William Baude, *Is Qualified Immunity Unlawful?*, 106 Calif. L. Rev. 45, 49 (2008).

[94] *See* Quern v. Jordan, 440 U.S. 332, 342 (1979).

[95] *See* 42 U.S.C. § 1983. In Smith v. Wade, 461 U.S. 30, 51 (1983), the Supreme Court held that punitive damages could be awarded against a defendant in a § 1983 case if the plaintiff proved that the defendant acted with "reckless or callous disregard for the plaintiff's rights" or intentionally violated the law.

[96] *See* West v. Atkins, 487 U.S. 42, 49 (1988).

[97] Gomez v. Toledo, 446 U.S. 635, 639–41 (1980).

[98] *See infra* section II.A.2.

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Clause, which generally does not protect citizens from other private citizens, as it applies to domestic violence victims.

1. Qualified immunity

The Supreme Court created qualified immunity with the goal of protecting government officials against various harms associated with the litigation of insubstantial lawsuits.[99] The Court sought to empower officers to do their job without the threat of litigation, so long as the officers acted in good faith.[100] Further doctrinal developments to the defense enabled the resolution of cases where defendants successfully invoked qualified immunity prior to discovery.[101]

The statute itself does not provide much clarity as it only refers to "[e]very person."[102] Thus, that aspect of the statute has required some definition. First, states themselves cannot be sued under Section 1983 because states are not considered natural "persons."[103] Further, state officials acting in their official capacities are not "persons."[104] This is because suing a state official in their official capacity is essentially suing that state official's office, which is then the same as suing the state itself.[105] By contrast, as the Supreme Court explained in *Monell*, local and municipal governmental entities and the officers they employ are all considered to be a "person" for purposes of Section 1983.[106] However, in order for the local government to be held liable, the plaintiff must show that the action in question was a result of the local government's policy or custom.[107] Lastly, if the defendant is an officer, the officer must be then acting in a discretionary way.[108] While officer im-

[99] Harlow v. Fitzgerald, 457 U.S. 800, 814 (1982).

[100] *See* Pierson v. Ray, 386 U.S. 547, 557 (1967); *see also* Joanna C. Schwartz, *How Qualified Immunity Fails*, 127 YALE L.J. 2, 15 (2017) (describing decisions where the court focuses primarily on qualified immunity's goal to protect officials from the burdens associated with discovery and trial).

[101] *See* Pearson v. Callahan, 555 U.S. 223, 231 (2009).

[102] *See* 42 U.S.C. § 1983 ("Every person who, under color of [law] . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . .").

[103] Will v. Mich. Dep't of State Police, 491 U.S. 58, 71 (1989).

[104] *Id.*

[105] *Id.* (citing Brandon v. Holt, 469 U.S. 464, 471 (1985); Kentucky v. Graham, 473 U.S. 159, 165–66 (1985)).

[106] *See* Monell v. Dep't of Soc. Servs., 436 U.S. 658, 690 (1978).

[107] *Id.* at 694. *But see* Pembaur v. City of Cincinnati, 475 U.S. 469, 480 (1986) (holding that a city may be held liable for decisions made by an official with policymaking authority for the local government itself); *see also* David Jacks Achtenberg, *Taking History Seriously: Municipal Liability Under 42 U.S.C. §1983 and the Debate over Respondeat Superior*, 73 FORDHAM L. REV. 2183, 2187–-91 (2005). Further, when the municipality is found to be liable, it generally has no qualified immunity defense like officers do. *See* Owen v. City of Independence, 445 U.S. 622, 638 (1980).

[108] Holloman v. Harland, 370 F.3d 1252, 1263–67 (11th Cir. 2004).

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munity is qualified and not absolute, it sets out to protect "all but the plainly incompetent or those who knowingly violate the law."[109]

When a defendant raises a qualified immunity defense, courts engage in a two-part test to determine whether the defendant will be subject to suit. First, the court asks whether the alleged facts give rise to a violation of a constitutional right.[110] Second, the court asks whether the right implicated was "clearly established" at the time of the alleged conduct.[111] When applying this test, judges have the opportunity to decide which of these two prongs of the test should be addressed first.[112] While the test used to be a subjective one[113], as it stands, the test looks to see whether a reasonable officer would know that their individual conduct would violate an established right.[114]

What constitutes a clearly established right is not so clear. First, courts have grappled as to how precise the clearly established precedent must be.[115] "The contours of the right" in question have to be clear enough that the reasonable officer would understand their conduct violates the Constitution.[116] For example, in a Fourth Amendment suit, the relevant question is not whether the Fourth Amendment was clearly established, but whether a reasonable officer would have believed the search in question was lawful under the Fourth Amendment.[117] Whether the specific officer knew that the law in question was clearly established is irrelevant because courts presume that if the precedent exists, a reasonable officer should know it does.[118] Lastly, the Supreme Court has made it clear that clearly established does not require a case "directly on point" with the facts of the case, but instead that the "existing precedent must have placed the . . . question [of clearness]

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[109] Malley v. Briggs, 475 U.S. 335, 341 (1986).

[110] Saucier v. Katz, 533 U.S. 194, 201 (2001).

[111] *Id.*

[112] Pearson v. Callahan, 555 U.S. 223, 236 (2009). The Pearson decision is also read to mean that the court could decide the case without the finding that the law is clearly established. After Pearson, courts have reduced the number of times in which they address the constitutional question which leads to courts finding fewer constitutional violations. *See* Aaron L. Nielson & Christopher J. Walker, *The New Qualified Immunity*, 89 S. CAL. L. REV. 1, 37 (2015).

[113] *See* Wood v. Strickland, 420 U.S. 308, 322 (1975). This test was abandoned in part because its subjective analysis created too many questions of fact and made it difficult for the court to decide these cases at the summary judgment stage without allowing for a trial. *See* Harlow v. Fitzgerald, 457 U.S. 800, 815–16 (1982). The principle of not going on to trial is seen further as a denial of summary judgment based on qualified immunity gives rise to an interlocutory appeal instead of an automatic trial. *See* Mitchell v. Forsyth, 472 U.S. 511, 527–30 (1985).

[114] *Harlow*, 457 U.S. at 818 (1982).

[115] *See generally* Karen M. Blum, *The Qualified Immunity Defense: What's "Clearly Established" and What's Not*, 24 TOURO L. REV. 501, 510–12 (2008). There are other aspects of the law that rely on officers acting on counsel's advice but for our purposes, it will not be part of the analysis. *See generally* Edward C. Dawson, *Qualified Immunity for Officers' Reasonable Reliance on Lawyers' Advice,* 110 NW. U.L. REV. 525 (2016).

[116] Anderson v. Creighton, 483 U.S. 635, 640 (1987).

[117] *Id.* at 640–41.

[118] *Harlow*, 457 U.S. at 818–19.

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beyond debate,"[119] or give the officer fair notice.[120] In some occasions, courts would find that the actions were a violation of a right but the right was not clearly stablished, thus the court would grant qualified immunity but make it clearly established for the next defendant.[121]

Second, the courts must decide where that possible clearly established law comes from. It goes without question that decisions by the Supreme Court of the United States constitute clearly established laws.[122] Similarly, federal courts of appeal look at precedent from their own circuit when assessing whether a right was clearly established.[123] Absent controlling authority the Supreme Court has looked at whether there is "consensus of [persuasive] cases," and has refused to lean towards one side when there is a disagreement among the persuasive authority.[124] Notably, district court opinions are not controlling precedent for the context of qualified immunity.[125]

2. *The Fourth Amendment*

Claims dealing with police encounters relating to PWSPC or domestic violence implicate the Fourth Amendment. The Fourth Amendment is understood to have two individual prongs: (1) protection from unreasonable searches and seizures, and (2) the requirement that there is probable cause when issuing a warrant.[126] The Fourth Amendment applies only to governmental action and is generally inapplicable to private actors even if they engage in unreasonable searches and seizures.[127] A "seizure" occurs when an officer uses physical force or a show of authority by police.[128] When force results in the "termination of freedom of movement through means intentionally applied," a seizure has occurred.[129]

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[119] Ashcroft v. al-Kidd, 563 S. Ct. 731, 740 (2011). The Supreme Court has, on occasions, reversed lower courts because the courts misunderstood the clearly established analysis and how it applies to specific cases. *See* White v. Pauly, 137 S. Ct. 548, 552 (2017).

[120] Hope v. Pelzer, 536 U.S. 730, 740 (2002).

[121] Martinez v. City of Clovis, 943 F.3d 1260, 1276–77 (9th Cir. 2019).

[122] *See* Wood v. Moss, 134 S. Ct. 2056, 2061 (2014); Ryburn v. Huff, 132 S. Ct. 987, 990 (2012).

[123] Vincent v. Yelich, 718 F.3d 157, 167–68 (2d Cir. 2013) (citing Piesco v. Koch, 12 F.3d 332, 345 (2d Cir. 1993)).

[124] Wilson v. Layne, 526 U.S. 603, 617 (1999).

[125] Ashcroft v. al- Kidd, 131 S. Ct. 2074, 2084 (2011); *see also* Camreta v. Greene, 563 U.S. 692, 709 n.7 (2011) ("[a] decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case.").

[126] U.S. CONST. amend. IV.

[127] United States v. Jacobsen, 466 U.S. 109, 113 (1984). Searches by private parties could be attributed to an officer if an officer instigated such a search. Cassidy v. Chertoff, 471 F.3d 67, 74 (2d Cir. 2006). The general rule is that there must be "a sufficiently close nexus" between the action and the government so that the actions of the private party are treated as the government's actions. United States v. Stein, 541 F.3d 130, 146 (2d Cir. 2008).

[128] California v. Hodari D., 499 U.S. 621, 626–27 (1991).

[129] *See* Brower v. Cnty. of Inyo, 489 U.S. 598, 597 (1989); *see also* Torres v. Madrid, 141 S. Ct. 989, 1003 (2021) ("We hold that the application of physical force to the body of a person with intent to restrain is a seizure . . .").

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Fourth Amendment doctrine does not necessarily ban all use of force, and instead carries with it a right in the hands of the officer to threaten or apply some degree of physical force.[130] In the words of the Court in *Johnson v. Glick,* "[n]ot every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers" would be a violation of the Fourth Amendment.[131] Instead, all claims of excessive force, regardless of whether it is deadly or not, in the context of a seizure, arrest or investigative stop are analyzed under the Fourth Amendment reasonableness standard.[132] The court balances the "nature and quality of the intrusion" with the governmental interest at stake in order to determine if the use of force was reasonable under the circumstances.[133] This analysis requires a careful review of the "facts and circumstances" of each case taking into account the government's interest in applying that force.[134] Under *Graham* the plaintiff must show that the force used was excessive while considering: (1) the severity of the relevant crime, (2) whether the alleged suspect posed a threat to officers or others, and (3) whether the suspect resists arrest or takes flight[135] The Sixth and Ninth Circuits take into account a person's SPC when evaluating use of force.[136]

When it comes to warrants, Fourth Amendment jurisprudence has created certain exceptions to the requirement. The first exception is the emergency aid doctrine, which applies to situations requiring the police to respond immediately like rendering aid, protecting the public from harm, and the protecting of property.[137] The Supreme Court has held that "law enforcement officers may enter a home without a warrant to render emergency assistance to an injured occupant or to protect an occupant from imminent injury."[138] It then clarified that even in emergency circumstances, an officer must have a reasonable belief that there is an imminent threat of violence.[139]

Police officers are allowed to enter a home if they see an altercation, injury, or need to prevent both. In *Stuart*, four police officers arrived at a house, heard an altercation inside, and were able to see four adults attempt-

[130] *Id.* at 396; *See also* Deorle v. Rutherford, 272 F.3d 1272, 1280 (9th Cir. 2001) ("To put it in terms of the test we apply: the degree of force used by [the officer] is permissible only when a strong governmental interest compels the employment of such force.").

[131] Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir. 1973).

[132] *Graham*, 490 U.S. at 395.

[133] *Id.* at 396.

[134] *Id.*

[135] *Id.*

[136] Drummond v. City of Anaheim, 343 F.3d 1052, 1058 (9th Cir. 2003); Champion v. Outlook Nashville, Inc., 380 F.3d 893, 904 (6th Cir. 2004). The test looks at the totality of the circumstances, but these two circuits have expressively referenced SPC when dealing with PWSPC.

[137] Missouri v. McNeely, 569 U.S. 141, 147–49 (2013).

[138] Brigham City v. Stuart, 547 U.S. 398, 403 (2006). Prior to Stuart the focus of the emergency doctrine used to rely heavier on the officer's motivation. See People v. Mitchell, 347 N.E.2d 607, 609 (N.Y. 1976) (requiring that the search must not be motivated by an intent to arrest and seize evidence).

[139] Ryburn v. Huff, 566 U.S. 469, 474 (2012).

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ing to restrain a juvenile.[140] The juvenile then broke free and struck one of the adults in the face, who proceeded to spit blood in a sink.[141] When the altercation continued, the officers proceeded to open the screen door and announce their prescience, which produced no results.[142] The officers then stepped into the kitchen, announced their presence, and the altercation finally ceased.[143] The lower court found that the injury caused by the juvenile did not trigger the emergency aid doctrine because it did not give rise to a reasonable belief that an "unconscious, semi-conscious, or missing person" was in the home and injured or dead.[144] The Supreme Court disagreed, finding that the officers' entry was reasonable given the commotion, that their attempts to knock would have been futile, and the clear altercation happening inside.[145]

In *Sheehan*, a woman who suffered from a schizoaffective disorder lived in a group home for PWSPC.[146] After a social worker received no answer from Sheehan during a wellness check,[147] the social worker used a key to enter the room. He found Sheehan, who was not responding to questions but sprang up and yelled, "Get out of here! You don't have a warrant! I have knife, and I'll kill you if I have to."[148] The social worker recognized Sheehan required "some sort of intervention" and called the police so they could assist in transporting her to another facility.[149]

When the officers arrived, they also knocked on Sheehan's door, received no answer, and entered the room with a key.[150] As the officers entered her room, Sheehan grabbed a kitchen knife and started to approach the officers while yelling, "I am going to kill you. I don't need help. Get out." so the officers retreated, and Sheehan closed the door.[151] At this point the officers were worried that she may gather other knives or even flee, so they claim they had to either wait for backup or enter the room to subdue Sheehan.[152] The officers decided to re-enter by having the larger officer push

[140] *Stuart*, 547 U.S. at 400–01.
[141] *Id.* at 401.
[142] *Id.*
[143] *Id.*
[144] *Id.* at 401–02 (quoting Brigham City v. Stuart, 122 P.3d 506, 513–14 (2005)).
[145] *Stuart*, 547 U.S. at 406. The court also found that there was nothing in the Fourth Amendment that had a requirement that the person needing the aid had to be unconscious and noted that the role of the officer includes violence prevention not just providing aid. *Id.*
[146] City & Cty. of S.F. v. Sheehan, 575 U.S. 600, 602–03 (2015). While she lived in a group home, members of the group home had a private room for themselves. *Id.* This is an important clarification because it shows the expectation of privacy in connection to the Fourth Amendment argument and because it overrides any argument of third-party consent.
[147] *Id.*
[148] *Id.* at 603.
[149] *Id.* California law allows for the temporary detention individuals who "as a result of a mental health disorder, is a danger to others, or to himself or herself, or gravely disabled, thus, the social worker completed an application to have Sheehan detained in order to be evaluated and possibly treated. *Id.*; *see also* CAL. WEL. & INST. CODE § 5150.
[150] *Sheehan,* 575 U.S. at 603.
[151] *Id.* at 604.
[152] *Id.* at 604–05.

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the door open while the other would pepper spray Sheehan.[153] When the officers reentered the room, Sheehan was again agitated, so the officers pepper sprayed her but she did not drop the knife, which caused one of the officers to shoot her twice and then again, multiple shots until she collapsed.[154]

The Court found that the first entry into Sheehan's room was constitutional because the officers responded to an emergency.[155] Similarly, the Court found that the second entry was part of a continuous emergency.[156] The court found the use of force reasonable and tried to resolve the question of whether the officer's failure to accommodate Sheehan's illness violated clearly established law for purposes of qualified immunity.[157] The court answered no and held that there was no clearly established precedent showing there was not an objective need for immediate entry, and that no matter how carefully the officers read the relevant cases, they would not have known that opening a person's door to prevent from gathering more knives or escaping would violate a constitutional right.[158]

Another exception to the warrant requirement is the exigent circumstances doctrine.[159] The doctrine usually entails the immediate action to protect the destruction of evidence or the protection of the public or other responding personnel.[160] Under this exception a warrantless search is allowed if "there is compelling need for official action and no time to secure a warrant."[161] In the aspect of domestic violence, several different scenarios have been found to be sufficient to satisfy the exigent circumstances doctrine. First, If the police arrive at the scene and find the property to be disheveled after receiving information that witnesses believe a woman may be getting assaulted.[162] If the police arrive at the house and see a clear sign of injury like

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[153] *Id.* The officers conceded that they did not take Sheehan's SPC s into consideration when deciding how to approach the situation. Sheehan v. City & Cty. of S.F., 743 F.3d 1211, 1219 (9th Cir. 2014). One of the officers said that Sheehan's condition was a "secondary issue" since she was a violent woman. *Sheehan*, 575 U.S. at 605.

[154] *Sheehan*, 575 U.S. at 605–06.

[155] *Id.* at 610–12 (citing Brigham City v. Stuart, 547 U.S. 398, 403 (2006)).

[156] *Id.* (following Michigan v. Tyler, 436 U.S. 499, 511 (1978)).

[157] *Sheehan*, 575 U.S. at 613.

[158] *Id.* The court also ruled that an expert who testified that the officers ignored their training in their decision to reenter the room was irrelevant to a qualified immunity analysis, and rather, even if against their training, a reasonable officer could believe their actions were justified. *Id.* at 616.

[159] The exigent circumstance exception undoubtedly overlaps in many cases with the emergency aid doctrine, and in the emergency aid doctrine is seen as a type of exigency. *See* Missouri v. McNeely, 569 U.S. 141 (2013). However, the exigent circumstances doctrine involves other scenarios that are not just rendering aid. *See e.g.,* Michigan v. Fisher, 558 U.S. 45, 49 (2009).

[160] *See* Thacker v. City of Columbus, 328 F.3d 244, 254 (6th Cir. 2003) (justifying a warrantless entry for the protection of police and paramedics); *see also* Fletcher v. Town of Clinton, 196 F.3d 41, 49 (1st Cir. 1999) (referencing to both the destruction of evidence and safety as exigent circumstances).

[161] *McNeely*, 569 U.S. at 149 (quoting Michigan v. Tyler, 436 U. S. 499, 509 (1978)).

[162] *See* United States v. Brooks, 367 F.3d 1128, 1135 (9th Cir. 2004) (responding to a call regarding a dispute in a disheveled hotel room).

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blood, it is likely to be considered an exigent circumstance.[163] Also, loud screams in the middle of the night can create an exigent circumstance.[164] Courts also take into consideration whether the officer is aware of prior domestic violence incidents in the residence.[165] Lastly, the Seventh[166] and Eighth[167] circuits would find exigent circumstances based on sufficient facts given in a 911 call.

When dealing with domestic violence, the issue of consent can be a problematic situation. Generally, entry into a person's house without a warrant is not reasonable,[168] unless there is an exception or the party consents to the search.[169] Consent can also arise in situations where a third party has "common authority" to the premises.[170] In *Georgia v. Randolph,* the court tried to reconcile both *Matlock* and *Rodriguez*, and held that when a potential defendant who is standing at the door objects to a search of the premises, a third party's consent cannot arise to a reasonable search.[171] However, if the potential objecting party is not present, or might be near the premises but is not invited to take a stance on the search, the third party's consent is valid.[172]

In situations where the police justify their entry with a reasonable fear that a victim might be hurt or getting her belongings, an entry might be justified even if the alleged aggressor is located.[173] In *Black*, Black's ex-girlfriend, Walker, called 911 and reported that Black had beaten her, that he had a gun.[174] Walker then told the 911 dispatcher that she intended to go back to the home with her mother to retrieve several items and that both of them would wait for the officers in the front of the house.[175] When the police arrived at the house, they saw no sign of Walker, but found Black — who knew why they were there — sitting in the backyard.[176] The court

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[163] *Thacker*, 328 F.3d at 256.

[164] *See* United States v. Barone, 330 F.2d 543, 544 (2d Cir. 1964) (finding that officers had a duty to investigate given the loud screams in the middle of the night).

[165] Tierney v. Davidson, 133 F.3d 189, 192–93, 197–99 (2d Cir. 1998).

[166] United States v. Richardson, 208 F.3d 626, 630 (7th Cir. 2000).

[167] United States v. Cunningham, 133 F.3d 1070, 1072–73 (8th Cir. 1998).

[168] Payton v. New York, 445 U.S. 573, 586 (1980).

[169] Illinois v. Rodriguez, 497 U.S. 177, 181 (1990) (objecting defendant was asleep when a third party consented to a search). Based on my research and understanding of these cases, the term "third party" does not necessarily refer to a visitor or a friend but relatives too.

[170] United States v. Matlock, 415 U.S. 164, 171 (1974) (finding consent when the defendant did not have an opportunity to object to a consenting third party).

[171] Georgia v. Randolph, 547 U.S. 103, 121 (2006).

[172] *Id.* The *Randolph* Court also ruled out the argument that the police had to take affirmative steps to find a possible objecting defendant when they might not be present. *Id*. Further, the Court limited its holding to cases in which there are evidentiary searches and when the police are acting to protect the domestic violence victim. *Id.* at 118-19. Yet, the Court mentioned situations like an officer having "good reason" to believe a threat exist and the need to possibly protect a third party while they gather their belongings as possible exigent circumstances. *Id.*

[173] *See* United States v. Black, 482 F.3d 1035, 1039 (9th Cir. 2007).

[174] *Id.* at 1039.

[175] *Id.*

[176] *Id.*

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found that the officers' belief that Walker could have been pulled back into the house and was hurt inside created an exigent circumstance.[177]

There are also the cases in which the police act as caretakers.[178] The Supreme Court first recognized this exception in *Cady v. Dombrowski*.[179] Community caretaking includes acts like providing aid, preserving property, and creating an overall feeling of safeness in the area.[180] The court's holding separates searches while engaging in community caretaking from other searches and holds that the former does not require a warrant and is subject to the Fourth Amendment's reasonableness standard.[181] In the context of searching automobiles, the court described these searches as being "totally divorced from the detection, investigation, or acquisition of evidence" in relation to criminal law.[182] However, the Supreme Court has not expanded its application of the community caretaking exception outside of automobile searches.[183]

3. State created danger

Victims of domestic violence bring constitutional law claims under the Fourteenth Amendment's Due Process Clause. The Due Process Clause of the Fourteenth Amendment states that "[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law."[184] The Supreme Court has determined that the state's failure to protect an individual against another private individual's violence does not constitute a violation of their due process rights.[185] However, language in *DeShaney* has been read as the Court suggesting that the state creates an affirmative duty to protect

[177] *Id.*

[178] Debra Livingston, *Police, Community Caretaking, and the Fourth Amendment*, 1998 U. CHI. LEGAL F. 261, 272 (1998).

[179] Cady v. Dombrowski, 413 U.S. 433, 447–48 (1973).

[180] Livingston, *supra* note 180.

[181] *Cady*, 414 U.S. at 447–48.

[182] *Id.* at 441.

[183] Vargas v. City of Philadelphia, 783 F.3d 962, 972 (3d Cir. 2015) (applying the exception to situations where a person needs medical attention is seized for non-investigatory purposes or the scene requires protection of the individual or the community).

[184] U.S. CONST. Amend. XIV, § 2.

[185] DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 197 (1989). In the context of domestic violence, a state's failure to enforce a restraining order does not trigger protections under procedural or substantive due process. Castle Rock v. Gonzales 545 U.S. 748 (2005) ("[reconciling Castle Rock and DeShaney,] the benefit that a third party may receive form having someone else arrested for a crime generally does not trigger protections under the Due Process Clause, neither in its procedural nor in its 'substantive' manifestations."). After *Castle Rock*, domestic violence victims have resorted to filing state tort claims, which are not part of this section. *See e.g.,* Massee v. Thompson, 90 P.3d 394 (Mo. 2004).

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when the state creates the danger itself.[186] This is known as the state created danger doctrine, which has been adopted by several circuits.[187]

In order to find that the state has created a danger, the defendant must have affirmatively acted in a manner which either created or enhanced the danger to an individual by a private party.[188] The affirmative conduct of a defendant gives rise to a violation of the Due Process Clause if it, explicitly or implicitly, transmits an "official sanction of private violence."[189] The defendant must have acted in a way in which would "shock the conscience," and in some situations, deliberately indifferent behavior may rise to that level.[190] There is no specific definition for shocking the conscience, so a court must look at the facts of a specific case and determine whether it shocks the conscience.[191] The defendant must affirmatively create the danger; the defendant's acts must be more than mere negligence; and there must be a factual connection between the acts and the harm.[192] Further, the injury to the victim must have been a foreseeable consequence of the defendant's conduct and not just result from a possibility of harm to the general public.[193] Lastly, the court takes into consideration whether through their acts, the defendants violated a state law or deviated from proper police training.[194] The state created danger doctrine along with qualified immunity creates a two-step process in which plaintiffs have to first prove that the officers' actions amounted to state created danger and then prove that the right was clearly established.[195]

Police officers who act in a way that could lead the abuser to believe that the officers are enabling or would fail to intervene in the domestic violence could lead to liability under the state created danger doctrine. In *Okin*,

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[186] *See DeShaney*, 409 U.S. at 201 ("While the State may have been aware of the dangers that [plaintiffs] faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). The Constitution is understood to create negative rights, a right that essentially "restrains the government," rather than creating affirmative rights or a "right to government services." *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 576–78 (2015) (explaining the *DeShaney* decision).

[187] *See e.g.,* Butera v. District of Columbia, 235 F.3d 637, 652 (D.C. Cir. 2001).

[188] Coyne v. Cronin, 386 F.3d 280, 287 (1st Cir. 2004). The danger must also be created for that specific party instead of creating danger for the public. *See e.g.,* Kallstrom v. City of Columbus, 136 F.3d 1055, 1066 (6th Cir. 1998).

[189] Okin v. Vill. of Cornwall-on-Hudson Police Dep't, 577 F.3d 415, 429 (2d Cir. 2009).

[190] Rivera v. Rhode Island, 402 F.3d 27, 37–38 (1st Cir. 2005).

[191] *See* County of Sacramento v. Lewis, 523 U.S. 833, 850–51 (1998).

[192] Irish v. Fowler, 979 F.3d 65, 74 (1st Cir. 2020).

[193] Bright v. Westmoreland Cnty., 443 F.3d 276, 281 (3d Cir. 2006).

[194] *See* Irish v. Maine, 849 F.3d 521, 528 (1st Cir. 2017).

[195] *See Fowler*, 979 F.3d at 79 (reversing a grant of summary judgment based on qualified immunity because the officers were on notice that notifying a suspect that they were under investigation for criminal activity and misleading the victim about the level of police protection she had, which constituted state created danger); *see also* Martinez v. City of Clovis, 943 F.3d 1260, 1276–77 (9th Cir. 2019) (holding that the state created danger applies when an officer "reveals a domestic violence complaint, . . . [makes] comments about the victim in a manner that reasonably emboldens the abuser to continue abusing the victim" as well as praising the victim in a manner which communicates that they may continue the abuse, but granting qualified immunity anyway).

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the Second Circuit reversed a grant of summary judgment based on qualified immunity on a state created danger claim.[196] Over a fifteen-month period, Okin made several calls and reports to the police that she was a victim of domestic violence in the hands of Sears.[197] During one of the calls, the officers responded but only spoke with Sears about football and did not address the alleged abuse nor the bruises Okin presented to them.[198] Further, the officers showed a "dismissive and indifferent attitude toward Okin's complaints," which made Okin more vulnerable.[199] The court found that under these facts there was a genuine issue of material fact as to whether the offices' action shocked the conscience.[200] The court went on to deny qualified immunity to the officials after looking at Second Circuit precedent, saying: "police officers are prohibited from affirmatively contributing to the vulnerability of a known victim by engaging in conduct . . . that encourages *intentional* violence against the victim . . . ."[201]

In *Graves*, Williams stabbed and killed Veronica, his pregnant wife, moments after she had just gotten a protective order against him.[202] Prior to the following events, Williams, Major Russell and Deputy Major Lioi of the police department had been friends over a year.[203] Veronica obtained a temporary restraining order, and the city of Baltimore issued a warrant for Williams' arrest because Williams had assaulted Veronica by restraining her and cutting her hair.[204] From there, an officer did not follow proper procedure with the warrant and took it to a different station.[205] During that week, Williams suspected that his wife had taken action against him, so he contacted Russell to find out what happened, who then told Williams what his wife had done.[206] While Russel encouraged Williams to turn himself in, he advised that he should wait until after the weekend to avoid being detained over the weekend.[207] The following week officers, as well as Russell, attempted to arrest Williams but failed to do so because "it was dark and no one answered the door."[208] Throughout the next several days, Williams and Russell engaged in several personal conversations that involved ways to surrender, instances of leniency as to when to surrender, and how to properly deal with the situation.[209] Days later, Williams stabbed Veronica.[210]

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[196] *Okin*, 577 F.3d at 426.

[197] *Id.* at 415–27. Admittedly, the facts of *Okin* stretch over 13 pages and this summary does a disservice to the several instances of abuse, which were reported to the police.

[198] *Id.* at 421

[199] *Id.* at 430.

[200] *Id.*

[201] *Id.* at 434.

[202] Graves v. Lioi, 930 F.3d 307, 314 (4th Cir. 2019). The court addressed them as Mr. and Mrs. Williams, but I want to show separation by not using her married name.

[203] *Id.* at 311.

[204] *Id.*

[205] *Id.* at 312.

[206] *Id.*

[207] *Id.*

[208] *Id.*

[209] *Id.* at 312–14.

[210] *Id.* at 312.

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The court categorized the text messages, the failure to enforce the warrant, and the continuous postponed surrendering as "inactions and omissions", incapable of creating a causal link to her eventual death, saying that "at most . . . [the officers] agreed to allow a cooperating individual that posed no known immediate risk to self-surrender."[211] Therefore, the court found that the actions of the officers did not create or enhance the danger to the victim.[212] The court held that because Veronica's rights were not violated, the officers were entitled to qualified immunity for their actions.[213] The court also noted that even if the actions were unlawful, the right was not clearly established thus the court would have granted qualified immunity regardless.[214]

B. Application of Qualified Immunity, Fourth Amendment Doctrine, and the State Created Danger Exception

This Section aims to show how a court would likely rule today when faced with one of these specific claims. Subsection 1 applies the qualified immunity and Fourth Amendment case law detailed above as it relates to the PWSPC. Subsection 1 is based on the facts from an incident involving a man suffering from Schizophrenia in Milwaukee who died in a police encounter.[215] Subsection 2 shows how qualified immunity and the state created danger exception would apply to a set of facts. Subsection 2 applies the law to the facts of an incident from a New Jersey town.

1. PWSPC scenarios

This subsection follows the facts of Adam Trammel, a 22-year-old Schizophrenic who encountered the police after one of his neighbors called the police because he was naked in the hallway.[216] When the police arrived, Trammel seemed to be having a breakdown and was taking a shower to calm down, as he did when he felt anxious.[217]

Since the police called Adam several times and Adam remained unresponsive even when the officers entered the bathroom, the entry was reasonable because any other attempt to contact Adam would have been futile.[218] Then, the officers tased Adam 15 times and applied two different sedatives in order to restrain him and get him medical care.[219] The officer's successful

[211] *See id.* at 325–30, 32.
[212] *Id.* at 331.
[213] *Id.* at 331–32.
[214] *Id.* at 332. The Fourth Circuit is one of the several circuits that looks at the Supreme Court and decisions from their own circuit to determine clearly established law. *See id.* at 333.
[215] Aleem Maqbool, *Don't Shoot, I'm Disabled*, BBC News (Oct. 4, 2018) https://www.bbc.com/news/stories-45739335 [https://perma.cc/PA2Z-Q82Z].
[216] *Id.*
[217] *Id.*
[218] *Id.*; *see also supra* note 140 and accompanying text.
[219] Maqbool, *supra* note 217.

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restraining of Adam through tasing and sedation constitutes a seizure under the Fourth Amendment.[220]

The use of excessive force was unreasonable. Unlike the victim in *Sheehan*, Adam was neither armed nor did he run toward the officers. Instead, Adam splashed the officers with water from his shower.[221] Further distinguishing Adam from the victim in *Sheehan* who expressed to the officers that she would kill them if they entered the room, Adam remained calm during the encounter but just did not respond to the officers' commands.[222] Notably, Adam was not committing a crime at the time the time he was tased and sedated.[223] When it comes to being a threat to the officers or the public, the 911 call and the body cam video clearly show that Adam was not acting violent but only "naked in the corridor, talking about the devil."[224] Lastly, the officers indicated they were not trying to arrest him, but get him help. Therefore, applying the *Graham* factors, the use of force was unreasonably excessive and accordingly a violation of his Fourth Amendment right.[225]

The officers are likely entitled to qualified immunity. First, the officers qualify as a "person" under Section 1983.[226] Second, as explained above, the officers' actions were a violation of the Fourth Amendment, which satisfies the first prong of qualified immunity.[227] In evaluating whether the right was clearly established, while the officers' actions were a violation of the Fourth Amendment, the proper inquiry has to be construed more specifically. Instead the inquiry would be whether a reasonable officer would have known that seizing Adam by tasing him and sedating him when he was not responding to their commands was unlawful.[228] Looking at Seventh Circuit precedent, it is clearly established that officers "cannot resort as an initial matter to lethal force on a person who is merely passively resisting and has not presented any threat of harm to others."[229] However, unlike *Williams* the officers used their tasers instead of a gun making the case more like *Sheehan* where the officers started with pepper spray.[230] Therefore, the court is likely to find that the right was not clearly established and grant qualified immunity to the officers.

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[220] *Id.*; *Browe*r, 489 U.S. at 626–27.
[221] *See supra* notes 152–153; Maqbool, *supra* note 215.
[222] *Id.*
[223] *Id.*
[224] *Id.*
[225] *See supra* note 136.
[226] *See supra* notes 104–110.
[227] *See supra* note 112.
[228] *See supra* notes 117–118.
[229] *See e.g.*, Estate of Williams v. Ind. State Police Dep't, 797 F.3d 468, 485 (7th Cir. 2015).
[230] *See supra* note 156.

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2. Domestic violence

The facts stated in this subsection follow the story of a Paterson, New Jersey woman whose name was kept out of the article.[231] In this part, to preserve the woman's anonymity, she will be called "Jane." Similarly, the boyfriend, who is also not named, will be called "Chris." Jane arrived at the police department with her two-month-old trying to file a report against her boyfriend who had assaulted her. When she arrived, the officer refused to take her statements, blew kisses at the phone her brother was using to record and called her a "cry baby."[232]

The police officer acted in a way that could lead Chris to believe that the officer was enabling or would not intervene in the domestic violence. Like the officers in *Okin* who showed dismissive and indifferent attitudes towards Okin by talking to the husband about football, the officer here showed the same attitude towards Jane by blowing kisses towards the camera.[233] While the enabling events in *Okin* happened in front of the abuser and Chris was not present in the police department during Jane's encounter, the police's action could have the same effect because Jane's video was shown in the news, which means that Chris could have seen it.[234] Lastly, the officer not being willing to take down her complaint in and of itself likely does not reach the level of enabling or not being likely to intervene, but adding the statement of "cry baby" and his acts of blowing the kiss does.

The officers' actions shock the conscience, and are a factual link to a possible future act of abuse and a violation of New Jersey law.[235] The court in *Okin* found that talking with the abuser about football instead of interviewing the victim created enough of a factual dispute as to whether the actions shocked the conscience, thus the officer not taking the statements from Jane and calling her a "cry baby" likely shocked the conscience.[236] While the officer's acts could be considered an omission like the acts of the defendants in *Graves*, his comments towards Jane were made in a manner that "emboldens [Chris] to continue abusing" like *Martinez*, which would create a causal link with Jane's future abuse.[237] Lastly, the officer likely violated a New Jersey law requiring an officer to arrest and take into custody a domestic violence sus-

[231] Michelle Charlesworth, *NJ Woman Accuses Police of Mocking Her After She Was Abused by Boyfriend*, EYEWITNESS NEWS (Jan. 7, 2021) https://abc7ny.com/woman-victimized-twice-domestic-violence-abuse-police-inaction/9442445/ [https://perma.cc/2555-SPNR] [hereinafter NJ Woman]. The case was chosen due to its recency and proximity given that it is in the state of New Jersey. Due to its recency, there is no indication that there was another instance of domestic violence, but this part will treat the facts as to what would happen if there was another incident after the encounter with the police.

[232] Charlesworth, *supra* note 233.

[233] *See supra* note 199 and accompanying text; Charlesworth, *supra* note 233.

[234] *Id.*

[235] *See supra* notes 192–93 and accompanying text.

[236] *See supra* notes 199–201.

[237] *See supra* notes 212–13; *see also supra* note 196.

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pect if the complaining victim shows signs of domestic violence.[238] Therefore, Jane is likely to succeed in her state-created danger claim.

The officer is likely entitled to qualified immunity. The officer constitutes a person for purposes of Section 1983.[239] The violation of Jane's Due Process rights is a violation of her constitutional right.[240] Then the court would need to see whether a reasonable officer would have known that it was clearly established that officers refusing to take a domestic violence victim's statement, making derogatory terms towards them, and engaging in other similar acts would be a violation of her due process rights.[241] Looking at Third Circuit precedent, the officer's actions are a failure to use his authority, which the court has previously refused to find as a violation of a right, and granted qualified immunity.[242] Therefore, the court is likely to find that Jane's right was not clearly established and instead find qualified immunity.

III. Remedying the Tension Between the Police and the Public Through Various Possibilities

Several remedies could be implemented to relieve the tension between the public and the police. While most of the public wants police reform,[243] many want the police to spend the same amount of time in their neighborhoods as they do now.[244] Thus, none of the possible remedies described below address a situation in which there is no police. A three-year study of 844 U.S. Court of Appeals opinions identified 52 claims where the court granted qualified immunity even after identifying constitutional violations.[245] Therefore, most of the subsections below address qualified immunity or a different method to bring claims against the police.

Section A focuses on the Supreme Court abolishing or reworking qualified immunity as well as the viability of the court addressing qualified immunity's validity. Section B describes how congress is trying to address qualified immunity by enacting a statute that would amend Section 1983. Section C explores how different states are addressing qualified immunity by creating state statutes that serve as different methods of suing police officers. Part D focuses on how police departments and other agencies can follow internal reform to improve the tension between the police and the public.

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[238] N.J. Stat. Ann. § 2C:25-21a(1).

[239] S*ee supra* notes 101–111.

[240] *See supra* note 112.

[241] *See* Charlesworth, *supra* note 231.

[242] Burella v. City of Phila., 501 F.3d 134, 147–48 (3d Cir. 2007) (quoting Bright v. Westmoreland Cty., 443 F.3d 276, 284 (3d Cir. 2006)).

[243] *See supra* note 18.

[244] Lydia Saad, *Black Americans Want Police to Retain Local Presence*, Gallup (Aug. 5, 2020), https://news.gallup.com/poll/316571/black-americans-police-retain-local-presence.aspx [https://perma.cc/R46L-JYR8].

[245] Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853, 1882–83 (2018).

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A. Abolishing or Reworking Qualified Immunity by the Supreme Court

Since qualified immunity is a judicially created defense, it makes sense to begin with its creator. If the Court abolishes qualified immunity, the Court will have to go against decades of precedent. If the Supreme Court does abolish qualified immunity as a defense, it would allow for suits for damages under Section 1983. This solution would have the biggest impact since there would need to be congressional action to recreate it. If the Supreme Court were to abolish or redress qualified immunity, it is hard to imagine what that result would look like. Some scholars have discussed that the answer would be the Court going back to its previous precedent.[246] However, such a result is unlikely.

The Court has not addressed the validity of qualified immunity in the context of overturning precedent. The Court has articulated a multifactor test to determine whether precedent should be overturned. Some of the factors considered when deciding to overturn precedent include: (a) the quality of the precedent's reasoning; (b) the workability of the established rule; (c) whether it is consistent with related decisions; (d) developments since the rule first originated; and (e) reliance on the decision.[247] The Supreme Court has not addressed qualified immunity in the context of overturning the doctrine, and usually only addresses the claim in their substantive value.[248] However, language in *Anderson* has been interpreted to mean that the Court is likely to revisit the defense if its justifications seem to be undermined.[249]

Current members of the Court are not likely to join in overruling the doctrine.[250] The most vocal member of the Court in opposing qualified immunity is Justice Sotomayor. In *Mullenix v. Luna*, Justice Sotomayor expressed that qualified immunity created a notion of "shoot first, think later" which essentially makes the "protections of the Fourth Amendment hollow."[251] In 2018, Justice Sotomayor reiterated her point that it renders a shoot first and think later attitude, and expressed how it "tells the public that palpably unreasonable conduct will go unpunished."[252] Similarly, Justice Thomas has expressed that when the appropriate case comes, the court should reconsider qualified immunity as it has parted from what it was

[246] Joanna C. Schwartz, *The Case Against Qualified Immunity*, 93 NOTRE DAME L. REV. 1797, 1832–33 (2018).

[247] Janus v. Am. Fed'n of State, Cty., & Mun. Employees, Council 31, 138 S. Ct. 2448, 2478–79 (2018).

[248] *See e.g.,* Ziglar v. Abbasi, 137 S. Ct. 1843, 1872 (2017); see Karen M. Blum, *Qualified Immunity: Time to Change the Message*, 93 NOTRE DAME L. REV. 1887 (2018) (describing several of these cases where the Supreme Court repeatedly grants qualified immunity without ruling on the first prong).

[249] *The Case Against Qualified Immunity*, *supra* note 248, at 1821.

[250] This section refers to the members of the court as of April 2021. The 9 Current Justices of the U.S. Supreme Court. https://tucson.com/news/national/the-9-current-justices-of-the-us-supreme-court/collection_5d491442-d98e-5a29-9ffd-e99507179c25.html#9 [https://perma.cc/4444-C43K].

[251] Mullenix v. Luna, 577 U.S. 7, 26 (2015) (Sotomayor, J., dissenting).

[252] Kisela v. Hughes, 138 S. Ct. 1148, 1162 (2018) (Sotomayor, J., dissenting).

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thought to be at common law.[253] Lastly, Justice Gorsuch—then on the Tenth Circuit—commented on how qualified immunity is there to protect law enforcement officers who are "effectuating their sworn obligation."[254] The other members of the Court seem not to take a more vocal stand on the topic.

As to narrowing or reworking qualified immunity, the Court seems to have taken steps towards that end. The Court had an opportunity to address qualified immunity again in the 2021 case of *McCoy v. Alamu*.[255] In *McCoy*, the Fifth Circuit granted qualified immunity because it found that the right was not established "beyond debate."[256] The court granted certiorari and in a summary disposition, reversed and remanded the Fifth Circuit for further consideration in light of *Taylor v. Riojas*.[257] In *Taylor*, the Supreme Court reversed the Fifth Circuit and found that "[no] reasonable officer" would have believed that their actions were constitutionally permissible.[258] This has been believed to be an attempt by the court to stay away from the "beyond debate" test and pointing courts to stay within the "no reasonable officer" test's boundaries.[259] However, in its most recent qualified immunity cases, the Court reversed both cases on the basis that none of the cases with similar facts "come[ ] close to establishing that the officers' conduct was unlawful," but with no mention of the reasonable officer test.[260]

B. Congressional action

The legislative branch can act by creating a new method for citizens to seek damages or amending Section 1983. Congress enacted Section 1983 under Section Five of the Fourteenth Amendment, which grants Congress the power to enforce the amendment via legislation.[261] Thus, if Congress acts, it is likely to do so in a similar manner.

Congress was working on passing legislation to address qualified immunity. The events of 2020 led legislators to introduce three bills looking to reform policing.[262] In its latest form, H. R. 1280, known as the George

[253] *Ziglar*, 137 S. Ct. at 1872.
[254] Cortez v. McCauley, 478 F.3d 1108, 1141 (10th Cir. 2007) (Gorsuch, J., dissenting).
[255] McCoy v. Alamu, 141 S. Ct. 1364 (2021).
[256] McCoy v. Alamu, 950 F.3d 226, 234 (5th Cir. 2020).
[257] *McCoy*, 141 S. Ct. 1364 (2021).
[258] Taylor v. Riojas, 141 S. Ct. 52, 54 (2020).
[259] Colin Miller, *The Supreme Court Issues a (Possibly) Landmark Ruling on Qualified Immunity*, EVIDENCE PROFBLOGGER (Feb. 23, 2021), https://lawprofessors.typepad.com/evidenceprof/2021/02/yesterday-the-united-states-supreme-court-issued-a-summary-disposition-inmccoy-v-alamu-that-could-end-up-being-a-landmark-r.html?utm_source=Feedburner&utm_medium=email&utm_campaign=Feed%3A™ypepad%2Fiuae+%28Evidence Prof+Blog%29 [https://perma.cc/J278-UW7T].
[260] City of Tahlequah, Oklahoma v. Bond, 142 S. Ct. 9, 12 (2021); Rivas-Villegas v. Cortesluna, 142 S. Ct. 4, 8–9 (2021).
[261] U.S. CONST. Amend. XIV, § 5.
[262] Chloee Weiner, *House Approves Police Reform Bill Named After George Floyd*, NPR (March 3, 2021), https://www.npr.org/2021/03/03/973111306/house-approves-police-reform-bill-named-after-george-floyd [https://perma.cc/AQQ4-MQ36].

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Floyd Justice in Policing Act of 2021 got enough votes to pass in the House of Representatives.[263] First, Section 101 of the Act would amend Section 242 of Title 18 by removing "willfully" and replacing it with "knowingly or recklessly."[264] Section 242 allows for criminal prosecution of state actors for the deprivation of rights.[265]

The George Floyd Justice in Policing Act also addresses Section 1983. Section 102, if passed, would revise 42 U.S.C. § 1983 to directly address qualified immunity.[266] The language of Section 102 says that "[i]t shall not be a defense or immunity" that a defendant acted in good faith or reasonably believed that their action was lawful, or that the right in question was not clearly established.[267] This language would directly address qualified immunity jurisprudence as we know it.[268] Thus, Section 102 would end qualified immunity as a defense, and if the Supreme Court seeks to revive it, it would need to be outside of the language prohibited by the section.

If Congress were to want to solidify qualified immunity as a defense and States continued to seek ways to end qualified immunity,[269] congressional action would need to be different. Generally, Congress cannot direct states to act in a certain way because of the doctrine of anti-commandeering.[270] Therefore, Congress cannot command states who have passed legislation to try to end qualified immunity to reverse such acts. Instead, because of preemption, Congress would need to codify qualified immunity by expressively making it a defense available to government actors by enacting a new statute that would provide qualified immunity to state actors at all times and not just only in the context of 1983 actions.[271]

While the George Floyd Justice in Policing Act would not directly address domestic violence and PWSPC, it would remove qualified immunity as a bar for recovery. With qualified immunity not being a defense to Section 1983, PWSPC who have been victims of excessive use of force by the police would be able to recover monetary damages because the officers would not be able to raise the qualified immunity defense. As to domestic violence scenarios, victims who have been placed in dangerous situations because of police misconduct would be able to recover damages via the state-created danger doctrine. Both PWSPC and domestic violence victims would still

[263] George Floyd Justice in Policing Act of 2021, H.R.1280, 117th Cong. (2021) (as passed by House, Mar. 3, 2021). To enact legislation Congress must meet both bicameralism and presentment, which means that the bill must go through both houses of Congress and then it must be signed by the President. *See generally* INS v. Chadha, 462 U.S. 919, 946–47 (1983). Thus, the bill has several steps before its enactment.

[264] George Floyd Justice in Policing Act of 2021, H.R.1280, 117th Cong. § 101 (2021).

[265] 18 U.S.C. § 242.

[266] *See* George Floyd Justice in Policing Act of 2021, H.R.1280, 117th Cong. § 102 (2021).

[267] *Id.*

[268] *See* supra section II.A.1.

[269] *See* infra section IV.B.

[270] *See* Murphy v. NCAA, 138 S. Ct. 1461, 1476 (2018).

[271] *See* Kansas v. Garcia, 140 S. Ct. 791, 801 (2020).

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need to prove excessive use of force and state-created danger claims, respectively.

C. State legislature or local municipalities

State legislatures can create different avenues for domestic violence victims and PWSPC to seek remedy. Given that qualified immunity is a judicially created defense, the doctrine of preemption would not bar states from enacting legislation that prohibits the use of qualified immunity as a defense in certain actions.[272] However, if qualified immunity is codified as a defense to all state actors all the time, these actions by the states would not be proper because of preemption.[273] After the events of 2020, several states have enacted state statutes in efforts to end qualified immunity by creating alternate ways to bring claims seeking remedy.[274] These alternate remedies come into play because many states have statutes requiring agencies to pay for representation when an officer is facing a Section 1983 lawsuit.[275] The ways the states of Colorado, New Mexico, and the City of New York have sought to end qualified immunity are detailed below.

Colorado enacted a statute to allow monetary damages similarly to Section 1983. Colorado was the first state in the nation to enact legislation to bar qualified immunity as a defense for violations of state law.[276] Subsection (3)(1) of the statute creates liability for state actors who violate a right secured by Colorado's bill of rights, Article II of the State's constitution.[277] Subsection (2)(b) states that "qualified immunity is not a defense to liability pursuant to this section."[278] Further, this statute includes liability when the police officer fails to intervene.[279] Subsection (4) forces the officer's employer to indemnify the officer for actions that are brought under this statute, unless the officer did not act in good faith, a reasonable belief that their acts were lawful, or was found guilty in a criminal action for the conduct in connection to the claim.[280]

[272] *See* Integrity Mgmt. Int'l, Inc. v. Tombs & Sons, Inc., 836 F.2d 485, 487 (10th Cir. 1987). Section 1983 is a federal statute; thus, States cannot amend it. This Section refers to state statues in which citizens can bring state law claims.

[273] *See id.*

[274] Nick Sibilla, *New Mexico Bans Qualified Immunity for All Government Workers, Including Police*, FORBES (Apr. 7, 2021), https://www.forbes.com/sites/nicksibilla/2021/04/07/new-mexico-prohibits-qualified-immunity-for-all-government-workers-including-police/?sh=69c4cf7279ad [https://perma.cc/N5BH-MVJR] (listing the States that have acted on qualified immunity).

[275] *See e.g.*, N.Y. PUB. OFF. LAW §17.

[276] Nick Sibilla, *Colorado Passes Landmark Law Against Qualified Immunity, Creates New Way to Protect Civil Rights*, FORBES (June 21, 2020), https://www.forbes.com/sites/nicksibilla/2020/06/21/colorado-passes-landmark-law-against-qualified-immunity-creates-new-way-to-protect-civil-rights/?sh=64b9e503378a [https://perma.cc/83XY-2TPB].

[277] COLO. REV. STAT. § 13-21-131(1).

[278] COLO. REV. STAT. § 13-21-131(2)(b).

[279] COLO. REV. STAT. § 13-21-131(1).

[280] COLO. REV. STAT. § 13-21-131(4)

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New Mexico enacted legislation to allow more victims of police misconduct to seek compensation. The bill's sponsor, Representative Georgene Louis, mentioned how making state agencies accountable for their actions builds trust between the agencies and the community.[281] Section (3) of the statute provide that a person is able to bring actions for a deprivation of their rights under the New Mexico Constitution's bill of rights.[282] Section (4) states that no state officer shall enjoy qualified immunity for the deprivation of a citizen's right.[283] New Mexico's statute also addresses omission as a violation.[284] Subsection (3)(C) limits the scope of the statute by providing that all claims should be brought "against a public body."[285] Thus, a person who has been harmed by a police officer would likely need to sue the police department.

New York City became the first city in the country to take steps toward ending qualified immunity by making it easier to bring legal action.[286] After signing the bill, the mayor announced that it will not make the officer liable for damages, but instead, would make the city and the police department liable.[287] Unlike Colorado and New Mexico, New York City's law addresses qualified immunity by mirroring the Fourth Amendment of the United States Constitution and creating liability for a state officer who violates that right or fails to intervene on the violation of that right.[288] Subsection 8-803 (b) clarifies that it is the employer of the actor who is then liable for any violation of a right.[289] Lastly, subsection 8-804 states that qualified immunity or "any other substantially equivalent immunity" are not defenses to actions brought under this ordinance.[290]

None of the statutes and regulations referenced above allow the officer to be directly liable for their actions. However, by creating other methods in which actions could be brought, they could still have a positive impact in the current tension between the public, domestic violence victims and PWSPC. Increasing the number of claims brought against police officers would indirectly affect the officer's behavior by exposing information about police practices.[291] Schwartz argues that through litigation documents—"complaints,

[281] *New Mexico Ends Qualified Immunity for Abuse Police*, EQUAL. JUST. INIT. (April 09, 2021), https://eji.org/news/new-mexico-ends-qualified-immunity-for-abusive-police/ [https://perma.cc/QHE5-9L6D].
[282] N.M. Stat. Ann. § 41-4A-3 (West).
[283] N.M. Stat. Ann. § 41-4A-4 (West).
[284] N.M. Stat. Ann. § 41-4A-3(B) (West).
[285] *Id.*
[286] Luke Barr, *New York City Moves to End Qualified Immunity, Making it 1st City in the US to Do So*, ABC NEWS (March 29, 2021), https://abcnews.go.com/Politics/york-city-moves-end-qualified-immunity-making-1st/story?id=76752098#:~:text=In%20New%20York%2C%20the%20City,officer%20Derek%20Chauvin's%20murder%20trial [https://perma.cc/5ZC7-4PUJ].
[287] *Id.*
[288] N.Y.C. Admin. Code §§ 8-802, 8-803.
[289] *Id.*
[290] *Id.*
[291] Joanna C. Schwartz, *After Qualified Immunity*, 120 COLUM. L. REV. 309, 360 (2020).

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discovery, motion practice, and trial"—valuable information will come to light, which will lead to improving police behavior.[292]

D. Internal action by police departments or academies

Unlike legislative bodies, police departments cannot enact laws for citizens to sue police officers. Instead, police departments can implement other types of remedies that can improve the tension among the police and the public. For years, scholars have called for joint action teams as they recognize that the police and mental health services alone cannot provide effective intervention, thus, they must act together.[293] As to domestic violence, there has been a growth in the movement towards decriminalization.[294] While the initiatives below do not directly address qualified immunity, they attack the root of the problem.

Implementing Community-Oriented Policing ("COP") can lead to the reform sought. COP is a style of policing based on the partnership of police departments with other agencies to proactively solve problems in the community.[295] A common theme in COP is to look beyond the criminal justice system and embrace the police's social work aspect.[296] Some of the skills developed through COP include proper use of discretion; enhanced communication skills; better abilities to build trust and partnerships; public speaking; and proper conflict resolution abilities.[297] Generally, a successful implementation of COP is correlated with good police officer training and a more responsive administration.[298] Unlike other models of policing, COP focuses on de-specialization, thus it encourages its practices to be adopted agency-wide instead of through the creation of specialized teams.[299] COP also bridges the gap of trust among the public and the police by providing social services to residents and participating in neighborhood activities.[300]

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[292] *Id.* at 357–58.

[293] *See* Richard Lamb, Linda E. Weinberger & Walter J. DeCuir Jr., *The Police and Mental Health*, 53 PSYCHIATRIC SERVICES 1266–71 (2002); Randy Borum *Improving High Risk Encounters Between People With Mental Illness And The Police,* 28 J. OF THE AM. ACADEMY OF PSYCHIATRY AND THE LAW: 332–37 (2000).

[294] *See generally* LEIGH GOODMARK, DECRIMINALIZING DOMESTIC VIOLENCE: A BALANCED POLICY APPROACH TO INTIMATE PARTNER VIOLENCE (2018).

[295] U.S. DEP'T OF JUST., OFF. OF CMTY. ORIENTED POLICING SERVICES, COMMUNITY POLICING DEFINED 1 (2003), https://cops.usdoj.gov/RIC/Publications/cops-p157-pub.pdf [https://perma.cc/LH4B-CVMK] [hereinafter OFFICE OF COP].

[296] Catherine L. Fisk & Song Richardson, *Police Unions*, 85 GEO. WASH. L. REV. 712, 730 (2017).

[297] OFFICE OF COP, *supra note* 297, at 19.

[298] Richard E. Adams, William M. Rohe & Thomas A. Arcury, *Implementing Community-Oriented Policing: Organizational Change and Street Officer Attitudes,* 48 CRIME & DELINQ. 399, 403–04, 421 (2002).

[299] OFF. OF COP, *supra* note 297, at 7.

[300] Charlie Beck & Connie Rice, *How Community Policing Can Work*, N.Y. TIMES (April. 17, 2021), http://www.nytimes.com/2016/08/12/opinion/how-community-policing-can-work.html [https://perma.cc/AH28-JS2C].

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COP directly addresses mental health crisis and domestic violence scenarios by engaging in different partnerships. Through partnerships, COP facilitates some of the services that a police department is not able to provide like mental health services.[301] For example, when an officer concludes that they are dealing with PWSPC, the officer determines what the ongoing problem is and whether there is a mental health professional or a caseworker who can help.[302] Partnerships also help with domestic violence. For example, the Marin County Sheriff's office assigned a full-time officer to work within the Marin Abused Women's Service center, which led to the creation of the Community Action Team and the Community Policing Action Team.[303] Both action teams engaged in the training of their members—police officers and other members of the community—in different domestic violence topics so they can work together to solve problems from domestic violence, also identified by the action teams.[304]

Police departments can implement the help of medical experts and at times, the police may not even respond at all. In two communities of New York City, mental health related 911 calls will be answered by some mental health professionals and not by the police.[305] The new team will be qualified to handle "suicide attempts, substance misuse and serious mental illness, as well as physical health problems."[306] In scenarios where a weapon is involved or the individual can create an imminent risk of harm, police officers will respond with the mental health teams.[307] This approach is similar to what are called "CAHOOTS" programs that responded to about 24,000 cases in 2019, only needing the police in 150 of those.[308]

The city of West Orange, New Jersey, is one of the municipalities to deploy what they call the Domestic Violence Response Team ("DVRT"), a team of volunteers trained and screened by the police department to provide

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[301] OFF. OF COP, *supra* note 295, at 8.

[302] *See id.* at 26.

[303] Jane Sadusky, *Community Policing and Domestic Violence: Five Promising Practices*, BATTERED WOMEN'S JUST. PROJECT at 18, https://www.bwjp.org/assets/documents/pdfs/community_policing_and_domestic_violence.pdf [https://perma.cc/5XG4-3BNP].

[304] *Id.* The action teams identified four specific problems with domestic violence: "1) underreporting by victims and the community; 2) insufficient education about domestic violence; 3) need for a change in attitude from blaming victims to holding perpetrators accountable; and 4) need for law enforcement to approach the 'verbal domestic' as an opportunity for intervention." *Id.*

[305] Caitlin O'Kane, *Mental Health 911 Calls Will Be Handled by Medical Experts Instead of NYPD in New Pilot Program*, CBS NEWS (Nov. 11, 2020), https://www.cbsnews.com/news/mental-health-911-calls-medical-experts-respond-new-york-city/ [https://perma.cc/2HUR-3FPF].

[306] *Id.*

[307] *Id.*

[308] *Id.* The cities of Albuquerque, Oregon, Denver, Los Angeles, San Francisco, and Eugene have implemented similar approaches. *Id.*; *see also* Christina Maxouris, *These Mental Health Crises Ended in Fatal Police Encounters. Now, Some Communities Are Trying a New Approach*, CNN, (Oct. 10, 2020), https://www.cnn.com/2020/10/10/us/police-mental-health-emergencies/index.html (detailing different police approaches to mental health crises across the country).

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domestic violence victims with emergency support and other alternatives.[309] DVRT members are required to complete a 40-hour training course.[310] The DVRT provides a "less authoritarian atmosphere" to victims who have experienced trauma or may be reluctant to seek help.[311] The DVRT can provide advice, provide referrals for counseling, guidance in seeking temporary restraining orders, arrange shelter, a 24-hour hotline, etc.[312]

Police departments[313] can improve the quality of the police force overall by improving their recruitment. This can begin by engaging in more proactive advertisement using posters, TV ads, and attending local high schools and universities, rather than relying on posting their availability on their website.[314] Then, police departments should provide more transparency regarding both the minimum qualifications for the job as well as the benefits of being a police officer.[315] Lastly, police departments should increase their efforts to recruit from minorities and other unrepresented groups.[316]

Police departments could also benefit from having more college-educated officers. In 1971, 8.5% of women and 14.6% of men 25 years-old or older had completed four years of college or more, compared to 38.3% and 36.6% in 2020.[317] A recent survey shows that 30% of officers have a four-year degree, but the survey suggests that these came as efforts to gain promotions and not when these officers were recruits.[318] As the population becomes more educated, police officers should follow the same trend, especially since having gone through college would create "older, more mature, and well rounded" officers.[319] Similarly, officers would gain exposure to diversity, tol-

[309] West Orange, Domestic Violence Response Team-DVRT. https://www.westorange.org/268/Domestic-Violence-Response-Team-DVRT [https://perma.cc/7476-EJKJ].

[310] Craigh McCarthy, *Police are Asking for Volunteers to join the Domestic Violence Response Team as well as the Auxiliary Police*, Patch (July 18, 2013), https://patch.com/new-jersey/westorange/west-orange-police-seeks-volunteers [https://perma.cc/M6CU-5C3D].

[311] West Orange, *supra* note 311.

[312] *Id.*

[313] For purposes of this section, police departments will also include police academies. This is because hiring practices vary by jurisdiction—in some jurisdictions, police academies hire new officers and send them to an academy, and in other jurisdictions police departments hire officers after they have left the police academy. United States Dep't of Just., Community Relations Services Toolkit for Policing, Policing 101, https://www.justice.gov/crs/file/836401/download [https://perma.cc/S2EU-Q9B8].

[314] Michael D. White & Gipsy Escobar, *Making Good Cops in The Twenty-First Century: Emerging Issues for The Effective Recruitment, Selection and Training of Police in the United States and Abroad*, 22 Int'l Rev. Of Law, Computers & Tech. 119, 120 (2008).

[315] *Id.* at 121.

[316] *Id.*

[317] Erin Duffin, *Percentage of the U.S. Population Who Have Completed Four Years of College or More From 1940 to 2020*, by gender, Statista (June 11, 2021), https://www.statista.com/statistics/184272/educational-attainment-of-college-diploma-or-higher-by-gender/ [https://perma.cc/H6E8-FBGR].

[318] Christie Gardiner, *Policing Around the Nation: Education, Philosophy, And Practice* 4, 2 (2017), https://www.policefoundation.org/wp-content/uploads/2017/10/PF-Report-Policing-Around-the-Nation_10-2017_Final.pdf [ ].

[319] White & Escobar, *supra* note 314, at 122.

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erance, and understanding by constantly interacting with people who act and think differently than them.[320]

More than just a college education, police officers would benefit from having specialized legal training. Police officers do not need the same amount of training as lawyers, but they should at least have an equivalent training in topics like substantive criminal law and criminal procedure.[321] Linetsky argues that this would also benefit police departments economically because departments would spend less resources handling lawsuits resulting from officers misapplying the law.[322] As to constitutional law, officers could learn more than black-letter concepts, and instead increase the amount of "theoretical underpinnings and historical developments" of constitutional protections to apply it to new scenarios every day.[323] Lastly, officers could hone their new knowledge by taking scenario-based training or fact pattern tests, both while in their academy training and while on the force.[324]

IV. A Plan Going Forward

Looking at the possibilities, there should be a good way to go forward. Section A of this Part focuses on how the remedies described in Part III could be received. Section A analyzes how scholars and other groups would react or refuse to cooperate with the abolishment or rework of qualified immunity, or other remedies discussed in Part III. Lastly, Section B of this Part proposes a path going forward by taking into consideration the critiques set forth in Section A.

A. How would these responses be received?

Opponents of abolishing qualified immunity propose a procedural rework rather than overruling the doctrine. Pro-qualified immunity scholars call for a rework of the standard set forward in *Pearson.*[325] The Supreme Court's holding in *Pearson* allows the judges to proceed without first deciding on whether the facts constitute a violation of constitutional law.[326] Nielsen and Walker argue for more uniformity in the lower courts by requiring courts to explain their reasoning as to why the lower courts decided to use the *Pearson* discretion in not answering the constitutional question.[327] Second, they propose for the Court to alter its certiorari review and give less weight as to whether an opinion is unpublished or not when deciding

[320] *Id.*
[321] Yuri R. Linetsky, *What the Police Don't Know May Hurt Us: An Argument for Enhanced Legal Training of Police Officers*, 48 N.M.L. Rev. 1, 39 (2018).
[322] *Id.* at 40.
[323] *Id.* at 41.
[324] *Id.* at 44–46.
[325] *See* Aaron L. Nielson & Christopher J. Walker, *A Qualified Defense of Qualified Immunity*, 93 Notre Dame L. Rev. 1853 (2018).
[326] *See supra* note 114 and accompanying text.
[327] Nielson & Walker, *supra note* 327, at 1884.

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whether to review qualified immunity cases.[328] Lastly, they call for the Court to address the *Pearson* discretion and informally discourage the use of discretionary power in a "strategic way."[329]

Scholars are more likely to support the way states are addressing qualified immunity. Peter Schuck argues that police departments have the ability to evaluate police practices, use different training methods, and different strategies based on deterrence, thus, police departments are a better target to bear the cost of liability.[330] Alternatively, displacing the liability from the individual officer to the police departments allows for victims to be able to recover on their judgment given that the individual officers are not likely to be able to pay a judgment against them.[331] The states who are enacting laws against qualified immunity are also requiring police departments to indemnify the officers.[332]

Legislative opponents to ending qualified immunity would oppose bills that enter the Senate that try to end qualified immunity as a protection of the officers. After the George Floyd Justice in Policing Act passed the House of Representatives, Republican legislators expressed how the bill would make it harder for police officers to do their jobs and would "weaken and possibly destroy our community's police forces."[333] Recently, Republican Senator Tim Scott, who is leading the talks for the negotiations of qualified immunity, announced that the plan going forward is shifting the burden from officer to police department instead of the abolishment of the doctrine.[334]

There is no concrete evidence that ending qualified immunity affects how officers would act in their day-to-day interactions and attitudes. Studies have found that the threat of a lawsuit does not affect "field practices" of policing because officers do not tend to think about being sued when doing their job.[335] Similarly, a study of the Cincinnati Police Department showed an increasing pattern of aggression by officers who had been previously

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[328] *Id.*

[329] *Id.*

[330] PETER H. SCHUCK, SUING GOVERNMENT: CITIZEN REMEDIES FOR OFFICIAL WRONGS 85 (1983).

[331] *See* Catherine Fisk & Erwin Chemerinsky, *Civil Rights Without Remedies: Vicarious Liability Under Title VII, Section 1983, and Title IX*, 7 WM. & MARY BILL RTS. J. 755, 796 (1999).

[332] *See supra* Section III.C.

[333] Kelsey Vlamis, *The House Passed a Police Reform Bill Named for George Floyd that Would Ban Choke Holds and "Qualified Immunity" for Officers*, YAHOO! (Mar. 4, 2021), https://news.yahoo.com/house-passed-police-reform-bill-080540582.html [https://perma.cc/HM8M-YMG2].

[334] Manu Raju, Jessica Dean & Ted Barrett, *GOP Senator Floats Compromise on Policing Legislation as Bipartisan Talks Pick Up Pace*, CNN (Apr. 21, 2021), https://www.cnn.com/2021/04/21/politics/policing-reform-talks-congress-latest-negotiations/index.html [https://perma.cc/7Y9L-S8AG].

[335] *See* VICTOR E. KAPPELER, CRITICAL ISSUES IN POLICE CIVIL LIABILITY 7 (4th ed. 2006).

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sued.[336] In contrast, 62% of officers who responded to a study answered that officers who know that they can face civil liability are "deterred from violating an individual's civil rights."[337]

The biggest pushback is likely to come from police unions. Police unions have been identified as the primary factor against police reform for years.[338] Police unions are responsible for police bargaining agreements that include things like their salary, benefits, access to preferred shifts, promotions, and disciplinary processes.[339] In some instances, officers have the right to consult with an attorney or representatives from their respective police union even when they have to make a report about a shooting involving themselves or a fellow officer.[340] Similarly, through police unions many states have created what are known as Law Enforcement Bill of Rights, which generally create a new set of laws that govern police procedure for misconduct.[341] Investigations note that if any initiative has any chance of success, it has to work to redraft collective bargaining agreements.[342] Thus, any action—abolishing, reworking, and/or internal change—would require a bargaining of the current collective bargaining agreements.

Certain groups would be against the introducing initiatives that involve diversity, especially if it involves police officers. An Illinois legislator tried to incorporate critical race theory, as well as "courses on procedural justice, arrest and use and control tactics, search and seizure, cultural competence," and constitutional use of force as part of police officers' training.[343] These actions received opposition from the local fraternal order of police, which stated that police officers needed less time in the classroom, and that these initiatives could place officers' lives in danger.[344] Similar arguments have been made in other areas of society, as opponents to such training frequently claim to "want[ ] to avoid certain feelings of discomfort or even shame" in certain groups.[345]

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[336] *See* Kenneth J. Novak, Brad W. Smith & James Frank, *Strange Bedfellows: Civil Liability and Aggressive Policing*, 26 Policing: Int'l J. Police Strategies & Mgmt. 352, 360, 363 (2003).

[337] Arthur H. Garrison, *Law Enforcement Civil Liability Under Federal Law and Attitudes on Civil Liability: A Survey of University, Municipal and State Police Officers*, 18 Police Stud. Int'l Rev. Police Dev. 19, 26 (1995).

[338] *See generally* Catherine L. Fisk & L. Song Richardson, *Police Unions*, 85 Geo. Wash. L. Rev. 712 (2017).

[339] *Id.* at 738.

[340] *Id.* at 741.

[341] *See e.g.,* N.M. Stat. Ann. § 29-14-4 (2013).

[342] Civil Rights Div., U.S. Dep't of Just. & U.S. Att'y's Off. for N. Dist. of Ill., Investigation of the Chicago Police Department at 111 (2017), https://www.justice.gov/opa/file/925846/download [https://perma.cc/5G4A-JRYP].

[343] Rachel Hilton, *Lawmaker Wants Police Officers Taught How Racism, 'Ignorance' Prevent Them From Doing Their Jobs Fairly*, Chi. Sun Times, (Apr. 19, 2021), https://chicago.suntimes.com/2021/4/19/22392451/critical-race-theory-police-officers-racism-race-lashawn-ford-fop-catanzara [https://perma.cc/UQ94-KLQV].

[344] *Id.*

[345] Aziz Huq, *The Conservative Case Against Banning Critical Race Theory*, Time, (July 13, 2021), https://time.com/6079716/conservative-case-against-banning-critical-race-theory/ [https://perma.cc/W9UN-RQV4].

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Funding and scope are common reasons why some groups oppose changes to police qualifications and training, both during the academy and after. Requiring a college degree would reduce the diverse pool of candidates that could become police officers by excluding candidates who are from disadvantaged groups that did not have access to secondary education.[346] When it comes to funding, places where police trainees bear the costs of the police academy, every new subject or training that adds time to the length of the police academy will be reflected in the tuition paid by officers.[347] Similarly, in places where police departments bear the cost of putting officers through the academy, a more robust police academy program would affect its cost in both tuition and officer salary.[348] Yet, sometimes the cost of not training police officers can far exceed the cost of more training.[349]

B. My recommendation

As the final piece of this paper, I propose a course of action to address the tension between the police and the public, and qualified immunity as a barrier to change. Since abolishing qualified immunity, either via the Supreme Court or Congress, seems to be the least likely outcome, my proposed solution involves a happy medium.[350] I propose to encourage States to keep passing legislation that places liability on the police departments to incentivize them to implement special programs.

As explained in Parts III.A, III.B, and IV.A, the Supreme Court is unlikely to abolish the doctrine of qualified immunity and members of Congress are opposing the passing of the George Floyd Justice in Policing Act. Further, the opposition to abolishing qualified immunity supports the idea that agencies should carry the weight of litigation,[351] thus these scholars would not have a problem with this prescription. Similarly, members of Congress who oppose abolishing the doctrine are also pushing toward shifting liability to the agencies.[352] Thus, these groups should not oppose the States passing more statutes.[353]

Police agencies would respond by implementing programs that would make the tension between the police and the public better. Given that practically all the states that are passing legislation to end qualified immunity are successful in eliminating it as a defense, citizens should be more successful in their claims.[354] Thus, this would be an incentive for the agencies to implement more of the program described in Part III.D. These programs of

[346] White & Escobar, *supra* note 316, at 122.
[347] Linetsky, *supra* note 323, at 40.
[348] *Id.*
[349] *Id.* (citing Telephone interview with Robert Meader, Commander, Columbus Ohio Police Department (May 12, 2017).
[350] *See* Parts III.A, III.B.
[351] *See supra* notes 332–334.
[352] *See supra* note 336.
[353] *See supra* section III.C.
[354] *See supra* Section III.C.

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course would then benefit domestic violence victims and PWSPC who have suffered at the hands of the police.

Put simply, we should encourage States to keep passing statutes that address qualified immunity by passing the liability to the police departments. Then, police departments would need to react to the new amount of claims they will be receiving to reduce the costs involved with litigation. Lastly, police departments would have to improve internally by implementing programs that make the tension between the police and the public better.

Conclusion

There is tension between the public and the police. Between training, use of force, and accountability there are many reasons why the public could feel a certain way towards police officers. Likewise, there are reasons why the police may have a different perspective toward the public. Specifically, victims of domestic violence and PWSPC face harder challenges when they count on the police to help, but officers might not be properly situated to help. Currently, qualified immunity serves as a barrier for officers to want to do better by protecting them from liability.

Qualified immunity leaves victims empty handed. PWSPC, or their families, who experienced excessive use of force would need to sue the police under Fourth Amendment unreasonable use of force doctrine. Similarly, victims of domestic violence who have had their situation worsen by their interaction with the police, assuming the police created or blustered that danger, need to filed action under the state created danger exception. While I recognize that plaintiffs still must prove their substantive claims, qualified immunity leaves victims empty handed even if they do succeed in proving their claims. As it stands, plaintiffs need to prove that the facts constitute a violation of a constitutional right, and show that the law was clearly established, which creates a shield for police officers and contributes to the failure to improve the current tension between the public and the police.

The proposed combined approach is a path to better days. Qualified immunity, an identified barrier to change, could be addressed in several ways. Both the Supreme Court and Congress can take steps toward abolishing the defense as it stands. Also, individual states can enact new laws that would allow victims to seek a remedy through other means outside of Section 1983 and preventing the use of qualified immunity as a defense. The current way states are looking to "end" qualified immunity is by creating new ways for citizens to sue, but it will be police departments that will carry the burden. Lastly, while internal police action cannot end qualified immunity, it can attack the problem by implementing different programs in the community. Currently, most of the opposition remains against abolishing the doctrine. Therefore, considering viability, the correct course of action should be to encourage states to keep creating statutes for victims to sue and making police agencies liable, which will force those agencies to then create more

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programs that would make the relationship between the police and the public better.

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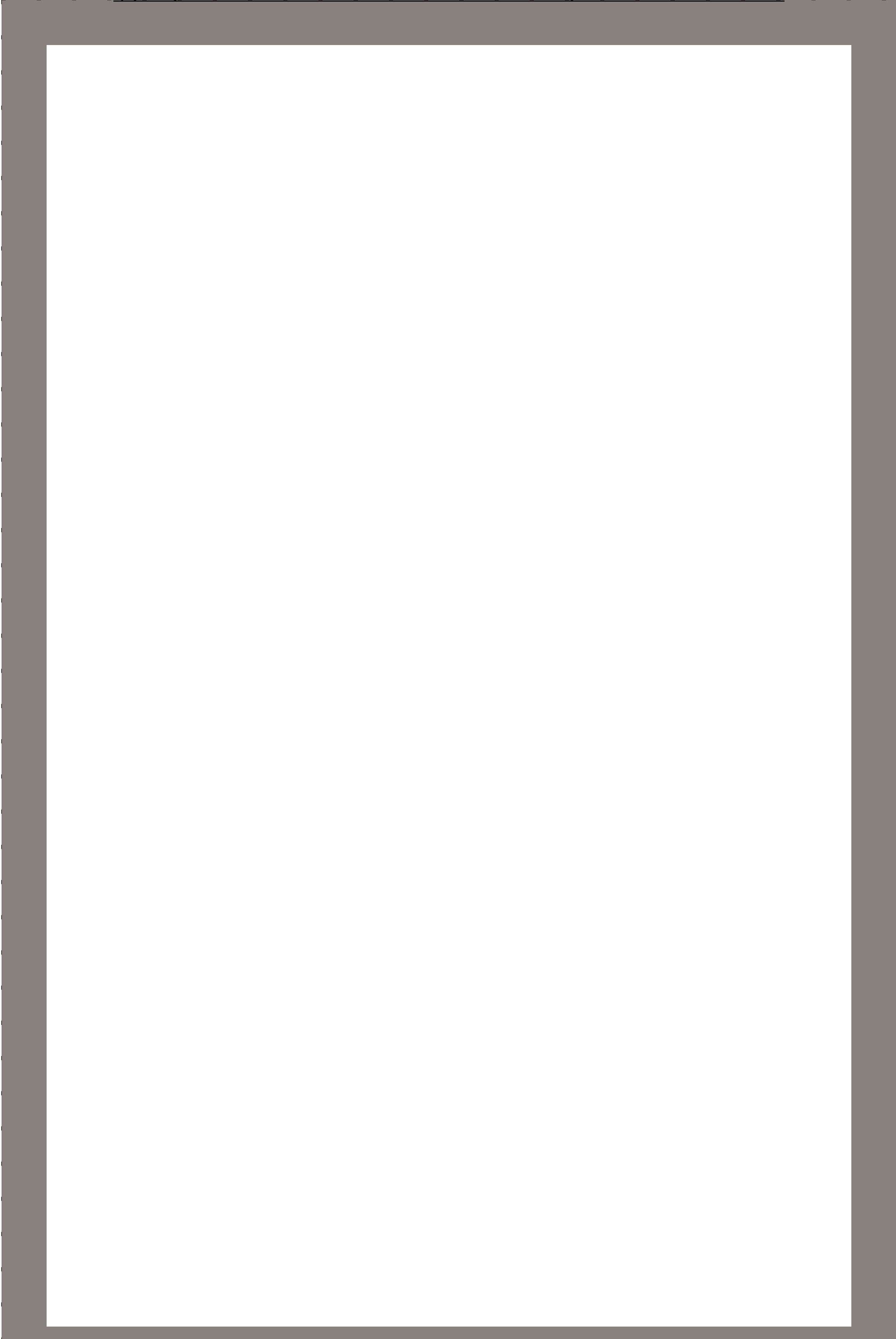

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A Cruel and Unusual Docket: The Supreme Court's Harsh New Standard for Last Minute Stays of Execution

*Isaac Green**

"This is not justice. . . . [T]he Court has allowed the United States to execute thirteen people in six months . . . without resolving the serious claims the condemned individuals raised. Those whom the Government executed during this endeavor deserved more from this Court."[1]

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* Harvard Law School, J.D. expected 2022; Dartmouth College, B.A. 2017. I am indebted to many mentors who encouraged my curiosity and passion throughout my education. Thanks specifically to Professor Carol Steiker who introduced me to the Supreme Court's capital jurisprudence, such as it is, encouraged me to write this Note and gave me excellent feedback. Additionally, Professors Lee Kovarsky, Stephen Valdeck, and Jack Goldsmith provided valuable comments on drafts. Brad Levenson and David Anthony shared their first-hand experience with last-minute capital litigation which informed this Note. I am also grateful for my classmates at Harvard Law School, including the participants in the Spring 2020 Capital Punishment Clinic who workshopped a draft, and to the editors of the Harvard Law and Policy Review who provided insightful feedback and edits. Finally, to Nomi, Jan and Elle who give me so much.

[1] United States v. Higgs, 141 S. Ct. 645, 647, 652 (2021) (Sotomayor, J., dissenting).

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INTRODUCTION

The Trump administration executed thirteen people during its last six months in power. Never before had the federal government executed that many people in even a single decade.[2] In an age where the capital punishment system is characterized by extreme delay,[3] executing so many people in such a short span was a singular feat. Former-President Trump and his Department of Justice were able to carry out the string of executions only by frequent resort to the Supreme Court. The newly bolstered conservative majority vacated numerous lower court orders pausing executions. The Court, apparently fed-up with delay in capital executions, was applying a strict new—though not yet fully articulated—standard that categorically disfavors last-minute relief for prisoners facing execution.[4] This Note characterizes

[2] This is at least true for the past 100 years for which there is data. *See* BUREAU OF PRISONS, DEPT. OF JUSTICE, Capital Punishment (2021) https://www.bop.gov/about/history/federal_executions.jsp [https://perma.cc/878R-G6GE].

[3] The 25 people executed in 2018, the last year for which official data is available, were sentenced, on average, almost 20 years earlier. TRACY SNELL, DEPT. OF JUSTICE, BUREAU OF JUSTICE STATISTICS (BJS), Capital Punishment, 2018—Statistical Tables (Table 11); *see also*, Glossip v. Gross, 576 U.S. 863, 923–38 (2015) (Breyer, J., dissenting); Lackey v. Texas, 514 U.S. 1045 (1995) (memorandum of Stevens, J., respecting denial of certiorari); Lee Kovarsky, *The American Execution Queue*, 71 STAN. L. REV. 1163, 1169–76 (2019); Dwight Aarons, *Can Inordinate Delay Between A Death Sentence and Execution Constitute Cruel and Unusual Punishment?*, 29 SETON HALL L. REV. 147, 182 (1998) (suggesting several reasons for this phenomenon).

[4] A second factor that enabled the rapid spate of executions was the long backlog of federal prisoners who had exhausted the traditional processes for challenging their death sentences. This backlog was the result of prior administrations' agnostic attitude towards the death penalty: aggressively defending sentences on appeal but declining to actually carry them out after the appeals were expended. *See* Maurice Chammah, *How Obama Disappointed on the Death Penalty*, SLATE (Jan. 1, 2017), https://www.themarshallproject.org/2017/01/18/how-obama-disappointed-on-the-death-penalty [https://perma.cc/SU73-QXDA].

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and critiques this apparent new standard governing the 'capital shadow docket.'

Eight of the thirteen federal executions were directly aided by the Supreme Court vacating lower court stays of execution.[5] The last execution, of Dustin Higgs, was only possible because the Supreme Court took the historically unprecedented step of granting certiorari before judgement and summarily reversed a district court opinion.[6] It did so without articulating any explanation whatsoever. For the thirteen federal prisoners condemned to death, the Supreme Court's new standard meant that the resolution of many of their claims was cut short, even when lower courts thought more time was required to consider them.

This new standard is born of frustration with and—I argue —misunderstanding of capital litigation. Several of the justices view the frequent flurry of last-minute litigation in capital cases as a guerilla abolition campaign by the capital defense bar, and they used the thirteen federal executions to fight back. They took their stand, as they increasingly do, on the "shadow docket," so called because it often hosts unreasoned and unsigned opinions.[7] For years the Court has "tinker[ed] with the machinery of death"[8] via these last-minute orders. In the post *Furman* era, the capital shadow docket has held the final answer to the all-important question: "can this execution proceed?"[9] But the Court's answer to this question is increasingly "yes," even when lower courts, with more time to consider, already issued lengthy opinions explaining why they thought the answer was "no."

[5] *See* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (vacating injunction protecting four prisoners who were subsequently executed: Alfred Bourgeois, Daniel Lewis Lee, Dustin Lee Honken, and Wesley Ira Purkey); Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.) (vacating injunction preventing the executions of three prisoners who were subsequently executed: Dustin Lee Konken, Wesley Ira Purkey, and Keith Nelson, who did not participate in *Lee*); Barr v. Hall, 141 S. Ct. 869 (2020) (mem.) (vacating injunction and stay preventing the execution of Orlando Hall); Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.) (vacating stay preventing execution of Lisa Montgomery); *Higgs*, 141 S. Ct. at 645 (vacating stay preventing execution of Dustin Higgs). Several of the other eight executions might also have been stopped by the lower courts, had the Supreme Court not made its impatience with delay so clear. *See, e.g.*, United States v. Johnson, 838 F. App'x 765, 766 (4th Cir. 2021) (mem.) (Wilkinson, J., concurring) (arguing that lateness and "numerosity of filings . . . betrays a manipulative intention to circumvent . . . the Supreme Court's warnings against procedural gamesmanship designed to bring the wheels of justice to a halt").

[6] *Higgs*, 141 S. Ct. at 645.

[7] William Baude, *Foreword: The Supreme Court's Shadow Docket*, 9 NYU J.L. & Liberty 1, 1 (2015) (coining the term and defining it as the Court's "orders and summary decisions that defy its normal procedural regularity").

[8] Callins v. Collins, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting from denial of certiorari). This phrase, which a Note on Supreme Court capital orders would be incomplete without, was made famous by Justice Blackmun's swansong renouncing the death penalty, though the phrase "machinery of death" appeared first ten years earlier in Rumbaugh v. McCotter, 473 U.S. 919, 920 (1985) (Marshall, J., dissenting from denial of certiorari).

[9] *See* Stephen M. Shapiro, Kenneth Geller, Timothy S. Bishop, Edward A. Harnett & Dan Himmelfarb, Supreme Court Practice 351 n.108 (10th ed. 2013) (describing the Court's process for answering this question which usually plays out over a couple hours on the night an execution is scheduled).

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This Note evaluates this trend, with a particular focus on the orders in the federal executions cases. I conclude that through these orders the Court put into practice a new standard that appears to categorically disfavor any judicially imposed last-minute delay to an execution, regardless of whether the government or even the courts themselves are to blame for the claim not being raised earlier.

This standard has the potential to eliminate important avenues for death penalty defendants to raise issues with their impending execution. In particular, these decisions threaten "intrinsically delayed claims," which are necessarily raised late in the post-conviction litigation process.[10] Other claims arise late because they are only 'discovered' when the scarce resources of the capital defense bar are marshalled by the urgency of an impending execution. Claims like these are not, and often cannot be, brought until after an execution warrant has been issued. If the Supreme Court continues down this path, it will nullify the jurisprudence establishing many of these claims, not by developing or overruling precedent, but by keeping the federal courts from enforcing these protections when they are actually meaningful: in the face of an imminent execution. Decades of capital jurisprudence could become dead letters, without the Court explaining why.

This Note argues that driving the recent changes in the adjudication of capital stay orders appears to be the Court finding as a quasi-legislative fact[11] that last-minute delay is presumptively the fault of the prisoner and that the harm of delay presumptively outweighs the benefits that accompany it in terms of accuracy, fairness, and transparency. This fits within the Court's recent use of the shadow docket generally, which some commentators have described as an attempt to redistribute upward some of the judicial power of the lower federal courts.[12] And while this Note focuses on what is happening on the capital shadow docket in particular, I argue that the federal executions are an important example of the perils of shaping law through the shadow docket generally. I suggest that these orders present a potential starting point for the political branches to undertake shadow docket reform.

[10] *See* Lee Kovarsky, *Delay in the Shadow of Death*, 95 N.Y.U. L. Rev. 1319, 1362–70 (2020) (explaining that many claims, such as those surrounding the constitutionality of how death sentences are carried out, "are almost always unripe or speculative when post-conviction litigation begins"); *see, e.g.*, Montgomery v. Watson, No. 20A124, 2021 WL 100808 (U.S. Jan. 12, 2021) (denying stay of execution to allow consideration of whether capital defendant had shown she was mentally incompetent to be executed after district court ruled she was likely to succeed on that claim); Bernard v. United States, 141 S. Ct. 504 (2020) (mem.) (denying stay of execution and petition for certiorari to consider whether a second post-conviction petition raising claims which were previously unavailable due to government misconduct is subject to AEDPA's "no reasonable factfinder" standard).

[11] Brianne J. Gorod, T*he Adversarial Myth: Appellate Court Extra-Record Factfinding*, 61 Duke L.J. 1, 39–43 (2011).

[12] *See, e.g.*, Testimony of Stephen I. Vladeck, *Case Selection and Review at the Supreme Court*, Hearing Before the Presidential Commission on the Supreme Court of the United States *13-*16 (Jun. 30, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/06/Vladeck-SCOTUS-Commission-Testimony-06-30-2021.pdf [https://perma.cc/4F54-QBM2].

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The Note proceeds in four parts. Part I outlines the federal executions and the broader context surrounding them. I trace the emergence of this new standard and show how these orders effectuated it and in doing so facilitated the executions of several prisoners despite there being substantial unanswered questions about the legality of their executions. Part II presents an empirical analysis of the Court's capital shadow docket. I present an account of the Court's emergency orders on executions over time. I categorize almost 700 stay orders issued by the Supreme Court, and compare their disposition as its membership has changed. This analysis shows that the Court is vacating lower court stays at a markedly increased rate and granting fewer of its own. This supports my argument that the federal execution orders were an escalation to an already ongoing aberration from normal capital shadow docket practice. The Court's change in approach to stays is drastic and well-underway.

Part III argues that this change should be reversed because it is misguided, and as the federal executions laid bare, unjust. A majority of justices on the Court presumably favor the new standard because they believe that last-minute capital litigation is largely a frivolous ploy by capital defendants to manufacture delay. But to the extent this argument has any merit generally, the federal executions in particular prove it is far too broad a generalization on which to stake people's lives. In truth, cutting short last-minute capital litigation unacceptably raises the risk of error. The harms of a rushed and incorrect decision are principally borne by the potential executee, but their effects can be more widespread. I argue that negative externalities have already arisen from the application of this new standard: far from streamlining last-minute litigation, the Court's orders effectuating the new presumption against stays created more uncertainty because they are already being misinterpreted by lower courts and others. All this exacerbates the already arbitrary and racially discriminatory way in which post-sentencing legal proceedings determine which death-sentenced prisoners live and which die.[13]

Finally, the Court's midnight orders vacating reasoned lower court opinions granting stays and injunctions – and, in the unprecedented case of David Higgs, a merits ruling – lacked reasoning and therefore accountability. When the only written opinion on the books is from a federal judge expressing grave doubts about the legality of an execution, the Supreme Court should not, without any explanation, authorize the execution to proceed any-

[13] *See generally,* Scott Phillips & Justin Marceau, *Whom the State Kills*, 55 Harv. C.R.-C.L. L. Rev. 585 (2020). While the Federal Government selected three white people to die first in the midst of last summer's racial reckoning, it is not surprising that ultimately more than half of those executed were people of color, and with the exception of Lisa Montgomery, the last seven executed were all black men. *See Execution Database*, Death Penalty Information Center (accessed February 26, 2021) https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=2020 [https://perma.cc/LJ2G-3H7Z].

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way. Decisions like this have the potential to undermine the Court's legitimacy and the public's faith in the rule of law.[14]

Part IV proposes congressional responses to these orders. Congress is the body constitutionally empowered to check the Supreme Court. In response to the Court's failure to carry out its responsibility to protect capital defendants, I call for a Congressional shot across the bow and briefly outline and analyze some potential options. Upstream reforms that remove barriers to death row prisoners raising claims earlier could reduce some – but not all – of the last-minute petitions on the capital shadow docket. More direct options include stripping the Court of the ability to vacate lower court stays entirely, creating a death penalty court of appeals that sits between the Supreme Court and the district courts, with mandatory jurisdiction of all last minute capital cases which the Supreme Court cannot bypass, or creating a deferential standard of review that the Supreme Court owes lower courts on interlocutory appeals of stays, as several commentators have called for in recent months in testimony before Congress and the Presidential Commission on Supreme Court Reform.

Ultimately I suggest that the best reform is a slightly more muscular version of the deference proposal: a statute automatically granting a stay of execution for a death row prisoner litigating their first post-warrant challenge to their execution.

I A brief history in two parts: The Capital Shadow Docket and the federal death penalty

To grasp the doctrinal shift portended by the Supreme Court's orders in the federal execution cases, it's necessary to briefly review the Court's fifty-year relationship with last-minute capital litigation, and the history out of which the recent spate of federal executions arose.

A. The Capital Shadow Docket: A new standard emerges

The Supreme Court's orders list, once passed over by most, has recently garnered significant attention.[15] President Biden, some of the Justices, Congress-people, and scholars alike have recently raised alarms at how frequently the Court is using the shadow docket to change the outcome in cases, early in the appellate process, and often in favor of Republican state and federal executives.[16] This is largely the result of a new solicitousness to the asserted

[14] *See* The Federalist No. 78, at 469 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (suggesting the courts would lose their ability to constrain the other branches to act consistent with the constitution if they "exercise WILL instead of JUDGMENT").

[15] *See, e.g.*, Stephen I. Vladeck, *The Solicitor General and the Shadow Docket*, 133 Harv. L. Rev. 123 (2019); Edward A. Hartnett, *Summary Reversals in the Roberts Court*, 38 Cardozo L. Rev. 591 (2016); Baude, *supra* note 7.

[16] *See* Wolf v. Cook Cnty., Illinois, 140 S. Ct. 681, 684, (2020) (Sotomayor, J., dissenting) ("[Mo]st troublingly, the Court's recent behavior on stay applications has benefited one litigant

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harms of the government (or perhaps more precisely, the Trump Administration) even in the face of its own reproachable delay.[17]

But while the Trump Administration's aggressive use of the shadow docket was certainly relevant to the Court's repeated intervention to allow the federal executions, the Court's desire to reduce judicial delays of executions predates Trump's thirteen hasty executions. To determine whether a stay of execution is proper, courts weigh the potential harm to the government caused by delay against the potential harms suffered by a person wrongfully put to death, or put to death in an illegal manner. In the federal execution cases, the Court not only displayed a concern for the government's frustration with court orders delaying executions, it also adopted a remarkably flippant attitude towards the irreversible harms at stake on the capital defendants' side of the scale.

1. Nelson, Hill, *and* Bucklew: *The more things change . . .*

Judicial antipathy for the delay caused by stays began festering long before the Court raised the bar for staying executions in the 2020 term.[18] Since the beginning of the post-*Furman* era and the proceduralization of the death penalty, certain justices have long tried to facilitate speedier death sentences,[19] while others have long cried foul in the face of these efforts.[20] The Court has attempted numerous times to articulate bespoke standards for

over all others. This Court often permits executions—where the risk of irreparable harm is the loss of life—to proceed, justifying many of those decisions on purported failures to raise any potentially meritorious claims in a timely manner. Yet the Court's concerns over quick decisions wither when prodded by the Government in far less compelling circumstances—where the Government itself chose to wait to seek relief, and where its claimed harm is continuation of . . . [the] status quo . . . . I fear that this disparity in treatment erodes the fair and balanced decision making process that this Court must strive to protect.") (citations omitted) (quotations omitted) (parenthetical omitted); *Hearing on Supreme Court Docket and Case Load Before H. Subcomm. on Courts, Intellectual Property, and the Internet, H. Comm. on Judiciary*, 117th Cong. (statement of Hon. Mondaire Jones) available at 1:41:48 ("Is there any good reason the Supreme Court should be deciding matters of life and death in anonymous rulings the length of tweets?") https://www.c-span.org/video/?509098-1/house-hearing-supreme-court-docket-case-load#&vod [https://perma.cc/FM43-NAHU]. *See generally* Vladeck, *supra* note 12.

[17] Vladeck, *supra* note 12, at 156.

[18] *See, e.g.*, Stephens v. Kemp, 464 U.S. 1027, 1032 (1983) (Powell, J., dissenting from grant of stay) ("This is another capital case in the now familiar process in which an application for a stay is filed here within the shadow of the date and time set for execution . . . Once again . . . a typically 'last minute' flurry of activity is resulting in additional delay of the imposition of a sentence imposed decades ago."); Haynes v. Thaler, 133 S. Ct. 639, 640, (2012) (Scalia, J., dissenting) ("Haynes has already outlived the policeman whom he shot in the head by 14 years. I cannot join the Court's further postponement of the State's execution of its lawful judgment.").

[19] Barefoot v. Estelle, 463 U.S. 880, 894–95 (1983) (encouraging lower courts to "consider whether the delay that is avoided by summary procedures warrants departing from the normal, untruncated processes of appellate review" in capital cases, and approving of the Fifth Circuit practice of denying stays of execution during the disposition of non-frivolous appeals on the basis of a finding of insufficient likelihood of prevailing on the merits to justify delay). *See also generally*, Mark Tushnet, "*The King of France with Forty Thousand Men":* Felker v. Turpin *and the Supreme Court's Deliberative Processes* 1996 S. CT. REV. 163, 163–90 (1996) (discussing this and other efforts to shorten the capital appeals process).

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stays in the capital context.[21] Until recently – and still, formally speaking– the standard articulated in *Nelson v. Campbell* and reaffirmed in *Hill v. McDonough* guided lower courts considering stays of execution.[22] *Nelson* instructs courts to consider: "the likelihood of success on the merits and the relative harms to the parties but also the extent to which the inmate has *delayed unnecessarily* in bringing the claim."[23] The likelihood of success prong was restated as "significant probability of success" in *Hill* and generally requires only that a serious legal issue exists, the resolution of which could make the execution unlawful.[24] Even the Court itself struggles to apply this standard consistently.[25] Driving the Court's jurisprudence around this issue is a clear preoccupation with capital defendants "sandbagging"[26] and strategically delaying litigation to extend their time on earth.[27]

[20] *Barefoot*, 463 U.S. at 913 (Marshall, J., dissenting) (characterizing as "truly . . . perverse" the notion that a state's announced "intention to execute [someone] before the ordinary appellate procedure has run its course" should be accommodated through summary treatment) (emphasis removed).

[21] *See Barefoot*, 463 U.S. at 892–97; Nelson v. Campbell, 541 U.S. 637, 647–50 (2004); Hill v. McDonough, 547 U.S. 573, 584–86 (2006); Bucklew v. Precythe, 139 S. Ct. 1112, 1133–34 (2019).

[22] *Barefoot* is still often cited by the Court as the standard to determine whether it ought to issue a stay of execution when lower courts have not. In that situation, the Court considers, along with the likelihood of irreparable harm in the absence of a stay, whether it is reasonably probable that the Court will grant certiorari and reverse. *See, e.g. Warner v. Gross*, 574 U.S. 1112, 1115 (2015) (Sotomayor, J., dissenting from denial of stay and invoking *Barefoot* test).

[23] *Nelson*, 541 U.S. at 649–50 (emphasis added). The Court has never explicitly articulated the standard for vacating, as opposed to granting a stay, but individual justices have said that similar factors apply, though perhaps more deferentially. *See* Vladeck, *supra* note 12, at 129–31 & nn. 39 & 53; *see also* Trump v. Int'l Refugee Assistance Project, 137 S. Ct. 2080, 2087 (2017) (per curiam) (citing *Nken*) ("In assessing [a] lower court['s] exercise of equitable discretion, [an appellate court] bring[s] to bear an equitable judgement of [its] own.").

[24] *Hill*, 547 U.S. at 584.

[25] Rebecca R. Sklar, Note, *Executing Equity: The Broad Judicial Discretion to Stay the Execution of Death Sentences*, 40 HOFSTRA L. REV. 771, 776 (2012) (highlighting this inconsistency).

[26] Wainwright v. Sykes, 433 U.S. 72, 89 (1977).

[27] *See Hill*, 547 U.S. at 585 (reaffirming that federal courts should exercise their equitable discretion to protect states from "dilatory or speculative suits" but declining the invitation to create any firmer barrier to late litigation). The standard for identifying abusive delay in the context of successive habeas petitions presents a related example of the concern with strategic delay driving the doctrine in a one-way ratchet-like direction. *McCleskey v. Zant*, 499 U.S. 467, 472 (1991) abandoned the more forgiving 'deliberately withheld' standard previously articulated in *Sanders v. United States*, 373 U.S. 1 (1963), where the burden was on the state to show a prisoner's abuse. *McCleskey* applied a cause and prejudice standard instead, which readily shifted the burden to the petitioner after the state merely alleged abuse of the writ. *McClesky*, 499 U.S. at 494. While *McCleskey* contemplated only the standard for successive petitions, Justice Marshall's dissent pointed out that the majority seemed motivated by the delay resulting from last-minute stays in cases where petitioners delayed raising their claims. *Id.* at 510 n.2. AEDPA created a still less forgiving standard for petitioners bringing successive habeas petitions. *See* Banister v. Davis, 140 S. Ct. 1698, 1707 (2020) (noting that *McCleskey* was codified and strengthened by AEDPA's provision regarding second and successive petitions, 28 U.S.C. § 2244(b))*; see also,* Lee Kovarsky, *supra* note 10 at 1335–38 (arguing that the Court's incorrect notion that death row prisoners strategically defer litigation to the eleventh hour has driven the proliferation of incremental restrictions on post-conviction remedies); Nicole Veilleux, *Staying Death Penalty Executions: An Empirical Analysis of Changing Judicial Attitudes*, 84 GEO. L.J. 2543, 2559–61 (1996).

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This history is crucial to understanding the Court's relationship with last-minute capital litigation coming into the summer of 2020. *Barr v. Lee*, a brief per curiam opinion, is the only writing joined by a majority of justices that explained the Court's thinking in the federal execution cases.[28] The terse four paragraph opinion devoted as much attention to the perceived lateness of the plaintiffs' lawsuit as it did to the merits of their Eighth Amendment challenge to the federal execution protocol.[29] And while the latter was relevant only to Lee's case, the discussion of delay applies more broadly and is the first and last explanation the Court gave before granting seven more vacaturs of lower court stays,[30] and denying another sixteen stays.[31]

Lee's discussion of delay relied on *Bucklew v. Precythe*, the Court's leading method-of-execution case.[32] Justice Gorsuch's majority opinion in *Bucklew* dripped with skepticism for the late method-of-execution challenge at issue, which it portrayed as essentially a pretense to buy time.[33] That dismissiveness was misguided in *Bucklew*.[34] While Justice Gorsuch asserted that method-of-execution challenges "must be resolved fairly and expeditiously," the emphasis was decidedly on expedience, and lower courts were instructed to "police carefully against attempts to use such challenges as tools to interpose unjustified delay."[35]

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[28] 140 S. Ct. 2590 (2020) (per curiam).

[29] *Id.* at 2590–92.

[30] United States v. Higgs, 141 S. Ct. 645 (2021) (mem.); United States v. Montgomery, 141 S. Ct. 1233 (2021) (mem.); Rosen v. Montgomery, 141 S. Ct. 1232 (2021) (mem.); Barr v. Hall, 141 S. Ct. 869 (2020) (mem.); United States v. Purkey, 141 S. Ct. 195 (2020) (mem.); Barr v. Purkey, 140 S. Ct. 2594 (2020) (mem.); Barr v. Purkey, 141 S. Ct. 196 (2020) (mem.).

[31] See Section II, Table 2, *infra.*

[32] 139 S. Ct. 1112 (2019).

[33] *See, e.g.*, *id.* at 1118–19 ("Mr. Bucklew raised this claim for the first time less than two weeks before his scheduled execution. He received a stay of execution and five years to pursue the argument, but in the end [all courts found it meritless]."); *id.* at 1119 ("After a decade of litigation, Mr. Bucklew was seemingly out of legal options. . . . As it turned out, though, Mr. Bucklew's case soon became caught up in a wave of litigation over lethal injection procedures."); *id.* at 1120 ("As a result [of pressure from anti-death penalty groups on execution drug suppliers], the State was unable to proceed with executions until it could change its lethal injection protocol again."); *id.* at 1134 ("[Mr. Bucklew] filed his current challenge just days before his scheduled execution. That suit has now carried on for five years and yielded two appeals to the Eighth Circuit, two 11th-hour stays of execution, and plenary consideration in this Court. And despite all this, his suit in the end amounts to little more than an attack on settled precedent . . . . ").

[34] First, it was the Court that accepted the case and stayed Bucklew's execution to hear it, and Justice Gorsuch himself who wrote a twenty-page opinion considering those claims. Indeed, four justices would have given him relief. *Id.* at 1136 (Breyer, J. dissenting, joined by Ginsburg, J., Sotomayor, J., and Kagan, J.). Second, *Bucklew* did not merely apply but affirmatively extended the Court's previous method-of-execution jurisprudence. *Id.* at 1146 (Sotomayor, J., dissenting) ("[T]oday's extension of *Glossip*'s alternative-method requirement is misguided (even on that precedent's own terms."). Finally, and importantly, the proposition that Mr. Bucklew delayed bringing his suit is at odds with the actual history of proactive challenges raised by Mr. Bucklew to the state's execution protocol over the course of years, litigation which was still unresolved when the state scheduled his execution. *Id.* at 1121.

[35] *Id.* at 1134.

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Justice Sotomayor was troubled by the majority's focus on delay in *Bucklew*.[36] She warned that "[w]ere those comments to be mistaken for a new governing standard, they would effect a radical reinvention of established law and the judicial role."[37] In hindsight, this may have been, if anything, an understatement.

2. Ray, Murphy, *and* Lee: *The Court practices what it preached*

After *Bucklew* was argued, but before the decision was handed down, the Court issued an order in *Dunn v. Ray*, dismissing a Muslim prisoner's challenge to an Alabama policy that prevented him from having his imam instead of a Christian chaplain with him as he died.[38] Without any discussion of the merits at all the Court remarked that "[o]n November 6, 2018, the State scheduled Domineque Ray's execution date for February 7, 2019. Because Ray waited until January 28, 2019 to seek relief, we grant the State's application to vacate the stay . . . ."[39]

Since *Bucklew* was still a few months from publication, to support this justification, the Court cited *Gomez v. United States Dist. Court for Northern Dist. of Cal.*, a short per curiam including the useful, if misleading, assertion that, "a court may consider the last-minute nature of an application to stay execution in deciding whether to grant equitable relief."[40] Significantly, the Court did not cite or apply *Nelson* perhaps because *Gomez* contains an unconditional assertion of the relevance of the last-minute, whereas *Nelson,* as the Eleventh Circuit noted, held a Court should only hold lateness against a plaintiff if the delay was unnecessary. The Court did not address the finding by the unanimous Eleventh Circuit panel,[41] that Ray did not discover until January 23rd that his request to be accompanied by his imam had been denied.[42]

The *Ray* decision was met with widespread condemnation.[43] So much so that in a footnote in *Bucklew* the Court belatedly offered a justification for

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[36] *Id.* at 1146 (Sotomayor, J., dissenting) ("Given the majority's ominous words about late-arising death penalty litigation, one might assume there is some legal question before us concerning delay. Make no mistake: There is not.") (citation omitted).

[37] *Id.*

[38] 139 S. Ct. 661 (2019) (mem.).

[39] *Id.*

[40] 503 U.S. 653, 654 (1992) (per curiam) (vacating a stay where an inmate's unjustified 10-year delay in bringing a claim was an "obvious attempt at manipulation").

[41] A circuit not known for its liberal justices or defendant-friendly precedent.

[42] Ray v. Comm'r, Alabama Dep't of Corr., 915 F.3d 689, 702–03 (11th Cir. 2019). The 11th Circuit in *Ray a*nalyzed the delay argument at great length, applying the ostensibly controlling standard from *Nelson* and observing that the equitable presumption against stays from that case only applies "where a claim could have been brought at such a time as to allow consideration of the merits without requiring entry of a stay." *Id.* quoting *Nelson,* 541 U.S. at 584.

[43] *See, e.g.*, MUSLIM PUB. AFFS. COUNCIL, *Justice for Some: The Impact of* Dunn v. Ray (Feb. 15th, 2019) https://www.mpac.org/blog/statements-press/justice-for-some-impact-dunn-v-ray.php [https://perma.cc/ENQ3-6MXN]; Richard Lempert, *Why Kavanaugh and a Conservative Supreme Court Punted a Religious Liberty Case on Procedure*, BROOKINGS (Feb. 15, 2019) https://www.brookings.edu/blog/fixgov/2019/02/15/dunn-v-ray-religious-liberty/

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its rejection of Domineque Ray's First Amendment claim: he ought to have known that his request to the prison was going to be denied, and had he asked for clarification sooner a stay might not have been necessary.[44] Evidently this was evidence of unnecessary delay sufficient to make vacatur proper under *Hill* and *Nelson*. But, whatever one makes of this tenuous argument for blameworthy delay, that is only a "but also" factor in the *Nelson* and *Hill* standard, and Ray's request was certainly not meritless, "pursued in a dilatory" fashion or "based on speculative theories."[45] The proof is the fact that the Court granted a substantially identical free exercise claim brought by a Buddhist inmate from Texas two months later in another shadow docket case, *Murphy v. Collier*.[46]

Nothing if not consistent in their application of their novel exacting presumption against stays, Thomas and Gorsuch dissented, without comment.[47] Almost two months later, upon further consideration, Alito wrote a lengthy dissent, acknowledging the hypocrisy of holding that the lower courts in *Murphy* erred when they "rul[ed] exactly as we [did] less than two months earlier."[48]

Kavanaugh and Roberts stood by both their votes and were forced to explain their inexplicable decision to execute the Muslim and save the Buddhist. "In light of Justice Alito's opinion" Kavanaugh issued a statement – also two months late – arguing that technically Ray had made an Establishment Claim rather than a Free Exercise Claim which was mooted by Alabama's agreement to exclude the chaplain from the execution chamber,[49] and that *Murphy* made his claim a couple weeks earlier than *Ray* in relation to his execution date.[50] Whatever can be said about the formalistic first distinction, the difference as to delay is almost certainly because Murphy's attorneys decided in light of *Ray* that they would do better to proceed to Court without an answer from the prison and risk being tossed out on ripeness than make the same mistake the Court had killed Ray for two months earlier.[51] Ray had to give up his religious freedom in his final moments on earth in order for the capital defense bar to learn a lesson about timeliness.

Which brings us back to *Lee*, where the Court – not at all chastened by its mistake in *Ray* – doubled down on Justice Gorsuch's instructions from

[https://perma.cc/GL3Y-CNDQ]; Adam Liptak, *Justices Allow Execution Inmate Denied Imam*, N.Y. Times, Feb. 7, 2019 at A15.

[44] *Bucklew*, 139 S. Ct. at 1134 n. 5.

[45] *Id.* at 1134 (quoting *Hill*, 547 U.S. at 584).

[46] 139 S.Ct. 1111 (2019) (mem.).

[47] *Id.*

[48] *Id.* at 1112.

[49] For what it is worth, the 11th Circuit construed Ray's claim as falling under both the Free Exercise and Establishment Clauses. *See*, *Ray*, 915 F.3d at 696 ("The Establishment Clause and the Free Exercise Clause work together to safeguard the spiritual freedom of our people.").

[50] *Murphy*, 139 S.Ct. at 1112 n.3.

[51] And in fact, while Murphy did make his request with the state earlier, Ray filed his lawsuit ten days before his execution whereas Murphy first filed in state court eight days before his scheduled execution. *See* Murphy v. Collier, 919 F.3d 913, 915 (5th Cir. 2019).

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Bucklew. Perhaps also written by Gorsuch, *Lee* like *Bucklew*, concluded with a warning to death row inmates and lower courts alike:

> "'Last-minute stays' like that issued this morning 'should be the extreme exception, not the norm.' It is our responsibility 'to ensure that method-of-execution challenges to lawfully issued sentences are resolved fairly and expeditiously,' so that 'the question of capital punishment' can remain with 'the people and their representatives, not the courts, to resolve.' In keeping with that responsibility, we vacate the District Court's preliminary injunction so that the plaintiffs' executions may proceed as planned."[52]

Not explicitly stated is the Court's ultimate conclusion that delay is presumptively unnecessary and the fault of the prisoner facing execution, and accordingly that last-minute stays of execution are categorically improper even if two lower courts thought a stay was needed to resolve the merits. The history of *Lee* and the rapid resumption of federal executions supports the hypothesis that this presumption now controls the adjudication of stays of execution.

B. The federal executions

1. The Roane *litigation and the government's long delay*

On June 11, 2001 the Federal Government executed Timothy McVeigh, who, six years earlier killed 168 people in the deadliest act of domestic terrorism in modern United States history.[53] That extraordinary case was the first federal execution carried out since 1963. But the Bush Administration soon made clear that a crime like McVeigh's was not the new bar for execution and carried out two more death sentences for more 'ordinary' capital crimes, one a week after McVeigh, and the other in 2003.[54] Then seventeen years passed before the Trump Administration restarted federal executions.[55]

During those seventeen years, the Federal Government gave every indication, at least in litigation, that it felt no urgency to resume executions. In 2006 the D.C. Federal District Court enjoined the executions of several fed-

[52] *Lee*, 140 S. Ct. at 2591–92 (quoting *Bucklew*, 139 S. Ct. at 1134).

[53] Bill Hemmer, *Timothy McVeigh Dead*, CNN (June 11, 2001, 9:32 a.m.), http://edition.cnn.com/2001/LAW/06/11/mcveigh.01/ [https://perma.cc/NMU9-KQ3X].

[54] *See* Bureau of Prisons, Dept. of Justice, Capital Punishment *supra* note 2. Juan Garza, a drug trafficker convicted of three murders was the second person executed in 2001. Louis Jones, a black former Army Ranger convicted of a brutal rape and murder of a white nineteen-year old army private, was the third and last person executed by the Federal Government in the 2000s. *See id.*; *see also Gulf War Vet Asks Bush for Clemency*, AP (March 17, 2003, 1:39 p.m.) https://www.cbsnews.com/news/gulf-war-vet-asks-bush-for-clemency/ [https://perma.cc/L7HU-L9RE].

[55] *Federal Government Resumes Executions After 17-Year Hiatus, Executes Seven Prisoners in Three Months*, Am. Bar Ass'n (Oct. 28, 2020) https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/fall-2020/federal-government-executes-seven-in-three-months/ [https://perma.cc/3JS8-5YDC].

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eral prisoners without opposition from the Federal Government.[56] This litigation, challenging the government's method of execution, dragged on for years with intermittent status updates from the government indicating it was slowly amending its execution protocol but was not ready to resume executions. The last such update occurred in 2011, and following that, the government took no further action in the case for seven years.[57]

Then on July 25, 2019, the Federal Government announced that three federal executions were to take place over the course of one week in December of 2019 and another two were scheduled for early January 2020.[58] At that point, several more federal prisoners who found themselves facing the newly imminent prospect of execution intervened in the *Roane* litigation.[59]

But on November 20, Judge Tanya Chutkan, who had been assigned the stale *Roane* case, issued preliminary injunctions halting these executions.[60] She held a delay was warranted in order to allow litigation to proceed based on: (1) the prisoners sufficient chance of success on one of their claims, that the government's planned method of execution was inconsistent with the requirements of the Federal Death Penalty Act (FDPA);[61] (2) the irreparable harm the plaintiffs would suffer from "being executed under a potentially unlawful procedure";[62] (3) the government's insubstantial interest in haste after years of delay and inaction in scheduling executions or amending its execution protocol; and (4) the public interest in not "short-circuiting legitimate judicial process," but rather in "ensur[ing] that the most serious punishment is imposed lawfully."[63] The D.C. Circuit refused the government's emergency request to vacate the injunction and ordered expedited briefing and argument of the appeal of the injunction.[64]

The Supreme Court, in what turned out to be the only "win" for federal prisoners over the course of the next six months of executions, also allowed the injunction to stand, but warned in a two sentence order that it expected the case to be adjudicated "with appropriate dispatch."[65] Justice Alito explained in a concurring statement that, "in light of what is at stake, it would be preferable" for the D.C. Circuit to review the District Court's preliminary injunction, but made clear that he believed it should ultimately be vacated

[56] Roane v. Gonzales, CIV.A. 05-2337 RWR, 2006 WL 6925754 (D.D.C. Feb. 27, 2006).

[57] Matter of Federal Bureau of Prisons' Execution Protocol Cases, 2019 WL 6691814, at *2 (D.D.C., 2019) (filed under the *Roane* docket).

[58] *Id.*

[59] *Id.* Wesley Purkey filed a separate motion for an injunction which was consolidated with the other cases under *Roane*.

[60] *Id.* at *8.

[61] 18 U.S.C. § 3596(a).

[62] *Matter of Federal Bureau of Prisons' Execution Protocol Cases*, 2019 WL at *7.

[63] *Id.* at *8 (applying the standard for granting a preliminary injunction from Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7 (2008)).

[64] Roane v. Barr, No. 19-5322 (D.C. Cir. Dec. 2, 2019) (declining to vacate injunction).

[65] Barr v. Roane, 140 S. Ct. 353 (2019) (mem.).

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and invited the government to renew its "application if the injunction is still in place 60 days from now."[66]

2. *Breaking the dam*

A divided D.C. Circuit panel, without a majority opinion for anything but the result, vacated the injunction on appeal but noted that the prisoners' constitutional claim remained open on remand because "the government did not seek [its] immediate resolution."[67] Shortly thereafter, the prisoners sought rehearing en banc, which was denied on May 15.[68] Two weeks later, on June 1st, they filed a petition for certiorari,[69] which was denied on June 29th.[70] While certiorari was still pending, on June 15, the government scheduled new execution dates for three of the prisoners involved in the litigation.[71] Daniel Lewis Lee's execution was scheduled for July 13, less than a month away.[72] Just four days after the new execution dates were announced, the plaintiffs under warrant asked the District Court for a new preliminary injunction based on their Eighth Amendment claim.[73]

On the morning of Lee's scheduled execution, Judge Chutkan, in a similar but substantially more detailed opinion than her first granting an injunction on the statutory claim, issued a new preliminary injunction to allow the court time to decide the prisoner's Eighth Amendment challenge to the federal execution protocol.[74] That opinion recounted the timeline above and noted that the last-minute nature of the stay was "unfortunate, but no fault of the Plaintiffs," but rather "the result of the Government's decision to set short execution dates even as many claims . . . were pending."[75] Indeed, given the new execution dates were set two weeks before certiorari was denied and jurisdiction returned to the district court, it's unclear how much faster things could have proceeded.[76]

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[66] *Id.* at 353–54 (Alito, J., concurring). Justices Gorsuch and Kavanaugh joined this statement.

[67] In re Fed. Bureau of Prisons' Execution Protocol Cases, 955 F.3d 106, 113 (D.C. Cir. 2020), *cert. denied sub nom.* Bourgeois v. Barr, 141 S. Ct. 180 (June 29, 2020). Several other claims based on the Administrative Procedure Act and the FDA's role in authorizing execution drugs also remained to be decided. *See id.*

[68] *See* Petition for Writ of Certiorari at 4, Bourgeois v. Barr, 141 S. Ct. 180 (2020) (mem.) (No. 19-1348).

[69] *Id.*

[70] *Bourgeois*, 141 S. Ct. at 180.

[71] Matter of Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 214 (D.D.C. 2020), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam). The government subsequently scheduled Keith Nelson's execution date after he had already renewed his claims in the District Court.

[72] *Id.*

[73] *Id.* at 217.

[74] *Id.* at 225. This opinion engaged with the *Hill* standard and cited *Bucklew*'s language disfavoring last-minute stays. *See id.* at 217–18.

[75] *Id.* at 214. Judge Chutkan also noted that one of the plaintiffs, Nelson, filed his complaint before his execution date was even announced. *See id.* at 224.

[76] It's also worth noting that, to the extent that Judge Chutkan might have issued an opinion earlier in order to give the appellate courts more time to review it, and the parties more

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The Supreme Court saw it differently, and around 2:30 a.m. in the early morning on July 14 vacated the injunction.[77] The short per curiam opinion noted that the protocol being challenged was in use in other states and highlighted the last-minute nature of the stay multiple times.[78] This result is hard to square with the result in *Roane v. Barr* seven months earlier. The constitutional challenge was no less substantial than the statutory challenge on which the Court had granted a stay. Judge Chutkan's opinion, the only one to ever address the issue, found that Lee's Eighth Amendment challenge was supported overwhelmingly by the scientific evidence in the record,[79] and Lee's APA claim remained unresolved. Given that, the two outcomes are hard to reconcile on any basis except the fact that the 60-day reprieve Justice Alito had tolerated was at an end, and so was the justices' patience. The justices who joined the *per curiam* may have been correct that in light of *Bucklew*'s high bar for an Eighth Amendment method of execution challenge and the widespread use of pentobarbital in state executions, Lee was very unlikely to succeed on the merits.[80] However, the district court analyzed actual evidence in the record under the *Bucklew* standard and came to a different conclusion. Perhaps Judge Chutkan engaged in some judicial activism, but the justices in the majority could not have determined that—and did not suggest they believed it—based on the dueling expert testimony in the record. The decision meant that the battle of experts remained unfinished, and the suitability—or lack thereof—of pentobarbital as a method of execution remained unexamined.

Although the death warrant technically expired at midnight on the 13th, the government nonetheless executed Daniel Lee early the next morning.[81]

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warning of her intention to stop the execution, Lee should not be punished for the court's delay.

[77] Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam). This order cut short the expedited appeal that had been ordered earlier that evening by the D.C. Circuit after it declined the request to summarily vacate the injunction. *See* Roane v. Barr, No. 20-5199 (D.C. Cir. July 13, 2020).

[78] *See Lee,* 140 S. Ct. at 2591. The opinion also stated the Eighth Amendment challenge was frivolous in light of the wide-spread use of pentobarbital for executions by the states. *See id.*

[79] *See Matter of Fed. Bureau of Prison's Execution Protocol Cases*, 471 F. Supp. 3d at 218; *see also Lee*, 140 S. Ct. at 2592 (Breyer, J., dissenting); *Id.* at 2593-94 (Sotomayor, J., dissenting).

[80] *Lee*, 140 S. Ct. at 2591.

[81] *Federal Government Ends Death Penalty Hiatus with Rushed Early-Morning Execution of Daniel Lee*, Death Penalty Information Center (July 14, 2020), https://deathpenaltyinfo.org/news/federal-government-ends-death-penalty-hiatus-with-rushed-early-morning-execution-of-daniel-lee [https://perma.cc/J8W4-C8S9]. The government started the execution at 4 a.m. but was informed by Lee's defense counsel that an Eighth Circuit stay was still in place. Lee was left strapped to the execution gurney for four hours while that was sorted out. He was pronounced dead at 8:07 a.m. ET, shortly after the Eighth Circuit lifted its stay. *See id.*

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3. *The tidal wave*

Thus began the Federal Government's unprecedented rush to execute twelve more prisoners. The executions proceeded at a record-breaking pace even as states' executions were entirely halted by COVID-19.[82] And the Supreme Court made sure that neither it nor any lower courts stood in the way. After the *Roane* litigation, the Court denied every request for a stay, often over strong dissents,[83] and vacated no fewer than eight lower court orders delaying executions.[84]

It cannot be denied that through these decisions the Court stunted the development of several important legal questions. Some of these were narrow questions regarding the construction of the Federal Death Penalty Act and admittedly unlikely to recur outside of the federal death penalty context;[85] other statutory questions were important and broadly applicable even outside the death penalty context;[86] still others raised weighty constitutional challenges.[87] Finally, some issues challenged whether the lower courts had

[82] *Execution Database*, DEATH PENALTY INFO. CTR. (accessed February 26, 2021), https://deathpenaltyinfo.org/executions/execution-database?filters%5Byear%5D=2020 [https://perma.cc/48HQ-BALW]. The database reveals that no state has carried out an execution after Lee's even as the Federal Government carried out twelve more. *See id*; *see also As Legal Proceedings Go Virtual, Many States Postpone Executions*, AM. BAR ASS'N (July 23, 2020), https://www.americanbar.org/groups/committees/death_penalty_representation/project_press/2020/summer/states-postpone-executions-amid-covid19-pandemic/ [https://perma.cc/RE2E-6AW5]. It is also clear that the federal executions contributed to the spread of COVID-19. *See* Michael Tarm, Michael Balsamo, & Michael Sisak, *AP Analysis: Federal Executions Likely a COVID Superspreader*, AP (February 5, 2021), https://apnews.com/article/public-health-prisons-health-coronavirus-pandemic-executions-956da680790108d8b7e2d8f1567f3803 [https://perma.cc/7HTQ-4R7Q].

[83] *See, e.g.*, Bourgeois v. Watson, 141 S. Ct. 507 (2020) (mem.) (Sotomayor, J., dissenting).

[84] *See infra* Part II, Table 1.

[85] *See* United States v. Higgs, 141 S. Ct. 645 (2021) (granting certiorari before judgment and vacating Fourth Circuit's stay of execution pending appeal and District Court's opinion disclaiming statutory authority under the FDPA to change the state law governing an execution after sentencing); *Bourgeois*, 141 S. Ct. 507 (mem.) (denying stay of execution and petition for cert to consider whether the FDPA prohibits executing someone who is intellectually disabled under prevailing diagnostic standards); Rosen v. Montgomery, 141 S. Ct. 1232 (mem.) (vacating D.C. Circuit's stay of execution pending en banc consideration of whether the FDPA requires the Federal Government follow state notice requirements in scheduling executions).

[86] *See* Bernard v. United States, 141 S. Ct. 504 (2020) (mem.) (denying stay of execution and petition for cert to consider whether a second post-conviction petition raising claims which were previously unavailable due to government misconduct is subject to AEDPA's "no reasonable factfinder" standard); Johnson v. United States, 141 S. Ct. 1233 (2021) (mem.) (denying a stay of Fourth Circuit decision declining to reconsider the applicability of the First Step Act to a capital sentence); Barr v. Purkey, 140 S. Ct. 2594 (2020) (mem.) (vacating lower court stay of execution and foreclosing consideration of, *inter alia*, whether a federal capital defendant whose first post-conviction counsel was constitutionally inadequate can raise a claim of ineffective assistance of trial counsel for the first time in a second post-conviction petition).

[87] *See* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (vacating stay of execution pending litigation of constitutional challenge to use of increasingly popular single drug protocol).

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adequately considered defendants' constitutional challenges.[88] At least one human life depended on the resolution (or lack thereof) of each of these issues, and as Justice Breyer noted in his dissent in the final case, *Higgs*, these were not frivolous questions.[89]

But beyond their effects on individual defendants and somewhat esoteric questions of law, these unreasoned orders also portend a deeper trend on the Court, which taken to its logical extreme—as a majority of the justices seemed eager to do in these cases—will effectively neuter significant doctrines of death penalty jurisprudence, not by developing or overruling precedent, but by stripping the lower courts of their own ability to enforce many of the rights of capital defendants that are currently on the books, particularly those which by their nature can only be vindicated through late-stage litigation after a death warrant has issued.[90]

The Supreme Court is set to issue an opinion this year in *Ramirez v. Collier*, where it has an opportunity to state with more particularity the standard they are applying in adjudicating capital stay petitions.[91] Hopefully when it does so, it will at least take the opportunity to make explicit the increased focus on prisoner's delay and will justify why this new balance is necessary despite the strong arguments against it. In Part III I argue that no satisfactory justification exists.

II. Empirical analysis: Observations on stay orders over two decades

In 1988, when Justice O'Connor dissented from the court's denial of the Florida Attorney General's request to vacate a stay of execution issued by a district court, she acknowledged that "the standard under which we consider motions to vacate stays of execution is deferential, and properly so."[92] The data presented below suggests that statement remained true for almost another two decades, but today the Supreme Court no longer treats lower court stays of execution deferentially. While vacating a stay was an "ex-

[88] Montgomery v. Watson, 141 S. Ct. 1232 (2021) (mem.) (denying stay of execution to allow consideration of whether capital defendant had shown she was mentally incompetent to be executed after district court ruled she was likely to succeed on that claim); Barr v. Purkey, 140 S. Ct. 2594 (2020) (vacating D.C. Circuit's stay pending consideration of mental competence to be executed likewise following favorable ruling for defendant in district court).

[89] *Higgs*, 141 S. Ct. at 646 (Breyer, J., dissenting).

[90] This is not the only area in which the Court has made it all too easy for important civil rights doctrines to remain underdeveloped. *C.f.* Pearson v. Callahan, 555 U.S. 223 (2009) (allowing courts to dispose of qualified immunity claims by skipping the first step from *Sacier v. Katz*, 533 U.S. 194 (2001), of determining whether a constitutional right was violated, and proceeding directly to the second step of deciding whether the right was clearly established.).

[91] *See* Ramirez v. Collier, No. 21-5592, 2021 WL 4129220, at *1 (U.S. Sept. 10, 2021) (order instructing parties "to address the type of equitable relief petitioner is seeking, the appropriate standard for this relief, and whether that standard has been met here") (citing Hill v. McDonough 547 U.S. 573, 584 (2006)).

[92] Dugger v. Johnson, 485 U.S. 945, 947 (1988) (O'Connor, J., dissenting).

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traordinary step"[93] in 1988, in 2021 it has become quite an ordinary thing for the Court to do.

This Note represents the first recent comprehensive analysis of the Supreme Court's capital shadow docket orders.[94] While the Court's decisions on capital stay requests are available at least as far back as the 1970s, I chose to analyze from 2021 through 2013 in order to be able to observe the effect of the Court's changing membership on its shadow docket orders. I also analyzed the period from 1999 through 2001 because those are the three years in which the most people were executed in the modern era, and thus are useful years in comparing the Court's traditional approach to stays of execution with the approach adopted recently.

The results show a clear trend against last-minute capital defendants. Table 1 shows that the Court is granting requests to vacate lower court stays at drastically higher rates compared to the five years ago. This is a trend that escalated with the Federal Executions in 2020 but seems to have started when Justice Gorsuch replaced Justice Kennedy. Additionally, Table 2 shows that the Court is also granting fewer stays.[95] However this change is not as drastic because the Court rarely ever grants last-minute relief to capital litigants where the lower courts failed to.[96] This data confirms what was anecdotally evident over the last few years: it is becoming harder and harder for capital defendants to seek protection of their federal rights, particularly those that arise closest to execution.

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[93] *Id.*

[94] The analysis was conducted as follows: I ran a search of the Supreme Court's docket in Westlaw for every item that contained the word "execution" and the words "application" and "stay" in the same sentence. I sorted the 2,569 results by date and then downloaded the most recent 2,000 into an excel document. Using excel "IF" formulas I categorized as many of the cases as possible by application type—"application for stay," "application to vacate stay," and "application to vacate preliminary injunction"—and result—"granted" or "denied." For the years being analyzed, I manually categorized all those that my formulas had been unable to categorize (about half) and then spot-checked the rest, deleting any results that were not shadow docket orders in capital cases pending execution. I also added in a few more results that my original search did not turn up either because they were requests to vacate injunctions rather than stays (I did a systematic search to ensure I was not missing any of these) or did not mention "execution" but nonetheless were death penalty orders that I came across in my research. There may be a handful of orders that I missed, but most likely they are denied stays of execution and therefore unlikely to significantly change the bottom-line answer.

[95] Even some stays that the Court does grant are later vacated by the denial of certiorari, without explanation by the justices who initially were persuaded to grant a stay. *See, e.g.*, Bower v. Texas, 575 U.S. 926 (2015) (Breyer, J., dissenting from denial of certiorari, joined by Ginsburg, J., and Sotomayor, J.); *see also* Linda Greenhouse, *The Supreme Court's Death Trap*, N.Y. TIMES, Apr. 1, 2015, at A23 (wondering "where were" the two other justices who originally voted to grant Mr. Bower a stay and asking "shouldn't they have felt moved to tell us something – anything?"). Mr. Bower's case and others like his counted as a stay.

[96] This may be due in part to the "oft-repeated mantra that the Supreme Court 'is not a court of error correction.'" *See* Robert Yablon, *Justice Sotomayor and the Supreme Court's Certiorari Process*, 123 YALE L.J. FORUM 551, 562 (2014) (quoting Stephen G. Breyer, *Reflections on the Role of Appellate Courts: A View from the Supreme Court*, 8 J. APP. PRAC. & PROCESS 91, 92 (2006)).

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TABLE 1:* APPLICATIONS TO VACATE STAY OR PI

	1999	2000	2001	2013	2014	2015	2016	2017	2018	2019	2020	2021
Granted	3	3	1	2	2	0	0	2	1	2	5	5
Denied	1	3	3	2	0	1	1	1	0	1	0	1
# Executions	98	85	66	39	35	28	20	23	25	22	17	11
% Executions 'Rescued'[97]	3%	4%	2%	5%	6%	0%	0%	9%	4%	9%	29%	45%

TABLE 2:* APPLICATIONS FOR STAY

	1999	2000	2001	2013	2014	2015	2016	2017	2018	2019	2020	2021
Granted	6	3	5	0	2	3	1	1	2	1	1	2
Denied	113	93	62	27	77	52	26	48	37	31	24	9

[97] This refers to the percent of executions that would not have occurred were it not for the Supreme Court's vacating a lower court order preventing it.
* Underlying data on file with author and available upon request.

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Two points are worth noting in contextualizing this data. First, a majority of the favorable results the Court has given death row prisoners on the shadow docket since 2017 surrounded religious claims.[98] In fact, in 2021 the Court has sanctioned or granted three last-minute stays to allow prisoners facing execution to argue for robust religious liberty rights including being in physical contact with a clergy-person during the execution.[99] Obviously religious liberties are receiving an increasingly favorable reception with this Court generally, however it is not entirely clear why they should be exempted from the Court's otherwise strict presumption against allowing last minute claims. Perhaps the justices themselves are struggling with these competing impulses, as they do not appear to be voting entirely consistently.[100]

It is tempting to conclude that this difference is explained by the developing priority position of religious liberty claims vis-à-vis competing rights. But while such an account is directionally consistent with the Court's recent jurisprudence, it is not a legally rigorous descriptive account of the capital shadow docket religious liberty cases. First, this developing reprioritization is just that—developing. The religious rights claimed by prisoners are at least as speculative as the Eighth Amendment method of execution claims raised by some of the thirteen executed federal prisoners, and more speculative than their statutory and administrative challenges. This is to say that the strength of the merits arguments—according to the law as it currently exists—is not a particularly honest way to distinguish between the religious claims that are being granted and all the others that are not.[101] The three liberal members on the Court are voting for relief in all these cases—religious liberty, method of execution, statutory, and some that are fact-bound and rely on settled law. And given their votes in cases like *Fulton*, Justices Kagan, Sotomayor and Breyer are likely not voting for relief in the capital religion cases based entirely on their agreement with the conservatives as to primacy of religious liberty rights, but rather on their willingness to err on the side of staying an execution whenever a legiti-

[98] *See*, *e.g.*, Gutierrez v. Saenz, 141 S. Ct. 127 (2020) (mem.) (granting stay to allow litigation of Free Exercise and RLUIPA claims); Murphy v. Collier, 139 S. Ct. 1475 (2019) (mem.).

[99] *See* Ramirez v. Collier, 142 S. Ct. 50 (2021) (mem.) (granting stay of execution and certiorari and setting an accelerated briefing schedule to consider whether Christian prisoner's First Amendment rights are violated by Texas's refusal to allow his pastor to lay his hands on him and pray out loud in the execution chamber); Gutierrez v. Saenz, 141 S. Ct. 1260 (2021) (mem.) (granting stay by vacating Fifth Circuit order vacating district court stay of execution based on Free Exercise Clause challenge); Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.) (declining to vacate stay in Free Exercise Clause challenge).

[100] *Compare Smith*, 141 S. Ct. at 725–26 (Chief Justice Roberts and Justices Kavanaugh and Thomas all noting their dissents, meaning that one or both of Justices Gorsuch and Alito must have joined Breyer, Sotomayor, Kagan, and Barrett in denying vacatur), *with Murphy*, 139 S. Ct. at 1478 (Justices Alito, Thomas, and Gorsuch noting their dissent and highlighting delay while Justice Kavanaugh and Chief Justice Roberts noted their concurrence).

[101] *But see Presidential Commission on the Supreme Court of the United States* 2 (July 20, 2021) (written testimony of Hashim M. Mooppan), https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf [https://perma.cc/JG5H-D9WD] (arguing that the Court was right to vacate stays protecting the federal capital defendants whenever their likelihood of success on the merits of their claims was doubtful under clearly established law).

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mate question exists regarding its legality.[102] The stay analysis should not be—and at least in the religious rights context is not—controlled by the merits where the law is unsettled around an execution.

That the differential treatment received by the religious liberty claims cannot be explained by the strength of their merits, suggests a different explanation: the justices' own weighing of the harms on either side in each case. If the legal merits of the claims were equally unsettled, but the religious liberty claims resulted in relief, it suggests the justices whose votes made the difference are more concerned about the harm to a person executed in a way that might inhibit their First Amendment rights than a person executed in way that might inhibit their Eighth Amendment rights. The justices consider the former a weightier harm than the latter. This means that for all the Court's suggestions that the presumption against late stays of execution is a new legal rule—a presumption that can only be overcome by the strongest of legal claims brought at the earliest possible minute – in practice the Court's own practice appears more fact dependent. I would argue that, as with other shadow docket orders, the justices' own subjective balancing of the harms—a question of fact rather than law—explains the apparent dissonance between religious claims and all others on the capital shadow docket. Through the shadow docket, the Court is asserting supervisory power over the fact-finding of the lower courts.[103]

The second point worth noting is that the imminent transition to a new administration, one which had announced its opposition to the death penalty, may have added to the Court's interest in ensuring that all the scheduled executions were carried out before January 20. The Court did not—and could not have—explicitly considered that the new administration would almost certainly not have moved forward with the executions. The Court could not have because that political change is legally irrelevant. While the government could argue that it is "irreparably harmed" whenever it cannot carry out "duly enacted plans,"[104] the fact that a new administration will change the plan if it gets a chance should not add to the Court's solicitude. On the other hand, the change may have snuck into the justices' consideration due to their awareness that the incentive to seek a stay was uniquely high because the prisoners and their lawyers knew that if they could get a stay of a few weeks, their chance of living out their lives would dramatically increase. For example, even when the lower courts set incredibly accelerated briefing schedules, that nonetheless would have

[102] Justice Thomas dissented in *Dunn v. Smith*, ostensibly based on his opposite commitment to the standard described in Part I. *See Smith*, 141 S. Ct. at 726–27 (Thomas, J., dissenting).

[103] *See* Lee Kovarsky, *The Trump Executions* 60–62 (July 27, 2021) (U. Tex. L. Sch., Pub. L. Res. Paper), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3891784 [https://perma.cc/TL66-UFJ3] (making some preliminary suggestions regarding the jurisprudential implications of the Court's aggressive shadow docket orders in the federal executions and characterizing it as an "[u]pward redistribution of judicial power").

[104] Abbott v. Perez, 138 S. Ct. 2305, 2324 n.17 (2018); *see also* Maryland v. King, 567 U.S. 1301, 1303 (2012) (Roberts, Circuit Justice) ("Any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury.") (quoting New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 434 U.S. 1345, 1351 (Rehnquist, Circuit Justice 1977)).

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extended to just past the inauguration, the Court cut short the litigation.[105] By contrast, in state capital litigation, a stay of execution usually buys a couple of years, but often not a complete reprieve from the death penalty.

It seems likely that this did weigh on the justices' minds, particularly in the November, December and January orders, which arguably escalated in their unusualness and culminated in *Higgs*, in which the Court, for apparently the first time in its history, granted certiorari before judgment and summarily reversed a district court.[106] That the incoming administration was the elephant in the room was studiously ignored, even by Justice Sotomayor in dissent. The only opinion I came across that came close to forthrightness on the subject was from Judge Chutkan who noted that she was "dismayed by the government's 'urgent' need to execute an inmate five days before a presidential inauguration."[107]

For the capital defense bar, the 'now or never' motivation underneath the justice's actions may contain a silver lining: some of the harshness of the apparent new standard the Court applied in the waning days of the Trump administration was due to the moment's idiosyncratic political environment rather than a deeper commitment to a severe substantive standard. If this is true, the new standard for granting stays, while strict, may be somewhat more forgiving than the denials of stays and grants of vacaturs during the federal executions suggests. However, as the data I present shows, the effect of the new standard is certainly not limited to the federal executions. The Court has continued to vacate stays as states have slowly resumed executions over the past year. Since President Biden took office, the Court has vacated three stays of state executions. Most recently the Court vacated a stay granted by a District Judge appointed by President Trump and affirmed by a unanimous Eleventh Circuit panel. It did so without explanation and over four dissents, including Justice Barrett.[108] Over the next few years, as the COVID pandemic abates and the gears of the states' execution systems begin churning once more, the staying power of the new standard will become clearer.

III. Assessment of the new standard

Thus far I have shown that beginning around the time *Bucklew* was argued, the Court has been articulating, and enforcing a stringent new standard

[105] A notable example is that the Fourth Circuit scheduled oral argument for just three weeks after the district court's merits ruling in *United States v. Higgs*, but even that was not fast enough for the Supreme Court, perhaps because it would have taken place a week after President Biden's inauguration. *See* United States v. Higgs, 833 F. App'x 387, 388 (4th Cir. 2021).

[106] *Higgs*, 141 S. Ct. at 645. It did so without any explanation whatsoever as to why the lower court's view of the law was so patently incorrect as to merit such an unusual step. *See id*.

[107] Matter of Fed. Bureau of Prisons' Execution Protocol Cases, No. 05-CV-2337, 2021 WL 127602, at *3 (D.D.C. Jan. 13, 2021).

[108] *See,* Hamm v. Reese, 142, S. Ct. 743 (2022) (mem.); *see also* Crow v. Jones, 142 S. Ct. 417 (2021) (mem.); Dunn v. Smith, 142 S. Ct. 1290 (2021) (mem.). Note that on the same day it vacated a stay in *Dunn v. Smith*, the Court declined to vacate a separate injunction against Smith's execution based on a religious freedom claim. Alabama ultimately complied with the terms of this injunction and executed Willie B. Smith III on October, 21, 2021.

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for stays of execution. The implementation of this standard was accelerated during the spree of federal executions, when the Court itself intervened to 'rescue' Seven of these executions from being stopped by lower court stays, and likely foreclosed relief for several other prisoners as lower courts caught on to the change. The fact that the Court implemented this standard so aggressively during the federal executions threw into sharp relief the change that otherwise might have proceeded more imperceptibly.

There are two primary reasons the federal execution cases made the change so stark. First, there were more opportunities to bring meritorious late-stage litigation in the federal context compared to the state context, both because the long pauses in federal executions left unchallenged the legality of the government's execution procedures, and because the statutes governing federal execution are complex and their enforcement lies with the federal judiciary, rather than state courts. Second, many of the justifications often invoked against federal court interference in executions, like federalism and comity, are absent from the federal context, meaning that the Court had fewer hooks on which to hang the new implicit standard.

This Part then examines what may be said for and against categorically disfavoring last-minute stays of execution.

A. The last minute delay incentive

The justices' motivation for the new standard is plain: they want to cut down on the strategic delay they believe is employed widely by the capital defense bar.[109] Justice Thomas, for example, made this explicit in his (delayed) response to Justice Breyer's plea,[110] for the Court to consider an Alabama prisoner's request to use nitrogen hypoxia as an alternative method of execution.[111] Justice Thomas asserted the prisoner employed "the same strategy adopted by many death row inmates with an impending execution: bring last-minute claims that will delay the execution, no matter how groundless."[112] Relatedly the justices also appear to be annoyed with the frequency that they are asked to adjudicate

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[109] *See* Kovarsky, *supra* note 10, at 1321–36 (cataloging evidence of this desire).

[110] Dunn v. Price, 139 S. Ct. 1312, 1314 (2019) (Breyer, J., dissenting from grant of application to vacate stay) ("I requested that the Court take no action until tomorrow, when the matter could be discussed at Conference. I recognized that my request would delay resolution of the application and that the State would have to obtain a new execution warrant, thus delaying the execution by 30 days. But in my judgment, that delay was warranted, at least on the facts as we have them now.").

[111] Price v. Dunn, 139 S. Ct. 1533, 1538 (2019) (Thomas, J., concurring) ("A stay [when] the petitioner inexcusably filed additional evidence hours before his scheduled execution after delaying bringing his challenge in the first place[ ] only encourages the proliferation of dilatory litigation strategies that we have recently and repeatedly sought to discourage.").

[112] *Id.* at 1540. Justice Thomas's concerns with gamesmanship continue. In fact, he asked about gamesmanship and delay three separate times during the November 2021 oral argument in *Ramirez v. Collier*. *See* Oral Argument at 1:40 & 41:00, (No. 21-5592), https://apps.oyez.org/player/#/roberts-12/oral_argument_audio/25300 [https://perma.cc/9TLJ-JT2A].

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last minute challenges to executions, and the drain this exerts on the Court's time and energy.[113]

It would be naïve or disingenuous to reject this perspective entirely. Capital defense attorneys know that once a warrant is issued their only chance at saving their client's life depends first on buying some time, and the best way to do so is with a claim pending that justifies a stay. So it is true that they dig deep in the record and find claims that haven't been fully adjudicated and that tend to be weaker. Sometimes, when they know a warrant is imminent, they may even hold back new weaker claims—by not initiating new litigation—in order to have something to file once the warrant is issued and potentially catch their client a delay.[114]

However, 'weaker' is the key word. Over the past two decades the Court has usually granted less than 5% of stay requests, and lower courts are granting stays at largely the same rate based on the number of requests to vacate lower court stays that the Court has received.[115] Based on this, it does not seem that the courts have any issue identifying and dismissing the clearly weak claims. The focus of this Note is the occasional claims that are not weak, that raise a substantial legal question, and that prisoners would not have chosen to delay.[116] That a claim is brought under warrant does not necessarily mean that it is weak. This is confirmed by the fact that historically the Court has granted a handful of stays every year, and sometimes those cases have resulted in full appeals that lead to changes in the law.[117]

In justifying the stringent new standard on this basis, the Court overemphasizes strategic delay and ignores the many other reasons that, through no fault of the prisoner, claims might not be litigated until the eleventh hour.

[113] *See id.* at 12:45 (Justice Kavanaugh predicting, "if we rule in [Ramirez's] favor here, this is going to be a heavy part of our docket for years to come, would be my sense given the history of death penalty litigation"); *id.* at 17:00 (Justice Alito predicting "we can look forward to an unending stream of variations" of religious liberty based challenges to execution methods).

[114] This is not necessarily the fault of capital defense attorneys as much as it is the fault of the system as it exists. The Court's own jurisprudence and AEDPA have also necessarily pushed many of these claims down the road by making it harder to raise successive claims. The courts are not exactly inviting capital defendants to come down and file a new petition as soon as they think they might have a new claim. Furthermore, appointed representation often effectively ends after a prisoner's first round of state and federal habeas. Often no one realizes that a meritorious claim remains to be litigated until a warrant is issued and specialized consulting attorneys parachute in and review the case. *See* Kovarsky, *supra* note 10, at 1380–85.

Ultimately, who lives and who dies remains so capricious and random, subject to the whims of a change in executive administration as much as anything else, that you cannot blame a capital defense lawyer for using every trick in the book to buy their client a couple more months in the judicial system in order to have a shot at convincing a new DA, governor, or president to show them mercy. The fact that some lawyers may hold back weak claims in certain situations should not be held against prisoners raising substantial claims in the interest of not undermining an incentive scheme.

[115] *See supra* Section II, Tables 1 & 2.

[116] I would be remiss if I did not note somewhere that the concept of prisoners as the legal decision makers who ought to suffer the repercussions of their choices seems like a complete fiction. It is the lawyers who are usually making the decisions about when to raise claims. *See* Kovarsky, *supra* note 10 at 1339 & n. 116.

[117] *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112 (2019).

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Professor Lee Kovarsky's recent article in the NYU Law Review powerfully argues that strategic delay is overblown in the judicial imagination and has wrongly lead to ever stricter standards blocking judicial review of capital sentences.[118] While the Court seems to think that delayed claims are the result of strategy and sand bagging, far more often late claims are the result of factors entirely outside of a defendant's control including limited defense resources being triaged to the most imminent executions and intrinsic barriers to raising claims earlier.[119] Additionally, to the extent that there is some incentive to hold onto a claim and raise it under warrant, that incentive is outweighed by the clear reduction in the likelihood of success that is already baked into the system to disincentivize strategic delay.[120] If a lawyer discovers a claim they believe has a legitimate chance of overturning their client's death sentence, they are not tempted to hold onto it and risk not getting a stay to litigate it at all.

Professor Kovarsky's refutation of the strategic delay account convincingly shows that capital defendants and their lawyers are rarely to blame for claims being raised on the eve of execution, and that the Court does not need to pile on one more disincentive to prevent sandbagging that has already been thoroughly deterred. To his account I would only add that appeals to strategic delay as justification for vacating stays is particularly inapt in the federal death penalty context. As discussed in Part I, many federal capital prisoners tried bringing statutory and constitutional claims to the government's execution protocol years earlier only to have the litigation stayed while the government slowly decided its next move. And it is hard to fault the federal prisoners and their lawyers for not vigorously pursuing every possible lead and claim earlier, when for decades the chance of a federal prisoner being executed seemed quite remote. In light of this fact, some meritorious claims may not have been raised earlier by the federal defendants because state prisoners whose executions seemed more imminent were prioritized by federal capital defense offices handling both state and federal prisoner's post-conviction litigation.

Additionally, as I showed in Part I, often the government is more to blame for the urgency of last-minute capital litigation than the prisoners.[121] A standard categorically disfavoring last-minute claims may actually invite more of them, because it attempts to deter a strategy that prisoners are not pursuing while simultaneously incentivizing states to provide ever shorter windows of

[118] *See* Kovarsky, *supra* note 10, at 1328–30 (explaining the logic of strategic delay in the context of stays); *id.* at 1341–57, and particularly 1353–57 (arguing that delay is not actually all that strategic and is rarely engaged in, at least with meritorious claims).

[119] *See id.* at Part III (discussing intrinsically delayed claims) and Part IV (discussing resource triage).

[120] *See, e.g.*, Wainwright v. Sykes, 433 U.S. 72, 87–88 (1977) (imposing cause and prejudice standard to overcome state procedural default); 28 U.S.C. § 2244(b)(2) (provision of AEDPA requiring dismissal of successive habeas petitions except in very narrow circumstances); *see also* Kovarsky, *supra* note 10, at 1335–39 (outlining many of these doctrines).

[121] *See, e.g.*, supra note 112 *Ramirez* Oral Argument at 1:32:17 (Justice Sotomayor asking Texas Solicitor General, "what was so slow? Why were you so slow here? . . . If you don't want there to be delay, what took you so long?"); Matter of Fed. Bureau of Prisons' Execution Protocol Cases, 471 F. Supp. 3d 209, 217 (D.D.C. 2020), *vacated sub nom.* Barr v. Lee, 140 S. Ct. 2590 (2020) (per curiam) (blaming government for the delay).

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time between warrant and execution, or to disclose critical information at the last minute. The strong presumption against last-minute stays is a potent motivation for the government to be dilatory itself, because it knows that the less time a prisoner has to bring a claim, the more likely it will be summarily denied. If the Court really is concerned with that last-minute nature of these requests, then the Court would do far better to punish the government for short timelines and late disclosures, rather than prisoners for understandably continuing to bring their claims within whatever time they have. It is interesting that in the oral arguments from *Ramirez v. Collier*, several of the conservative justices were singularly focused on Ramirez's sincerity in his religious beliefs, but only Justice Sotomayor asked about Texas' delay, which was at least as evident from the record.

Finally, as I hinted at earlier, the strict standard for stays seems particularly inapposite in these federal executions, because aside from the concern with sandbagging, much of the typical doctrinal justification for denying relief to death row prisoners is based on appeals to federalism, comity and respect for states' prerogatives to run their own criminal systems.[122] Justices concerned with promoting these values might believe that last minute stays show a particular lack of regard for state officials who are forced to postpone executions in the eleventh hour. But, whatever merit this concern may have in general, it could not have justified the strict standard that evolved during the *federal* executions.[123] The United States Attorney General's federal criminal justice prerogatives deserve no special respect from the United States Supreme Court, at least not in the same sense that state attorneys, who represent separate sovereign governments, do.

There is not much, then, that can be said for a standard that so disfavors last-minute stays. The Court applied the standard seeking to disincentivize death row prisoners from engaging in strategic delay, but if they were not doing so with any frequency anyway, then the deterrent purpose falls flat. The Court may still point to other benefits of the new regime, such as minimizing the emotional and administrative whiplash that comes from halting an execution hours before it is to begin. The family members of a defendant's victims no doubt want finality.[124] And of course, the longer an execution is delayed, the

[122] *See, e.g.*, *Hill*, 547 U.S. at 585 ("The federal courts can and should protect States from dilatory or speculative suits . . . .").

[123] This is not the only area in which the Court is importing anti-criminal defendant doctrines that are ostensibly justified by federalism and judicial comity into the federal criminal setting where those justifications have no force. For example, the rule of *Teague v. Lane*, 489 U.S. 288 (1989) baring the application of new rules of procedure in state habeas proceedings is also applied to deny relief to federal prisoners. *See, e.g.*, Chaidez v. United States, 568 U.S. 342, 358 & n. 16 (2013) (holding in a federal habeas case that the rule from Padilla v. Kentucky, 559 U.S. 356 (2009), requiring defense counsel to advise the defendant about the risk of deportation arising from a guilty plea, was a new rule of criminal procedure that did not apply retroactively and declining to address the argument that it did not apply in the federal context).

[124] *See, e.g.*, *Hill*, 547 U.S. at 584 (noting "the State's strong interest in enforcing its criminal judgments without undue interference from the federal courts" and that crime victims also "have an important interest in the timely enforcement of a sentence."); *Price*, 139 S.Ct. at 1540 (2019) (Thomas, J., concurring) (recounting experience of Bessie Lynn, the widow of Price's victim who

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more attenuated its penological justification becomes.[125] The fact remains that a human life depends on the courts' careful decision making and that cannot "be rushed or taken lightly; there can be no 'justice on the fly' in matters of life and death."[126]

Many areas of the law require decision makers to draw a line between maximal deterrence of sandbagging and maximal prevention of injustice. For example, we do not withdraw social security benefits at the slightest hint of fraud, but nor do we pretend that fraud in entitlement claims does not exist at all. This policy decision has been explicitly recognized by the Court in the context of capital punishment as far back as *Brown v. Allen*.[127] Given that prisoners facing death do face a powerful incentive to try and get a stay, it might be unworkable to automatically grant any stay request for a pending claim filed in the warrant stage. But likewise, it is unworkable to say there is a (potentially) rebuttable presumption that no late claim should receive a stay, no matter how blameless the prisoner is for delay nor how weighty the merits. As with all doctrines that undermine the absolute finality of a criminal sentence, the line must be drawn somewhere between these extremes.

Staying an execution, even at the very last minute, where necessary to allow a full and fair adjudication seems to be nothing less than what running a system of capital punishment requires. The alternative would mean "limiting constitutional protections for prisoners on death row" which is far "too high a constitutional price."[128] This risk is particularly high when it is the Supreme Court—and not a lower court—denying relief without explanation. Because at the Supreme Court, even if an individual prisoner—or more accurately their appointed lawyers—did engage in reproachable delay, denying their meritorious claim inevitably has downstream effects on similarly situated future claimants. This Part argues that reflexively denying last-minute relief inflicts significant harms, both on individuals facing execution and on the judicial system as a whole. I suggest that these harms far outweigh the dubious benefits that the Court's new implicit standard might provide.

"waited for hours with her daughters to witness petitioner's execution, but was forced to leave without closure" after the Court failed to vacate the Eleventh Circuit's stay until after the warrant had expired at midnight). *But see, e.g.*, Noah Shepardson, *Family of Murder Victims Wants to Stop the Feds From Resuming Executions*, REASON (Nov. 6, 2020, 12:36 pm) https://reason.com/2019/11/06/family-of-murder-victims-wants-to-stop-the-feds-from-resuming-executions/ [https://perma.cc/4G3X-M92P]. Not infrequently the victim's family say they would rather there be no execution at all.

[125] *See* Glossip v. Gross, 576 U.S. 863, 923–38 (2015) (Breyer, J., dissenting)

[126] United States v. Higgs, 141 S. Ct. 645, 652 (2021) (Sotomayor, J., dissenting) (*quoting* Nken v. Holder, 556 U.S. 418, 427 (2009)).

[127] 344 U.S. 443, 496 (1953) (Frankfurter, J.) ("Judges dealing with the writ of habeas corpus, as with temporary injunctions, must be left some discretion—room for assessing fact and balancing conflicting considerations of public interest.").

[128] Bucklew v. Precythe, 139 S. Ct. 1112, 1145 (2019) (Breyer, J., dissenting).

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B. Harm to individuals

The risk of getting it wrong attends all judicial decision making, but it is particularly acute on the capital shadow docket when decisions are irreversibly made, late at night, and in a matter of hours.[129] Last minute stay decisions inherently involve underdeveloped facts and uncertain law, and the risk of this uncertainty is the unlawful death of a human being. Additionally, by increasingly vacating lower court stays in this way the Supreme Court is sowing confusion for capital defendants as to how and when they can bring challenges. The Court leaves these people without clear guidance as to the state of the law and therefore as to what arguments are actually available to them as they engage in last minute fights to prove their innocence or their executions unlawful. Combining the inherent challenge for judges of getting these decisions right every time with the uncertainty for litigants of how to most effectively make their arguments, results in an unacceptable risk that the courts will allow a wrongful execution to take place. The Court's requirement that heightened reliability attend capital punishment is entirely inconsistent with its new shoot first and ask questions later approach to stays of execution.

1. Sometimes the Court gets it wrong

This fear is not merely hypothetical. The Court has almost certainly blessed the execution of innocent people in the past.[130] Many more people have been sentenced to death through procedures that the Court, upon further contemplation, realized were unconstitutional. For example, Justice Scalia wrote for a unanimous Court in *Hitchcock v. Dugger*, holding that the sentencer must be able to consider non-statutory mitigating evidence contrary to Florida's death penalty statute,[131] but during the seven years before the opinion was handed down, at least thirteen men presented an identical claim in their certiorari petitions and requests for stays.[132] With the Court's denial of each man's final appeal, Florida carried out each unlawful sentence.[133]

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[129] In a variety of contexts, the Court has acknowledged that the irreversibility of capital punishment demands "heightened reliability." *See, e.g.*, Woodson v. North Carolina, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case."); Simmons v. South Carolina, 512 U.S. 154 (1994) (requiring heightened reliability in jury instruction regarding future eligibility for parole when death penalty is under consideration).

[130] *See, e.g.* James S. Liebman, Shawn Crowley, Andrew Markquart, Lauren Rosenberg, Lauren Gallo White & Daniel Zharkovsky, *Los Tocayos Carlos*, 43 COLUM. HUM. RTS L. REV. 711 (2012) (documenting in painstaking detail the extensive proof that Carlos DeLuna was executed for a murder that in all likelihood was committed by Carlos Hernandez). The evening before DeLuna was executed, Supreme Court denied DeLuna a stay of execution over the dissents of Justices Brennan and Marshall. DeLuna v. Lynaugh, 493 U.S. 999 (1989) (mem.)

[131] 481 U.S. 393, 394, 399 (1987).

[132] Eric M. Freedman, *No Execution If Four Justices Object*, 43 HOFSTRA L. REV. 639, 641 n.7 (2015)

[133] *Id.*

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The Court has also issued orders on the capital shadow docket that allowed executions to be carried out in ways that subsequently proved to be troublingly flawed. For example, the Court missed its chance to stop Oklahoma's botched execution of Charles Warner in January of 2015.[134] Six months earlier, Oklahoma had executed Clayton Lockett, who suffered on the execution gurney for 40 minutes before dying, crying out that "something is wrong" and "the drugs aren't working."[135] Then Oklahoma—the first state to ever experiment with lethal injection—[136] announced its intention to resume executions with the same set of drugs, including the sedative midazolam which many experts believed was inadequate for executions.[137] Warner and three other prisoners facing execution sued.[138] The Supreme Court denied Warner a stay, and during his 18 minute long execution, he reportedly screamed, "my body is on fire."[139] Oklahoma's haste to execute Warner was unrestrained by the Court and in this haste the state not only kept using midazolam rather one of the more effective sedatives used by other states, but also to accidentally gave Warner potassium acetate instead of potassium chloride, as the protocol required.[140] After Oklahoma's second failed attempt, the Court did ultimately grant certiorari in *Glossip v. Gross* to consider the merits of the surviving prisoners' argument that midazolam is an ineffective sedative that risks consciousness during painful executions.[141] Following Warner's execution, Oklahoma paused executions for six years.[142]

But in 2021 Oklahoma scheduled several new executions, despite the fact that a challenge to Oklahoma's new execution protocol, which still relied on midazolam, was pending in federal court.[143] In late October, the Tenth Circuit issued a stay of two imminent executions, in light of factual issues regarding midazolam's suitability for executions that should be resolved at trial.[144] On the eve of the first execution, without explanation, the Supreme Court vacated the

[134] Warner v. Gross, 574 U.S. 1112 (2015) (mem.) (denying application for stay of execution).
[135] *Id.* (Sotomayor, J., dissenting).
[136] Deborah W. Denno, *The Lethal Injection Quandary: How Medicine Has Dismantled the Death Penalty*, 76 FORDHAM L. REV. 49, 65 (2007).
[137] *Warner*, 574 U.S. at 1112.
[138] *Id.*
[139] Kaleigh Rogers, *How Do You Confuse Two Lethal Injection Drugs? We Asked a Pharmacologist*, VICE (October 9, 2015, 9:45am), https://www.vice.com/en/article/d7ygkk/how-do-you-confuse-two-lethal-injection-drugs-we-asked-a-pharmacologist [https://perma.cc/F48E-7QF2].
[140] *Id.* Based on the similar chemical makeup of these two compounds it seems unlikely that this mix-up contributed significantly to Warner's suffering.
[141] 576 U.S. 863, 881 (2015). While the Court held that the district court did not commit clear error by finding midazolam was likely to keep a person unconscious during an execution, this may have been in part out of a subconscious reluctance not to reach the contrary conclusion and be faced with the blame for Warner's fate. *See infra* note 152 and accompanying text.
[142] Keaton Ross, *State Officials Say Oklahoma is on Track to Resume Executions*, OKLA. WATCH (October 14, 2020), https://oklahomawatch.org/2020/10/14/state-officials-say-oklahoma-is-on-track-to-resume-executions/ [https://perma.cc/AVN7-6JDT].
[143] Jones v. Crow, No. 21-6139 (10th Cir. Oct. 28, 2021) (order granting stays of execution to John Grant and Julius Jones).
[144] *Id.* at 3.

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Tenth Circuit's stay.[145] Later that evening, John Marion Grant was seen convulsing and vomiting after being injected with midazolam, drawing comparisons to Oklahoma's earlier botched executions.[146] Undeterred, and unrestrained by the Court, Oklahoma vowed to press on with the other scheduled executions.[147]

2. *Inherently delayed claims usually can only be raised under warrant and take time to properly adjudicate*

Some claims that can only be raised after a warrant is issued are incredibly complex and require sensitive factual inquiries, specific to each death row prisoner. For example, *Ford* claims require the Court to determine whether a prisoner's mental deficiencies prevent them from rationally understanding their execution.[148] As the prisoners on death row are increasingly elderly, more people with significant dementia face execution.[149] Following *Madison v. Alabama*'s,[150] articulation of the nuanced and complex individual considerations at play in a *Ford* claim, it is very important that there is an adequate forum to hear expert testimony supporting and refuting the claim.[151] However, these claims can only be brought once a prisoner has an execution date scheduled, and given the short length of time states often provide between scheduling and carrying out an execution, a stay may well be necessary to adequately consider a claim, as it was in *Madison*.[152] Madison was granted a reprieve by the Court less than an hour before his execution was set to begin.[153] If the Court disfavors all stays of execution, then people in Madison's position in the future may be denied stays and face unconstitutional executions, even though it is the state, rather than the prisoner, who caused the need for a last minute scramble.

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[145] Crow v. Jones, No. 21A116, 2021 WL 4999201 (U.S. Oct. 28, 2021) (mem.). Justices Sotomayor, Kagan and Breyer dissented.

[146] *See* Austin Sarat, *Oklahoma Botched Yet Another Execution*, SLATE (Nov. 1, 2021), https://slate.com/news-and-politics/2021/11/oklahoma-botches-another-execution-using-lethal-injection-drugs.html [https://perma.cc/D26P-CGHY].

[147] Nicholas Bogel-Burroughs, *Oklahoma to Continue Lethal Injections After Man Vomits During Execution*, N.Y. TIMES (Oct. 29, 2021), https://www.nytimes.com/2021/10/29/us/oklahoma-execution-lethal-injection.html [https://perma.cc/AB75-2J7C].

[148] Ford v. Wainwright, 477 U.S. 399, 406 (1986) (holding that the Eighth Amendment forbids the execution of a prisoner whose mental illness at the time a sentence is to be carried out, prevents him from rationally understanding his execution).

[149] Kim Chandler, *Aging Death Row: Is Executing Old or Infirm Inmates Cruel?*, AP NEWS (April 18, 2018), https://apnews.com/article/d4d2040cceed48529d17cc33438a72cd [https://perma.cc/UW3P-FKZD].

[150] 139 S. Ct. 718, 729 (2019) (calling for judges to carefully "attend to the particular circumstances of a case and make the precise judgment" of whether a prisoner's dementia inhibits his rational understanding of his sentence).

[151] Alexander H. Updegrove & Michael S. Vaughn, *Evaluating Competency for Execution after* Madison v. Alabama, 48 J. AM. ACAD. PSYCHIATRY L. 530, 534 (2020).

[152] *See,* Madison v. Alabama, 138 S.Ct. 943 (2019) (mem.) (granting application of stay).

[153] *See* Steve Almasy & Mayra Cuevas, *Supreme Court stays execution of inmate who lawyer says is not competent*, CNN (Jan. 26, 2018), https://apnews.com/article/d4d2040cceed48529d17cc33438a72cd [https://perma.cc/3R9T-TYAH].

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And beyond the individual prisoners who will be denied stays they ought to receive, the legal doctrine itself will suffer, which will affect all similarly situated future plaintiffs. If Madison had brought his claim in 2021 under the new implicit standard categorically disfavoring last-minute stays, it seems unlikely the Court would have delayed his execution to hear his appeal. This would have left the question presented by his case unresolved and other capital defendants with dementia facing execution uncertain as to how to raise their *Ford* claims, or whether there is any point to raising them at all.

Furthermore, *Madison* is one of many cases that could be pointed to in response to those who defended the Court's vacaturs in the federal cases by arguing that relief was not proper in any of those cases because it was not ever clear that the petitioners were likely to succeed on the merits.[154] The legal question in *Madison*'s case was not clearly answered at the time the Court stayed his execution (in fact, that was precisely why the Court issued a stay), and even after the Court issued its opinion, there was still considerable doubt as to whether the Eighth Amendment right the Court articulated made Madison's own execution illegal.[155] In the context of capital cases, an exacting requirement of success on the merits is simply unworkable in that it would stunt the development of law and is inconsistent with the Court's actual practice.

The Court's decision in *Madison* was not particularly prisoner-friendly, but it at least provided a modicum of clarity around when memory loss is and is not sufficient to make out a *Ford* claim. Indeed, the federal capital defendants executed in the last three months of the Trump administration suffered from the fact that numerous legal questions were not resolved in the cases of the capital defendants executed over the summer.[156] Especially at the Supreme Court, it is better to resolve these legal questions on which a life depends than to foist upon lower courts and death row prisoners alike an undeveloped doctrine to muddle through as an execution date looms. Even if the Court would like to eliminate protections such as *Ford*, it should do so by overruling cases on its merits docket, with an opinion signed by five or more justices, not through unsigned opinions arbitrarily vacating the stays which are predicate to the protection of *Ford* being meaningful.[157]

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[154] *Presidential Commission on the Supreme Court of the United States* 2–3, 16–19 (July 20, 2021) (written testimony of Hashim M. Mooppan), https://www.whitehouse.gov/wp-content/uploads/2021/09/Hashim-Mooppan.pdf [https://perma.cc/6L9X-L6L4] ("[W]hen a claim is not likely to succeed . . . the execution should not be postponed until the claim is finally rejected due merely to the existence of doubts and questions held by some judges.").

[155] *Madison*, 139 S. Ct. at 729–30 (remanding and requiring further adjudication before execution because "we come away at the least unsure whether" the state court erred in its adjudication of Madison's claim).

[156] *See, e.g.*, Mitchell v. United States, 140 S. Ct. 2624 (2020) (Sotomayor, J., statement respecting denial of stay) (noting that four federal executions in, considerable uncertainty still remains as to the meaning of the FDPA's requirement that sentences are carried out "in the manner prescribed by the law of the State in which the sentence is imposed.").

Even when all was said and done, this question remained unresolved despite the D.C. Circuit's offer to do so en banc on an expedited schedule. That question and others would arise again if the federal government ever resumed executions. *See Higgs*, 141 S. Ct. 648–49.

[157] There is reason to fear that this arbitrariness will fall disproportionately on defendants of color. *See* Phillips & Marceau *supra* note 13.

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C. Effect on lower court decision making

The lower courts too have cause to complain, because they are saddled with unclear—and questionably controlling—guidance from the Supreme Court. They are forced to read the proverbial tea leaves of late night orders, which are increasingly unreasoned and unsigned. And while lower court judges always dislike being overruled, this concern is elevated in the context of last minute death penalty litigation. Judges know that their decision in a last-minute capital petition is very likely to be appealed to the Supreme Court, and that the Court is certain to pay attention if they give last minute relief to a petitioner. Additionally, the harm to litigants and others of reversal by the Supreme Court no doubt weighs heavily on judges when they are considering a request to stay an execution. For the defendant, lower court orders giving them relief can give them false hope, only to be dashed hours later by a subsequent Supreme Court order vacating the stay protecting their life. For these prisoners, it would surely have been better not to receive any stay at all than to have their life be the rope in a capricious tug of war. Therefore, good judges will pay careful attention to what the Court is saying and doing in terms of allowing or vacating stays in capital cases, to minimize the risk of stopping an execution only to have the Supreme Court allow it to proceed.

Already, lower Courts are applying the stricter standard themselves in capital cases, relying on signals that the Court has transitioned to a higher standard.[158] In a striking example, the Seventh Circuit vacated a district court's stay of Lisa Montgomery's execution based *primarily* on the statement that "last-minute stays of execution should by the extreme exception, not the norm" and that even if the delay was not strategic, nothing in Montgomery's petition overcomes the "strong presumption" that a stay will not be granted where a claim could have been brought sooner.[159] Eventually, if the Court consistently vacates lower court stays, lower Courts will stop bothering to grant them at all.[160]

Beyond the lack of clarity in the standard for granting a stay, lower courts also have to grapple with uncertainty as to the precedential value shadow docket rulings carry for the merits of a claim. In the past, the Court itself maintained that non-merits rulings carried minimal precedential effect.[161] However, some

[158] *See, e.g.*, Price v. Comm'r, Ala. Dep't of Corr., 920 F.3d 1317, 1329 (11th Cir. 2019) (citing *Bucklew* and acknowledging that the court must address the fact that litigation was delayed).

[159] Montgomery v. Watson, 833 Fed. App'x. 438, 439 (C.A.7, 2021) (mem.) (alteration in original) (quoting *Bucklew*, 139 S. Ct. at 1134 & n.5).

[160] *C.f.* Dugger v. Johnson, 485 U.S. 945, 948 (1988) (O'Connor, J., dissenting from denial of application to vacate stay) ("If this Court defers only to grants of stays, while giving searching review to every denial of a stay, the lower federal courts may in time come to issue stays routinely. In that event, *Barefoot v. Estelle's* statement that stays of execution are not automatic in capital cases, would be effectively overruled) (quoting Wainwright v. Booker, 473 U.S. 935, 936, n. 3 (1985) (Powell, J., concurring)).

[161] See, e.g., *Lunding v. N.Y. Tax Appeals Tribunal*, 522 U.S. 287, 307 (1998) ("Although we have noted that '[o]ur summary dismissals are . . . to be taken as rulings on the merits in the sense that they rejected the specific challenges presented . . . and left undisturbed the judgment appealed from,' we have also explained that they do not 'have the same precedential value . . . as does an

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lower court judges nonetheless peer into the shadows in search of guidance from the Court,[162] particularly as more and more important decisions are made on the shadow docket.[163] One federal judge has even created a framework categorizing the precedential value of different types of shadow docket result based on clarity to encourage lower courts to "defer to the [C]ourt's guidance, as terse as it may be."[164]

And the Court itself has recently suggested that it too believes its shadow docket orders deserve some deference. Though not a death penalty case, a recent example of this, is the "GVR"[165] the Court issued in *Gish v. Newsom*, a case regarding California's COVID restrictions.[166] The order instructed a district court to reconsider its decision preliminarily upholding California COVID restrictions affecting religious attendance in light of an earlier shadow docket decision, *South Bay II*, that itself did not even produce a majority opinion.[167] It is still not entirely clear what aspect of the four different opinions that emerged from *South Bay II* the Court though should inform the district court's further consideration.

The issue with binding lower courts to the Supreme Court's shadow docket is that the orders are terse at best and decide individual outcomes without articulating clear rules to apply going forward. And this is to be expected since it is hard to see how the orders could develop law on these complicated issues without full briefing, oral arguments, and greater time for consideration. Nevertheless, as Professor William Baude put it, "it is difficult for lower courts to follow the Supreme Court's lead without an explanation of where they are being led."[168]

Furthermore, difficulty and danger attends reading too far into shadow docket rulings. Consider the Fourth Circuit's denial of federal death row defendant Corey Johnson's motion to stay his execution to allow him to prove that

opinion of this Court after briefing and oral argument on the merits.'" (quoting *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 477 n.20 (1979)) (alterations in original)).

[162] *See, e.g.*, CASA de Maryland, Inc. v. Trump, 971 F.3d 220, 281 n.16 (4th Cir.) (King, J., dissenting) (admonishing the majority for its heavy reliance an emergency order staying related injunctions from district courts in other circuits), reh'g en banc granted, 981 F.3d 311 (4th Cir. 2020).

[163] *See* Stephen Vladeck, *The Supreme Court Needs to Show its Work,* ATLANTIC (March 10, 2021, 9:35 AM) https://www.theatlantic.com/ideas/archive/2021/03/supreme-court-needs-show-its-work/618238/ [https://perma.cc/CXX9-Y732].

[164] Vetan Kapoor & Judge Trevor McFadden, *Symposium: The Precedential Effects of Shadow Docket Stays*, SCOTUSBLOG (Oct. 28, 2020, 9:18 AM) https://www.scotusblog.com/2020/10/symposium-the-precedential-effects-of-shadow-docket-stays/ [https://perma.cc/DE6W-M4UK]. *But see, The Precedential Effects of the Supreme Court's Emergency Stays*, 44 HARV. J.L. & PUB. POL. 827 (2021) (acknowledging that due the fact-intensive, unique and irreversible characteristics of capital stay decisions, they "may not, as a practical matter, offer lower courts much precedential value").

[165] *See* Aaron-Andrew P. Bruhl, *The Supreme Court's Controversial GVRs - And an Alternative*, 107 MICH. L. REV. 711, 712 (2009) (describing and critiquing the practice of issuing a GVR: granting a petition for certiorari, vacating a lower court opinion, and remanding for further consideration).

[166] No. 20A120, 2021 WL 422669 (U.S. Feb. 8, 2021) (mem.).

[167] *Id.; see also,* S. Bay United Pentecostal Church v. Newsom, 141 S. Ct. 716 (2021) (mem.).

[168] Baude, *supra* note 7, at 18.

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his intellectual disability made him ineligible for the death penalty under the Federal Death Penalty Act (FDPA).[169] Judge Motz wrote a concurring opinion arguing that the strong evidence Johnson presented of his intellectual disability under prevailing clinical standards, raised a "grave" challenge to "the propriety of now executing him."[170] But Judge Motz nonetheless concurred in the denial of Johnson's motion, because she believed the issue was resolved by the fact that a month earlier the Supreme Court, without any explanation, had denied a stay of execution to Alfred Bourgeois who also brought a successive claim under the same provision.[171] Indeed Judge Motz approvingly quoted Justice Sotomayor's dissent in *Bourgeois*—the only writing that accompanied the order—before inferring that since the whole Court allowed Mr. Bourgeois' execution to go forward, a majority must have rejected Sotomayor's construction of the FDPA's prohibition on the execution of the intellectually disabled.[172]

But it is far from clear that a majority of the Supreme Court did disagree with Justice Sotomayor's reading of the FDPA on the merits, especially given that no member of the majority explained their thinking at all. Several distinctions between the two cases might have been relevant, including the Court's perception that Mr. Bourgeois had delayed bringing his claim. This possibility was not explored by Judge Motz and we do not know whether she would have ruled the same way if she knew that a new presumption against last minute claims, rather than a rejection of Sotomayor's interpretation of the FDPA, was the reason the justices denied Bourgeois relief.[173]

D. Harms to the Court and the Rule of Law

Hasty denials or vacaturs of stays also creates issues for the justices themselves, for the Court as an institution and ultimately for our belief in the rule of law. For the justices, an unforgiving standard around stays of execution may undermine their ability to effectively adjudicate future cases. And for the Court, exhibiting an unwillingness to entertain the claims of individuals facing the irreversible infliction of society's gravest punishment inevitably undermines the Court's legitimacy and with it faith in the rule of law. The mere possibility or

[169] 18 U.S.C. § 3596(c) (providing that "a sentence of death shall not be carried out" against someone who is intellectually disabled).

[170] *United States v. Johnson*, 2021 WL 118854, at *2 (4th Cir. Jan. 12, 2021) (Motz, J. concurring in part).

[171] *Id.*

[172] *Id.* (quoting *Bourgeois*, 141 S. Ct. at 509 (Sotomayor, J., dissenting)).

[173] Even when there is a per curiam it can be very hard to disentangle the impact of the delay versus the merits. For example, Judge Chutkan's one decision denying a stay was overturned on appeal in the D.C. Circuit because they said she read too much into the court's per curiam in *Lee* which, as discussed *supra* Part I.B, vacated a stay based on both the merits of Lee's Eighth Amendment challenge and the perceived delay in bringing it. *See In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123, 133-35 (D.C. Cir. 2020); *Matter of Fed. Bureau of Prisons' Execution Protocol Cases*, No. 19-MC-145 (TSC), 2020 WL 4915563 (D.D.C. Aug. 15, 2020), *appeal dismissed sub nom. In re Fed. Bureau of Prisons' Execution Protocol Cases*, No. 20-5252, 2020 WL 6038916 (D.C. Cir. Sept. 16, 2020), and *rev'd and remanded sub nom. In re Fed. Bureau of Prisons' Execution Protocol Cases*, 980 F.3d 123 (D.C. Cir. 2020)

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appearance of any judge, let alone Supreme Court justices, succumbing to partisan pressures in their capital decisions "casts a cloud of illegitimacy over the criminal justice system."[174]

1. Disposing of so many capital appeals on the shadow docket creates perverse incentives for individual justices

The justices themselves are not well served by a categorical presumption against stays of execution. First, as *Johnson* shows, there seems to be a perverse incentive for justices not to write dissent in capital cases. Perhaps by consistently writing to underscore the wrongheadedness of the Court's orders greenlighting the federal executions, Justice Sotomayor actually added precedential weight to those decisions by making explicit the reasoning that a majority of the Court impliedly rejected.[175]

Second, if the Court realizes upon further reflection that it erroneously allowed an execution to proceed, the justices might nonetheless be reluctant to reverse course and admit their mistake, especially given the stakes of capital cases. This might explain Justice Kennedy's vote in *Glossip v. Gross* to allow Oklahoma to continue using midazolam despite clear evidence that its "ceiling effect" renders it an exceedingly poor choice as a sedative in executions.[176] Joining the four liberal justices in dissent in *Glossip* would have required an acknowledgement that the Court should have stopped Charles Warner's execution. If this is correct, one hastily denied stay led to the continued use of a sedative that does not adequately keep people from experiencing physical and mental anguish during their execution. Justice Kavanaugh's statement in *Murphy* also supports this point.[177] While Justice Kavanaugh, and Chief Justice Roberts who joined him, were willing to correct their mistake and prevent further religious discrimination, they did not own up to the error in *Ray* and instead issued a two-months too-late statement relying on tenuous nuances to distinguish *Ray* from *Murphy*.[178]

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[174] Woodward v. Alabama, 571 US 1045, 1050–51(2013) (Sotomayor, J., dissenting from denial of certiorari).

[175] *See,* Kapoor & McFadden *supra* note 165 (arguing that "dissents from" shadow docket decisions should serve as persuasive authority).

The liberal justices on the Court increasingly face a Hobson's choice between explicitly calling out the seemingly drastic changes being made to precedent and practice, and potentially reinforcing them, or playing along with the conservative majority's characterization of their actions as standard incremental precedential developments. Justice Sotomayor seems to be increasingly choosing the former over the latter. *See, e.g.*, Jones v. Mississippi, 141 S. Ct. 1307, 1328 (2021) ("[T]he Court attempts to circumvent *stare decisis* principles by claiming that the Court's decision today carefully follows [prior precedent]. The Court is fooling no one." (citations omitted).

[176] *See* Freedman *supra* note 133 at 657 n.71 (correctly predicting that the justices might have some "psychological reluctance" to rule in favor of the three remaining Oklahoma plaintiffs after denying Warner's request for a stay).

[177] Murphy v. Collier, 139 S. Ct. 1111, 1111–12 (2019) (mem.)

[178] *See* notes 49-51 and accompanying text.

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2. *Unreasoned and reflexive denials of prisoners' claims undermine the Court's legitimacy and the rule of law*

A doctrine that reflexively closes the door to death row prisoners' appeals does not allow the Court to engage in the deliberate decision making that should characterize the actions of the highest court in a mature democracy. In fact, the Court's federal capital decisions did not even live up to the standards it holds the executive branch to in the context of agency decision making.[179] Regardless of one's view of capital punishment, it is not controversial to hope that our capital punishment system will be as free as possible of arbitrariness and the appearance of it. But the Court's current ad hoc and unforgiving standard, which seems to make exceptions primarily for prisoners bringing claims around religious rights, appears profoundly and increasingly arbitrary.[180] That the highest court in our judicial system is the primary source of this apparent arbitrariness compounds the problem in several ways. First, these unsigned orders signal a lack of accountability on the part of the justices to the people whose lives are in their hands, and to those of us watching. Second, that the orders are not justified by articulated reasons creates a lack of transparency leading not only to the confusion discussed above in the context of capital litigation, but also to an erosion of the public's esteem for the Court and faith in the rule of law in general.[181]

The Court is now solidly made up of conservative justices, and more likely than at any point in modern history to issue decisions that are relatively predictable based upon justices' partisan affiliations.[182] Taking as a given that the results are increasingly preordained, especially in the context of capital punishment, the fact remains that the way the Court makes decisions matters enormously. In the coming decades there is little doubt that the liberals and progressives will stridently disagree with many of the decisions that the Court makes, but it is not preordained that they will also disagree with the way the Court makes those decisions. It should be more important to the conservative justices than anyone else that those who disagree with—but are nonetheless

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[179] Dep't of Homeland Sec. v. Regents of the Univ. of California, 140 S. Ct. 1891, 1909 (2020) (requiring the executive to "turn square corners in dealing with the people" and "defend its action[ ]" with consistent reasoning) (citations omitted); Dep't of Com. v. New York, 139 S. Ct. 2551, 2576 (2019) (requiring "[r]easoned decisionmaking . . . [and] an explanation for agency action", not distraction or obfuscation).

[180] Dunn v. Price, 139 S. Ct. 1312, 1313 (2019) ("Should anyone doubt that death sentences in the United States can be carried out in an arbitrary way, let that person review the following circumstances as they have been presented to our Court this evening.") (Breyer, J., dissenting from vacatur of stay).

[181] Daniel Epps & Ganesh Sitaraman, *How to Save the Supreme Court*, 129 YALE L.J. 148, 151, 167–68 (2019) ("[T]he Supreme Court plays a significant role in the public imagination as a citadel of justice. For many Americans, given the Supreme Court's salience, faith in the Court may be deeply intertwined with feelings about the very idea of law.").

[182] *Id.* at 152.

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governed by—their decisions cannot complain about *how* those decisions are being made.[183] On this score, the conservative Court is not off to a good start.[184]

First, the justices have not acted with accountability as a whole or individually when it comes to the capital shadow docket. Collectively, the Court has repeatedly denied stays to death row prisoners , and worse, vacated lower court stays without explanation. I have cataloged numerous examples above. Perhaps the historical nadir of the Supreme Court's accountability is *United States v. Higgs* where the Court granted certiorari before judgment and reversed the Federal District Court of Maryland without so much as a word of explanation.[185] The text of the FDPA allows a district court to either sentence a federal defendant to die "in the manner prescribed by the law of the State in which the sentence is imposed" or "[i]f the law of the State does not provide for implementation of a sentence of death, the court shall designate another State [under whose law] the sentence shall be implemented."[186] When Mr. Higgs was sentenced to death, he was sentenced to die in Maryland, but the State subsequently abolished the death penalty and the government asked the Court to amend or supplement the sentence to allow the execution to take place in Indiana. The district court applied a textualist reading of the statute, and held that the "designation of a different state . . . invariably occurs at the time of sentence" and accordingly the court is without "jurisdiction . . . to amend or supplement its judgment well after the fact."[187] It is difficult to imagine the textualists on the Supreme Court writing an opinion explaining why this analysis was incorrect, but they did reach the contrary result through an unprecedented, unsigned order.[188]

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[183] *See, e.g.*, *id.* at 163; Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 L. & Soc'y Rev. 621, 627 (1991) (arguing that "the legitimacy of the U.S. Supreme Court is based on the belief that it makes decisions in fair ways, not on agreement with its decisions").

[184] Of course the justices might point out that their approval at the moment is relatively high, far better than the other two co-equal branches, and indeed at the end of 2020, it was doing better among Democrat than Republican poll respondents, likely due to its dismissal of challenges to the presidential election. Kathy Frankovic, *Election Cases Hurt the Supreme Court's Image Among Republicans*, YouGov (Dec. 18 2020, 3:00 PM), https://today.yougov.com/topics/politics/articles-reports/2020/12/18/election-cases-hurt-supreme-courts-image [https://perma.cc/VU45-WWQW]. To the extent this refutes my argument, it is only due to the unhappy fact that death penalty cases are not the most salient on the Court's docket, and the average American is simply not paying attention to the capital shadow docket.

[185] United States v. Higgs, 141 S. Ct. 645, 645 (2021) (mem.).

[186] 18 U.S.C. § 3596(a).

[187] United States v. Higgs, No. PJM 98-520, 2020 WL 7707165, at *6 (D. Md. Dec. 29, 2020), *rev'd and remanded*, 141 S. Ct. 645 (2021).

[188] Justice Kagan has famously declared that the Supreme Court justices are "all textualists now." Harvard Law School, *A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YouTube (Nov. 25, 2015) (at 8:25), https://www.youtube.com/watch?v=DPEtszFT0Tg [https://perma.cc/6JSD-M7XU]. Justices Gorsuch and Barrett have loudly and proudly declared their commitment to a strict textualism, and both might have had trouble signing a merits opinion reversing the district court's close reading of the statute in *Higgs*. *See* Confirmation Hearing on the Nomination of Hon. Neil M. Gorsuch to Be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary, 115th Cong. 131 (2017) (statement of Judge Neil M. Gorsuch) ("[W]hat a good judge always strives to do . . . is try to understand what the words on the page mean."); Confirmation Hearing on the Nomination of Hon. Amy C.

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The fact that these decisions are unsigned creates accountability issues as well. Take for example *Dunn v. Smith*, the Court's first capital shadow docket decision after the federal executions, in which an unknown majority of the Court denied an application to vacate the Eleventh Circuit's stay of execution for a religious Alabaman prisoner seeking to have his pastor at his side in the execution chamber.[189] Justice Kavanaugh and the Chief Justice noted their dissent in a short statement reiterating their position from *Murphy*.[190] Justice Thomas did not join their dissent but noted that he would have vacated the injunction.[191] Justice Kagan—joined by Justices Breyer, Sotomayor, and Barrett—wrote a several paragraph long explanation of why she let the stay of execution stand based on her view that Alabama's policy violates the Religious Land Use and Institutionalized Persons Act's requirement that prisons adopt policies that least restrict prisoners' religious freedom.[192] The astute reader counting to nine will notice that two names are missing: Justices Alito and Gorsuch did not note their opinion, but at least one of them must have sided with Mr. Smith, the prisoner. But still today the public has no inkling which of them did so or why. Indeed, we are only left to observe three odd results: in *Ray,* a Muslim prisoner was allowed to die without his spiritual advisor; a few months later in *Murphy,* a Buddhist prisoner's execution was stopped because the Court said that a state could not selectively deny religious advisors access to the chamber; and the next year in *Smith*, a Christian prisoner's execution was stopped based on his claimed right to have his advisor present in the chamber. Surely Justice Gorsuch or Alito has a compelling explanation for these results, but as of now, the public does not even know which justice to ask for an explanation.

Justices have long cast dispositive anonymous votes on the shadow docket, but as the docket grows in importance, and as the capital shadow docket becomes harder and harder for prisoners to navigate, results like this become more common and more problematic. Not only does it create the appearance that the Court is deciding cases based on results and favored litigants rather than principles,[193] but it also makes it harder for prisoners to divine what sort of last-

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Barrett to Be an Associate Justice of the Supreme Court of the United States, Hearing Before the S. Comm. on the Judiciary, 116th Cong. (stating that her textualism requires her to "appl[y] the law as written").

[189] Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.).

[190] *Id.* at 726–27 (Kavanaugh, J., dissenting) (arguing that a state policy that equally bars all clergy from the execution chamber should be allowed, but that as a practical matter states should nonetheless allow clergy in to "avoid still further delays and bring long overdue closure for victims' families"). It bears mentioning that their position in *Murphy* is no doubt what Alabama relied on when it changed its policy to exclude all clergy from the execution chamber. Thus it is not only prisoners and lower courts who are harmed by the Court's capriciousness on the shadow docket, but also states seeking to execute prisoners in a manner that will comply with the law. Alabama did not know that one of the justices who would have granted no relief to the Buddhist prisoner in Texas would mysteriously change his mind when a Christian prisoner in Alabama was to be treated the same way.

[191] *Id.* at 725.

[192] *Id.* at 725–26.

[193] The Supreme Court's Shadow Docket, Hearing Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Prop. & Internet, 117th Cong. 6 (2021) (written statement of

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minute arguments might be met favorably, leaving them to throw everything at the wall to see what might stick. While there are good reasons for giving the members of a firing squad the plausible deniability that comes from inserting a blank into some of their guns, the judges at the helm of our criminal justice system deserve no such dispensation.[194] The Justices should sign their names when they send a prisoner to die, or when they spare his life.

The Court has long acknowledged that its "power lies . . . in its legitimacy" and thus that "a decision without principled justification would be no judicial act at all."[195] And principled justifications do little to reinforce legitimacy if they are not elaborated. Perhaps the justices believe that this principle only constrains the Court in the most politically salient cases before it. But the shadow docket is increasingly host to many such high-profile issues,[196] and I believe the justices underestimate the salience of the death-penalty at their own peril. Others who study the Court's legitimacy in this area like William Baude agree, "this is no way to run a railroad."[197] For capital defendants, the Court itself, and the legitimacy of our legal system, something has to change.

IV. Potential reforms to the Capital Shadow Docket

Thus far I have argued that the Court acted in an unjustified and basically lawless way when it short-circuited the late-stage legal processes of the thirteen federal prisoners facing execution. I have also argued that the Court should not continue cutting short the legal claims of those facing execution. But in the months following the federal executions, there has been little indication from the Court that it is likely to change its approach to the capital shadow docket on its own. Instead, the lawlessness of the capital shadow docket demands a response from the co-equal branch constitutionally empowered to curb the Court.[198]

Stephen I. Vladeck), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-VladeckS-20210218-U1.pdf [https://perma.cc/UKE7-4N9J].

[194] Thank you to Professor Carol Steiker for this apt analogy.

[195] Planned Parenthood of S.E. Pa. v. Casey, 505 U.S. 833, 865 (1992).

[196] *See, e.g.*, Whole Woman's Health v. Jackson, 141 S. Ct. 2494 (2021) (mem.) (denying application for vacatur or injunction).

[197] Will Baude, *Death and the Shadow Docket*, Reason (Apr. 12, 2019, 3:30 PM), https://reason.com/volokh/2019/04/12/death-and-the-shadow-docket/ [https://perma.cc/24ZP-FY4K].

[198] One might object at this point that reform should not come from Congress at all. After all, the over-use of the shadow docket is a problem entirely of the Court's creation, and one which is within its power to quickly correct. As one prominent shadow docket scholar told me in a private conversation, "all the best reforms exist inside the Court." While this institutionalist perspective might have merit in theory, especially considering the Court's relatively light merits docket, ultimately, I do not find it compelling. For starters, until the Court refused to use the shadow docket to stay Texas S.B. 8, Justice Sotomayor was the only member of the Court to even acknowledge that there is a problem with the way the Court is using the shadow docket, and she remains the only one to do so. *See* Little v. Reclaim Idaho, 140 S. Ct. 2616, 2618 (2020) (Sotomayor, J., dissenting from the grant of stay).

Justice Kagan did eventually take a stand in Whole Woman's Health v. Jackson, 141 S. Ct. 2494, 2500 (2021) (Kagan, J., dissenting), where she used strong language to criticize the Court's use of the shadow docket, saying it "every day becomes more unreasoned, inconsistent, and impossible to defend." However, the sophistication of her critique left a little to be desired. For example,

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Some in Congress seem to agree with my assessment.[199] A subcommittee of the House Judiciary Committee held a hearing on the shadow docket in February 2021, a heavy focus of which was the capital cases, and the full Senate Judiciary Committee held a hearing on the Shadow Docket following its ruling on the Texas abortion ban in September.[200] Publicly acknowledging the need for a change to the Court's use of the shadow docket is an important first step towards reform.[201] Reasonable people might disagree about what the best reform is, but something must be done. And even introducing legislation targeting this problem could put tangible and impactful pressure on the Court. This Part briefly outlines and analyzes several possible congressional reforms to the capital shadow docket.

While the reforms I discuss here focus on the capital shadow docket, proceeding with any of them would likely have implications beyond it, at least expressively. Congressional action targeted narrowly at the capital shadow docket might be more politically and practically feasible than broader reform disabling the Court from resorting to its emergency orders power at all. For those interested in curbing the shadow docket generally, pointing to the Court's recent errors and inconsistencies on the capital shadow docket, and beginning reform from there, seems like an appropriate first step.

Ultimately I argue that the best option for congressional reform would be a statute automatically staying the execution of a prisoner pursuing their first challenge to their fitness to be executed or the method with which they will be executed.

she puzzlingly said that the Court's decision in *Jackson* typified the Court's recent use of the shadow docket; however, *Jackson*, in contrast with many of the orders regarding the federal executions, articulated some reasons for leaving in place a reasoned (if sparsely) lower-court decision. The truly concerning uses of the shadow docket have neither of those positive characteristics.

The fact that even Justice Kagan does not seem to be meaningfully attuned to the real issues with the Court's use of the shadow docket suggests that if reform ever comes from within the Court, it will not happen until the chorus outside the Court grows louder and more specific in their criticism. This final section attempts to contribute to that project.

Further, beyond the unlikely prospect of the Court imminently reforming itself, I have doubts that any reform coming from within the Court would go far enough towards securing protections for capital defendants. The new majority has shown an appetite for speedy unimpeded executions, and I am not optimistic that they could be persuaded to abruptly return the Court to its previous more measured ways.

[199] The Presidential Commission on Supreme Court Reform has also been very focused on the shadow docket, and the capital shadow docket in particular, though this Note focuses on Congress' options, because ultimately any meaningful Court reforms will have to be legislative.

[200] Supreme Court Docket and Case Load, Hearing Before House Judiciary Comm., Subcomm. on Courts, Intellectual Prop. & Internet, 117th Cong. (2021); Texas's Unconstitutional Abortion Ban and the Role of the Shadow Docket, Hearing Before the Senate Judiciary Comm., 117th Cong. (2021).

[201] *Cf.* Epps & Sitaraman, *supra* note 182, at 152 ("Whether policymakers adopt these precise proposals or not, it is imperative that they search for reforms along these lines. Doing nothing means that the Court's legitimacy will continue to suffer in the eyes of the public.").

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A. Jurisdiction-based reforms

1. Strip the Court of jurisdiction to review lower court stays and temporary injunctions of executions

Starting off bold, Congress could strip the Court's jurisdiction to review lower-court decisions delaying executions to allow litigation to proceed. This could be accomplished through a carefully drafted standalone piece of legislation providing that, "notwithstanding any other jurisdictional provisions, the Supreme Court shall not have jurisdiction to review, by appeal, writ of certiorari before judgment, or otherwise, any decision of a lower court granting a temporary stay or injunction of a scheduled execution."[202] Alternatively—though I think more riskily–the jurisdiction strip could be accomplished by identifying and amending the various provisions under which the Court's jurisdiction is currently invoked and accepting review of lower-court stays of execution under them.[203]

Stripping the Court's jurisdiction to vacate lower court stays should not raise constitutional objection because it would not strip the Court of jurisdiction entirely—which itself would not necessarily be unconstitutional –[204] but would merely regulate the time at which the Court could take an appeal over a certain class of cases. The Court can only exercise jurisdiction over appeals of stay decisions, which by their nature are not final judgements, because Congress gave it the power to do so in 28 U.S.C. § 2101(f)[205] and in the All Writs Act.[206] When submitting an application to vacate a stay, government lawyers generally assert jurisdiction under the Supreme Court's Rule 23, which itself references § 2101(f) and the All Writs Act.[207] What Congress gives the Court,

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[202] *Cf.* H.R. 3676 (2017) (proposing similar, but broader, language to limit the Court's jurisdiction to review any state statute on abortion).

[203] I say this is a riskier approach because the Court has seen its way around such jurisdiction strips in the past by invoking other sources of jurisdiction. *See, e.g.*, Ex parte Yerger, 75 U.S. 85, 106 (1868) (holding that the Court still had jurisdiction over appeals of habeas decisions under Section 14 of the Judiciary Act of 1789, notwithstanding Congress' abrogation of its direct appellate jurisdiction over those cases in the Act of 1867 upheld in *Ex parte McCardle*, as explained in the following footnote).

[204] *See, e.g.*, Ex parte McCardle, 74 U.S. 506, 515 (1868) (upholding statute stripping the Supreme Court of jurisdiction to directly review lower federal court habeas decisions). Of course, the scope of *McCardle*'s holding is the subject of ongoing debate, but the narrow and time-limited strip of jurisdiction over a specific class of cases contemplated here is necessarily within even the narrowest reading of *McCardle*. *See* Patchak v. Zinke, 138 S. Ct. 897, 907 n.4 (2018) ("[T]he core holding of *McCardle*—that Congress does not exercise the judicial power when it strips jurisdiction over a class of cases—has never been questioned.").

[205] This subsection provides: "In any case in which the final judgment or decree of any court is subject to review by the Supreme Court on writ of certiorari, the execution and enforcement of such judgment or decree may be stayed for a reasonable time to enable the party aggrieved to obtain a writ of certiorari from the Supreme Court."

[206] 28 U.S.C. § 1651(a) ("The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.").

[207] *See, e.g.*, Application for Stay or Vacatur of Injunction at 1, Barr v. Purkey, 140 S. Ct. 2594 (2020) (No. 20A9).

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it can take away, and amending these acts to limit the Court's power to take an interlocutory appeal over ongoing litigation is well within Congress' constitutional authority to make exceptions and regulations to the Court's appellate jurisdiction.[208]

This reform would disable the Court from cutting short last-minute capital cases, and it would send a broader message of disapproval to the Court. If Congress is concerned with the Court's expanding use of the shadow docket, taking this step might even cause the Court to rely less on the shadow docket, and would do so in a relatively limited and innocuous way, leaving the Court with flexibility to maneuver and invoke its emergency orders power as necessary.[209] Additionally, while this would not be a meek reform, it would be unlikely to spark a direct and potentially destabilizing confrontation.

One likely response to this reform is that it goes too far and would make it too easy for a handful of activist lower court judges to bring the capital punishment system to a halt. If Congress means to end the death penalty in the United States, perhaps it should go about doing so in a more transparent and accountable way.[210] However, in light of the limited scope of the jurisdiction strip to only reach interlocutory appeals, this response seems overblown. The gears of executions would only stop turning if a majority of judges in a given circuit were willing to play along with indefinite delay of litigation, never issuing a final ruling over which the Court would regain jurisdiction. Lower court judges are bound to even-handedly apply the law just the same as the justices of the Supreme Court are, and even the Ninth Circuit denies many—likely most—applications for last minute stays of execution.[211] There is no particular reason that Congress should not be able to decide that lower courts are entitled to unexamined discretion when they believe they need more time or further proceedings to determine the legality of an impending execution.

A different but related counter-argument is that this change would make it hard for the Supreme Court to weigh in on the legal questions unique to stays of execution, including the appropriate standard for granting them. Perhaps this is actually the point of the reform. If Congress did this, it would be expres-

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[208] U.S. CONST. art. III, § 2, cl. 2 ("[T]he supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.").

[209] *See* Katie Barlow, *Alito Blasts Media for Portraying Shadow Docket in Sinister Terms,* SCOTUSBLOG (Sept. 30, 2021, 6:59 PM), https://www.scotusblog.com/2021/09/alito-blasts-media-for-portraying-shadow-docket-in-sinister-terms/ [https://perma.cc/3L6Z-PERU]; Mark Rienzi, *The Supreme Court's "Shadow" Docket: A Response to Professor Vladeck,* NAT'L REVIEW. (Mar. 16, 2021, 1:30 PM), https://www.nationalreview.com/bench-memos/the-supreme-courts-shadow-docket-a-response-to-professor-vladeck [https://perma.cc/9EFX-DA6J].

[210] Whether Congress even has the power to end capital punishment in the states is a matter of some debate. There is a legitimate argument that given the Court has held that capital punishment is constitutional, Congress does not have the power to second guess that decision under *City of Boerne v. Flores*, 521 U.S. 507 (1997). However, I believe that with a strong factual record showing that the death sentence is imposed and carried out in an impermissibly discriminatory manner, Congress might be able to legislate (at least temporarily) the death penalty out of existence.

[211] *See, e.g.*, United States v. Mitchell, 971 F.3d 993, 995 (9th Cir. 2020) (per curiam).

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sing its judgment that the Court's new standard for capital stays is wrong. However, without additional legislation affirmatively saying what the standard should be—which I propose below—lower courts might find themselves stuck with the Court's new standard categorically disfavoring all last-minute stays, particularly if the Court's upcoming decision in *Ramirez* articulates it more clearly in a merits decision.

Without further legislation articulating a standard for capital stays, there would be nothing to stop the Court from reviewing, after the fact on appeal of a final judgment, a lower court's grant of a stay, and suggesting that a stay should not be granted again in similar circumstances.[212] Of course, it would be up to the lower courts to decide what precedential value such a statement in dicta would be entitled to. And even with statutory guidance as to the proper standard for evaluating stay applications, the circuits might reach different conclusions about the proper interpretation of that standard.

Thus this reform might not make it hard enough for the Court to at least attempt to influence lower court grants of stays, because even if some circuits ignored the Court's statements as dicta and contrary to Congress's intent, a lack of uniformity in the last-minute procedures available to death row defendants would be likely to emerge across the different circuits. Such arbitrariness in the capital punishment has historically been a powerful argument against the imposition of the death penalty,[213] and it is a challenging moral and jurisprudential question whether we should enact a reform that attempts to reinforce the constitutional safeguards on executions but which will not benefit all death row prisoners equally.

2. *Create an intermediate capital court of appeals with exclusive jurisdiction to review stays of execution*

This concern with inconsistency could be alleviated with the creation of a court, other than the Supreme Court, with appellate jurisdiction over stay decisions. The United States Death Penalty Court of Appeals would sit between the Supreme Court and the district courts, and have mandatory jurisdiction of all capital cases that the Supreme Court cannot bypass. Along with a strip of the Supreme Court's interlocutory jurisdiction over stays of execution, this specialized court would ensure uniformity and would be able to give last-minute capital cases the time and focus they require. This reform would take seriously the justices' articulated concern that last-minute litigation overburdens their docket,[214] and would respond by giving this duty to a court with the narrow mandate of reviewing last-minute capital appeals. The district courts would still be the first finders of fact and would deny or grant stay applications as neces-

[212] *See, e.g.*, *Bucklew*, 139 S. Ct. at 1134 (emphasizing in dicta that stays should be the extreme exception).

[213] *See* Furman v. Georgia, 408 U.S. 238 (pausing capital punishment due largely to arbitrariness in the imposition of death sentences).

[214] *See supra* note 114 (questions of Justices Kavanaugh and Alito).

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sary, but then appeals would be taken to and only to—the Death Penalty Court of Appeals, rather than to the circuits and then the Supreme Court.[215]

This might seem like an extreme and risky proposal, and I will note that none of the law professors I have discussed it with are on board. Many express the legitimate fear that creating specialized courts of appeal for politically charged issues is a slippery slope that leads to the politicization of the judiciary and undermines the rule of law. This concern is not unreasonable, and applies with some force to a jurisdiction stripping solution as well: perhaps neither is a road down which we want to walk, especially given the partisanship and norm-busting that characterizes our current political moment.

However, perhaps Congress occasionally flexing the power to rearrange federal jurisdiction is exactly what is required to keep the Court from following the political branches down the path towards partisanship. Indeed, Charles Black has long argued that Congress' plenary power over the federal courts' jurisdiction is the rock upon which the democratic legitimacy of Article III courts depends.[216] According to this view, Congress must have the power and wherewithal to act when the Court acts without legitimacy or in a way that is consistently contrary to the will of the populace. Of course there is a counter—that sometimes it is proper for the Court to act contrary to the will of the populace—and a counter to that, all of which is beyond the scope of this paper. Ultimately it is hard to separate one's priors about the Court's history and current direction around salient issues from one's intuitions about the appropriate relationship between the Court and the political branches. Pragmatically, I am skeptical of arguments that ask us to forgo a tool for popular political change today because of the potential that the tool will be turned against our interests at some far-off point in the future. I doubt that politics and the political effects of legal changes are so predictable.

Support for the idea of a specialized court has materialized from an unexpected quarter: Congressman Darrell Issa (R-CA) asked during the House of Representative subcommittee hearing on the shadow docket whether creation of such a court might be desirable.[217] It is also not unprecedented: both the United States Court of Appeals for the Federal Circuit and the United States Foreign Intelligence Surveillance Court of Review are Article III courts with specialized fields of jurisdiction. The United States Death Penalty Court of Appeals should be staffed with judges confirmed consistent with Article III, but it could be modeled either after the Federal Circuit with permanent judges

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[215] Stay appeals coming from state supreme courts would likely still need to go to the Supreme Court.

[216] Charles L. Black Jr., Decision According to Law 18 (1981) ("'Jurisdiction' is the power to decide. If Congress has wide and deep-going power over the courts' jurisdiction, then the courts' power to decide is a continuing and visible concession from a democratically formed Congress.").

[217] Supreme Court Docket and Case Load, Hearing Before House Judiciary Comm., Subcomm. on Courts, Intellectual Prop. & Internet, 117th Cong. (2021) (statement of Hon. Darrell Issa at 50:15), https://www.c-span.org/video/?509098-1/house-hearing-supreme-court-docket-case-load#&vod [https://perma.cc/69F9-XMZG]. It should be noted that Professor Vladeck gave a resounding "no" in response to this question. *See id.*

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or after the Foreign Intelligence Surveillance Court with temporarily assigned judges.

The issue with the former is that permanently assigning judges would give the current President significant power to shape the new court, which might be practically advantageous if the proposal were enacted within the next few years, but would certainly politicize the Court and might raise *a fortiori* the concern discussed above regarding effectively stopping the implementation of capital punishment in the United States. The latter proposal of rotation might allay some of the concerns around politicization, although that would depend largely on how assignments were made—in the FISA Court, the Chief Justice makes the assignments, which would be less politicizing. A rotating bench would have the disadvantage of diminishing the subject matter expertise of judges on the court.[218]

Ultimately, though interesting and superficially appealing, I do not think jurisdiction-based reforms alone are the right way to proceed. First, if the Supreme Court is stripped of jurisdiction over capital cases, it is possible that no federal court would be empowered to review them, because a federalism issue might exist if Congress attempted to channel direct review of state courts of last resort decisions to a federal court other than the Supreme Court. Additionally, congressional action selectively stripping jurisdiction over particular issues from the Supreme Court may not be a precedent we should be eager to set, particularly not in the name of preserving the rule of law. The executive and legislative branches controlled by the same party and clearly empowered to remove from the Court's jurisdiction any matters over which they find a third branch's supervision inconvenient is a scary prospect.

B. Rules-of-decision-based reforms

1. Prescribe a deferential standard of review for the Supreme Court to apply to lower court grants of stays

A less confrontational option would leave the Supreme Court with final jurisdiction over capital stays and injunctions but would explicitly instruct the Court (and the courts of appeals) to afford significant deference to the decisions of lower courts granting prisoners relief. This is plainly constitutional. Congress has enacted many pieces of legislation requiring the federal courts to defer to the decisions of district courts or even of other adjudicators.[219] Take *Miller v.*

[218] It would perhaps be more tolerable to the judges themselves to spend three-month rotations on a court whose role is to engage quickly and deeply with legal questions arising shortly before a capital sentence is to be carried out. Perhaps few judges would be interested in a life appointment to such a court characterized by long periods of idleness and short sprints of work, often requiring very late hours.

[219] *See, e.g.*, 18 U.S.C. § 3626(e) (Prison Litigation Reform Act providing for automatic stay of a court order granting a prisoner prospective relief); 42 U.S.C. § 2000cc (Religious Land Use and Institutionalized Persons Act instructing courts to apply strict scrutiny in certain situations); 5 U.S.C. § 706 (Administrative Procedure Act establishing various standards to different categories of agency decisions and actions).

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French, where the Court upheld a provision of the Prison Litigation Reform Act (PLRA) that automatically stays injunctions granted to rectify unconstitutional prison conditions whenever prison officials challenge such injunctions.[220] If Congress can give one class of litigants the power to grant themselves an automatic stay of a court's judgment, and can further restrain all federal courts from using their equitable powers to enjoin that stay, then surely Congress can create a very deferential standard of review that the Supreme Court owes lower courts on interlocutory appeals of stays.

If Congress believes that deterring delay weighs too heavily in the current standard for staying executions, then it ought to say so. Congress made just such a calculation in 1996 when it enacted AEDPA and instructed federal courts exercising habeas jurisdiction to afford significant deference to state court decisions upholding convictions before exercising plenary review over them.[221] Professor Amir Ali suggested this reform in congressional testimony, arguing that "where a lower court has reviewed the record and determined that an execution is likely to violate the law . . . a lower court's request for additional time to consider the lawfulness of an execution should be disturbed only if it is apparent to the Supreme Court that the lower court's decision" was unreasonable in light of clearly established federal law or based on an unreasonable determination of the facts. It is not without irony that Professor Ali suggested the § 2254(d) standard which comes from AEDPA, where it is usually a barrier to capital litigants seeking federal review of state court decisions denying them relief.[222]

While there would be a certain poetic justice to requiring the Court to grant AEDPA deference to district court stays, a few improvements to the § 2254(d) standard, tailored to the setting of capital stays, would be useful. First, there is no reason that the law district courts are applying needs to be clearly established. In fact, that requirement would likely have allowed the Court to overturn most of the stays granted for federal prisoners just because the dearth of litigation over the FDPA meant that most of the law had not yet been established at all, least of all by the Supreme Court. The "clearly established" requirement has been the source of significant mischief in the context of capital litigation,[223] and while it would still restrain a district court from vacating an underlying state conviction, there is no reason to reiterate and reinforce it in our new standard, which is intended to make it easier to secure more time to consider the legality of an execution. Second, Congress ought to explicitly

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[220] 530 U.S 327, 350 (2000).

[221] 28 U.S.C § 2254(d) (instructing that federal courts should not overturn state court judgements unless they are "(1) contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence").

[222] The Supreme Court's Shadow Docket, Hearing Before the House Judiciary Comm., Subcomm. on Courts, Intellectual Prop. & Internet, 117th Cong. 6 (2021) (written statement of Amir Ali), https://docs.house.gov/meetings/JU/JU03/20210218/111204/HHRG-117-JU03-Wstate-AliA-20210218-U2.pdf [https://perma.cc/NT82-6PNT].

[223] *See, e.g.*, Sawyer v. Smith, 497 U.S. 227, 236 (1990) (holding that *Caldwell v. Mississippi*, 472 U.S. 320 (1985) was not clearly established prior to the petitioner's conviction).

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address delay and say, in no uncertain terms, that the fact a claim is delayed in reaching the court, whether the delay is the fault of the prisoner or not, should not affect the court's decision of whether a stay is necessary.[224]

And finally, a court should not have to find that an impending execution is "likely" to violate the law, but merely that there is a "significant possibility" that it will.[225] Defenders of the Court's capital shadow docket decisions leaned on the idea that an execution should only be stopped if the prisoner is likely to succeed on the merits, and that most of the federal prisoners never reached that threshold.[226] This argument selectively ignores *Hill*'s articulation of a lower standard for those facing execution than the normal likelihood of success standard required for an injunction and the Supreme Court cases authorizing stays of execution even in the face of unsettled law or claims that turned out to not be successful.[227] Congress should articulate a standard that takes into account the irreversibility of an execution and the difficulty of establishing a likelihood of success in the face of the often unsettled law in this area.

Critics might ask whether the application of this reform to decisions to grants of stays but not to denials of stays unfairly gives prisoners the upper hand in litigation. But it is sensible for this deference only to apply in one direction, primarily because of the irreversibility of an execution.[228] Additionally, the Supreme Court and the courts of appeals need not give any particular deference to a lower court's decision that a claim does not merit further consideration. Appellate courts exist to decide whether a lower court missed something, and so should consider for themselves whether they require more time to consider the merits of a claim. On the other hand, when a lower court has concluded that it does need more time to adjudicate something fairly, and when a life is on the line, appellate courts should not second-guess that conclusion before the lower court has had time to actually make a decision, especially since appellate courts usually have far less time to consider the issue than lower courts do.

Another counter-argument might sound in federalism. A state might even raise a constitutional challenge to the reform as limiting the Court's core function of preserving the constitutional balance between federal and state power. While there might be some cases that provide meager support for such an argu-

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[224] If this seems like too categorical an approach, then perhaps Congress could at least set a safe-harbor date. For example, the statute might provide that all claims that are brought at least a week before a scheduled execution would be entitled to deference under the statute.

[225] Hill v. McDonough, 547 U.S. 573, 584 (2006).

[226] *See* Mooppan Testimony, *supra* note 155, at 2.

[227] *See, e.g.*, Bucklew v. Precythe, 139 S. Ct. 1112 (2019); Dunn v. Smith, 141 S. Ct. 725 (2021) (mem.).

[228] *Presidential Commission on the Supreme Court of the United States* 16 (June 30, 2021) (written testimony of Samuel L. Bray), https://www.whitehouse.gov/wp-content/uploads/2021/06/Bray-Statement-for-Presidential-Commission-on-the-Supreme-Court-2021.pdf [https://perma.cc/PD5K-AQ26] ("[T]here is no symmetry between an erroneous execution and an erroneous non-execution. If proper attention is given to irreparability and the need to preserve the judiciary's ability to decide a case, then the justices should be much more willing to give shadow docket orders that *delay* an execution than shadow docket orders that *accelerate* an execution."); Freedman, *supra* note 133, at 652–54 (arguing that executions should be stayed whenever necessary to afford the Justices "[t]ime to [t]hink" about whether to grant certiorari in a case).

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ment, it does not seem particularly persuasive given that the Constitution does not explicitly say that it is the federal judiciary, much less the Supreme Court, that is solely responsible for preserving this balance, and any impingements on state sovereignty would be justified by constitutional violations—or potential violations—found by the lower federal courts. Furthermore, just as AEDPA represents a Congressional decision to require federal courts observe various rules based in comity before second guessing the final judgment of a state court, Congress has every right to push the needle a little way in the other direction.

A deference standard of review would be a good step, and would at least signal that Congress will not abide capricious shadow docket decisions sending prisoners to die when legitimate doubts remain regarding the legality of doing so. Additionally, the moderation of this reform, and its similarity to AEDPA, might make it more politically feasible. But I have doubts that it would really restrain the Court adequately in the long run because standards of deference are malleable, particularly in the hands of the Supreme Court. Furthermore, this reform would be of no use if the district and appellate courts that first adjudicate a claim themselves are deeply skeptical of delayed claims. If Congress is in the mood to take action on the capital shadow docket, perhaps it should go further than this.

2. *Automatically stay executions of prisoners bringing their first challenge to their fitness or method of execution*

Prisoners should have an opportunity to litigate their challenge to their fitness to be executed and the method of their execution, and they should receive a reasoned decision one way or the other. This could be accomplished, as Professor Ali also suggested, by requiring the Court to "state its reasons for concluding that the lower court's decision" to stay an execution was incorrect.[229] Congress might go even further and require the Court to overturn a stay of execution—if at all—on its merits docket. This more aggressive reform would have the paradoxical benefit of being less constitutionally questionable. Constitutional questions might arise if Congress tried to tell the justices that they must sign their names or how long or detailed their opinions must be,[230] but since the Court's "rules of decisions" test most explicitly prevents Congress from arrogating judicial power,[231] Congress is certainly empowered to ask the Court to exercise *more* judicial power by holding arguments and issuing an opinion that sets down a principle reaching beyond the present case.[232]

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[229] Ali Testimony, *supra* note 222, at 6.

[230] Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 225 (1995) (providing that Congress cannot direct "what particular steps shall be taken in the progress of a judicial inquiry").

[231] *See id.*; United States v. Klein, 80 U.S. (13 Wall.) 128, 146 (1871).

[232] *But see* Schiavo ex rel. Schindler v. Schiavo, 404 F.3d 1270, 1272–75 (11th Cir. 2005) (Birch, J., specially concurring) (arguing the Act for the Relief of the Parents of Theresa May Schaivo, Pub. L. 109-3 (2005), violates separation-of-powers principles for a variety of reasons, most relevant here because the power to extend or withdraw jurisdiction does not include a power to dictate "how a federal court should exercise its judicial functions"), *stay denied*, 544 U.S. 957 (2005). While some of Judge Birch's language might extend to this context, it is not necessarily

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But Congress could do something that is both simpler and even less constitutionally controversial: grant an automatic stay to prisoners who are going to be executed before their challenge to their execution can be heard. Justice Scalia once announced his uncontroversial policy of staying executions long enough for the Court to decide on a pending petition for direct review.[233] And justices have previously called for, and an informal norm generally guarantees, prisoners a chance to litigate their first federal habeas petition before they are executed.[234]

A similar presumption should exist for prisoners who wish to challenge their fitness to be executed or their execution method, particularly at a time when states are experimenting with new methods of execution to circumvent the limitations on access to the drugs traditionally used.[235] Thus I envision a statute that automatically stays an execution – or requires district courts to grant a stay – where an execution date has been set and a prisoner is challenging their fitness to be executed under *Ford* or *Atkins*, the method of their execution under *Glossip* and *Bucklew*, or the infringement on their religious exercise under RLUIPA and—presumably—*Ramirez*.

A prisoner would not be entitled to unlimited automatic stays, but would get one opportunity to file a § 1983 petition that includes all the challenges to their execution that they intend to lodge. Successive petitions could be subject to the same sort of rules governing successive habeas petitions under AEDPA, where a second chance would only be allowed if a state changed the execution procedures or withheld information so that a particular aspect of the execution could not be challenged the first time around.[236] This would prevent states from manufacturing last-minute urgency by setting such short timelines that prisoners cannot meaningfully bring their intrinsically delayed claims. It would essentially require states to set execution dates at least six months in advance to allow these claims to be adequately raised, briefed, and decided without running up against the clock.

Ultimately this seems to be the simplest and most straightforward reform congress could enact. The stay mechanism is similar to the one the Court ap-

true that he would see these requirements as raising the same issues as Congress' instructions in the Schaivo case because that law applied only to one family and explicitly interfered in pending state court litigation, and was thus closer to the traditional "rule of decision" forbidden by *Klein*.

[233] Cole v. Texas, 499 U.S. 1301, 1301 (1991) (Scalia, J., in chambers) ("While I will not extend the time for filing a petition beyond an established execution date, neither will I permit the State's execution date to interfere with the orderly processing of a petition on direct review by this Court.") (citation omitted).

[234] Ad Hoc Committee on Federal Habeas Corpus in Capital Cases, *Report on Habeas Corpus in Capital Cases*, reprinted in 45 Crim. L. Rep. 3239 (1989) (the commission, chaired by Justice Powell, recommended formalizing entitlement to an automatic stay of execution during the pendency of a prisoner's first federal habeas petition); Emmett v. Kelly, 552 U.S. 942, 943 (2007) (statement of Stevens, J., joined by Ginsburg, J., respecting denial of certiorari) (endorsing the same proposal).

[235] Ken Ritter, *Second Nevada Death Row Inmate Seeks to Join Zane Floyd Execution Case*, AP News (July 24, 2021) https://news3lv.com/news/local/second-nevada-death-row-inmate-looks-to-join-zane-floyd-execution-case [https://perma.cc/HF34-YXUP] (discussing Nevada's "plan to administer drugs never before tried in any lethal injection in any state").

[236] *See* 28 U.S.C. § 2244(b)(1)–(2); *see also infra* note 245, describing this standard.

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proved in *Miller v. French*.[237] If anything, it is less potentially problematic than the PLRA which stays a judge's relief of a constitutional violation just in case a higher court does not believe there is a violation. On the other hand, if this proposed reform undermines judicial power at all, it is by delaying the implementation of decision finding an execution constitutionally acceptable just in case a higher court believes there is a violation. It would ensure that at least two federal courts fully consider the legality of an execution before it proceeds. And applied to state executions, it is plainly within Congress' Fourteenth Amendment enforcement power. Opponents would argue that this will just further delay executions, and it would likely lead most prisoners to bring some challenge, no matter how frivolous, to their executions. However, as I have argued throughout, a short delay is a small price to pay to ensure that the most serious punishment in our penal system is meted out lawfully.

C. *Upstream reforms*

Finally, we could take the Supreme Court at their word and join them in their effort to minimize last minute stays of execution by enacting reforms that make it easier for prisoners to bring their claims earlier, ideally before their execution dates have been set. The ways in which other laws and doctrines prevent prisoners from raising their claims until the last-minute are manifold.[238] For example, AEDPA makes it very difficult to raise successive claims or to present new evidence challenging a conviction.[239] Since the ways in which the courthouse doors are shut to prisoners earlier in the appeals process are so numerous, there are many ways we might go about opening them.

One potential reform that has long been discussed, and which was recently brought back up by Professor Vladeck in his congressional testimony is giving the Court mandatory appellate jurisdiction over appeals of capital sentences.[240] He optimistically noted that this would "make it easier for death-row prisoners to bring timely method-of-execution challenges."[241] Justice Rehnquist first suggested something along these lines in *Coleman v. Balkcom*.[242] Frustrated with the delay in resuming executions after *Gregg*, he proposed a regime where the Court would grant certiorari in every state capital habeas case, "review" and deny petitioners' claims, and thus trigger 28 U.S.C. § 2244(c), which would foreclose any further federal jurisdiction.[243] With great respect for Professor Vladeck, I think the most likely outcome of this proposal, particularly with current makeup of the Supreme Court, would be the same as Justice Stevens foresaw in the 80s: making "the primary mission of th[e] Court the vindication

[237] 530 U.S. 327 (2000).
[238] *See generally* Tushnet, *supra* note 19.
[239] *See* Kovarsky, *supra* note 8, at 1336.
[240] *See* Vladeck, *supra* note 194, at 18.
[241] *Id.* However, as discussed above, Eighth Amendment claims are often not ripe until states set execution dates, so this would not necessarily mean that prisoners are able to bring their claims "early" as opposed to "timely."
[242] 451 U.S. 949, 963 (1981) (Rehnquist, J., dissenting from denial of certiorari).
[243] *Id.*

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of certain States' interests in carrying out the death penalty."[244] Anyway, allowing prisoners to appeal as a right to the Supreme Court would not actually solve many of the issues leading to delay, unless the Court was also empowered to, for example, appoint special masters in each case to conduct evidentiary hearings. Even then, and even if the Court was inclined (and constitutionally enabled) to waive the normal justiciability rules that make many claims unripe until an execution date has been set, many of the facts underlying *Ford* or *Glossip* claims must be found very close to the moment of execution for them to be meaningful at all.

Instead, we could amend AEDPA to make it easier to raise claims earlier. For instance, Congress could amend 28 U.S.C § 2244, into which AEDPA inserted strict limits on successive claims, and return to the more permissive pre-1996 regime where successive claims can be brought if the "ends of justice permit it."[245] If it were not so hard for prisoners to bring claims earlier, there would be less excuse for not raising meritorious claims as soon as they discover them. To the extent that prisoners do wait to raise new claims in successive federal petitions, it is at least partially because they have very little to gain by bringing them sooner and they may believe that courts are less likely to hold them to the strictest interpretations of AEDPA when their actual execution is imminent.

Conclusion

Like never before, the Court's capital shadow docket is governed by "[p]ower, not reason."[246] During the October 2019 term there were eleven "5 to 4" shadow docket rulings—almost half of them capital cases—compared to twelve merits rulings provoking four dissents.[247] And the Court is increasingly hostile to death row prisoners in last-minute litigation, even as the Court has granted the federal government stays of lower court decision with such "notable frequency" that it looks as if it has "nearly no burden at all" when seeking to

[244] *See id.* at 950 (Stevens, J., concurring in denial of certiorari and objecting to Justice Rehnquist's proposal).

[245] *Compare* Tyler v. Cain, 533 U.S. 656, 661–62 (2001) (describing today's 28 U.S.C. § 2244(b)(1)–(2), which requires successive petitions be dismissed unless they present new claims which rely on a previously unavailable, retroactive constitutional rule or a factual predicate that was unavailable and which now establishes "by clear and convincing evidence" that but for the error the applicant would not have been found guilty), *with* McCleskey v. Zant, 499 U.S. 467, 492–97 (1991) (describing prior version of 28 U.S.C § 2244 (a-b) allowing state prisoners to bring successive petitions if they could show "cause and prejudice" or that "the ends of justice" would be served by allowing the inquiry).

[246] Payne v. Tennessee, 501 U.S. 808, 844 (1991) (Marshall, J., dissenting).

[247] *See* Steve Vladeck, *The Supreme Court's Most Partisan Decisions Are Flying Under the Radar*, Slate (Aug. 11, 2020, 12:12 PM), https://slate.com/news-and-politics/2020/08/supreme-court-shadow-docket.html [https://perma.cc/24BX-UDBP]. Professor Vladeck again highlighted this in his testimony before the House Subcommittee on Courts, Intellectual Property and the Internet, available (at 20:22) at https://www.c-span.org/video/?509098-1/house-hearing-supreme-court-docket-case-load#&vod [https://perma.cc/VMD2-A263].

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undo lower court orders.[248] In the context of the death penalty this gets it exactly backwards. As Justice Marshall argued 40 years ago, "a stay of execution must be granted unless it is clear that the prisoner's appeal is entirely frivolous."[249] The irreversible nature of death demands nothing less.

This Note is not calling for an end to the death penalty.[250] My argument is only that the courts must allow a condemned person to live long enough to challenge the legality of his death. However, like Justice Breyer, I believe "it may be that, as [we] come[ ] to place ever greater importance upon ensuring that we accurately identify, through procedurally fair methods, those who may lawfully be put to death, there simply is no constitutional way to implement the death penalty."[251] But assuming that capital punishment exists, for now, we must ensure that it is carried out in as constitutional a manner as possible. The Supreme Court appears increasingly uninterested in that goal. Faced with the choice Justice Breyer offered between "a death penalty that at least arguably serves legitimate penological purposes *or* . . . a procedural system that at least arguably seeks reliability and fairness in the death penalty's application,"[252] the Court has opted for the former.

[248] Little v. Reclaim Idaho, 140 S. Ct. 2616, 2618 (2020) (Sotomayor, J., dissenting from the grant of stay) (highlighting the Court's solicitousness of government requests for stays of lower-court orders, including the first two federal death penalty orders).

[249] Barefoot v. Estelle, 463 U.S. 880, 907–08 (1983) (Marshall, J., dissenting).

[250] Though that important conversation continues apace. *See, e.g.*, Federal Death Penalty Prohibition Act, H.R. 262, 117th Cong. (2021); S.B. 1165, 2021 Leg., Reg. Sess. (Va. 2021) (signed Mar. 24, 2021).

[251] Bucklew v. Precythe, 139 S. Ct. 1112, 1145 (2019) (Breyer, J., dissenting).

[252] Glossip v. Gross, 576 U.S. 863, 938 (2015) (Breyer, J., dissenting).

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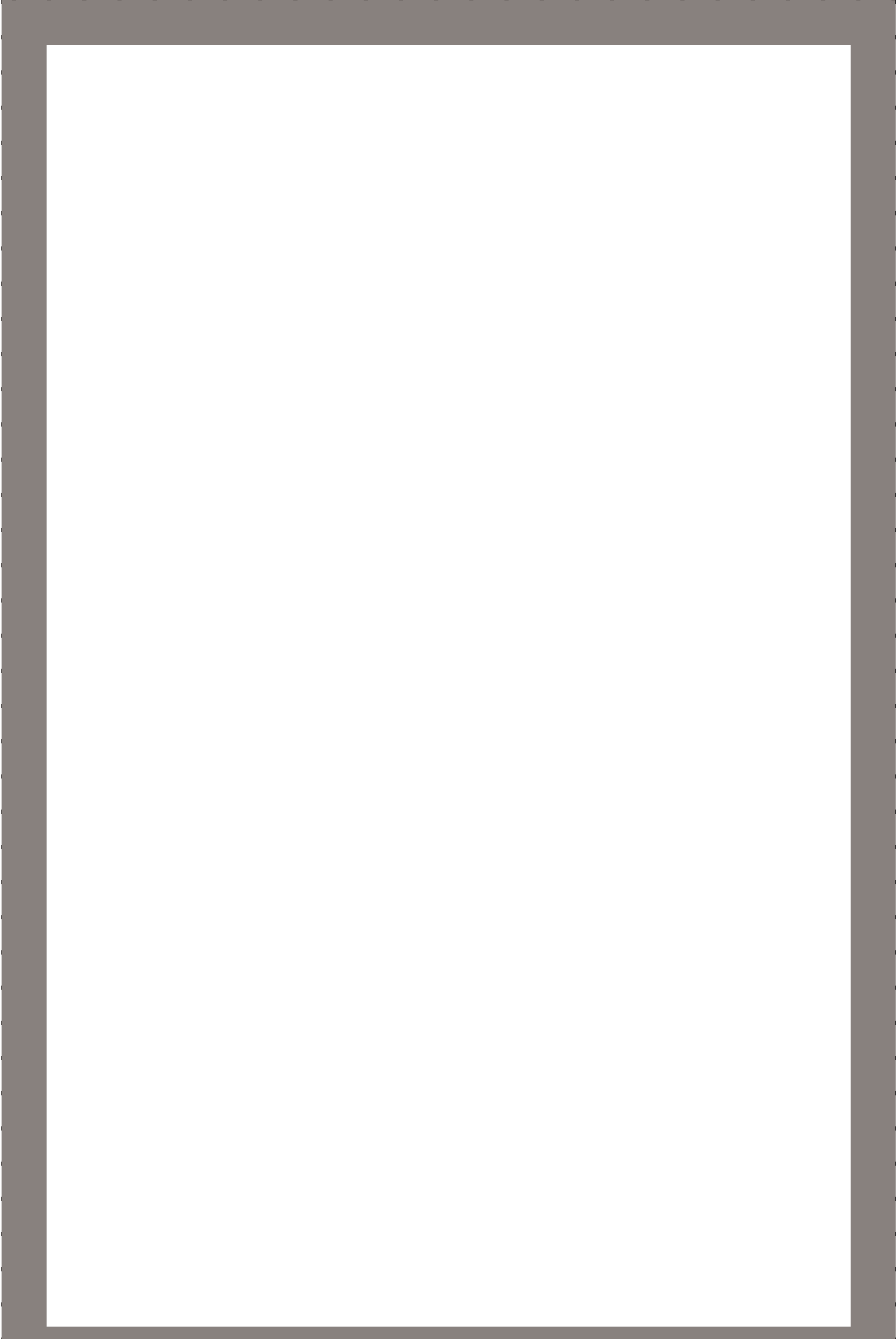

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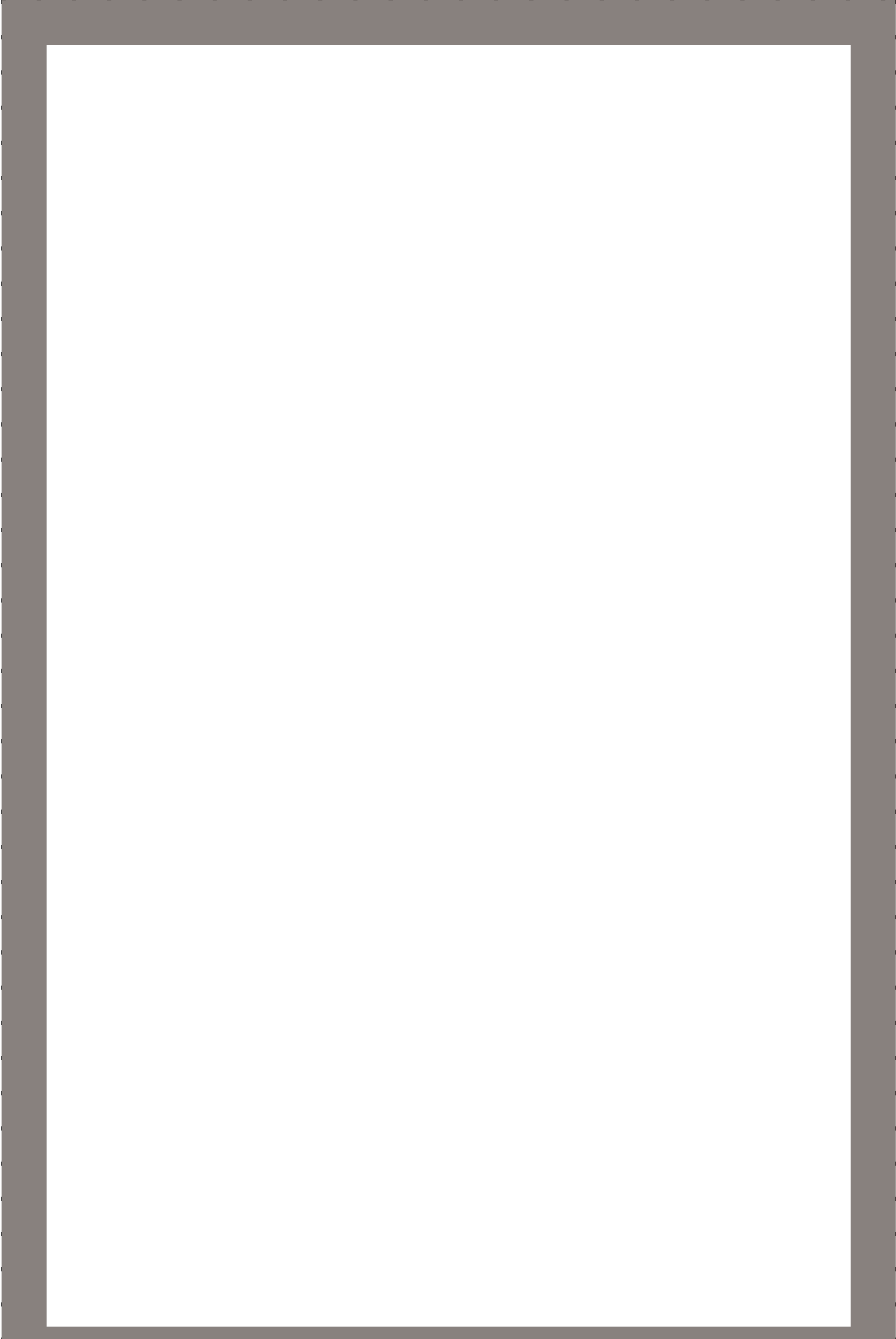

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