

FIRST AMENDMENT LAW REVIEW

VOLUME 18

FALL 2019

BOARD OF EDITORS

Editor-in-Chief
ALYSSA LEADER

Executive Editor
RACHEL ANN STEPHENS

Chief Articles and Notes Editor
ARIANA ROSENTHAL

Managing Editor
MICHAEL PERETZ

Online Editor
WILSON GREENE IV

Symposium Editor
ALISON ROSSI

Article Editors
ALEX COOK
BRANDON MAYES
EMILY MONNETT

Note Editors
VANESSA CANUTO
CHRIS EDDY
OLIVA PERRY
CALEB RASH
DANIEL ROOT

WRITING STAFF

SARAH A. BAKER
MICHAEL J. BOYD
LINDSAY E. BYERS
ASHLEY N. FOX
BILLIE JEAN FORBES
SARAH M. FRENCH
MAUREEN F. GLEASON
G. BRIAN GRIFFIN
LAURENA C. J. GRISSETT
EVAN ALEXANDER GROSSKURTH
HELENA R. HARDING
ATHINA A. HINSON-BOYTE
MANNIRMAL K. JAWA

PRAKASH KADIRI
ELLIOTTE A. KIEL
TISHA M. MARTIN
MORGAN MCNEIL
MIREYA L. MCALPINE-BRAXTON
JULIA S. MEISTER
JAELYN D. MILLER
GRANT T. PENDERGRAFT
ALEC K. QUINT
TIM SOOKRAM
ZACHARY TOOMAN
MERRIWETHER C. VAUGHAN

FACULTY ADVISOR

DAVID S. ARDIA, *Associate Professor of Law and Co-Director of the UNC Center for Media Law and Policy*

SYMPOSIUM ADVISOR

MARY-ROSE PAPANDREA, *Associate Dean for Academic Affairs and Professor of Law*

THE UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW

Administration

MARGARET SPELLINGS, B.A., Honorary Doctorate, *President of the University of North Carolina*
MARTIN H. BRINKLEY, A.B., J.D., *Dean and Arch T. Allen Distinguished Professor of Law*
MARY-ROSE PAPANDREA, B.A., J.D., *Associate Dean for Academic Affairs and Judge John J. Parker Distinguished Professor of Law*
ANDREW HESSICK, B.A., J.D., *Associate Dean for Strategy and Professor of Law*
CARISSA BYRNE HESSICK, B.A., J.D., *Associate Dean for Faculty Development and Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr., Distinguished Professor of Law*
CRAIG T. SMITH, B.A., J.D., LL.M., *Assistant Dean for the Writing and Learning Resources Center and Clinical Professor of Law*
KELLY PODGER SMITH, B.A., J.D., *Associate Dean for Student Services*
DEIRDRE GORDON, B.S., *Associate Dean for Advancement*
NICK P. GOETTSCHE, B.A., B.A., M.P.A., *Associate Dean for Administration*
AMY BAREFOOT GRAEDON, B.A., *Assistant Dean for Communications*
JENNIFER L. GOTSHALL CLARK, B.S., *Assistant Dean for Finance*
JOHN B. KASPRZAK, B.A., M.A., J.D., *Assistant Dean for Student Development and Adjunct Professor of Law*
BRIAN D. LEWIS, B.G.S., M.A., *Assistant Dean for Career Development*
BIANCA MACK, B.A., M.B.A., J.D., *Assistant Dean for Admissions*

Faculty

DAVID S. ARDIA, B.S., M.S., J.D., LL.M., *Associate Professor Law and Co-Director of the Center for Media Law and Policy*
KEVIN BENNARDO, B.A., J.D., *Clinical Associate Professor of Law*
KIMBERLY C. BISHOP, B.A., J.D., *Clinical Associate Professor of Law*
MARTIN H. BRINKLEY, A.B., J.D., *Dean and Arch T. Allen Distinguished Professor of Law*
JOHN WESLEY BROOKER, B.A., J.D., *Visiting Clinical Assistant Professor of Law*
LISSA LAMKIN BROOME, B.S., J.D., *Burton Craige Distinguished Professor of Law and Director of the Center for Banking and Finance*
PATRICIA L. BRYAN, B.A., J.D., LL.M., *Henry P. Brandis Distinguished Professor of Law*
ALEXA Z. CHEW, A.B., J.D., *Clinical Associate Professor of Law*
ANDREW CHIN, B.S., Ph.D., J.D., *Professor of Law*
JOHN MARTIN CONLEY, B.A., J.D., Ph.D., *William Rand Kenan Jr. Professor of Law*
JOHN F. COYLE, B.A., M.Phil., J.D., *Reef C. Ivey II Term Associate Professor of Law*
NICOLE M. DOWNING, B.S., J.D., M.S.L.S., *Head of Reference Services and Clinical Assistant Professor of Law*
MAXINE N. EICHNER, B.A., J.D., M.A., Ph.D., *Graham Kenan Distinguished Professor of Law*
KATE SABLOSKY ELEGOLD, B.A., J.D., *Clinical Associate Professor of Law*
LEWIS MOORE EVERETT, B.A., M.A., J.D., *Clinical Associate Professor of Law*
BARBARA A. FEDDERS, B.A., J.D., *Assistant Professor of Law*
DEBORAH R. GERHARDT, A.B., J.D., *Associate Professor of Law*
MICHAEL J. GERHARDT, B.A., M.S., J.D., *Samuel Ashe Distinguished Professor in Constitutional Law*
RACHEL I. GURVICH, B.A., J.D., *Clinical Assistant Professor of Law*
THOMAS LEE HAZEN, B.A., J.D., *Cary C. Boshamer Distinguished Professor of Law*
ANDREW HESSICK, B.A., J.D., *Associate Dean for Strategy and Professor of Law*
CARISSA BYRNE HESSICK, B.A., J.D., *Associate Dean for Faculty Development and Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr., Distinguished Professor of Law*
JEFFREY MICHAEL HIRSCH, B.A., M.P.P., J.D., *Geneva Yeargan Rand Distinguished Professor of Law*
DONALD THOMAS HORNSTEIN, B.A., J.D., *Aubrey L. Brooks Professor of Law*
MELISSA HYLAND, B.A., J.D., M.S.L.S., *Reference Librarian and Clinical Assistant Professor of Law*
MELISSA B. JACOBY, B.A., J.D., *Graham Kenan Professor of Law*
EISHA JAIN, B.A., J.D., *Assistant Professor of Law*
TIFFANY JOHNSON, B.A., J.D., M.I.S., *Reference Librarian and Clinical Assistant Professor of Law*
THOMAS A. KELLEY, III, A.B., J.D., *Paul B. Eaton Distinguished Professor of Law and Interim Director of Clinical Programs*
JOSEPH E. KENNEDY, B.A., J.D., *Martha Brandis Term Professor of Law*
CATHERINE Y. KIM, B.A., J.D., *George R. Ward Term Associate Professor of Law*
JULIE L. KIMBROUGH, B.A., J.D., M.S.L.S., *Deputy Director of the Law Library and Clinical Assistant Professor of Law*
AARON S. KIRSCHENFELD, A.B., M.S.I.S., J.D., *Digital Initiatives Law Librarian and Clinical Assistant Professor of Law*
P. ANNE KLINEFELTER, B.A., M.S.L.S., J.D., *Director of Law Library and Professor of Law*
JOAN H. KRAUSE, B.A., J.D., *Dan K. Moore Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
HOLNING S. LAU, B.A., J.D., *Willie Person Mangum Distinguished Professor of Law*
WILLIAM P. MARSHALL, B.A., J.D., *William Rand Kenan Jr Distinguished Professor of Law*
JONAS J. MONAST, B.A., J.D., *C. Boyden Gray Distinguished Fellow, Assistant Professor of Law and Director of the Center on Climate, Energy, Environment & Economics (CE³)*
ROBERT P. MOSTELLER, B.A., M.A., J.D., *J. Dickson Phillips Distinguished Professor of Law*
ERIC L. MULLER, A.B., J.D., *Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics*
RICHARD E. MYERS, B.A., M.A., J.D., *Henry Brandis Distinguished Professor of Law*
PETER NEMEROVSKI, A.B., J.D., *Clinical Associate Professor of Law*
GENE R. NICHOL, B.A., J.D., *Boyd Tinsley Distinguished Professor of Law*
DONNA L. NIXON, B.S., J.D., M.S.L.S., *Electronic Resources Librarian, Faculty Coordinator of International and Exchange Programs, and Clinical Assistant Professor of Law*
JOHN V. ORTH, A.B., J.D., M.A., Ph.D., *William Rand Kenan Jr. Professor of Law*
LEIGH Z. OSOFSKY, A.B., J.D., *Professor of Law*
MARY-ROSE PAPANDREA, B.A., J.D., *Associate Dean for Academic Affairs and Judge John J. Parker Distinguished Professor of Law*
BETH S. POSNER, A.B., M.A., J.D., *Clinical Assistant Professor of Law*
STACEY L. ROWLAND, B.A., M.I.S., M.S., J.D., *Assistant Director for Collection and Technology Services and Clinical Assistant Professor of Law*
KATHRYN A. SABBETH, B.A., J.D., LL.M., *Associate Professor of Law*
OSCAR J. SALINAS, B.A., J.D., M.A., *Director of Academic Excellence Program and Clinical Associate Professor of Law*
MARIA SAVASTA-KENNEDY, B.A., J.D., *Clinical Professor of Law and Director of the Externship Program*

RICHARD S. SAVER, B.A., J.D., *Arch T. Allen Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
 NICK SEXTON, B.A., J.D., M.S., *Head of Access Services and Clinical Assistant Professor of Law*
 THEODORE M. SHAW, B.A., J.D., *Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights*
 ELIZABETH SHEROWSKI, B.A., J.D., *Visiting Clinical Assistant Professor of Law*
 CRAIG T. SMITH, B.A., J.D., LL.M., *Assistant Dean for the Writing and Learning Resources Center and Clinical Professor of Law*
 ALLISON SYMULEVICH, B.S., J.D., M.I.S., *Reference Librarian and Clinical Assistant Professor of Law*
 KATHLEEN DELANEY THOMAS, B.S., J.D., LL.M., *Assistant Professor of Law and Director of the UNC School of Law Tax Institute*
 SARA B. WARF, B.A., J.D., *Clinical Associate Professor of Law*
 W. MARK C. WEIDEMAIER, B.A., J.D., *Ralph M. Stockton, Jr. Distinguished Professor of Law*
 DEBORAH M. WEISSMAN, B.A., J.D., *Reef C. Ivey II Distinguished Professor of Law*
 SHELDON H. WELTON, B.A., M.P.A., J.D., Ph.D., *Visiting Assistant Professor of Law*
 ERIKA K. WILSON, B.S., J.D., *Thomas Willis Lambeth Distinguished Professor in Public Policy*
 JANINE M. ZANIN, B.A., J.D., *Clinical Associate Professor of Law and Faculty Supervisor of Externship Programs*

Adjunct Faculty

E. KENT AUBERRY, A.B., J.D., *Adjunct Professor of Law*
 SHERROD BANKS, A.B., J.D., *Adjunct Professor of Law*
 CARMEN BANNON, B.S., J.D., *Adjunct Professor of Law*
 JENNIFER LEAH BILLS, B.A., J.D., *Adjunct Professor of Law*
 SETH A. BLUM, B.A., M.A., J.D., *Adjunct Professor of Law*
 ELIZABETH BRASWELL, B.A., J.D., *Adjunct Professor of Law*
 JONATHAN E. BROUN, B.Ph., J.D., *Adjunct Professor of Law*
 JOANNA CAREY CLEVELAND, B.A., J.D., M.P.A., *Adjunct Professor of Law*
 FELICE M. CORPENING, B.A., J.D., *Adjunct Professor of Law*
 KAREN DAVIDSON, B.A., M.A., J.D., *Adjunct Professor of Law*
 KEARNS DAVIS, B.A., M.A., J.D., *Adjunct Professor of Law*
 JOLYNN DELLINGER, B.A., M.A., J.D., *Adjunct Professor of Law*
 THE HONORABLE M. PATRICIA DEVINE, B.A., J.D., *Adjunct Professor of Law*
 JINA DHILLON, B.A., M.P.H., J.D., *Adjunct Associate Professor of Law*
 THE HONORABLE CHRIS DILLON, B.A., J.D., *Adjunct Professor of Law*
 MARK E. DOROSIN, B.A., M.A., J.D., *Adjunct Professor of Law*
 PATRYK DRESCHER, B.S., M.A., J.D., *Adjunct Professor of Law*
 SHERRY HONEYCUTT EVERETT, B.A., M.A., J.D., *Adjunct Associate Professor of Law*
 EMILY CROWDER FRAZELLE, B.S., M.P.A., J.D., *Adjunct Professor of Law*
 BETH YOUNT GRIMES, B.A., J.D., *Adjunct Professor of Law*
 MIKAEL R. GROSS, B.S., M.S., J.D., *Adjunct Professor of Law*
 R. HARPER HECKMAN, B.A., J.D., *Adjunct Professor of Law*
 ELIZABETH HOPKINS THOMAS, B.A., J.D., *Adjunct Assistant Professor of Law*
 MALCOLM HUNTER, B.A., J.D., *Adjunct Professor of Law*
 SAMUEL S. JACKSON, A.B., J.D., *Adjunct Professor of Law*
 ROBERT O. JENKINS, B.A., M.P.A., J.D., *Adjunct Professor of Law*
 VALERIE A. JOHNSON, B.A., J.D., *Adjunct Professor of Law*
 JOHN B. KASPRZAK, B.A., M.A., J.D., *Assistant Dean for Student Development and Adjunct Professor of Law*
 MARIA ELENA LAPETINA, B.A., M.S., J.D., *Adjunct Associate Professor of Law*
 MARIA M. LYNCH, B.A., J.D., *Adjunct Professor of Law*
 RINA LYUBKIN, B.S., B.S., J.D., *Adjunct Clinical Professor of Law*
 RICHARD L. MAGEE, A.B., J.D., *Adjunct Professor of Law*
 KIMBERLY D. MANEY, B.A., J.D., *Adjunct Professor of Law*
 JAMES M. MARKHAM, B.A., J.D., *Adjunct Associate Professor of Law*
 C. STEVEN MASON, B.A., J.D., *Adjunct Professor of Law*
 ANN W. MCCOLL, B.A., J.D., *Adjunct Professor of Law*
 AMILY K. MCCOOL, B.A., M.S.W., J.D., *Adjunct Associate Professor of Law*
 WILLIAM S. MILLS, A.B., J.D., *Adjunct Professor of Law*
 CHRISTINE C. MUMMA, B.S., J.D., *Adjunct Professor of Law*
 THE HONORABLE ROBERT F. ORR, A.B., J.D., *Adjunct Professor of Law*
 BARBARA OSBORNE, B.A., M.A., M.Ed., J.D., *Adjunct Professor of Law*
 DAVID W. OWENS, B.A., M.R.P., J.D., *Adjunct Professor of Law*
 ZANETA M. ROBINSON, B.S., J.D., *Adjunct Professor of Law*
 TODD S. ROESSLER, B.S., M.S., J.D., *Adjunct Professor of Law*
 ELLIOT M. SILVERSTEIN, B.S., J.D., Ph.D., *Adjunct Professor of Law*
 JARED S. SMITH, B.A., J.D., *Adjunct Assistant Professor of Law*
 THOMAS M. STERN, B.A., J.D., *Adjunct Professor of Law*
 JEFF WARD, B.A., M.A., J.D., LL.M., *Adjunct Associate Professor of Law*
 DEVON WHITE, B.A., M.A., J.D., *Adjunct Professor of Law*
 WALTER C. WHITE, B.A., J.D., *Adjunct Professor of Law*
 THE HONORABLE FRANK D. WHITNEY, B.A., J.D., M.B.A., *Adjunct Professor of Law*
 MELVIN F. WRIGHT JR., B.A., J.D., *Adjunct Professor of Law*

Faculty Emeriti

JOHN CHARLES BOGER, A.B., M.Div., J.D., *Wade Edwards Distinguished Professor of Law Emeritus*
 KENNETH S. BROUN, B.S., J.D., *Henry Brandis Professor of Law Emeritus*
 CAROLINE NICHOLSON BROWN, B.A., M.A., J.D., *Professor of Law Emerita*
 MICHAEL L. CORRADO, B.A., B.S., A.M., Ph.D., J.D., *Arch T. Allen Distinguished Professor of Law Emeritus*
 CHARLES EDWARD DAYE, B.A., J.D., *Henry Brandis Professor of Law Emeritus*
 LAURA N. GASAWAY, B.A., M.S., J.D., *Paul B. Eaton Distinguished Professor of Law Emerita*
 S. ELIZABETH GIBSON, B.A., J.D., *Burton Craige Professor of Law Emerita*

JOSEPH JOHN KALO, B.A., J.D., *Graham Kenan Professor of Law Emeritus*
RONALD CHARLES LINK, A.B., M.A., J.D., *Dan K. Moore Distinguished Professor of Law Emeritus*
ARNOLD H. LOEWY, B.S., J.D., LL.M., *Graham Kenan Professor of Law Emeritus*
RUTH ANN MCKINNEY, B.A., M.Ed., J.D., *Clinical Professor of Law Emerita*
ALICE A. RATLIFF, B.A., M.A., J.D., *Clinical Professor of Law Emerita*
RICHARD A. ROSEN, B.A., J.D., *Professor of Law Emeritus*
WILLIAM J. TURNIER, B.S., M.A., J.D., *Willie Person Mangum Professor of Law Emeritus*
JUDITH WELCH WEGNER, B.A., J.D., *Burton Craige Professor of Law Emerita*
ARTHUR MARK WEISBURD, A.B., J.D., *Reef C. Ivey II Distinguished Professor of Law Emeritus*

The *First Amendment Law Review* is published three times a year by the First Amendment Law Review.

The views expressed in signed contributions to the *Review* do not necessarily reflect the opinions of the Board of Editors.

Subscriptions: We have stopped printing issues and therefore stopped accepting subscriptions. The contact information for the *Review* is listed below:

First Amendment Law Review
The University of North Carolina School of Law
100 Ridge Road, CB# 3380
3002 Van Hecke-Wettach Hall
Chapel Hill, North Carolina 27599-3380
(919) 843-6683
falr@unc.edu

Manuscripts: The *Review* invites the submission of unsolicited manuscripts. Manuscripts cannot be returned unless accompanied by a self-addressed, postage-paid envelope. Correspondence and manuscripts should be directed to the Editor-in-Chief.

Copyright: Copyright © 2018 by the North Carolina Law Review Association. Except as otherwise provided, permission is hereby granted for copies of each article to be made for classroom use, provided that: (1) all copies are distributed at no cost, (2) the author and the *First Amendment Law Review* are identified, (3) proper notice of copyright is affixed to each copy, and (4) the *First Amendment Law Review* is notified of the use.

Publication Information: The *Review* is exclusively online and available through Hein Online, LexisNexis, Westlaw, and on the *First Amendment Law Review's* website. The text and citations in Volume 17 conform generally to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds, 20th ed. 2015).

Cite as: FIRST AMEND. L. REV.

www.falrunc.wordpress.com

The Board of Editors would like to thank the following
individuals and organizations for their support of the
First Amendment Law Review:

Dean Martin H. Brinkley

Professor David S. Ardia

Dean Mary-Rose Papandrea

Professor William P. Marshall

Assistant Dean John B. Kasprzak

Director of Student Services Lakethia Jefferies

University of North Carolina Center for
Media Law & Policy

Graduate and Professional Student Federation of the University
of North Carolina at Chapel Hill

Student Bar Association

Student Congress of the University of North Carolina at Chapel
Hill

North Carolina Law Review

North Carolina Banking Institute

North Carolina Journal of International Law and
Commercial Regulation

North Carolina Journal of Law and Technology

and the many alumni of the First Amendment Law Review
and UNC School of Law who helped to build and continue
to support this publication.

FIRST AMENDMENT LAW REVIEW

VOLUME 18

FALL 2019

ESSAY

#HECKLED

Josh Blackman.....1

ARTICLE

FREE SPEECH, FAKE NEWS, AND DEMOCRACY

Alvin I. Goldman & Daniel Baker.....66

NOTES

IS SILENCE FOR SALE? THE FIRST AMENDMENT
IMPLICATIONS OF THE MICHIGAN STATE UNIVERSITY'S
SETTLEMENT WITH LARRY NASSAR SURVIVORS

Emily O. Monnett.....142

CLOSING THE “POLITICAL ACTION COMMITTEE
LOOPHOLE”: THE CONSTITUTIONALITY OF PROHIBITIONS
ON PAC TO PAC DONATIONS

Michael C. Peretz.....186

#HECKLED

Josh Blackman*

The conflict is all-too familiar. A controversial speaker is invited to speak at a university. The overwhelming majority of students on campus don't care one way or the other. A small number of students want to hear what the speaker has to say—primarily, but perhaps not exclusively, those who are inclined to agree with the speaker. However, a protest is staged by an equally small number of students who disagree with that speaker's opinions and indeed object to his mere presence on campus. Most of those students demonstrate outside the event or quietly protest inside the room. The leaders of the pack try a different approach: shout down the speaker in an effort to “deplatform” him.¹

The speaker may respond with aggression and shout back at the students. Or, he may respond with conciliation and engage the students. Or, the speaker may abandon the event altogether—either of his own volition or because security officers forced him to leave. Invariably, the speaker is not able to give the lecture he wanted to give. The students who wanted to hear the

* Associate Professor, South Texas College of Law Houston. I am grateful to participants of the Yale Freedom of Expression Scholars conference for their insightful comments.

¹ Declan McCullagh, *Deplatforming Is a Dangerous Game*, REASON (Feb. 2019), <https://reason.com/2019/01/20/deplatforming/>.

speaker feel cheated. And the students who protested feel vindicated. All sides disagree about whether the heckler's veto succeeded.

This conflict is personally familiar: it happened to me.² In March 2018, the Federalist Society Chapter at the City University of New York (CUNY) Law School invited me to lecture about free speech on campus. About thirty students wanted to hear me speak. About fifty students protested my event. And the remainder of 600-member student body didn't care. For about eight minutes, a handful of the protestors shouted me down through constant interruptions. I was unable to speak more than a few words at a time. Eventually, I engaged the students with a series of questions to defuse the tensions. I tried to find common ground. Soon enough, the hecklers disbanded. I never gave the lecture I planned to give. Instead, during my remaining time, I answered questions on a wide range of topics from the students who didn't flee.

² See Scott Jaschik, *Shouting Down Talk on Campus Free Speech*, INSIDE HIGHER ED (Apr. 16, 2018), <https://www.insidehighered.com/news/2018/04/16/guest-lecture-free-speech-cuny-law-school-heckled>; see also Josh Blackman, *Students at CUNY Law Protested and Heckled My Lecture about Free Speech on Campus*, JOSH BLACKMAN'S BLOG (Mar. 29, 2018), <http://joshblackman.com/blog/2018/04/12/students-at-cuny-law-protested-and-heckled-my-lecture-about-free-speech-on-campus/>.

To this day, I am still conflicted about the incident at CUNY. My legal analysis is necessarily intertwined with my personal experiences. I had never been protested before, and I have not been protested since. Indeed, the entire situation came as something of a surprise. Before the event, the campus security officer asked me about my “exit plan”—that is, how I would leave the building in the event of an altercation. During the event, the students stood inches over my shoulders, right behind me. The event could have turned violent very quickly; fortunately, it did not.

This essay, however, is not a plea for sympathy. I am a tenured law professor, and I lecture across the country on controversial legal topics.³ Today, this sort of treatment comes with the territory. Rather, in this essay, I will discuss my perspective about the incident as objectively and critically as possible. Easier said than done. I’ll try my level best. Indeed, I waited over a year to write this essay. I needed a detached perspective to consider the legal questions in the abstract. But not completely detached. I will use my experiences to illustrate how

³ Less than twenty-four hours before the protest, the South Texas College of Law Houston’s Board of Directors approved my application for tenure. I am deeply grateful to my colleagues for their vote of confidence. This security will ensure that I can effectively engage protesters and challenge their ideas for many decades to come.

students attempt to promote and inhibit certain types of speech. My goal is to assess how the First Amendment—and broader principles of free speech—should treat the heckler’s veto on today’s college campuses.

Part I explains why certain speakers are invited on campus. Part II addresses the corollary question: why do students protest those speakers? Part III considers the necessary consequence of Part II: how do students *today* protest speakers? This part also recounts my experiences at CUNY, and addresses how the First Amendment protects speakers who get #heckled. Finally, Part IV addresses how the university should respond to student protests.

I. WHY ARE CERTAIN SPEAKERS INVITED ON CAMPUS?

Historically, most speakers could not reach large audiences because of the limited channels of mass media. There were only so many people who could appear on nationwide broadcasts. Today, anyone with a smartphone and a hashtag can instantly reach a global community. Speech is cheap.⁴ On a daily basis, Americans are overwhelmed with a “cacophony of

⁴ See Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805 (1995).

competing voices, none of which [can] be clearly and predictably heard.”⁵ Indeed, with a quick YouTube search, college students can hear any perspective on any topic.

What, then, is the purpose of inviting a speaker to campus? To provide a platform for a specific speaker to talk about a specific topic, as a means to personally interact with other students, and generate support for a perspective. And why are *certain* speakers invited? They can offer what I describe as the three Ps: performance, provocation, and persuasion.

First, the most successful, highly-touted campus speakers know how to put on a show: their remarks are engaging, entertaining, and educational. There are “soft” ways of attracting students to an optional extra-curricular event. Free food helps. Especially hot, non-pizza meals. But the biggest draw is always the caliber of the speaker and the salience of the topic. Furthermore, live interaction offers what YouTube cannot: the opportunity to *personally* ask the speaker a question-that-is-really-more-of-a-comment. This one-on-one interaction is extremely valuable and can be uniquely served through on-campus events.

Second, student groups expect the speaker to cause a stir. *Terminiello v. City of Chicago* recognized that “a function of free

⁵ Red Lion Broad. Co. v. FCC, 395 U.S. 367, 376 (1969).

speech under our system of government is to invite dispute.”⁶ Student organizations understand that speakers can most effectively promote their views when they “induce[] a condition of unrest, create[] dissatisfaction with conditions as they are, or even stir[] people to anger.”⁷ Different organizations tolerate different degrees of provocativeness—in my experience, law school students tend to be more risk averse than undergraduates. However, in all cases, students realize a common theme: provocative topics will draw a bigger crowd. Milquetoast speakers are not invited to give equivocal lectures.

Third, the ultimate purpose of these special events is not only to educate; it is to persuade. Professors in college courses are not hired to convince their students that a particular perspective is correct. Their mission is to educate, not pontificate. In theory, at least. Guest lecturers have the opposite mission. Many student groups invite outside speakers in order to persuade their classmates, or at a minimum, make an alternate perspective seem more palatable. More often than not, this viewpoint is underrepresented on campus.

This approach is not insidious. Extra-curricular organizations provide a necessary balance on campus. Active

⁶ 337 U.S. 1, 4 (1949).

⁷ *Id.*

student groups “often have values, views, and ideologies that are at war with the ones which the college has traditionally espoused or indoctrinated.”⁸ When these students “ask for change,” Justice Douglas observed in *Healy v. James*, “they . . . speak in the tradition of Jefferson and Madison and the First Amendment.”⁹ A generation ago, left-wing groups—such as the Students for a Democratic Society chapter in *Healy*—sought change on right-wing campuses. Now, the politics are largely reversed.¹⁰

Today, conservative groups invite conservative speakers to present opinions that local faculties often will not.¹¹ Without outside lecturers, students may never be exposed to certain ideas—take it from my experiences. I frequently visit other law schools to discuss constitutional originalism. I often get the sense that the students were either (a) never exposed to the concept, or (b) briefly exposed to a strawman version of the jurisprudence.

⁸ *Healy v. James*, 92 S.Ct. 2338, 2354 (1972) (Douglas, J., concurring).

⁹ *Id.*

¹⁰ See Josh Blackman, *Collective Liberty*, 67 HASTINGS L.J. 623, 641 (2016) (noting how progressives and conservatives have swapped their perspectives on free speech).

¹¹ Jeremy Bauer-Wolf, Trickle-down Antagonism, Inside Higher Ed (May 10, 2017), <https://www.insidehighered.com/news/2017/05/10/gop-student-groups-mirror-tactics-national-organizations>. (“Right-leaning campus groups said in interviews they don’t attempt to ignite discord, but that in planning certain events -- like the case of Ann Coulter’s canceled speech at University of California, Berkeley -- they simply sought to bring an alternate view to their campuses.”)

Moreover, these events need not be one-sided. Indeed, often the best way to persuade is through a debate: students can independently assess competing sides of an issue. The most effective events pair an outside speaker with a local professor. Students are able to quickly see two sides of the same issue. But make no mistake, debates are sponsored to improve the standing of the student group's perspective. And that purpose is, generally, what occasions protests.

II. WHY DO STUDENTS PROTEST SPEAKERS?

Part I considered why certain speakers are invited to campus. Part II will address why those speakers are protested. Many protests occur because students disagree with the perspective of the presenter. For example, students at CUNY protested me, in part, because they disagreed with my views on immigration, healthcare, and other important topics. This disagreement may or may not be based on an accurate characterization of what the speaker actually believes. Indeed, protests may be premised on assumptions about what a given speaker will say. These assumptions may be unfounded. At least in my case, the CUNY students incorrectly presumed that I held certain beliefs based on the groups I associate with. In other

cases, these assumptions may prove accurate—perhaps the students read the speaker’s writings or watched past lectures.

Philosophical disagreements, however, provide only a superficial justification for protests. Rather, students will often object to the mere presence of the speaker on the campus. This opposition can be premised on many different grounds. Perhaps the speaker takes a position that is antithetical to the position the students hold. For example, the speaker is ardently pro-life or passionately pro-choice.¹² Or, the students perceive the speaker’s message as antithetical to the students themselves.¹³ That is, the speaker is seen as racist, sexist, homophobic, transphobic, xenophobic, etc. The university’s willingness to host that speaker, the argument goes, is tantamount to the university endorsing the speaker’s message.

To be sure, certain well-known speakers contribute little or nothing to campus discourse. Rather, they are invited *solely* to rile up students, create strife, and cause discord. Yet, these sort

¹² Alexandra Descantis, *Students Shout Their Abortions to Disrupt a Pro-Life Display*, NATIONAL REVIEW (May 3, 2019), <https://www.nationalreview.com/corner/students-shout-their-abortion-to-disrupt-a-pro-life-display/>; Kristin Templeton & Tori Thiessen, *Pro-Life group holds anti abortion demonstration on campus, met with Lee student counter-protest*, LEE CLARION (Mar. 28, 2019), <https://www.leeclarion.com/2019/pro-life-group-holds-anti-abortion-demonstration-on-campus-met-with-lee-student-counter-protest>.

¹³ Katie Steinmetz, *Milo Yiannopolous Finally Spoke at Berkeley. But the Protesters Were Louder*, TIME (Sept. 25, 2017), <https://time.com/4955245/milo-yiannopoulos-berkeley-free-speech-week/>.

of free speech martyrs, who receive a disproportionate share of media attention, are few and far between. There are far more speakers who do nothing of the sort. Yet, because their views are inconsistent with the academic heterodoxy, these speakers are unfairly lumped in with the rest. Indeed, during my CUNY visit, I was tarred as a fascist, a white supremacist, and every -phobe in the book. Far too often, students engage in *reductio ad Hitlerum*: people who disagree with their views must be a Nazi.¹⁴ In my experience, this sort of rhetoric unfairly slanders speakers who hold views outside the mainstream and, regrettably, cheapens the moral opprobrium of actual Nazis.

For one reason or another, students determine that a demonstration is an effective means to counter speech they disagree with. Are protests effective at accomplishing these goals? I'm skeptical. First, anyone on campus can hear a speaker's opinions with a simple YouTube search. Even if the demonstrators are successful at preventing the speaker from lecturing on campus, their classmates can still hear the message by other means. Second, a protest invariably draws attention to a given speaker. The disruption brings *extra* attention to the

¹⁴ Logically Fallacious, *Reductio ad Hitlerum*, <https://www.logicallyfallacious.com/tools/lp/Bo/LogicalFallacies/152/Reductio-ad-Hitlerum> (last visited Oct. 30, 2019).

speaker, especially if the one-sided protest can be highlighted on social media. It worked for me. The recording of my protest garnered over 30,000 views on YouTube. Most of my lectures seldom receive more than a few dozens of views. Third, with poorly-coordinated protests, the demonstrators may look bad, and the speaker looks good in contrast. This dynamic aptly describes my incident at CUNY. In some rare cases the protests turn violent.¹⁵ Here, the demonstrators can make the controversial speaker seem reasonable by way of comparison.

Yet the protests still perform a valuable function: to convey a contrary message and to express discontent that the university allowed the speaker onto campus. Especially if the recording of the protest goes viral.

III. HOW DO STUDENTS TODAY PROTEST SPEAKERS?

Today, students protest speakers with four general approaches: I call them the four Ds. First, students can pressure the administration to *disinvite* the speaker. Second, students can *discourage* their classmates from attending the event, both through in-person and online interactions. Third, students can

¹⁵ Peter Beinart, *A Violent Attack on Free Speech at Middlebury*, THE ATLANTIC (Mar. 6, 2017), <https://www.theatlantic.com/politics/archive/2017/03/middlebury-free-speech-violence/518667/>.

peacefully *demonstrate* outside or inside the event. Fourth, students can *disrupt* the event. (To simplify the constitutional analysis, I will presume these events occur at state institutions, which are bound by the First Amendment.¹⁶)

In each circumstance, the First Amendment dynamics are distinct and interrelated. This essay will consider the issue from four perspectives: (1) the rights of student organizations to invite their own speakers, (2) the right of the speaker to speak, (3) the rights of students to hear the invited speakers, (4) and the rights of demonstrators to protest those speakers. The university has competing responsibilities to consider each perspective. Throughout this section, I will weave in—where relevant—my own experiences at CUNY.

A. Disinvite

In recent years, it has become increasingly common for universities to disinvite speakers.¹⁷ This form of “deplatforming,”¹⁸ as it is known, follows two types of invitations. First, after the university itself invites the speaker. Second, where a student group—with or without the university’s

¹⁶ See *Healy v. James*, 408 U.S. 169, 180 (1972).

¹⁷ See Harvey C. Mansfield, *The Theory Behind My Disinvitation*, WALL STREET JOURNAL (Apr. 14, 2019, 3:21 PM), <https://on.wsj.com/32Vjv2C>.

¹⁸ McCullagh, *supra* note 1.

consent—invites the speaker. The First Amendment analysis differs in each context.

1. The University Invited the Speaker

In some cases, a University may invite a speaker to give a distinguished lecture or to deliver a commencement address. Here, students may object to the invitation. As a constitutional matter, students have a right to petition the administration for redress of their grievances; and the institution is under no obligation to respond.¹⁹ Their demands, which may be objectively unreasonable, do not give rise to any constitutional problems. Post-invitation objections are especially appropriate because, as a general matter, students had no role in selecting the commencement speaker. That decision rested entirely with the administration. Moreover, unlike most extracurricular events—where attendance is sparse—the vast majority of the student body is expected to attend graduation ceremonies.²⁰ Finally,

¹⁹ See *Minn. Bd. Commun. for Colleges v. Knight*, 465 U.S. 271, 285 (1984) (“Nothing in the First Amendment or in this Court’s case law interpreting it suggests that the rights to speak, associate, and petition require government policymakers to listen or respond to individuals’ communications on public issues”).

²⁰ See *Lee v. Weisman*, 505 U.S. 577, 595 (1992) (“Everyone knows that in our society and in our culture high school graduation is one of life’s most significant occasions . . . Graduation is a time for family and those closest to the student to celebrate success and express mutual wishes of gratitude and respect, all to the end of impressing upon the young person the role that it is his or her right and duty to assume in the community and all of its diverse parts.”).

unlike most extracurricular events, there is no opportunity for interaction. Students cannot ask commencement speakers tough questions after their address.²¹ They must sit in the audience like potted plants.²² The administration should carefully choose graduation speakers, in light of the broad reach of their message.

As a policy matter, once the invitation is made, universities should resist the urge to disinvite the speaker. Revoking invitations sets a terrible precedent. Moreover, cancelling an address ultimately shields the student body, and their guests, from learning about a new perspective. However, there are no constitutional problems if the administration revokes the invitation. Under prevailing government speech doctrine, the University can pick and choose the viewpoints it expresses—the justification need not be neutral.²³ The disinvited speaker would not have a cause of action against the University

²¹ Keith Whittington, *Should We Care About College Commencement Speakers?*, THE VOLOKH CONSPIRACY (May 29, 2019, 8:00 AM), <https://perma.cc/WN48-6YAQ> (“Students and faculty are not expected to line up to ask questions after a commencement address. There is no room for debate or the expression of doubt.”).

²² During a recent commencement address, the speaker made what I thought were inappropriate comments about gun control. Sitting on the stage, I doffed my cap as a sign of silent protest. Several of my colleagues, as well as students in the audience, noticed. After commencement concluded, I told the speaker in the robing room that her remarks were inappropriate. She was incensed that anyone could take offense at what she thought were reasonable remarks. Most students will never have that opportunity.

²³ See *Walker v. Tex. Div., Sons of Confederate Veterans, Inc.*, 135 S.Ct. 2239 (2015); *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009); *Rumsfeld v. Forum for Acad. and Inst.’l Rights, Inc.*, 547 U.S. 47 (2006).

for a violation of the First Amendment. However, the other members of the community—who did not object—are being denied the right to hear the speaker.²⁴ Because the invitation was made, and revoked, by the administration—which has a general prerogative to select their own speakers—there are no direct First Amendment violations. The analysis is different when a student group, rather than the administration, offers the invitations.

2. A Student Group Invited the Speaker

Universities generally allow students to invite their own speakers. In such cases, the university has delegated authority to the students to determine what extracurricular programming exists on campus. Even at private institutions, which are not bound by the First Amendment,²⁵ this sort of delegation reflects an important tenet of academic freedom: students have the right to bring speakers of their choice onto campus to promote

²⁴ See *Kleindienst v. Mandel*, 408 U.S. 753, 759-760 (1972) (recognizing the right of “of American academics who have invited [a foreign speaker] to participate with them in colloquia, debates, and discussion in [universities in] the United States.”).

²⁵ THE FIRE, “Private Universities”
<https://www.thefire.org/resources/spotlight/public-and-private-universities/>.

discourse. Once this delegation is made, universities have an institutional obligation to stand by this commitment.

However, universities often attach strings to that discretion. For example, the student groups may have to seek approval from the administration before inviting an outside speaker. This process can serve several different purposes—from mundane to logistical to censorious.

First, the university may require organizations to register events to maintain a centralized calendar of student functions. Such a regime is in no sense problematic, and indeed will help promote attendance.

Second, the university may require registration to coordinate the location of events. This regime may be benign: given a fixed number of classrooms, the administration needs to be able to coordinate physical space. So long as students are provided a room of an adequate size for the intended event, there is no problem. However, there may be situations where the university deliberately schedules a controversial event in an unpopular, difficult to attend location or in a small space that cannot fit the anticipated crowd size. These approaches may constitute backdoor “deplatforming.”²⁶

²⁶ See Josh Verges, *Did UMN move Ben Shapiro speech to St. Paul due to politics? It's 'plausible', judge says*, ST. PAUL PIONEER PRESS (Feb. 27, 2019),

Third, the administration may restrict the times at which an event may take place. For example, the university may designate a certain time of day for extracurricular events—a bloc that does not conflict with scheduled classes. If this policy is applied neutrally, there are no problems. Yet, difficulties may arise if the university mandates that only one organization can hold an event during a given time—that approach prohibits counter-speech. Some universities impose a limit on the number of events an organization can hold a year. This approach will invariably punish the organizations with the most funding, that can afford to put on several events a year. Several law schools that I have visited have adopted this rule. Though facially neutral, these policies invariably restricted events hosted by Federalist Society chapters.

Fourth, the administration may require the organization to pay for security costs to host a particularly controversial speaker. Often these costs are prohibitive and amount to an effective revocation of the invitation.²⁷ There may be cases where

<https://www.twincities.com/2019/02/27/umn-ben-shapiro-st-paul-speech-university-of-minnesota-campus/>. Cf. Stephen Dethrage, *Students relocate Westboro Baptist Church counter protest after pressure from UA administration*, ALABAMA LOCAL NEWS (Jan. 14, 2019),

https://www.al.com/tuscaloosa/2013/05/students_relocate_westboro_bap.html.

²⁷ See Eugene Volokh, *U. Miami Will Cover Security Costs of Student-Organized Charles Murray Debate on Free Speech*, THE VOLOKH CONSPIRACY (Mar. 15, 2018, 1:26am), <https://perma.cc/FET3-XCFJ> (“[T]he Society is

the university finds it necessary to cover these security costs to promote free speech.²⁸ For example, schools could elect to cover the security costs for one event per organization per year.

In each of these four instances, the university did not *expressly* deny the organization the ability to invite a given speaker. Nor did the university force the organization to revoke the invitation. Rather, they employed different soft approaches to minimize the speaker's impact or to make the invitation cost-prohibitive.

Door number five is far more problematic: the university may require the organization to seek pre-approval of a speaker before an invitation can be sent. At that juncture, the university has unbridled discretion to grant or deny permission to give the invitation. Here, the university may engage in blatant viewpoint discrimination. And, unlike with the commencement address, which constitutes government speech, here the university is restricting student organizations' rights to hear the speaker of their choice. The First Amendment implications in this scenario are far different. However, this cost is often unseen: speakers

covering Murray's transportation costs, honorarium, and the like, as is usual for Federalist Society speakers, and the University is covering the security fees.").

²⁸ See ERWIN CHEMERINSKY & HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 130 (2017) ("There must be places on campus available for speech, even if providing them imposes some costs on the university.").

seldom learn that an organization wanted to invite them but was unable to because of university pressure. (Students at one school I visited told me that the administration spiked an invitation to my colleague; when I told him, he was shocked.) Therefore, these soft “deplatformings” are difficult to perceive and nearly impossible to challenge.

Door number six is the most visible form of disinvitation. Here, the organization is allowed to invite a speaker without having to first seek university approval. Or even worse, the organization seeks approval, and it is granted. However, following a backlash, the university forces the organization to withdraw the invitation. Unlike the previous example, the speaker knew he was invited, and then was uninvited because of intervention by the University. This scenario can give rise to a First Amendment violation.

3. I Was Invited, But Not Disinvited, From CUNY

Every year, I am invited to lecture at approximately fifty law schools—usually by the local Federalist Society chapter.²⁹ I

²⁹ *About Us*, FEDERALIST SOCIETY, <https://fedsoc.org/about-us> (last visited Nov. 19, 2019) (“The Federalist Society for Law and Public Policy Studies is a group of conservatives and libertarians interested in the current state of the legal order.”). This national organization has chapters at most law schools. The

discuss a wide range of topics about the Supreme Court and Constitutional law. In October 2017, the Federalist Society chapter at the City University of New York School of Law invited me to speak on a panel discussion about theories of constitutional interpretation. I had planned to discuss originalism. Alas, the students were not able to find any other professors who were willing to participate in the event.

This phenomenon is fairly common: most law school faculty decline to participate in Federalist Society events for a host of reasons. First, these sorts of discussions do not provide academic bona fides that are helpful for tenure-track professors; they may prefer to attend symposia and other scholarly activities. Second, some professors resent the fact that the outside speaker is paid an honorarium, while the local professor is paid nothing. (The honorarium is paid to compensate the speaker for spending one day or more traveling; the Federalist Society does not pay professors to speak at their own institutions). Third, other professors hold the Federalist Society in low regard for a host of reasons, and want nothing to do with it. (At one school, a professor openly admitted that he was boycotting all Federalist Society events because he disagreed with the organization.)

Federalist Society approves certain speakers to visit these chapters and talk about various legal issues.

After several rounds of emails, I suggested to the CUNY students that we switch topics to free speech on campus. It is a talk I had given before without any problems at several other colleges.³⁰ The topic can be engaging and entertaining. I generally play video clips of other campus protests to draw students in. Invariably, this topic is provocative: more often than not, students on the left protest speakers on the right.³¹ My ultimate goal is to persuade students that free speech need not be a right-left issue. More importantly, progressive students—especially those with views outside the mainstream—stand to benefit the most from robust First Amendment protections. I present my position in a calm, non-adversarial manner. Afterwards, I always take at least ten minutes of questions and provide candid answers. In the past, these talks have been very well received, even by students who disagree with my substantive

³⁰Josh Blackman, *Free Speech and Intellectual Diversity in Law Schools – SIU Federalist Society Chapter*, YOUTUBE (Feb. 13, 2018), <https://www.youtube.com/watch?v=4FZQzNFPQjg&t=565s>; Josh Blackman, *Free Speech on College Campuses: Texas Southern Federalist Society Chapter*, YOUTUBE (Nov. 1, 2017), <https://www.youtube.com/watch?v=HjzKQ8I8K1w&t=1503s>; Josh Blackman, *Free Speech on College Campuses at UMass Law*, SOUNDCLOUD (Apr. 24, 2017), <https://soundcloud.com/josh-blackman-4/free-speech-on-college-campuses-at-umass-law>; Josh Blackman, *Barry University Federalist Society – Free Speech on Campus*, YOUTUBE (Mar. 20, 2017), https://www.youtube.com/watch?v=nFC_PltDROQ&t=1413s.

³¹Jeremy Peters, *In the Name of Free Speech, States Crack Down on Campus Protests*, (June 14, 2018) <https://www.nytimes.com/2018/06/14/us/politics/campus-speech-protests.html>

views. The Federalist Society chapter agreed that this topic would work well at CUNY. But once again, the chapter was unable to find any other professor who would participate in the event. I planned to give the solo version of my talk.

CUNY students tried to lobby the university to disinvite me. They were unsuccessful. Three days before the event, the President of the chapter wrote, “We passed out the flyers today (first day back from spring break) and a large number of students are already up in arms about the event.” The Office of Student Affairs explained that “some enraged students . . . apparently, are planning to protest.” I asked why they were protesting. The Federalist Society President provided an explanation:

These students saw first, that this is a Federalist Society event; and second, they saw a few of your writings (specifically a National Review article praising [Attorney General] Sessions for rescinding DACA and ACA)³², and instantly assume you’re racist; and third, our event being titled about free speech is reminiscent of events that claim free speech just to invite people like Milo Yiannopoulos and Ann Coulter.

He explained that “we have the support of the administration” and the event would proceed as scheduled. Hours before the

³² Josh Blackman, *Jeff Sessions Restores the Rule of Law*, NATIONAL REVIEW (Oct. 16, 2017, 7:10 PM), <https://www.nationalreview.com/2017/10/obamacare-immigration-trump-attorney-general-jeff-sessions-lawmaking-power-from-executive-to-congress/>.

event began, Mary Lu Bilek, the Dean of CUNY Law, sent an email to all students:

As a law school, a public institution, and a school within the CUNY system, we are committed to academic freedom, the free exchange of ideas, and expression of all points of view, including the freedom to disagree with the viewpoints of others.

University policy provides guidelines for how to express disagreement lawfully (including through demonstrations), defines prohibited conduct, and details the procedure for handling disruptive demonstrations at CUNY facilities. Many of us witnessed a demonstration here earlier this year, which is an example of expressive conduct that does not run afoul of any University policy.

We attach a copy of the University's policies and rules, including those covering the processes for dealing with student and employee prohibited conduct.

She attached CUNY's Policy on Freedom of Expression and Expressive Conduct.³³ A member of the CUNY community tweeted, "Only at the 'nation's premier public interest law school' does the Dean send an email about CUNY limits on protest shortly after a conservative student org (Federalist Society) sends a reminder about the vile speaker (Justin [sic] Blackman) that they're bringing to campus[.]"³⁴ Here, my invitation was honored.

³³ THE CITY UNIVERSITY OF NEW YORK POLICY ON FREEDOM OF EXPRESSION AND EXPRESSIVE CONDUCT, <http://bit.ly/2Z8etgU>.

³⁴ @yoyoitsflo, TWITTER (Mar. 29, 2018, 12:07 PM), <https://twitter.com/yoyoitsflo/status/979434905359745025>.

B. Discourage

Often, the protesters' first effort is to pressure the administration to disinvite the speaker. If the invitation is in fact revoked, then the protesters were successful. However, if the event proceeds as planned, students have other options. Specifically, the students can attempt to discourage their classmates from attending the event. This approach leverages speech to counter speech. If done properly, discouragement can be very effective. In my case, the CUNY students researched some of my past writings and lectures. They circulated a pamphlet that criticized several of my positions. The message was stated directly: I was not welcome on campus. Many of the statements were taken completely out of context, but I applauded the students for taking the time to review my record.

Such campaigns can also rely on social pressure: ostracizing students who participate in the event or who cross the protestors' picket line. At CUNY, I counted about five people in the room when the event started. By the time it concluded, there were about thirty people. Several of the late-arrivers told me that they were intimidated by the protesters. Out of fear of retribution, they did not want to be seen with me. Several students thanked me after the event and explained that

conservative speech is stifled on campus not by the faculty, but by the students. The students criticize anyone who does not toe the progressive line. I find this discourse troubling as a policy matter, but it is constitutionally benign. The students are using their own speech to counter that of the invited speaker.³⁵ There is no problem. The right of the speaker is not disrupted. And those who want to hear the speaker are able to, even if they face social stigma for doing so.

C. Demonstrate

Students can demonstrate before, during, and after an event in many ways. I draw a sharp distinction between a demonstration and a disruption. The former approach allows the event to proceed, though the speaker has to deal with some distractions. The latter approach does not allow the event to proceed. I will discuss disruptions in the next part. Here, I will consider demonstrations.

1. Demonstrate Outside the Event

³⁵ See *Whitney v. California*, 274 U.S. 357, 377 (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.”).

First, students can demonstrate outside the event.³⁶ This approach appeals to the quintessential marketplace of ideas: respond to speech you disfavor with speech you favor.³⁷ Indeed, perhaps the most effective element of this method is that the invited speaker must walk through the proverbial gauntlet of signs, jeers, and chants. Take it from me—the experience is somewhat intimidating, and the students sent an effective message.

So long as the students do not *physically* block access to the room for the speaker or other students, this sort of demonstration is perfectly lawful. The free speech rights of the demonstrators, speaker, and students are all protected. However, there may be cases where students demonstrate outside the classroom very loudly, such that their commotion makes it difficult to hear the speaker inside the classroom. Such situations should be treated in the same fashion as demonstrations inside the classroom.

³⁶ Debbie Truong, Sarah Larimer & Susan Svrulga, *Georgetown Law students and faculty protest speech by Attorney General Jeff Sessions*, WASH. POST. (Sept. 26, 2017), <https://www.washingtonpost.com/news/grade-point/wp/2017/09/26/georgetown-law-students-plan-to-protest-jeff-sessionss-speech/>.

³⁷ See *Abrams v. United States*, 250 U.S. 616, 630 (Holmes, J., dissenting) (1919) (“[T]he 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.”).

The overwhelming majority of the CUNY students who objected to my event engaged in peaceful demonstrations. As I walked through the hallway to the classroom there were several dozen students demonstrating. I encourage you to watch the video to absorb the ambiance.³⁸ They chanted “Shame on you,” booed, and hissed.

They held up signs. Earlier that day, students passed out poster board and markers in the hallway. Many of the signs were directed at me personally: “Josh Blackman, you are not welcome here.” “Pronouns Matter, Josh Blackman does not.” “Oppressors are not welcome here.” “My existence > your opinion.” “I’m White and Afraid of Everything.” “Go home Josh Blackman.” “Racists are not welcome here.” “Anti-DACA not welcome @ CUNY.” My personal favorite: “Your legal analysis is lazy and wrong.” The sign was at least half-right. I framed another sign, which was left on the floor: “Go home and blog about how hard this was.” Indeed, I did.³⁹

Other signs attacked the Federalist Society. “Federalist Society is Racist.” “The Federalist Society Was Founded to

³⁸ The Federalist Society, *Importance of Free Speech on Campus* [Prof. Josh Blackman], YOUTUBE (Apr. 12, 2018), <https://youtu.be/kuWEFjnwLiA>.

³⁹ Josh Blackman, *Students at CUNY Law Protested and Heckled My Lecture about Free Speech on Campus*, JOSH BLACKMAN’S BLOG (Apr. 12, 2018), <http://joshblackman.com/blog/2018/04/12/students-at-cuny-law-protested-and-heckled-my-lecture-about-free-speech-on-campus/>.

Uphold White Supremacy.” “Conservative hate ≠ intellectual debate.”

Other signs were directed at the First Amendment—the topic of my lecture: “The First Amendment is a weak shield for White Supremacy.” “The First Amendment is not a License to Dehumanize Marginalized People.” “My free speech is fuck you, white supremacist.” “The Constitution is racist.” “Your hate speech is not welcome here.”

Other signs critiqued the notion of the “rule of law” itself: “Rule of Law = White Supremacy.” “Restoring the Rule of Law = White Supremacy.” “Constitutional Originalism = White Supremacy.” “We reject the myth of legal objectivity.”

Other signs faulted CUNY for hosting me: “Shame on CUNY: Don’t give Oppressors a Platform,” “CUNY – You said DACA Students are Welcome here. Where is the Protection? Where is the Safety?” “CUNY Law – You’ve Failed our Students, Past, Present, and Future.”

I could write an entire volume in response to these signs, but my disagreement with their message is irrelevant for present purposes. These students all exercised their rights of free speech to make me as uncomfortable as possible—as they should have. It was quite intimidating to walk through the throng of students

shouting at me. But they got their point across. Indeed, they also conveyed to other students their opinions about me, the Constitution, the Federalist Society, and CUNY. The demonstration in no way disrupted my ability to speak.

The mode of this non-violent demonstration should be lauded. One student did make a half-hearted effort to block my entry into the room with his backpack, but I easily moved past him.

2. Demonstrate Inside the Event

Students can also peacefully demonstrate inside the classroom. As a threshold matter, classrooms used for extracurricular events should be considered limited public forums.⁴⁰ In contrast with a traditional public forum, in a limited public forum, the government may adopt certain reasonable restrictions on who can use the space.⁴¹ However, the government cannot restrict access to these spaces based on the speaker's viewpoint.⁴² For example, students can stand in the

⁴⁰ *Perry Education Association v. Perry Local Educators' Association*, 460 U.S. 37, 45 (1982) (“The Constitution forbids a State to enforce certain exclusions from a forum generally open to the public even if it was not required to create the forum in the first place.”).

⁴¹ *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The necessities of confining a forum to the limited and legitimate purposes for which it was created may justify the State in reserving it for certain groups or for the discussion of certain topics.”).

⁴² *Id.* (“These principles provide the framework forbidding the State to exercise viewpoint discrimination, even when the limited public forum is one of its own creation.”).

back of the room and hold up signs. This approach does not prevent the speaker from conveying his message. Their presence may be distracting to those in the room. That's the point: draw attention to the counter speech. Think of Mary Beth Tinker's black armband.⁴³ Her silent protest was designed to draw attention to her views about the Vietnam war. But the demonstration did not "substantially interfere with the work of the school or impinge upon the rights of other students."⁴⁴ Protesters can also turn their backs on the speaker, walk out when the lecture begins, and wear t-shirts with messages. These forms of silent protest can be effective.⁴⁵

Additionally, after the presentation, students inside the classroom can challenge the speaker by asking effective questions. Most speakers are fairly adept at handling hostile questions, but the mere presence of the questions provides an effective counterpoint—especially if the event is not structured as a debate. But a sharply worded question can put the invited speaker on the ropes. Take it from my experience—every once

⁴³ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁴⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

⁴⁵ Maria Danilova, *Protesters carrying signs like "white supremacist" met Betsy DeVos during a speech at Harvard*, BUSINESS INSIDER (Sept. 29, 2017), <https://www.businessinsider.com/harvard-protesters-met-betsy-devos-2017-9>.

in a while, a student manages to trip me up. It happens to the best of us.

These types of demonstrations allow the speaker to speak and ensure that classmates can listen. So long as the demonstration inside the classroom is quiet, there is no problem under the First Amendment. The rights of the speaker and the other students in attendance have not been disrupted.

A different constitutional analysis would apply, however, if the *same* classroom were used for a regularly scheduled class, rather than for an extracurricular, student-sponsored event. In this more traditional context, the classroom serves as a nonpublic forum.⁴⁶ In such a space, the government can impose restrictions based on the content of speech.⁴⁷ Specifically, the space is being utilized to convey a message approved and controlled by the university—indeed, many classes are prerequisites for graduation. Professors lack the traditional free speech rights in

⁴⁶ *Minn. Voters All. v. Mansky*, 585 U.S. ___, 138 S. Ct. 1876, 1885 (2018) (“[I]n a nonpublic forum, on the other hand—a space that ‘is not by tradition or designation a forum for public communication’—the government has much more flexibility to craft rules limiting speech.”) (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 46 (1983)); *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 70 n.11 (1983) (Brennan, J., dissenting) (“It is noteworthy that *Tinker* involved what the Court would be likely to describe as a nonpublic forum.”).

⁴⁷ *Minn. Voters Alliance v. Mansky*, 585 U.S. ___, 138 S. Ct. 1876, 1885 (2018) (“[T]he government may impose some content-based restrictions on speech in nonpublic forums, including restrictions that exclude political advocates and forms of political advocacy.”).

the classroom they would have in forums outside the classroom.⁴⁸ They are paid to teach a specific topic, though the norms of academic freedom provide considerable leeway for how that topic can be taught. Moreover, the administration and professors routinely exercise control over their students' speech in these nonpublic forums. Students who speak out of turn, or even who quietly disrupt a class, can be disciplined.⁴⁹ The sort of conduct that occurred during my protest at CUNY would never fly in a first-year law school class. This sort of pedagogical control in no way offends the First Amendment.⁵⁰

E. Disruption

The final category of protest involves *disruption*. This mode can be accomplished in two broad fashions. First, there are visual disruptions: standing in front of or behind the speaker. Second, there are auditory disruptions: making noise such that the speaker cannot be heard. Not all disruptions violate the rights of the speaker to speak and of the other students to hear. The

⁴⁸ Stanley Fish, *Free Speech Is Not an Academic Value*, CHRON. HIGHER EDUC.: CHRON. REV. (Mar. 20, 2017), <https://www.chronicle.com/article/Free-Speech-Is-Not-an-Academic/239536>.

⁴⁹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969).

⁵⁰ *Ark. Ed. Television Comm'n v. Forbes*, 523 U.S. 666, 679 (1998) (“[T]he government does not create a designated public forum when it does no more than reserve eligibility for access to the forum to a particular class of speakers, whose members must then, as individuals, ‘obtain permission,’ to use it.”) (citation omitted).

constitutional analysis should turn on the context in which the disruption occurs, the intent of the disruptors, the duration of the disruption, and whether the speaker is in fact able to give the talk he was invited to give. No simple approach exists to draw these lines. Indeed, I am still not certain if my own talk at CUNY was disrupted.

1. Visual Disruptions

A visual disruption is designed to prevent the audience from seeing the speaker or his presentation. This type of disruption can be performed in several fashions. First, students can stand *in front* of a speaker. Here, the speaker can continue to talk, uninterrupted. However, this tactic blocks the visual connection between the speaker and the audience. Moreover, the close proximity between the speaker and the students could give rise to a security threat: peaceful protests can quickly turn violent with the right catalyst.

Second, students can stand *behind* the speaker. (That's what happened to me at CUNY.) This approach does not block the visual connection between the speaker and the audience. Yet, it heightens the risk of physical violence: the speaker cannot simultaneously keep an eye on the audience and the developments behind his or her head. Moreover, as a matter of

norms, the invited speaker is expected to occupy the front of the room. Other students, who were not invited as speakers, do not have the floor. They can ask questions from the back of the room at the appropriate juncture.

Third, protesters can also disrupt the speaker's demonstrative devices, such as a PowerPoint presentation. For example, students can stand in front of a screen, or block—or even turn off—the projector. Often, a PowerPoint contains core components of a speaker's message. Blocking the screen is tantamount to blocking the speech itself.

These forms of visual disruptions still allow the speaker to speak, but—to varying degrees—not be seen.

2. Auditory Disruptions

A highly effective way to interfere with an event is through an auditory disruption. One common method is the so-called “shout-down.” A basic principle of human communication is that only one person can audibly speak at once. If two people speak at the same time—cross-talk—neither can be heard. Perhaps one party shouts louder. Or the other party uses more extreme language to garner attention. Either way, the parties are unable to engage in a meaningful discourse because

of the shouting contest—a verbal race to the bottom. Think of most primetime cable news tête-à-têtes.⁵¹

Students can shout-down a speaker in several different ways. First, students can shout isolated questions from the audience—questions that they will wait to be answered.

Second, students may shout out the equivalent of an excited utterance: for example, “Shame on you!” or “Come on!” In certain contexts, a brief exclamation, at the right moment, may be appropriate. For example, Jeremy Waldron explains that in the British parliament, it is accepted to speak out of turn during a controversial portion of a member’s address.⁵² This interruption is truly de minimis. But in such cases, the shout is likely intended to engage the speaker and elicit a reaction, not shut him down.

Third, students can continuously sing or chant while the speaker is presenting. These sounds are not designed to foster a dialogue or provide a brief interjection. Rather, these chants

⁵¹ The Rubin Report, *This 10 Second Clip Is The Worst Cable News Video You’ll ever See*, YOUTUBE (Oct. 24, 2014), <https://www.youtube.com/watch?v=oliDEQKiH-g>.

⁵² See Jeremy Waldron, *Heckle: To Disconcert with Questions, Challenges, or Gibes*, (NYU Sch. Of Law, Pub. Law & Legal Theory Working Paper Grp., Paper No. 17-42, 2017), <https://ssrn.com/abstract=3054555>.

serve merely to throw the speaker off her game and prevent other students from listening.⁵³

Fourth, students can stand in front of, or behind the speaker and shout to his or her face. This approach—combining visual and auditory interference—ratchets up the level of hostility. It is difficult to present a prepared lecture when people are yelling at your face.

3. CUNY Students Shouted Me Down

Let's return to my experience at CUNY. After traversing the gauntlet in the hallway, I entered the CUNY classroom. Much to my surprise, there were about five people in attendance. Moments later, student with signs filed in and surrounded all four sides of the room. Those demonstrating in the back of the room were not a problem. However, about a dozen students stood directly behind me.

The President of the Federalist Society Chapter asked the students standing behind me to move. They refused. I didn't raise any objection. Had they stayed there, and not made any noise, I would have continued with my lecture as planned. It was a visual disruption, but a minimal one.

⁵³ See The Rubin Report, *supra* note 44.

But they did not stay quiet. The protesters simultaneously shouted many messages before I even started. “Shame on You.”

“I don’t understand how CUNY allows this.”

“There are students that are directly affected by this hate speech.”

“Legal objectivity is a myth.”

“You still have an opportunity to leave.”

The President began his introduction. The protesters heckled him.

“This is not okay.” As he said my name, someone called out “He’s a white supremacist.” Others booed.

At this point I hadn’t said a word.

One of the protesters observed, “He’s filming us. Just so everyone is aware, he is filming us.”

I told her, “I am.” I record all of my lectures—here I took the additional step of recording the walkup to the event. In advance, I did not quite know what to expect, but my experience is to always have my own recording in the event there were doubts about what I, or others did. YouTube is my insurance policy. In any event, New York is a one-party consent recording jurisdiction.⁵⁴

⁵⁴ N.Y. Penal Law § 250.00.

A few students in attendance clapped as I began to speak.

“Well thank you very much to CUNY for having me,” I said.

In unison, they yelled out, “CUNY is not having you.”

“You are not welcome.”

Another shouted out something about “white men and those who support white supremacy.”

An African-American student who was attending the event replied, “I am not white.”

A protestor, holding a sign that said “Josh Blackman is not welcome here and neither is the Fed Society” asked, “Then why are you here? Why aren’t you with us?”

A member of the Federalist Society Chapter reminded the protesters that they were not allowed to interrupt me once I started. At that point, a member of the CUNY administration entered the room and walked right up to the protesters. She said:

All right, listen. Everybody stop. Let me tell you something. The university rules are people get to speak. You may protest. You may protest. But you may not keep anyone from speaking. If you do, I have other things to do, I will be back. Or you can resolve this yourselves. Or you can have me resolve it.

As she began to walk away, a student asked, “Why are you bringing racists into your school? Can you answer that?”

“Why are you not providing support for students affected by this hate speech?”

The administrator repeated, “Did you hear me?”

A student replied, “We are not children. You can’t talk to us like that.” She never came back.

Professor Franklin Siegel, who was seated in the back, urged the students, “Please don’t take the bait.”

A student muttered, “Franklin, come on.”

He repeated, “Don’t take the bait.”

A student said, “He is threatening us.” The students then discussed amongst themselves whether the administration could punish them.

At this point, about three minutes in, I had only managed to say a single sentence. How should I proceed? I was engaged in a game of chicken. Who would cave first? Would the students stop protesting once I gave my prepared speech? Or would I abandon my prepared speech to stop the protesting? I recognized quickly that if I proceeded to give my speech, as planned, they would have continued to protest. I realized there would be no way for me to present my usual talk. And under the circumstances, playing the videos I planned to play would have been impossible—the students were standing in front of the

screen. As a result, I quickly turned to Plan B. I decided to respond to arguments made in the circulated pamphlets.

I began, “For those of you who are actually here to hear me speak, I’ll try.”

In unison, the students interrupted me, “Nahh.”

I continued, “When I came to campus, there was a sign that said ‘Oppressors not welcome.’”

A student shouted, “You!”

I continued, “It says at the bottom, ‘we reject the idea that his views,’ my views, ‘merit space on this campus and reject the myth of legal objectivity. Josh Blackman is not welcome at CUNY Law.’ Congratulations, you’ve made me feel very unwelcome. But I’m still going to say what I’d like to say.”

A student interrupted, “You’re very brave.”

I told him, “Thank you, thank you I try.”

They continued to shout over me. One said, “CUNY Law is threatening us and protecting speakers.”

I said, “I actually want to start by using the one legal argument you actually made.” (I deliberately paused to give them a chance to get the laughter out of their system.) I continued, “That violence exists in the law and it is a myth that law is inherently neutral. You said there is a myth of legal

objectivity. So, let me talk about legal objectivity for a few minutes. Someone did some excellent opposition research. Whoever did this, I applaud you.” I tried to build some kind of bond with humor and flattery. “You found seven or eight bullets on various videos I’ve given over the years. I’d like to make a few points. You wrote, that I supported the President’s decision to rescind DACA. Now let me tell you something. I actually support the DREAM Act.”

There were audible gasps in the room. “This might surprise you. I think the DREAM Act is a good piece of legislation.”

Someone yelled out “Gaslighting.” That is, I was trying to make them question their own reality.⁵⁵

I continued, “Were I a member of Congress.” Someone interrupted me. I said, “Let me speak, please.”

A number of students shouted out “Nah.”

I continued, “Were I a member of Congress, I would vote for the DREAM Act. My position is that the policy itself was not consistent with the rule of law. Which teaches a lesson.”

⁵⁵ Stephanie A. Sarkis, *11 Warning Signs of Gaslighting*, PSYCHOLOGY TODAY (Jan. 22, 2017) <https://www.psychologytoday.com/us/blog/here-there-and-everywhere/201701/11-warning-signs-gaslighting>.

Someone started snapping and booing. “The lesson is you can support something as a matter of policy.”

Someone shouted, “What about human rights?”

I ignored the question, and continued, “but find that the law does not permit it. And then the answer is to change the law.”

A student shouted out “Fuck the law.” This comment stunned me.

I replied, “Fuck the law? That’s a very odd thing. You are all in law school. And it is a bizarre thing to say fuck the law when you are in law school.” They all started to yell and shout over me.

One student yelled at me, “You chose CUNY didn’t you. You knew what would happen.”

At the time, I didn’t appreciate the significance of her question. The students believed I picked CUNY because I wanted to be protested. This question shed light on the “Don’t take the bait.” That is, I came to CUNY to bait them into protesting against me. To the contrary! I had never been protested before. I was shocked that a lecture about free speech would occasion such a protest. Yet, once I found out they were going to protest me, I was not going to back down and withdraw.

The hecklers at this public institution would not veto my speech.

I would stand there as long as needed to make my point.

Amidst the cacophony, I interjected, “Let me speak. Let me speak. Fuck the law, right? That’s a good mantra. Fuck the law.”

A student, looking at the small number of people in attendance, said, “Look how many of us and how many of them there are.”

I replied, “I am actually very impressed, let me say this, I am actually impressed that there are so many of you.” Again, I tried to flatter the students to build some kind of bond. “You could be anywhere right now, and you chose to come out here and exercise your constitutional rights. You want to exercise your rights. And I’ll do the same.”

A student shouted, “CUNY Law is not acting right.”

I continued, “I’m going to express my views. Let me go down this checklist. I think DACA. . . .”

I started to make a comment about DACA, when the student standing immediately to my right said, “I don’t want to hear this.” Then they started to exit.

I said, “You want to go? Please leave, by all means.” They began to exit. I said, “I think DACA is a good policy.”

A student replied, “I think you’re tired.”

I admitted, in full candor, “No, I’m feeling pretty good.”

At that point, the speakers realized they lost the game of chicken.

I was going to speak.

A student shouted, “You’re lying to yourself.”

Another said, “You’re a white supremacist.”

Another said, “This is really about CUNY Law and how you let this happen.”

Another said “Shame on you” to the students in attendance.

Then, the dialogue shifted to the back of the room. The African American student mentioned earlier said, “I don’t support this guy,” but “I want to hear him speak.” The protesters tried to shame him for attending. He continued, “I want to ask him a very hard question. And we should all try to ask him very hard questions. Like about the notion of legal objectivity.”

Sensing the event had taken a different direction, I said, “Let’s talk about that.” The protesters then heckled and shouted over the student asking the question. I interjected, “let him talk, let him talk.” The students were not only protesting me. They were protesting their own classmate—one who strenuously disagreed with me!

After the protest died down, he said, “I respect the fact that you have a right to speak, and you came here. I do not support anything you are writing or your politics, but I do respect the fact that we can have a dialogue and ask some tough questions.”

At that point—about eight minutes after I was introduced—the protesters left the room. (I learned they marched to the Dean’s office to complain.) After they left, I took questions from the students for over an hour. I did not present any of my prepared remarks. Instead, I spoke about originalism, textualism, the separation of powers, DACA, affirmative action, criminal procedure, and wide range of other topics. The conversation was civil and professional. I was very proud of the students who stayed till the end. (Well, there was one Trump supporter in the room who called me a “cuck” for not being #MAGA enough—I can’t win!) Indeed, though there were only five people at the start of the event, by the time it concluded, I counted about thirty people.

4. Was My CUNY Event Disrupted?

Was my CUNY event disrupted, such that my First Amendment rights were violated? I'll consider this question at three stages of the event.

First, did the protesters outside the room, who yelled and held signs, violate my rights? Absolutely not. They were exercising their rights to use speech (spoken and written) to make me feel as uncomfortable as possible. Though, their conduct *could* have changed the entire nature of the event. I pose a question to everyone reading this article: if you were told that fifty people were standing outside the event forum and would boo and hiss at you, would you walk to the event? If the campus security officer asked about your "exit plan," and could not guarantee your safety? This question is more difficult than it may seem.

Second, did the protesters inside the room, who stood inches over my shoulder, cross the line? This question is much closer. My ability to speak depends, in some measure, on my physical safety. I did not feel threatened—there were certainly no "true threats"⁵⁶ made—but the situation could have escalated

⁵⁶ See *Elonis v. United States*, 135 S. Ct. 2001, 2016 (2015) (Alito, J., concurring) ("A threat may cause serious emotional stress for the person threatened and those who care about that person, and a threat may lead to a violent confrontation.").

quickly. I was very much aware that the sole plain-clothes security officer in the back of the room would have been unable to prevent violence. I pose another question: if you were surrounded by demonstrators during a prepared lecture, would you have exited the room? I suspect many professors would not have lingered.

Third, did the protesters violate my rights when they shouted over me? That is, did the eight-minute disruption, out of an hour-long lecture, violate my First Amendment rights? The Supreme Court's Takings Clause jurisprudence may offer a helpful analogy to understand the scope of the CUNY protest. Consider *Pennsylvania Coal Co. v. Mahon*.⁵⁷ In this old chestnut, the state prohibited the mining of coal on part of a parcel.⁵⁸ Justice Holmes's majority opinion found that the government effected a taking without just compensation. "The general rule," he wrote, "is, that while property may be regulated to a certain extent, if regulation goes *too far*[,] it will be recognized as a taking."⁵⁹ Justice Brandeis wrote a solo dissent. He offered a different test: instead of only considering the small parcel of land on which mining was prohibited, the Court should consider the

⁵⁷ 260 U.S. 393 (1922).

⁵⁸ *Id.* at 412.

⁵⁹ *Id.* at 415 (emphasis added).

“value of the whole property.”⁶⁰ That is, the other parts of the property on which mining, and other gainful activities, were permitted. This test would become known as the “parcel as a whole” test.

The Supreme Court would embrace Justice Brandeis’s dissent five decades later in *Penn Central Transportation Co. v. New York City*.⁶¹ The Penn Central Transportation Corporation wanted to build a tower atop Grand Central Terminal in Manhattan.⁶² To block this change, New York City designated the train station as an historical “landmark.”⁶³ Penn Central argued that the landmark designation was an unconstitutional “taking” of the air rights over its land.⁶⁴ The Supreme Court upheld the designation.⁶⁵ Justice Brennan wrote the majority opinion.⁶⁶ Even though New York’s law diminished the value of the air rights, Penn Central could still benefit from using other portions of Grand Central Terminal. Therefore, there was no taking.⁶⁷ In other words, because the Court considered the

⁶⁰ *Id.* at 419 (Brandeis, J., dissenting).

⁶¹ *Penn Cent. Transp. Co v. New York City*, 438 U.S. 104, 131-32 (1978).

⁶² *Id.* at 116.

⁶³ *Id.* at 115-16.

⁶⁴ *Id.* at 130.

⁶⁵ *Id.* at 138.

⁶⁶ *Id.* at 107.

⁶⁷ *Id.* at 138.

“parcel as a whole,” as Brandeis propose, the diminution in value did not go “too far.”

CUNY Dean Mary Lu Bilek appealed to Brandeis—on the Takings Clause, alas, not the First Amendment. She said the protest was reasonable because of its limited duration:

For the first eight minutes of the seventy-minute event, the protesting students voiced their disagreements. The speaker engaged with them. The protesting students then filed out of the room, and the event proceeded to its conclusion without incident. This non-violent, limited protest was a reasonable exercise of protected free speech, and it did not violate any university policy. CUNY Law students are encouraged to develop their own perspectives on the law in order to be prepared to confront our most difficult legal and social issues as lawyers promoting the values of fairness, justice, and equality.⁶⁸

She embraced the *Penn Central* parcel as a whole test. Because the disruption lasted only eight minutes out of seventy minutes, the argument goes, my rights were not violated.

But the “parcel as a whole” test is a very poor fit for free speech jurisprudence. This property-centric approach presumes stability while campus protests are volatile. In *Penn Coal*, the parties understood exactly how much land could not be mined. And in *Penn Central*, the parties knew exactly how much of the train station could still be utilized. That model works for metes

⁶⁸ Scott Jaschik, *Shouting Down Talk on Campus Free Speech*, INSIDE HIGHER ED (Apr. 16, 2018), <https://perma.cc/4AZR-W75W>.

and bounds. It doesn't work for a real-time discourse. Hindsight is always 20/20. When the event began, I had no idea how long the disruption would last. For all I knew, the students could have made noise nonstop.

Why did the students at CUNY not protest me for the full hour? I take some credit. Rather than trying to deliver my lecture as planned, or shout over the students, I tried to engage them. I asked them questions to try to forge a common ground. That strategy defused the situation. But it could have backfired. The students could have shouted at me for the entire hour—or worse, continuously clanked a cowbell! The event also could have turned violent. Even after the students exited, I had a concern they would return at some point.

The campus security officer did ask me about my “exit plan.” He explained that there were certain safe ways to exit the building. When I said I planned to leave via car, and not the subway, he was relieved. It was a question I had never before considered. Although he initially told me he did not want to be present in the room, he escorted me from the elevator to the classroom. At the time, I considered what would happen if the event became violent. On the one hand, I would want to leave if my safety was at risk. On the other hand, I worried that the

university could cite a risk of violence as a pretext to placate the protesters, and thereby silence my message. This situation resembles the proverbial heckler's veto at issue in *Terminiello v. City of Chicago*.⁶⁹ I was not prepared to leave unless good cause existed. The school would have had to remove me.⁷⁰

I quickly made the decision to abandon the lecture I had intended to give and instead answered questions for an hour. This fluid situation demonstrates that you cannot measure the effect of a protest simply by dividing the numerator (how many minutes the disruption lasted) by the denominator (how long the event was scheduled to last).

How would you have handled that protest? Consider several hypotheticals. Professor A could have been intimidated by the throng of students in the hallway, and never entered the room. Professor B could have refused to talk over the protesters, and simply left the room. Professor C could have tried to give the lecture as planned, and been unable to because of interruptions. Professor D could have lost his temper and shouted back at the

⁶⁹ *Terminiello v. Chicago*, 337 U.S. 1 (1949).

⁷⁰ *See* *Feiner v. New York*, 340 U.S. 315, 318 (1951) ("Although the officer had thus twice requested petitioner to stop over the course of several minutes, petitioner not only ignored him but continued talking. During all this time, the crowd was pressing closer around petitioner and the officer. Finally, the officer told petitioner he was under arrest and ordered him to get down from the box, reaching up to grab him.").

students—thus escalating the event. Professor E could have demanded that the administration remove the protesters, and when the administration took no action, stormed out of the room. In these cases, Professors A through E would have spoken for zero minutes. Even under Dean Bilek's framework, there was a disruption—but that outcome was, in part, a factor of my own sensibilities.

If a speaker deemed the circumstances unsafe or unproductive, and exits, his case against the university would be much stronger. However, because I engaged the protesters, my case against the University is weak. I quickly reached this conclusion.

IV. HOW SHOULD UNIVERSITIES RESPOND TO DISRUPTIONS?

This essay concludes by addressing the most difficult question: how should universities respond to disruptions? I will consider four different general approaches. First, the administration can do nothing at all. That is, the university could allow speaker to fend for himself in response to the disruption. Second, the administration can ask the participants to stop the disruption—but nothing more. If the disruption continued, the speaker would still have to fend for himself. Third, the

university's security force can order the disruptors to leave the room. If they failed to do so, the disruptors could be arrested. Fourth, after the event concludes, the administration could discipline the disruptors. This type of punishment could range from a mere warning, to denial of certain academic privileges, to suspension or expulsion, and beyond.

A. Do Nothing

The path of least resistance for the administration is to do nothing: simply allow the disruption to proceed, and let the speaker fend for himself. Consider a recent incident at Portland State University, a public institution in Oregon. The College Republicans invited Michael Strickland, a conservative blogger, to campus.⁷¹ Two years earlier, Strickland drew a gun during a Black Lives Matter protest at the university.⁷² He was convicted for that offense.⁷³ Strickland was banned from the campus for two years.

⁷¹ *Campus police no match for heckler with cowbell who hijacked speech at Portland State*, FIRE (Mar. 12, 2019), <https://www.thefire.org/campus-police-no-match-for-heckler-with-cowbell-who-hijacked-speech-at-portland-state/>.

⁷² Sophie Concannon, *Protesters silence controversial speaker at College Republicans event*, PSU VANGUARD (Mar. 11, 2019), <https://psuvanguard.com/protesters-silence-controversial-speaker-at-college-republicans-event/>.

⁷³ Aimee Green, *Man who pointed Glock at 'Don't Shoot PDX' protesters banned from owning guns*, THE OREGONIAN (May 3, 2017), https://www.oregonlive.com/portland/2017/05/man_who_pointed_gun_at_dont_sh.html.

When he returned to campus in 2019, his event was disrupted. One protestor circled the room and clanked a cowbell for more than an hour.⁷⁴ Here, the student's goal wasn't to entertain everyone with a cowbell recital. His intent was to make it impossible for Strickland to speak—and it was personal.

The protestor told Strickland, "I didn't touch you, and you pointed a gun at me. I'm just exercising my First Amendment rights."⁷⁵ He added, "We want to deplatform you. We want you to stop fucking talking."⁷⁶ The event eventually continued after a full hour of disruption.

Several campus security officers were in the room during the altercation, but they took no action.⁷⁷ Students often see law enforcement as a hostile and antagonistic force.⁷⁸ In the presence of uniformed police officers, some students may not be

⁷⁴ Andy Ngo, *College Republicans PSU Event Gets Shut Down*, YOUTUBE (Mar. 6, 2019), <https://youtu.be/EU9Ax19JZf0>.

⁷⁵ Concannon, *supra* note 65.

⁷⁶ Stumptown Matters, *Mike Strickland PSU Speaking Event Interrupted By Anarchist - Part 1 of 4*, YOUTUBE (Mar. 9, 2019), <https://youtu.be/d20IkGdybOI>.

⁷⁷ Eugene Volokh, *Police Officer Stands by While Portland State University College Republicans Event Is Shouted (and Cowbelled) Down*, THE VOLOKH CONSPIRACY (Mar. 8, 2019), <https://reason.com/2019/03/08/police-officer-stands-by-while-portland/>.

⁷⁸ Daarel Burrette, *A Fight to Build Trust With School Police*, EDUCATIONWEEK, <https://www.edweek.org/ew/articles/2017/02/01/a-fight-to-build-trust-with-school.html>

comfortable expressing themselves.⁷⁹ Here, the presence of campus police had no effect.

Though the university prevented any physical violence, they did nothing to ensure that the speaker was allowed to speak and took no action to stop the disruption. However, under the “parcel as a whole” theory, the fact that Strickland was eventually able to speak proves that his rights were not violated.

I disagree. Speakers and students should not have to endure an hour of cowbelling to hear a message. Here, the university’s nonfeasance resulted in the deprivation of the speaker’s right to speak and the students’ right to listen. The protesters, who may not have been students, were able to exercise the heckler’s veto.

B. Ask the Disruptors to Stop

CUNY chose an alternate path. A few minutes after the disruption began, an associate dean entered the room. She told the students that they could not keep me from speaking. She also said that if they did not let me speak she would “be back.” She

⁷⁹ See Charlie Kolodziej, *Pro-Palestinian Protesters Interrupt Anti-BDS Talk at Law School, Escorted Out by UCPD*, THE CHICAGO MAROON (Apr. 10, 2019), <https://www.chicagomaroon.com/article/2019/4/10/pro-palestinian-protesters-interrupt-anti-bds-talk/> (“Several students who witnessed the incident expressed frustration with the presence of police officers in the Law School and questioned the University’s application of its free speech policy by allowing the protesters to be removed.”).

never came back. Her warning was completely empty and perfunctory. The students quickly called her bluff and ignored the associate dean. The disruption continued for several minutes after she left, and only dissipated when I engaged the students.

There is no practical difference between the approach taken by Portland State (do nothing) and the approach taken CUNY (do nothing effective). In both cases, the disruption continued. Though, I commend the CUNY administration for voicing support for free speech, at least superficially.

C. Remove the Disruptors Who Refuse to Stop

Universities have a third option: order the disruptors to stop, and if they refuse, remove them from the room. This approach differs from the precatory CUNY approach, in which an associate dean sternly asked the students to stop. A recent event at the University of Chicago demonstrated this more forceful approach. The University is a private institution, but it has a longstanding and well-known commitment to free speech.⁸⁰

Students at the University of Chicago Law School invited Professor Eugene Kontorovich to lecture about the First

⁸⁰ Press Release, Ass'n of Am. Univs., AAU Presidents and Chancellors Reaffirm Commitment to Free Speech on Campus (Apr. 18, 2017), <https://www.aau.edu/newsroom/press-releases/aau-presidents-and-chancellors-reaffirm-commitment-free-speech-campus>.

Amendment and anti-BDS laws (Boycott, Divestment, and Sanction of Israel).⁸¹ Several protesters, who were not students at the University, repeatedly shouted over Professor Kontorovich: “Free, free Palestine, protesting is not a crime.”⁸² Kontorovich opted to talk over the chanting, but recordings from the event reveal that it was very difficult to hear him.⁸³ Professor Kontorovich also tried to engage the protesters, by answering their questions. Unlike at CUNY, the students did not respond well to the engagement.

After ten minutes of disruption, the Dean of Students entered the room. The campus newspaper relayed that the Dean “repeatedly asked the protesters to stop chanting or to leave the room.” One student in attendance said the protesters “smiled at him and continued chanting.” Someone—not the Dean—called the university police. The authorities escorted the protesters from the room.⁸⁴ Several protesters who were not students were issued trespass warnings, and they left.⁸⁵

⁸¹ Kolodziej, *supra* note 71.

⁸² *Id.*

⁸³ Josh Blackman, *Protest at the University of Chicago (4/9/19)*, YOUTUBE (Apr. 9, 2019), <https://youtu.be/SdpKzecq170>; Josh Blackman, *Protest at the University of Chicago (4/9/19) #2*, YOUTUBE (Apr. 9, 2019), <https://youtu.be/WnNJGOBTqSA>; Josh Blackman, *Protest at the University of Chicago (4/9/19) #3*, YOUTUBE (Apr. 9, 2019), https://youtu.be/pLvm_8FIzXI.

⁸⁴ *Id.*

⁸⁵ *Id.*

Following the event, the Dean sent a campus wide email.⁸⁶ First, he explained that the “chanting did violate the University’s policies.”⁸⁷ All invited speakers have the “right to be heard” and those “who choose to be present” have the right “to hear the speaker.”⁸⁸ Those who disagree with the speaker have the right “to ask tough questions.” But they cannot exercise a heckler’s veto, which is “contrary to our principles.”⁸⁹ He added, “Protests that prevent a speaker from being heard limit the freedoms of other students to listen, engage, and learn.”⁹⁰

Second, the Dean discussed methods of protest that are “consistent with [the university’s] policy and principles.” For example, “[s]tudents may hold up signs and turn their backs on speakers so long as they do not block others, or they may ask tough questions of those with whom they disagree.” In addition, “[v]ocal protests are also permitted outside of events provided that they do not infringe on the rights of the speakers or attendees.”

Third, the Dean reasoned that the protesters “would have been allowed to remain” if they “bec[a]me silent” after they were

⁸⁶ Email from Office of the Dean of Students, University of Chicago (Apr. 9, 2019), <http://bit.ly/2SuTthS>.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Id.*

asked to “cease their chanting.” In that case, “nothing further would have happened.” Or, they could have “continued their chanting after exiting the room and moved away from the corridor where lunch talks were taking place.” However, because they did not respond to a request to “cease the disruption,” then “the next step [was] to request the assistance” of the authorities. The Dean did not call the police in this case, but he stated that he would have taken that next step.

Fortunately, the protests at both CUNY and Chicago were not violent. The protesters left peacefully. But what if they refused to leave? Should they be dragged out of the room, kicking and screaming? That outcome would be awful. Colleges should resist the urge to use physical force to remove a non-violent protestor. Let them make noise, and mete out discipline afterwards. But a physical arrest would be largely counterproductive and overwhelm any positive dialogue that can occur. In most cases, it should be sufficient to ask the students to leave.

D. Discipline the Disruptors

After the event concludes, the administration is faced with one final question: should those who disrupted the event be punished? Universities can use a range of possible disciplinary

measures. First, at the most basic level, the school could issue a warning not to take similar actions in the future. If the prospective protesters ignore that warning, then more forceful punishments could be used. But if the admonishment was limited to a mere oral warning, there would be no paper trail. Second, students could be denied certain academic privileges, such as the ability to participate in extracurricular activities and other student organizations. Third, repeat offenders could be suspended from classes. In the most egregious instances—perhaps where violence is involved—expulsion may be warranted. Fourth, when law students disrupted protected speech, the college could make a reference to character and fitness boards.

The gravity of the punishment should be premised on the purpose the school seeks to advance: is the student being disciplined as a punishment for his act, or as a means to deter other students from engaging in similar behavior? I am skeptical the latter model works. Student bodies change from year-to-year, and institutional memory of such punishments quickly fade. Therefore, the punishment should be determined based on whether the rights of the speakers and other students were violated. Specifically, schools should consider whether the

protestor's intent was to prevent the speaker from speaking, or to dissuade other students from listening. Only the former should warrant discipline. The latter should be tolerated. Here, intent matters. And figuring out a speaker's intent can be extremely complicated.

It is fairly straightforward to answer how and why protesters should be punished. Schools are very familiar with meting out discipline. The far more difficult question is *when* protesters should be punished.

Consider my incident at CUNY. Should the students who disrupted the event be disciplined? This question is extremely complicated. If a student engaged in disruptive behavior during a regularly scheduled class, virtually all administrations would consider imposing some form of discipline. But it is too facile to analogize the extra-curricular event with a classroom. Invited speakers do not have the right to speak in front of a passive audience. There may be circumstances where, at the right juncture, a sharp question or comment is warranted—even before the question and answer phase begins. The proverbial excited utterance. I will indulge that possibility, because the interjection serves as effective counter-speech. Indeed, an effective speaker will use that question as an opportunity to

advance her point. And the student who asks the question must allow the speaker to answer.

Merely asking a question to prevent others from hearing the speaker's voice is a very different matter. The speaker's right is violated because he cannot convey the message he was invited to give. Additionally, other students are deprived the opportunity to hear that message. Here, discipline may be warranted—especially when the students are standing near the speaker. The risk of violence is real. Therefore, disruptions to prevent the speaker from being heard should result in disciplined. However, no discipline should be meted out when the students use silent means inside the classroom to protest, and vocal means outside the classroom to protest.

Where is the line? The case law is largely unhelpful.⁹¹ Consider the facts of *Healy v. James*. Students at Central Connecticut State College started a local chapter of Students for a Democratic Society (SDS). The President of the College refused to recognize the chapter, and the students brought suit under the First Amendment.

⁹¹ See Frederick Schauer, *The Hostile Audience Revisited*, EMERGING THREATS (Nov. 2017), <https://knightcolumbia.org/content/hostile-audience-revisited> (“The value of returning to the question of the hostile audience is heightened by the fact that existing legal doctrine on the question is, at best, murky.”).

The Court explained that, “state colleges and universities,” like the high school at issue in *Tinker* “are not enclaves immune from the sweep of the First Amendment.”⁹² Justice Powell explained “[t]he college classroom with its surrounding environs is peculiarly the ‘marketplace of ideas,’ and we break no new constitutional ground in reaffirming this Nation’s dedication to safeguarding academic freedom.”⁹³ Yet, again like in *Tinker*, the Court observed that “First Amendment rights must always be applied ‘in light of the special characteristics of the . . . environment’ in the particular case.”⁹⁴ The Court highlighted the University’s role in promoting speech on campus: “If an organization is to remain a viable entity in a campus community in which new students enter on a regular basis, it must possess the means of communicating with these students.”⁹⁵ Justice Powell added, “the organization’s ability to participate in the intellectual give and take of campus debate, and to pursue its stated purposes, is limited by denial of access to the customary media for communicating with the administration, faculty members, and other students.”⁹⁶ Those “means” and

⁹² Healy, 408 U.S. at 180 (1972).

⁹³ *Id.* at 180-81.

⁹⁴ *Id.* at 180.

⁹⁵ *Id.* at 181.

⁹⁶ *Id.* at 181-82.

“media” would include the ability to host outside speakers that are able to speak.

But what about when members of that group—either Students for a Democratic Society or the Federalist Society—cause a disruption? The Court admitted that the University may require student groups to “affirm that they intend to comply with reasonable campus regulations.”⁹⁷ And what if students “violate the rules?” Then, Justice Powell observed, the university “may also impose sanctions” “to assure that the traditional academic atmosphere is safeguarded.”⁹⁸ But those actions must be restrained. “While a college has a legitimate interest in preventing disruption on the campus, which under circumstances requiring the safeguarding of that interest may justify such restraint, a ‘heavy burden’ rests on the college to demonstrate the appropriateness of that action.”⁹⁹

V. CONCLUSION

I end this essay on an admittedly unsatisfying note. I am not confident courts can PROVIDE meaningful standards that consider the rights of all parties involved. Campus disruptions are fluid and dynamic events. Judicial review months, or even

⁹⁷ *Id.* at 193.

⁹⁸ *Id.* at 194.

⁹⁹ *Id.* at 184.

years, later is largely unhelpful. By the time all of the appeals are exhausted, the students will have graduated, the speakers will have moved onto other topics, and the story will be long forgotten.

The critical moment is when the speaker, the students, and the demonstrators come face-to-face. How the university handles that moment, in the moment, will define how free speech is promoted on the campus. Settlements or consent decrees years later will be little more than an academic footnote. Here, the University of Chicago struck the right balance; CUNY paid lip service to free speech; and Portland State abdicated its constitutional duty.

FREE SPEECH, FAKE NEWS, AND DEMOCRACY

Alvin I. Goldman & Daniel Baker*

I. PROTECTING FREE SPEECH VERSUS PROTECTING DEMOCRACY

It is widely assumed that freedom of speech is an essential feature of democracy.¹ In the American Constitutional system, the First Amendment expresses a fundamental protection that must be honored and applied if democracy is to be maintained as the most legitimate and justifiable form of government.² As

* Alvin I. Goldman earned his B.A. at Columbia University and his Ph.D. at Princeton University. He is currently best known for spearheading the field of social epistemology, especially in his path-breaking book *Knowledge in a Social World* (Oxford, U.K., 1999). Among his contributions to other fields are many in political and legal theory, including “Toward a Theory of Social Power (1972), “What Is Democracy?” (2017), and “Speech, Truth, and the Marketplace for Ideas” (1996). The scope of his writings is reflected in the many volumes addressed to his work, such as B. McLaughlin and H. Kornblith, eds., *Goldman and His Critics* (Wiley Blackwell, 2016). He has received numerous honorary appointments and awards, including membership in the American Academy of Arts and Sciences and President of the American Philosophical Association, Pacific Division. Recently retired from Rutgers University, where he was Board of Governors and Distinguished Professor (of philosophy and cognitive science), he is now affiliated with the University of California, Berkeley.

Daniel Baker received degrees in philosophy, economics, and law from the University of Washington, the University of Cambridge, and Duke University, respectively, before earning a Ph.D. in public policy at the University of California, Berkeley. He studies the intersection of political philosophy and democratic theory with public policy, economics, and law. He is a licensed attorney in Washington State and serves as a Lecturer at the Goldman School of Public Policy, University of California, Berkeley.

¹ STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 1 (2008). See also ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948).

² “Indeed, the votes and statements of the Justices in *Guarnieri* indicate that all of the current Justices accept the basic premise that the First Amendment’s Free Speech Clause is preeminently concerned with the democratic process, and that speech relevant to self-governance receives greater protection than other forms of speech.” Ashutosh Bhagwat, *Details:*

emphasized in *Garrison v. Louisiana*, “speech concerning public affairs is more than self-expression; it is the essence of self-government.”³ Free speech and the accompanying protections of the media in the First Amendment allow citizens to inform themselves and deliberate about policy in a way that gives self-government its meaning and its effectiveness.

This is the relatively simple and basic story that students are taught as part of their primer on American government. And since freedom of speech is also hailed as a fundamental human right—embraced by a wide range of nations across the world—its centrality and significance are hard to overstate.⁴ In application however, matters are not so simple.

Specific Facts and the First Amendment, 86 S. CAL. L. REV. 1, 35 (2012) (citing *Borough of Duryea v. Guarnieri*, 564 U.S. 379 (2011)).

³ 379 U.S. 64, 74–75 (1964).

⁴ See G.A. Res. 217 (III)A, Universal Declaration of Human Rights, art. 19 (Dec. 10, 1948); G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights, (Dec. 16, 1966); European Convention for the Protection of Human Rights and Fundamental Freedoms, art. X, Nov. 4, 1950, 213 U.N.T.S. 222 (entered into force Sept. 3, 1953); American Convention on Human Rights, art. XIII, Nov. 22, 1969, O.A.S.T.S. No. 36, at 1, OEA/Ser. LJV/ 11.23 Doc. Rev. 2 (entered into force July 18, 1978); African [Banjul] Charter of Human and Peoples' Rights, art. IX, June 26, 1981, OAU Doc. CAB/ LEG/67/3/Rev.5.

Freedom of speech involves tradeoffs to weigh its value against the harms that speech can cause, and no country resolves these tradeoffs entirely in favor of protecting speech.⁵ Even among advanced democracies that have agreed to treat speech as a fundamental right, there is significant disagreement about resolving these tradeoffs.⁶ At the same time, what makes a democratic government more or less successful is itself a thorny and actively debated issue.

Recently, these debates have coalesced around the spread of “fake news”—false claims that have seemed to many commentators to undermine the effectiveness and value of democratic elections by flooding the environment with

⁵ See Tom Ginsburg, *Freedom of Expression Abroad: The State of Play*, in *THE FREE SPEECH CENTURY* 193 (Lee C. Bollinger & Geoffrey R. Stone ed., 2019).

⁶ For example, consider the differing ways that tradeoffs are resolved in the regulation of hate speech. Stephanie Farrior, *Molding the Matrix: The Historical and Theoretical Foundations of International Law Concerning Hate Speech*, 14 *BERKELEY J. INT’L L.* 1, 11–12 (1996) (citing Universal Declaration of Human Rights, *supra* note 5, Articles 7, 29) (“the right to freedom of expression is subject to the restrictions found in the general limiting clause, Article 29, as well as in Article 7, which prohibits incitement to discrimination”). For the U.S. interpretation, see *Snyder v. Phelps*, 562 U.S. 443 (2011). For the European interpretations, see *ARTICLE 19, Responding to “Hate Speech”: Comparative Overview of Six EU Countries* (2018).

disinformation.⁷ For example, a poll by the Pew Research Center between February 19 and March 4, 2019 found that “made-up news” was identified by more Americans than terrorism, illegal immigration, racism, and sexism as “a very big problem in the country today.”⁸

A recent *New York Times* op-ed, “Facebook Wins, Democracy Loses,” detailed the events of the 2016 American presidential election and reflected on its ramifications for democracy.⁹ Siva Vaidhyanathan describes it as follows:

On Wednesday, Facebook revealed that hundreds of Russia-based accounts had run anti-Hillary Clinton ads precisely aimed at Facebook users whose demographic profiles implied a vulnerability to political propaganda.... The ads ... were what the advertising industry calls “dark posts,” seen only by a very specific audience,

⁷ The *Oxford English Dictionary* defines disinformation as, “The dissemination of deliberately false information, esp. when supplied by a government or its agent to a foreign power or to the media, with the intention of influencing the policies or opinions of those who receive it; false information so supplied.” “Disinformation, n.,” OED Online (2019) (last visited Sept. 26, 2019).

⁸ Amy Mitchell, Jeffrey Gottfried, Galen Stocking, Mason Walker & Sophia Fedeli, *Many Americans Say Made-Up News is a Critical Problem that Needs To Be Fixed*, PEW RESEARCH CENTER (June 2019), https://www.journalism.org/wp-content/uploads/sites/8/2019/06/PJ_2019.06.05_Misinformation_FINAL-1.pdf (last visited Sept. 30, 2019).

⁹ Siva Vaidhyanathan, *Facebook Wins, Democracy Loses*, N.Y. TIMES (Sept. 8, 2017), <https://www.nytimes.com/2017/09/08/opinion/facebook-wins-democracy-loses.html>.

obscured by the flow of posts within a Facebook News Feed and ephemeral....

The potential for abuse is vast. An ad could falsely accuse a candidate of the worst malfeasance a day before Election Day, and the victim would have no way of even knowing it happened. Ads could stoke ethnic hatred and no one could prepare or respond before serious harm occurs.... Unfortunately, the range of potential responses to this problem is limited. The First Amendment grants broad protections to publishers like Facebook....¹⁰

The author then draws the following “strong” conclusion about the impact of these practices on democracy: “We are in the midst of a worldwide, internet-based assault on *democracy* . . . In the twenty-first century social media information war, *faith in democracy is the first casualty*.”¹¹

Vaidhyanathan claims that the spread of false information produced an “assault” on democracy.¹² But exactly what notion of democracy underlies this claim? Before agreeing with his conclusion, we should ask for more details. How exactly is democracy assaulted? If there are such assaults, how do they relate to democratic goals? Finally, how exactly is free speech

¹⁰ *Id.*

¹¹ *Id.* (italics added).

¹² *Id.*

implicated in this “assault”? Does this assault indicate that speech protections are overly broad?

In another op-ed contribution to the *New York Times*, Zeynep Tufekci presented an additional example that may be helpful to begin answering these questions.¹³ Tufekci describes a similar case in which a Facebook post featured outrageous claims about Hillary Clinton, such as the claim that Clinton had FBI agents murdered.¹⁴ Let us assume that this egregious falsehood was posted at the behest of the Trump campaign, making it false speech during a campaign. Then let us imagine a new character, Arnold, and add further details to the story for purposes of illustration. Let Arnold be an American voter who read this post about Clinton’s murders, believed the tale, and then concluded that Clinton would be a terrible president. Thus, Arnold changed his mind and voted for Donald Trump rather than Clinton.

¹³ Zeynep Tufekci, *Zuckerberg’s Preposterous Defense of Facebook*, N.Y. TIMES (Sept. 29, 2017), <https://www.nytimes.com/2017/09/29/opinion/mark-zuckerberg-facebook.html>.

¹⁴ *Id.*

Our case is one in which a falsehood is “told” to Arnold (among numerous others) by a campaign operative, and this falsehood influences his vote. How should a democratic government approach this kind of case? On the one hand, the traditional story described above, which emphasizes the importance of free speech for democracy, would seem to count against regulation of these false claims. On the other hand, these commentators seem to question that presumption and call for regulative action.¹⁵ Two categories of action might be contemplated: One consists of attempts to eliminate or reduce these kinds of postings, especially on platforms with a multitudinous readership. A second would take punitive action against some actor(s)—either against the campaign purchaser of the Facebook ad or Facebook itself. In other words, action might be taken against one or both of these actors for creating and/or distributing “fake news.” Assuming there is sufficient evidence to show that these events actually transpired, should the government make a criminal or civil case of it? Should there be

¹⁵ By focusing on public, regulative action, we set aside questions of defamation, which would address whether Clinton or other parties could bring a private action against the Trump Campaign.

statutes that enable the state to take punitive action against false campaign speech in the (hypothetical) case in question?

Anyone who sides with regulation must concede that the First Amendment jurisprudence has been very resistant to the idea that the mere falsity of a conveyed message is grounds for taking action against a speaker. To take a few examples, in *United States v. Alvarez*,¹⁶ the Court was careful to instruct that “falsity alone may not suffice to bring speech outside the First Amendment.”¹⁷ Similarly, anything recognizable as a conception of freedom of speech must entail a requirement that government, in its capacity as potential regulator, maintain a stance of evaluative neutrality vis-à-vis messages. As Justice Jackson expressed the point, “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in matters of opinion

”¹⁸

¹⁶ 567 U.S. 709 (2012).

¹⁷ *Id.* at 709.

¹⁸ *W. Va., State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

Under a broad interpretation of this doctrine, a message to Facebook users that falsely asserts that Hillary Clinton murdered FBI agents is not grounds for legal action. As Harry Kalven, an esteemed legal theorist of his era, wrote: “the state is not to umpire the truth or falsity of doctrine; it is to remain neutral.”¹⁹ Under this view, freedom of speech protects speakers’ rights to speak as they please, regardless of the truth or falsity of the message. People are not to be constrained from saying what they would like to say, i.e. from expressing their thoughts or opinions. In the present case, presumably, this interpretation implies that statutes are not legitimate (and must therefore be declared unconstitutional) when they seek to constrain based on content what speakers may say or may post in a public forum, such as Facebook. In other words, under this interpretation, the state may not determine whether particular assertions are true or false or take action against speakers who make false assertions.

The statements asserted or conveyed by these hypothetical speakers are examples of what nowadays is called

¹⁹ HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 10 (1988).

“fake news.”²⁰ There is no consensus about exactly what is meant by this expression, though.²¹ At a minimum, a working definition should take fake news to refer to false statements made by people who do not actually believe what they assert, who may even actively disbelieve those statements. Thus, they are characteristically assertions intended to be *disinformation* rather than genuine, or truthful, information. Is it appropriate for the First Amendment to preclude government from regulating the activity in question? That is, is it appropriate (within a democracy) for courts of law to protect the rights of speakers to intentionally engage in the spreading of fake news, as illustrated in our examples? If we assume that speakers are *always* within their First Amendment *rights* to say what is false, or say what

²⁰ For a background on fake news, its production and recent trends, see Hunt Allcott and Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. OF ECON. PERSPECTIVES 211, 213–17 (2017).

²¹ Edson C. Tandoc Jr., Zheng Wei Lim & Richard Ling, *Defining “Fake News,”* 6 DIGITAL JOURNALISM 137, 147 (2018). Several prominent definitions have been offered recently. Hunt Allcott and Matthew Gentzkow “define ‘fake news’ to be news articles that are intentionally and verifiably false, and could mislead readers.” Hunt Allcott and Matthew Gentzkow, *Social Media and Fake News in the 2016 Election*, 31 J. ECON. PERSP. 211, 213 (2017). David Lazar, et al., define fake news as “fabricated information that mimics news media content in form but not in organizational process or intent.” David M. J. Lazar, et al., *The Science of Fake News: Addressing Fake News Requires a Multidisciplinary Effort*, 359 SCI. 1094 (2018).

they believe to be false, it looks as though the constitutional protection of freedom of speech will exclude the creation and enforcement of government-based remedies against fake news of the kind we have just sketched.

Now, some citizens might be content with this upshot, or at least willing to accept it. Freedom of speech is so vital a component of democracy, they might say, that we should simply accept this consequence and live with it. The articles cited above indicate growing resistance to the idea that fake news is simply an unfortunate side effect to a consensus understanding of democratic free speech. In this article, we will focus on one element of this debate: regulation of false campaign speech.

While the constitutionality of such statutes is unclear, currently more than a dozen states have statutes prohibiting some form of false campaign speech.²² For example, Wisconsin's

²² Staci Lieffring, *First Amendment and the Right to Lie: Regulating Knowingly False Campaign Speech After United States v. Alvarez*, 97 MINN. L. REV. 1047, 1056 (2013). *See, e.g.*, ALASKA STAT. § 15.13.095(A) (2010); COLO. REV. STAT. § 1-13-109 (2012); FLA. STAT. ANN. § 104.271 (WEST 2008); LA. STAT. ANN. § 18:1463(C) (2011); MISS. CODE ANN. § 23-15-875 (2007); N.C. GEN. STAT. § 163-274(A)(8) (2011); N.D. CENT. CODE § 16.1-10-04 (2007); OR. REV. STAT. ANN. § 260.532 (WEST 2009); S.D. CODIFIED LAWS § 12-13-16 (SUPP. 2012); TENN. CODE ANN. § 2-19-142 (2003); UTAH CODE ANN. § 20A-11-1103 (WEST 2010); WASH. REV. CODE ANN. § 42.17A.335 (WEST 2012); W. VA. CODE ANN. § 3-8-11 (WEST 1995); WIS. STAT. ANN. § 12.05 (WEST 2004).

statute asserts, “No person may knowingly make or publish, or cause to be made or published, a false representation pertaining to a candidate or referendum which is intended or tends to affect voting at an election.”²³

False campaign speech is precisely a category into which fake news examples seem to fall when the speaker is directed by a campaign. The fact that so many states have passed statutes prohibiting false campaign speech lends further support to the notion that voters or representatives are concerned about the issue of fake news and were supportive of some regulation of false electoral assertions to protect the integrity of elections. Obviously, this kind of regulation departs from a simple, unqualified interpretation of the First Amendment, which would prohibit regulation of any speech in the public forum.²⁴ Affirming these statutes would assert that some speech in the public forum

²³WIS. STAT. ANN. § 12.05 (2018).

²⁴ See, e.g., *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964) (stating that the First Amendment reflects “a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open”).

imposes harm worthy of government action, even when weighed against the value of free speech in a democracy.

Of course, the Court need not concur with the pro-regulation policy vis-à-vis false campaign speech implied by these state statutes. It is distinctly possible that the Court would overturn some or all of these statutes if it reached that test.²⁵ For the moment, however, we are not interested in what the Supreme Court—or circuit courts—have decided or are likely to decide. Such questions will be addressed in Section IV. For now, it is sufficient to note that the existence of these statutes indicates a strong desire to consider regulation of fake news.

It is well past time to consider whether government regulation of false electoral speech or fake news can fit a justifiable interpretation of the First Amendment. That is, setting aside the prediction of whether the Court would in fact find these statutes constitutional, we ask whether they *ought* to be constitutional. No interpreters of the First Amendment contend

²⁵ In fact, both Washington's and Minnesota's bans on false campaign speech were struck down by state and federal courts of appeals, respectively. *Rickert v. State*, Pub. Disclosure Comm'n, 168 P.3d 826, 827 (Wash. 2007); *Wash. ex rel. Pub. Disclosure Comm'n v. 119 Vote No! Comm.*, 957 P.2d 691, 693 (Wash. 1998); *281 Care Comm. v. Arneson*, 638 F.3d 621, 635 (8th Cir. 2011), cert. denied, 2012 WL 2470100 (June 29, 2012).

that freedom of speech is guaranteed across the board, for all categories of speech, in all circumstances. That unqualified, or “purist,” interpretation has never been endorsed by the Supreme Court.²⁶ Although the First Amendment says “Congress shall make no law . . . abridging the freedom of speech . . . ,”²⁷ this does not confer an absolute right to speak or publish, without responsibility, whatever one may choose, nor does it give people full protection for everything they say.²⁸ In particular, there are exceptions for a few well-defined and narrowly limited categories of speech that allow for lesser protection against content regulation²⁹ including obscenity,³⁰ fighting words,³¹ child pornography,³² and defamation.³³ In short, the Court allows exceptions to the general principle of free speech. This exception should be extended to fake news and other campaign falsehoods.

²⁶ STEPHEN M. FELDMAN, *FREE EXPRESSION AND DEMOCRACY IN AMERICA* 463 (2008).

²⁷ U.S. CONST. AMEND. I.

²⁸ *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

²⁹ See Joshua Cohen, *Freedom of Expression*, 22 PHIL. & PUB. AFF. 207, 214 (1993).

³⁰ *Roth v. United States*, 354 U.S. 476, 485 (1957).

³¹ *Chaplinsky v. New Hampshire*, 315 U.S. 565, 571-72 (1942).

³² *New York v. Ferber*, 458 U.S. 747, 760-61 (1982).

³³ *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

In considering these matters, we might profitably reflect on examples of speech policy in other domains. In a recent article, Jeffrey Howard provides an instructive example concerning speech that advocates criminal conduct.³⁴ Howard reminds us that the U.S. Supreme Court insists that such speech should be protected, not suppressed or regulated.³⁵ In the case of *Brandenburg v Ohio*, the Court affirmed sweeping protection for such speech.³⁶ Except for emergency cases in which the speech will cause imminent harm, it must be protected. The upshot, under this ruling, is to protect criminal actions that many people would intuitively consider highly worthy of punitive action.³⁷

Here are two (actual) examples that Howard considers. In 2015, a husband and wife in San Bernardino, California, shot and killed fourteen people. They were apparently inspired by exposure to the extreme cleric Anwar al-Awlaki, whose YouTube video advocated the duty to kill Americans. Under American law, al-Awlaki could not be convicted for his speech

³⁴ Jeffrey W. Howard, *Dangerous Speech*, 47 PHIL. & PUB. AFF. 208 (2019).

³⁵ *Id.* at 209.

³⁶ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969).

³⁷ Howard, *supra* n. 35, at 209.

(which Howard labels “dangerous speech”).³⁸ Similarly, in 2019, a man in Christchurch, New Zealand, entered two mosques and killed 51 people, having been radicalized by the Norwegian white supremacist, Anders Breivik, who himself had murdered seventy-seven people in 2012. Again, under American law, Breivik would not have been culpable for his inflammatory speech. Because websites and online videos inciting murder typically do not cause harm immediately, their suppression would be deemed an unconstitutional violation of the legal right to freedom of expression.³⁹

This American perspective on “dangerous speech” is by no means universally shared, as Howard points out.⁴⁰ Indeed, it stands in sharp contrast with the law of the United Kingdom, where encouraging terrorism is itself deemed a crime. The British example, moreover, is emulated in most liberal democracies’ treatment of dangerous speech.⁴¹ If these countries are “right,” the American judiciary must have this matter wrong.

³⁸ *Id.* at 208.

³⁹ *Id.* at 209.

⁴⁰ *Id.* at 210.

⁴¹ *Id.*

Of course, the central topic of our paper is not “dangerous” speech; it is “electoral” speech. More specifically, it is false electoral speech. The point remains, however, that it would be indefensibly narrow-minded to uncritically accept existing American legal practices without due reflection, especially in light of the important relation between accurate speech and democratic desiderata, as we shall argue in Section III.

II. FREE SPEECH AND DEMOCRATIC GOALS

As noted in Section I, freedom of speech is a core feature of democracy. But what makes it so valuable or so special? Why think that a strongly maintained system of free speech is an important component of a truly democratic system of government? Even if we take it as given that democracy is the most justifiable form of government, why does it follow that free speech is needed? And why should the free speech (or free expression) system take the specific form— and interpretation— that the First Amendment of the U.S. Constitution takes? Different answers to these questions have been offered by different writers. In this section and those that follow, we

examine some sample answers and see which—if any—offer compelling answers.

In their 2017 book, constitutional scholars Erwin Chemerinsky and Howard Gillman write as follows:

Freedom of expression—which includes verbal and nonverbal behaviors that express a person’s opinion, point of view, or identity—is considered a fundamental right within our political system. The Supreme Court has called it “the matrix, the indispensable condition, of nearly every other form of freedom” and has ruled that it occupies a “preferred place” in our constitutional scheme.⁴²

Chemerinsky and Gillman acknowledge that there may be good reasons to limit speech. “[Speech] has been used to mock and bully, and to question the dignity of entire groups of people in ways that put them at risk. It has been used to objectify women, sexualize children. Speech can invade privacy or ruin a reputation ... [and] threaten national security.”⁴³ Nonetheless, they defend a preferred place for freedom of expression as

⁴² ERWIN CHERMERINSKY AND HOWARD GILLMAN, *FREE SPEECH ON CAMPUS* 22 (2017).

⁴³ *Id.* at 23.

essential for freedom of thought and essential for democratic self-governance.⁴⁴

Their account of why freedom of speech is essential to democracy proceeds as follows:

[F]reedom of speech is essential to democratic self-government because democracy presupposes that the people may freely receive information and opinion on matters of public interest and the actions of government officials. The act of voting still occurs in many autocratic societies where speech is severely limited and government officials punish people who criticize the government.... It is not the act of voting that creates a self-governing society but rather the people's ability to formulate and communicate their opinions about what decisions or policies will best advance the community's welfare.⁴⁵

Surely the last statement is a bit too quick. Receipt and expression of communication is important but not itself *sufficient* to create a self-governing society. Voting matters! If nobody but a reigning dictator has the power to vote (or enact whatever laws they wish), then ordinary citizens might communicate until they are blue in the face without creating a democratic government. Democracy is established through institutions, where formal

⁴⁴ *Id.*

⁴⁵ *Id.* at 25.

voting is critical. Suppose a vast bulk of the population is consigned to penitentiaries where they may communicate with each other but have no formal opportunity to execute their preferred plans or schemes. Communication can often be helpful, crucially so, but talk in itself will not suffice to influence government, democratic or otherwise, without institutions to implement this influence.

There are additional reasons why the power to communicate doesn't guarantee democracy. Suppose a group of citizens has the power to hack into their compatriots' devices, conveying radically misleading messages (as in the case of Arnold in Section I), and these messages are taken as true. Such widespread communication power used for deceitful ends would be seen by many to fall short of democracy because the vote does not truly represent the will of the people. Group X's power to misuse *or* misdirect group Y's communicative power can undercut the alleged democratic value of Y's communicative power. This is not to deny the importance of communication or information in helping to constitute a democracy, but a more

nuanced approach that identifies the democratic value at stake is necessary.

The same point holds for other popular approaches to democratic theory which assign great importance to information or knowledge. The oldest approach of this kind is the “marketplace of ideas” rationale for free speech.⁴⁶ This idea dates back to John Milton, who wrote, “Let her [Truth] and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.”⁴⁷ In the twentieth century, Justice Oliver Wendell Holmes articulated the same idea as follows: “the best test of truth is the power of the thought to get itself accepted in the competition of the market.”⁴⁸ Let us evaluate its claim to centrality.

The rationale begins with the assumption that a democratic society aims to get the truth: the more truth the better. It then makes the claim that the best way for society to *get* the truth is to allow everyone to express his or her viewpoints to

⁴⁶ See generally Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 33 DUKE L.J. 1, 3 (1984).

⁴⁷ JOHN MILTON, AREOPAGITICA: A SPEECH FOR THE LIBERTY OF UNLICENSED PRINTING 45 (H.B. Cotterill ed., MacMillan & Co. 1959) (1644).

⁴⁸ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

others, keeping government out of the picture. Allegedly, this will allow everyone to defend their respective views, and all will profit.

The free-marketplace-of-ideas theory is arguably the most influential argument on behalf of freedom of speech, but is it true to say that such marketplaces are optimal systems for generating true beliefs?⁴⁹ Doubts can initially be raised by the fact that no controlled experiment has been conducted that attests to the superiority of a marketplace system in a social arena. In the absence of any careful formulation and controlled study of such systems, let us reflect on a few familiar existing systems that aim to generate true beliefs. In each case we may ask: Do experienced system designers, interested in the generation of true belief, choose a free-market structure, in which everyone may speak and no governmental or supervisory agency is allowed to interfere with their speech? Have these designers studied the truth-delivering properties of this system and found that its

⁴⁹ For a prominent formulation of doubt about the free marketplace of ideas argument, see FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* CH. 2 (1982). The line of skepticism developed in the current article is complementary to, but distinct from, Schauer's.

results are superior to those of competing systems, in which, for example, only designated individuals are allowed to speak?

What we will find is that it is quite common for “selective” or “restrictive” systems to be chosen in place of “open-to-all” systems. Even where system designers are intelligent and well-intentioned, they often choose “selective” systems as superior to completely open ones.

To illustrate this, consider some examples chosen from the legal realm. Courts commonly engage in highly selective procedures. Judges admit certain individuals to testify (i.e. to speak) before the jury, whereas other individuals are excluded from delivering any testimony in court. Two categories of people are most likely to be deemed appropriate to serve as courtroom witnesses: eye-witness testifiers and expert-witness testifiers.⁵⁰ In each type of witness, the judge allows suitable individuals to testify but disallows others, depending on their relevant qualifications.⁵¹

Although rules of evidence have been subject to change over time, the general practice of conferring testimonial roles to

⁵⁰ FED. R. EVID. 602; FED. R. EVID. 702.

⁵¹ FED. R. EVID. 602; FED. R. EVID. 702.

selected individuals and denying such roles to others based on their qualifications have persisted. They either must have suitable scientific knowledge⁵² or have witnessed some event relevant to the case under litigation.⁵³ These standards are spelled out in appropriate rules of evidence (e.g., the “Federal Rules of Evidence”), which lay down rules that govern the system and considerations that should be weighed to determine if a witness should testify.⁵⁴ Nobody ever suggests that random people, who merely wish to opine on the case, are entitled to do so.

This is clearly not a free-marketplace-of-ideas system, yet it is one that is widely used and accepted despite the importance of true beliefs in the court system. Few complaints are heard from the general electorate that they are deprived of speech opportunities or that universal admissibility to speak in court would improve the system. This is a case in which the “open marketplace” for speech is a possible fact-seeking system that courts of law could adopt. But none have done so. Is it so clear

⁵² See *Daubert v. Merrill Dow Pharms.*, 509 U.S. 579, 587–95 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999).

⁵³ FED. R. EVID. 602.

⁵⁴ *Id.*

that careful reflection on political debate would lead to very different results?

The courtroom case is one of many examples where the chosen system does not feature the practice of letting everyone speak as they please. Consider another example drawn from the law. The Securities and Exchange Commission restricts what people may say while selling stocks and bonds.⁵⁵ This provision helps buyers avoid being misled or deceived by sellers' claims. Such speech restrictions obviously depart from the assumption that a free market for speech, left to itself, would best generate true beliefs and avoid error. Once again, people who are knowledgeable about business dealings are apparently not persuaded that an unhindered speech market is the best way to generate truth. While the rhetoric alleges that the marketplace system is best, experienced system designers (or evaluators) evidently feel that constraints on certain types of speech lead to a more reliable system.

The issue raised here is continuous with the central issue posed in Section I. The First Amendment, under its orthodox

⁵⁵ See 17 C.F.R. § 240.14c-6 (2019) (restricting "false or misleading statements").

interpretation, is strongly tilted toward protecting freedom of speech. Especially in political matters, even knowingly false statements may not be sufficient to incur government regulation.⁵⁶ Does this really promote democratic and truth-oriented upshots?

As has been pointed out by numerous scholars, any interpretation of the First Amendment must be constructed from its functions or purposes.⁵⁷ As Thomas Emerson argues, “Any study of the legal doctrines and institutions necessary to maintain an effective system of freedom of expression must be based upon the functions performed by the system in our society, the dynamics of its operation, and the general role of law and legal institutions in supporting it.”⁵⁸

Three major purposes have been proposed for the First Amendment.⁵⁹ The first proposal is *cognitive*. The First

⁵⁶ See *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 271 (1964).

⁵⁷ See, e.g., THOMAS I. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 5–9 (1970); ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 5 (2012).

⁵⁸ EMERSON, *supra* note 58, at 5.

⁵⁹ POST, *supra* note 58, at 6. For a survey of other justifications that have been offered for freedom of speech beyond the three major proposals, see

Amendment protection for speech is said to be “advancing knowledge and discovering truth.”⁶⁰ It is the cognitive proposal that underlies the marketplace-of-ideas theory we have just questioned. The second proposal is that the purpose of the First Amendment is *ethical*. Here, the goal of the First Amendment is said to be “assuring individual *self-fulfillment*,” so that every person can realize his or her “character and potentialities as a human being.”⁶¹ The third proposal is *political*. Here, the purpose of the First Amendment is said to be “facilitating the communicative processes necessary for successful democratic self-governance.”⁶²

Building off the ethical proposal, a popular idea behind freedom of speech goes under the label of “autonomy.” Autonomy, or individual self-fulfillment, is the “principle that all persons ought to be accorded the equal dignity to fulfill their unique individual potential.”⁶³ Emerson defended a central purpose of the First Amendment as “assuring individual self-

Leslie Kendrick, *Another First Amendment*, 118 COLUM. L. REV. 2106–12 (2018).

⁶⁰ POST, *supra* note 58, at 6 (quoting Emerson, *supra* note 58, at 6).

⁶¹ *Id.* (emphasis added).

⁶² *Id.*

⁶³ *Id.* at 10.

fulfillment.”⁶⁴ C. Edwin Baker, a prominent proponent of the autonomy conception, argued, “In making collective decisions, people should be as unrestrained as possible, not because this form of process necessarily leads to the wisest decisions, but because the process is an attempt to embody a fundamental value of liberty in the sphere of necessarily collective decisions Liberty, not democracy, is fundamental.”⁶⁵

Despite the appeal of autonomy as a fundamental value, it cannot sustain an interpretation of the First Amendment as the central purpose.⁶⁶ Autonomy can be manifested through any form of behavior, not merely communication, which undermines the privilege granted to speech in the First Amendment.⁶⁷ Robert Post convincingly dismisses the autonomy interpretation with the following argument:

If the protection of autonomy were a fundamental goal of the First Amendment, all expression equally connected to the achievement of

⁶⁴ EMERSON, *supra* note 58, at 6.

⁶⁵ C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 30 (1989).

⁶⁶ See T. M. Scanlon, *Why Not Base Free Speech on Autonomy or Democracy?*, 97 VA. L. REV. 541, 546 (2011) (arguing that “autonomy” is understood in too many different ways to capture the interests at stake in First Amendment protection).

⁶⁷ Post, *supra* note 58, at 10.

individual self-fulfillment would be accorded equal First Amendment value. But this is emphatically not the case. Much speech that may be of great importance to the autonomy of individual speakers receives no First Amendment coverage at all.⁶⁸

A specific example of this point concerns the regulation of speech by state employees:

First Amendment coverage materializes only when employee speech is about a matter “of public concern,” because only such speech is “entitled to special protection.” First Amendment doctrine attributes no constitutional significance to the importance that such speech may bear to the autonomy or self-fulfillment of an employee.⁶⁹

This serves as a counterexample to the autonomy interpretation because expression ought to have the same value to autonomy whether it is about a matter of public concern or not.⁷⁰ Special treatment for matters of public concern implies that autonomy is not the primary purpose of the First Amendment.

The political purpose of the First Amendment has been most closely associated with prominent theorists Alexander

⁶⁸ *Id.* at 10–11.

⁶⁹ *Id.* at 11–12.

⁷⁰ “Both freedom of political speech and freedom of other speech embody the same value—respect for individual liberty.” Baker, *supra* note 57, at 31. Baker unconvincingly attributes the apparent focus on political speech in First Amendment case law to pragmatic considerations, rather than a justified emphasis on political speech. *Id.* at 33–36.

Meiklejohn⁷¹ and Robert Bork.⁷² Meiklejohn and Bork each offer a version of a principle where First Amendment coverage does not extend to the autonomy interests of speakers but rather protects the rights of voters to receive information. Thus, Meiklejohn and Bork concur that political considerations provide the basis for First Amendment interpretation. However, Post extends the political or democratic conception in a fruitful way. Successful self-government requires not only that voters can influence political decisions, but also that voters share a “warranted conviction that they are engaged in the process of deciding their own fate.”⁷³ The First Amendment does not only extend to explicitly political subjects, as Bork argued,⁷⁴ but also to literary, artistic, and scientific expression.⁷⁵ Therefore, Bork

⁷¹ ALEXANDER MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* (1948), in *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* (1960).

⁷² Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 1 (1971).

⁷³ Robert C. Post, *Equality and Autonomy in First Amendment Jurisprudence*, 95 MICH. L. REV. 1517, 1523 (1997) (reviewing OWEN FISS, *LIBERALISM DIVIDED: FREEDOM OF SPEECH AND THE MANY USES OF STATE POWER* (1966)).

⁷⁴ Bork, *supra* note 64, at 28.

⁷⁵ *Miller v. California*, 413 U.S. 15, 22–23 (1973).

and Meiklejohn's principle does not correspond with well-entrenched principles of First Amendment law.⁷⁶

Post argues that these early theorists of free speech and democracy fell short because they underestimated the nature of democracy.⁷⁷ Rather than a conception of majoritarian rule focused entirely on decision-making power, democracy rests on the value of self-government, the notion that those subject to the law should experience themselves as coauthors of that law.⁷⁸ Constitutional democracies instantiate this value by ensuring that governments are responsive and subordinate to public opinion, and the First Amendment plays a necessary role by visibly guaranteeing everyone the possibility to influence public opinion.⁷⁹

⁷⁶ Post, *supra* note 58, at 16–17.

⁷⁷ *Id.* For a critical account of the democratic theories of the First Amendment under these early theorists' more limited conceptions of democracy, see Baker, *supra* note 66, at 25–37.

⁷⁸ Meiklejohn moved partially toward support for this view of democracy, extending First Amendment protection to the arts, sciences, and humanities as part of the range of communication from which the voter derives knowledge. Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 256–57. See also Harry Kalven, Jr., *The New York Times Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 221.

⁷⁹ Post, *supra* note 58, at 17.

Post's extension of the political principle interpretation does not end at the need to tolerate all views. "It follows from this analysis that First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion."⁸⁰ Understanding Post's perspective depends on appreciating the role that truth must play in a defensible conception of legitimate authority. Post is unpersuaded that a broad interpretation of First Amendment protections can apply to all areas of speech because an interpretation that is indifferent to true and false content does not live up to the standard of *knowledge*—which implies truth according to philosophical consensus—and knowledge is normatively necessary for informed public opinion.⁸¹ This leads Post to the following explanation:

If content and viewpoint neutrality is the cornerstone of the Supreme Court's First Amendment jurisprudence, the production of expert knowledge rests on quite different foundations. It depends upon the continuous exercise of peer judgment to distinguish meritorious from specious opinions. Expert knowledge requires exactly what normal First

⁸⁰ *Id.* at 18.

⁸¹ *Id.* at 7–9.

Amendment doctrine prohibits. “The First Amendment ... ‘as a general matter ... means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.’”⁸²

A broad interpretation that applied content-neutral First Amendment protection to disciplinary standards would undermine the foundations of expert knowledge.

To put the matter simply, if “the First Amendment recognizes no such thing as a ‘false’ idea,” then it cannot sustain, or even tolerate, the disciplinary practices necessary to produce expert knowledge. The creation of expert knowledge requires practices that seek to separate true ideas from false ones. A scientific journal bound by First Amendment doctrine, and thus disabled from making necessary editorial judgments about the justification and truth of submissions, could not long survive.⁸³

This leaves an apparent paradox at the heart of a theory attaching a political purpose to the First Amendment. To see themselves as coauthors of the laws that govern them, Americans should see the speech of all persons treated with toleration and equality, not decreed from higher authorities, but to ensure that public opinion is founded on truth and knowledge, disciplines

⁸² *Id.* at 9 (quoting *Nev. Comm’n on Ethics v. Carrigan*, 131 S. Ct. 2343, 2347 (2011)).

⁸³ *Id.* at 9.

must be given the latitude to distinguish reliable beliefs from unreliable beliefs, a process that depends crucially on expert authority.⁸⁴

Post calls these two values “democratic legitimation” and “democratic competence.” “Democratic legitimation” is the function the First Amendment plays when it allows citizens to see themselves as coauthors of the government and the law.⁸⁵ “Democratic competence” is the “cognitive empowerment of persons within the public discourse, which in part depends on their access to disciplinary knowledge.”⁸⁶ It captures those institutions that are necessary for the formation of public opinion, including disciplinary authority to determine which views constitute true knowledge before those ideas contribute to the formation of public opinion. As argued by democratic theorist John Dewey, “genuinely public policy cannot be

⁸⁴ *Id.* at 29–34.

⁸⁵ *Id.* at 33–34. A similar emphasis on democratic legitimacy can be found in James Weinstein, *Participatory Democracy as the Central Value of American Free Speech Doctrine*, 97 VA. L. REV. 491, 498–500 (2011). On the other hand, Steven Shiffrin rejects the value of self-government outright, adopting a far more limited conception of democracy that denies legitimacy is possible on a large scale. Steven Shiffrin, *Dissent, Democratic Participation, and First Amendment Methodology*, 97 VA. L. REV. 559, 562 (2011).

⁸⁶ Post, *supra* note 58, at 33–34.

generated unless it be informed by knowledge, and this knowledge does not exist except when there is systematic, thorough, and well-equipped search and record.”⁸⁷ A government that manipulates disciplinary knowledge sets the terms of its own legitimacy by undermining the capacity of the public to form autonomous views critical of state policy.⁸⁸

Post solves the apparent paradox between legitimation, requiring broad protection necessary for tolerating all views, and competence, requiring restrictive disciplinary authority, by separating realms.⁸⁹ Both values are always present, but for Post, within the public discourse, democratic legitimation is lexically supreme—leading to expansive protections of public speech – while outside the public discourse, there is more latitude to prioritize democratic competence by allowing disciplines latitude to police knowledge.⁹⁰

In ensuing sections, we will concur broadly with Post’s definition of values, adopting a political conception of the First Amendment and likewise distinguishing between values in

⁸⁷ JOHN DEWEY, *THE PUBLIC AND ITS PROBLEMS* 177–79 (1927).

⁸⁸ Post, *supra* note 58, at 33.

⁸⁹ *Id.* at 34.

⁹⁰ *Id.* at 34.

democratic legitimation and democratic competence. We will, however, disagree with his prioritization of these values. For Post, within the public discourse, democratic legitimation is always more important than democratic competence.⁹¹ In other words, it is more important within the public discourse to tolerate all views equally than to ensure competent and true knowledge. Thus, Post would not support regulation of fake news within the public discourse or within campaigns.

We disagree with Post's prioritization and will provide a basis for regulation of false campaign speech to protect electoral integrity in the modern speech environment.⁹² We will argue that the presence of rampant false campaign speech undermines the faith of the citizens in the soundness of the election results and in the soundness of the democracy. Thus, false campaign speech is analogous to perjury, and we will defend the necessity and appropriateness of regulation. Post's dichotomy between the public discourse (where there cannot be speech regulation) and knowledge generating disciplines and institutions (where there

⁹¹ *Id.*

⁹² *See infra* Part V.

can be speech regulation) is unsustainable, and regulation of false campaign speech may be defended under free speech values.

This is, for now, just a sketch. Before building on that sketch, it is worth pausing over a different approach to speech theory that is more widely endorsed and would also protect a very wide range of speech and expression.

III. DEMOCRACY, VOTING, AND DISINFORMATION

In Section I, we encountered the problem of how a broad interpretation of the First Amendment can be compatible with a commitment to democracy when the election environment is bombarded with fake news. Given the strong protection that the First Amendment confers on political speech,⁹³ how can a legal-political system that aspires to be a leading democracy deal successfully with the case—discussed in Section I—of fake news interference in an American election? It seems to open a wide door to discursive encroachment on voter decision-making that (in our hypothetical case) could easily lead to an undermining of voter influence and an inability of voters to ensure (or even make

⁹³ “We have long recognized that not all speech is of equal First Amendment importance. It is speech on *matters of public concern that is at the heart of the First Amendment’s protection*.” *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 758–59 (1985) (internal quotations omitted) (emphasis added).

it probable) that elections reflect the intentions of the voters. In other words, if democracy is open to pervasive campaigns of disinformation, this may well undermine a significant part of the value that we expect voting to deliver.

Let us begin with a simple model of the aim and structure of representative democracy. This model is formulated by Alvin Goldman (the lead author of this article) in his book, *Knowledge in a Social World* (1999).⁹⁴

Representative democracies feature a division of labor. Ordinary citizens are not expected to devise or execute the best political means to their political ends. That is what representatives are hired to do. Ordinary citizens have the job of selecting officials who will do the best job of achieving their political ends.

What should we assume about a citizen's goals or ends? These may range from egoistic to altruistic ends of many varieties. The result of a candidate being elected and holding office for a given term, let us suppose, is a large combination of

⁹⁴ ALVIN I. GOLDMAN, *KNOWLEDGE IN A SOCIAL WORLD* 315–48 (1999).

(politically related) outcomes. Call any such combination of outcomes an “outcome set.” Each possible outcome might be conceptualized as some economic or societal state of affairs, such as the unemployment level, the cost of living, the availability of healthcare, educational opportunities, etc.

Continuing with the Goldman model,⁹⁵ assume that each voter has a (tacit) preference ordering over the outcome-sets that might occur. For each pair of possible outcome-sets, a voter either (tacitly) prefers the first outcome-set to the second, prefers the second to the first, or is indifferent between the two. Given a few additional assumptions, we can then draw some general conclusions about how voters will decide to cast their votes.

First, assume that all electoral races have exactly two candidates.⁹⁶ Then a voter who plans to vote in a race featuring candidates C and C* would first want to compare the outcome-set that would occur if C were elected to the outcome-set that would occur if C* were elected. If voter V judges (believes) that the outcome-set that would be generated by C would be superior from her perspective to the outcome-set that would be generated

⁹⁵ *Id.*

⁹⁶ For further detail on this scenario, *see id.* at 320–25.

by C^* , then V would vote for candidate C . And if V judges that the outcome-set that would be generated by C^* would be preferable from her perspective to the outcome-set generated by C , then V would vote for C^* .⁹⁷

Given these relations, the crucial question for V to consider is: Which of these two candidates, if elected, would generate a better outcome-set than the other? Call this the “Core Voter Question.” To have a determinate answer, however, the question must be relativized to a specified voter and his preference ordering. Obviously, each voter who poses the question poses a different question than the other voters pose, because each references his or her own preference-ordering. For analogous reasons, which answers are the true, or correct, answers to their person-relative questions will differ from voter to voter. For example, the answer “candidate C would be better” might be true for one voter while “candidate C^* would be better” might be true for another voter.⁹⁸

⁹⁷ Ties are ignored in the interest of simplicity.

⁹⁸ Since the truth value of these types of statements depends on the ensuing outcome-sets that transpire, which in turn depend on actions taken by the

We now ask how an individual voter's choice of a candidate affects that voter's goal satisfaction, and, more generally, how the choices of the many voters affect the welfare—or "success"—of the electorate as a whole. Relatedly, we ask how the larger electorate's success in selecting the "correct" candidates—"correct" from their point of view—bears on the *democratic* "quality" of the political transaction.

We can call the answer to such a question "Core Voter Knowledge."⁹⁹ The term "knowledge" is used here in a weak sense in which it means simply "true belief" (whether or not the belief is justified). Thus, if voter V believes that the proposition "Jones is the best candidate [for me]," then this belief will be true as long as Jones would indeed generate an outcome-set that is superior to that of the other candidate (as judged by V's preference ordering). Of course, merely guessing will not reliably generate a high proportion of accurate Core Voter Beliefs. But

winning candidate plus actions taken by other political (and non-political) "players," one might wonder whether there is any robust truth of the matter at the time that a voter casts his or her ballot. However, we are presupposing a deterministic framework which presumes that (given a specific set of electoral votes, etc.) there will be a very complex set of ensuing events that fix a determinate truth value (given the preference orderings of the voter in question).

⁹⁹ GOLDMAN, *supra* note 95, at 323.

well-formed background beliefs may succeed in promoting a high percentage of Core Voter Knowledge.¹⁰⁰

Now let us return to the case of Arnold and the anti-Hillary Clinton ad on Facebook, falsely claiming that Clinton had FBI agents killed. Let us say that Arnold and many others read the posted ad and believe its contents.¹⁰¹ They therefore revise their beliefs about the value of the outcome-set that would result from Clinton's being elected compared with the value of the outcome-set of Trump being elected. In the language of our model, these revised beliefs impact their Core Voter Knowledge—their beliefs about which candidate will bring about a better outcome-set, by their own lights.

With these changes of belief, those voters now favor Trump over Clinton and vote accordingly, changing their answer to the Core Voter Question. Hence, many of these voters (including Arnold) cast their votes for Trump, where those votes

¹⁰⁰ *Id.* at 325.

¹⁰¹ We will address whether this assumption is reasonable in Section V, where we offer three reasons to believe that enough voters will believe false campaign speech to undermine the integrity of the election process. See, *infra*, sec. V.

are actually inaccurate assessments of the comparative merits (or demerits) of what would ensue if Trump were elected (as compared with what would ensue if Clinton were elected), a decrease in Core Voter Knowledge.¹⁰²

Turning to the real world now—which is not far removed from the world we have been describing—there is ample evidence from Special Counsel Robert Mueller’s inquiry that massive disinformation campaigns occurred and that the disinformation may have swung the result of the 2016 Presidential election.¹⁰³ While it is difficult to say in such a complex system if those campaigns actually turned this election, it is easier to determine that there is good reason for us, and *for fellow voters*, to believe this decrease in Core Voter Knowledge impacted the integrity of the election results. This pervasive disinformation gives citizens reason to doubt themselves as genuine coauthors of their government, which is to say they have reason to doubt the legitimacy of the election results.¹⁰⁴

¹⁰² Goldman, *supra* note 95, at 328.

¹⁰³ *See generally* KATHLEEN HALL JAMIESON, CYBERWAR (2018); ROBERT S. MUELLER, III, REPORT ON THE INVESTIGATION INTO RUSSIAN INTERFERENCE IN THE 2016 PRESIDENTIAL ELECTION, VOL. I (2019).

¹⁰⁴ *See* Post, *supra* note 58, at 17.

Many citizens would say that this doubt has indeed been a “loss” or a “harm” suffered by American democracy, even setting aside the anti-democratic inclinations of the Trump administration. An ill-gotten win, or even the perception of such a win, is a defeat for democracy because it undermines the result’s status as the collective will of the democratic process. Although not identical to one in which an election has been manipulated directly through a corrupt process, a similar doubt is produced when citizens cannot trust that their own vote or their fellow citizens’ votes are free from systematic distortion.

The medium by which our hypothetical Arnold was attacked shares with its real counterpart the same pathway to influence: *disinformation*. Disinformation is false information that is intended to mislead the hearer, as opposed to misinformation, which is merely false.¹⁰⁵ We have just argued that disinformation, when directed to voters, can harm a democracy by undermining the real or perceived legitimacy of its institutions. Our central question then is whether this harm to

¹⁰⁵ *Disinformation*, RANDOM HOUSE WEBSTER’S COLLEGE DICTIONARY (1991).

legitimacy is serious enough to be met by government action to deter such disinformation.

Thus far, there seems to be no movement within the federal government or judicial system to enact or prepare for such a step. But there are signs that ordinary people, and players engaged in various sectors of the media, sense the need and appropriateness of taking action. In July 2018, Facebook announced that it would begin removing false information that could lead to people being physically harmed.¹⁰⁶ This was largely a response to episodes in Sri Lanka, Myanmar, and India, in which rumors that spread on Facebook led to real world attacks on ethnic minorities.¹⁰⁷ To be sure, physical harm is not the same as electoral harm, but many American citizens would say that the political harm suffered also rises to a sufficient degree that action is warranted. We should not forget that more than a dozen American states have adopted statutes that allow for actions to be taken against false campaign speech.¹⁰⁸

¹⁰⁶ Sheera Frenkel, *Facebook to Remove Misinformation That Leads to Violence*, N.Y. TIMES (July 18, 2018), <https://www.nytimes.com/2018/07/18/technology/facebook-to-remove-misinformation-that-leads-to-violence.html>.

¹⁰⁷ *Id.*

¹⁰⁸ *See, supra*, n. 23.

The focus then turns to the Supreme Court, which ultimately must uphold these statutes under the First Amendment if they are to be enforced. Are there any grounds to interpret such a regulation as fitting the purpose of the First Amendment? We must ask whether there are any grounds to interpret such a regulation as fitting the purpose of the First Amendment.

IV. FALSE CAMPAIGN SPEECH AND THE CONSTITUTION

The stakes are high when a democracy moves to regulate false campaign speech. On one hand, “the First Amendment ‘has its fullest and most urgent application’ to speech uttered during a campaign for political office.”¹⁰⁹ On the other hand, concerns about political legitimacy are at their most poignant when they impact the vote, the mechanism through which voters exert democratic voice. The importance of these democratic ends has been acknowledged by the Court as limiting the protection of the First Amendment. “That speech is used as a tool for political ends does not automatically bring it under the protective mantle

¹⁰⁹ *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 223 (1989) (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971)).

of the Constitution. For the use of the known lie as a tool is at once at odds with the premises of democratic government . . . ”¹¹⁰

The question then is how to reconcile these competing aims—protection of the value of free speech during a campaign against the harm that a known lie or falsehood can do to the legitimacy and premises of democratic government.

“[A]s 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.”¹¹¹ This demands that content-based restrictions—where regulation of false campaign speech is a content-based restriction—are “presumed invalid” so that the “Government bears the burden of showing their constitutionality.”¹¹² Presumptive invalidity follows the tradition of broad First Amendment protections against content based regulation absent specific categories of lesser protections established by the Court, such as incitement,

¹¹⁰ *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964).

¹¹¹ *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 564, 573 (2002) (internal quotations omitted) (quoting *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60, 65 (1983)).

¹¹² *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 660 (2004).

obscenity, defamation, “fighting words,” child pornography, fraud, true threats, and imminent threats.¹¹³

A. False Statements and United States v. Alvarez

Any consideration of laws regulating false campaign speech and fake news must consider carefully the recent case *United States v. Alvarez*.¹¹⁴ In *Alvarez*, the respondent appealed his conviction under the Stolen Valor Act,¹¹⁵ which made it a crime to falsely claim receipt of military medals, with an enhanced penalty for false claiming the Congressional Medal of Honor, as Alvarez had claimed.¹¹⁶ *Alvarez* is particularly pertinent to our inquiry because it was a content-based regulation of false speech, where the respondent told an intended, undisputed lie regarding his service history.

Citing numerous precedential cases suggesting that false statements have no value and hence no First Amendment protection, the Government argued that the Stolen Valor Act

¹¹³ See, *supra*, n. 30–34.

¹¹⁴ 567 U.S. 709 (2012).

¹¹⁵ 18 U.S.C. § 704 (2018).

¹¹⁶ *Alvarez*, 567 U.S. at 714.

should be upheld.¹¹⁷ For instance, the Court has stated that “[f]alse statements of fact are particularly valueless [because] they interfere with the truth-seeking function of the marketplace of ideas. . . .”¹¹⁸ Furthermore, false statements “are not protected by the First Amendment in the same manner as truthful statements.”¹¹⁹ “Spreading false information in and of itself carries no First Amendment credentials,”¹²⁰ and “there is no constitutional value in false statements of fact.”¹²¹

Nonetheless, Justice Kennedy, speaking for a plurality of four Justices with two concurring, rejected the argument that false speech should be in a general category that is presumptively unprotected.¹²² Kennedy identified three features that speak against a falsehood as a category. First, each precedent case featured a “legally cognizable harm”¹²³ associated with the false statement. While falsity was not irrelevant to those decisions, it did not support a categorical rule that false statements receive no

¹¹⁷ *Id.* at 709.

¹¹⁸ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

¹¹⁹ *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

¹²⁰ *Herbert v. Lando*, 441 U.S. 153, 171 (1979).

¹²¹ *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1974).

¹²² *Alvarez*, 567 U.S. at 722.

¹²³ *Id.* at 719.

First Amendment protection.¹²⁴ Second, following *New York Times Co. v. Sullivan*,¹²⁵ the “Court has been careful to instruct that falsity alone may not suffice to bring the speech outside the First Amendment. The statement must be a knowing or reckless falsehood.”¹²⁶ Thus, a high mens rea standard of “actual malice,” entailing knowledge or reckless disregard, must accompany a false statement.¹²⁷ Third, the statute must be narrowly tailored to a legitimate government interest.¹²⁸ The Stolen Valor Act was not sufficiently narrowly tailored to meet this standard.¹²⁹

These restrictions reflect Kennedy’s application of a strict scrutiny standard. In his concurrence, Justice Breyer joins with the plurality’s invalidation of the Stolen Valor Act, but does so under a lower level of intermediate scrutiny.¹³⁰ This disagreement leaves some window of uncertainty as to the level of scrutiny that should apply to a regulation of false campaign

¹²⁴ *Id.* at 719.

¹²⁵ 376 U.S. 254 (1964).

¹²⁶ *Alvarez*, 567 U.S. at 719 (citing *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 280 (1964)).

¹²⁷ *Sullivan*, 376 U.S. at 270–80.

¹²⁸ *Alvarez*, 567 U.S. at 725.

¹²⁹ *Id.* at 728–29.

¹³⁰ *Id.* at 730 (Breyer, J., concurring).

speech. In *281 Care Comm. v. Arneson*,¹³¹ the Eighth Circuit applied *Alvarez* to review the Minnesota Fair Campaign Practices Act¹³²—a statute banning false campaign speech¹³³—and applied a strict scrutiny standard, ruling that Breyer’s intermediate scrutiny would not apply to a statute banning false campaign speech.¹³⁴ Because political speech occupies the core of the protection of the First Amendment, whereas *Alvarez* applied only to false, non-political speech, strict scrutiny was the appropriate standard.¹³⁵ While this issue remains contestable, we will proceed assuming strict scrutiny will apply.

While *Alvarez* did not rule directly on false campaign speech, numerous commentators have argued that it puts those statutes in constitutional peril. “The result of *Alvarez* is that laws regulating false campaign speech are in even more constitutional trouble than they were before, and any attempts to regulate such speech will have to be narrow, targeted, and careful in their

¹³¹ 766 F.3d 774 (8th Cir. 2014).

¹³² MINN. STAT. § 211B.06 (2018), *invalidated by* 281 Care Comm. v. Arneson, 766 F.3d 774, 785 (8th Cir. 2014).

¹³³ See Lieffring, *supra* note 23, at 1059.

¹³⁴ *Arneson*, 766 F.3d at 784.

¹³⁵ See Joel Timmer, *Fighting Falsity: Fake News, Facebook, and the First Amendment*, 35 CARDOZO ARTS & ENT. L.J. 669, 680 (2017).

choice of remedies.”¹³⁶ These concerns reflect the difficulty of meeting the strict scrutiny standard presumably applied to false campaign speech in a political election.

B. Legally Cognizable Harm

Alvarez presents a difficulty for false campaign speech laws because it disallows the identification of false speech as a category for less protection. The plurality distinguishes precedent cases indicating lesser protection for false statements because they featured “some other legally cognizable harm associated with a false statement.”¹³⁷ It is important here to carefully consider the examples used to establish this distinction. One form of false speech that can unquestionably be regulated is perjury. In distinguishing, Kennedy states,

It is not simply because perjured statements are false that they lack First Amendment protection. Perjured testimony ‘is at war with justice’ because it can cause a court to render a ‘judgment not resting on truth.’ *In re Michael*, 326 U.S. 224, 227 (1945). Perjury undermines the function and

¹³⁶ Richard L. Hasen, *A Constitutional Right to Lie in Campaigns and Elections?*, 74 MONT. L. REV. 53, 56 (2013). See also Lieffring, *supra* note 23, at 1061, 1076; Timmer, *supra* note 130, at 681–82.

¹³⁷ *Alvarez*, 567 U.S. at 719.

province of the law and threatens the integrity of judgments that are the basis of the legal system.¹³⁸

The legally cognizable harm present in perjury but lacking in *Alvarez* is that perjury *undermines the function of the law* and *threatens the integrity* of the institution. This is precisely the type of concern we identified in Section III, where we argued that disinformation undermines the function of elections in legitimating the government and threatens the integrity of the electoral institution. If such a harm is cognizable in perjury, then it must also be cognizable in false campaign speech.

Similarly, the plurality finds that statutes banning false representation of oneself as speaking on behalf of the government to “protect the integrity of Government processes, quite apart from merely restricting false speech.”¹³⁹ Such statutes protect the good repute and dignity of government service, setting aside whatever financial or property loss may result.¹⁴⁰ Again, this example shows that mere falsity is being distinguished from cases where the false speech undermines the function and integrity of the process. Where false campaign

¹³⁸ *Id.* at 720–21 (citing *United States v. Dunnigan*, 507 U.S. 87, 97 (1993)).

¹³⁹ *Id.* at 721.

¹⁴⁰ *United States v. Lepowitch*, 318 U.S. 702, 704 (1943).

speech and disinformation undermine the electoral process, the distinction in *Alvarez* does not speak against it.

C. Actual Malice

A second challenge is to show that false campaign speech exhibits “actual malice,” a standard that has limited action on false claims since *New York Times Co. v. Sullivan* in 1964.¹⁴¹ Recognizing that incorrect statements are inevitable in a healthy political debate, *Sullivan* protects some false speech to carve out “breathing space” for political discourse to survive.¹⁴² Thus, to bring a libel action against critics of a public official, it must be demonstrated that the critic exhibited “actual malice,” with knowledge that the statement is false or with reckless disregard to its falsity.¹⁴³ Any lesser standard would have a chilling effect on protected speech because would-be critics would fear the expense and difficulty of demonstrating the truth of the criticism.¹⁴⁴

¹⁴¹ 376 U.S. 254 (1964).

¹⁴² *Id.* at 271–72.

¹⁴³ *Id.* at 279–80; Lee Goldman, *False Campaign Advertising and the Actual Malice Standard*, 82 TUL. L. REV. 889, 900 (2008).

¹⁴⁴ *Sullivan*, 376 U.S. at 279.

The actual malice standard, extended to false campaign speech in dicta in *Brown v. Hartlage*, is an exacting standard.¹⁴⁵ It is not enough to show ill will, gross negligence, or reliance on biased testimony.¹⁴⁶ Rather, it must be shown that the defendant made a false statement with a “high degree of awareness of . . . probable falsity.”¹⁴⁷ This standard presents a serious evidentiary burden on any prosecutor seeking to convict under a false campaign speech statute.

Some doubt remains that the actual malice standard will be extended to false campaign speech. Lee Goldman argues that *Brown* is weak precedent that does not reflect subsequent reasoning of the Court. Where in *Brown*, the Court recognized the State’s interest in regulating the electoral process as “legitimate,” recent cases have taken a stronger position.¹⁴⁸ In *McConnell v. FEC*, the Court stated, “the electoral process is the very ‘means through which a free society democratically translates political speech into concrete governmental

¹⁴⁵ 456 U.S. 45, 61 (1982); Goldman, *supra* note 138, at 902–04.

¹⁴⁶ Goldman, *supra* note 138, at 905.

¹⁴⁷ *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968).

¹⁴⁸ Goldman, *supra* note 138, at 907.

action.”¹⁴⁹ Under this more significant constitutional interest, there is “no place for a strong presumption against constitutionality, of the sort often thought to accompany the words ‘strict scrutiny.’”¹⁵⁰ Goldman argues instead that a balancing standard is more appropriate, which would be accompanied by a lower mens rea standard.¹⁵¹ We flag this argument here, though our position remains viable if actual malice is applied.

D. Narrow Tailoring

The level of scrutiny determines the extent that regulations must be tailored to meet a compelling government interest. The intermediate scrutiny contemplated by the concurrence in *Alvarez* requires a “fit between statutory ends and means.”¹⁵² This level of scrutiny takes “account of the seriousness of the speech-related harm the provision will likely cause, the nature and importance of the provision’s

¹⁴⁹ 540 U.S. 93, 137 (quoting *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377, 401 (2000) (Breyer, J., concurring)).

¹⁵⁰ *Id.*

¹⁵¹ Goldman, *supra* note 138, at 907–09.

¹⁵² *United States v. Alvarez*, 567 U.S. 709, 730 (2012) (Breyer, J., concurring).

countervailing objectives, the extent to which the provision will tend to achieve those objectives, and whether there are other, less restrictive ways of doing so.”¹⁵³ In contrast, strict scrutiny “requires the Government to prove that the restriction ‘furthers a compelling interest and is narrowly tailored to achieve that interest.’”¹⁵⁴ Each of these standards shares the element of a compelling government interest, with the distinction being how narrowly the regulations must be tailored to achieve that interest.

The outline of a compelling interest in electoral integrity has been recognized by the Court.¹⁵⁵ In *Eu v. San Francisco Democratic Central Committee*, the Court found “a compelling interest in preserving the integrity of its election process.”¹⁵⁶ In *Crawford v. Marion Cnty. Election Bd.*, the Court found an independent interest in “public confidence in the integrity of the electoral process.”¹⁵⁷ The Court has also found that an interest in preventing fraud and libel “carries special weight during election campaigns when false statements, if credited, may have serious

¹⁵³ *Id.*

¹⁵⁴ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 340 (2010).

¹⁵⁵ *Timmer*, *supra* note 130, at 680.

¹⁵⁶ 489 U.S. at 231.

¹⁵⁷ 553 U.S. 181, 197 (2008).

adverse consequences for the public at large.”¹⁵⁸ Citing *Eu*, the Court concluded, “a State has a compelling interest in protecting voters from confusion and undue influence.”¹⁵⁹

This compelling interest is not enough on its own. For a regulation of false campaign speech to survive strict scrutiny, the government must show that the restriction is “actually necessary” to achieve this compelling government interest.¹⁶⁰ Actual necessity requires the government to demonstrate three things. First, there must be a “direct causal link between the restriction imposed and the injury to be prevented.”¹⁶¹ Overturning the Stolen Valor Act, the Court noted that the government pointed to “no evidence” to establish this causal connection.¹⁶² Second, it must show why “counterspeech would not suffice to achieve its interest.”¹⁶³ Third, it must show that

¹⁵⁸ *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 349 (1995).

¹⁵⁹ *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (citing *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 228–29 (1989)).

¹⁶⁰ *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (quoting *Brown v. Entm’t Merchs. Ass’n.*, 564 U.S. 786, 799 (2011)).

¹⁶¹ *Id.*

¹⁶² *Id.* at 726.

¹⁶³ *Id.*

regulating speech is “the least restrictive means among available, effective alternatives.”¹⁶⁴

We will not offer exact language for a statute regulating false campaign speech to meet the strict demands of narrow tailoring. We will have to leave that task for a later day and authors with more expertise in constitutional law.¹⁶⁵ We can, however, offer evidence to demonstrate a causal connection between false campaign speech and harm to electoral integrity, the compelling government interest at hand. This, we hope, will provide defenders of statutes regulating false campaign speech with one arrow in their quiver to make the case.

Before turning to that argument, we will provide an overview of the state of the law, as we understand it. We began emphasizing that the Court interprets the First Amendment in its “fullest and most urgent application” when considering speech in the course of a political election. This urgency has led the Court to look on regulation of false speech with a great deal of skepticism, and this skepticism shines through when we see how

¹⁶⁴ *Id.* at 729 (quoting *Ashcroft*, 535 U.S. at 666).

¹⁶⁵ See generally Lieffring, *supra* note 23, at 1070-76 (offering one analysis of the steps necessary for a statute to meet narrow tailoring).

strictly it scrutinizes any regulation of false speech. *Alvarez* makes clear that false speech alone will not be recognized as a category of speech deserving lesser protection, but regulation of false campaign speech is not only about falsity. False campaign speech threatens the integrity of the election process and the perception thereof, both of which have been acknowledged by the Court as legitimate government interests. Neither of these interests was at stake in *Alvarez*.¹⁶⁶ Nonetheless, it is still reasonably likely that the Court will impose strict scrutiny on laws regulating false campaign speech, which requires a showing of cognizable harm, actual malice, and narrow tailoring. Given the skepticism of the Court, this is a tough case on all counts, but we hope to demonstrate that a cognizable harm to a legitimate government interest occurs in the presence of false campaign speech, an important step toward defending regulation.

V. FAKE NEWS UNDERMINES DEMOCRATIC COMPETENCE

Our task in Section V is to provide evidence that regulation of fake news and false campaign speech is “actually

¹⁶⁶ See *supra* Section IV.A.

necessary” to meet the compelling government interest recognized in *Eu* of preserving the integrity of the election process. Recall from *Alvarez* that the government must show three things to demonstrate that a regulation of speech is “actually necessary” to achieve a compelling government interest.¹⁶⁷ First, there must be a direct causal link between the restriction on speech and the injury to be prevented. Second, the government must show that counter-speech would not suffice to achieve the interest. Third, regulating speech must be the least restrictive means to prevent injury to the compelling interest.¹⁶⁸

A. A Direct Causal Link

In Section III, we introduced a framework where a voter, Arnold, hears a piece of fake news and changes his vote on that basis, and we argued that such a result should be seen as a harm to democracy.¹⁶⁹ For the sake of demonstration, we postulated without argument that Arnold was influenced by a particular piece of fake news. Here, we ask whether there is good reason to

¹⁶⁷ *United States v. Alvarez*, 567 U.S. 709, 725 (2012) (quoting *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 799 (2011)).

¹⁶⁸ *Id.* at 729 (quoting *Ashcroft v. Am. Civil Liberties Union*, 535 U.S. 656, 666 (2004)).

¹⁶⁹ *See supra* Section III.

believe that sufficient voters will in fact land in Arnold's position, influenced by false campaign speech to alter their vote. This would establish the causal link between false campaign speech and a harm to electoral integrity. There are three reasons why we might believe that voters will believe false statements of fact when they are offered in the context of a campaign.

Since Scottish philosopher Thomas Reid offered reliance on the testimony of others as a first principle in his studies of human knowledge, philosophers have recognized that reliance on others is a natural human propensity.¹⁷⁰ Acceptance of testimony is fundamental because it necessarily predates reason and judgment. A child would perish for lack of knowledge if he did not have a natural predisposition to believe in the truth of his teacher's statements.

Modern philosophers have added to this natural propensity to argue that it is justified to grant *prima facie* authority to others. As Tyler Burge argues, "Acceptance underlies language acquisition. Lacking language, one could not

¹⁷⁰ THOMAS REID, *ESSAYS ON THE INTELLECTUAL POWERS OF MAN* 601 (1785).

engage in rational, deliberative activity, much less the primary forms of human social cooperation.”¹⁷¹ Because reliance underlies rationality and judgment, and since we must trust the veracity of our own judgment to avoid radical skepticism, we are required as a matter of consistency to grant *prima facie* authority to the word and testimony of others.¹⁷² In short, it is natural and justified to believe the word of others absent good reason not to do so.

Prima facie or fundamental authority can be overridden by contrary factors, such as evidence about the trustworthiness of the speaker, which we will address shortly.¹⁷³ However, the fundamental role that reliance plays in human reason gives us reason to believe that people will continue to trust testimony. Reid wisely observes this continuing tendency to trust others:

But when our faculties ripen, we find reason to check that propensity to yield to testimony and to authority, which was so necessary and so natural in the first period of life. . . . Yet, I believe, to the

¹⁷¹ Tyler Burge, *Content Preservation*, 102 PHIL. REV. 457, 468 (1993).

¹⁷² Richard Foley, *Egoism in Epistemology*, SOCIALIZING EPISTEMOLOGY: THE SOCIAL DIMENSIONS OF KNOWLEDGE 53, 63 (Frederick F. Schmitt ed., 1994).

¹⁷³ See generally Burge, *supra* note 166, at 467 (“Justification in acquiring beliefs from others may be glossed, to a first approximation, by this principle: A person is entitled to accept as true something that is presented as true and that is intelligible to him, unless there are stronger reasons not to do so.”) (emphasis omitted).

end of life, most men are more apt to go into this extreme than into the contrary; and the natural propensity still retains some force.¹⁷⁴

The second reason we may expect voters to be influenced by false campaign speech is that the speaker frequently has more information than the voter. Whereas the first reason argued that voters are predisposed and justified to grant fundamental authority to testimony, this reason argues that they have good reason to grant derivative authority to others. Derivative authority follows from reasons to consider the speaker reliable.¹⁷⁵ The information imbalance between a voter who has little time to inform herself on politics and the political or media speaker is often profound. This imbalance gives the voter reason to trust the veracity of a piece of false campaign speech.

For a skeptical reader, the first two reasons may be unconvincing. Surely, voters must know that political operatives have built-in incentives to deceive, and these incentives should cause voters to doubt the fundamental and derivative authority entailed by the first two reasons. Expecting voters to take an

¹⁷⁴ REID, *supra* note 165, at 601.

¹⁷⁵ Foley, *supra* note 167, at 55.

unbiased and dispassionate view of the evidence surrounding a piece of fake news or false campaign speech would ignore a whole literature suggesting that voters view evidence through the prism of their preexisting ideological affiliation.

As shown in the seminal study by Lord, Ross, and Lepper, people tend to take evidence that confirms their prior beliefs at face value, while subjecting evidence that disconfirms prior beliefs to intense critical evaluation.¹⁷⁶ This result was extended by Ditto and Lopez, who found that less information is required and less cognitive processing is devoted to reach conclusions that we favor as opposed to conclusions we disfavor.¹⁷⁷ This lack of skepticism for confirming evidence is not a consequence of the intelligence of the listener. In fact, some evidence suggests that more intelligent listeners marshal that intelligence to craft better explanations for the positions they

¹⁷⁶ Charles G. Lord, Lee Ross, & Mark R. Lepper, *Biased Assimilation and Attitude Polarization: The Effects of Prior Theories on Subsequently Considered Evidence*, 37 J. PERSONALITY & SOC. PSYCHOL. 2098 (1979).

¹⁷⁷ Peter H. Ditto & David F. Lopez, *Motivated Skepticism: Use of Differential Decision Criteria for Preferred and Nonpreferred Conclusions*, 63 J. PERSONALITY & SOC. PSYCHOL. 568, 579 (1992).

otherwise desire to believe.¹⁷⁸ A product of these effects is that balanced information increases polarization along political lines.

Recent work indicates that the impact of party identity is growing, such that party identity is as strong a predictor of discriminatory feelings as race.¹⁷⁹ Stanford University political scientist Shanto Iyengar describes these effects on the tendency to believe fake news: “If I’m a rabid Trump voter and I don’t know much about public affairs, and I see something about some scandal about Hillary Clinton’s aides being involved in an assassination attempt, or that story about the pope endorsing Trump, then I’d be inclined to believe it.”¹⁸⁰ Where false campaign speech follows prior beliefs or the party beliefs, voters will be inclined to lend credence to it rather than look on it skeptically. An analysis by economists Hunt Allcott and Matthew Gentzkow shows that “Democrats and Republicans

¹⁷⁸ Russell Golman, David Hagmann & George Loewenstein, *Information Avoidance*, 55 J. ECON. LITERATURE 96, 102 (2017); Dan M. Kahan, et al., *The Polarizing Impact of Science Literacy and Numeracy on Perceived Climate Change Risks*, 2 NATURE CLIMATE CHANGE 732, 734 (2012).

¹⁷⁹ Shanto Iyengar & Sean J. Westwood, *Fear and Loathing across Party Lines: New Evidence on Group Polarization*, 59 AM. J. POL. SCI. 690, 703–04 (2015).

¹⁸⁰ Amanda Taub, *The Real Story About Fake News Is Partisanship*, N.Y. TIMES (Jan. 11, 2017), <https://www.nytimes.com/2017/01/11/upshot/the-real-story-about-fake-news-is-partisanship.html>.

are both about 15 percent more likely to believe ideologically aligned headlines.”¹⁸¹

We argue that these three reasons, (1) a natural tendency to rely on others, (2) an information imbalance between voter and a campaign speaker, and (3) a well-established tendency for voters to accept as true evidence that confirms their ideological beliefs, jointly give justification to believe that many voters will be swayed by claims in fake news. This corresponds with recent analyses that suggest that 75 percent of Americans who see fake news believe it.¹⁸² Therefore, fake news and false campaign speech are causally linked to a cognizable harm to the integrity of the election process. Following the framework laid out in Section III, we argue that fake news and false campaign speech gives voters reason to doubt that elections represent the coauthorship of the people, thereby undermining democratic legitimacy.

¹⁸¹ Alcott & Gentzkow, *supra* note 22, at 213.

¹⁸² Craig Silverman & Jeremy Singer-Vine, *Most Americans Who See Fake News Believe It, New Survey Says*, BUZZFEED NEWS (Dec. 6, 2016), <https://www.buzzfeednews.com/article/craigsilverman/fake-news-survey> (last visited Sept. 30, 2019).

Of course, in a cacophonous election campaign, it would be impossible in only the most unusual circumstances to show that a campaign statement or fake news item exactly caused the election result to flip, or for voters to lose faith in the legitimacy of the election results. It is impossible to isolate a counterfactual. This will always leave room for a dogmatic interlocutor to deny the evidence of a causal link. We submit that these reasons jointly give strong evidence of a causal link.

B. Counterspeech Would Not Suffice

The second requirement in showing “actual necessity” echoes Justice Brandeis’s famous concurrence in *Whitney v. California*.¹⁸³ “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.”¹⁸⁴ The influence of this dictum has created a presumption in favor of solving speech harms through more speech where possible, rather than a restriction of speech. *Alvarez* embeds that presumption in the standard to meet “actual

¹⁸³ *Whitney v. California*, 274 U.S. 357 (1927) (Brandeis, J., concurring).

¹⁸⁴ *Id.* at 377.

necessity” by requiring the government to show that more speech could not solve the specific issue.¹⁸⁵

Legal scholar Tim Wu has convincingly argued against more speech as a solution to modern harms surrounding fake news.¹⁸⁶ The Brandeis solution assumes a world in which listeners are under conditions of informational scarcity. In an environment of informational scarcity, listeners are assumed to have the time and interest necessary to consume available information, and censorship—especially by the government—is the relevant factor for keeping ideas away from the public.¹⁸⁷ Wu argues that these conditions no longer apply in a digital age where fake news has become increasingly prevalent.¹⁸⁸ Listeners now have more information than they could possibly consume, and it is not the information that is scarce, but rather the attention of listeners.¹⁸⁹

Recent research demonstrates that the problem is even deeper than Wu may suggest. After investigating 126,000

¹⁸⁵ *United States v. Alvarez*, 567 U.S. 709, 725-26 (2012).

¹⁸⁶ Tim Wu, *Is the First Amendment Obsolete?* (Colum. Pub. L., Research Paper No. 14-573, 2017), <https://ssrn.com/abstract=3096337>.

¹⁸⁷ *Id.* at 6.

¹⁸⁸ *Id.*

¹⁸⁹ *Id.* at 7.

verified true and false stories tweeted more than 4.5 million times by approximately 3 million people, researchers Soroush Vosoughi, Deb Roy, and Sinan Aral found that false political rumors “diffused significantly farther, faster, deeper, and more broadly than the truth in all categories of information.”¹⁹⁰ Psychological research demonstrates that hostile rumors are shared to (1) coordinate attention and action against the target group and (2) signal willingness to engage in conflict escalation.¹⁹¹ Under these conditions, the sharer is less concerned with the truth value of the rumor, and the hostile rumor is akin to a rallying cry.¹⁹² In a political context, psychologists Michael Bang Petersen, Mathias Osmundsen, and Kevin Arceneaux show that political rumors are motivated by a desire to show chaos and tear down the political system as such, rather than to help one particular candidate.¹⁹³

¹⁹⁰ Soroush Vosoughi, Deb Roy & Sinan Aral, *The Spread of True and False News Online*, 359 SCIENCE 1146, 1147 (2018).

¹⁹¹ Michael Bang Petersen, Mathias Osmundsen & Kevin Arceneaux, A “Need for Chaos” and the Sharing of Hostile Political Rumors in Advanced Democracies 4 (Sept. 1, 2018) (unpublished manuscript) (on file with authors), <https://psyarxiv.com/6m4ts/> (last visited Sept. 30, 2019).

¹⁹² *Id.*

¹⁹³ *Id.* at 30–31.

Under these conditions, it is more effective for those seeking to censor sound criticism to flood the environment with false or misleading speech in sufficient volume to drown out the offensive criticism and undermine confidence in the system. This flooding has the effect of distracting the public and changing the subject rather than silencing the opposition. Even the Chinese and Russian governments have moved toward flooding tactics.¹⁹⁴ The Chinese government fabricates an estimated 448 million social media comments each year.¹⁹⁵ To argue that more speech would solve the harms to election integrity associated with fake news and false campaign speech is to misunderstand the speech environment in which they arise.

C. Regulating speech is the least restrictive means

The third requirement to show “actual necessity” is that other, less restrictive, means could not be used to address the legitimate interest.¹⁹⁶ The possibility of less restrictive means is also undermined by Wu’s argument cited above. Where fake

¹⁹⁴ Wu, *supra* note 182, at 15.

¹⁹⁵ Gary King, Jennifer Pan & Margaret E. Roberts, *How the Chinese Government Fabricates Social Media Posts for Strategic Distraction, Not Engaged Argument*, 111 AM. POL. SCI. REV. 484, 484 (2017).

¹⁹⁶ *United States v. Alvarez*, 567 U.S. 709, 729 (2012) (citing *Ashcroft v. Am. Civil Liberties Union*, 542 U.S. 656, 666 (2004)).

news and false campaign speech are generated to garner attention in a saturated market, silencing that speech *is* the least restrictive means to address the threat to election integrity. Other means to mitigate this effect might task the government with directly vetting information or establishing a bureau of information. These would be more restrictive means than the regulation of campaign speech that we have addressed here.

It is worth noting that some features of our argument make it less susceptible to government abuse than other measures that may protect electoral integrity. By linking false campaign speech and fake news to the integrity of the election process, we are not asking the government or the courts to directly determine where and when one particular election may have been swayed by one particular piece of false campaign speech. We argue that the government has a legitimate interest in regulating false campaign speech because it has a tendency to harm democratic competence and democratic legitimation. False campaign speech harms democratic competence by making it less likely that elections reflect the informed will of the people. It harms democratic legitimation by undermining the

faith that citizens should have that the electoral results represent informed co-authorship.

Under this framing, we are asking courts to evaluate the veracity of factual statements and to apply a mens rea standard of actual malice, two judgments that should be justiciable in a court of law. We are not asking courts to regulate opinions or adjudicate “reasonable” claims, such as judgments that would put courts in a position fraught with potential for politically motivated abuse. Instead, we argue that this understanding of the constitutional role of regulation of false campaign speech does not leave the law open to unmanageable abuse.

Interpreted in the proper way, we submit that regulation of false campaign speech can and should be seen as “actually necessary” under the First Amendment. This interpretation would meet the goals of democratic competence and democratic legitimation underlying a compelling government interest in electoral integrity. As we noted in Section IV, we do not see our role as providing exact language that can pass constitutional muster, but with sufficiently careful crafting, regulation of false campaign speech should fit into a modern interpretation of the First Amendment. To meet the challenges of running a

successful democracy in the digital age, our constitutional protections must reflect a modern understanding of electoral tactics.

VI. CONCLUSORY REMARKS AND STEPS FORWARD

We have approached the issue of fake news in democracy through the lens of state statutes barring false campaign speech—statutes whose constitutionality has been further thrown into doubt by the recent case *United States v. Alvarez*.¹⁹⁷ While *Alvarez* established that false speech is not a category deserving of lower First Amendment protection, we have argued that false campaign speech is not merely false speech, but also imperils a compelling interest in electoral integrity. In this way, false campaign speech is more closely analogous to laws barring perjury than a law barring lies about the Medal of Honor.

We do not argue for regulation of false campaign speech from the perspective of skeptics in the value of free speech or free press. Rather, we see regulation of fake news in the modern environment as consonant with traditional interests of strong

¹⁹⁷ *Alvarez*, 567 U.S. 709.

advocates of free speech. The compelling interest in question – preserving the integrity of the election process – has been acknowledged by a Court fiercely protective of free political expression. Protecting this interest makes possible democratic self-government in exactly the way that fierce defenders of First Amendment protections since Meiklejohn have advocated.¹⁹⁸ In particular, we follow Post in emphasizing the importance that speech regulation can have in securing democratic competence for the purposes of ensuring that voters see the results of an election as the legitimate co-authorship of the people.¹⁹⁹

In grounding our argument in the democratic interests underlying the First Amendment, we hope to sketch a path for regulation of fake news beyond the false campaign speech laws addressed here. In a modern information environment, a future Joseph McCarthy will not suppress dissent through direct censorship of speech,²⁰⁰ but instead by flooding the environment with false speech to confuse the issue and “troll” armies to intimidate the speaker. We join Wu in arguing that First

¹⁹⁸ Meiklejohn, *supra* note 72.

¹⁹⁹ Post, *supra* note 58, at 95–96.

²⁰⁰ See generally Geoffrey R. Stone, *Free Speech in the Age of McCarthy: A Cautionary Tale*, 93 CALIF. L. REV. 1387 (2005).

Amendment law must adapt to this environment to protect the important interests underlying free speech or risk being rendered obsolete.²⁰¹

Democracy loses in the presence of fake news. It loses in the competence of its elections and in the ability of its people to see its elections as the result of honest and informed deliberation of the citizens. To address this loss, we must move beyond the sloganeering that advocates free speech values only through unreflective, blanket protection of all political speech. Moreover, a dogmatic adherence to the Brandeis solution of “more speech” must confront modern evidence that there is often little reason to believe that more speech can prevent harms to electoral integrity. There are, of course, possibilities for abuse in specific formulations, but we express our value for free speech and robust public deliberation, not by shrinking from these debates into dogmatic principles, but by weighing the values carefully and reaching reasonable regulations.

²⁰¹ Wu, *supra* note 182, at 17–19.

IS SILENCE FOR SALE? THE FIRST AMENDMENT IMPLICATIONS OF THE MICHIGAN STATE UNIVERSITY'S SETTLEMENT WITH LARRY NASSAR SURVIVORS

Emily O. Monnett*

Michigan State University ("MSU") has been embroiled in one of the largest sports or academic scandals in history.¹ In 2016, reporters from the *IndyStar* began the process of uncovering years of sexual abuse at the hands of MSU faculty member Dr. Larry Nassar.² Over the course of the investigation, it was revealed that Nassar had sexually assaulted hundreds of girls and young women over the course of two decades.³ The majority of the assaults occurred at MSU.⁴

Nassar will be in jail for the rest of his life, serving sentences for criminal sexual conduct and child pornography.⁵ Additionally, MSU has been under investigation for its role in

* J.D. Candidate, Class of 2020, University of North Carolina School of Law; Articles Editor, First Amendment Law Review

¹ See, e.g., Caroline Kitchener & Alia Wong, *The Moral Catastrophe at Michigan State*, THE ATLANTIC (Sept. 12, 2018), <https://www.theatlantic.com/education/archive/2018/09/the-moral-catastrophe-at-michigan-state/569776/>.

² Tim Evans, Mark Alesia & Marisa Kwiatkowski, *Former USA Gymnastics Doctor Accused of Abuse*, INDYSTAR (Sept. 12, 2016), <https://www.indystar.com/story/news/2016/09/12/former-usa-gymnastics-doctor-accused-abuse/89995734/>.

³ Kitchener, *supra* note 1.

⁴ *Id.*

⁵ Lauren Theisen, *Larry Nassar Sentenced to Additional 40 to 125 Years in Prison*, DEADSPIN (Feb. 5, 2018, 9:49 AM), <https://deadspin.com/larry-nassar-sentenced-to-additional-40-to-125-years-in-1822724375>.

Nassar's actions.⁶ Survivors⁷ of Nassar's abuse claim that the University was aware of the abuse and went to great lengths to cover it up.⁸ For example, one filed a lawsuit alleging that in 1992 Nassar filmed himself raping a student-athlete, and a member of MSU's board of trustees took steps to conceal the video.⁹ In May 2018, MSU settled with 332 survivors of Nassar's abuse for \$500 million, though the university's troubles remain.¹⁰

The settlement is historic, but the amount is unsurprising given the number of victims and the number of complaints that the University ignored over the course of almost two decades.¹¹ But the settlement came with a surprising provision: Survivors of the abuse agreed to stop advocating for two specific reform bills that the Michigan state legislature were debating and voting upon at the time of the settlement.¹² The bills were originally

⁶ Kitchener, *supra* note 1.

⁷ In this essay, I will use the term "survivor" and "victim" interchangeably. Both terms have value and can serve different purposes. The use of both terms also allows for exclusivity and recognizes a variety of responses to trauma. For more explanation on the use of the terms, see RTI International, *Victim or Survivor: Terminology from Investigation Through Prosecution*, SEXUAL ASSAULT KIT INITIATIVE 1, <https://sakitta.org/toolkit/docs/Victim-or-Survivor-Terminology-from-Investigation-Through-Prosecution.pdf>.

⁸ Kitchener, *supra* note 1.

⁹ *Id.*

¹⁰ Dvora Meyers, *Michigan State's Nassar Settlement Could Set a Troubling First Amendment Precedent*, DEADSPIN (May 18, 2018, 2:02 PM), <https://deadspin.com/michigan-states-nassar-settlement-could-set-a-troubling-1826139831>; Kitchener, *supra* note 1.

¹¹ *Id.*

¹² *Id.*

introduced in February 2018 through the combined efforts of survivors of Nassar's abuse and Michigan state legislators.¹³ The two bills at issue would have ended governmental immunity¹⁴ for cases of childhood sexual abuse.¹⁵ The governmental immunity provisions of the bills were only one piece of the bills' efforts to combat childhood sexual abuse; the bills also included provisions to expand the statute of limitations, allow victims of childhood sexual abuse to file lawsuits anonymously, and expand mandatory reporting laws.¹⁶

At the time the settlement was announced, state legislators declared they would continue to work on and advocate for the reform bills, even though the survivors of Nassar's abuse were required to pull their support.¹⁷ Several legislators committed their support specifically to the

¹³ Jonathan Oosting, *Nassar Victims Push Changes to Michigan Law*, THE DETROIT NEWS (Feb. 26, 2018, 7:17 PM), <https://www.detroitnews.com/story/news/politics/2018/02/26/nassar-victims-sexual-assault-legislation/110876874/>.

¹⁴ Governmental immunity shields a state government from liability. *Odom v. Wayne Cty.*, 760 N.W.2d 217, 227 (Mich. 2008). Under the doctrine, the state or state entity is only liable when the state has expressly permitted a suit against it. *Id.*

¹⁵ Meyers, *supra* note 10.

¹⁶ *Id.*

¹⁷ Beth LeBlanc & Jonathan Oosting, *Nassar Bills Expected to Change Regardless of MSU Deal*, THE DETROIT NEWS (May 17, 2018, 7:44 PM), <https://www.detroitnews.com/story/news/local/michigan/2018/05/17/nassar-legislation-changes-msu-agreement/35038653/> ("Sen. Margaret O'Brien, who sponsored some of the post-Nassar legislation, said she remains committed to the package as it passed out of the Senate in March, including the proposal related to governmental immunity.").

governmental immunity provisions.¹⁸ But the Michigan state legislature changed its tune in July 2018, a week after the settlement agreement was filed in the U.S. District Court in Grand Rapids.¹⁹ State legislators dropped the governmental immunity bills and modified another in accordance with the provisions in the settlement.²⁰ Bob Young, an attorney who helped negotiate the settlement on behalf of MSU, said the settlement's reference to the legislation indicates an agreed-upon outcome that would result from victims' pulling their support for the legislation.²¹ The settlement was entirely conditioned on the failure of the bills.²² The settlement agreement explicitly stated that the settlement itself was only valid once the bills failed.²³ Furthermore, Young confirmed that the failure of the bills was

¹⁸ *Id.* ("Sen. Curtis Hertel Jr., D-East Lansing, said he will immediately introduce new legislation if the House drops the governmental immunity bill or other provisions he deems critical.").

¹⁹ See Beth LeBlanc, *Filing Sheds New Light on Nassar Settlement*, THE DETROIT NEWS (July 18, 2018, 6:01 PM), <https://www.detroitnews.com/story/news/local/michigan/2018/07/18/filing-msu-nassar-victims-settlement/797632002/>.

²⁰ *Id.*

²¹ *Id.*

²² The necessary condition that "(1) Michigan Senate Bill 872 (2018) either shall (A) fail to be enacted into law because it is withdrawn, defeated by vote, or otherwise fails to pass, or (B) be amended to reduce the timeframe to bring otherwise time-barred Nassar-Related Claims to 90 days following enactment of Senate Bill 872 (2018); and (2) Michigan Senate Bills 875 (2018) and 877 (2018) shall fail to be enacted into law because they are withdrawn, defeated by vote, or otherwise fail to pass" is marked as satisfied in the settlement agreement. See Lauren Theisen, *Here's Michigan State's Settlement Agreement With Larry Nassar's Victims*, DEADSPIN (July 18, 2018, 9:42 PM), <https://deadspin.com/heres-michigan-states-settlement-agreement-with-larry-n-1827705229>.

²³ Thiesen, *supra* note 25.

the only way that MSU could see any demonstrable result from the survivors' pulling their support of the reform bills.²⁴

Michigan State had a lot riding on these bills.²⁵ In addition to the complaints they already settled, the University faces a federal lawsuit from 257 of the survivors.²⁶ In a motion to dismiss that lawsuit, the University responded, "As much as MSU sympathizes with Plaintiffs, it would be contrary to the State's established public policy, as embodied in the laws and the decisions of its courts, to impose legal liability on the MSU Defendants," citing governmental immunity from these kinds of suits.²⁷ In August 2019, MSU sought to dismiss *another* wave of lawsuits on the grounds of governmental immunity.²⁸

Here, the damage is done and the governmental immunity bills are dead, but several First Amendment commentators have decried the provision of the settlement that

²⁴ Amy Rock, *Full Details of MSU Settlement with Nassar Victims Released*, CAMPUS SAFETY (July 20, 2018), <https://www.campus safetymagazine.com/clery/details-msu-settlement-nassar-victims> ("The only way we could assure ourselves that their support had been withdrawn was a demonstrable result. That's why it's worded that way.").

²⁵ See Nicholas Roumel, *Is Michigan State's Nassar Settlement Fake News for Some Survivors?*, NACHTLAW (May 23, 2018), <https://www.nachtlaw.com/blog/2018/05/is-michigan-states-nassar-settlement-fake-news-for-some-survivors/>.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Michigan State: We're Immune from Liability in Nassar Claims*, WTOP (Aug. 27, 2019, 2:33 PM), <https://wtop.com/national/2019/08/michigan-state-were-immune-to-liability-in-nassar-claims>.

limited survivors' ability to advocate for reform.²⁹ Commentators point out that state officials are working to silence the political speech of the survivors, and that these provisions are not enforceable.³⁰ They express concern about the precedent these kinds of settlements set for future litigation.³¹

Unfortunately, it is likely that a school, government official, or other state actor will be involved in a similar scandal.³² The MSU settlement is a roadmap for defeating unfriendly legislation. Going forward, whether provisions limiting a party's First Amendment rights can be successfully challenged will continue to be an important legal issue. And not just a sexual violence issue. Regardless of the issue, litigation and legislation are both powerful reform tools. If settlements can be used to kill legislation, they could hobble an important tool for social and political change.

²⁹ Meyers, *supra* note 10; LeBlanc & Oosting, *supra* note 18.

³⁰ Meyers, *supra* note 10; LeBlanc & Oosting, *supra* note 18.

³¹ Meyers, *supra* note 10.

³² In recent years, there have been sexual assault scandals at Pennsylvania State University, MSU, and the University of Southern California. Greg Toppo, *Why Do Colleges Keep Failing to Prevent Abuse?*, INSIDE HIGHER ED (June 5, 2018), <https://www.insidehighered.com/news/2018/06/05/why-do-campus-abuse-cases-keep-falling-through-cracks>. The recent scandals within the Catholic Church provide a good example of how widespread sexual abuse scandals are. *See, e.g.*, Emma Green, *Why Does the Catholic Church Keep Failing on Sexual Abuse?*, THE ATLANTIC (Feb. 14, 2019), <https://www.theatlantic.com/politics/archive/2019/02/sean-omalley-pope-francis-catholic-church-sex-abuse/582658> (providing some background on recent sexual abuse scandals within the Catholic Church).

This Note evaluates whether courts can and should enforce provisions of settlement agreements between private parties and state actors that limit one party's First Amendment rights. Section I of this Note looks at constitutional issues in determining the enforceability of this settlement. Section II of this Note evaluates the enforceability of this settlement under the *Rumery/Grossmont* framework. Section III looks at the traditional contract theory and the public policy exception as a means of challenging the settlement provision. Section IV concludes by summarizing how and why similar settlements can—and *must*—be challenged.

I. CONSTITUTIONAL ISSUES

Several outspoken critics of the MSU settlement have expressed concern about its implications for the First Amendment.³³ But it is important to first analyze whether the First Amendment is implicated at all. The First Amendment of the United States Constitution states, “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 Government for a redress of grievances.”³⁴ Of all the

³³ Meyers, *supra* note 10; LeBlanc & Oosting, *supra* note 18.

³⁴ U.S. CONST. amend. I (emphasis added).

rights protected by the First Amendment, the MSU settlement would most likely implicate the freedom of speech.

A. Freedom of Speech

The First Amendment has historically limited the legislative authority of the federal government.³⁵ However, the interaction between the First and Fourteenth Amendments³⁶ of the Constitution extends the reach of First Amendment protections.³⁷ Under the Fourteenth Amendment, states and state actors, including education officials at public institutions, must act within the confines of the Constitution and the Bill of Rights.³⁸ The First Amendment does not apply to private actors, and thus there can be no First Amendment violation without action by the state or federal government.³⁹ In this way, the protections of the Constitution and the First Amendment extend

³⁵ See U.S. CONST. amend. I (“*Congress shall make no law* respecting an establishment of religion”) (emphasis added).

³⁶ “All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.” U.S. CONST. amend. XIV, § 1.

³⁷ See *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures”).

³⁸ See *id.* (“[Boards of Education] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”).

³⁹ See *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

beyond laws passed by Congress and can apply to certain actions taken by state actors.⁴⁰ The courts have not established one singular test for determining what is or is not state action.⁴¹ Instead, it is a fact-specific inquiry.⁴² That said, state universities and public schools have traditionally been treated as government entities subject to constitutional limitations.⁴³ As a publicly funded university,⁴⁴ Michigan State University is bound by the Constitution, including the First Amendment.

The Supreme Court of the United States has been clear that “the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”⁴⁵ The government cannot proscribe speech merely because it disapproves of the ideas expressed.⁴⁶ Historically, this means that restrictions on First Amendment rights are only constitutional when the restrictions are “content neutral.”⁴⁷ “Content-based regulations are

⁴⁰ See *id.* at 293.

⁴¹ *Lee v. Katz*, 276 F.3d 550, 554 (9th Cir. 2002) (“Because of the fact-intensive nature of the inquiry, courts have developed a variety of approaches to the State actor issue.”).

⁴² *Id.*

⁴³ See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503 (1969); *Cooper v. Aaron*, 358 U.S. 1 (1958); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954); *McLaurin v. Okla. State Regents*, 339 U.S. 637 (1950).

⁴⁴ See MICH. CONST. art. VIII, § 4 (“The legislature shall appropriate moneys to maintain . . . Michigan State University . . .”).

⁴⁵ *Police Dept. of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

⁴⁶ See *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 392 (1992).

⁴⁷ See *id.* at 382.

presumptively invalid.”⁴⁸ More specifically, “[l]aws designed or intended to suppress or restrict the expression of specific speakers contradict basic First Amendment principles.”⁴⁹ When challenged, content-based restrictions can only survive if they pass strict scrutiny, meaning the restriction is constitutional only if it is narrowly tailored to meet a compelling government interest.⁵⁰ Furthermore, speech on matters of public concern are historically given more rigorous First Amendment protection.⁵¹ Speech on matters of public concern is a fairly broad concept and includes speech that can “be fairly considered as relating to any matter of political, social, or other concern to the community.”⁵²

Here, a restriction on speech is targeted specifically at survivors of Nassar’s abuse and is focused on their advocacy on two specific reform bills. It should be noted that the settlement provision is technically an indirect restriction on the waiver of the survivors’ First Amendment rights, as it says the bills must

⁴⁸ *R.A.V.*, 505 U.S. at 382. Content-based restrictions are permitted for certain categories of “speech,” including: obscenity, defamation, and “fighting words.” *Id.* at 382-83.

⁴⁹ *United States v. Playboy Entm’t Grp.*, 529 U.S. 803, 812 (2000).

⁵⁰ *Id.* at 813. (“If a statute regulates speech based on its content, it must be narrowly tailored to promote a compelling Government interest.”).

⁵¹ *See generally* *Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (“[R]estricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest . . .”); *Connick v. Myers*, 461 U.S. 138, 145 (1983) (“[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”) (internal quotations omitted).

⁵² *Connick v. Myers*, 461 U.S. 138, 146 (1983).

fail for the settlement to be valid rather than the survivors cannot advocate for the bills. However, this should not change the analysis because it was understood and intended as a waiver of the survivors' political speech.⁵³ Counsel for MSU made it clear that the provision of the settlement was related to the survivors' advocacy by saying, "The only way we could assure ourselves that their support had been withdrawn was a demonstrable result. That's why [the settlement is] worded that way."⁵⁴ The condition in the settlement was meant as a way to enforce and verify the withdrawal of support for the bills. It was meant to restrict the survivors' First Amendment rights. Based on the text and the statements made by MSU's counsel, it is hard to argue the provision was about anything other than forcing the survivors to withdraw their political support and silence their political advocacy.

As a state actor, MSU cannot place a content-based restriction on speech that is not narrowly tailored to a compelling government interest.⁵⁵ It is unclear what MSU would cite as a compelling governmental interest in restricting the speech of Nassar's victims. Realistically, MSU's strongest interest is in

⁵³ *See id.*

⁵⁴ Rock, *supra* note 26.

⁵⁵ *See R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992).

maintaining governmental immunity to avoid liability in future lawsuits. As discussed previously, the two reform bills would work to limit the defense of governmental immunity in cases of child sexual abuse.⁵⁶ MSU has a strong interest in avoiding another \$500 million settlement, but it is unclear how this argument would stand up in court. It may be difficult to argue that there is a compelling government interest in preventing the public from weighing in on the reform bills, especially given that there were elected representatives pushing for the reform bills.⁵⁷

At the very least, there is a strong argument that creating a condition in their settlement is not narrowly tailored to this interest. Instead, MSU could have engaged in their own political advocacy around the bills or taken other steps to fight the bills at issue. Conversely, the settlement only restricts the survivor's ability to advocate for two specific reform bills rather than foreclosing all future political advocacy. State legislators could introduce a new bill with the exact same provisions, and victims of Nassar's abuse are free to support it. In that sense, the restriction may be narrowly tailored to achieve the government's interest.

⁵⁶ Meyers, *supra* note 10.

⁵⁷ LeBlanc & Oosting, *supra* note 18.

The survivors' ability to speak about their experiences in promoting reform measures is a matter of public concern and should be given robust First Amendment protections. The settlement concerns one of the largest sports and academic scandals in American history. The public has a strong interest in learning and hearing about it from all angles, not only because Michigan is still considering reform measures in the wake of the scandal but also because it was a historic and culturally significant event.

The provision of the settlement restricting the survivor's political speech violates their First Amendment rights and thus can additionally be challenged under the unconstitutional conditions doctrine.

1. Unconstitutional Conditions Doctrine

Under the unconstitutional conditions doctrine, the settlement agreement is likely unenforceable. The unconstitutional conditions doctrine stands for the idea that the government cannot grant a benefit on the condition that the beneficiary surrender a constitutional right.⁵⁸ For example, the government cannot require an organization to support or

⁵⁸ *E.g.*, *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013); *Rumsfeld v. Forum for Acad. and Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006). *See also* 16 AM. JUR. 2D *Constitutional Law* § 411 (2019).

promote a particular position in order to receive federal funds, thus infringing on the organization's right to free speech.⁵⁹

The unconstitutional conditions doctrine applies even when the government could have withheld the benefit altogether.⁶⁰ When the doctrine applies, courts must use strict scrutiny in assessing the condition at issue.⁶¹ In order for the condition to be constitutionally valid, the government interest must outweigh the particular right at issue.⁶² Furthermore, the government cannot require an individual to give up a right in exchange for a discretionary benefit when the benefit given has little relation to the issue at hand.⁶³ A state actor cannot constitutionally condition the receipt of a benefit on an agreement that the recipient will surrender a constitutional right.⁶⁴

Accordingly, the government cannot deny a benefit from an individual in a way that infringes on that person's First

⁵⁹ See, e.g., *U.S. Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 570 U.S. 205 (2013).

⁶⁰ See, e.g., *Perry v. Sinderman*, 408 U.S. 593, 597 (1972) (holding that the government cannot deny a discretionary benefit in a way that inhibits a person's constitutionally protecting rights). See also 16 AM. JUR. 2D *Constitutional Law* § 411 (2019).

⁶¹ See AM. JUR. 2D *Constitutional Law* § 411 (2019).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *R.S.W.W., Inc. v. City of Keego Harbor*, 397 F.3d 427, 434 (6th Cir. 2005); 16 AM. JUR. 2D *Constitutional Law* § 411 (2019).

Amendment rights.⁶⁵ The unconstitutional conditions doctrine protects “the Constitution's enumerated rights by preventing the government from coercing people into giving them up”⁶⁶ and “ensure[s] that the government may not indirectly accomplish a restriction on constitutional rights which it is powerless to decree directly.”⁶⁷ A condition is unconstitutional when the government could not directly impose it.⁶⁸ In essence, the unconstitutional conditions doctrine protects our constitutional rights by preventing the government from having a work-around for things it is already powerless to do. Because the government cannot pass a law saying its citizens cannot criticize the government, it also cannot make not criticizing the government a condition of receiving government benefits,⁶⁹ obtaining a permit,⁷⁰ receiving funding,⁷¹ etc.

Through the settlement provision, MSU is restricting the survivor's First Amendment rights, something that it is otherwise powerless to do. There is little debate that Michigan could have

⁶⁵ See *Koontz v. St. Johns River Water Mgmt. Dist.*, 570 U.S. 595, 604 (2013); *Rumsfield v. Forum for Acad. and Inst'l Rights, Inc.*, 547 U.S. 47, 60 (2006).

⁶⁶ *Koontz*, 570 U.S. at 604.

⁶⁷ 16 AM. JUR. 2D *Constitutional Law* § 411 (2019).

⁶⁸ See *Rumsfield*, 547 U.S. 47 at 60.

⁶⁹ See *Perry v. Sinderman*, 408 U.S. 593, 597 (1972).

⁷⁰ *Koontz*, 570 U.S. at 606.

⁷¹ *Rumsfield*, 547 U.S. 47 at 59 (“[We] recognize a limit on Congress' ability to place conditions on the receipt of funds.”).

constitutionally directly prohibited the survivors of Nassar's abuse from advocating for reform measures. First, this would be a content-based restriction on speech and subject to strict scrutiny.⁷² Second, because it is about proposed legislation in the wake of a massive government scandal, the speech at issue would be a matter of public concern.⁷³ Therefore, under the constitutional conditions doctrine, MSU cannot indirectly prohibit Nassar's survivors from advocating for reform measures.

As discussed previously, the settlement was wholly conditioned on the failure of the two bills.⁷⁴ Accordingly, the settlement provision is indirectly conditioned on the waiver of the survivors' First Amendment rights, as it says the bills must fail for the settlement to be enforced rather than that the survivors cannot advocate for the bills. But this should not change the

⁷² See *supra* Section. II A.

⁷³ See *supra* Section. II A.

⁷⁴ The necessary condition that "(1) Michigan Senate Bill 872 (2018) either shall (A) fail to be enacted into law because it is withdrawn, defeated by vote, or otherwise fails to pass, or (B) be amended to reduce the timeframe to bring otherwise time-barred Nassar-Related Claims to 90 days following enactment of Senate Bill 872 (2018); and (2) Michigan Senate Bills 875 (2018) and 877 (2018) shall fail to be enacted into law because they are withdrawn, defeated by vote, or otherwise fail to pass" is marked as satisfied in the settlement agreement. See Lauren Theisen, *Here's Michigan State's Settlement Agreement With Larry Nassar's Victims*, DEADSPIN (July 18, 2018), <https://deadspin.com/heres-michigan-states-settlement-agreement-with-larry-n-1827705229>; see also Nick Roumel, *Is Michigan State's Nassar Settlement Fake News for Some Survivors?*, NACHTLAW (May 23, 2018), <https://www.nachtlaw.com/blog/2018/05/is-michigan-states-nassar-settlement-fake-news-for-some-survivors>.

analysis because, as outlined above, it was understood and intended as a waiver of the survivors' political advocacy.⁷⁵ As the settlement was conditioned on the survivors' waiver of First Amendment rights, the settlement is unconstitutional under the unconstitutional conditions doctrine.

The Ninth Circuit decision in *Davies v. Grossmont Union High School Dist.*⁷⁶ also supports the conclusion that the settlement is unenforceable. *Grossmont* dealt with a situation that is most similar to the MSU settlement at issue. In understanding *Grossmont*, it is also important to understand the Supreme Court's decision in *Town of Newton v. Rumery*.⁷⁷

2. *Rumery* and *Grossmont*

In *Rumery*, the Supreme Court was asked to decide, "whether a release of individual rights in a private settlement agreement with a public official violated public policy."⁷⁸ The Supreme Court held that "a promise is unenforceable if the interest in its enforcement is outweighed in the circumstances by a public policy harmed by enforcement of the agreement."⁷⁹

⁷⁵ See *id.*

⁷⁶ *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390, 1396 (9th Cir. 1991).

⁷⁷ 480 U.S. 386 (1987).

⁷⁸ *Grossmont*, 930 F.2d 1390, 1396; see *Rumery*, 480 U.S. at 392.

⁷⁹ *Rumery*, 480 U.S. at 392 (plurality opinion).

Bernard Rumery was arrested for witness tampering in connection with a felony sexual assault.⁸⁰ Rumery eventually negotiated a release-dismissal agreement with the local prosecutor, where the prosecutor agreed to drop all charges against Rumery if he “would agree not to sue the town, its officials, or [the victim] for any harm caused by [his] arrest.”⁸¹ Almost a year later, Rumery brought suit against the town of Newton alleging that the town and its officers had violated his constitutional rights.⁸² The suit was dismissed in Federal District Court on the grounds that Rumery had agreed to release all claims against the city.⁸³

The Supreme Court held that such agreements were not *per se* unenforceable⁸⁴ and instead relied on a balancing test weighing the public interest in enforcement versus non-enforcement.⁸⁵ The Court concluded that release-dismissal agreements are not any more coercive than plea-bargaining.⁸⁶ They also relied on the fact that Rumery was a “sophisticated

⁸⁰ *Id.* at 389-90.

⁸¹ *Id.* at 389-90.

⁸² *Rumery*, 480 U.S. at 391.

⁸³ *Id.*

⁸⁴ *Id.* at 392 (“Thus, although we agree that in some cases these agreements may infringe important interests of the criminal defendant and of society as a whole, we do not believe that the mere possibility of harm to these interests calls for a *per se* rule.”).

⁸⁵ *Id.*

⁸⁶ *Id.* at 393.

businessman,” who was competent to weigh the benefits and drawbacks of gaining immunity from criminal prosecution in exchange for abandoning a civil suit.⁸⁷ The Court concluded that there is a strong public interest in support of release-dismissal agreements.⁸⁸ Section 1983 suits, like the one Rumery filed, are expensive and lengthy to defend. Release-dismissal agreements “protect officials from the burdens of defending unjust claims . . . [and] further this important public interest.”⁸⁹

Four Justices disagreed with the Court’s analysis.⁹⁰ Justice Stevens, writing for the dissent, argued that it was improper to analogize release-dismissal agreements with plea-bargaining.⁹¹ They concluded that an “agreement to forgo a civil remedy for the violation of the defendant’s constitutional rights in exchange for complete abandonment of a criminal charge” was not at all like a plea bargain.⁹² The dissent relied on two main points to suggest such agreements are unenforceable: first, the agreements are inherently coercive, and second, the agreements “exact[] a price unrelated to the character of the defendant’s own

⁸⁷ *Id.* at 394.

⁸⁸ *Id.* at 395 (plurality opinion).

⁸⁹ *Id.* at 396.

⁹⁰ *Id.* at 403 (Stevens, J., dissenting).

⁹¹ *Id.* at 409.

⁹² *Id.*

conduct.”⁹³ The dissent did not go so far as to say that all release-dismissal agreements are unenforceable, but instead stated that “the federal policies reflected in the enactment and enforcement of § 1983 mandate a strong presumption against the enforceability of such agreements and that the presumption is not overcome in this case by the facts or by any of the policy concerns discussed by the plurality.”⁹⁴

In *Davies v. Grossmont Union High School Dist.*,⁹⁵ the Ninth Circuit applied *Rumery* and refused to enforce a contract provision that prohibited an individual from running for office. The appellant, Dr. Davies, and his wife had originally sued Grossmont Union High School District under § 1983 in connection with his wife’s employment with the district.⁹⁶ Dr. Davies and his wife eventually settled with the District, and the settlement included a provision that he would not “ever seek, apply for, or accept future employment, position, or office with [Grossmont Union High School District.]”⁹⁷ A year later, Dr. Davies ran for the Governing Board of the District and was elected.⁹⁸ The District then sought to enforce the contract and

⁹³ *Id.* at 411.

⁹⁴ *Id.* at 417-18.

⁹⁵ 930 F.2d 1390 (9th Cir. 1991).

⁹⁶ *Id.* at 1392.

⁹⁷ *Id.*

⁹⁸ *Id.*

force Dr. Davies to resign.⁹⁹ Dr. Davies challenged the enforceability of the order upholding the settlement agreement.¹⁰⁰

The Ninth Circuit addressed a number of arguments from Dr. Davies.¹⁰¹ They affirmed the idea that constitutional rights may be waived “if it can be established by clear and convincing evidence that the waiver is voluntary, knowing and intelligent.”¹⁰² They concluded that Dr. Davies had in fact waived his constitutional right to seek office.¹⁰³ However, the Ninth Circuit refused to enforce the settlement agreement on public policy grounds.¹⁰⁴ The court agreed that enforcing the contract “would violate [Dr. Davies’] constitutional right to run for elective office and the constitutional right of the voters to elect him.”¹⁰⁵ In so deciding, the Ninth Circuit looked to *Rumery*¹⁰⁶ and compared the two cases.

In differentiating the case from *Rumery*, the Ninth Circuit focused primarily on the fact that the rights released by Rumery were private rights,¹⁰⁷ and “thus the Court believed that the

⁹⁹ *Id.* at 1393.

¹⁰⁰ *Id.* at 1394.

¹⁰¹ *See id.* at 1394-96.

¹⁰² *Id.* at 1394.

¹⁰³ *Id.* at 1395.

¹⁰⁴ *Id.* at 1396.

¹⁰⁵ *Id.*

¹⁰⁶ *Town of Newton v. Rumery*, 480 U.S. 386 (1987).

¹⁰⁷ *Grossmont*, 930 F.2d 1390, 1397 (9th Cir. 1991).

surrender of these rights did not have a significant impact upon the public at large.”¹⁰⁸ The Ninth Circuit noted a clear distinction between the surrender of a statutory remedy with the waiver of a constitutional right.¹⁰⁹ This distinction created two important propositions.¹¹⁰ First, a stricter rule is more appropriate in cases where a constitutional right is waived because constitutional rights are “generally more fundamental than statutory rights.”¹¹¹ Second, “foregoing a remedy of money damages for a past injury that cannot be undone may not implicate the public interest to the same extent as does the surrender of the right itself.”¹¹² The *Davies* court declined to follow that line of analysis, and instead held that the case did not even meet the *Rumery* standard.¹¹³

The Ninth Circuit examined whether the public interest is better served by enforcement of the agreement rather than non-enforcement.¹¹⁴ In terms of public policy in favor of non-enforcement, the settlement involved the waiver of the “the most important political right in a democratic system of government: the right of the people to elect representatives of their own

¹⁰⁸ *Id.* at 1400.

¹⁰⁹ *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.* at 1397.

¹¹⁴ *Id.*

choosing to public office.”¹¹⁵ Unlike in *Rumery*, the waiver of the right to run for office implicates the public interest and has an effect on the public at large.¹¹⁶

In favor of enforcement is “a policy favoring enforcement of private agreements and the encouragement of settling litigation.”¹¹⁷ This interest is important but is present in every settlement agreement.¹¹⁸ The court thus concluded that “where a substantial public interest favoring nonenforcement is present, the interest in settlement is insufficient.”¹¹⁹ The Ninth Circuit then looked for an additional interest beyond the interest in settlement.¹²⁰ The court found that the school district’s other interest in preventing Dr. Davies from being on the board was malicious.¹²¹ Whether or not a person is fit to be on the school board is an issue for the voters to decide during the election—not members of the board during a settlement agreement.¹²² The Ninth Circuit also took issue with commodification of political rights and said it “corrupts the political process.”¹²³

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 1398.

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.* (“Otherwise, there would be no point to the *Rumery* balancing test: since the interest in settlement is present in every case, every settlement agreement would be enforced.”).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *See id.*

¹²³ *Id.*

The *Davies* court went on to invalidate the agreement on additional grounds.¹²⁴

Before the government can require a citizen to surrender a constitutional right as part of a settlement or other contract, it must have a legitimate reason for including the waiver in the particular agreement. A legitimate reason will almost always include a close nexus—a tight fit—between the specific interest the government seeks to advance in the dispute underlying the litigation involved and the specific right waived.¹²⁵

In *Rumery*, there was a “tight fit” between the interests advanced in the underlying litigation and interest waived.¹²⁶ The criminal charges against the defendant in *Rumery* and the civil suit filed by the defendant arose from the same incident.¹²⁷ In resolving the dispute between the defendant and the prosecutor, both matters needed to be resolved.¹²⁸ In contrast, “the nexus between the individual right waived and the dispute that was resolved by the settlement agreement is not a close one” for Dr. Davies and the school district.¹²⁹ The underlying dispute between Dr. Davies and the school district had “little connection” with the potential of Dr. Davies running for election.¹³⁰ The Ninth

¹²⁴ *Id.* at 1399.

¹²⁵ *Id.*

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ *Id.*

Circuit concluded that “[t]he absence of a close nexus will ordinarily show that the government is seeking the waiver of important rights without a legitimate governmental interest that justifies doing so.”¹³¹ The Ninth Circuit did not go so far as to say the absence of a “close nexus” was enough to make a contract provision unenforceable.¹³² But without a strong public policy in favor of enforcement, a contract provision will be unenforceable.¹³³ The Ninth Circuit found the provision unenforceable because in their view there was no strong public policy in favor of enforcement on the facts.¹³⁴

Relying solely on *Grossmont*, the provision in the settlement between MSU and the survivors of Larry Nassar’s abuse could be deemed unenforceable, as well as any similar provisions in future settlements. The Ninth Circuit relied on a number of distinctions between *Rumery* and the case at hand, and similar distinctions exist here. First, the right that was waived was one of fundamental importance. The survivors of Nassar’s abuse waived their right to political advocacy regarding specific

¹³¹ *Id.*

¹³² See *id.* (“Although there may be circumstances in which the public interest that would be served by enforcement of a settlement agreement is so strong that it outweighs the absence of a close nexus, such cases are the exception rather than the rule.”).

¹³³ See *id.*

¹³⁴ *Id.*

reform bills.¹³⁵ This is, at its core, political speech, which has traditionally been afforded the most protection.¹³⁶ Like the right to vote and run for office at issue in *Grossmont*,¹³⁷ the right to political speech can only be restricted as necessary to achieve a compelling government interest.¹³⁸

Second, like the right at issue in *Grossmont*, the right to political speech here affects the public at large. Whether the two reform bills mentioned in the settlement became law directly impacts the citizens of Michigan. The bills had the potential to open other government actors up to liability and affect the rights of any Michigander to sue.¹³⁹ Furthermore, it had a direct effect on the plaintiffs in pending litigation against MSU.¹⁴⁰ The reform bills had the potential to open up MSU to liability in future cases.¹⁴¹ The *Grossmont* court stressed that the voters should have the right to choose their elected officials.¹⁴² Just as the citizens of Michigan have the right to choose through their representatives what bills are enacted. As in *Grossmont*,¹⁴³ there are fundamental

¹³⁵ See Meyers, *supra* note 10.

¹³⁶ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339-40 (2010).

¹³⁷ *Grossmont*, 930 F.2d at 1397.

¹³⁸ *Citizens United*, 558 U.S. at 340.

¹³⁹ See Leblanc & Oosting, *supra* note 18.

¹⁴⁰ See *supra* note 24.

¹⁴¹ See *supra* note 24.

¹⁴² *Grossmont*, 930 F.2d at 1398.

¹⁴³ *Id.* (“[D]emocratic government is premised on the proposition that the people are the best judges of their own interests, and that in the long run it is

constitutional rights at issue that affect the public at large, and thus there is a public interest in favor of nonenforcement.

A sticking point for the Ninth Circuit was that the school board was using the settlement to silence a political rival outside the democratic process.¹⁴⁴ MSU is not a political rival of the survivors of the abuse; however, MSU has directly opposed the reform bills advocated by the survivors and has benefitted politically from the survivors' silence.¹⁴⁵ In some ways, this does make them political rivals.

In *Grossmont*, the Ninth Circuit balanced the public interest in non-enforcement with the interests in enforcement.¹⁴⁶ Similarly, there is a public interest here in encouraging settling and favoring enforcement of private agreements. But the Ninth Circuit concluded that when there is a strong interest in favor of nonenforcement, the interest in settling is not enough. MSU's interest in supporting policies limiting their liability is also likely

better to permit them to make their own mistakes than to permit their "rulers" to make all their decisions for them.")

¹⁴⁴ *Id.* ("As harmful as such agreements are in general, they are particularly offensive where, as here, the parties authorizing the payment are elected officials and the recipient is a potential political opponent.").

¹⁴⁵ See Jonathan Oosting & Kim Kozlowski, *Engler: Lawmakers 'Interfered' in Settlement Talks*, THE DETROIT NEWS (March 15, 2018), <https://www.detroitnews.com/story/news/politics/2018/03/15/msu-nassar-lawsuit-talks-divisions/32961185/> ("Lawmakers scaled back broader retroactive and immunity elimination provisions this week amid intense lobbying from [MSU]...").

¹⁴⁶ *Id.*

an insufficient additional interest. The issue of whether or not certain reform bills are good policy is a matter for the legislators and their constituents to decide, rather than MSU.

MSU has an additional interest in enforcing the provision as it shields MSU from liability. In *Rumery*, the plurality gave weight to the government wanting to shield itself from frivolous § 1983 claims.¹⁴⁷ In her concurrence, Justice O'Connor agreed, saying "[s]paring the local community the expense of litigation associated with some minor crimes for which there is little or no public interest in prosecution may be a legitimate objective of a release-dismissal agreement."¹⁴⁸

However, the MSU settlement is distinct from the release-dismissal agreement at issue in *Rumery*. First, the link between MSU shielding itself from frivolous claims and the settlement is more attenuated. The settlement deals with advocacy for specific reform bills, not specifically with any particular claims or settlement.¹⁴⁹ And second, MSU is not merely shielding itself from "minor crimes for which there is little or no public interest." MSU is working to shield itself from liability from one of the largest sports and sex abuse scandals in history. Given these

¹⁴⁷ *Town of Newton v. Rumery*, 480 U.S. 386, 396 (1987).

¹⁴⁸ *Id.* at 399-400 (O'Connor, J., concurring).

¹⁴⁹ Theisen, *supra* note 24.

distinctions, it is unlikely that MSU's interest in shielding itself from liability would be given the same weight as in *Rumery*.

Balancing the public policy interests in enforcement and nonenforcement according to *Grossmont*, it is likely that the provision in the MSU settlement would be unenforceable. Given the respect afforded to political speech, it also seems likely that similar provisions relating to political advocacy in settlement agreements would be unenforceable when applying the *Grossmont* standard.

The Ninth Circuit also invalidated the provision of the settlement in *Grossmont* on constitutional grounds.¹⁵⁰ The MSU settlement also involves a state actor¹⁵¹, MSU, so it was worth analyzing this as well. Following the Ninth Circuit's rationale in *Grossmont*, the MSU settlement provision would likely fail because there is no "close nexus" between the government interest in the dispute underlying the litigation and the specific right waived. Here, the underlying dispute is over MSU's involvement in Nassar's sexual abuse. The right waived is the survivor's political speech related to the reform bills. The survivor's advocacy for reform has little to do with the dispute

¹⁵⁰ *Grossmont*, 930 F.2d at 1399.

¹⁵¹ *See supra* Section I.

over MSU's liability for the abuse. According to *Grossmont*,¹⁵² this gives rise to the presumption that there is no legitimate government interest. Without a well-articulated and legitimate government interest, MSU would likely fail at enforcing the provision under this analysis as well.

The petition for writ of certiorari for *Grossmont* was denied,¹⁵³ and as it stands *Grossmont* is still good law in the Ninth Circuit. Although no other circuits have taken up the analysis in *Grossmont*, it has been distinguished on a few occasions.¹⁵⁴ But those cases have been distinguished only on the grounds that there was no state actor¹⁵⁵ or that there was no public interest at issue.¹⁵⁶

What would the Supreme Court do with a case like *Grossmont* or a challenge to the MSU settlement? Did the Ninth Circuit in *Grossmont* go beyond where the Supreme Court would

¹⁵² 930 F.2d at 1399 ("The absence of a close nexus will ordinarily show that the government is seeking the waiver of important rights without a legitimate governmental interest that justifies doing so.").

¹⁵³ *Davies v. Grossmont Union High Sch. Dist.*, 930 F.2d 1390 (9th Cir. 1991), *cert denied*, 501 U.S. 1252 (June 28, 1991).

¹⁵⁴ See *Harcourt Brace Jovanovich Legal & Prof'l Publ'ns v. Multistate Legal Studies, Inc.*, 26 F.3d 948 (9th Cir. 1994); *Wilkicki v. Brady*, 882 F. Supp. 1227 (D.R.I. 1995); *State v. Noah*, 9 P.3d 858 (Wash. Ct. App. 2000).

¹⁵⁵ *Noah*, 9 P.3d at 871 (Wash. Ct. App. 2000) ("[*Grossmont*] is not applicable here because it was a case of state action where the school district was a party.").

¹⁵⁶ See *Wilkicki v. Brady*, 882 F.Supp 1227 (D.R.I. 1995)

("In [*Grossmont*], the enforcement of plaintiff's waiver compromises a fundamental right of the public; in this case, the enforcement of the waiver does not.").

go? The Supreme Court in recent years has placed significant weight on the value of political speech.¹⁵⁷ The Court has also given strong protection to speech on matters of public concern.¹⁵⁸ Furthermore, the MSU case involves not only political speech but also state action to silence political advocacy. It is therefore possible that the Supreme Court would move to protect political speech. Looking at traditional constitutional doctrines and recent case law, the survivors of Nassar's abuse could likely succeed in challenging the settlement provision silencing their political advocacy. The survivors also likely have a successful challenge under traditional contract theory.

II. TRADITIONAL CONTRACT THEORY

The settlement agreement between MSU and the survivors of Nassar's abuse is a contract between the two parties and is thus subject to the traditional rules of contracting.¹⁵⁹ As such, it is important to analyze whether the settlement can be challenged under traditional contract principles. The settlement agreement is unique in that, in part, it is a contract to buy the

¹⁵⁷ See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339-40 (2010).

¹⁵⁸ See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 552 (2011).

¹⁵⁹ See *Knudsen v. C.I.R.*, 793 F.3d 1030, 1035 (9th Cir. 2015)

("A settlement is a contract, and its enforceability is governed by familiar principles of contract law.").

survivors' silence related to their political advocacy. Given that the settlement is a unique form of contract, it can be challenged under public policy doctrine.

Generally, great weight and recognition is given to the "freedom of contract."¹⁶⁰ However, there is significant debate about "contracts of silence"¹⁶¹ and whether they should be treated differently because they suppress speech.¹⁶² Contracts of silence are exactly what they sound like; contracts where one or both parties agree to remain silent about a subject. Contracts of silence have exploded in the last forty years with the rise of the non-disclosure agreement ("NDA"), one form of the contract of silence.¹⁶³ Contracts of silence are used to conceal a range of information, including trade secrets, sexual harassment allegations, and environmental hazards.¹⁶⁴ The freedom of speech is critical, yet not all contracts of silence are harmful.¹⁶⁵ Companies are and should be allowed to protect their trade secrets from contractors and former employees¹⁶⁶ and celebrities can and should be able to keep their address and location

¹⁶⁰ Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 264 (1998).

¹⁶¹ *See id.* at 268.

¹⁶² *Id.* at 266.

¹⁶³ Michelle Dean, *Contracts of Silence*, COLUM. JOURNALISM REV. (Winter 2018), https://www.cjr.org/special_report/nda-agreement.php/.

¹⁶⁴ *Id.*

¹⁶⁵ *See* Garfield, *supra* note 166, at 275.

¹⁶⁶ *Id.* at 269.

private.¹⁶⁷ Contracts of silence can still be used in dangerous ways.¹⁶⁸ For example, non-disclosure agreements are frequently cited as an explanation for why sexual predators can continue to harm new victims.¹⁶⁹ In essence, not all contracts of silence are created equal. The legal system should be equipped to handle these differences.¹⁷⁰

Though the law places great weight on the freedom to contract, it is not an absolute right.¹⁷¹ Under traditional contract theory, the courts have a variety of tools for dealing with the disparities in value among contracts of silence.¹⁷² Courts regularly refuse to enforce contracts for a wide variety of reasons.¹⁷³ Some contracts of silence can be found unenforceable under traditional contract principals such as unconscionability¹⁷⁴ or duress.¹⁷⁵ In determining the enforceability of contracts of silence, the most relevant contract doctrine is public policy.¹⁷⁶

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 331-32. *See* Dean, *supra* note 169.

¹⁶⁹ *See* Dean, *supra* note 169.

¹⁷⁰ *See* Garfield, *supra* note 166, at 269.

¹⁷¹ *See id.* at 294.

¹⁷² *See id.* at 276.

¹⁷³ *See id.* at 276-92.

¹⁷⁴ *See, e.g.,* Disher v. Fulgoni, 464 N.E.2d 639, 644 (Ill. App. Ct. 1984) (invalidating overbroad employee confidentiality agreement on public policy grounds, but also noting the “unconscionable nature” of the agreement); *see also id.* at 285.

¹⁷⁵ *Id.* at 286.

¹⁷⁶ *See id.*

“Under the Restatement (Second) of Contracts, a contract or term will be unenforceable when public policy considerations against enforcement clearly outweigh the interests in favor of enforcement.”¹⁷⁷ Courts are given wide discretion to consider both laws and their own sense of what should be enforceable in deciding what violates public policy.¹⁷⁸

Under Section 178 of the Restatement, a contract provision is unenforceable under public policy “if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.”¹⁷⁹ This means that courts may find a contract provision unenforceable when (1) there is legislation specifically stating such or (2) when the “public policy against enforcement clearly outweighs the interests in favor of enforcing the term.”¹⁸⁰ Generally courts consider legislation, case law, and their own judgment to decide what is good for public

¹⁷⁷ *Id.* at 294-95. See RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981); *see, e.g.*, *Town of Newton v. Rumery*, 480 U.S. 386, 403 (1987).

¹⁷⁸ See RESTATEMENT (SECOND) OF CONTRACTS § 179 cmt. a (AM. LAW INST. 1981); *see also* *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (“The meaning of the phrase ‘public policy’ is vague and variable; courts have not defined it, and there is no fixed rule by which to determine what contracts are repugnant to it.”).

¹⁷⁹ RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

¹⁸⁰ Garfield, *supra* note 166, at 296-97.

welfare in determining what violates public policy.¹⁸¹ Given the weight and importance of the private right to contract, courts have historically limited their use of the public policy exception.¹⁸² While courts should remain restrained in their use of the public policy exception, there are times when society would benefit more from not enforcing a contract or a contract provision.¹⁸³

No bright line rule exists for determining whether contracts of silence are unenforceable on public policy grounds.¹⁸⁴ Courts will almost always enforce contracts requiring silence related to trade secrets;¹⁸⁵ however, courts will almost always refuse to enforce a contract on public policy grounds that requires a party to remain silent about the commission of a crime.¹⁸⁶ Most contracts of silence exist somewhere in between

¹⁸¹ *Id.* at 297; *see also* *Pittsburgh, C. & St. L. Ry. Co. v. Kinney*, 115 N.E. 505, 507 (Ohio 1916) (“Sometimes such public policy is declared by Constitution; sometimes by statute; sometimes by judicial decision. More often, however, it abides only in the customs and conventions of the people . . .”).

¹⁸² *Garfield*, *supra* note 166, at 298-99; *see also* *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931) (“The principle that contracts in contravention of public policy are not enforceable should be applied with caution and only in cases plainly within the reasons on which that doctrine rests.”).

¹⁸³ *Garfield*, *supra* note 166, at 299.

¹⁸⁴ *Id.*

¹⁸⁵ *See id.* at 300-306; *see, e.g.*, *Kewanee Oil Co. v. Bicron Corp.*, 416 U.S. 470 (1974) (discussing the role and importance of trade secret law).

¹⁸⁶ *Garfield*, *supra* note 166, at 302-03; *see, e.g.*, *Branzburg v. Hayes*, 408 U.S. 665, 696 (1972) (“ . . . it is obvious that agreements to conceal information relevant to commission of crime have very little to recommend them from the standpoint of public policy.”).

these two examples.¹⁸⁷ How should courts deal with these contracts? How should courts determine public policy when there are no relevant laws on point? The broad text of the Restatement¹⁸⁸ has given courts little guidance in formulating a test for determining public policy.¹⁸⁹

Comparing the two extremes of contracts of silence, Alan Garfield proposes that “[a] court must compare the strength of the public and private interests in enforcing a contract that suppresses speech”¹⁹⁰ (the “confidentiality interest”) “with the competing public interest in not having the threat of contractual liability inhibit speech”¹⁹¹ (the “disclosure interest”). When the disclosure interest clearly outweighs the confidentiality interest, the contract is not enforceable.¹⁹² In determining whether the public interest in speech overrides the interest in contract enforcement, Garfield suggests looking at other areas of the law.¹⁹³ For example, trade secret law suggests, “that a person’s interest in protecting trade secrets is sufficient to override the

¹⁸⁷ Garfield, *supra* note 166, at 312.

¹⁸⁸ “A promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms.” RESTATEMENT (SECOND) OF CONTRACTS § 178 (AM. LAW INST. 1981).

¹⁸⁹ See Garfield, *supra* note 166, at 314.

¹⁹⁰ *Id.* at 315.

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 316.

public interest in access to such information.”¹⁹⁴ Garfield argues that determining the balance of interests in any given case depends greatly on the facts.¹⁹⁵

Under traditional contract theory, the settlement agreement provision at issue in the MSU case is likely unenforceable on public policy grounds. There are quite a few interests in favor of “confidentiality.” First, the settlement was freely entered into by the plaintiffs. Second, the historic settlement amount was likely due in part to the survivors being compensated for their silence. MSU agreed to settle at such a great expense, in part, because the university wanted to buy their silence. In MSU’s view, the survivors were justly compensated for their rights. Third, the parties entered into the agreement with the expectation that the settlement would be enforced. Contracts function because both parties operate under the assumption the contract will be enforced.¹⁹⁶ If parties have reason to doubt the enforceability of their contract, they have less reason to abide by it.

In terms of “disclosure interests,” the citizens of Michigan had an interest in hearing from those directly affected

¹⁹⁴ *Id.*

¹⁹⁵ *Id.* at 318.

¹⁹⁶ See Chunlin Leonhard, *Illegal Agreements and the Lesser Evil Principle*, 64 CATH. UNIV. L. REV. 833, 846-47 (2015).

by Nassar's abuse in forming their opinions about reform measures. The reform measures were designed to protect past and future victims of abuse, and the voices of survivors could help the general public better understand the strengths and weaknesses of these provisions as well as the differences that reform could make. There is also a strong interest in not allowing government actors to circumvent the political process in their favor. It is possible that the reform bills would have failed on their own, but that is for the legislators and their constituents to decide. Michigan State University should not be able to decide its own future liability. The sheer importance of the political process and allowing political actors full knowledge in making decisions outweighs any confidentiality interest.

State laws can give an indication of a state's public policy interest in determining whether a contract should be enforceable.¹⁹⁷ For example, if a state has a statute protecting trade secrets, this suggests that public policy in that state supports enforcing a contract over a trade secret. Michigan does not have any relevant laws here, and this does not affect the above balance between disclosure and confidentiality interests; however the

¹⁹⁷ Garfield, *supra* note 166, at 297.

area of law surrounding contracts of silence is evolving.¹⁹⁸ Several states have debated passing laws forbidding non-disclosure agreements (one form of contracts of silence) in cases of sexual harassment.¹⁹⁹ If settlements like the one in the MSU case become more common, it would be important to monitor how states are regulating non-disclosure agreements in sexual harassment cases. It is possible that states will change their laws in the wake of the #MeToo²⁰⁰ movement.²⁰¹ If a state were to pass a law forbidding non-disclosure agreements in sexual harassment cases, a settlement like the one between MSU and the survivors of Nassar's abuse would likely be outright unenforceable under that law, or at least unenforceable under the public policy doctrine.

¹⁹⁸ See Stephanie Russell-Kraft, *How to End the Silence Around Sexual-Harassment Settlements*, THE NATION (Jan. 12, 2018), <https://www.thenation.com/article/how-to-end-the-silence-around-sexual-harassment-settlements/>.

¹⁹⁹ *Id.*

²⁰⁰ The #MeToo movement refers generally to the anti-sexual harassment movement. The movement has grown tremendously over the last few years and has been a public reckoning for powerful men in the entertainment business and politics. See Christen A. Johnson & KT Hawbaker, *#MeToo: A Timeline of Events*, CHICAGO TRIBUNE (July 17, 2019, 7:12 PM), <https://www.chicagotribune.com/lifestyles/ct-me-too-timeline-20171208-htmlstory.html>.

²⁰¹ See Russell-Kraft, *supra* note 203, at 3 ("To address the harms that confidentiality requirements impose, lawmakers in a handful of states, including New York, New Jersey, and Pennsylvania, have floated bills to bar nondisclosure provisions in . . . settlements relating to claims of discrimination, retaliation, and harassment.").

Non-disclosure agreements are slightly different from what is at stake in the MSU settlement, but they are similar enough to suggest a state's public policy would not allow a similar settlement to be enforced. Under a non-disclosure agreement, a party would still be allowed to engage in political advocacy; however, they would not be able to discuss the specifics of their case. Sexual harassment can, in many cases, be a matter of public concern.²⁰² Political speech of the kind at issue in the MSU settlement is a significant matter of public concern because the reform bills would have affected the rights and responsibilities of all Michigan citizens. There is even greater public interest and effect in a similar settlement than a non-disclosure agreement, which suggests they would be given equal—or even greater—protection.

III. CONCLUSION

So far, Nassar's victims have not challenged the terms of their settlement agreement with MSU. The day the settlement was certified, the Michigan state legislature dropped the two reform bills at issue.²⁰³ The Michigan legislature is free to continue to work on and pass reform bills in the future and could

²⁰² See, e.g., *Webb v. Bd. of Trs. of Ball St. Univ.*, 167 F.3d 1146, 1150 (1999) (finding that speaking out about sexual harassment could be speech on matter of public concern).

²⁰³ LeBlanc, *supra* note 18.

even go so far as to introduce identical bill text under a new name. So why does it matter that the settlement provision was likely unconstitutional and unenforceable on public policy grounds? And as a society, are we comfortable with the way the scenario played out?

The survivors got what they wanted out of the settlement. That matters. On some level, they were given power over their story and their narrative. Many survivors of sexual abuse prefer to stay quiet about what happened and move on with their lives.²⁰⁴ Arguably, the survivors of Nassar's abuse were appropriately compensated for the rights that they gave up. The average payout survivors received for the settlement is \$1.2 million.²⁰⁵ That is ten to fourteen times more than what survivors of sexual abuse typically receive in settlements in Michigan.²⁰⁶ Furthermore, the settlement did not foreclose any future opportunities to become advocates for social or political change or for survivors to speak about their experience.

²⁰⁴ See *Speaking Out from Within: Speaking Publicly About Sexual Assault*, PENN. COAL. AGAINST RAPE 1-2 (2018), https://pcar.org/sites/default/files/resource-pdfs/speaking_out_from_within_speaking_publicly_about_sexual_assault.pdf.

²⁰⁵ Theisen, *supra* note 24.

²⁰⁶ *Id.*

Still, there is something inherently disturbing about MSU essentially buying survivors' silence. While the survivors were compensated, there is no way to calculate the benefit that their advocacy could have given the public at large. The idea that political speech has a value and can essentially be sold to the government is a difficult pill to swallow. Moreover, the Michigan legislators and their constituents should have the power to decide how to address the problem of child sexual abuse and whether government entities could be liable in those situations. This settlement took that power away from the legislature and their constituents.

Because the settlement involved over three hundred plaintiffs, it is possible that not every plaintiff got a fair deal.²⁰⁷ The reform bills were introduced with the help of a few of Nassar's victims.²⁰⁸ With such a large group of plaintiffs engaged in the settlement negotiations, it is easy to imagine that some parties had to make concessions for the benefit of the group that they might not have made if negotiating alone.²⁰⁹ For some, the

²⁰⁷ *Id.*

²⁰⁸ Leblanc & Oosting, *supra* note 18.

²⁰⁹ For example, large groups may be more risk-averse than individuals. Samid Hussain & Dina Older Aguilar, *An Economic Approach to Assessing the Reasonableness of Class-Action Settlement*, 9 ANTITRUST LITIGATOR 4-5 (2010), <https://www.cornerstone.com/Publications/Articles/An-Economic-Approach-to-Assessing-Settlements>. This means that large groups may settle for less than they would as individuals. *See id.* at 5.

rights they gave up may have meant little, and for others they may have meant much more. The few survivors that helped introduce the bill may not have wanted to impede the settlement for the rest of the group. And while the settlement may have only effectively silenced a few voices, but even one political voice silenced, in this case, is too many.

Unfortunately, what happened with Larry Nassar is likely not the last of these kinds of scandals. Currently, over one hundred students at Ohio State University have spoken up about misconduct by a team doctor and a professor at the school.²¹⁰ Additionally, more than fifty women at the University of Southern California have come forward with allegations against a campus gynecologist.²¹¹ As states and universities grapple with what to do in the wake of #MeToo, settlements with similar provisions are not out of the question. In making legislative decisions, states and their citizens should be able to hear from all interested and affected parties.

Finally, the use of this strategy has implications beyond sexual violence and into different areas of the law. What if a local

²¹⁰ Catie Edmondson, *More Than 100 Former Ohio State Students Allege Sexual Misconduct*, N.Y. TIMES (July 20, 2018), <https://www.nytimes.com/2018/07/20/us/politics/sexual-misconduct-ohio-state.html>.

²¹¹ *Id.*

government settles over an environmental disaster but requires the plaintiffs to end their advocacy efforts? Or a police department settles a claim related to misconduct that requires the victim to stop pursuing criminal justice reform? Silence on these issues technically has a price—\$1.2 million, but can we live with that?

CLOSING THE “POLITICAL ACTION COMMITTEE LOOPHOLE”: THE CONSTITUTIONALITY OF PROHIBITIONS ON PAC TO PAC DONATIONS

Michael C. Peretz*

The 2020 election cycle is now officially in full-swing. Over the next year, President Donald J. Trump and the various Democratic candidates seeking their party’s nomination for President will crisscross the country to gain voter support in the form of votes and campaign contributions. Meanwhile, Congressional and Senatorial candidates will increasingly spend more time in their districts and states to meet with voters and raise funds to fend off serious challengers. If recent history repeats itself, these candidates will collectively raise billions of dollars for their campaigns.¹ While the media will undoubtedly report on the amount of dollars raised by many of these candidates—an important measure to determine the viability of any campaign for federal office—these reports will *not* accurately reflect the true strength of these organizations unless they also account for

* J.D. Candidate, Class of 2020, University of North Carolina School of Law; Managing Editor, *First Amendment Law Review*.

¹ Madi Alexander, *PACs Made Up Nearly Half of 2016 Election Spending*, BLOOMBERG LAW, Apr. 18, 2017, <https://www.bna.com/pacs-made-nearly-n57982086803/>.

expenditures made by Political Action Committees² (“PACs”) in support of each of these candidates.

During the two most recent election cycles,³ PACs received and spent a record amount of campaign contributions.⁴ For instance, during the 2016 general election cycle, expenditures made by PACs⁵ “made up a forty-six percent share of all dollars spent on federal campaigns during the 2016 election cycle,” whereas spending made by presidential and congressional candidates constituted a lesser thirty-six percent share combined.⁶ This phenomenon illustrates a seismic shift in American politics.⁷ The power and influence of the traditional campaign apparatus, one that is permitted to raise and spend money solely for the

² Although this Note will use the term “PAC” or “political action committee,” neither formally exists under federal law. The federal government formally recognizes and regulates “political committee[s],” which is defined as any committee, club, association or other group of persons that receives contributions in excess of \$1000 or makes expenditures in excess of \$1000 in a calendar year to influence elections for federal office. 52 U.S.C. § 30101(4)(A) (2018).

³ The “two most recent election cycles” refers to the 2018 midterm election and the 2016 presidential election.

⁴ See Alexander, *supra* note 2.

⁵ Bloomberg’s analysis of campaign contributions categorized all PACs the same, including super PACs permitted to take in unlimited donations. See *id.*

⁶ Alexander, *supra* note 2.

⁷ The 2016 general election was the second consecutive general election in which the expenditures of Political Action Committees accounted for the largest share of spending, when compared to the campaign spending of “Presidential Candidates,” “Congressional Candidates,” and “Party Committees.” *Id.* However, the 2016 election was the first on record in which PACs raised and spent more than “Presidential Candidates” and “Congressional Candidates” combined. *Id.*

benefit of a specific candidate, has waned when compared to PACs that are lawfully raising and spending money to influence the outcome of multiple elections at once.⁸

This is not necessarily an alarming phenomenon. PACs serve a unique and often beneficial role in American democracy—they provide citizens who feel strongly about a particular political issue or platform the opportunity to donate to organizations that will spend their donations towards get-out-the-vote efforts; voter registration drives; and even candidates who, if victorious, will govern in accordance with the committees' values. In essence, PACs can serve as a vehicle to amplify the voices of citizens.

For example, the Tea Party Patriots PAC, with donations from the general public, amplifies the voices of private citizens who advocate for limited government and fiscal responsibility.⁹ Similarly, the Vote Climate U.S. PAC speaks on behalf of citizens who are concerned about the state of the environment and want to elect candidates who will vote for legislation to regulate carbon emissions.¹⁰ Both of these organizations, among thousands of

⁸ See 52 U.S.C. § 30101(4)(A) (2018).

⁹ TEA PARTY PATRIOTS PAC, <https://www.teapartypatriots.org/ourvision/> (last visited Apr. 6, 2019).

¹⁰ VOTE CLIMATE U.S. PAC, <https://voteclimatepac.org/vote-climate-mission-and-approach/> (last visited Apr. 6, 2019).

others, make it easier for citizens to exercise their constitutional rights to engage in civic discourse.¹¹

For all the benefits that PACs provide Americans, there still exists one tremendous problem that calls into question existing state and federal campaign finance laws: under the current legislative schemes enacted by Congress and most state legislatures, PACs are permitted to donate funds to other PACs.¹² This may sound well and good, for it is certainly possible that PACs wish to share funds with other likeminded committees to jumpstart certain initiatives. However, legislative schemes that permit PAC to PAC donations but restrict how much a citizen may donate to a candidate campaign create what this Note calls the “Political Action Committee Loophole.” This loophole, albeit difficult to exploit, allows sophisticated citizens to conceivably use PACs as a vehicle to circumvent campaign finance laws that prohibit how much a citizen may donate to any single campaign on an annual basis. This loophole will be discussed in greater detail in Part III of this Note. In brief, under a statutory scheme where PAC to PAC donations are legal, but citizens may not donate

¹¹ The right to engage in civic discourse is encapsulated by the rights to free speech, assembly, and association. *See* U.S. CONST. amend. I.

¹² BALLOTPEdia, https://ballotpedia.org/PACs_and_Super_PACs (last visited Jan. 6, 2020); *see also* OPENSECRETS, <https://www.opensecrets.org/pacs/pacfaq.php> (last visited Jan. 6, 2020).

more than a specified amount to a PAC or campaign, a wealthy donor could conceivably funnel his or her donations through multiple PACs for the sole benefit of one PAC, one candidate's campaign apparatus, or both.¹³ This would allow the sophisticated donor to not only exceed statutory contribution limits for a donation to a PAC or campaign in a given election cycle, but to also shield his or her contribution(s) from the public.

Recognizing that existing loopholes may allow certain donors and PACs to assert undue influence in federal elections, multiple state legislatures have appropriately responded by prohibiting PACs from making certain expenditures to other PACs. For example, both the Alabama and Missouri legislatures enacted prohibitions on PAC to PAC donations, ridding most PACs of the ability to donate monies they have on hand to other likeminded PACs.¹⁴

¹³ A hypothetical example of this practice is presented in Part III of this Note.

¹⁴ Missouri's prohibition took form of a constitutional amendment. MO. CONST. art. 8, § 23. Although the amendment was formally approved by the voters of the state, it was initially introduced in the legislature as "Amendment 2." Jason Rosenbaum, *Amendment 2 Could Bring Campaign Donation Limits Back to Missouri*, ST. LOUIS PUBLIC RADIO (Oct. 14, 2016), <https://news.stlpublicradio.org/post/amendment-2-could-bring-campaign-donation-limits-back-missouri#stream/0>. On the other hand, Alabama placed a probation on PAC-to-PAC donations by means of a statute. ALA. CODE § 17-5-15(b) (2018).

The motivation behind these two legislative actions was reasonable: (1) to prevent sophisticated donors from being able to influence elections by circumventing proper protocols involving contribution limits and disclosure and (2) to prevent PACs from coordinating with candidate campaigns and party committees. Both Alabama and Missouri’s legislative actions were challenged in federal court by PACs on the basis that they violated the First Amendment rights to freedom of speech and association.¹⁵ The ensuing litigation resulted in a circuit split between the Eighth and Eleventh Circuits on the same question: are prohibitions on PAC to PAC donations constitutional under the First Amendment?¹⁶

This Note seeks to explore how the recent circuit split between the Eighth and Eleventh Circuits fits into the existing framework of First Amendment jurisprudence and to subsequently weigh the constitutionality of prohibitions on PAC to PAC donations. The implications of this circuit split can only be fully understood with an understanding of the relationship between the First Amendment rights to freedom of speech and association,

¹⁵ *Ala. Democratic Conference v. Att’y Gen. of Ala.*, 838 F.3d 1057, 1060 (11th Cir. 2016); *Free & Fair Elections Fund v. Mo. Ethics Comm’n*, 903 F.3d 759, 762 (8th Cir. 2018).

¹⁶ Alabama’s statute survived its constitutional challenge, *Ala. Democratic Conf.*, 838 F.3d 1057, 1058, whereas Missouri’s constitutional amendment did not, *Free & Fair Elections Fund*, 903 F.3d 759, 762.

America's campaign finance laws, and the United States Supreme Court's foundational case law interpreting them.¹⁷

The analysis will proceed in five parts. Part I provides a background on the First Amendment's protection for the freedom of speech and right to associate and explains how these constitutional rights are implicated by campaign finance law. Part II introduces the two central tenets of campaign finance law and surveys the foundational case law on campaign finance to provide a legal backdrop under which to properly analyze the two recent cases at issue: *Alabama Democratic Conference v. Attorney General of Alabama*¹⁸ and *Free & Fair Elections Fund v. Missouri Ethics Commission*.¹⁹ Part III further argues this Note's position: placing prohibitions on PAC to PAC donations is a reasonable policy but, in light of recent Supreme Court precedent, likely does not serve a legitimate state interest as a matter of law. Part IV analyzes the two circuit courts' decisions in question within the appropriate legal framework. Part V examines, and criticizes, how the current campaign finance case law restricts a state's ability to be proactive when trying to stop corruption before it happens and will discuss

¹⁷ See U.S. CONST. amend. I.

¹⁸ 838 F.3d 1057 (11th Cir. 2016).

¹⁹ 903 F.3d 759 (8th Cir. 2018).

the implications of this circuit split on the upcoming 2020 general election.

I. THE FIRST AMENDMENT AND CAMPAIGN FINANCE LAW

The First Amendment to the Constitution²⁰ is a “cluster of distinct but related rights[.]”²¹ Particularly relevant to this discussion involving campaign finance laws is the First Amendment rights of free speech and peaceful assembly, and the implicit right of association. These rights are implicated whenever the government enacts regulations limiting the extent to which any citizen may express themselves politically or limiting any citizen’s ability to associate with a certain political group.²²

A. The Right to Free Speech and the Protection of Political Expression

The “[d]iscussion of public issues and debate on the qualifications of candidates” are firmly within the purview of First Amendment protection.²³ In light of the Framers’ motivations for drafting the First Amendment, expressions of political speech are considered to be “integral to the operation of the system of government established by our Constitution.”²⁴ It follows that

²⁰ U.S. CONST. amend. I.

²¹ David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 484 (1983).

²² See *Buckley v. Valeo*, 424 U.S. 1, 13–17 (1976).

²³ *Id.* at 14.

²⁴ *Id.*

“[t]he First Amendment affords the broadest protection to such political expression in order to assure the unfettered interchange of ideas for the bringing about of political and social changes desired by the people.”²⁵

There exists “practically universal agreement that a major purpose of [the First Amendment] was to protect the free discussion of governmental affairs,” which includes the “discussions of candidates.”²⁶ The U.S. Supreme Court in *Monitor Patriot Co. v. Roy*²⁷ even went so far as to declare “the constitutional guarantee [of free speech] has its fullest and most urgent application precisely to the conduct of campaigns for political office,” conveying that political expression is considered fundamentally important within the context of the right to free speech.²⁸ This powerful assertion directly implicates the rights of PACs advancing the interests of their donors in the public forum by independently buttressing the campaigns of certain candidates or advocating for certain issues.

B. The Right to Peacefully Assemble and the Right to Freely Associate

²⁵ *Id.* (citing *Roth v. United States*, 354 U.S. 476, 484 (1957)).

²⁶ *Id.* (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)).

²⁷ 401 U.S. 265 (1971).

²⁸ *Id.* at 272.

With the exception of speech, the right of citizens to freely assemble²⁹ is the “most widely and commonly practiced action that is enumerated in the Bill of Rights.”³⁰ To understand how campaign finance laws implicate the freedom of association, it is first important to discuss the origin of the specifically enumerated First Amendment protection for peaceful assembly, as these rights are intrinsically related.

The Assembly Clause was inspired³¹ by the impact colonial taverns and “tavern talk”³² had on the revolution³³ against the British Crown.³⁴ These taverns played a vital role as hubs of colonial assembling. Baylen Linnekin explains that these taverns were the “most common and important situs for building a consensus for American opposition to the British.”³⁵

Taverns were the only colonial space outside the home that permitted participants in all social classes the opportunity

²⁹ U.S. CONST. amend. I. (“Congress shall make no law respecting . . . the right of the people peaceably to assemble . . .”).

³⁰ Baylen J. Linnekin, *“Tavern Talk” and the Origins of the Assembly Clause: Tracing the First Amendment’s Assembly Clause Back to Its Roots in Colonial Taverns*, 39 HASTINGS CONST. L.Q. 593, 593 (2012).

³¹ It is important to understand the Framers’ reasons for protecting the right to peacefully assemble in the First Amendment, as it provides a logical framework to better understand how the right to peacefully assemble and the right to freely associate are related.

³² Linnekin, *supra* note 31 at 595.

³³ *Id.* at 598 (“As the years passed, informal discussions continued alongside more formal meetings as colonists began to explore the machinations of revolution.”).

³⁴ *Id.* (“In the British view, the homeland was merely asking prospering colonists to repay their protectors.”).

³⁵ *Id.* at 599.

to decide whether, how, and to what extent they would participate and shape their interactions with others. It was in these informal community cells that colonists found the most egalitarian context for gatherings. . . . Taverns fostered a deep sense of community and offered the perfect milieu for political debate. In this way, taverns served as political spaces where citizens could participate in civic life.³⁶

For instance, some of the most influential Founding Fathers, including George Washington, Patrick Henry, and Thomas Jefferson, chose to assemble at taverns as they plotted against the British.³⁷ It is unsurprising, then, that American assertions of a right to peacefully assemble were not just included in the Bill of Rights but also in several State constitutions before the U.S. Constitution was ratified in 1787.³⁸

Although the First Amendment explicitly protects the right to peacefully assemble with fellow citizens, it does not include any direct language that protects the rights of Americans to freely associate with whichever group(s) or political party they may choose to join. Even though both these rights are inherently related—they both permit citizens to join together with likeminded individuals to effect change—the constitutional right of

³⁶ *Id.* at 603-04 (internal citations and quotations omitted).

³⁷ *Id.* at 605 (stating that Founding Fathers planned successful boycotts after assembling at colonial taverns).

³⁸ *See* *United States v. Cruikshank*, 92 U.S. 542, 551 (1876) (“The right of the people peaceably to assemble for lawful purposes existed long before the adoption of the Constitution of the United States.”).

association³⁹ was not formally recognized until 1958.⁴⁰ The U.S. Supreme Court formally recognized the right of association after acknowledging that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association,”⁴¹ thereby making it an essential aspect of First Amendment protections.

Most relevant to this Note’s discussion of campaign finance, however, are the Court’s subsequent decisions that determined that the right of association goes so far as to protect the ability “to associate with others for the common advancement of political beliefs and ideas,” which includes “[t]he right to associate with the political party of one’s choice.”⁴² Therefore, one’s freedom to freely associate is the constitutional right most often implicated by legislation regulating campaign finance because these laws regulate the extent to which one can support a specific candidate’s campaign, party committee, or PAC.

II. THE CENTRAL TENETS OF CAMPAIGN FINANCE LAWS AND THE DEVELOPMENT OF THE REGULATORY FRAMEWORK

³⁹ Campaign finance provisions often implicate this right. *See infra* notes 45–54.

⁴⁰ *See NAACP v. Alabama*, 357 U.S. 449, 460 (1958).

⁴¹ *Id.*

⁴² *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973).

The modern campaign finance framework is a “muddled mixture of legislative reforms” and Supreme Court decisions that limit the impact of those laws.⁴³ Even though campaign finance regulations have changed significantly over the past forty years, the two central tenets of campaign finance law—contribution limits and disclosure thresholds—remain the same.⁴⁴

The modern regulatory framework policing campaign finance is largely based upon the structure originally enacted as part of the Federal Election Campaign Act of 1971 (“FECA”),⁴⁵ even though the act has been reformed by Congress on multiple occasions and successfully challenged at the Supreme Court.⁴⁶

The first significant Congressional reform to FECA was passed in 1974, just two years after President Richard Nixon

⁴³ Paul J. Weeks, Note, *Enhancing Responsiveness and Alleviating Gridlock: Pragmatic Steps to Balance Campaign Finance Law in Light of the Supreme Court’s Jurisprudence*, 83 GEO. WASH. L. REV. 1097, 1103 (2015).

⁴⁴ See Anthony Johnstone, *Recalibrating Campaign Finance Law*, 32 YALE L. & POL’Y. REV. 217, 228-30 (2013).

⁴⁵ Federal Election Campaign Act of 1971, Pub. L. No. 92-225, 86 Stat. 3 (1972).

⁴⁶ Weeks, *supra* note 44, at 1104 (stating that Congress made some small changes to FECA before making more substantial reforms to the law in 2002). The most recent overhaul of FECA occurred in 2002 with the Bipartisan Campaign Reform Act (BCRA). *Id.* at 1106. Although there have not been any major reforms to the BCRA since 2002, the FEC “puts forth new rules attempting to effectuate the Court’s decisions” that deem certain provisions unconstitutional. *Id.* at 1104.

originally signed it into law.⁴⁷ The 1974 reforms to FECA⁴⁸ placed more stringent restrictions on campaign finance, including codifying contribution limits for individuals wishing to donate to campaigns and placing spending limits on individuals or groups (PACs) that decide to independently support or oppose a candidate.⁴⁹ At the time, the statutory individual contribution limit to campaigns was set at \$1000 for individuals and \$5000 for political committees (PACs), per campaign.⁵⁰

Furthermore, the codified spending limits imposed by the amendments were rather severe. Individuals or organized groups, such as PACs, were only allowed to independently spend \$1,000 in support of or in opposition to particular candidates.⁵¹ The legislative history surrounding FECA indicates that Congress was focused on enacting campaign finance reform to address both actual corruption and the appearance of corruption, which it “believ[ed] encompass[ed] both undue influence and unequal access.”⁵² The provisions of this reform bill were ultimately

⁴⁷ *Id.*

⁴⁸ Federal Election Campaign Act Amendments of 1974, Pub. L. No. 93-443, 88 Stat. 1263 (1974).

⁴⁹ Weeks, *supra* note 44, at 1105.

⁵⁰ Federal Election Campaign Act Amendments of 1974, *supra* note 49. Furthermore, individual contributors could not donate more than \$25,000 annually to political campaigns. *Buckley v. Valeo*, 424 U.S. 1, 1 (1976).

⁵¹ Federal Election Campaign Act Amendments of 1974, *supra* note 49.

⁵² Jonathan S. Krasno & Frank J. Sora, *Evaluating the Bipartisan Campaign Reform Act (BCRA)*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 123 (2003)

challenged in federal court by various candidates for federal office and associated political parties and organizations.⁵³

A. Buckley v. Valeo (1976)

*Buckley v. Valeo*⁵⁴ is the foundational case in the Supreme Court's campaign finance jurisprudence. This decision was particularly noteworthy for two reasons: First, it "introduced corruption as a concern with weight enough to allow limiting First Amendment freedoms."⁵⁵ Second, the Court developed a balancing framework, still in use today, to determine whether a particular campaign finance regulation is constitutional. In this decision, the Court held that FECA's contribution provisions⁵⁶ were constitutional, but that the independent expenditure

(explaining that the Members of Congress who passed FECA in 1979 and the BCRA in 2002 had a similar definition of the word "corruption"). Although Congress did not closely define what "undue influence" and "unequal access" meant in real terms, as the term corruption is "a technical term of political science" that has remained the same since the Founding Era, as evidenced by Framers' overwhelming concern that corruption would ultimately destroy any chance that the United States would ever flourish. Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 346–350, 373 (2009). In fact, "[c]orruption was discussed more often than in the Constitutional Convention than factions, violence, and instability," and "was a topic of concern on almost a quarter of the days that the members [of the Constitutional Congress] convened." *Id.* at 352.

⁵³ See *Buckley v. Valeo*, 424 U.S. 1 (1976).

⁵⁴ *Id.*

⁵⁵ Teachout, *supra* note 53.

⁵⁶ At the time, the contributions to candidates for federal office were limited to \$1000 from individuals and \$5000 from political committees. Weeks, *supra* note 45, at 1104-05.

provisions violated the First Amendment.⁵⁷ The holding of this case was rather clear: it “creat[ed] a dichotomy between contribution limits (generally permissible) and expenditure limits (generally impermissible).”⁵⁸

When making its decision to uphold the statutory limits placed on individual campaign contributions and large donations made directly to political committees (now more commonly referred to as PACs), the Court adopted a balancing framework.⁵⁹ This framework balances the First Amendment interest of citizens to freely associate against the government’s interest to combat actual or apparent corruption.⁶⁰ On one hand, the Court recognized that FECA’s statutory limitations on campaign contributions “impose[d] direct quantity restrictions on political communication and association by persons, groups, candidates,

⁵⁷ The term “independent expenditures” refers to fiscal outlays any person or political organization, such as a PAC, makes in support of a candidate *without* coordinating with the campaign. For instance, if a citizen and their family wished to create elaborate signs on behalf of President Donald J. Trump when he visited their town on a campaign stop, the monies spent by the family in creating these signs would constitute independent expenditures, as they were not made in coordination with the campaign. Statutory limits on such independent expenditure were deemed unconstitutional by the *Buckley* Court, as discussed in the subsequent paragraphs. Weeks, *supra* note 44, at 1104-05.

⁵⁸ Marc E. Elias & Jonathan S. Berkon, *After McCutcheon*, 127 HARVARD L. REV. F. 373, 374 (2014).

⁵⁹ See *Buckley*, 424 U.S. at 35–36, 38.

⁶⁰ See *id.*

and political parties,”⁶¹ thereby regulating the extent to which one can associate with a specific candidate or campaign. However, the Court also recognized that the federal government had an interest in regulating one’s right to freely associate—by means of monetary donations to a campaign or PAC—in order to prevent actual corruption, or even the appearance of corruption.⁶²

Even though the Court properly described the substantial First Amendment interest at issue, the Court nonetheless dismissed the appellants’ argument that the \$1000 individual contribution limit was “unrealistically low because much more than that amount would still not be enough to enable an unscrupulous contributor to exercise improper influence over a candidate or office holder, especially in campaigns for statewide or national office.”⁶³

In response to the appellants’ claim that FECA’s contribution limits were entirely arbitrary and did not actually serve the purpose of rooting out actual or apparent corruption,⁶⁴

⁶¹ *Id.* at 18.

⁶² Weeks, *supra* note 45, at 1105.

⁶³ *Buckley*, 424 U.S. at 30.

⁶⁴ The non-government appellants contended that the contribution limits were not narrowly tailored enough to serve the government’s stated purpose: to stop *quid pro quo* corruption, or even the appearance of it. They argued that bribery laws and the disclosure requirements enumerated in FECA “constitute[d] a less restrictive means of dealing with proven and suspected

the Court reasoned that certain restrictions on political donations were constitutional because the federal government had a rather significant interest⁶⁵ “in preventing actual and apparent corruption—specifically the danger, or even the appearance, of quid pro quo corruption.”⁶⁶ This interest, the Court concluded, was paramount and outweighed the individual interest to freely donate, without limits, to campaigns and political committees.⁶⁷

On its face this decision was reasonable. After all, the Framers were rightfully concerned that corruption would ultimately overwhelm the American Republic as it did Rome, and thus ensured “[t]he Constitution carrie[d] with it an anti-corruption principle.”⁶⁸ With this in mind, it would appear that the *Buckley* Court’s decision properly reflected the Framers’ intent, and thus is rightfully considered “a seminal case.”⁶⁹

quid pro quo arrangements.” *Buckley*, 424 U.S. at 27-28 (emphasis added) (quotations omitted).

⁶⁵ The Court described this interest as “weighty.” *Id.* at 29.

⁶⁶ Weeks, *supra* note 44, at 1105.

⁶⁷ See *Buckley*, 424 U.S. at 28-29. The Court noted that the contributions limits enumerated in FECA “still provided substantial opportunities to engage in politically expressive activity and to associate with candidates and political committees.” Weeks, *supra* note 44, at 1105.

⁶⁸ Zephyr Teachout, *The Anti-Corruption Principle*, 94 CORNELL L. REV. 341, 342 (2009).

⁶⁹ See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 485 (2007) (Scalia, J., concurring).

Legal theorists often refer to this case as the “original campaign finance decision,”⁷⁰ as it was the first instance in which the Court formally held that Congress may adopt certain contribution limits to control how citizens may associate with political campaigns or PACs.⁷¹ Here, the Court accepted the federal government’s assertion that it was necessary for Congress to enact contribution ceilings, in conjunction with disclosure requirements, to fulfill the government’s stated interest:

And while disclosure requirements serve the many salutary purposes discussed elsewhere in this opinion, Congress was surely entitled to conclude that disclosure [requirements were] only a partial measure, and that contribution ceilings were a necessary legislative concomitant to deal with the reality or appearance of corruption inherent in a system permitting unlimited financial contributions, even when the identities of the contributors . . . are fully disclosed.⁷²

Nonetheless, the Court in *Buckley* also held that there are some limits to the regulations Congress may enact. For instance, the Court found that the government lacks a substantial interest in limiting independent expenditures of these entities because they are ultimately made without coordination with either the candidate or their campaign; in other words, there is a decreased

⁷⁰ Dennis F. Thompson, *Two Concepts of Corruption: Making Campaigns Safe for Democracy*, 73 GEO. WASH. L. REV. 1036, 1036 (2005).

⁷¹ *See id.*

⁷² *Buckley*, 424 U.S. at 28. In other words, the Supreme Court concluded that the Congressional action was narrowly tailored to fit the government’s interest.

chance of quid pro quo corruption, or the appearance of such malfeasance.⁷³ The Court reasoned that, on balance, “independent expenditure limits were unconstitutional based on this lack of governmental interest coupled with the increased interference with the First Amendment right to political expression that limitations on independent expenditures pose.”⁷⁴

As noted by Paul J. Weeks and other astute legal commentators, the *Buckley* Court altered FECA “in a manner that undermined the overall regulatory scheme” initially enacted by Congress.⁷⁵ In the years following *Buckley*, however, the Supreme Court, under Chief Justices Burger and Rehnquist, published decisions that “subtly expanded” the “permissible grounds” for campaign finance regulation by Congress and state legislatures.⁷⁶ In fact, the Rehnquist Court consistently upheld legislative schemes regulating campaign finance “under increasingly expansive conceptions of the government interest in preventing actual and apparent corruption.”⁷⁷

⁷³ *Id.* at 45–47.

⁷⁴ Weeks, *supra* note 44, at 1105.

⁷⁵ *Id.*; see also Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1710–11 (1999).

⁷⁶ Michael S. Kang, *After Citizens United*, 44 IND. L. REV. 243, 243 (2010); See e.g. *McConnell v. FEC*, 540 U.S. 93 (2003); *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431 (2001); *Nixon v. Shrink Mo. Gov’t PAC*, 528 U.S. 377 (2000).

⁷⁷ Kang, *supra* note 77, at 248.

For example, in *Austin v. Michigan Chamber of Commerce*,⁷⁸ the Court expanded the government's interest in preventing actual and apparent corruption when it upheld regulations of campaign finance aimed at mitigating "the corrosive effects of corporate money."⁷⁹ In 2003, the Rehnquist Court yet again deferred to the government's interest in preventing actual and apparent corruption in *McConnell v. FEC*,⁸⁰ where it upheld portions of the Bipartisan Campaign Reform Act of 2002 ("BCRA")⁸¹ that were aimed at preventing "improper influence and opportunities for abuse that extended beyond the usual concern about quid pro quo arrangements."⁸²

The Rehnquist Court's deference to the governmental interest in preventing apparent or actual corruption has been completely reversed in recent years by the Roberts Court. *Citizens United v. FEC*⁸³ and *McCutcheon v. FEC*⁸⁴ serve as profound examples for how the modern Supreme Court, moving increasingly in a conservative direction, determines whether pieces

⁷⁸ 494 U.S. 652, 668–69 (1990).

⁷⁹ Kang, *supra* note 77, at 248.

⁸⁰ 540 U.S. at 188–89.

⁸¹ The BCRA, signed into law in 2002, was the most significant piece of campaign reform adopted by Congress since FECA. See Jonathan S. Krasno & Frank J. Sorauf, *Evaluating the Bipartisan Campaign Reform Act (BCRA)*, 28 N.Y.U. REV. L. & SOC. CHANGE 121, 121–23 (2003).

⁸² Kang, *supra* note 77, at 248.

⁸³ 558 U.S. 310 (2010).

⁸⁴ 134 S. Ct. 1434 (2014).

of campaign finance legislation enacted by Congress and state legislatures are constitutional. A brief discussion of the doctrinal impact of these two cases is necessary to lay the groundwork for a proper analysis of the central question of this Note—are state campaign finance regulations prohibiting PAC to PAC donations constitutional under the First Amendment?

*B. Citizens United v. FEC*⁸⁵ (2010)

Citizens United invalidated “federal prohibitions on independent corporate expenditures in connection with federal elections,”⁸⁶ holding that there was no constitutional basis “for allowing the [g]overnment to limit corporate independent expenditures.”⁸⁷ While the Court’s holding did not speak to the constitutionality of PAC to PAC donations, as they were not at issue in the case, this landmark decision is entirely relevant when analyzing the constitutionality of any campaign finance regulation. This particular decision illustrates the Roberts Court’s

⁸⁵ Political pundits and candidates for federal office often refer to *Citizens United* in a negative light to make a broader point about the need for further campaign finance reform. See e.g., Thomas B. Edsall, *After Citizens United, a Vicious Cycle of Corruption*, N.Y. TIMES, Dec. 6, 2018, <https://www.nytimes.com/2018/12/06/opinion/citizens-united-corruption-pacs.html>.

This Note, however, takes no position on the merits of this particular Supreme Court decision. It aims to properly apply this decision, in conjunction with its other precedent, to analyze the circuit split between the Eighth and Eleventh Circuits at issue.

⁸⁶ Kang, *supra* note 77, at 244.

⁸⁷ *Citizens United v. FEC*, 558 U.S. 310, 365 (2010).

substantial winnowing of the legitimate government interest in campaign finance regulation—preventing actual corruption or the appearance of corruption—to actual or apparent quid pro quo corruption, thereby making it more difficult for the government to prevail when restricting speech in campaigns.⁸⁸

The Court relied mainly upon the majority's opinion in *Buckley v. Valeo* to explain its rationale deeming federal prohibitions on independent expenditures by corporations unconstitutional.⁸⁹ It reaffirmed that government has no interest in limiting independent expenditures, whether it be by individuals or corporations, and explained that the impact of the prohibition in question extended well beyond preventing quid pro quo corruption:

Limits on individual expenditures, such as § 441b, have a chilling effect extending well beyond the Government's interest in preventing quid pro quo corruption. The anticorruption interest is not sufficient to displace the speech here in question. Indeed, 26 States do not restrict independent expenditures by for-profit corporations. The

⁸⁸ Kang, *supra* note 77, at 243 (“*Citizens United*, reflecting Justice Kennedy’s views previously expressed mainly in dissent, represents the Roberts Court’s clear reversal of [the Rehnquist Court] trend and a narrow focus on quid pro quo corruption as the exclusive grounds for government regulation.”).

⁸⁹ *Id.* at 246.

Government does not claim that these expenditures have corrupted the political process in those States.⁹⁰

Here, the Roberts Court strayed significantly from relatively recent precedent that had been incredibly deferential to the government, in which campaign finance regulations were upheld so long as the regulation(s) in question could conceivably limit corruption or the appearance of it.⁹¹ By concluding that the government regulation in question was unconstitutional because it went further than the “Government’s interest in preventing quid pro quo corruption,” the Roberts Court provided a new framework to determine if a particular campaign finance regulation can overcome a First Amendment challenge: whether the particular regulation in question is *narrowly tailored* to prevent actual or apparent quid pro quo corruption.⁹²

C. McCutcheon v. FEC (2014)

In *McCutcheon*,⁹³ the Supreme Court invalidated the congressional enactment of “biennial aggregate limits,” which limited the total amount of money any citizen may contribute to PACs, federal candidates, or party committees (e.g. the

⁹⁰ See *Citizens United*, 558 U.S. 310, 357; see also Kang, *supra* note 77, at 246.

⁹¹ See Kang, *supra* note 77, at 246–47.

⁹² See *id.* at 249 (asserting that Justice Kennedy’s majority decision, which is “focused narrowly on the prevention of quid pro quo corruption” are “likely [to] direct the Court’s campaign finance decisions going forward”).

⁹³ *McCutcheon v. FEC*, 572 U.S. 185 (2014).

Republican National Committee and Democratic National Committee) over a two year period.⁹⁴ The conservative plurality consisting of Justices Roberts, Scalia, Kennedy, and Alito, affirmed what Justice Kennedy wrote in his majority opinion in *Citizen's United*: the government may only enact campaign finance regulations “that regulate against the threat of actual or apparent quid pro quo corruption.”⁹⁵ Quid pro quo corruption, as defined by Chief Justice Roberts, “captures the notion of a direct exchange of an official act for money.”⁹⁶ On the other hand, under the dissent’s view, written by Justice Breyer, the definition of corruption should be much broader and include “efforts to obtain influence over or access to elected official[s] or political parties” in order to “maintain the integrity of our public governmental institutions.”⁹⁷ If the definition were made broader, then, the government would be able to more strictly regulate campaign contributions.

Even though a plurality defined corruption much more narrowly than their dissenting colleagues,⁹⁸ the Court chose not to

⁹⁴ Elias & Berkon, *supra* note 60, at 374.

⁹⁵ *Id.* at 373.

⁹⁶ *McCutcheon*, 572 U.S. at 192 (citing *McCormick v. United States*, 500 U.S. 257, 266 (1991)).

⁹⁷ *Id.* at 234, 236. (Breyer, J., dissenting) (quoting *Citizens United v. FEC*, 558 U.S. 310, 359 (2010)).

⁹⁸ Justice Thomas filed his own opinion concurring in judgement only. *McCutcheon*, 572 U.S. at 228. In his concurrence, Justice Thomas argued that

overturn the longstanding federal campaign regulations related to individual campaign contributions.⁹⁹ Originally upheld in *Buckley*, those regulations limit how much an individual citizen may donate to a particular candidate or PAC during an election cycle. Here, the plurality, led by Justice Scalia, reasserted that provisions limiting an individual’s First Amendment right to freely associate through campaign contribution limits advanced the government’s interest to prevent actual or apparent quid pro quo corruption and were thus constitutional.¹⁰⁰ This portion of the Court’s holding is central¹⁰¹ to this Note’s discussion of the constitutionality of state

although *Buckley* was properly applied in this case, it should be overturned completely. *Id.* at 232 (“I would overrule *Buckley* and subject the aggregate limits in BCRA to strict scrutiny, which they would surely fail”). Here, Justice Thomas continues to advocate that all campaign contribution limits are unconstitutional. *See id.* (“I am convinced that under traditional strict scrutiny, broad prophylactic caps on both spending and giving in the political process . . . are unconstitutional.”) (quoting *Colo. Republican Fed. Campaign Comm. v. FEC*, 518 U.S. 604, 640-41 (1996) (Thomas J., concurring)).

⁹⁹ Today, a citizen may donate a maximum of \$2600 to any candidate each year, \$5000 to any PAC each year, \$10,000 to any state party each year, and \$32,400 to any national party each year. Elias & Berkon, *supra* note 59, at 377.

¹⁰⁰ *Id.* at 373.

¹⁰¹ Because the Supreme Court deemed contribution limits to be constitutionally permissible, citizens who wish to donate more than what the federal contribution limits allow are unable to do so. In light of these limits, certain states, have become concerned that some citizens, particularly those with significant resources, may still nonetheless try to circumvent the federal contribution limits by funneling money through multiple PACs to their candidate of choice. Enacting prohibitions on PAC to PAC donations could prevent citizens from being able to exploit a loophole to spend beyond what is legally permissible.

prohibitions on PAC to PAC donations at issue in both *Alabama Democratic Conference v. Attorney General of Alabama*¹⁰² and *Free and Fair Elections Fund v. Missouri Ethics Commission*.¹⁰³ While the Court makes clear that certain campaign finance regulations can prevail over the Supreme Court's exacting scrutiny standard,¹⁰⁴ this standard has become difficult to overcome, particularly when a case comes before the Roberts Court that is properly applying longstanding precedent. Therefore, when Congress and state legislatures across the nation enact further campaign finance regulations, they should expect to face difficult legal challenges over whether the provision is narrowly tailored enough to prevent actual or apparent quid pro quo corruption. Of course, this is under the assumption that the Court continues to properly apply *Buckley* and *Citizens United* to the case before it.

III. STATE PROHIBITIONS ON PAC TO PAC DONATIONS

Every state in the United States has enacted its own regulations that govern the financing of candidates seeking statewide, local, and municipal office, regulating the conduct of party committees and PACs operating in their respective

¹⁰² 838 F.3d 1057 (11th Cir. 2016).

¹⁰³ 903 F.3d 759 (8th Cir. 2018).

¹⁰⁴ Regulations that place limits on how much a citizen can spend to donate to a particular campaign, PAC, or party committee are almost certainly going to be upheld so long as the limits enacted are not extremely low.

jurisdictions.¹⁰⁵ In light of the fact that the federal government has enacted individual limits on campaign contributions,¹⁰⁶ state legislatures have subsequently passed legislation to try to close loopholes that could possibly be exploited by individuals or PACs trying to circumvent contribution limits or other aspects of campaign finance law. For instance, Alabama’s state legislature identified possible problems with its campaign finance laws that undermined the public trust,¹⁰⁷ thereby inspiring the passage of its own “PAC to PAC transfer ban,” described below, in hopes of quelling actual or apparent corruption.¹⁰⁸

Similarly, the State of Missouri¹⁰⁹ astutely identified a potential loophole in which a wealthy citizen could feasibly

¹⁰⁵ See, e.g., DAVID E. POISSON, *LOBBYING, PACS, & CAMPAIGN FINANCE: 50 STATE HANDBOOK*, Ch. 1 (2018).

¹⁰⁶ See *supra* Sections II.A.–C.

¹⁰⁷ See *Ala. Democratic Conf. v. Att’y Gen. of Ala.*, 838 F.3d 1057, 1070 (11th Cir. 2016) (acknowledging there was “ample evidence that, before the law’s passage, PAC-to-PAC transfers were viewed by Alabama citizens as a tool for concealing donor identity, thus creating the appearance that PAC-to-PAC transfers hide corrupt behavior.”).

¹⁰⁸ Alabama’s campaign finance laws, which do “not limit the amount of money a person, business or PAC may contribute directly to a candidate’s campaign,” *Ala. Democratic Conf.*, 838 F.3d at 1060, does not make Alabama susceptible to Donor A’s hypothetical scheme described above. If Donor A resided in Alabama, he or she could simply donate an unlimited amount of funds to a candidate for statewide office legally. They would not have to concoct a scheme by which he or she funnels money through multiple PACs in order to exceed contribution limits.

¹⁰⁹ The Missouri Ethics Commission, the government entity responsible for investigating “alleged violations of laws pertaining to campaign finance and enforces those laws,” believed that a ban on PAC to PAC transfers were required in order to prevent a donor from being able to evade the individual

circumvent federal campaign contribution limits:¹¹⁰ funneling money through various PACs that would then contribute all of the donated funds by the individual to a certain campaign, PAC, or party committee of the individual's choice. For example, a hypothetical donor ("Donor A") could donate \$5,000 to ten PACs and then direct each of these organizations to then transfer \$5,000 to a PAC or principal campaign committee of Donor A's choosing. Under this scheme, Donor A would effectively be donating \$50,000 to an independent PAC or campaign committee of his or her choosing, well in excess of what is permitted by federal law and Missouri state law. Thus, in hopes of closing the loophole that would otherwise make Donor A's hypothetical behavior legal, Missouri adopted its own constitutional amendment, discussed below, to place a prohibition on PAC to PAC transfers. Even though Missouri's constitutional amendment and Alabama's statutory provision each had different aims, both barred the same activity. These

contribution limit. *Free & Fair Election Fund v. Mo. Ethics Comm'n*, 903 F.3d 759, 762 (8th Cir. 2018).

¹¹⁰ The individual contribution limit in Missouri is \$2600 per candidate. MO. CONST. art. VIII, § 23.3(1)(a).

state actions were challenged in federal court on constitutional grounds, as discussed in Part IV of this Note.

A. Alabama’s Fair Campaign Practices Act

Alabama’s Fair Campaign Practices Act (“FCPA”) contains all of the campaign finance requirements for Alabama’s state elections.¹¹¹ In 2010, Alabama’s state legislature made changes to FCPA that made it “unlawful for any political action committee . . . to make a contribution, expenditure, or any other transfer of funds to any other political action committee.”¹¹²

Under this statutory scheme, the Alabama legislature carved out a single exception to this prohibition on PAC to PAC monetary transfers, permitting PACs that are not principal campaign committees¹¹³ to “make contributions, expenditures, or other transfers of funds to a principal campaign committee.”¹¹⁴ This, however, is a very narrow exception as it still prohibits the vast majority of PACs, “set up to give money to several candidates,” from “mak[ing] a contribution or expenditure to another PAC that is doing the same thing.”¹¹⁵

¹¹¹ See ALA. CODE §§ 17–5–1 to –21 (2018).

¹¹² *Ala. Democratic Conf.*, 838 F.3d, at 1060 (citing to ALA. CODE § 17–5–15(b)).

¹¹³ Principal campaign committees are PACs that are set up to support a single candidate. These PACs often make “independent expenditures” on behalf of a single candidate.

¹¹⁴ *Id.*

¹¹⁵ *Id.*

B. The Amendment to the Missouri State Constitution

On November 8, 2016, Missouri voters approved an amendment to the Missouri Constitution that added several new provisions related to campaign finance.¹¹⁶ The clause that formally places a prohibition on PAC to PAC donations states: “Political action committees . . . shall be prohibited from receiving contributions from other political action committees.”¹¹⁷ The amendment also defines “political action committees” as “a committee of continuing existence which is not formed, controlled or directed by a candidate, and is a committee other than a candidate committee, political party committee, campaign committee . . . whose primary or incidental purpose is to receive contributions or make expenditures to influence or attempt to influence the action of voters.”¹¹⁸ Here, like the statute crafted by the Alabama legislature, Missouri’s constitutional prohibition on PAC to PAC transfers of donations restricts the ability of PACs not controlled by candidates or created for the sole benefit of

¹¹⁶ The provisions were formally added to the Missouri Constitution under Article VIII. MO. CONST. art. VIII, § 23. See Jason Rosenbaum, *Amendment 2 Could Bring Campaign Donation Limits Back to Missouri*, ST. LOUIS PUBLIC RADIO (Oct. 14, 2016) <https://news.stlpublicradio.org/post/amendment-2-could-bring-campaign-donation-limits-back-missouri#stream/0>; Benjamin Peters, *Co-ops Ask for Restraining Order in Campaign Finance Lawsuit*, MO. TIMES (Dec. 20, 2016), <https://themissouritimes.com/36355/co-ops-ask-restraining-order-campaign-finance-lawsuit/>.

¹¹⁷ MO. CONST. art. VIII, § 23.3(12).

¹¹⁸ *Id.* at § 23.7(20).

supporting one candidate from giving funds to other similar PACs. This prohibition, which ultimately impacts the vast majority of PACs, was a major point of contention in the lawsuit alleging this provision violates the First Amendment.

C. The Constitutionality of Prohibiting PAC to PAC Donations in Light of the Roberts Court’s Rulings in Citizens United and McCutcheon

Closing the “Political Action Committee Loophole” that allows sophisticated donors to use PACs as a vehicle to evade campaign contribution limits is a sound policy initiative.¹¹⁹ However, the Roberts Court would likely deem any state law that bans PAC to PAC donations to be unconstitutional, unless the state could show, with definitive proof, that the loophole has previously been exploited, thereby showing actual or apparent quid pro quo corruption.

As previously discussed, the Roberts Court is significantly less deferential to state campaign finance regulations, when compared to the Burger and Rehnquist Courts.¹²⁰ Although the Roberts Court has continued to uphold *Buckley*’s framework to determine the constitutionality of a provision that regulates

¹¹⁹ This loophole only applies in states that have campaign contribution limits, as most do, and at the federal level, which has had campaign contribution limits since 1974. Weeks, *supra* note 44, at 1104.

¹²⁰ See Kang, *supra* note 77, at 246–247, 249; Elias & Berkon, *supra* note 59, at 373.

campaign finance, the Court has effectively changed its test that determines whether a legitimate state interest is present—it will uphold only those laws that root out “actual or apparent quid pro quo corruption.”¹²¹ Therefore, under this strict application of the *Buckley* rule, a state must be able to show that a prohibition on PAC to PAC donations will serve to stop “actual or apparent quid pro quo corruption.”¹²² In order to do this, a state must be able to provide “real-world examples of circumvention of . . . [its] hypothetical.”¹²³ In other words, a state must show that citizens in the state—or perhaps citizens in another similarly situated state—were previously exploiting this loophole *before* it enacted the regulation. Considering it is hard to prove whether a citizen has actually exploited this loophole to donate to a campaign more than what is permitted,¹²⁴ it is almost certain that the U.S. Supreme Court would find a law banning PAC to PAC donations to be

¹²¹ See Kang, *supra* note 77, at 249.

¹²² See *id.*

¹²³ *McCutcheon v. FEC*, 572 U.S. 185, 217 (2014).

¹²⁴ Once a donor donates money to several PACs, which then ultimately donate to a single candidate campaign, it becomes very difficult to prove that the donations to the candidate campaign were part of a coordinated effort concocted by the initial donor.

unconstitutional as a matter of law, as it could not meet the increasingly higher standard for a legitimate state interest.

IV. THE CIRCUIT SPLIT BETWEEN THE EIGHTH AND ELEVENTH CIRCUITS

The Supreme Court’s foundational case law on campaign finance—*Buckley*, *Citizens United*, and *McCutcheon*—provides an analytical framework to determine whether a particular state’s campaign finance regulation is constitutional.¹²⁵ In 2016 and 2018, the Eighth and Eleventh Circuit, respectively, addressed precisely the same question: whether a ban on PAC to PAC donations is constitutional under the First Amendment. Even though both cases were heard after the Supreme Court issued its most recent opinion on campaign finance in *McCutcheon*, the courts ruled differently, creating a circuit split, which has led to uncertainty in campaign finance law. The Eleventh Circuit Court of Appeals ruled that Alabama’s statutory ban on PAC to PAC donations was constitutional. The Eighth Circuit Court of Appeals disagreed and determined that Missouri’s amendment was unconstitutional under the First Amendment as a matter of law. Although both

¹²⁵ See, e.g., *Free & Fair Election Fund v. Mo. Ethics Comm’n*, 903 F.3d 759, 763 (8th Cir. 2018) (applying the Supreme Court’s exacting scrutiny test, as applied in *McCutcheon*, 572 U.S. at 197).

courts cited to the foundational case law,¹²⁶ neither the Eighth nor Eleventh Circuit properly applied the more recent case law that is significantly less deferential to governmental regulation of campaign finance—at least when compared to the foundations laid by the Burger and Rehnquist Courts. In comparing the two decisions, the Eighth Circuit most properly applied the exacting scrutiny standard from *McCutcheon*, thereby making it the most reflective of how the Supreme Court would likely rule on this matter.

A. Alabama Democratic Conference v. Attorney General of Alabama (2016)

After the Alabama legislature passed new provisions to the FCPA effectively banning PAC to PAC donations,¹²⁷ the Alabama Democratic Conference (“ADC”), a registered PAC in the State of Alabama,¹²⁸ brought forth a legal challenge to Alabama Code § 17–5–15(b).¹²⁹ At the time of this lawsuit, the ADC was “the largest grassroots political organization in Alabama” and it relied

¹²⁶ See *supra* Part II.

¹²⁷ Alabama’s FCPA referred to PAC to PAC donations as “PAC-to-PAC transfers” but there is no distinction between the two names. ALA. CODE § 17-5-15(b) (2018).

¹²⁸ The ADC’s mission is to “communicate with black voters in Alabama and [to] encourage[e] them to support candidates for public office that the organization believes would best represent their interest.”

¹²⁸ Ala. Democratic Conf. v. Att’y Gen. of Ala., 838 F.3d 1057, 1059 (11th Cir. 2016).

¹²⁹ See *id.*

heavily upon other progressive PACs and the state Democratic Party apparatus to fund its involvement in state elections.¹³⁰ Therefore, the new, updated provisions of the FCPA banning PAC to PAC donations greatly threatened the ADC’s ability to remain “actively involved in elections in Alabama.”¹³¹

In response to the legislature’s decision to pass a statute that restricted some of its major funding sources, the ADC decided to restructure its contribution system, creating two separate bank accounts: one account was created for the purpose of donating campaign contributions to candidates, per the statutory limits, and the other account was created for ADC’s independent expenditures.¹³² In July of 2011, ADC sued the State of Alabama in Federal District Court on the basis that the PAC to PAC transfer ban violated its right “to make independent expenditures.”¹³³ Ultimately, the district court held that Alabama’s prohibition on PAC to PAC donations was constitutional as applied to the ADC.¹³⁴

In its ruling, which was ultimately upheld by the Eleventh Circuit Court of Appeals, the court reasoned that current Supreme

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *See supra* Section II.B.

¹³³ *Ala. Democratic Conf.*, 838 F.3d at 1060–1061.

¹³⁴ *Id.* at 1061.

Court precedent aligned with the State of Alabama's interests.¹³⁵ However, the lower court seemed to apply the more permissive *Buckley* standard, stating that "the only sufficiently important interest that will support the PAC to PAC transfer ban is preventing quid pro quo corruption *or the appearance* thereof."¹³⁶ By applying the more permissive standard from *Buckley*, the court essentially disregarded the majority opinion in *Citizens United* that seemed to have considerably narrowed the permissible state interest to simply preventing actual or apparent quid pro quo corruption.¹³⁷ After identifying the improper rule, the district court ultimately reasoned that ADC's organizational structure,¹³⁸ which failed to have "any other internal controls to safeguard against the risk that contributions, even if formally earmarked for independent expenditures, could be funnelled [*sic*] to a candidate" gave rise to the appearance of corruption; thus, the state's statute was sufficiently tailored to stop corruption.¹³⁹

¹³⁵ *Id.* at 1062.

¹³⁶ *Id.* (emphasis added).

¹³⁷ Kang, *supra* note 77, at 249 (asserting that Justice Kennedy's majority decision in *Citizens United* "focused narrowly on the prevention of quid pro quo corruption," not the general appearance of corruption).

¹³⁸ Even though the ADC established two separate accounts for campaign activities it failed two separate groups operating these accounts. *Ala. Democratic Conf.*, 838 F.3d at 1061.

¹³⁹ *Id.* at 1062.

On appeal, the ADC made a narrow argument as it related to PAC to PAC donations and independent expenditures, arguing “the State [did] not have a sufficiently important interest in banning PAC to PAC transfers used only for independent expenditures.”¹⁴⁰ It also argued that “the PAC-to-PAC transfer ban does not actually promote any state interest” and that “the law is not sufficiently closely drawn to protect the State’s purported interests.”¹⁴¹ These arguments ultimately failed.

Like the district court in this matter, the Eleventh Circuit Court of Appeals did not properly apply the Court’s recent precedent in *Citizens United*, which more narrowly defined the state’s interest to restrict campaign finances to actual or apparent quid pro quo corruption.¹⁴² Even though the court cited to *McCutcheon*, which stated that “Congress may regulate campaign contributions to protect against corruption or the appearance of corruption,”¹⁴³ the Eleventh Circuit did not take into account that the ultimate holding of the opinion: the government may only enact campaign finance regulations that “regulate against the threat of actual or apparent quid pro quo corruption.”¹⁴⁴ Rather,

¹⁴⁰ *Id.* at 1063.

¹⁴¹ *Id.*

¹⁴² See Kang, *supra* note 77, at 249.

¹⁴³ *McCutcheon v. Fed. Election Comm’n*, 572 U.S. 185,191 (2014).

¹⁴⁴ Elias & Berkon, *supra* note 59, at 373-74.

the Eleventh Circuit applied something resembling the Rehnquist Court's much more permissive standard to the state defendant, asserting that the state has a legitimate interest in regulating campaign finance even if there is merely the appearance of quid pro quo corruption.¹⁴⁵ This allowed the court to side with the state of Alabama when it asserted that its prohibition on PAC to PAC donations did serve the legitimate state interest of rooting out the appearance of corruption.¹⁴⁶

Next, the Eleventh Circuit dismissed ADC's argument that Alabama's prohibition on PAC to PAC donations "[did] not sufficiently serve the State's interest in preventing quid pro quo corruption or the appearance of quid pro quo corruption."¹⁴⁷ On this point, the ADC argued that because *Citizens United* established that "the State no longer has a cognizable corruption-based interest

¹⁴⁵ *Ala. Democratic Conf.*, 838 F.3d at 1064 (citing to *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985), which held, like *Buckley*, that "preventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances").

¹⁴⁶ *See id.* at 1065 n.1 ("The District Court noted a series of newspaper articles and testimony by the State highlighting that, before the PAC-to-PAC transfer ban, the appearance in Alabama was that donors were attempting to conceal donations to candidates and other groups by laundering said donations through multiple PACs. Donors were able to conceal these donations by making a contribution to one PAC, which in turn made a contribution to another PAC, which then made a contribution to yet another PAC and so on, such that by the time the money was delivered to a candidate there was no way to effectively trace the contribution from the original donor to the ultimate recipient" (internal quotations omitted)).

¹⁴⁷ *Id.* at 1065.

in restricting independent expenditures . . . that the State has no anti-corruption interest in regulating contributions into the account that the ADC uses only for independent expenditures.”¹⁴⁸ In essence, ADC claimed that Alabama’s statute was unconstitutional as applied to its organization, which had two separate bank accounts to delineate the funds being used for independent expenditures and funds being given directly to campaigns.

In response to this argument, the Eleventh Circuit claimed that a state’s interest in preventing corruption “may no longer justify regulating independent expenditures when there is no other form of contribution to or coordination with a candidate involved.”¹⁴⁹ However, ADC was actively coordinating with other candidate campaigns, albeit from a separate bank account. Based upon this fact, the court properly reasoned that case law from other circuits,¹⁵⁰ which “uniformly invalidated laws limiting

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1066. Here, the court properly applied the rule from *Citizens United*, as it held that independent expenditures did not lead to, or create the appearance of, quid pro quo corruption. 558 U.S. at 360 (“By definition, an independent expenditure is political speech presented to the electorate that is not coordinated with a candidate.”).

¹⁵⁰ See, e.g., *Republican Party of N.M. v. King*, 741 F.3d 1089, 1096–97 (10th Cir. 2013) (“If an entity can fund unlimited political speech on its own without raising the threat of corruption, no threat arises from contributions that create the fund.”); *N.Y. Progress & Prot. PAC v. Walsh*, 733 F.3d 483, 487 (2nd Cir. 2013); *SpeechNow.org v. FEC*, 599 F.3d 686, 696 (D.C. Cir. 2010).

contributions to PACs that made only independent expenditures” did not apply to this particular situation.¹⁵¹ Therefore, the court concluded,¹⁵² that Alabama had a valid corruption interest to regulate in this matter due to the fact that the ADC did not “do more than merely establish separate bank accounts for candidate contributions and independent expenditures.” In explaining its rationale, the court wrote:

There must be safeguards to be sure that the funds raised for making independent expenditures are really used only for that purpose. There must be adequate account-management procedures to guarantee that no money contributed to the organization for the purpose of independent expenditures will ever be placed in the wrong account or used to contribute to a candidate.¹⁵³

There is no issue with the court’s reasoning that ADC did not put in place reasonable safeguards to shield it from Alabama’s law. After all, the facts on the record were rather damning to

¹⁵¹ *Ala. Democratic Conf.*, 838 F.3d at 1066.

¹⁵² Here, the Eleventh Circuit joined the Second and Fifth Circuits, which held that states had a legitimate interest in regulating hybrid PACs that possess separate bank accounts for independent expenditures and candidate campaigns when there are not adequate safeguards in place to ensure there is no comingling of funds. *See* *Vt. Right to Life Comm., Inc. v. Sorrell*, 758 F.3d 118, 143 (2d Cir. 2014) (concluding that having a separate bank account for independent expenditures does not alleviate anti-corruption concerns when the organization in question also maintained an “otherwise indistinguishable” account to spend money on candidate campaigns); *See* *Catholic Leadership Coal. of Tex. v. Reisman*, 764 F.3d 409, 443 (5th Cir. 2014) (holding that a state had a sufficient anti-corruption interest in ensuring that a contribution was used only for independent expenditures).

¹⁵³ *Ala. Democratic Conf.*, 838 F.3d at 1068.

ADC’s case.¹⁵⁴ However, the Eleventh Circuit failed to properly apply the most recent Supreme Court precedent, *Citizens United* and *McCutcheon*. Thus, it should not have been sufficient that the Alabama legislature provided evidence on the record that the public simply believed PACs were being used as a vehicle to exploit the “Political Action Committee Loophole.” Rather, Alabama should have been required to provide evidence of actual or apparent quid pro quo corruption to justify its regulation.

The Roberts Court has demonstrated that when a state seeks to regulate campaign finance, the Court must look for evidence of actual or apparent quid pro quo corruption in order to sufficiently meet the threshold for a legitimate state interest.¹⁵⁵ If this case proceeded to the Supreme Court, Alabama would have difficulty winning as it would be unable to show, based upon the facts currently on the record, that there was widespread actual or apparent quid pro quo corruption ongoing between PACs and sophisticated citizens in its state. Therefore, based upon the less deferential standard the Roberts Court had established in *Citizens*

¹⁵⁴ See *id.* at 1069 (explaining that “ADC did not offer[] any evidence to indicate that it has implemented any other internal controls to safeguard” and that ADC’s two accounts were “controlled by the same entity and people”) (internal quotations omitted).

¹⁵⁵ See Kang, *supra* note 77, at 246–247, 249; See Elias & Berkon, *supra* note 59, at 373.

United and affirmed in *McCutcheon*, the Court would likely hold that Alabama did not have a legitimate state interest, as a matter of law, to enact a prohibition on PAC to PAC donations.¹⁵⁶

B. Free & Fair Election Fund v. Missouri Ethics Commission (2018)

Soon after Missouri's constitutional amendment banning PAC to PAC donations went into effect, two PACs—Free and Fair Election Fund (“FFEF”) and the Association of Missouri Election Cooperatives Political Action Committee (“AMEC-PAC”)—sued to enjoin enforcement of the § 23.3(12) ban on PAC to PAC donations.¹⁵⁷ Similar to the ADC in Alabama, FFEF “receive[d] contributions and [made] independent expenditures to influence voters.”¹⁵⁸ FFEF also alleged in its complaint “that it desired to accept contributions from other PACs and to contribute to those PACs that make only independent expenditures.”¹⁵⁹ In other words, FFEF claimed that it had no interest in soliciting donations from other PACs and then using those funds to donate

¹⁵⁶ Although this Note contends that the policy of closing the potential Political Action Committee loophole by means of a prohibition on PAC to PAC donations is entirely reasonable, the Roberts Court has been increasingly less deferential to states seeking to regulate campaign finance without evidence suggesting of actual or apparent corruption. However, there is the possibility that there are five votes on the Court to revert back to the previous permissive standard, as the Court has two new members since *Citizens United* and *McCutcheon*.

¹⁵⁷ *Free & Fair Elections Fund v. Mo. Ethics Comm’n.*, 903 F.3d 759, 762 (8th Cir. 2018).

¹⁵⁸ *Id.*

¹⁵⁹ *Id.*

to candidates. Like FFEF, AMEC-PAC also alleged in its complaint that it desired to accept contributions from other PACs and also donate to other PACs.¹⁶⁰ Both jointly sued the State of Missouri in federal court, seeking declaratory and injunctive relief, “alleging that the ban on PAC-to-PAC transfers was unconstitutional on its face under the First and Fourteenth Amendments, and unconstitutional as applied to each [of the PACs].”¹⁶¹

The district court concluded that Missouri’s ban on PAC to PAC donations “was unconstitutional on its face under the First Amendment and unconstitutional as applied to FFEF.”¹⁶² When reviewing the district court’s finding, the Eighth Circuit Court of Appeals began its opinion by properly stating that *McCutcheon*’s “exacting scrutiny” standard applies, because a ban on PAC to PAC donations regulates political contributions.¹⁶³ However, the Eighth Circuit went on to cite the Supreme Court’s rule in *McCutcheon* that “preventing corruption or the *appearance of corruption*” is the only legitimate state interest to justify regulating campaign finance.¹⁶⁴ As previously discussed, even though the

¹⁶⁰ *See id.*

¹⁶¹ *Id.* at 763.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *See id.* (emphasis added).

Roberts Court in *McCutcheon* initially phrased its standard in the same way as the more permissive Burger and Rehnquist Courts,¹⁶⁵ it effectively required a clear showing of actual or apparent quid pro quo corruption to justify its regulation.¹⁶⁶ Therefore, to determine whether the Eighth Circuit properly followed the Supreme Court's precedent, a further inquiry into the court's rationale is required.

The Eighth Circuit held that Missouri did not demonstrate "a substantial risk that unearmarked PAC to PAC contributions will give rise to quid pro quo corruption or its appearance."¹⁶⁷ Although the Missouri Commission reasonably asserted that "without the ban on PAC-to-PAC transfers, a donor could evade the [state's] individual contribution limits of \$2600 per candidate" by "contribut[ing] large, unearmarked sums of money to a candidate by laundering it through a series of PACs that he

¹⁶⁵ The Burger and Rehnquist Courts permitted states to regulate campaign contributions by merely citing to a showing that there was the general appearance of corruption. *See e.g.*, *FEC v. Nat'l Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985) ("[P]reventing corruption or the appearance of corruption are the only legitimate and compelling government interests thus far identified for restricting campaign finances.").

¹⁶⁶ *See* Elias & Berkon, *supra* note 59, at 373 (explaining the conservative plurality consisting of Justices Roberts, Scalia, Kennedy, and Alito, affirmed what Justice Kennedy wrote in his majority opinion in *Citizen's United*: the government may only enact campaign finance regulations "that regulate against the threat of actual or apparent quid pro quo corruption.").

¹⁶⁷ *See* *Free & Fair Elections Fund v. Mo. Ethics Comm'n*, 903 F.3d 759, 764 (8th Cir. 2018) (emphasis omitted).

controls,” the court still found that “the transfer ban . . . does little, if anything, to further the objective of preventing corruption or the appearance of corruption.”¹⁶⁸ This was a strict ruling, especially considering the court defined a legitimate state interest as “further[ing] the objective of preventing corruption.”¹⁶⁹ Under this seemingly permissive standard, it would have been reasonable for the court to find Missouri was fulfilling its legitimate state interest by trying to close a loophole in its election laws.

What ultimately doomed the Missouri constitutional amendment was that Missouri was neither able to “point to evidence of any occasions before the amendment where PAC to PAC transfers led to the circumvention of contribution limits” nor “identify any donors who have exceeded contribution limits by using transfers among a network of coordinated PACs.”¹⁷⁰ In other words, because Missouri simply sought to close a loophole that had not been exploited yet, the court found that the regulation did not meet the standard of a legitimate state interest. This seems to suggest that the Eighth Circuit, like the Roberts Court, interpreted the seemingly deferential rule established in *Buckley*, and affirmed in *Citizens United* and *McCutcheon*, so narrowly as to effectively

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ *Id.*

require a state to show actual or apparent quid pro quo corruption *before* enacting the restriction. Under this reading of the rule, which is likely the most reflective of how the Supreme Court would rule, smart, reasonable policies to close the “political action committee loophole” before it is exploited are likely to be deemed unconstitutional as a matter of law.

V. A BRIEF CRITICISM OF MODERN CAMPAIGN FINANCE CASE LAW

As previously discussed,¹⁷¹ it is likely that the Roberts Court would strike down any state’s prohibitions on PAC to PAC donations. Although these policies are reasonable and close the “Political Action Committee Loophole” that allows sophisticated donors to use PACs as a vehicle to circumvent campaign contribution limits, they would likely be unable to survive constitutional muster. Why?

The Roberts Court in *McCutcheon* made clear that the state must be able to “provide any real-world examples of circumvention” of its stated policy in order to show that it has a legitimate state interest in enacting the policy to begin with.¹⁷² Therefore, as a matter of law, a state seeking to be proactive and

¹⁷¹ See *supra* Part III.

¹⁷² *McCutcheon*, 572 U.S. at 217.

close any loopholes in its existing campaign finance laws before citizens exploit said loopholes would be unlikely to ever show a legitimate state interest. This is a tremendous flaw in modern campaign finance case law.

While it is generally a sound policy for legislatures to enact legislation after recognizing a problem exists, it is tremendously difficult for a state to definitively show that a sophisticated donor is exploiting the law to evade contribution limits to justify prohibitions on PAC to PAC donations.¹⁷³ Therefore, even though wealthy individuals may circumvent state and Congressional regulations on contribution limits using PACs as their vehicles, the government would likely struggle to show that the regulation, albeit reasonable, serves a legitimate state interest.

In April 2019, the the U.S. Supreme Court denied certiorari in *Free and Fair Elections v. Missouri Ethics Commission*.¹⁷⁴ One could take this as a signal that the Supreme Court agrees with the Eighth Circuit’s treatment of the Court’s campaign finance law precedent. However, the High Court also denied certiorari in the Alabama case,¹⁷⁵ suggesting their unwillingness to reconsider or clarify their

¹⁷³ See *supra* Part III.

¹⁷⁴ *Free and Fair Elections v. Mo. Ethics Comm’n.*, 903 F.3d 759 (8th Cir. 2018), *cert. denied*, 139 S.Ct. 1601 (2019).

¹⁷⁵ *Ala. Democratic Conference v. Att’y Gen. of Ala.*, 838 F.3d 1057 (11th Cir. 2016), *cert. denied*, 137 S.Ct. 1837 (2017).

previous contentious rulings. Accordingly, the “Political Action Committee Loophole” is likely to remain a topic of discussion during the 2020 election cycle, especially considering the growing influence of PACs on American democracy¹⁷⁶ and the growing debate around campaign finance reform. One thing seems clear, however: Regardless of how sound of a policy it may be to place prohibitions on PAC to PAC donations, should this question come before the Supreme Court, the Roberts Court will be unlikely hold that prohibitions on such activity to be constitutional under First Amendment case law.

¹⁷⁶ Alexander, *supra* note 2.