FIRST AMENDMENT LAW REVIEW

VOLUME 21 **ISSUE 2**

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

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

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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.

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 21 conform generally to THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION (Columbia Law Review Ass'n et al. eds, 21st ed. 2020).

Cite as: FIRST AMEND. L. REV.

www.firstamendmentlawreview.org

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

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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 21 **ISSUE 2**

ARTICLES

NOTES

FINDING THE CORRECT BALANCE BETWEEN THE FREE EXERCISE OF RELIGION AND THE ESTABLISHMENT CLAUSES

Vincent J. Samar*

ABSTRACT

The First Amendment's Free Exercise and Establishment Clauses were meant to guarantee freedom of religion for all persons living in the United States. This was to be done by ensuring that government could not establish a state religion nor interfere with individual practices and beliefs so long as they did not violate public morals. The idea was to have the two clauses operate together to ensure state separation in matters of religion. However, recent caselaw involving government accommodations to religious organizations has emphasized the Free Exercise Clause with little or no attention afforded the Establishment Clause. As a result, intermediate factors like entanglement, endorsement, general applicability, and neutrality, that previously were used to assist the separation of church and state, are now called into question. This Article attempts to rekindle these factors by attaching a public/private distinction to the way the two clauses are understood, to ensure a more certain and clearer basis for the separation of church and state.

I. INTRODUCTION

It is not uncommon in the United States to hear people say that the U.S. Constitution protects freedom of religion. Nor is it uncommon in the United States to hear that there is a separation of church and state.[1] In fact, however, no such language is present anywhere in the Constitution, including its 27 amendments. What is found in the First Amendment are two clauses often referred to as the "religious clauses." They are the "Establishment Clause" and the "Free Exercise Clause."[2] The

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[1] Hana M. Ryman & J. Mark Alcorn, *The Establishment Clause (Separation of Church and State)*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/885/establishment-clause-separation-of-church-and-state (last visited July 22, 2022).

[2] U.S. CONST. amend. 1. I should note here that Article VI of the Constitution states: "no religious Test shall ever be required as a Qualification to any Office or public

Establishment Clause prohibits government from establishing a state religion or endorsing any particular religious practice or belief.[3] The Free Exercise Clause prohibits government from interfering with individual religious practices and beliefs so long as the practices don't undermine public morals.[4] Two problems of interpretation often arise, however. One problem occurs when people seek to follow a practice, believing that it is protected by the Free Exercise Clause, when in fact it is contrary to some governmental law or regulation. The other is when people seek to follow a practice they believe is protected by the Free Exercise Clause but is contrary to some governmental law or regulation; and also when benefits that the government affords to the public at large are denied to individuals or groups that expressly want to use them in connection with their religious preferences. Limitations on the use of public funds in such cases is usually explained to avoid government endorsement of the religious preference.[5]

In this Article, I will focus first on how the Supreme Court's interpretations of the religious clauses prior to 2012 made use of specific interpretative factors like entanglement, endorsement, general applicability, and neutrality to resolve conflicting issues. Next, I will identify how some of the Court's

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Trust under the United States." U.S. CONST. art. VI, cl. 3. Whether that language will continue to be consistent with the aforementioned religious clauses will depend on how the latter are interpreted.

[3] "There are three major competing approaches to [understanding] the establishment clause," among possible others: "Strict Separation," "Neutrality Theory," and "Accommodation/Equality." For any particular case, the result may depend upon the theory chosen. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1192 (3d ed. 2006). Strict separation "says that to the greatest extent possible government and religion should be separated." *Id.* "State power is no more to be used to handicap religions than it is to favor them." Everson v. Board of Educ., 330 U.S. 1, 18 (1947). State neutrality theory holds that "government must be neutral toward religion; that is, the government cannot favor religion over secularism or one religion over others." CHEMERINSKY, CONSTITUTIONAL LAW, *supra* at 1193. "Every government practice must be judged in its unique circumstances to determine whether it constitutes an endorsement or disapproval of religion." The accommodations approach says: "the Court should interpret the establishment clause to recognize the importance of religion in society and accommodate its presence in government." CHEMERINSKY, CONSTITUTIONAL LAW, *supra* at 1196. In other words, "government violates the establishment clause only if it literally establishes a church, coerces religious participation, or favors one religion over others." *Id.* (citing Lee v. Weisman, 505 U.S. 577, 587 (1992)). *See also* LINDA GREENHOUSE, JUSTICE ON THE BRINK: THE DEATH OF RUTH BADER GINSBURG, THE RISE OF AMY CONEY BARRETT, AND TWELVE MONTHS THAT TRANSFORMED THE SUPREME COURT 14 (2021).

[4] *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 1366 (6th ed. 2019).

[5] *See, e.g.*, Locke v. Davey, 540 U.S. 712, 722 (2004).

more recent departures from its previous modes of interpretation have made it difficult for lower courts and the public at large to understand which governmental actions are currently permissible and which are not. The approach I plan to take will put privacy at the center of the Free Exercise Clause and the public good at the center of the Establishment Clause. Following this approach should give rise to an overall understanding of how the two clauses might operate together such that some of the intermediate factors the Supreme Court has recently pushed aside may now be rethought to resolve conflicts between the two clauses. My hope is to delineate how the two clauses can be made complementary.

Section II will take up Supreme Court decisions involving the Establishment Clause in the last ten years and what might be the current understanding of the clause. Section III will offer a similar review of the Free Exercise Clause. Section IV will then draw out difficulties lower courts and the public at large are likely to confront based on some of the Court's most recent decisions. Section V will provide a philosophical approach, based on privacy and the common good, to assist the Supreme and lower courts in reestablishing how to resolve apparent conflicts between the clauses. Section VI will then review some of the recent cases the Court has decided to see if they might come out differently applying the criteria I am suggesting. Finally, section VII will consider how moral criticisms, especially from social conservatives, have also affected claims for maintaining a separation between church and state. A brief conclusion follows.

II. ESTABLISHMENT CLAUSE

The First Amendment to the U.S. Constitution opens with "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…."[6] The first clause is referred to as the "Establishment Clause"; the second, "The Free Exercise Clause." These two clauses, along with several other unrelated provisions and proposed amendments to the Constitution comprise The Bill of Rights. Their purpose was to garner enough States to ratify the new Constitution that had been proposed at the Philadelphia Convention of 1787 but for

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

which there were concerns at the time over whether it would provide adequate protections for individual and states' rights.[7]

The specific concerns giving rise to the Establishment Clause reflect the fact that during colonial times, prior to the United States' independence, many southern states established by law the Church of England for their communities; while most New England states recognized "localized Puritan (or 'Congregationalist')" denominations.[8] In most of these locations "clergy were appointed and disciplined by colonial authorities and colonists were required to pay religious taxes and (often) to attend church services."[9] This led, following independence, to a general agreement among the former colonies that there should be no nationally recognized church."[10] That consensus, which became a basis for the First Amendment, would also eventually lead to all states disestablishing religion by 1833[11] and the Supreme Court applying the Establishment Clause to the States via the Fourteenth Amendment Due Process Clause in 1947.[12]

Most jurists agree that it would violate the Establishment Clause "for the government to interfere with a religious organization's selection of clergy or religious doctrine; for religious organizations or figures acting in a religious capacity to exercise governmental power; or for the government to extend benefits to some religious entities and not others without adequate secular justification."[13] However, beyond these limitations, there is much disagreement over how far the Establishment Clause extends.[14]

In 1971, in the consolidated case *Lemon v. Kurtzman*,[15] an 8-0 majority of the Supreme Court put down a test to resolve Establishment Clause violations,[16] which (as will be shown

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[7] ROGER A. BRUNS, A MORE PERFECT UNION: THE CREATION OF THE UNITED STATES CONSTITUTION 15 (National Archives and Records Service 1978), https://files.eric.ed.gov/fulltext/ED247177.pdf.
[8] Marci A. Hamilton & Michael McConnell, *The Establishment Clause*, NATIONAL CONSTITUTION CENTER, https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/264 (last visited Aug. 4, 2022).
[9] *Id.*
[10] *Id.*
[11] *Id.*
[12] Everson v. Bd. of Educ., 330 U.S. 1, 8 (1947).
[13] Hamilton & McConnell, *supra* note 8.
[14] *Id.*
[15] 403 U.S. 602 (1971).
[16] *Id.* at 612.

below) the Court began to deviate from and has now overruled.[17] The case involved two statutes: a Pennsylvania statute that provided state aid in the form of reimbursement for nonpublic school teacher salaries, textbooks, and instructional materials in certain specified secular subjects, and a Rhode Island statute that gave teachers in nonpublic elementary and secondary schools a 15% supplement to their salaries to maintain them on a par with salaries paid in the State's public schools.[18] Both aid provisions had been given to church-related schools.[19] In holding both aid programs unconstitutional, the Court set forth three concerns lying behind creation of the Establishment Clause: "sponsorship, financial support, and active involvement of the sovereign in religious activity."[20] The test that the Court then created to resolve these concerns provided "[f]irst, that the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster 'an excessive government entanglement with religion.'"[21] Applying the test to the two statutes, the Court did not believe either of the first two prongs were violated.[22] The legislatures sought to promote high quality secular education, which is a legitimate legislative purpose, and took steps to restrict their aid to apply only to secular and not sectarian functions.[23] However, the Court found numerous potential issues present for government engagement with religion, from determining who and how one teaches,[24] to how costs get separated,[25] to community involvement in funding education possibly based on religious bias,[26] to its own acceptance that "the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government."[27] This last point is particularly interesting, for as will be seen below, the Court has since changed its view of what the Establishment Clause requires, from complete exclusion of government, to

[17] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407 (2022). *See infra* note 29 and accompanying text.
[18] *Id.* at 606–07.
[19] *Id.* at 607.
[20] *Id.* at 612.
[21] *Id.* at 612–13 (citation omitted).
[22] *Id.* at 613.
[23] *Id.*
[24] *Id.* at 618–21.
[25] *Id.* at 621–22.
[26] *Id.* at 622–23.
[27] *Id.* at 625.

government being neutral between religious and non-religious activities, thus nullifying the *Lemon* test.

Although for purposes of this Article I will be focusing on accommodations to religion, I do note other areas where the Establishment Clause has been applied, as these may become relevant in the future and may offer some support in the school area as well. In *Emerson v. Board of Education*,[28] the Court allowed a state statute designed to assist parents sending their children to public or parochial schools by reimbursing the schools for student transportation expenses.[29] In *Board of Education v. Allen*,[30] the Court allowed local school boards to loan textbooks to students attending private religious schools to cover non-religious subjects.[31] In so holding, the Court asked:

> what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.[32]

More recently, in *Zelman v. Simmons-Harris*,[33] the Court went further to hold that the Establishment Clause did not prohibit tuition assistance vouchers to parents who may choose to send their children to parochial schools.[34] In the area of government-sponsored prayer, the Court has held unconstitutional public

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[28] 330 U.S. 1 (1947).
[29] *Id.* at 17–18.
[30] 392 U.S. 236 (1968).
[31] *Allen*, 392 U.S. at 238–241, 248–49. However, in *Aguilar v. Felton*, the Court, fearing government entanglement with religion, prohibited public school teachers from being paid to assist low-income students in religious schools. 473 U.S. 402, 413 (1985). *Aguilar* is now likely overruled by the court's recent abandonment of the *Lemon* test. Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022).
[32] *Allen*, 392 U.S. at 243 (quoting Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963)). The questions were part of a test the Court had previously adopted in *School District of Abington Township v. Schempp* "for distinguishing between forbidden improvements of the State with religion and those contacts which the Establishment Clause permits[.]" Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 222 (1963).
[33] 536 U.S. 639 (2002).
[34] *Id.* at 643–647, 662–63.

schools leading children in prayer[35] or Bible studies,[36] or offering prayers at graduations[37] and football games.[38] However, prayers spoken at the beginnings of legislative sessions are not prohibited where these are usually steeped in history.[39] Nor are they prohibited at town meetings where the town council will accept the prayer of any faith.[40]

As for government-sponsored religious symbols, such as the display of the Ten Commandments or a Nativity scene in government buildings or on public parks, the approach the Supreme Court previously followed[41] may now be undermined following its recent decision in *Kennedy v. Bremerton School District*, which essentially did away with the "endorsement test."[42] As explained by Justice O'Connor in *Lynch v. Donnelly*,[43] the endorsement test was intended to clarify the third prong of the *Lemon* test by asking "whether government's actual purpose is to endorse or disapprove of religion."[44] Justice O'Connor would later explain this as "focus[ing] upon the perception of a reasonable, informed observer."[45]

Applying the endorsement test, in *Lynch v. Donnelly*, the Court allowed display of a Nativity scene in a public shopping district that was surrounded by other holiday decorations as a sign of the season.[46] The same would not be true if the Nativity scene stood by itself at the top of a staircase in a courthouse.[47] A display of the Ten Commandments with clearly sectarian references and a legislative resolution stating that it was the "embodiment of ethics in Christ" violates the Establishment Clause.[48] However, placing the Ten Commandments on 22 acres of the state capitol grounds along with "17 monuments and 21

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[35] Engel v. Vitale, 370 U.S. 421, 424 (1962).
[36] Sch. Dist. of Abington Twp., Pa. v. Schempp, 374 U.S. 203, 225 (1963).
[37] Lee v. Weisman, 505 U.S. 577, 598–99 (1992).
[38] Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 294–98 (2000). As this case involves a student-led, student-initiated prayer over the school public address system, prior to each home varsity football game, it remains uncertain if the decision in this case prohibiting the prayer is still good law following the Court's opinion in Kennedy v. Bremerton School District. 142 S. Ct. 2407 (2022).
[39] Marsh v. Chambers, 463 U.S. 783, 794–95 (1983).
[40] Town of Greece v. Galloway, 572 U.S. 565, 591 (2014).
[41] Hamilton & McConnell, *supra* note 8.
[42] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2427–28 (2022).
[43] 465 U.S. 668 (1984).
[44] *Id.* at 690 (O'Connor, J., concurring).
[45] Cap. Square Rev. and Advisory Bd. v. Pinette, 515 U.S. 753, 773 (O'Connor, J., concurring).
[46] *Lynch*, 465 U.S. at 680.
[47] *See* Cnty. of Allegheny v. Am. C. L. Union, 492 U.S. 573, 621 (1989).
[48] McCreary v. Am. C. L. Union, 545 U.S. 844, 870 (2005).

historical markers commemorating the 'people, ideals, and events that compose Texan identity'" was deemed to be part of the Nation's tradition of recognizing its historic meaning.[49]

This all amounts to the Court's attempt to create an interpretative approach based on service to the public to avoid possible Establishment Clause violations. The approach allows certain governmental actions including reimbursement for parochial school transportation expenses,[50] purchase of textbooks appropriate to the teaching of secular subjects,[51] and displays of religious symbols as historical markers[52] or parts of a commercial cultural display,[53] so long as the display is not specifically focused on the symbols' religious meaning. In all, government actions must not appear to be too entangled with any production or support of any religious belief or practice. But so long as that requirement was met, the Establishment Clause was not violated by the governmental activity. Of course, the problem that emerges from this approach is how to determine whether an entanglement might be too supportive.[54] This may be why some of the Court's more liberal members have preferred individual investigations upon which compromises might be reached with the more conservative jurists, as opposed to merely adopting some overarching universal rule.[55]

III. FREE EXERCISE CLAUSE

The Free Exercise Clause provides "Congress should make no law . . . prohibiting the free exercise of religion."[56] Originally, the Free Exercise Clause, like the Establishment Clause, applied only to the federal government.[57] This changed, however, when the Court in *Cantwell v. Connecticut*[58] held that Connecticut's permit and breach of the peace laws violated the

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[49] Van Orden v. Perry, 545 U.S. 677, 681, 690 (2005).
[50] Everson v. Bd. of Educ., 330 U.S. 1, 18 (1947).
[51] Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 248–49 (1968).
[52] *Van Orden*, 545 U.S. at 681, 690.
[53] *Lynch*, 465 U.S. 668 (1984).
[54] *See generally* Paul J. Weber, *Excessive Entanglement: A Wavering First Amendment* Standard, 46 REV. POL. 483, 483–87 (1984), https://www.jstor.org/stable/1406690 (last visited Aug. 4, 2022).
[55] *See, e.g.*, William C. Duncan, *Breyer's record on religious freedom*, SUTHERLAND INSTITUTE (Feb. 16, 2022), https://sutherlandinstitute.org/breyers-record-on-religious-freedom/. It is worth noting here Justice Breyer's dissent in Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2282 (2020) (Breyer, J., dissenting).
[56] U.S. CONST. amend. I.
[57] *Free Exercise Clause*, LEGAL INFO. INST., CORNELL L. SCH., https://www.law.cornell.edu/wex/free_exercise_clause (last visited Aug. 4, 2022).
[58] 310 U.S. 296 (1940).

free exercise rights of Jehovah Witnesses to make door-to-door solicitations; this was because the statutes were so broadly written that they gave the government too much discretion to determine which situations were religious.[59] Today, the two clauses govern both the federal and state governments.[60]

Still, how far the Free Exercise Clause applies to limit state and federal laws has been a matter of controversy from the beginning.[61] In *Reynolds v. United States*,[62] for example, the Court held that while Congress could not force the Mormon church to change its belief in polygamy, it could prohibit the practice because marriage was a matter of state regulation.[63] However, in *Wisconsin v. Yoder*,[64] the Court found that Wisconsin's attendance requirement in secondary school to be "in sharp conflict with the fundamental mode of life mandated by the Amish religion."[65] Here, it is worth noting that the analysis was founded upon an earlier decision, *Sherbert v. Verner*,[66] a case in which a Seventh-day Adventist was not given unemployment benefits after being fired for not reporting for work on a Saturday, the Sabbath of her faith.[67] In finding the unemployment action violated the plaintiff's free exercise of her religion, the Court applied a compelling state interest test, which would later be overruled in *Employment Division, Department of Human Resources of Oregon v. Smith*.[68] *Smith* instead asked whether the regulation was of general applicability.[69] That later test would itself eventually be superseded by a federal (and some state) statute(s) to be discussed below. Still, one might wonder what the outcome might have been if *Smith*'s rule of general applicability had been applied in *Yoder*.

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[59] *Id.* at 307.
[60] *See Free Exercise Clause*, *supra* note 57.
[61] *Interpretation and Debate: The Free Exercise Clause*, NAT'L CONST. CTR., https://constitutioncenter.org/the-constitution/amendments/amendment-i/interpretations/265#the-free-exercise-clause (last visited Aug. 5, 2022).
[62] 98 U.S. 145 (1879).
[63] *Id.* at 166.
[64] 406 U.S. 205 (1972).
[65] *Id.* at 217. I would note here that Chief Justice Burger's majority opinion acknowledges a point raised in Justice Douglas' dissent—that there could be a conflict between the interests and desires of Amish children and their parents, but in as much as this was not an issue presented in the case, it was left to the state courts to decide. *Id.* at 230–31.
[66] 374 U.S. 398 (1963).
[67] *Id.* at 220 (citing Sherbert v. Verner, 374 U.S. 398 (1963), *overruled by* Employment Div., Dep't of Hum. Res. of Ore. v. Smith, 494 U.S. 872 (1990)).
[68] 494 U.S. 872 (1990).
[69] *Id.* at 885.

In another case, *Church of Lukumi Babaalu Aye v. City of Hialeah*,[70] following an announcement by the church that it planned to establish a house of worship, a school, cultural center, and museum to bring to the City of Hialeah, Florida, the Afro-Caribbean religion of Santeria, which included offerings of animal sacrifices, the City Council passed ordinances prohibiting animal sacrifices or slaughtering except where licensed by the state.[71] In this case, the Court held the ordinances were specifically directed at the Church of Lukumi and, as such, were not neutral, which meant the *Smith* standard didn't apply and thus couldn't survive strict scrutiny.[72]

At this point, it is also worth affording some attention to another line of cases, mostly at the state level, concerning the extent of parental responsibility for the health care of their children. Both the Church of Christ, Scientists (aka Christian Scientists) and Jehovah's Witnesses believe prayer, rather than traditional medicine or medical therapies, can heal the sick.[73] This belief has given rise to a number of court cases at the state level where parents have been charged with failing to secure adequate medical treatment for their children.[74] While parents have the right to make their own medical decisions for themselves, courts have been "reluctant to endorse such choice when it might result in harm to children."[75] This reluctance prompted, in the 1970s, 44 states passing medical exemptions "allowing parents to refuse medical treatment based on their membership in churches eschewing medical treatment."[76] In 1984, following the death of their two-year-old child due to an obstructed bowel, two Massachusetts parents were charged and convicted of involuntary manslaughter.[77] That case was never appealed, perhaps because the church did not want a decision that would be binding in similar cases.[78] Two years later, Christian Scientist parents of a child in Florida were charged with "felony child abuse and third degree murder for refusing to

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[70] 508 U.S. 520 (1993).
[71] *Id.* at 526–27.
[72] *Id.* at 546.
[73] Thurman Hart, *Christian Scientists*, THE FIRST AMENDMENT ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/1322/christian-scientists (last visited Aug. 8, 2022).
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*

administer insulin to their daughter, a diagnosed diabetic."[79] Thus far, the U.S. Supreme Court has not addressed how far the Free Exercise clause might extend to protect parents in matters regarding child safety. This important issue was raised by Justice Douglas in *Wisconsin v. Yoder*, where the parents were "seeking to vindicate not only their own free exercise claim, but those of their high-school-age children."[80]

However, the Court did deny certiorari in a Minnesota case in which a natural father was awarded $1.5 million in compensatory damages for the death of his child in the care of her Christian Scientist mother, stepfather, and their agents.[81] It was undisputed that the child's "caregivers failed to seek medical help in the three days leading to his death, despite continuous and dramatic indications that [he] was ill with a life-threatening disease."[82] The Minnesota Court of Appeals denied punitive damages as a violation of Free Exercise.[83] However, it did allow compensatory damages against the mother, stepfather, and some of their Christian Scientist treatment assistants, noting that the U.S. Supreme Court in *Cantwell v. Connecticut*, had stated: "Although one is free to believe what one will, religious freedom ends when one's conduct offends the law by, for example, endangering a child's life."[84] Since then, there have been no other cases at the Supreme Court level, and the exact meaning of its statement in *Cantwell* has been left unresolved.

This brief review of earlier Establishment and Free Exercise cases is not meant to wholly encompass the cases' holdings. It is doubtful that a singular point of view could be easily fitted to these cases. Rather, it is meant to show that even early on in the history of the Clauses, there was much debate and uncertainty as to how they might stack up when poised against each other. Such uncertainty cannot be resolved by the all-too-familiar approach of simply looking to who is doing the interpretation, a liberal or conservative justice, or by divining a possible purpose the interpretation might be serving. It is going to require a clearer understanding of the way the two clauses are best suited to operate together.

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[79] The parents were not convicted. *Id.*
[80] 406 U.S. at 241 (Douglas, J., dissenting).
[81] Lundman v. First Church of Christ, Scientist, 516 U.S. 1092 (1996), *cert. denied*, Lundman v. McKown, 530 N.W. 2d 807 (Minn. Ct. App. 1995).
[82] Lundman v. McKown, 530 N.W. 2d 807, 828 (Minn. Ct. App. 1995).
[83] *Id.* at 816.
[84] *Id.* at 817 (citing Cantwell v. Connecticut, 310 U.S. at 303–04).

IV. DIFFICULTIES IN THE WAY THE TWO CLAUSES ARE INTERPRETED

How has the Court's recent understanding of the relationship between the Establishment Clause and the Free Exercise Clause undermined separation of church and state? Here, it is important to see that the establishment restrictions aren't always based just on the First Amendment. Some states, as will be seen below, have establishment restrictions written into their state constitutions. In those cases, the disestablishment challenge that usually arises is whether the First Amendment's Free Exercise clause limits the state's constitutional establishment clause, where it is thought to be broader than the federal Establishment Clause. For instance, in *Locke v. Davey*,[85] Washington State had a scholarship program for talented students, but the money could not be used to obtain a theology degree under a provision of the Washington state constitution that prohibited funding religious education.[86] The provision was challenged by Joshua Davey, who forfeited his scholarship after seeking to major in pastoral ministries.[87] The U.S. Supreme Court, in a 7-2 decision delivered by then Chief Justice Rehnquist, ruled that the state could choose not to fund a particular category of education and that the Free Exercise Clause is not violated so long as neither the scholarship program nor the state constitution exhibits animus toward religion.[88]

This view, insofar as the federal Establishment Clause was involved, would change beginning with *Hosanna-Tabor Evangelical Lutheran Church and School v. Equal Employment Opportunities Commission*.[89] In that case, the Court, eight years after *Locke*, considered how far federal establishment of a religion extended where the challenge was based on a disability claim.[90] In that case, Cheryl Perich, a teacher at the school, filed a lawsuit for violation of the Americans with Disabilities Act after she was dismissed following being diagnosed and treated for narcolepsy.[91] The school argued that the Court-created "ministerial exception" under the First Amendment applied to bar any anti-discrimination action against a religious

[85] 540 U.S. 712 (2004).
[86] *Id.* at 715.
[87] *Id.* at 717.
[88] *Id.* at 724–25.
[89] 565 U.S. 171 (2012).
[90] *Id.*
[91] *Id.* at 178–79.

institution.[92] The Sixth Circuit had held that Perich's role was not ministerial in nature as she taught secular as well as religious subjects, although she was a commissioned minister.[93] But the Supreme Court, in a unanimous decision written by Chief Justice Roberts, reversed the lower court's decision, finding that Perich's status as a commissioned minister outweighed the secular aspects of her job.[94] The Court also rejected the EEOC's claim that the "ministerial exception" was limited to just hiring and firing decisions.[95] Instead, the Court stated: "The exception instead ensures that the authority to select and control who will minister to the faithful—a matter 'strictly ecclesiastical'—is the church's alone."[96] In his concurring opinion, Justice Alito added that the ministerial exception

> should apply to any "employee" who leads a religious organization, conducts worship services or important religious ceremonies or rituals, or serves as a messenger or teacher of its faith. If a religious group believes that the ability of such an employee to perform these key functions has been compromised, then the constitutional guarantee of religious freedom protects the group's right to remove the employee from his or her position.[97]

Hosanna-Tabor would provide a basis for later claims involving teachers at religious schools who challenge loss of their jobs but are less obviously ministers. In *Our Lady of Guadalupe School v. Morrissey-Berru*,[98] teachers at two Catholic primary schools in Los Angeles brought civil age and medical discrimination employment suits after being terminated from their teaching positions.[99] Even though neither had formal ministerial training or the title of being a minister, the school argued that the teachers fell under the ministerial exception of *Hosanna-Tabor* because they taught religion along with other subjects and were obligated to teach children Catholic values and

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[92] *Id.* at 180.
[93] *Id.* at 181.
[94] *Id.* at 192.
[95] *Id.* at 194.
[96] *Id.* at 194–95 (citation omitted).
[97] *Id.* at 199 (Alito, J., concurring) (joined by Justice Kagan).
[98] 140 S. Ct. 2049 (2020).
[99] *Id.* at 2058.

participate in liturgical activities.[100] In deciding in favor of the schools, Justice Alito, writing for a seven member majority, stated:

> What matters, at bottom is what an employee does. . . . As elementary school teachers responsible for providing instruction in all subjects, including religion, they were the members of the school staff who were entrusted most directly with the responsibility of educating their students in the faith. And not only were they obligated to provide instruction about the Catholic faith, but they were also expected to guide their students, by word and deed, toward the goal of living their lives in accordance with the faith.[101]

Applying this understanding, the majority went on to argue that it was clear that the petitioners fell within the ministerial exception of *Hosanna-Tabor*.[102] Justice Thomas wrote a concurring opinion to "reiterate my view that the Religion Clauses require civil courts to defer to religious organizations' good-faith claims that a certain employee's position is 'ministerial.'"[103] Justice Sotomayor dissented, claiming that the majority had misclassified the teachers because neither had formal training or the title of minister, nor had either school even required its religion teachers to be Catholic.[104] The dissent pointed out that the net effect of the decision may be a loss of employment law protections for thousands of lay employees working in religious schools.[105]

This removal of government involvement in religious activities would seem to represent a departure from the Court's earlier holding in *Employment Division, Department of Human Resources of Oregon v. Smith*.[106] In *Smith*, two employees at a private drug rehabilitation center were denied unemployment benefits after being fired for ingesting peyote while performing a religious ritual of the Native American church.[107] The petitioners

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[100] *Id.* at 2057–59.
[101] *Id.* at 2064, 2066.
[102] *Id.* at 2069.
[103] *Id.* at 2069–70 (Thomas, J., concurring).
[104] *Id.* at 2081 (Sotomayor, J., dissenting) (joined by Justice Ginsburg).
[105] *Id.*
[106] 494 U.S. 872 (1990).
[107] *Id.* at 874.

claimed that the denial of benefits violated their First Amendment right to the Free Exercise of Religion.[108] The Oregon Supreme Court had held that the denial was permissible because consumption of peyote was a crime under Oregon law.[109] The Supreme Court, per Justice Scalia, agreed stating:

> The government's ability to enforce generally applicable prohibitions of socially harmful conduct, like its ability to carry out other aspects of public policy, "cannot depend on measuring the effects of a governmental action on a religious objector's spiritual development." To make an individual's obligation to obey such a law contingent upon the law's coincidence with his religious beliefs, except where the State's interest is "compelling"—permitting him, by virtue of his beliefs, "to become a law unto himself,"—contradicts both constitutional tradition and common sense.[110]

These rulings raise a number of questions. Has the Supreme Court since changed its mind concerning its holding in *Smith*? Or might it now just be willing to allow for greater deference when the party involved is a "minister"? If the latter, what is legally required to be shown to prove that one is a minister? Is it just a good faith deference to be afforded the organization employing the person, as Justice Thomas suggested?

After controversies with religious groups began to arise following the Court's decision in *Smith*, Congress passed and President Clinton signed the Religious Freedom and Restoration Act of 1993 (RFRA).[111] Under the terms of that Act, federal laws

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[108] *Id.*

[109] *Id.* at 875.

[110] *Id.* at 885 (citations omitted).

[111] 42 U.S.C.A. §§ 2000bb-20000bb-4 (2012). Another more restrictive statute protecting religious land use and prisoners was adopted in 2000, the Religious Land Use and Institutionalized Persons Act (RLUIPA), 42 U.S.C. §§ 2000cc (2000). In *City of Boerne v. Flores*, the Court ruled in a case that attempted to apply RFRA to override a historical district zoning restriction to expand a church in Boerne, Texas, that federal RFRA did not apply to the states and Congress did not have the power to make it so under Section 5 of the Fourteenth Amendment. City of Boerne v. Flores, 521 U.S. 507 (1997). As a result, many states adopted their own RFRA-like statutes to protect the free exercise of religion, even when it may conflict with their own statutes. *See* Jonathan Griffin, *State Religious Freedom Restoration Acts*, NAT'L

"shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability," unless the law was in furtherance of a compelling interest and the least restrictive in the furtherance of that interest.[112] In effect, this Act was an attempt to reestablish what had been the balancing test prior to *Smith* under *Sherbert v. Verner*[113] and *Wisconsin v. Yoder*.[114] The significance of this statute is how it might implicate future cases involving government intrusion on the free exercise of religion, since it now appears that the political branches are willing to prevent federal laws from too much interference with religious free exercise.[115]

For example, following the passage of the Patient Protection and Affordable Care Act of 2010 (ACA),[116] the Department of Health and Human Services (HHS) adopted a regulation requiring all for-profit employers of more than fifty employees "to provide [insurance] coverage, without cost sharing, for '[a]ll Food and Drug Administration [(FDA)] approved contraceptive methods, sterilization procedures, and patient education and counseling," if the employee is a woman with reproductive capacity.[117] The regulation was challenged by Hobby Lobby Stores, Inc., whose owners claimed that their business had been organized around principles of the Christian faith and that use of certain contraceptives was immoral.[118] The Court, in a 5-4 majority opinion, per Justice Alito, held first that RFRA applies to corporations since corporations are composed of people to achieve desired ends.[119] Second, the Court held that HHS had not shown that its method of providing health care benefits to employees without forcing religious corporations to violate their beliefs was the least restrictive way to achieve its

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CONF. OF STATE LEGIS. (May 4, 2017), https://www.ncsl.org/research/civil-and-criminal-justice/state-rfra-statutes.aspx.

[112] 42 U.S.C. § 2000bb-1.

[113] 374 U.S. 398 (1963) (holding that denial of unemployment benefits to a Seventh-Day Adventist because she refused to accept work on Saturdays violated her ability to freely exercise her religion).

[114] 406 U.S. 205, 217 (1972) (holding that Wisconsin's requirement that children attend public school to age 16 were in "in sharp conflict with the fundamental mode of life mandated by the Amish religion" and not justified by the state's asserted compelling interest given the preparation for life these children are being prepared for).

[115] Since 1993, similar RFRA laws were adopted at a number of state legislatures. Jonathan Griffin, *supra* note 111.

[116] 42 U.S.C.A. § 300gg-13(a)(4).

[117] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 697 (2014) (citing 77 Fed. Reg. 8725 (Feb. 15, 2012)).

[118] *Id.* at 701–02.

[119] *Id.* at 706.

compelling interest since the government could have provided these benefits directly to the employees.[120]

Here, it is important to expose a concern that arose between Justice Alito's majority opinion and Justice Kennedy's concurring opinion, which the dissent was quick to point out. Justice Kennedy, who provided the necessary fifth vote to the Court's 5-4 majority, acknowledged in his concurrence first that "[t]here are many medical conditions for which pregnancy is contraindicated [and that] [i]t is important to confirm that a premise of the Court's opinion is the assumption that the HHS regulation here at issue furthers a legitimate and compelling interest in the health of female employees."[121] This was an important declaration because it shows that there are compelling interests at stake warranting governmental intrusion on religion, provided the intrusions are narrowly tailored.

Second, Kennedy argued that the HHS regulation was not narrowly tailored and that he only agreed with the majority in that "the means [the government] uses to regulate [must be] the least restrictive way to further its interest. As the Court's opinion explains, the record in these cases shows that there is an existing, recognized, workable, and already-implemented framework to provide coverage."[122] Kennedy was referring to the fact that HHS had "allowed the same contraception coverage in issue here to be [directly] provided to employees of nonprofit religious organizations, as an accommodation to the religious objections of those entities."[123] Still, even with this caveat in mind, and even taking account that this was a statutory case rather than a constitutional one, the fact remains that there appears to be two very different readings possible of what the Court was saying in *Hobby Lobby*. Certainly, it was extending the First Amendment Free Exercise Clause to apply to corporations. Beyond that was its concern that HHS had failed to ensure its regulation was narrowly tailored. Could this latter concern have been met by HHS following the approach it had adopted for non-profits, or does it assume that free exercise limits what government can do in providing for the health and well-being of individuals by allowing corporations to speak on their behalf? As Justice Kennedy writes, the Court properly never answered whether a new government program perhaps operating similarly

[120] *Id.* at 728.
[121] *Id.* at 737 (Kennedy, J., concurring).
[122] *Id.* at 737–38.
[123] *Id.* at 738.

to what had been established for nonprofits would satisfy the RFRA concern raised by the plaintiffs; that was just being assumed.[124]

Justice Ginsburg writing in dissent noted: "Impeding women's receipt of benefits 'by requiring them to take steps to learn about, and to sign up for, a new [government-funded and administered] health benefit' was scarcely what Congress contemplated."[125] Justice Ginsburg also questioned: "[W]here is the stopping point to 'let the government pay' alternative?"[126] What is curious about this case is the creation of a kind of inverse to what we think of as the establishment/free exercise conflict. Normally, we think of government as being prohibited from establishing a state religion, while at the same time not interfering with what individual members of the public believe. Here, the concern seems to be whether religion can undermine what the government needs to do to provide for the health and well-being of the public.

In another case, the state of Missouri had a program to offer qualifying organizations funds to purchase recycled tires to resurface playgrounds.[127] Trinity Lutheran Church of Columbia would have fit within the law's organizational requirements but was disqualified from participating in the program because the Missouri Constitution provides: "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion."[128] Trinity Lutheran sued, claiming the state's refusal to allow it to participate in the program violated its free exercise of religion.[129] The U.S. Supreme Court, in a 7-2 decision written by Chief Justice Roberts, first noted that the parties agreed that the Establishment Clause did not prohibit Missouri from allowing a religious organization to participate in the funding program.[130] The Court was asked to decide whether the Free Exercise Clause required allowing them to participate.[131] Chief Justice Roberts described the resolution to this question as a "'play in the joints' between

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[124] *Id.* at 738–39; *see id.* at 764–65 (Ginsburg, J., dissenting).
[125] *Id.* at 765–66 (Ginsburg, J., dissenting).
[126] *Id.* at 766.
[127] Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2017 (2017).
[128] *Id.*; MO. CONST. art. I, § 7.
[129] *Comer*, 137 S. Ct. at 2018.
[130] *Id.* at 2019. ("The parties agree that the Establishment Clause . . . does not prevent Missouri from including Trinity Lutheran in the Scrap Tire Program.").
[131] *See id.* ("[T]his Court has repeatedly confirmed that denying a generally available benefit solely on account of religious identity imposes a penalty on the free exercise of religion.").

what the Establishment Clause permits and the Free Exercise Clause compels."[132] Here, the Court held that the exclusion of churches from what otherwise would be a neutral secular aid program merely because of its *status* as a church violated their free exercise of religion.[133] Justice Thomas, in his concurrence, would go further to prohibit laws that facially discriminate against religion absent a state interest "of the highest order."[134] Justice Gorsuch also wrote in a separate concurring opinion that the distinction the Court followed between laws that discriminate based on religious *status* versus religious *use* was untenable, opening the door to whether religious *use* of government funds might be allowed in the future.[135] Justice Breyer also concurred, writing that the First Amendment was not meant to exclude religious organizations from participating in government benefits designed to preserve the health and safety of children.[136] But in a strong dissent, Justice Sotomayor, after reviewing the history behind the Religious Clauses and the Court's past precedent noted that

> [a]t bottom, the Court creates the following rule today: The government may draw lines on the basis of religious status to grant a benefit to religious persons or entities but it may not draw lines on that basis when doing so would further the interests the Religion Clauses protect in other ways. Nothing supports this lopsided outcome. Not the Religion Clauses, as they protect establishment and free exercise interests in the same constitutional breath, neither privileged over the other. Not precedent, since we have repeatedly explained that the Clauses protect not religion but "the individual's freedom of conscience,"—that which allows him to choose religion, reject it, or remain undecided. And not reason, because as this case shows, the same interests served by lifting government-imposed burdens on certain religious entities may sometimes be equally served by

[132] *Id.* at 2019.
[133] *Id.* at 2022–24.
[134] *See id.* at 2025 (Thomas, J., concurring) (joined by Justice Gorsuch).
[135] *See id.* at 2026 (Gorsuch, J., concurring).
[136] *Id.* at 2027 (Breyer, J., concurring).

> denying government-provided benefits to certain religious entities.[137]

She then states that the case raises a serious Establishment Clause concern as it directly requires a state to fund a religious organization in a way that would assist the spreading of its message and views.[138] Obviously, the criticism that Justice Gorsuch expresses about the status/use distinction would only further Justice Sotomayor's concern.

In a related 2020 case, *Espinoza v. Montana Department of Revenue*,[139] the Court considered whether Montana's program that afforded parents who send their children to private non-sectarian schools a tax-credit but no similar credit to parents who send their children to sectarian schools violated the Free Exercise Clause.[140] Petitioners were low-income mothers who wanted to use the money for their children's tuition at Stillwater Christian School.[141] The Montana Supreme Court struck down the program based on a provision in the state constitution prohibiting the use of public funds for religious education.[142] In overturning the state Supreme Court's decision, Chief Justice Roberts stated that the state court had applied the "no-aid" provision so as to discriminate against religious schools in violation of the First Amendment Free Exercise Clause.[143] Montana was concerned with establishing a greater separation of church and state than what the Constitution guaranteed. However, the Court found that this concern did not satisfy strict scrutiny.[144] Justice Thomas, however, writing in concurrence, questioned the Court's earlier Establishment Clause interpretations, which held that the government "must remain both completely separate from and virtually silent on matters of religion," issues not addressed by the present case.[145] Justice Alito, also writing in concurrence, argued that regardless of the

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[137] *Id.* at 2040 (Sotomayor, J., dissenting) (citations omitted).
[138] *See id.* at 2041 ("[The Court] holds not just that a government may support houses of worship with taxpayer funds, but that—at least in this case and perhaps in others—it must do so whenever it decides to create a funding program.").
[139] 140 S. Ct. 2246 (2020).
[140] *Id.* at 2251.
[141] *Id.* at 2252.
[142] *Id.* at 2253 (noting that the Montana Supreme Court decided the scholarship program flouted the State Constitution's "guarantee to all Montanans that their government will not use state funds to aid religious schools").
[143] *Id.* at 2260.
[144] *Id.* at 2260–61.
[145] *Id.* at 2263–64 (Thomas, J., concurring) (joined by Justice Gorsuch).

original motivation for the state's constitutional provision, the no-aid provision itself violates the Free Exercise Clause.[146] And Justice Gorsuch, also writing in concurrence, again challenged the Court's status/use distinction.[147] Justice Ginsburg argued in dissent that Montana's law did not impose any burden on the Free Exercise of religion since the State Supreme Court had struck the program (secular and sectarian) in its entirety before it ever reached this Court.[148] Justice Breyer's dissent highlighted his worry that the Court's approach entangled government with religion, the very thing the Clauses were designed to prevent. He wrote, "[s]etting aside the problems with the majority's characterization of this case, I think the majority is wrong to replace the flexible, context-specific approach of our precedents with a test of "strict" or "rigorous" scrutiny. And it is wrong to imply that courts should use that same heightened scrutiny whenever a government benefit is at issue."[149] Finally, after noting that the petitioners had never challenged the facial constitutionality of the "no-aid" provision under the Free Exercise Clause, Justice Sotomayor dissented, stating that requiring "a State to subsidize religious schools if it enacts an education tax credit . . . 'slights both our precedents and our history,' and 'weakens this country's longstanding commitment to a separation of church and state beneficial to both.'"[150]

The next case worth our attention is *Fulton v. City of Philadelphia*.[151] In that case, the City of Philadelphia contracted with private foster care agencies to place children with qualified foster families. The process involved conducting home evaluations to certify "the family's 'ability to provide care, nurturing and supervision to children,' '[e]xisting family relationships,' and ability 'to work in partnership' with a foster agency.'"[152] Catholic Social Services (CSS) was one such private agency.[153] The City's contract with the private agencies included a non-discrimination clause. There was also a citywide Fair

[146] *Id.* at 2267–68, 2271 (Alito, J., concurring). Justice Alito expressed the opinion that originally the provision was aimed at discriminating against Catholics and may have some of that same effect today.
[147] *Id.* at 2275–76 (Gorsuch, J., concurring).
[148] *Id.* at 2279 (Ginsburg, J., dissenting) (joined by Justice Kagan).
[149] *Id.* at 2281, 2288 (Breyer, J., dissenting) (joined in part by Justice Kagan).
[150] *Id.* at 2292 (Sotomayor, J., dissenting).
[151] 141 S. Ct. 1868 (2021).
[152] *Id.* at 1875 (citing 55 PA. CODE § 3700.64 (2020)).
[153] *Id.* at 1874.

Practices ordinance prohibiting discrimination against same-sex couples.[154]

The City began an investigation into CSS's participation in the program after "a newspaper ran a story in which a spokesman for the Archdiocese of Philadelphia stated that CSS would not be able to consider prospective foster parents in same-sex marriages."[155] That investigation led the City to announce that "it would not enter a full foster care contract with CSS in the future unless the agency agreed to certify same-sex couples."[156]

The District Court ruled that the non-discrimination provision and City Fair Practices were neutral rules of general applicability under *Smith*, and the Third Circuit affirmed.[157] However, the U.S. Supreme Court found the restrictions were neither neutral nor a matter of general applicability but placed a burden on religion.[158] The Court held that because the standard foster care contract allowed for an unspecified exception for sexual orientation except where it might be based on religious belief, *Smith* doesn't apply, and so the case must be evaluated under strict scrutiny.[159]

Here, the Court narrowed how it viewed the case so as to undermine the City's argument, noting "[m]aximizing the number of foster families and minimizing liability are important goals, but the City fails to show that granting CSS an exception will put those goals at risk."[160] Failing to provide a compelling reason for not affording CSS an exception, the Court held that the City's denial of the contract violated Free Exercise.[161] However, notwithstanding the Court's narrowing of its focus, it is worth noting from the concurrence by Justices Alito, Thomas, and Gorsuch (often referred to as the conservative members of the Court) that they would go much further to reverse *Smith* and the exception it provides for neutral rules of general applicability.[162] Instead, they would adopt in its place, a strict scrutiny approach, on the basis that *Smith*'s holding wasn't consistent with the language of the Free Exercise Clause and that it hasn't "provided a clear-cut rule that is easy to apply."[163]

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[154] *Id.* at 1875.
[155] *Id.*
[156] *Id.* at 1875–76.
[157] *Id.* at 1876.
[158] *Id.* at 1877.
[159] *Id.* at 1878.
[160] *Id.* at 1881–82.
[161] *Id.*
[162] *Id.* at 1888 (Alito, J., concurring).
[163] *Id.*

Justice Barrett in her concurrence, however, seemed less certain that *Smith* should be overruled and only strict scrutiny applied, noting "this Court's resolution of conflicts between generally applicable laws and other First Amendment rights—like speech and assembly—has been much more nuanced."[164]

In *Carson v. Makin*,[165] we have a case not all that dissimilar from *Locke v. Davey*.[166] The state of Maine offered tuition assistance to parents who live in a school district that did not have a designated secondary school for their child to attend.[167] The program, however, restricted the kinds of private schools that would be eligible for tuition payments, including a requirement that the school be nonsectarian.[168] The parents of two children sent to private religious schools claimed the restriction violated their Free Exercise of religion under the First Amendment.[169] The Supreme Court, per Chief Justice Roberts, held

> a neutral benefit program in which public funds flow to religious organizations through the independent choices of private benefit recipients does not offend the Establishment Clause. Maine's decision to continue excluding religious schools from its tuition assistance program after *Zelman* thus promotes stricter separation of church and state than the Federal Constitution requires . . . . But as we explained in both *Trinity Lutheran* and *Espinoza*, such an "interest in separating church and state 'more fiercely' than the Federal Constitution . . . 'cannot qualify as compelling' in the face of the infringement of free exercise . . . ." The State pays tuition for certain students at private schools—so long as the schools are not religious. That is discrimination against religion. A State's antiestablishment interest does not justify enactments that exclude some members of the community from an otherwise generally

[164] *See id.* at 1883 (Barrett, J., concurring) (joined by Justice Kavanaugh and in part by Justice Breyer).
[165] 142 S. Ct. 1987 (2022).
[166] 540 U.S. 712 (2004).
[167] *Id.* at 1993.
[168] *Id.* at 1993–94.
[169] *Id.* at 1994–95.

> available public benefit because of their religious exercise.[170]

Justice Breyer, in dissent, argued that the majority opinion provided "almost exclusive" attention to the Free Exercise Clause, paying little or "almost no attention" to the federal Establishment Clause.[171] Justice Sotomayor, in a separate dissent, also argued that "that the Court was 'lead[ing] us . . . to a place where separation of church and state is a constitutional slogan, not a constitutional commitment.'"[172] Her concern would soon show itself in *Kennedy v. Bremerton School District*.[173]

In that case a high school football coach, Joseph Kennedy, lost his job after kneeling in private prayer at the 50-yard line of his school's football stadium following football games.[174] The school district disciplined the coach for fear that an onlooker would view his public action as an endorsement by the school district of the coach's religious beliefs, which would violate the Establishment Clause.[175] Recall Justice O'Conner's concern regarding any appearance of governmental "endorsement." Nevertheless, the Supreme Court held that "a plaintiff may carry the burden of proving a free exercise violation in various ways, including by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'"[176] The Court then went on to hold that "[a] government policy will fail the general applicability requirement if it 'prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way,' or if it provides 'a mechanism for individualized exemptions.'"[177] The Court also noted that the neutrality requirement will fail when "it is 'specifically directed at . . . religious practice.'"[178] In either circumstance, strict scrutiny would apply and the government would need to show

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[170] *Id.* at 1997–98 (citing Zelman v. Simmons-Harris, 536 U.S. 639, 652–653 (2002); Widmar v. Vincent, 454 U.S. 263, 276 (1981)).
[171] *Id.* at 2002 (Breyer, J., dissenting) (joined by Justices Kagan and Sotomayor).
[172] *Id.* at 2014 (Sotomayor, J., dissenting) (citing her earlier dissent in Trinity Lutheran Church of Columbia v. Comer, 137 S. Ct. 2012, 2041 (2017)).
[173] 142 S. Ct. 2407 (2022).
[174] *Id.* at 2415.
[175] *Id.* at 2417–18.
[176] *Id.* at 2421–22.
[177] *Id.* at 2422 (citation omitted).
[178] *Id.* (citation omitted).

that "its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest."[179]

The Court found that the latter neutrality limitation was violated because "the [School] District prohibited 'any overt actions on Mr. Kennedy's part, appearing to a reasonable observer to endorse even voluntary, student-initiated prayer.'"[180] Additionally, because the school gave only Coach Kennedy a negative performance evaluation for failing "to supervise [student-athletes] after games," while not requiring other members of the coaching staff to supervise students after a game, it appeared the evaluation "was a bespoke requirement specifically addressed to Mr. Kennedy's religious exercise," thus violating the general applicability condition.[181] For our purposes, it is also worth noting that the Court viewed Coach Kennedy's speech as "private speech, not government speech,"[182] carried out at the same time "[o]thers working for the District were free to engage briefly in personal speech and activity."[183] The School District's attempt to prevent it, perhaps out of fear of how it might appear to the public, is what likely gave rise to its accepting, what the Court had previously rejected, a "modified heckler's veto, in which . . . religious activity can be proscribed" based on "'perceptions'" or "'discomfort.'"[184] But was this really the case when Kennedy performed his prayer on the 50-yard line of the football stadium, a place not generally open to the public, and often in company with students who might feel coerced to follow the coach's practice?

It is at this point that the Court applied strict scrutiny to the District's reasoning prohibiting Coach Kennedy's private prayer activity. According to the Court, the two Clauses were meant to have "'complementary' purposes, not warring ones where one Clause is always sure to prevail over the others."[185] From this interpretation, the Court viewed the District's application of the so-called "reasonable observer" standard, when connected to the endorsement concern that Justice O'Connor had earlier expressed concern with, to create a vice with "the Establishment Clause on the one side and the Free

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[179] *Id.* (citation omitted).
[180] *Id.*
[181] *Id.* at 2423.
[182] *Id.* at 2424.
[183] *Id.* at 2425.
[184] *Id.* at 2427 (citing Good News Club v. Milford Central School, 533 U.S. 98 (2001)).
[185] *Id.* at 2426 (citation omitted).

Speech and Free Exercise Clauses on the other."[186] Once that was accomplished, the Court believed the District was afforded too much freedom to then decide for itself which way to go.[187] The Court stated the District had been relying on the third prong of the *Lemon* test (discussed above) that "called for an examination of a law's purposes, effects, and potential for entanglement with religion."[188] It then overruled *Lemon*, holding that the Court's precedents since *Lemon* provide "that the Establishment Clause must be interpreted by 'reference to historical practices and understandings.'"[189] Finding no evidence that students were being coerced, the Court went on to hold that adopting the District's approach to Establishment would amount to protecting religious liberty by suppressing it.[190] Justice Thomas wrote a concurrence in which he questioned what kind of analysis "should apply to Free Exercise claims in light of the 'history' and 'tradition' of the Free Exercise Clause" or the government's ability to impose restrictions.[191] His question seemed to suggest very little might apply to restrict the Free Exercise Clause going forward.

But, in a very powerful dissent by Justice Sotomayor, she starts by pointing out that Free Exercise protections differ from those of Free Speech protections because the Establishment Clause "provides a 'specific prohibition on forms of state intervention in religious affairs with no precise counterpart in the speech provisions.'"[192] She argues that endorsement concerns, "properly understood, bear no relation to a heckler's veto" but serve to protect the "political community writ large."[193] Replacing the third prong of the *Lemon* test, with an unspecified history and tradition test offers no guidance to school administrators or lower courts on how to decide future cases.[194] Moreover, the Court misunderstands the prior cases involving school prayer by failing to recognize the kind of coercion, which often involves peer pressure, especially involving primary and secondary students.[195]

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[186] *Id.* at 2427.
[187] *Id.*
[188] *Id.*
[189] *Id.* at 2428.
[190] *Id.* at 2431.
[191] *Id.* at 2433 (Thomas, J., concurring).
[192] *Id.* at 2447 (Sotomayor, J., dissenting) (joined by Justices Breyer and Kagan) (citation omitted).
[193] *Id.* at 2448.
[194] *Id.* at 2450.
[195] *Id.* at 2451.

Justice Sotomayor continues, noting that the Court should not be asking "whether a coach taking a knee to pray on the field would constitute an Establishment Clause violation in any and all circumstances;" Instead, it should be asking "whether permitting Kennedy to continue a demonstrative prayer practice at the center of the football field after years of inappropriately leading students in prayer in the same spot, at that same time, and in the same manner" violates the Establishment Clause by making "students to feel compelled to join him."[196] It was this conduct, taken as a whole, that gave rise to an Establishment Clause violation as the School District feared.[197] Justice Sotomayor's dissent presents a different view, asking whether the coach's history with the school should play a role in a nuanced analysis, as opposed to the strict scrutiny approach adopted by the majority.[198] I would also focus on the very obvious appearance of endorsement present in this case since not everyone would have access to the fifty-yard line immediately following a game who was not an employee or student at the school. That is not an incidental appearance.

What this discussion teaches isn't whether the Establishment Clause and the Free Exercise Clause are complementary or contradictory but rather that they are susceptible to an activist Court (conservative or liberal) manipulating how they work. Clearly, the Court's more recent decisions seem to extend the reach of the Free Exercise Clause, which, as Justice Sotomayor's dissent correctly notes, is at the expense of the Establishment Clause.[199] Perhaps there is an overriding reason for doing this; still, it is hard to imagine what that reason might be. Remember, a different Court, with a different understanding of the Clauses, could very likely come out in favor of the Establishment Clause over the Free Exercise Clause.

That would not be, by itself, an overwhelming concern, if the only places where this occurred were truly borderline cases where justices could have serious disagreements. But that doesn't seem to be the direction in which the Court is going, especially when some of the concurring opinions, as noted above, want to go even further than the majority's decision would require. That is not to say that it might not be appropriate

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[196] *Id.* at 2452.
[197] *Id.* at 2453.
[198] *See id.* at 2450.
[199] *Id.* at 2450–53.

in some cases to write a broader decision, especially if other similar cases are likely to follow or a serious human right may be at stake. However, this should be more the exception than the rule in most cases involving borderline issues, especially if the net effect of a broader decision is likely to undermine another important constitutional provision like Establishment. Unnecessary expansions of either clause, even if they only remain temporarily in place, undermine the idea of rule of law and make the Court appear to be taking sides in a cultural or political conflict. Such a continued perception should not be encouraged if the Court is to maintain the appearance of being a neutral observer and not appear to be just another political branch of the government. That is why separation of church and state is so important. As the public is now becoming increasingly aware of the importance of Court decisions, the need for the Court to show neutrality by ensuring this separation is even more important.

Looking at recent cases, one finds an overabundance of Free Exercise protection and little to no Establishment protection. Are we to assume the Establishment Clause was just adopted to prevent creation of a state religion or to prevent *direct* support of taxpayer assistance for any religion? If the latter, given the issues involving indirect taxpayer contributions, the Court's current position would seem unavailing. Is the Establishment Clause essentially now narrowed to perhaps only the specific establishment concerns that were in the mind of those who wrote and ratified the Constitution and Bill of Rights? If so, what will be the role of religion in terms of government laws and policies heading into the future?

Perhaps a more important question is how the use of religion in law will be applied to people who may not share the same faith? And this is an especially significant problem for a pluralistic society which contains folks from many different and ideologically varying religious and moral points of view. Perhaps, even more significant, as the more recent cases would attest, are the serious concerns over how in a pluralistic society the dignity of all its members will be protected. Will some members be found to be more dignified or deserving of greater respect then others just because they fall under a religious point of view that the Court finds currently appealing? Even saying every religious view should be treated equally doesn't resolve this problem. What about nonbelievers?

Part of the problem is that the Court itself does not appear to have a clear direction on how Free Exercise and Establishment should be interpreted. At times the Court talks about private action versus public action but, even that becomes murky when reading the Court's explanations for its decisions, since there is no clear line to draw. I am not suggesting that all that is lacking is an exact formula that once clarified will provide a clear and simple basis for decision. I doubt, given the variety of different facts likely to arise in the multitude of cases coming before the Court, that a single such formula is even possible. What I am suggesting is the need for a far better way to understand the difference between the two Clauses that can aid in determining where the line should be drawn, such that even allowing for differences of opinions over specific facts, the Court will not seriously undermine the breath of the Clauses involved or its own integrity.

V. PUBLIC VERSUS PRIVATE APPROACH

Language is a very powerful tool, not just because it allows us to know what may be in another person's mind to the extent he or she will share it but also because it allows the listener to evaluate one's own views when confronted with other perspectives.[200] In this same vein, it is very important that ideas presented before the Supreme Court not just be considered in terms of their momentary results but how they are likely to affect the future, to the extent that future decisions can be predicted.[201] For this reason, I will focus my discussion in this section on how the Court should be thinking about issues arising under the Free Exercise and Establishment Clauses rather than how a particular case should be decided. That said, I realize that some of what I have to say will likely open the door to questioning some previously decided cases, as I will use some previous cases as examples of what I am thinking. That should not be surprising. I feel the Court's lack of a clear understanding between the

[200] In John Stuart Mill's *On Liberty*, one of the arguments Mill uses to protect free expression from censorship, even where the expression may seem justified, is: "[E]ven if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds." John STUART Mill, *On Liberty*, *in* ESSENTIAL WORKS OF JOHN STUART MILL 302, 470 (Max Lerner ed., 1965).

[201] While some predictions may seem more easily foreseeable, others may be less predictable given the uncertainty of facts likely to arise. As a result, the language used to describe how to handle short-term interests needs to be carefully circumvented to avoid overreach into areas where it may not be so easily satisfying.

Establishment and Free Exercise Clauses offers a less than ideal framework to either guide lower courts or even a future Supreme Court in deciding cases.[202] Still, my goal is not specifically to deride any particular prior decision as much as to say how the Court should be thinking about the two Clauses when making any decision. Additionally, as I think will be seen below, the factors that have already been used to decide cases in the past, and sometimes to be questioned by the Court, including entanglement, endorsement, neutrality, and general applicability, were not as misguided as the Court at times seemed to suggest. Rather, they were perhaps not sufficiently general to provide consistent sets of justifications for the cases. They lacked the ability to draw upon more general principles. However, once those background principles are made clear, application of the intermediate factors will be more consistent in helping the Court determine which Clause should govern any particular factual situation.

And so, I will begin by first asking what the two Clauses (Free Exercise and Establishment) are about. Here, it is worth noting that in most of the cases discussed above, the Court took note of the fact that the issue being decided arose in the context of a private school, a private agency, or involved an individual engaged in a private prayer or private speech. This is not at all unexpected since often the way government operates to affect the public good is by engaging with private persons or institutions. Nor should it be unexpected that such conflicts arise from the way the Clauses are written. The Free Exercise Clause protects, as a fundamental right, the religious activities and beliefs of private persons, organizations, and groups.[203] When set alongside the Fourteenth Amendment's Equal Protection Clause, it becomes clear that religious believers should not be discriminated against because of what they believe, who they are, or their status of religious affiliation. That doesn't mean, as was expressed in the *Smith* case, that the religious believer should

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[202] A standard way of proceeding in such matters is for appellate courts including the Supreme Court to consider hypotheticals to discover how a particular decision will likely affect future cases. *See* Allyson N. Ho & Kelly A. Moore, *Understanding Differences Between Trial and Appellate Court Oral Arguments*, NEW YORK L. J. (Aug. 26, 2013), https://www.morganlewis.com/pubs/2013/08/understanding-differences-between-trial-appellate-oral-arguments-new-york-law-journal. But this presumes that there exists a basic framework for unraveling the issues to be considered. If such a framework is absent or unclear, it is not surprising that lower courts will have trouble applying even a Supreme Court decision beyond its facts.

[203] This would seem to follow from a straight-forward reading of the language. U.S. CONST. amend. I.

be exempted from laws of general applicability.[204] Nor does it mean that religious believers are necessarily entitled to a government funded educational environment that supports their particular religious view, as opposed to not being excluded from programs that support the secular aspects of their education.[205] If it did, there would be little place for the Establishment Clause, and it would be extremely hard to keep the government from appearing to favor a particular religious point of view, especially if the majority of recipients of the funding were of one or a small set of doctrinally connected religious faiths. The problem in this situation, as with many similar ones, is figuring out where the boundaries lie. That is why hard and fast rules in close call situations are less helpful than a more nuanced approach.

The Establishment Clause prevents government from establishing a state religion.[206] Anything less would be inconsistent with the straight-forward meaning of the Clause itself. Similarly, the Free Exercise Clause focuses on government not intruding on individual beliefs and religious practices. Again, this is a straight-forward reading of the clause. Moreover, focusing on what these Clauses are about when properly described should offer some direction for how the intermediate factors described above ought to be applied. Privacy issues are most associated with the Free Exercise Clause since most often free exercise claims involve personal choices to pursue one's individual religious beliefs or practices.[207] Public or common good issues are most associated with the Establishment Clause insofar as the Establishment Clause is often thought to protect individuals and groups from having to participate in, support, or conform their behavior to a view inconsistent with their own religious beliefs.[208] Here, establishment claims can also be seen

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[204] Emp. Div., Dep't of Hum. Res. of Or. v. Smith, 494 U.S. 872, 878–79 (1990) (citing Reynolds v. United States, 98 U.S. 145, 166–67 (1878)).

[205] *Contra* Steven G. Calabresi & Abe Salander, *Religion and the Equal Protection Clause* 187 (Nw. Univ. L. Sch. Fac. Working Paper, Paper No. 213, 2012), https://scholarlycommons.law.northwestern.edu/cgi/viewcontent.cgi?article=1212&context=facultyworkingpapers.

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

[207] In Free Exercise cases, individuals and organizations make claims to what is essentially a personal privacy right to the free exercise of religion against government restrictions often grounded in the Establishment Clause. *See, e.g.*, Emp. Div., Dep't of Hum. Res. Or. v. Smith, 494 U.S. 872 (1990).

[208] Over the years three theories have evolved for how to understand the Establishment Clause. They are the separationist thesis, the neutrality theory, and the accommodationist argument. For a very brief description of these different views, see *First Amendment: Establishment Clause*, CONSTITUTIONAL LAW REPORTER, https://constitutionallawreporter.com/amendment-01/establishment-clause/ (last

to arise when government seeks to protect the general welfare against a free exercise challenge that might give rise to a public harm.[209] In that circumstance, the establishment claim should be understood as protecting against government allowing the encroachment of a religious practice onto those who do not share the same religious point of view.[210]

However, a problem arises that must be resolved first. The government actions will often be connected to private persons, organizations, and behaviors. This connection may stem from a government contract with an organization or from the government imposing criminal, labor, or other duties on operations. Here, it is important to be clear where the line is to be drawn, essentially where private actions of individuals and organizations ends, and governmental action might begin. Indeed, the need for such a separation has given rise to the current Supreme Court arguably going too far in favor of the Free Exercise Clause and not enough in favor of the Establishment Clause.[211] It is also important to ensure that rules of general applicability designed to protect the public not be offset because of a religious connection, especially one unrelated to the purpose of the rule.[212] Thus, the first concern to be considered is what exactly is meant by a private action.

I would begin with a way of thinking about privacy in terms of the Fourth Amendment, tort, and constitutional law.[213] Accordingly, "[a]n action is self-regarding (private) with respect

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visited Nov. 12, 2022); *see also Case Categories: Establishment Clause*, THE FIRST AMENDMENT ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/encyclopedia/case/128/establishment-clause (last visited Nov. 12, 2022).

[209] I would argue, for example, that in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), an establishment claim lurked in the background and only didn't come to the floor because the City had allowed *undefined* exceptions to its antidiscrimination policies without providing for a religious exception.

[210] *See id.*

[211] *See* Bradley Girard and Gabriela Hybel, *The Free Exercise Clause vs. The Establishment Clause: Religious Favoritism at the Supreme Court*, HUMAN RIGHTS, AM. BAR ASS'N (July 5, 2022), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/intersection-of-lgbtq-rights-and-religious-freedom/the-free-exercise-clause-vs-the-establishment-clause/ (last visited Nov. 12, 2022).

[212] In *Edwards v. Aguillard*, 482 U.S. 578, 581 (1987), the Court invalidated Louisiana's educational requirement that whenever evolution is taught, creation science must also be taught. The Court found that the Legislature's real goal was not to "provid[e] a more comprehensive scientific curriculum," but rather "to advance the religious viewpoint that a supernatural being created humankind." *Id.* at 586, 590.

[213] VINCENT J. SAMAR, THE RIGHT TO PRIVACY: GAYS, LESBIANS AND THE CONSTITUTION 62–76, 85–117 (1991).

to a group of other actors if and only if the consequences of the act impinge in the first instance on the basic interest of the actor and not on the interests of the specified class of actors."[214] By "in the first instance," I mean that the mere description of the action without the inclusion of any additional facts or causal theories would not suggest a conflict with anyone else's interest.[215] But, here, one needs to be careful because "the breath of meaning often associated with the term *interest* could undo the aforesaid restriction on 'in the first instance.'"[216] To avoid this from happening, I qualify the word "interest" with the adjective "basic." By a "basic interest," I mean an interest "independent of conceptions about facts and social convention," as opposed to "derivative interests" which would be "dependent on the combination of basic interests with conceptions about facts and social conventions."[217]

> There are two general categories of basic interests: freedom and well-being. The category of freedom includes interests in freedom of expression, privacy, freedom of thought, worship, and so on. The category of well-being includes interests in preserving one's life, health, physical integrity (as in not being assaulted), and mental equilibrium (as in not being subject to mental harassment). In neither of these two categories are particular conceptions about facts or social conventions presupposed.[218]

Additionally, the definition pays attention to the fact that privacy concerns are group centered. What may be not be private between someone and their family, like whether the person wears a toupee, may be private between the person and the IRS; conversely, what may not be private between the person and the IRS, for instance his or her annual income, may be private between the person and certain members of his or her family. It should further be noted that the aforesaid definition provides only a prima facie basis for when a privacy claim is present. It does not guarantee that the claim will hold up if there is evidence

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[214] *Id.* at 68.
[215] *Id.* at 67.
[216] *Id.*
[217] *Id.*
[218] *Id.* at 67–68.

that real harm would likely result. In that instance, a determination would need be made as to how far the privacy claim should be protected. This means that if the privacy claim involved a free exercise of religion, there may arise instances where it is legitimate for government to intrude on the free exercise claim to prevent harm. In short, the above analysis opens the door to a further question, namely, what kinds of harm can government legitimately consider in deciding whether free exercise can be set aside. Remember, because government cannot establish religion, the harms it tries to safeguard against cannot be harms that would only be recognized by the religion itself.

Here, it is important to distinguish between the kinds of claims that arise with respect to religion from the kinds that are likely to arise with respect to government action, the latter of which will most probably concern matters that are empirically verifiable and often scientific in nature. It has been noted that one way to distinguish religious claims from scientific ones is that religious claims concern "both the natural and the supernatural."[219] By contrast, scientific claims concern only "the natural world."[220] Indeed, naturalist thinkers will often "draw a distinction between methodological naturalism, an epistemological principle that limits scientific inquiry to natural entities and laws, and ontological or philosophical naturalism, a metaphysical principle that rejects the supernatural."[221] The former are "concerned with the practice of science . . . [and do] not make any statements about whether or not supernatural entities exist."[222] The Natural Academy of Sciences describes the relationship between science and religion as follows:

> Science and religion are based on different aspects of human experience. In science, explanations must be based on evidence drawn from examining the natural world. Scientifically based observations or experiments that conflict with an explanation eventually must lead to modification or even abandonment of that explanation. Religious faith, in contrast, does not depend only

[219] Helen De Cruz, *Religion and Science*, *in* STAN. ENCYCLOPEDIA OF PHIL. § 1.2 (Edward N. Zalta, ed., Winter 2021), https://plato.stanford.edu/archives/win2021/entries/religion-science/.
[220] *Id.*
[221] *Id.* (citation omitted).
[222] *Id.*

> on empirical evidence, is not necessarily modified in the face of conflicting evidence, and typically involves supernatural forces or entities. Because they are not a part of nature, supernatural entities cannot be investigated by science.[223]

I point this difference out because it relates to the First Amendment's concern that government must not establish religion. This means that any claim government makes must be based on something that is empirically testable and logically derivable and not on any preferred metaphysical scheme.[224]

Given this definition of a private action, one sees immediately that certain matters involving religious beliefs and practices would be private because no one else's interest is involved. Personal beliefs and actions that do not affect others are the ideal cases where free exercise ought to be soundly protected. For example, like in *Smith*, if a person uses an otherwise illegal drug as part of a religious ceremony, use of the drug in that context should not be considered illegal, provided the use does not pose a danger to the user or others. Justice Alito, in his concurrence in *Fulton*, noted that the Volstead Act, which implemented the Prohibition Amendment, provided an important exception for the use of sacramental wine in the Catholic mass.[225]

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[223] *Evolution Resources at the National Academies: Science and Religion*, NAT'L ACAD.: SCI., ENG'G, MED., COMPATIBILITY, https://www.nationalacademies.org/evolution/science-and-religion (last visited Aug. 14, 2022).

[224] At this point, I would like to make clear that nothing in this part of the discussion is meant to affirm any greater degree or ultimate truth to either religious or scientific claims. It is not meant to do this for the former because that level of truth may not be available by empirical falsification. It is not meant to get at any greater scientific truth than what can be determined from physical experience because to do so would be to go beyond what the physical is capable of establishing. In his "Introduction" to *[A] Treatise [of Human Nature]*, [David] Hume launches the constructive phase of his project by proposing nothing less than "a compleat system of the sciences, built on a foundation entirely new." (T xvi.6). The new foundation is the scientific study of human nature. He argues that all the sciences have some relation to human nature, "even Mathematics, Natural Philosophy, and Natural Religion." (T xv.4). They are all human activities, so what we are able to accomplish in them depends on understanding what kinds of questions we are able to handle and what sorts we must leave alone. If we have a better grasp of the scope and limits of our understanding, the nature of our ideas, and the operations we perform in reasoning about them, there is no telling what improvements we might make in these sciences.
William Edward Morris & Charlotte R. Brown, *David Hume*, in STAN. ENCYCLOPEDIA OF PHIL. § 3, (Edward N. Zalta ed., Summer 2022).

[225] Fulton v. Philadelphia, 141 S. Ct. 1868, 1884 (2021) (Alito, J., concurring).

However, where someone else's interest would be affected, perhaps because the person was driving or performing life-supporting services, government need not protect the Free Exercise of religion. An exception would arise, however, if there is an alternative means available for government to provide the protection needed, such as providing the services itself, but then only if this would be within the capacity of what government can legitimately do under current circumstances. In other words, if the alternative approach would require legislative approval not readily available to avoid the harm, then such an alternative approach is not reasonably acceptable. If no alternative is available, government can justifiably limit application of the Free Exercise Clause since in such circumstances, it would have a compelling reason to override the privacy right of the individual. For example, if medical service personnel in a public hospital or nursing home environment refused for religious reasons to get the COVID-19 vaccine or wear a mask when serving persons susceptible to infection, it would not violate free exercise for the government agency to terminate or reassign their employment to protect the health and well-being of the patients being served.[226] Assuming both options (termination or reassignment) are available, government should opt for reassignment because satisfying its compelling interest should have the least intrusive effective on individual free exercise.

In one recent case arising out of New York, the employees claimed that use of the COVID-19 vaccine, which they believed was developed from aborted fetal cells, would violate their religion's belief in protecting the sanctity of human life.[227] However, even if true, this would not allow the employees to expose other human beings to a fatal disease. Finding the employee an alternative position, if available, would be better than terminating the employee. What the government would not be justified in doing would be to claim its denial was based on some ultimate truth beyond what experience teaches, whatever that truth might be based upon, for that would itself be a kind of unpermitted establishment. This explains some of the concern that arose in the above refenced case out of New York when the Governor stated: "'God wants' people to be vaccinated—and that those who disagree are not listening to 'organized religion'

[226] *See, e.g.*, Dr. A v. Hochul, 142 S. Ct. 552 (2021) (Mem.) (denying injunctive relief to public hospital workers objecting, on religious grounds, to COVID-19 vaccine requirements imposed by New York).
[227] *Id.* at 553 (Gorsuch, J., dissenting).

or 'everybody from the Pope on down.'"[228] The state is not justified in denying the relevance of the employee's religious belief because government in that case would be affirming an alternative religious-like view in violation of the Establishment Clause. However, no such affirmation occurs if the government's claim is merely that medical evidence establishes severe potentially life-threatening danger to patients by allowing unprotected exposure to personnel who may be affected or perhaps carriers of an airborne virus.

Here, it is important to say something about the difference between a religious reason, which the government has no right to allow or disapprove, and a secular reason. Recent Court decisions have seemed to confuse secular reasons by holding that anytime the government supports a secular exception from an otherwise general rule of applicability, it must necessarily provide a religious exception or be found to disrespect religion.[229] While there may be cases where the government allows a secular exception without affording a similar religious exception as a ruse to disrespect religion, it cannot be assumed that this will always be true. And that is because the two understandings are not identical. A religious view makes a metaphysical claim concerning its ultimate truth that a secular view does not. Consequently, no matter how strongly the secular claim might be, so long as the government's reason for adopting it is confined to an understanding of its utility in terms of human experience, government should not be thought to be establishing a religion in violation of the Establishment Clause.[230] Thus, claims derived from medical science, as in the above example, should always be understood in terms of their practical use in responding to the different ways human experience is measured, and the government should be careful in how it phrases such claims to avoid misunderstandings. So long as government operates within this pragmatic framework and affords no attempt at creating a metaphysical justification for its actions, the Establishment

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[228] *Id.* at 555.

[229] *See* Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2422 (2022).

[230] *See* Ilya Somin, *Atheists and Secular Humanists Are Protected by the First Amendment Regardless of Whether Their Belief Systems Are "Religions" or Not*, WASH. POST (Nov. 19, 2014, 11:00 AM), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/11/19/atheists-and-secular-humanists-are-protected-by-the-constitution-regardless-of-whether-their-belief-systems-should-be-considered-religions-or-not/.

Clause is not violated. The importance of this understanding can be seen in other contexts as well.

Consider again the situation of the Christian Scientist or Jehovah's Witness who refuses medical treatment for their child on the ground that prayer alone should provide the appropriate approach to treating their child's illness. In that instance, the parents do not have a valid privacy claim with respect to the child's welfare because, notwithstanding the parents' description of what they propose to do, the facts suggest that their action will likely lead to the child's death. In that case, the government acting to support the health and welfare of children can interfere with the parent's choice by acting in *loco parentis* to provide for the child's need for appropriate medical treatment.[231] Obviously, there will be certain limits here. If the medical procedure the government is proposing is not medically sound, then the parents' privacy claim will not necessarily conflict with that of the child's, and a hearing will be necessary to resolve the factual dispute. Also, the government would never be justified in imposing a health care measure on a competent adult who preferred to follow the prayer healing approach of his or her religion, since in that case no one else's interest is at risk and, therefore, government has no compelling reason for undermining the individual's free exercise choice.

It is perhaps at this point that a comment should be made regarding our earlier discussion of the Supreme Court's decision in *Wisconsin v. Yoder*. Recall that in that case the Court held unconstitutional, as a violation of the Free Exercise Clause, Wisconsin's requirement that all children attend public school until age 16, as the requirement was "in sharp conflict with the fundamental mode of life mandated by the Amish religion."[232] Justice Douglas in his dissenting opinion noted,

> I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at

[231] "A Latin term meaning 'in [the] place of a parent' or 'instead of a parent.' Refers to the legal responsibility of some person or organization to perform some of the functions or responsibilities of a parent." *In Loco Parentis,* LEGAL INFORMATION INSTITUTE, CORNELL LAW SCHOOL, https://www.law.cornell.edu/wex/in_loco_parentis (last visited Aug. 25, 2022).
[232] Wisconsin v. Yoder, 406 U.S. 205, 217 (1972).

> stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children.[233]

Indeed, Chief Justice Burger acknowledged the issue but held that it was not before the Court.[234] Still, it is worth noting that Justice Douglas' concern may very well pop up in other similar contexts. As such, the Court's decision in *Wisconsin v. Yoder* ought to be limited to its facts and not be considered to provide a broad principle of constitutional interpretation generally.

Before moving forward, one other matter needs clarification: how to evaluate cases where despite the initial description of the action, there is a clear showing of likely harm to others, as was true in some of the cases just discussed. As stated above, if the privacy description is shown not to apply given the kind of action it would oppose, then that should be sufficient for applying a neutral rule of general applicability without further discussion. In effect, government should apply a heightened or intermediate form of scrutiny to access the situation. However, in cases where the initial description of the private action is on its face applicable, as with an adult's preference to be governed by healing prayer rather than medical science, a deeper evaluation into the nature of the likely harm needs to be undertaken before the intrusion on individual privacy should be allowed. Strict scrutiny is that basis so long as any protection it would allow for the government's interest is narrowly drawn. Note, nowhere would I apply a simple rational basis test since there would still be an important religious concern even if it is not a strict privacy concern.

Since the Free Exercise of Religion is a fundamental right provided it is grounded, as argued above, in supporting individual privacy, the only way it can be offset is where the privacy concern it represents is offset by a compelling state interest, and the method chosen to protect the state's interest is the least intrusive on the free exercise claim. Only if both conditions are met can the Free Exercise Clause be set aside in favor of the state fulfilling its interest. Keep in mind that the initial basis for determining whether the state's actions are

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[233] *Id.* at 241 (Douglas, J., dissenting).
[234] *Id.* at 231–32.

legitimate is the Preamble to the U.S. Constitution, where the state's authority is grounded in its ability to "establish Justice, insure domestic Tranquility, provide for the common defence [defense], promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Prosperity."[235] Elsewhere I have argued that these principles can be seen as connected to a still larger obligation on the part of the state to protect individual autonomy, and thus, in situations where a conflict might occur with a fundamental right, autonomy should provide the common denominator for determining which interest is the more important.[236] Consequently, a limitation is imposed on the free exercise of religion in a context where individual privacy is at stake, when there exists a compelling interest in service to the protection of autonomy generally. This is because in such circumstances the Free Exercise Clause must yield way to the state's compelling interest, provided that the means chosen for carrying it out are narrowly drawn. Otherwise, if privacy is not at stake in the free exercise claim because, under the circumstances, the description of the interest itself, without the inclusion of any additional facts or causal theories, would impose consequences on others the state has an obligation to protect, only intermediate and not strict scrutiny need be applied. Under such circumstances, the latter follows from the fact that the state's interest is not derived from any attempt to invade privacy but is provided for by the constitutional provision against state establishment of religion, which allows for an intermediate approach to limiting application of the free exercise clause where harm to others can be precisely identified.[237] The analysis here reflects just how the two religious clauses can be seen as

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[235] U.S. CONST. pmbl.

[236] *See* SAMAR, *supra* note 213, at 90–94.

[237] Another way to understand this distinction is to recognize that because the free exercise right is justified by its protection of individual privacy, which is itself grounded in autonomy, it will only conflict with other *active* rights, similarly grounded in autonomy. Consequently, protection of autonomy becomes the common denominator for deciding which right governs and whether the privacy interest in the free exercise claim need be limited to only ensuring that the intrusion be no more than necessary to achieve the compelling interest at stake. Other non-active, so-called '*passive*' rights, that the free exercise claim may conflict with are not grounded in autonomy. As such, they undermine the privacy aspect of the free exercise claim right from the start, since the claim as described will necessarily exhibit an intrusion on these other passive rights. Consequently, to protect these interests the state need only show that they constitute an important obligation the state has a duty to protect under the Constitution. In short, they are rights that should be protected under the Establishment clause as providing the state's constitutional authority to protect these other rights. *See* SAMAR, THE RIGHT TO PRIVACY, *supra* note 213, at 104–05.

complementarity, by clearly separating the public/private interests such that the former is clearly reflected in the establishment clause while the latter, properly understood, is confined to the free exercise clause.

In sum, if satisfying a religious claim would impose on the public some physical danger, we first need to examine how the claim is being described to see if strict scrutiny ought to apply. However, if on examination the claim is not strictly a privacy matter, heightened and not strict scrutiny should apply. For example, New York's imposition of a mask requirement on religious believers occupying public spaces during the COVID-19 pandemic ought to have been complied with, unless the government is just exhibiting animus toward religion. This would be an example of an intermediate application to ensure the restriction was not in furtherance of some stereotype or bias against religion.[238] In the same manner, a Catholic doctor who refuses to receive a COVID-19 vaccine for fear it was derived from fetal cells should not be prevented from attending to patients *only if* there is a reasonable alternative the doctor will adopt to avoid contamination that would otherwise occur.[239] This latter example shows that the State's need to provide an important reason for its restriction cannot be reduced to just any reason when a religious concern is at stake, even if the concern is not strictly private. It cannot simply be based on cost or efficiency. Considering all that has been said thus far, let's review how my analysis might have applied to decide some of the recent Supreme Court cases described above.

V. RECONSIDERING THE SUPREME COURT'S RECENT RELIGIOUS CASES

The Court's earlier decision in *Cantwell v. Connecticut* was correct. Connecticut's permit to solicit and breach of peace laws were too broad and did seem to entangle government in a process of interpreting what religious solicitations were appropriate without clear directions. This would leave the free exercise of religion open to any number of interpretations. On the other hand, *Reynolds v. United States* was clearly aimed to protect women, a compelling governmental interest.[240] Some may

[238] *See, e.g.*, Ewan Palmar, *Orthodox Jews Set Fire to Masks in Protest at New York's COVID Restrictions*, NEWSWEEK (Oct. 7, 2020) https://www.newsweek.com/orthodox-jews-mask-protest-new-york-1536946.
[239] *See, e.g.*, Dr.A v. Hochul, 142 S. Ct. 552 (2021) (Mem.) (Gorsuch, J., dissenting).
[240] 98 U.S. 145, 167–68 (1878).

question whether the Court would have reached the same result had the issue been whether either sex should be able to marry more than one partner, but that would be a question for another day. In *Reynolds*, the issue was whether the government's prohibition of plural marriage at the time and in the context, where only men could marry more than one woman, was a compelling enough interest to justify brushing aside the free exercise claim of the individuals involved.[241] So long as there is a reasonable probability, when restricted to only one sex, that plural marriage is likely to be mentally, economically, and possibly physical harmful to the other sex and their offspring, government would seem to have a sufficient compelling interest to prohibit it.

Looking back to the *Lukumi* case, animals, in contrast with humans, have little choice as to how humans will use them, and it is certainly true that animals are regularly used in medical and cosmetic research and for food and clothing.[242] Still, limiting how animals are used where the use is not necessary (I am assuming in the religious context it may be necessary) and especially how they are treated when used (whether, for example, they are made to suffer) should be at least a legitimate governmental interest, if not a compelling one, that can be applied even when an animal is made part of a religious sacrifice.[243] This is because animals, like human beings, have "[t]he capacity for suffering and enjoyment [which] is a *prerequisite for having interests at all*, a condition that must be satisfied before we can speak of interests in a meaningful way."[244]

On a related issue, applying the public/private distinction described above, allowing religious symbols as part of a cultural/economic depiction in a public park or shopping center, especially during holidays, does not violate the Establishment Clause, provided they are not the sole symbols on display. That is to say, other symbols (including religious symbols) must be present and different events must be acknowledged for displays. But perhaps most importantly the religious aspect of the symbols cannot be made the center of governmental attention.[245] Similarly, government payments for secular textbooks and

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[241] *Id.* at 161–68.
[242] *See, e.g.*, Animal Welfare Act, 7 U.S.C. § 2131.
[243] *Id.*; *see also* Animal Welfare Regulations, 9 C.F.R. §§ 1.1-3.142.
[244] Peter Singer, *All Animals Are Equal*, *in* ETHICS: THE BIG QUESTIONS 500, 505 (2nd ed., James Sterba ed., 2009).
[245] *See, e.g.*, Van Orden v. Perry, 545 U.S. 677 (2005); Lynch v. Donnelly, 465 U.S. 668 (1984).

transportation to school, where the school is meeting state education requirements that the government has an obligation to promote should not be seen as problematic. Nor should government financial support for drug and alcohol outreach programs that may have a religious sponsor be a problem, so long as the program does not require any form of religious participation or indoctrination and is clearly connected to meeting nonsectarian educational and health needs that the state would be able to sponsor on its own.[246] This area may, however, give rise to too close an entanglement between the state and the religious organization to ensure that the public funds are not being used for impermissible purposes such as religious training, education, or indoctrination. Thus, adopting a case-by-case evaluation, may be the best kind of approach for a lower court to follow when deciding whether the government has gone too far in its involvement with a particular religious organization. Granted the *Lemon* test left open exactly how the entanglement might be measured, giving rise to some of its criticisms. Still such challenges can be answered by a careful inquiring as to whether the government's involvement exhibits an impermissible establishment of religion and, if not, whether the public's interest is served by allowing some government funding. No compelling interest need be shown since no violation of free exercise is implicated, only an investigation as to whether an impermissible establishment might be involved. The impermissible establishment itself would be the justification for disallowing government funding.

The Court's recent jump to nullify the *Lemon* test in *Kennedy v. Bremerton School District* needs to be rethought.[247] While there is no free exercise right for parents to receive support for their children's religious education, and there is an establishment restriction against government support of religious education, inevitably there will be cases where government support of sectarian schools will be justified. For example, in

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[246] *See What are the rules on funding religious activity with Federal money?* U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES (HHS), https://www.hhs.gov/answers/grants-and-contracts/what-are-the-rules-on-funding-religious-activity-with-federal-money/index.html (last visited Nov.12, 2022).

[247] In *Kennedy v. Bremerton School District*, 142 S. Ct. 2407, 2427 (2022), the Court justified giving up the *Lemon* test because it saw the test as grounded in the belief that government and religion, under the Establishment Clause, had to be totally opposed. But this was a mistake in not seeing how the two Clauses might operate so as not to be contradictory. Entanglement, endorsement, neutrality, and general applicability, as intermediate determiners for how to decide cases, may still have a proper role if only the Court would make clear how the two Clauses should operate.

certain parts of Maine, where public schools may not be already in place, government funds can be earmarked for nonsectarian schools provided they avoid any direct religious use.[248] (I use the word "direct" here intentionally because some indirect effect will likely take place on the school's overall budget.) The difficulty likely to arise when evaluating how funds are being used is the all-too-easy government entanglement via accounting and oversight reviews. This is less a problem when the tuition is provided directly to parents who choose to send their children to educational institutions of their choice, provided the state has qualified the institution as affording adequate secular education, even if some of those institutions also provide religious education.[249] That is because the choice of where to send a child is not determined by the government but by the parents; all the

[248] *See* Carson v. Makin, 142 S. Ct. 1987 (2022).

[249] *See id.* Perhaps some will argue that the earlier cases involving education supported government affording deference to religious education over secular education. But I would argue these that these earlier cases just as much supported government affording wide access to a quality secular education wherever the children might be taught. *Compare* Pierce v. Society of Sisters, 268 U.S. 510 (1925), *with* Meyer v. State of Nebraska, 262 U.S. 390 (1923). *Pierce* involved a challenge by the Society of Sisters, a Catholic organization, to an Oregon statute, the Compulsory Education Act, which required every parent to send their eight- to sixteen-year-old children to public schools as opposed to private or parochial schools. In holding the statute violated the Fourteenth Amendment's liberty provision, the Court noted:

> No question is raised concerning the power of the state reasonably to regulate all schools, to inspect, supervise and examine them, their teachers and pupils; to require that all children of proper age attend some school, that teachers shall be of good moral character and patriotic disposition, that certain studies plainly essential to good citizenship must be taught, and that nothing be taught which is manifestly inimical to the public welfare. . . . Under the doctrine of *Meyer v. Nebraska* . . . we think it entirely plain that the Act of 1922 unreasonably interferes with the liberty of parents and guardians to direct the upbringing and education of children under their control.

Pierce, 286 U.S. at 534–35. (citation omitted). In *Meyer*, Nebraska had approved a statute prohibiting public and private school teachers from teaching children under the age of ten and before having passed the Eighth grade, subjects in any language other than English. In this case, the Court held the statute to violate the liberty interest protected by the Fourteenth Amendment, noting that "[t]he power of the state to compel attendance at some school and to make reasonable regulations for all schools, including a requirement that they shall give instructions in English, is not questioned. Nor has challenge been made of the state's power to prescribe a curriculum for institutions which it supports." *Meyer*, 262 U.S. at 402. What was at stake was a statute prohibiting the teaching of children subjects in a foreign language where "[i]t is well known that proficiency in a foreign language seldom comes to one not instructed at an early age, and experience shows that this is not injurious to the health, morals or understanding of the ordinary child." *Id.* at 403.

government is doing here is not prohibiting the parent's choice. But even with that said, the payment itself must be restricted to fund only secular activities, so no establishment issue arises.[250] Still, some will argue that allowing any funding, even for the secular education component of a sectarian school, supports the whole school by alleviating some of the school's expenses. This is less true where the expenses come from outside in the form of tuition vouchers to parents as opposed to directly paying the school, since the parents could just as easily apply them to a nonsectarian school as to a sectarian one. Additionally, if the reason for funding private schools is that the private school is the only school in the position to provide education, any incidental benefit to religion is allowable as satisfying, at least, a short-term compelling interest of the state.

Looking at some of the Court's more recent cases, *Locke v. Davey* was correctly decided. The state doesn't have to make scholarships available in every subject area just because it makes it available in some.[251] The state might have very good reasons for making scholarships available to science, mathematics, or humanities students, for example, because of a lack of or need for secular professionals in the area. Additionally, making scholarships for specifically religious studies runs the problem of appearing to put taxpayers on the side of supporting religious beliefs. In short, there would be obvious establishment problems for a state to try and go in this direction. However, if the state makes a scholarship program available to teach secular subjects to all but religious private school participants, that is not a decision based on *use* but *status*, and so long as the religious institution is also teaching those secular subjects, the Court in *Carson v. Makin* was correct to hold such discrimination to be unconstitutional under the Free Exercise Clause and Fourteenth Amendment.[252]

In contrast, the Court's decisions in both *Hosanna-Tabor* and *Our Lady of Guadalupe* seem overbroad. In both cases, the Court determined the teachers were ministers without any real investigation into the matter. Especially in *Our Lady of Guadalupe*, the Court allowed the school to determine whether its teaching employees were ministers or not without any real investigation into when someone is a minister. Granted, were the Court to allow such an investigation, a problem arises if the answer would

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[250] *See* Bd. of Educ. of Cent. Sch. Dist. No. 1 v. Allen, 392 U.S. 236, 243 (1968).
[251] Locke v. Davey, 540 U.S. 712, 723 (2004).
[252] *See* Carson v. Makin, 142 S. Ct. 1987, 2000 (2022).

require analysis of the institution's religious beliefs. For example, in Judaism, any "person qualified by academic studies of the Hebrew Bible and the Talmud to act as spiritual leader and religious teacher of a Jewish community or congregation" would constitute being a Rabbi.[253] Ordination is not required.[254] And so the concern with carrying out such an investigation by the state would likely be too much government involvement in deciding who is a minister.

A better approach would be to ask whether the law being challenged is generally applicable. In the case of *Hosanna-Tabor*, the Act being challenged was the Americans with Disabilities Act;[255] in the case of *Our Lady of Guadalupe*, the suit involved civil challenges for age and disability discrimination.[256] Since these concerns would apply to any employee, if the schools wanted to claim the teachers it was employing were ministers, the burden should be on the school, not the state, to show why this was the case. And it would be best for the school to do this by having clear provisions in their hiring contracts of how the employee is being viewed by the school and the likely consequence that will befall disputes in the future, such as the ones described above.

Following in this same vein, the problem I see in *Smith* isn't the application of a rule of general applicability,[257] it is the fact that a mere description of the Native American employees' action of using peyote as part of their religious ritual did not suggest a conflict with anyone else's interest, at least not absent a showing of how this implicated their job responsibilities. Granted, they were being hired by a drug counseling agency, but that doesn't dismiss the fact that their drug use was part of a religious ritual any more than if it were part of a medical treatment. Consequently, if that action was to be the basis for denial of unemployment benefits, there would need to be an investigation into what the state's compelling interest was in this context and whether it was narrowly drawn. Absent that, there could be a provision placed in the employment contract that specifically detailed the employees were giving up a right to use drugs, even as part of a religious ritual, provided it could affect them while at work.

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[253] Definition of Rabbi in Judaism, BRITANNICA, https://www.britannica.com/topic/rabbi (last visited Aug. 17, 2022).
[254] *See id.*
[255] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. EEOC, 565 U.S. 171, 179 (2012).
[256] Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049, 2058 (2020).
[257] *See* Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).

As for the *Hobby Lobby* case, since that involved a federal statute in which Congress set a higher standard for its own rules of general applicability, there is no constitutional issue regarding the Free Exercise Clause.[258] As the dissent was quick to point out, however, in passing RFRA, Congress was intending to restore the compelling state interest test that applied pre-RFRA where free exercise issues were involved, not to create a new set of protections for religious free exercise.[259]

Here, it is worth noting that less than a week after the *Hobby Lobby* decision, when the Court decided *Wheaton College v. Burwell*,[260] a different problem arose. In that case, the College sought an injunction from having to file the required ESBA Form 700 to enjoin Health and Human Services (HHS) from enforcing provisions of the ACA while its case proceeded on appeal.[261] The College claimed that having to fill out Form 700, which notifies the insurer of its separate obligation to directly provide the required contraceptive coverage to students and employees, makes the College complicit in violating its religious beliefs.[262] Here, the Supreme Court agreed that all the College should have to do to satisfy HHS's requirement was provide written notice to the government that it is a non-profit organization with religious objections to providing contraceptive coverage.[263] It did not have to fill out Form 700.[264] On its face, that decision would seem to be just fine as it is the least intrusive on the College's religious conviction. However, as Justice Sotomayor pointed out in her dissent, the Court was too quick to grant an emergency injunction because there had been no showing in the lower court that the College would suffer any "substantial burden" by having to file the requisite form.[265] The underlying concern here was with the Court's apparent willingness to broaden the free exercise protection beyond its pre-RFRA compelling interest requirement.

In *Trinity-Lutheran*, the Court got it right, although the concurrences of Justices Thomas and Gorsuch went way too far. The Court was correct that there was no good reason for

[258] Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 683 (2014).
[259] *Id.* at 747 (Ginsburg, J., dissenting).
[260] 573 U.S. 958 (2014).
[261] *Id.* at 958.
[262] *See id.*
[263] *Id.*
[264] *Id.*
[265] *Id.* at 963–64 (Sotomayor, J., dissenting) (joined by Justices Ginsburg and Kagan). Indeed, "two Courts of Appeals that have addressed similar claims have rejected them." *Id.* at 964.

disallowing the church from being able to participate in a general program that offered recycled tires to resurface playgrounds. What if the concern related to offering health and safety protections as Justice Breyer points out? Chief Justice Roberts was also correct to read the Missouri Constitution's statement that "no money shall ever be taken from the public treasury, directly or indirectly, in aid of any church, sect or denomination of religion"[266] as expressing animus against religion. For the phrase "directly or indirectly" seems to go well-beyond any establishment concern to make the religious entity itself appear as if it were totally independent of the community. How would such a view play out in regard to police or fire protection? Clearly, it is one thing to establish a religion and quite another to simply discard its presence in a way that no other organization would be discarded simply because it is a religion.

I think Justice Gorsuch goes wrong in his dissent when he wants to throw out the status/use distinction. No doubt there will be difficult cases where judgment will be required, but that is exactly what courts do. The point, to use Chief Justice Roberts's phrase of a "'play in the joints' between what the Establishment Clause permits and the Free Exercise Clause compels"[267] is to afford the lower courts the greatest opportunity to make sense of what the case is about. On the other hand, contrary to Justice Thomas's view, any time religion is excluded it cannot, on that basis alone, be assumed that the reason was animus against the religion.[268] It ought to depend very much on why the exclusion is occurring and what interests are being protected.

On the surface, *Espinoza v. Montana Department of Revenue* seems similar to *Trinity-Lutheran*, for as Chief Justice Roberts noted: "the Montana Supreme Court applied the no-aid provision to discriminate against schools" in violation of the First Amendment Free Exercise Clause.[269] However, an important difference is that the state Supreme Court in *Espinoza* had already struck the whole program as applied to both secular and sectarian institutions before the U.S. Supreme Court rendered its decision.[270] This makes the U.S. Supreme Court's judgment appear as an invitation to state governments to offer

[266] Trinity Lutheran Church of Columbia, Inc. v. Comer, 137 S. Ct. 2012, 2017 (2017).
[267] *Id.* at 2019.
[268] *See id.* at 2025 (Thomas, J., concurring).
[269] 140 S. Ct. 2246, 2260 (2020).
[270] *Id.* at 2279 (Ginsburg, J., dissenting).

tax credits to parents whose children attend sectarian schools as an acceptable establishment. Justice Breyer's concern that this gives rise to a deeper entanglement of government involvement with religion is thus correct.[271] I might point out here a further problem with Justice Thomas's expressed concern that establishment does not require that government "must remain both completely separate from and virtually silent on matters of religion."[272] Perhaps not, considering what I have said above. But clearly Justice Thomas goes too far where he gleans from this that government should get involved in and oftentimes express support on matters of religion.[273] The way I have tried to understand the intersection of free exercise and establishment avoids both results by affirming appropriate places where government involvement and speech might be necessary and other places where it clearly is not.

It is worth noting that in *Fulton v. City of Philadelphia*, a somewhat different concern arose.[274] Normally, one would expect, if CSS wanted to participate in Philadelphia's foster care program, it should follow the City's foster care rules and not try to rewrite them. That would be consistent with *Smith*.[275] However, in this case, the Court correctly ruled against the City because the contract did allow for exceptions concerning same-sex couples, at the sole discretion of the Commissioner and for no specified set of reasons.[276] Therefore, since free exercise is a fundamental right, the City's failure to offer an exception for CSS's free exercise claim suggests an animus against CSS's religious belief. Such a decision, like in *Wisconsin v. Yoder*, should be limited to its facts, however. Since what gave rise to the Court's result was Philadelphia's own failure to provide a rational basis for the exceptions, the City's antidiscrimination policy should have survived this challenge had the City limited the exception to apply only if the foster children themselves objected to the placement. The latter concern might then be justified by how well the child would be able to fit into their new home.

Lastly, we come to *Kennedy v. Bremerton School District*, where the Court seems to have made a serious error. Recall in that case the Court's reason for acknowledging Kennedy's right

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[271] *Id.* at 2281 (Breyer, J., dissenting).
[272] *Id.* at 2264 (Thomas, J., concurring).
[273] *Id.* at 2266.
[274] 141 S. Ct. 1868 (2021).
[275] Emp't Div. v. Smith, 494 U.S. 872, 890 (1990).
[276] *Fulton*, 141 S. Ct. at 1878.

to pray on the fifty-yard line following a football game was that the school had allowed other private acts by coaches following a football game such as making a phone call to their families.[277] The problem with the Court's analysis is that these other acts would on their face be thought to be private absent proof of any conflict that might result from there having been performed. However, even just focusing on the description of Kennedy's act, to go onto the fifty-yard line following a football game and there kneel to make a private prayer, is not a private action. The issue isn't whether Kennedy's prayer was private; the issue is whether praying on the fifty-yard line following a football game is private, since attendees would still be in the stands and students and staff would still be on or near the field.[278] Also, the fifty-yard line is not a place just anyone can go following a football game. Since access to the field is normally restricted by the school to students and staff, Kennedy's access to the field was based on being a coach employed by the school.[279] Additionally, the football field and the fifty-yard line, in particular, are places the school uses to draw attention to football games or other performances it might be hosting.[280] Consequently, Kennedy performing a prayer on the fifty-yard line right after a game could very easily be understood as an approved action by the school district. In fact, it is likely to be perceived that way given who would likely observe it were either students or outside attendees. As such, Bremerton School District was quite correct in believing it was obligated under the Establishment Clause, as any governmental institution would be, not to engage in acts that would likely signal to those around an establishment of religion.[281] The fact that Coach Kennedy continued to offer a prayer on the fifty-yard line after having been told of the school's policy, clearly shows his disrespect for the school's obligation to remain neutral with respect to religion. Under these circumstances, the school was quite right to consider how Kennedy's action might appear as an endorsement by the School District to the public and to discipline him with a suspension. The Court, in concluding that Kennedy's action should have been allowed, unjustifiably abandoned both the *Lemon* test and the endorsements test in favor of some kind

[277] 142 S. Ct. 2407, 2415 (2022).
[278] The Court admitted that the matter cannot be settled simply by the fact Mr. Kennedy's prayer was private. *See id.* at 2425.
[279] *See id.* at 2420.
[280] *See id.*
[281] *Id.* at 2419.

of unclear use of "historical practices and understandings."[282] Again, the Court's discard of these two intermediate principles was not because of their inability to resolve the case but the result of its own failure to make clear what the two Clauses stand for in a complementary way.

VII. MORALITY: A COMMENT

In this section, I will focus on a presentation that was part of an online workshop entitled *Religion and the Equal Protection Clause*, by Steven Calabresi and Abe Salander, at Northwestern Law School.[283] In that presentation, the authors argue for affording greater credibility to voucher programs that favor religious education.[284] Note that above I did not have a problem with voucher programs that allow parents to select private educational institutions, even if they were religious, so long as state education qualifications were met. This was because such programs may support making available to parents the kinds of quality education the state has undertaken to create. The problem with the authors' claim is that it starts out disavowing moral values religious people might object to that are often part of a secular education. I believe this is wrong. Even religious education, especially if it is funded by the government, should include secular moral values as well. This represents a form of neutrality in which all people gain some understanding of their place in a pluralistic society. The way the authors criticize public school education, especially in regard to the teaching of morality, implies that the secular view of morality taught in the public schools should not be presented to students coming from varying religious traditions. The authors write:

> Public schools discriminate on the basis of religion. Even though the education laws do not explicitly ban religious individuals from attending public schools, religious students are effectively excluded by the character of the public school curriculum, moral teachings in public schools, and general atmosphere at public schools. Public education is generally advertised as being secular, neutral, and open to all students. Yet neutrality in education is probably impossible because

[282] *Id.* at 2428.
[283] Calabresi & Salander, *supra* note 205.
[284] *Id.* at 187.

> conveying values to children is an inherent aspect of education. Secularism and popular culture are incompatible with many religious belief systems, and public schools are simply incapable of teaching the religious values and doctrine that religious families often need. Indeed public education in America is neither neutral nor welcoming to all students, as public schools regularly promote political and social agendas at odds with religious views.
>
> In modern society, it is impossible to create a "neutral" educational environment.
> Religious and secular educators advance polar opposite approaches on such controversial topics as sex education, homosexuality, abortion, and standards of dress and decency. For instance, California recently enacted the California Fair Education Act which mandates that educators, textbooks, and instructional materials positively promote "lesbian, gay, bisexual, and transgender Americans" as role models. Needless to say, this produced a strong backlash from religious groups opposed to these lifestyles. Balancing religion and science has also never been simple. The debate over creationism versus evolution is long-lived and impassioned. Which books should be read, or not read, as well as how to teach history are also regularly debated. And clashes between religious and secular factions frequently end up being litigated in court.[285]

As can be seen from these two paragraphs, "neutral" in the context of public education is treated by these authors as if it is in opposition to private religious moral teaching. But that is not its purpose. It is not meant to be in opposition to religious values as such but rather to focus on what holds a pluralistic society together, i.e., one where many different value systems are likely to operate. As the authors' own references to "creationism versus evolution" should make clear, they are inclined to disallow forms of secular education religious people object to.

[285] *Id.* at 163–64 (footnotes omitted).

And since no one form of even religious education would meet the requirements of all religions, the only conclusion one can draw is that moral education should not be part of secular education.

At this point, I am tempted to ask, should governmental licensing bodies do the same thing with regard to who may serve as medical practitioners, lawyers, or in other professional roles? Should persons trained only in Sharia or Canon law be allowed to represent clients in civil courts? Must public supported hospitals employ Christian Scientist healing practitioners to operate alongside or even in place of medical doctors? How far should the society go in deciding which kinds of educations ought to count and by how much? In effect, what is being suggested by this working paper is that secular moral education (regardless of whether one may also have a religious moral education) be set pretty much out-of-bounds as a general governmental requirement. But this implies that secular education cannot be neutral, at least with regard to religious believers. And that is simply not correct. Nor is it correct that any other form of sectarian moral education would be any more neutral.

Public schools can provide and government can require a secular moral education to be part of the curriculum. This is because such education is necessary to allow a pluralistic society to operate. That does not mean that a religious school, provided it included in its educational curriculum relevant secular notions of morality, couldn't also include more particularized notions appropriate to its own belief system. Nor does it prevent public school children from asking questions that arise out of their own religious traditions. It does require that public school students be instructed in what seems to hold people together in a pluralistic society. Alternative points of view that might be raised by students should not be disdained and can be discussed; the only limitation under the Establishment Clause is that school authorities do not promote these alternative points of view as universally correct when they are founded upon metaphysical notions that cannot be verified. Nor should sectarian perspectives be encouraged to replace reasoned secular perspectives that encourage liberty and equality. All this can be done without disrespecting either the secular position or various religious positions. At a higher educational level, one might investigate whether any such set of societal moral principles can be established universally, but as that would most likely go

beyond what can reasonably be expected to take place in a secondary, and especially in a primary, educational environment, it need not concern us here.[286]

Our concern needs to be that secular morality represents a form of public reason capable of helping the student achieve the ideal of democratic citizenship. Such an ideal comes about, as the philosopher John Rawls explains, when

> our exercise of political power . . . is exercised in accordance with a constitution the essentials of which all citizens may reasonably be expected to endorse in light of principles and ideals acceptable to them as reasonable and rational. This is the liberal principle of legitimacy. And since the exercise of political power itself must be legitimate, the ideal of citizenship imposes a moral, not a legal duty—the duty of civility—to be able to explain to one another on those fundamental questions how the principles and policies they advocate and vote for can be supported by the political values of public reason. This duty also involves a willingness to listen to others and a fairmindedness in deciding when accommodations to their views should reasonably be made.[287]

Here, it might be asked, why not also engage in the very disputes that at a higher educational level would be quite common in a philosophical debate? If this could occur at the secondary public-school level, it would be great, provided the discussion fell within the scope of what was earlier described as the pragmatic empirical framework. This raises the further question, why shouldn't discussions extend beyond a secular to discussion that also include religious attitudes?

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[286] I have in mind here such arguments as offered by the philosopher Alan Gewirth to establish a system of universal human rights. *See generally* ALAN GEWIRTH, REASON AND MORALITY (1978); DERCYK BEYLEVELD, THE DIALECTICAL NECESSITY OF MORALITY: AN ANALYSIS AND DEFENSE OF ALAN GEWIRTH'S ARGUMENT TO THE PRINCIPLE OF GENERIC CONSISTENCY (1991).

[287] JOHN RAWLS, POLITICAL LIBERALISM 217 (1993) (citing Amy Gutmann & Dennis Thompson, *Moral Conflict and Political Consensus*, 101 ETHICS 64, 76–86 (October 1990)). *Contra* Robert P. George, *Public Reason and Political Conflict: Abortion and Homosexuality*, 106 YALE L. J. 2475, 2478–79 (June 1997).

Again, it is certainly fine for a student to say that a particular view about morality may not be supported by his or her religious tradition. In this case, the student may wish to think about how they might want to handle that discrepancy in their everyday life, which will inevitably involve interactions with other people. What would not be acceptable would be for the school to waive a particular secular point of view as being solely correct just because it is in vogue or what might generally be believed. Nor would it be right to say that the secular point of view is the only one worthy of attention or necessarily the best one. On the other hand, it is fine for the school to require compliance with social norms, regardless of religious belief, that allow the school to operate efficiently and ensure that all students feel respected, comfortable, and safe. The door can be left open to the possibility of other viewpoints so long as the value of the secular viewpoint in holding society together is not randomly dismissed. Remember, the school should be focusing on a set of norms that can properly serve to hold people with very different moral and religious beliefs together in a pluralistic society. And so, an important question to ask is how best to hold people together in a pluralistic society where very different religious points of view might be present.

Such an approach would include adopting norms that emphasize respect for differences in the way people perceive themselves or live their lives, fairness in how individuals ought to be treated, support for laws that protect overall human dignity and well-being, and acknowledgment that even differences of opinion can often be reconciled by focusing on what we share in common instead of emphasizing our disagreements. These norms support a pluralistic society working together. They may not represent the views of any one religion or of any one social group, but they do provide a place in which society can come together. And they should not be seen to threaten any religion since they are not being offered as the sole or even necessarily the best way in which society might operate. As such, they are certainly proper norms for a secular classroom to operate within. Indeed, claims that such norms need not be the basis for a required secular education because they undermine the free exercise of religion are simply not tenable.

It will be recalled from what was said above that government has obligations under the Constitution to "promote the general Welfare, and secure the Blessings of Liberty to

ourselves and our Posterity . . . . "[288] Certainly, government establishing a required form of secular education, including the teaching of secular morality, fits within these obligations. Similarly, the right of parents to seek a religious moral education for their children above and beyond whatever secular education they receive fits under the Free Exercise Clause. What is not abided is for the latter protection to undermine or replace the former. Free exercise does not permit public sector education to undermine participation in a pluralistic society in which members come together and work toward common goals out of mutual respect for their rights as citizens. In that instance, the state has a compelling reason to protect the public from such a tragedy, and so long as the means chosen don't prevent a separate religious education to also be included, it is sufficiently narrow to operate as part of the state's educational requirement. I am reminded of a point made by Brian Barry in his book, *Culture & Equality*, where he criticizes the Supreme Court decision in *Wisconsin v. Yoder*.[289] In effect, what Barry said and Justice Douglas' dissent implied was that Amish children, who may come to decide that the austere life they were taught as children but later determined was not for them, would have no way to exit their society because they would have been deprived of the necessary education to gain meaningful employment elsewhere.[290] Such a limit to obtaining alternative forms of education, including moral education, is not something the Court should be promoting.

VIII. CONCLUSION

The First Amendment Establishment and Free Exercise Clauses were created to guarantee religious freedom in the United States. Initially, this was done by limiting instances where an individual could be assailed from engaging in his or her religious beliefs or practices because the federal government was prohibited from establishing a religion for the whole country. Following adoption of the Fourteenth Amendment, this limitation on the federal government would eventually be applied to the states. Additionally, neither the federal nor the state governments were to promote activities that discriminated

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[288] U.S. CONST. pmbl.
[289] BRIAN BARRY, CULTURE & EQUALITY: AN EGALITARIAN CRITIQUE OF MULTICULTURALISM (2001).
[290] *Id.* at 242–44.

against any religion so as not to undermine the Free Exercise Clause.

On the surface, these limitations seemed perfectly complementary. However, as the two levels of government became more involved in what the Constitution's Preamble had proclaimed to be the federal government's duty—to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity"[291]—situations began to arise where the government's attempt to fulfill its obligations would conflict with various religious traditions, often by the government having set out various rules (civil and criminal) and regulations (involving labor and individual rights) that regulated seemingly private activity. Initially, the Supreme Court attempted to resolve these conflicts by adopting a set of intermediate criteria (entanglement, endorsement, general applicability, and neutrality) designed to restrict those governmental actions that might be seen as an intrusion on religious liberty. However, eventually the factors themselves became the problem. It became less clear exactly how they were to operate to prevent intrusions on the free exercise of religion in part because the Court had not said very much about how that clause was to balance with the Establishment Clause. Indeed, in recent years, the Court seemed to be paying little attention to the Establishment Clause, providing almost complete deference to the Free Exercise Clause.

In this Article, I have attempted to address the problem of how the two Clauses might work together by adding a private versus public set of criteria to the meaning of the two Clauses. In so doing, I hope I have set out a way for how the two Clauses could oversee the intermediate factors the Court had previously made use of in deciding cases. One such goal was to bring back into attention some intermediate factors that arguably the Court has mistakenly disavowed or downplayed like entanglement and endorsement and possibly general applicability, while still providing great support for other factors like neutrality. Doing this should not only help the Court in making clear its understanding of the two Clauses going forward; it should also assist the lower courts, who have recently found it difficult to know which factors they should be following, when deciding free exercise cases. Finally, the approach laid out here should also add to the Court's legitimacy by reducing the appearance that

[291] U.S. CONST. pmbl.

religious decisions are determined more by which group of justices is in the majority: justices who appear more religiously conservative seem to want to support free exercise concerns; liberals seem more to favor establishment concerns.[292]

In the United States, it is common to think that church and state are and ought to be separate, and this has been a long-standing position of the Court. However, to make this continue as a practical reality going forward that isn't biased in favor of one or the other positions of the justices, it is important that it be well supported intellectually. Part of the problem is the practical reality that courts deal with cases that pose specific factual controversies which need to be settled. Another problem is making clear the courts' understanding of the principles they will rely on to resolve the issues before them. I hope this Article helps resolve the challenges posed by our two religion clauses and provides some direction where the Court should be going in the future.

[292] *See generally* LINDA GREENHOUSE, JUSTICE ON THE BRINK 202–31 (2021).

POLITICAL ADVERTISING IN VIRTUAL REALITY

Scott Bloomberg*

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I. INTRODUCTION

A range of reactions met Mark Zuckerberg's 2021 announcement that The Facebook Company would rebrand as "Meta" and would adopt, as its primary strategic focus, the creation of a virtual reality ("VR") environment[1] called the

* Associate Professor of Law, University of Maine School of Law. I thank the attendees of the 2022 Privacy Law Scholars Conference—where an earlier version of this Article was presented—and the participants in Maine Law's Faculty Workshop Series, for their feedback on the Article. I also thank the Stanford Cyber Policy Center for inviting me to present this paper at the Existing Law and Extended Reality Symposium. Thank you to Ethan Zuckerman, Brittan Heller, and Avi Bar-Zeev for taking the time to discuss earlier drafts of this article, and to Alexandra Roberts, Thomas Kadri, Hany Farid, and Tamar Katz for sharing sources that deepened my understanding of the issues addressed in the Article. Last but not least, I thank Dale Rappaneau and Mark Sayre for their superb research assistance, and the *FALR* staff for their editorial work.

[1] Virtual reality ("VR") is "a fully immersive software-generated artificial digital environment [that is] . . . experienced by users via special electronic equipment, such

Metaverse.[2] Some commenters questioned the company's motive for announcing the rebranding, noting that Facebook badly needed a change in narrative after the Facebook Papers leaks and other scandals.[3] Others noted that the idea of creating a metaverse-like environment was nothing new and had in fact been done before.[4] Some thought Meta's Metaverse was a terrible, dystopian idea.[5] Others were enthusiastic about the economic aspects of Mark Zuckerberg's vision.[6]

Good idea, bad idea, old idea, or new idea; one thing is certain: When one of the world's wealthiest technology companies announces a plan to focus its considerable resources on developing a new-verse, it is time to focus a critical lens on that plan. For privacy law scholars, there is much on which to focus. Operating a VR environment like the so-called metaverse will involve the collection, processing, storage, and sharing of vast quantities of personal data.[7] That data will likely range from

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as a Head Mounted Display (HMD)." *Virtual Reality (VR)*, XR SAFETY INITIATIVE, https://xrsi.org/definition/virtual-reality-vr (last visited Mar. 2, 2023). The term "immersive reality" is sometimes used interchangeably with VR.

[2] Facebook Reality Labs, *Mark Zuckerberg Keynote Address at Facebook Connects 2021* (Oct. 28, 2021), https://www.facebook.com/facebookrealitylabs/videos/561535698440683/.

[3] Peter Suciu, *A 'Metaverse' Of Questions: What's Behind Facebook's Rebranding?*, FORBES (Oct. 23, 2021), https://www.forbes.com/sites/petersuciu/2021/10/23/a-metaverse-of-questions-whats-behind-facebooks-rebranding/?sh=29a1091c3be1; *e.g.*, James D. Walsh, *Why Facebook's Metaverse Is Dead on Arrival*, N.Y. MAG. (Nov. 8, 2021), https://nymag.com/intelligencer/2021/11/why-facebooks-metaverse-is-dead-on-arrival.html.

[4] Ethan Zuckerman, *Hey, Facebook, I Made a Metaverse 27 Years Ago*, THE ATLANTIC (Oct. 29, 2021), https://www.theatlantic.com/technology/archive/2021/10/facebook-metaverse-was-always-terrible/620546/; Jeff Grubb, *Facebook Stops Just Short of Rebranding to 'The Web'*, VENTUREBEAT (Oct. 28, 2021), https://venturebeat.com/arvr/facebook-stops-just-short-of-rebranding-to-the-web/; Louis B. Rosenberg, *Regulating the Metaverse, a Blueprint for the Future* (2022), https://www.researchgate.net/publication/362541437_Regulating_the_Metaverse_a_Blueprint_for_the_Future (Indeed, the term "metaverse" is not unique to Meta-née-Facebook, or to any specific company. It is a generic term used to describe "a persistent and immersive simulated world that is experienced in the first person by large groups of simultaneous users who share a strong sense of mutual presence.").

[5] Brian Merchant, *The Metaverse Has Always Been a Dystopian Idea*, VICE (July 30, 2021, 9:00AM), https://www.vice.com/en/article/v7eqbb/the-metaverse-has-always-been-a-dystopia.

[6] Michel Kilzi, *The New Virtual Economy of the Metaverse*, FORBES (May 20, 2022), https://www.forbes.com/sites/forbesbusinesscouncil/2022/05/20/the-new-virtual-economy-of-the-metaverse/?sh=72cdb91246d8.

[7] David Uberti, *Come the Metaverse, Can Privacy Exist?*, WALL ST. J. (Jan. 4, 2022), https://www.wsj.com/articles/come-the-metaverse-can-privacy-exist-11641292206 ("The infrastructure underpinning the metaverse—virtual-reality glasses and augmented-reality software, for openers—will rely on reams of data showing how users interact with their surroundings . . . .").

basic account information to highly sensitive information that tracks how users interact with their virtual surroundings.[8] And beyond information-privacy issues, VR raises important privacy-related questions involving equality and bodily autonomy. For instance: Will people be able to grope your body (or, more specifically, the avatar that represents your body) in VR?[9] What real-world inequities will carry over into our new virtual spaces?[10]

Privacy scholars (and others) are just beginning to grapple with one particularly vexing problem that promises to be endemic in VR environments: advertising. Renowned computer scientist Louis Rosenberg has called VR platforms "the most dangerous tool of persuasion that humanity will have ever created."[11] And with good reason:

> [VR] platforms will be able to track where you go, what you do, where you look and how long your gaze lingers, your gait; they'll look at your posture and be able to infer your level of interest. They'll monitor your facial expressions, vocal inflections, vital signs, blood pressure, heart rate, blood flow patterns on your face. These extensive profiles will make the amount of information that the social media companies get seem like the good old days.[12]

VR platforms will be able to use this biometric data—acquired through biometric monitoring devices incorporated into VR technologies—to target advertisements to users in unprecedented ways. In her 2020 article, *Watching Androids Dream of Electric Sheep: Immersive Technology, Biometric Psychography, and the Law*, Brittan Heller labels this advertising

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[8] *Id.*; *see also infra* Part III(A).

[9] *See* Mary Anne Franks, *The Desert of the Unreal: Inequality in Virtual and Augmented Reality*, 51 U.C. DAVIS L. REV. 499, 501–02 (2017) (citing Jordan Belamire, *My First Virtual Reality Groping*, MEDIUM (Oct. 20, 2016), https://medium.com/athena-talks/my-first-virtual-reality-sexual-assault-2330410b62ee (recounting the experience of a female gamer whose avatar was groped by another player during a game).

[10] *See id.* at 503 (warning against the carry-over of existing inequalities into virtual reality).

[11] Derek Robertson, *'The Most Dangerous Tool of Persuasion,'* POLITICO (Sept. 14, 2022, 4:00 PM) (quoting Louis Rosenberg), https://www.politico.com/newsletters/digital-future-daily/2022/09/14/metaverse-most-dangerous-tool-persuasion-00056681.

[12] *Id.* (quoting Louis Rosenberg).

practice "biometric psychography."[13] She explains that VR technologies rely (and will increasingly rely) on monitoring users' bodies in order to function.

> [A]n immersive system must understand how users interact with the world at a foundational level. For example, any immersive system must track what its user looks at and for how long. It can implicitly track how individuals react to things - do they stare? Do they do a double take? Do they resolutely look away?[14]

Heller, like Rosenberg, posits that companies will be able to gain valuable insights from tracking the ways users' bodies react in VR environments. Companies could then use these insights to target advertisements to users or for other commercial ends. This "gathering and use of biological data, paired with the stimuli that caused a biological reaction, to determine users' preferences, likes, and dislikes," is biometric psychography.[15]

If this sounds like science fiction, it is not. VR platforms have a tremendous financial incentive to adopt advertising-centric business models that rely on accurately predicting users' preferences. VR technologies already incorporate biometric monitoring devices. And companies are already using biometric data to conduct consumer research through controlled studies and to serve display advertisements in the brick-and-mortar context. Just as internet platforms turned the troves of data they acquired by surveilling users' online behaviors into valuable advertising products, VR platforms may soon use data about how you interact in VR environments to serve you ads. Extant problems with online ad microtargeting thus threaten to carry over, and worsen, as VR technologies gain more widespread adoption.

While scholars have indeed begun focusing on the dangers of *commercial* advertising in VR, they have largely overlooked how these same technologies will enable the extreme microtargeting of *political* advertisements using biometric and other highly personal data. And it would border on naiveté to think that political campaigns will not try to use the "most

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[13] Brittan Heller, *Watching Androids Dream of Electric Sheep: Immersive Technology, Biometric Psychography, and the Law*, 23 VAND. J. ENT. & TECH. L. 1, 4 (2020).
[14] *Id.* at 10.
[15] *Id.* at 6.

dangerous tool of persuasion" to persuade—and manipulate—how people vote: Political campaigns readily adopted, and now rely upon, the microtargeting tools provided by existing internet platforms, and innovative campaigns are already experimenting with VR and related technologies. In the not-so-distant future, we may be seeing and hearing political advertisements based in part on what our involuntary biological reactions reveal about our preferences and dislikes. As a consequence, each of us will experience the messaging differently. On granular levels, people may see candidates wearing different clothing (a suit or a plaid shirt?) or driving in different automobiles (a minivan or a pickup truck?). On higher levels, people attending the same political rally may be privy to different speakers, or different topics of speech, or even different speeches from the same speaker. The political ads we see might also be displayed, tested, and adjusted based on what our faces, eyes, bodies, and other personal data reveal about our preferences.

To some degree, this type of fractured informational environment already exists on the internet.[16] Through the advertising tools that platforms originally designed for commercial use, candidates can slice-and-dice their audiences, tailoring different messages to different segments of the population based on various types of personal information.[17] That practice has led to a number of challenges for our democracy, including abuses by nefarious actors, the creation of filter bubbles, challenges to presenting counter-speech, the erosion of shared truths and norms, and invasions on intellectual and political privacy.[18] If targeting ads in VR using biometric psychography becomes the next step in the evolution of political advertising, these problems will only get worse.

Nonetheless, a formidable obstacle awaits policymakers who try to curb this ad-targeting practice: The Supreme Court's First Amendment jurisprudence. Litigants will be able to use the Supreme Court's current, libertarian, Speech Clause doctrine to cast restrictions on the use of biometric psychography (and other microtargeting techniques) in VR political advertising as severely burdening core political speech rights, just as they have done with respect to campaign finance restrictions. A reviewing court would subject such restrictions to strict scrutiny and would almost certainly find that they violate the First Amendment.

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[16] *See infra* Part II(B) (discussing political ad microtargeting).
[17] *Id.*
[18] *Id.*

And, as I shall explain, even content-neutral laws that restrict the general use of biometric psychography would be vulnerable to as-applied challenges under current Speech Clause doctrine.

Part II of this Article explains how online platforms' business models revolve around the use of personal information to target advertisements based on users' predicted preferences. This Part also describes how political campaigns have leveraged these advertising products and details the democratic problems that stem from microtargeting political advertisements. Part III theorizes how political advertising will work in VR environments. This Part unpacks the prospect of biometric ad targeting in VR; identifies three forms of political advertising that may arise in VR environments; and—by describing a hypothetical VR political rally—illustrates how using biometric data to target VR political ads will greatly exacerbate current problems caused by online political ad microtargeting. Part IV analyzes how laws restricting the use of biometric data to target VR political advertisements would fair under the Supreme Court's current, libertarian, First Amendment jurisprudence. That analysis reveals that content-based restrictions are almost certain to violate the Speech Clause and that even content-neutral restrictions would be susceptible to as-applied challenges from political advertisers. Part V concludes the Article by discussing the consequences of its First Amendment analysis.

II. POLITICAL ADVERTISING ON ONLINE PLATFORMS

A. Problems with the Platform Ad Targeting Business Model

There is a social media platform for everyone these days. If you're into short, humorous videos—TikTok; glamorous photos of people living the good life—Instagram; quips from people you find interesting—Twitter; communities built around common interests—Reddit; staying in touch with family and friends—Facebook; a more professional vibe—LinkedIn. Snapchat. YouTube. Pinterest. The list goes on.

For all the different permutations of social media platforms out there, the platforms' business models largely revolve around the same thing: advertising.[19] Advertising

[19] During a hearing before the Senate's Commerce and Judiciary committees, Mark Zuckerberg famously (or infamously) declared, "Senator, we run ads," in response to Senator Chuck Grassley's question of how Facebook is able to "sustain a business model in which users don't pay for your service." *Transcript of Mark Zuckerberg's Senate Hearing*, WASH. POST (Apr. 10, 2018), https://www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/. *See also* Kate Klonick, *The New Governors: The*

generates tremendous revenue for platforms. It is what drives their now-astronomical market values.[20]

The value proposition that platforms offer to marketers derives from the information that platforms are able to harvest from their users. Some of that information is run-of-the-mill personal information that users submit when they initially create a profile to join the platform: name, age, gender, place of residence, job, and the like. But much of the information comes from how users engage with the platforms. When a user posts content, associates with people or groups, or interacts with the platform through likes, dislikes, upvotes, downvotes, retweets, shares, comments, etc., that engagement can be tracked, databased, and analyzed to produce insights about which advertisements the user should be shown.[21] And which advertisements should the user be shown? The advertisements they are most likely to click, and thus generate revenue for the platforms, of course.

Platforms' advertising systems run on predictions. The more accurately a platform can predict which advertisements a user will click, the more money the platform will make. And the more information a platform has about its users, the more accurately it can predict their users' behavior.[22] To illustrate how this works, assume that a platform knows nothing about a user and simply displays random advertisements to the user. The user may—by happenstance—click an ad that interests them, thus causing the advertiser to pay the platform a small price for the click. But it may take 10,000 ads before the user actually clicks on one; the click-through-rate ("CTR") may be 0.01%. Now assume that the platform knows the user's profile information. It knows the user is a 30-year-old female law student in Portland,

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People, Rules, and Processes Governing Online Speech, 131 HARV. L. REV. 1598, 1627 (2018) (describing how the desire to maximize advertising revenues drives social media companies' content moderation decisions).

[20] *See, e.g.,* Sam Shead, *Facebook is the Big Loser of the Fourth Quarter's Advertising Wars,* CNBC (Feb. 4, 2022, 8:55 AM), https://www.cnbc.com/2022/02/04/facebook-is-the-big-loser-of-the-fourth-quarters-advertising-wars.html (highlighting the relation between social media companies' advertising revenues and their market valuations).

[21] There is a robust body of literature regarding how social media companies collect personal information to engage in behavioral and other advertising practices. For a few examples that are particularly relevant to this article, *see* SHOSHANA ZUBOFF, THE AGE OF SURVEILLANCE CAPITALISM (2019); TIM WU, THE ATTENTION MERCHANTS 323–27 (2016); Dawn Carla Nunziato, *The Varieties of Counterspeech and Censorship on Social Media*, 54 U.C. DAVIS L. REV. 2491, 2537–52 (2021).

[22] *See, e.g.*, Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 135–137 (providing an overview of this advertising system); ZUBOFF, *supra* note 21, at 93–97.

Maine, and it can display ads to her based on that information (perhaps advertisements for overpriced law school textbooks). This additional knowledge may allow the platform to improve its CTR to 0.05%. Finally, assume that the platform knows the user's profile information and has volumes of data on her daily engagement with the platform for the past five years, including what ads she has clicked in the past. And assume that the platform can combine this data with offline data uploaded by the advertiser.[23] Using those troves of data may allow the platform to improve its CTR to 0.1%. A CTR of 0.1% may seem small in the abstract, but the improvement from a 0.01% to a 0.1% CTR equates to an enormous increase in revenue generated per user. Spread out over millions upon millions of daily users, even miniscule improvements in the accuracy of a platform's predictions will substantially increase its revenue.[24]

This advertising-centric business model creates two problematic incentives for platforms. The first is to collect and database ever-increasing amounts of information on their users in order to improve the accuracy of the platforms' predictions. This incentive can lead to privacy intrusions when the platforms initially collect and store user information and when they subsequently use that information for ad-targeting purposes.

Indeed, platforms target advertisements to users based on sensitive information that users would often prefer to keep private. For example, a 2015 report from the Office of the Privacy Commissioner of Canada found that advertising networks displayed targeted ads about sensitive topics such as pregnancy tests, bankruptcy, divorce lawyers, and liposuction.[25] Tim Wu recounts an example of a man who began seeing targeted ads for funeral services shortly after he was diagnosed with pancreatic cancer.[26] People experiencing depression,

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[23] *See, e.g.*, *Create a Customer List Custom Audience*, META BUSINESS HELP CENTER, https://www.facebook.com/business/help/170456843145568?id=2469097953376494 (last visited Mar. 3, 2023) (describing how marketers can upload a list of customer emails, phone numbers, and addresses to target ads to their existing customers on Facebook); *About Lookalike Audiences*, META BUSINESS HELP CENTER, https://www.facebook.com/business/help/164749007013531?id=401668390442328 (last visited Mar. 3, 2023) (explaining how marketers can create a lookalike audience based on a source audience's "demographics, interests and behaviors").

[24] *See, e.g.*, ZUBOFF, *supra* note 21, at 95 (quoting a Microsoft researcher's conclusion that "even a 0.1% accuracy improvement in our production would yield hundreds of millions of dollars in additional earnings").

[25] ONLINE BEHAVIOURAL ADVERTISING (OBA) FOLLOW UP RESEARCH PROJECT, OFF. OF THE PRIV. COMM'R OF CAN. (June 2015), https://www.priv.gc.ca/en/opc-actions-and-decisions/research/explore-privacy-research/2015/oba_201506/.

[26] WU, *supra* note 21, at 324.

grappling with revealing their gender identity or sexual orientation, losing their religion, and working through similar intimate challenges may see constant reminders of their struggles from marketers looking to sell a product or service online.[27] Targeted advertising "can be a particularly brutal reminder of trauma because the ads feel so personal and individualized, and because what you search for or browse online can affect the ads you see, creating a feedback loop of pain."[28]

Worse yet, platforms' ad targeting practices can create or perpetuate social inequities. Platforms can serve people wildly different ads based on what their online behaviors reveal about their incomes, education levels, zip codes, races, genders, sexual orientations, and so on.[29] Those ads can, for example, influence where a person attends college, which loan they take out to afford college, which apartment they rent during college, and which insurance company they use for renters'' insurance.[30] A lower-income military veteran residing in a majority-Black zip-code might be bombarded with ads for for-profit colleges and financial products with unfavorable terms. Change one of those attributes and the person might soon be exposed to a far more advantageous array of educational, housing, and financial options.

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[27] Rae Nudson, *When Targeted Ads Feel a Little Too Targeted*, VOX (Apr. 9, 2020, 10:20 AM), https://www.vox.com/the-goods/2020/4/9/21204425/targeted-ads-fertility-eating-disorder-coronavirus (providing examples including ads for menstrual products, fertility products, ads related to sexuality or gender, and more).

[28] *Id.*

[29] Eli Pariser recounts an example of two friends who searched for "BP" in 2010, shortly after the BP Deepwater Horizon oil spill. One friend saw "investment information about BP," as well as a "promotional ad from BP." The other friend saw news about the oil spill. The friends experienced these wildly different search results despite both being "educated, white, left-leaning women who live in the Northeast." As Pariser puts it, "[i]f the results were that different for these two progressive East Coast women, imagine how different they would be for my friends and, say, an elderly Republican in Texas . . . ." ELI PARISER, THE FILTER BUBBLE: WHAT THE INTERNET IS HIDING FROM YOU 2–3 (2011).

[30] *See, e.g.*, Sandra Wachter, *Affinity Profiling and Discrimination by Association in Online Behavioral Advertising*, 35 BERKELEY TECH. L.J. 367, 375–80 (2020) (describing how online behavioral advertising can lead to a variety of discriminatory outcomes); Anita L. Allen, *Dismantling the "Black Opticon": Privacy, Race Equity, and Online Data-Protection Reform*, 131 YALE L.J. F. 907, 921–27 (2022) (describing, in relevant part, the discriminatory exclusion and discriminatory predation that African Americans experience as a result of online ad targeting); FED. TRADE COMM'N, BIG DATA: A TOOL FOR INCLUSION OR EXCLUSION? 10 (2016), https://www.ftc.gov/system/files/documents/reports/big-data-tool-inclusion-or-exclusion-understanding-issues/160106big-data-rpt.pdf ("Participants raised concerns that when big data is used to target ads, particularly for financial products, low-income consumers who may otherwise be eligible for better offers may never receive them.").

The second problematic incentive created by platforms' ad-centric business models is the persistent need to drive engagement with users; that is, to maximize the amount of time users spend interacting with platforms. Increased engagement allows platforms to display more ads to their users and to collect more information about their users, thus improving the accuracy of platforms' targeting programs.[31] This need to foster constant user engagement informs several aspects of platform creation and management. For example, nearly all platforms now feature "endless scrolls," where instead of hitting the end of a page and having to click to a next page to see more content, new content (and new advertisements, of course) continuously loads as the users scrolls down.[32] Even details that seem benign, like the color of a notification badge, may be selected with careful attention to driving user engagement.[33] It is easy to get sucked in—to get addicted—to social media when platforms are tailor-made for that purpose.[34]

Compounding these addictive design features, platforms use complex algorithms to curate content for users with the aim of maximizing engagement.[35] And what content tends to keep users' eyes on their screens? As Professor Kyle Langvardt explains, "it seems that the most reliable engagement drivers are messages that stimulate feelings of outrage and group identification."[36] Shocking content, controversial content, and conspiracy theories may thus enjoy preferred status over less viscerally exciting but more socially beneficial content.[37]

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[31] *See* Langvardt, *supra* note 22, at 134, 137 (explaining that social media companies are "obsess[ed]" with "driving engagement" and identifying increased ad volume and accuracy as the reasons behind this obsession).
[32] *Id.* at 142–46 (discussing the "endless scroll" design feature).
[33] *Id.* at 142.
[34] *See id.* at 141–51 (describing how platform design features can lead to problematic habit-forming behaviors and other social challenges); *see also* Alan Z. Rozenshtein, *Silicon Valley's Speech: Technology Giants and the Deregulatory First Amendment*, 1 J. FREE SPEECH L. 337, 356 (2021) (discussing Langvardt's research).
[35] *See* ZUBOFF, *supra* note 21, at 457–59; Raymond Brescia, *Privacy's "Three Mile Island" and the Need to Protect Political Privacy in Private-Law Contexts*, 48 FLA. ST. U. L. REV. 973, 989–90 (2021).
[36] Langvardt, *supra* note 22, at 149.
[37] *See id.* (noting that "[m]any recommendation algorithms . . . have been shown repeatedly to send users along a 'radicalizing' path"); Julie Cohen, *Tailoring Election Regulation: The Platform is the Frame*, 4 GEO. L. TECH. REV. 641, 657 (2020) ("[Platforms] amplify socially networked flows in ways that elicit conditioned, automatic, and tribal responses because that is the approach that most reliably enriches their shareholders and venture investors.").

B. Beyond Commerce: Problems with Political Ad Targeting on Platforms

As anyone who follows elections in the United States knows, the appeal of advertising on internet platforms is not limited to corporations looking to sell a product. Campaigns looking to sell a politician, and politicians looking to sell a message, can leverage such advertising to spread their gospel. In the four years from 2014 to 2018, online political advertising increased an estimated 2,539 percent, from $71 million (1% of overall political ad spending) to $1.9 billion (22% of overall spending).[38] That trend continued into the 2020 election, when online political advertising became even more important due to campaigns' limited abilities to engage voters in person during the early stages of the COVID-19 pandemic. Overall, online political advertising exceeded $2.8 billion in 2020.[39] In the Presidential election alone, digital advertising exceeded $430 million from April to November of 2020 (24.3% of overall ad spending in the Presidential general election).[40]

This extraordinary growth of online political advertising carries some democratic benefits. The low price tag of online advertising lowers the barriers of entry for candidates and political groups to reach the electorate when compared to traditional advertising mediums like television, print, and radio.[41] Candidates and groups can use platforms' targeting tools to reach (and expand) their intended audiences in an incredibly efficient manner. And online advertising allows users to engage with candidates in a way that traditional media advertising does not: one click and the user can instantly access a wealth of information about the candidate's background and campaign platform.

But the explosion in online political advertising poses severe challenges for our democracy as well. First, as the 2016 U.S. Presidential election infamously revealed, nefarious actors can weaponize platforms' microtargeting tools toward anti-

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[38] Megan Janetsky, *Low Transparency, Low Regulation Online Political Ads Skyrocket*, OPEN SECRETS (Mar. 7, 2018, 4:29 PM), https://www.opensecrets.org/news/2018/03/low-transparency-low-regulation-online-political-ads-skyrocket/.

[39] *See 2020 Political Digital Advertising Report*, TECH FOR CAMPAIGNS, https://www.techforcampaigns.org/impact/2020-political-digital-advertising-report (last visited Mar. 3, 2023).

[40] Wesleyan Media Project, *Political Ads in 2020: Fast and Furious* (Mar. 23, 2021), https://mediaproject.wesleyan.edu/2020-summary-032321/.

[41] *See, e.g.*, TECH FOR CAMPAIGNS, *supra* note 39 (explaining the cost advantages digital advertising carry for smaller and newer campaigns).

democratic ends.[42] Second, political ad microtargeting creates harmful filter bubbles.[43] Filter bubbles, in turn, prevent speakers with opposing or different viewpoints from presenting effective counter-speech,[44] and they erode shared truths and shared norms that are important to sustaining democratic self-governance.[45] Third, relying on users' online behaviors and other personal information to target political ads intrudes on intellectual and political privacies that are important to maintaining a well-functioning democracy.[46]

1. Misuse by Nefarious Actors

On February 16, 2018, a grand jury impaneled as part of Special Counsel Robert Mueller's probe into Russian interference in the 2016 U.S. Presidential election returned an indictment charging a Russian government agency known as the Internet Research Agency (the "IRA"), along with several Russian persons, with conspiracy to defraud the United States, conspiracy to commit wire fraud and bank fraud, and aggravated identity theft.[47] The indictment explained how the IRA employed hundreds of individuals to create fake personas and "group pages" on social media sites in order to "create political intensity through supporting radical groups, users dissatisfied with the social and economic situation and oppositional social

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[42] *See infra* Part II(B)(1).

[43] *See, e.g.*, Nunziato, *supra* note 21, at 2539–41.

[44] *See* Abby K. Wood & Ann M. Ravel, *Fool Me Once: Regulating "Fake News" and other Online Advertising*, 91 S. CAL. L. REV. 1223, 1277 (2018).

[45] *See, e.g.*, Nunziato, *supra* note 21, at 2544 ("[P]olitical ads disseminated via traditional media are subject to broad exposure and broad public scrutiny—which are necessary for the truth-facilitating features of the marketplace of ideas mechanisms to function. Microtargeted ads, on the other hand . . . are not similarly subject to broad exposure or broad public scrutiny."); Cohen, *supra* note 37, at 652 ("Voter microtargeting efforts move and are designed to move on the collective level, nurturing rumor and innuendo, hardening targeted populations in their tribal responses to real and perceived differences, and frustrating the sorts of efforts toward rapprochement on which theories about republican self-government rely.") and 657–58 (describing platforms as posing a threat to an "anti-factionalism" and "anti-authoritarian" interests); Christopher S. Elmendorf & Abby K. Wood, *Elite Political Ignorance: Law, Data, and the Representation of (Mis)Perceived Electorates*, 52 U.C. DAVIS L. REV. 571, 606–08 (2018).

[46] *See* Ira Rubenstein, *Voter Privacy in the Age of Big Data*, 2014 WISC. L. REV. 861, 904–07 (2014) (explaining the importance of intellectual and political privacy to democratic participation and summarizing literature on the subject); *see also* Neil Richards, *Intellectual Privacy*, 87 TEX. L. REV. 387 (2008). Cohen, *supra* note 37, at 658, describing an "anti-manipulation" interest that can be thought of as overlapping with intellectual and political privacy concerns.

[47] *See* Indictment, United States v. Internet Research Agency LLC, *et al.*, 1:18-cr-00032-DLF (Doc. 1) (Feb. 16, 2018).

movements."[48] It used these fake personas and groups to sow divisions in American society and to support President Trump's campaign.[49]

One of the most comprehensive accounts of the IRA's social media operation comes from a study based on data from Facebook and Twitter provided to the authors by the Senate Select Committee on Intelligence.[50] On Facebook, the IRA created dozens of fake group pages, designed to look like they were formed and managed by U.S. persons, centered around distinct social groups or hot-button political issues. The most active groups included those designed to appeal to patriotism and southern culture ("Being Patriotic," "Heart of Texas," and "South United"), minorities ("Blacktivist," "United Muslims of America," "LGBT United," "BM (Black Matters)," and "Brown Power"), religious Christians ("Army of Jesus"), and persons with anti-immigrant views ("Stop A.I. (All Invaders)).'"[51]

The IRA then ran thousands of advertising campaigns to attract Americans to join these groups. By using the same advertising tools that businesses use to target consumers, the IRA was able to microtarget its campaigns to the specific segments of the U.S. population it wanted to reach. The Howard *et al*. study examined these thousands of advertising campaigns and divided them into categories based on the IRA's targeting decisions. For instance, an ad campaign targeting people interested in "'Mexico,' 'Chicano rap' and 'Hispanidad'" would "suggest the IRA was intending to target Latin American . . . users."[52] Some of the most common targets of the IRA's ads were people interested in "African American Politics and Culture," "Black Identity and Nationalism," "Conservative Politics and Culture," "Latin American Culture," "Social Justice," "Pro-gun Politics,"

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[48] *Id.* ¶ 10(a), 33, 34.

[49] *Id.* ¶ 6 (noting the "strategic goal to sow discord in the U.S. political system" and the goal of "supporting the presidential campaign of then-candidate Donald J. Trump").

[50] Philip N. Howard *et al.*, *The IRA, Social Media and Political Polarization in the United States, 2012-2018* (2019), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1004&context=senatedocs; *see also* Ellen L. Weintraub & Carlos A. Valdivia, *Strike and Share: Combatting Foreign Influence Campaigns on Social Media*, 16 OHIO ST. TECH. L.J. 702–06 (2020) (summarizing Russia's use of social media to influence the 2016 U.S. Presidential election and to sow division in the United States).

[51] Philip N. Howard *et al.*, *The IRA, Social Media and Political Polarization in the United States, 2012-2018* (2019), https://digitalcommons.unl.edu/cgi/viewcontent.cgi?article=1004&context=senatedocs.

[52] *Id.* at 18.

"LGBT Rights & Social Liberalism," "Immigration," "Muslim American Politics and Culture," and "Veterans & Policing."[53]

By microtargeting these segments of the population, the IRA was able to grow membership in its group pages. This allowed the IRA to use organic posts to spread "a wide range of disinformation and junk news" to large, segmented audiences.[54] The Agency targeted the audiences it built through its politically conservative group pages with content designed to "energize conservatives around Trump's campaign."[55] And it targeted its more liberal audiences with content aimed to "encourage . . . cynicism . . . in an attempt to neutralize their vote."[56]

The reach of this nefarious content was not limited to group members themselves. When a group page posts content, the content appears in the group members' news feeds. Group members can then interact with the content by "liking" it, sharing it, or commenting on it. These interactions in turn cause the content to appear in the group-member's friends' news feeds. Those friends can also interact with the post, and can join the group page, further expanding the size of the group's audience. Thus, a relatively small initial investment in political ad microtargeting to attract members to a group page can, over time, generate a massive audience. One source estimates that Russian forces spent a total of $400,000 and were able to reach about 200 million users.[57]

Russia's 2016 operation may be the most prominent instance of a nefarious actor weaponizing political ad microtargeting tools, but it does not stand alone. The same election cycle brought us the Cambridge Analytica scandal, in which data harvested from users' Facebook profiles was used by the Trump campaign (among others) for ad targeting purposes.[58] More recently, Meta has published regular reports detailing its efforts to take down coordinated inauthentic behavior ("CIB") operations that often originate in foreign nations.[59] Some of these

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[53] *Id.* at 23.
[54] *Id.* at 32.
[55] *Id.*
[56] *Id.*
[57] Ian Vanderwalker and Lawrence Nodren, *Getting Foreign Funds Out of America's Elections*, BRENNAN CTR. JUST. (Apr. 9, 2018), https://www.brennancenter.org/our-work/policy-solutions/getting-foreign-funds-out-americas-elections.
[58] *See e.g.*, Sam Meredith, *Facebook-Cambridge Analytica: A timeline of the data hijacking scandal*, CNBC (Apr. 10, 2018), https://www.cnbc.com/2018/04/10/facebook-cambridge-analytica-a-timeline-of-the-data-hijacking-scandal.html.
[59] *See* Meta, *Coordinated Inauthentic Behavior Explained* (Dec. 6, 2018), https://about.fb.com/news/tag/coordinated-inauthentic-behavior/ (explaining

operations have been aimed at establishing an American social media presence to use as a weapon in future elections.[60] And the techniques employed by foreign actors are becoming more sophisticated. The IRA, for example, has reportedly tried to "exploit a hole in Facebook's ban on foreigners buying political ads" by "paying American users to hand over personal pages and setting up offshore bank accounts to cover their financial tracks."[61] Simply put, the problem of nefarious actors leveraging social media platforms—especially the platforms' ad targeting tools—to interfere with U.S. democracy is an ongoing national security threat.[62]

2. Filter Bubbles, Counter Speech, & Shared Truths

Filter bubbles form when a platform serves content to users based on the platform's predictions about the users' preferences.[63] Most major platforms operate this way since their

coordinated inauthentic behavior, detailing Facebook's efforts to combat the practice, and compiling reports).

[60] *See, e.g.*, *Facebook removes 203 accounts for foreign interference from Russia*, REUTERS (Mar. 12, 2020), https://www.reuters.com/article/facebook-content/facebook-removes-203-accounts-for-foreign-interference-from-russia-idUKL4N2B55BG (noting that the removed accounts "frequently posted U.S. news and attempted to add audience through topics that included black history, black excellence and fashion, celebrity gossip and LGBTQ issues"); Shannon Bond, *Facebook Removes Chinese Accounts Posting About Foreign Policy, 2020 Election*, NPR (Sept. 22, 2020), https://www.npr.org/2020/09/22/915778396/facebook-removes-chinese-network-posting-about-foreign-policy-2020-election; Steven Overly, *Facebook removes foreign accounts targeting U.S. election*, POLITICO (Oct. 27, 2020), https://www.politico.com/news/2020/10/27/facebook-removes-foreign-accounts-targeting-election-432843. In a related, domestic problem, right-wing militia groups utilized Facebook's ad targeting tools in 2020 to promote their extremist messages. Ryan Mac & Caroline Haskins, *Facebook Has Been Profiting From Boogaloo Ads Promoting Civil War and Unrest*, BUZZFEEDNEWS (June 30, 2020), https://www.buzzfeednews.com/article/ryanmac/facebook-instagram-profit-boogaloo-ads.

[61] Matthew Rosenberg *et al.*, *'Chaos is the Point': Russian Hackers and Trolls Grow Stealthier in 2020*, N.Y. TIMES (Jan. 10, 2020), https://www.nytimes.com/2020/01/10/us/politics/russia-hacking-disinformation-election.html.

[62] *See* Joint Statement from DOJ, DOD, DHS, DNI, FBI, NSA, and CISA on Ensuring Security of 2020 Elections (Nov. 5, 2019), https://www.fbi.gov/news/press-releases/press-releases/joint-statement-from-doj-dod-dhs-dni-fbi-nsa-and-cisa-on-ensuring-security-of-2020-elections (identifying Russia, China, and Iran as potentially using social media campaigns to "influence voter perceptions"); Jessica Watson, *Microtargeting as Information Warfare*, 6 CYBER DEFENSE REV. 63 (2021) (framing political ad microtargeting as a national security threat).

[63] *See* PARISER, *supra* note 29, at 9 (introducing the term "filter bubble"); *see also* CASS SUNSTEIN, *REPUBLIC.COM* (2001); CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA (2017); Wood & Ravel, *supra* note 44, at 1236–37.

business models revolve around predicting user preferences and displaying content and advertisements that match those preferences.[64] Rather than being exposed to a diverse set of viewpoints, users thus primarily see information that aligns with their predicted preferences.

Filter bubbles existed long before the internet and long before platforms across the internet chose to hyper-personalize users' information flows. People chose to read certain newspapers, watch certain news stations, or follow certain bloggers, while disregarding others. But today's filter bubbles are meaningfully different. As Eli Pariser explained in introducing the concept of a filter bubble more than a decade ago, modern filter bubbles are: (a) personalized to the individual rather than a large group of people with a common interest; (b) invisible to users, who often don't know that a platform is personalizing content for them, let alone *why* the platform is showing them particular content; and (c) virtually unavoidable for internet users.[65]

Microtargeted political ads contribute to platforms' filter bubble effect as one of at least three primary and inter-related causes. The first cause involves user self-selection. When a social media user chooses to join groups or follow other users that all have the same (or similar) ideological viewpoints, the user will primarily see content that reflects that ideological viewpoint. The second cause involves the algorithms that platforms employ to serve content to users. As discussed *supra*, platforms have a tremendous financial incentive to show users content with which the user wants to engage. This generally means that algorithms serve content "that reinforces [users'] tribal inclinations—especially content that triggers outrage or affords opportunities to signal affiliation."[66] Once the algorithm has predicted your tribe, the connections you make and the content you see will likely deepen your tribal affinity.

Political ad microtargeting intensifies the filter-bubbling effect caused by these other two factors. Campaigns can target platforms' already-filtered user bases with near-personalized messaging, catering the content of political ads to users' predicted preferences and then refining that targeted messaging

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[64] *See, e.g.*, Tim Wu, *Is the First Amendment Obsolete*, 117 MICH. L. REV. 547, 555–56 (describing the link between platforms' business models and the rise of filter bubbles).
[65] PARISER, *supra* note 29, at 9–10.
[66] Cohen, *supra* note 37, at 647.

through A/B testing.[67] Layered upon the organic political content that the platform curates just for them, users are bombarded during election season with political advertising curated based on their predicted preferences.[68]

Filter bubbles offend well-established free speech values. This is so in at least two respects. First, filter bubbles undermine speakers' ability to present counter-speech. The Supreme Court has based its First Amendment jurisprudence in large part upon the belief that speech must be protected to facilitate a healthy marketplace of ideas.[69] The notion of a marketplace of ideas presupposes that listeners will be subject to multiple, competing viewpoints, with the best speech rising to the proverbial top.[70] However, when the information ecosystem devolves into a series of filter bubbles, listeners hear less and less counter-speech (and more and more affirming speech), creating a structural market flaw.

The negative effect on counter-speech caused by filter bubbles is especially pronounced in the context of political ad microtargeting.[71] Since campaigns can easily target advertisements containing unique messages to a group of only hundreds of voters—among electorates that often range in the tens-of-millions—it is nearly impossible for opposing speakers to counter the targeted advertisements' claims.[72] The task is

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[67] *See e.g.*, Elmendorf & Wood, *supra* note 45, at 607 (noting that online advertising allows campaigns to "run thousands of variations of an advertisement every day, using A/B testing to discover the messages that maximize clicks").

[68] It is worth pausing to appreciate how these latter two causes of filter bubbles obfuscate what I previously termed the "self-selection" cause of filter bubbles. After a user makes an initial content selection on a platform, the platform's predictive algorithm will influence the user's subsequent selections by displaying content and advertisements with which it believes the user will engage based on the user's initial selection. Indeed, the predictive algorithm may even influence the initial selection. If the platform already has information about the user—say, through the initial registration process—it can suggest content to the user before the user even makes a selection.

[69] *See, e.g.*, Nunziato, *supra* note 21, at 2492–93 (explaining the marketplace of ideas theory); G. Michael Parsons, *Fighting for Attention: Democracy, Free Speech, and the Marketplace of Ideas*, 104 MINN. L. REV. 2157, 2162–80 (2020) (describing and critiquing the Court's marketplace of ideas framework).

[70] Nunziato, *supra* note 21, at 2492–93.

[71] *See, e.g.*, *id.* at 2537–40 (describing the effect political ad microtargeting has on counter-speech); PARISER, *supra* note 29, at 155–56 (predicting, in 2011, that political ad microtargeting would make counter-speech nearly impossible).

[72] *See* Peter Kafka, *Facebook's Political Ad Problem, Explained by an Expert*, VOX (Dec. 10, 2019, 8:00 AM), https://www.vox.com/recode/2019/12/10/20996869/facebook-political-ads-targeting-alex-stamos-interview-open-sourced (quoting former Facebook executive Alex Stamos as stating that "[i]f you allow people to show an ad to just 100 folks,

particularly insurmountable when we consider the effects on a large scale, rather than in the context of countering a single ad. At scale, political advertisers segment the population in different ways for their numerous ad campaigns. Any particular user is included or excluded from each audience segment based on any of hundreds of different data points about the user. Each user is then subject to a unique slate of political ads based on their inclusion or exclusion in each of these thousands (upon thousands) of audience segments. It is as if the advertiser is "whispering millions of different [political] messages into zillions of different ears for maximum effect and with minimum scrutiny."[73] With a minimal ability for counter-speakers to scrutinize and contest these advertisements within earshot of the relevant audiences, the false or otherwise noxious messaging in the advertisements can more easily become accepted truths to the viewers. That accepted truth can then be reinforced through other information viewed in the filter bubble, be it through advertisements or organic content displayed based on an algorithm's (tribalistically inclined) predictions. Rinse and repeat for every platform user in the electorate.

The second subsidiary problem caused by filter bubbles is the dissolution of shared truths and norms. Jurists and First Amendment scholars have long identified the search for truth as one of the core values of preserving free speech.[74] Establishing shared truths is, in turn, essential to maintaining a well-functioning democracy: Through a healthy speech market, shared truths and norms can emerge and may then form the foundation for reaching democratic agreement on matters of public import.[75]

Filter bubbles impinge the public's ability to establish common beliefs about both truths and norms. "Broadcast-

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and then you run tens of thousands of ads, then it makes it extremely difficult for your political opponent and the print media to call you out").

[73] Nunziato, *supra* note 21, at 2544 (quoting Kara Swisher, *Google Changed Its Political Ad Policy. Will Facebook Be Next?*, N.Y. TIMES (Nov. 22, 2019)).

[74] *See, e.g.*, Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881 (1963) ("[F]reedom of expression is . . . to begin with, the best process for advancing knowledge and discovering truth."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("[The framers] believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . .").

[75] *See, e.g.*, Emerson, *supra* note 74, at 882 (explaining how free speech is imperative for societies to "reach common decisions that will meet the needs and aspirations of its members"); PARISER, *supra* note 29, at 5, 50, 164 (discussing the importance of shared truths and norms to maintaining a healthy democracy, in the context of filter bubbles).

television advertisements that appeal to widely shared values" are increasingly being "supplanted by micro-targeted, social-media-conveyed appeals to the prejudices and predilections of individual recipients."[76] As a result, "[d]emocracy-sustaining norms of mutual respect and accommodation may be at risk, to say nothing of shared understandings about facts."[77] And by "hardening targeted populations in their tribal responses to real and perceived differences," microtargeting "frustrate[es] the sorts of efforts toward rapprochement on which theories about republican self-government rely."[78] Simply put, the more fragmented our political information environment becomes, the more difficult it becomes to agree on what our politics should be.

3. Intellectual & Political Privacy

Finally, the microtargeting of political advertisements threatens the intellectual and political privacies needed for self-government to properly function. These values—like the presentment of counter-speech and the establishment of shared truths—also find roots in First Amendment jurisprudence. Professor Neil Richards explains this in his 2008 article, *Intellectual Privacy*:

> Intellectual privacy is the ability, whether protected by law or social circumstances, to develop ideas and beliefs away from the unwanted gaze or interference of others. Surveillance or interference can warp the integrity of our freedom of thought and can skew the way we think, with clear repercussions for the content of our subsequent speech or writing. The ability to freely make up our minds and to develop new ideas thus depends upon a substantial measure of intellectual privacy. In this way, intellectual privacy is a cornerstone of meaningful First Amendment liberties.[79]

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[76] Elmendorf & Wood, *supra* note 45, at 575; *see also* Ellen P. Goodman, *Digital Fidelity and Friction*, 21 NEV. L.J. 623, 626 (2021) (critiquing platforms' structures as producing "a noisy information environment that is inhospitable to the production of shared truths and the trust necessary for self-government").
[77] Elmendorf & Wood, *supra* note 45, at 606.
[78] Cohen, *supra* note 37, at 652.
[79] Richards, *supra* note 46, at 389.

Political privacy, for present purposes, may be thought of as an important genus of intellectual privacy. It is the ability to develop ideas and beliefs *about political matters* away from the unwanted gaze or interference of others. Because intellectual and political privacy are foundational to a well-functioning democratic process, the need to safeguard this aspect of privacy expands beyond the prevention of individual harms (with which privacy protections are usually associated). Rather, the democratic dimension to intellectual and political privacy "marks a shift from privacy as an individual value to privacy as a social or public value that matters to individuals in their role as citizens."[80]

The microtargeting of political ads threatens the public value of intellectual and political privacy. As Ira Rubenstein explained, while writing toward the inception of political ad microtargeting in 2014, "if the First Amendment protects the right to read anonymously, then this protection also must extend to seeking information online and refusing to share information about one's tastes, preferences, interests, and beliefs, which is exactly the type of information that campaigns obtain through . . . profiling."[81] Thus, voters should be

> entitled to seek and gain access to online political information without having to disclose their political leanings or suffer the chilling effect of pervasive monitoring and tracking of their every thought and belief. In the face of such pervasive monitoring and tracking of voters' online behavior by every campaign web site and every ad-funded online newspaper, magazine, blog, and most other sources of political information, surely the First Amendment must protect voters' freedom of thought. If not, an essential precondition of democracy will be undermined.[82]

The threat to intellectual and political privacy posed by political ad microtargeting has only grown more severe as

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[80] Rubenstein, *supra* note 46, at 904; *see also* Sofia Grafanaki, *Autonomy Challenges in the Age of Big Data*, 27 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 803, 818–19, 855 (2017) (discussing the importance of intellectual privacy to individual autonomy in a free society).

[81] Rubenstein, *supra* note 46 at 907.

[82] *Id.* (building upon Julie E. Cohen, *A Right to Read Anonymously: A Closer Look at "Copyright Management" in Cyberspace*, 28 CONN. L. REV. 981 (1996)).

campaigns have refined their targeting practices by using platforms' increasingly sophisticated tools. Now, "every election cycle will come with new challenges and will force us to rethink the legality of campaigning practices" to ensure that sophisticated political ad targeting techniques do not "compromis[e] values that are necessary preconditions for democratic life, such as political privacy."[83]

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In sum, platforms operate based on an advertising-centric business model that incentivizes them to collect as much information about users as possible. Platforms then use these troves of information to display users' content that maximizes the users' engagement with the platform and also to display ads with which users are most likely to engage. The platforms' never-ending quest for more information and more engagement leads to a series of broad-based problems: privacy invasions, discriminatory outcomes, and internet addiction.

More acutely, the personal information that platforms amass allows them to microtarget ads to minute segments of the population. Commercial actors have deployed these microtargeting tools with great success, but when platforms allow the tools to be used for political advertising purposes, significant dangers emerge. First, the tools can be exploited by nefarious actors who aim to undermine liberal democracy. Second, the practice of microtargeting political ads exacerbates platforms' filter-bubbling effects, making the presentment of counter-speech exceedingly difficult and reducing opportunities to establish shared truths and norms. And third, the practice poses harms to intellectual and political privacies that are important to sustaining a well-functioning democracy.

Legal scholars have long appreciated the risks that platforms' business models pose to liberal democracy, and they are increasingly focusing on the more specific harms caused by political ad microtargeting.[84] But while we are in the midst of grappling with that problem, the technology behind the problem is changing. And it is changing in a way that, I fear, will greatly exacerbate the existing problems identified in Part II.

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[83] Grafanaki, *supra* note 80, at 860.

[84] See, for example, the sources cited throughout Part II(B).

III. POLITICAL ADVERTISEMENTS IN VIRTUAL REALITY

A. VR Technologies and Biometric Monitoring

The experience of being in a VR environment is, in a word, breathtaking. One source describes such environments as "replac[ing] users' real-world surroundings convincingly enough that they are able to suspend disbelief and fully engage with the created environment."[85] That was certainly my experience—suspended disbelief—as I soaked in the views from the summit of Mount Everest in my first experience using the Oculus VR headset a few years ago.[86] Or take a friend's account of playing the VR version of ADR1FT, a game in which the user plays an astronaut trying to survive the destruction of a space station:[87] My friend described the physical sensation of breathlessness that he felt when the astronaut began to run out of oxygen in space, and the sensation of helplessness he experienced when the astronaut eventually died.[88] Professors Lemley and Volokh recount a similar story to describe just how real VR environments feel. People using the Oculus Rift VR Headset were reluctant to walk across a virtual plank, high in the virtual air. Some people refused outright, others panicked and removed their headsets, while the brave souls who stepped off the plank "invariably lean[ed] forward as they [took] that one step, because their body [was] signaling them that they [were] falling."[89] That example is from 2013. ADR1FT was released in 2016. The technology was amazing then; it is better now; and it will only get better moving forward.

So how does it work? How are these technologies able to create the sensation of reality in users who nonetheless know they are in a virtual environment? The magic increasingly involves biometric monitoring.

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[85] Ivy Wigmore, *Definition: Immersive Virtual Reality (Immersive VR)*, TECHTARGET.COM (Aug. 2016), https://www.techtarget.com/whatis/definition/immersive-virtual-reality-immersive-VR.

[86] *See Everest VR*, METAQUEST, https://www.oculus.com/experiences/rift/1043021355789504/ (last visited July 25, 2022).

[87] ADR1FT, IGN, https://www.ign.com/games/adr1ft (last visited July 25, 2022).

[88] Indeed, a review by the tech company Nvidia describes the "stifling sense of claustrophobia, and frustrating lack of self-control," as well as the "bewildering and heart pounding exercise" that users experience when playing ADR1FT. ADR1FT Review, NVIDIA, https://www.nvidia.com/en-us/geforce/news/gfecnt/adr1ft-fight-for-survival-in-space-in-the-gripping-vr-experience-now-on-oculus-rift/ (last visited July 25, 2022).

[89] Mark A. Lemley & Eugene Volokh, *Law, Virtual Reality, and Augmented Reality*, 166 U. PA. L. REV. 1051, 1064 (2018).

Users access VR environments by donning a head-mounted display ("HMD"). When a user puts on the HMD, the device displays a video feed that encompasses the user's entire range of vision (the user cannot see the "real world"). To make the video feed realistic enough to create the sensation of *realness*—to get the user to "suspend disbelief"—HMDs track, at a minimum, the user's head and body position and adjust the video depending on where the user is looking and moving.[90]

For example, Meta's Oculus Quest 2 HMD uses a tracking technology known as six degrees of freedom.[91] The technology tracks the user's movement in six ways: "forward, backward, up, down, side-to-side, and the tilt angle of the user's head."[92] The video feed from the HMD seamlessly adjusts based on the user's positioning, just as a person's field of vision naturally adjusts when they turn their head or move their body. Quest 2 also tracks users' hand movements through cameras positioned on the HMD, allowing users to interact with their virtual environments by pointing, pinching, and scrolling.[93]

Some sophisticated VR technologies currently available on the market go even further. HTC's line of VIVE products include full-body tracking,[94] a facial tracker,[95] and an eye tracker.[96] VIVE's facial tracker sells for a mere $129 and can "[r]ead intentions and emotions in real-time" by tracking "38 blend shapes across the lips, jaw, teeth, tongue, cheeks, and chin."[97] Users can pair the facial tracker with VIVE Pro Eye

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[90] *See* Heller, *supra* note 13, at 13–16 (describing how VR technologies function).
[91] *Meta Quest 2 and Meta Quest Headset Tracking*, META, https://store.facebook.com/help/quest/articles/headsets-and-accessories/using-your-headset/turn-off-tracking/ (last visited July 25, 2022).
[92] Heller, *supra* note 13, at 14.
[93] *Getting Started with Hand Tracking on Meta Quest 2 and Meta Quest*, META, https://store.facebook.com/help/quest/articles/headsets-and-accessories/controllers-and-hand-tracking/hand-tracking-quest-2/ (last visited July 25, 2022).
[94] *Introducing VIVE Tracker (3.0)*, VIVE, https://www.vive.com/us/accessory/tracker3/ (last visited Apr. 12, 2023) ("Use multiple trackers and recreate your real-life movements in VR with precise accuracy."); *see also* Ben Lang, *Meta Says Full-body Tracking Probably Not Viable with Inside-out Headsets*, ROAD TO VR (Feb. 16, 2022), https://www.roadtovr.com/meta-quest-2-full-body-tracking-fbt-not-viable-quest-2/ (explaining the different between "inside-out tracking," where the tracking camera is on the HMD and tracking is mostly limited to head and hand positions, and "outside-in tracking," where an external camera(s) allows for full body tracking).
[95] *VIVE Facial Tracker*, VIVE, https://www.vive.com/us/accessory/facial-tracker/ (last visited July 25, 2022).
[96] *Pro Eye*, VIVE, https://www.vive.com/us/product/vive-pro-eye/overview/ (last visited July 25, 2022).
[97] *VIVE Facial Tracker*, *supra* note 95.

(which, VIVE boasts, can "[t]rack and interpret eye movements")[98] for "a whole-face tracking experience."[99] Finally, in the months leading up to this article's publication, Meta and Pico both released HMDs with built-in eye tracking and face tracking capabilities.[100]

As noted above, some of these biometric monitoring technologies are integral to VR functionality. If an HMD did not track users' head positions, it could not create the immersive, virtual environment that the user purchased the HMD to access. Facial recognition trackers may soon be needed for VR avatars to mimic users' facial movements as they interact with others in VR environments. And eye tracking has several beneficial uses in VR, from reducing hardware costs and energy requirements by "provid[ing] high resolution only where you are looking," to improving users' experience as they navigate virtual spaces.[101]

Other biometric monitoring technologies will integrate into VR in varying degrees, depending upon what use-cases for VR emerge. To take a fun example, full body tracking is a practical necessity for the sub-culture of break-dancers who use VR technologies to compete in virtual breakdancing competitions.[102] Widely used wearable devices like FitBits and Apple Watches can monitor your stress level and heart rate,[103] and with Meta's marketing focus on Quest's health and exercise applications, such monitors seem like prime candidates for long-term VR integration.[104] Louis Rosenberg predicts that biometric

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[98] *Pro Eye*, *supra* note 96.

[99] *VIVE Facial Tracker*, *supra* note 95; *see also* Heller, *supra* note 13, at 29 (explaining how facial tracking can be used to indicate users' emotional responses of "anger, surprise, fear, joy, sadness, contempt, and disgust").

[100] *See Meta Quest Pro*, META, https://www.meta.com/help/quest/articles/headsets-and-accessories/quest-pro/index-quest-pro/#name2 (last visited Feb. 2, 2023) (describing the HMD's ability to capture facial expressions and track eye movement); *see Pico 4 Enterprise*, PICO, https://www.picoxr.com/global/products/pico4e (last visited Feb. 2, 2023).

[101] Avi Bar-Zeev, *The Eyes Are the Prize: Eye-Tracking Technology Is Advertising's Holy Grail*, VICE (May 28, 2019, 10:48 AM), https://www.vice.com/en/article/bj9ygv/the-eyes-are-the-prize-eye-tracking-technology-is-advertisings-holy-grail.

[102] *See* Ben Lang, *The Future is Now: Live Breakdance Battles in VR Are Connecting People Across the Globe*, ROAD TO VR (Jan. 18, 2021), https://www.roadtovr.com/vr-dance-battle-vrchat-breakdance/.

[103] *See Apple Watch Series 7*, APPLE, https://www.apple.com/apple-watch-series-7 (last visited July 26, 2022); *FitBit Sense*, FITBIT, https://www.fitbit.com/global/us/products/smartwatches/sense (last visited July 26, 2022).

[104] *See, e.g.*, *Fitness is Fun on Meta Quest*, META, https://www.meta.com/quest/experiences/fitness/ (last visited Sept. 28, 2022).

monitoring in the metaverse will also include vocal inflections, vital signs, gait, posture, pace, and certain hand movements.[105]

B. Biometric Psychography and VR Advertising

As more types of biometric monitoring become necessary (or useful) to VR technologies' functionality, the potential secondary use of biometric data for targeted advertising in VR becomes more alarming. In perhaps the most well-developed account of VR technologies in legal scholarship, Brittan Heller describes exactly how biometric monitoring used in VR technologies can lead to exploitative targeted marketing opportunities.[106] As she explains, VR companies can use biometric tracking to compile dossiers on how a user's body reacts to external stimuli in VR environments over time.[107] The companies can then use the insights gained from these dossiers—combined with other personal and behavioral information—to predict and shape the user's behavior, including, most significantly, selecting which advertising messages to display to the user.[108]

To provide a straightforward example, Heller asks the reader to imagine they are playing a VR racing game.

> You look down the line of cars and settle on a sleek, cherry red convertible. As you run your virtual hands along its virtual hood, your body responds with signs of excitement—your heart rate increases, your skin moistens, and your pupils dilate. The VR hardware records these involuntary biological reactions . . . . [R]ed convertibles soon begin popping up in your virtual and online spaces, along with advertisements for new car insurance and reminders to renew your driver's license. User information from the racing game has been sold to companies, advertising agencies, and government agencies. It is used to target experiences, services, or products that you are prone to like, and to predict your consumer preferences and personal opinions . . . . Playing a

[105] Rosenberg, *supra* note 4, at 7.
[106] Heller, *supra* note 13; *see also* Bar-Zeev, *supra* note 101 (cataloguing the various uses of eye tracking technologies in VR advertising).
[107] Heller, *supra* note 13, at 27–28.
[108] *Id.* at 6, 27–28.

> VR racing game is like hitting a "like button" on steroids.[109]

Your involuntary biological reaction to the red convertible would become another data point in a comprehensive dossier that maps your physical responses to external stimuli in the environment—just as every like, upvote, comment, click, and friend connection becomes data for marketers today. Over time, VR companies would have thousands upon thousands of data points about your involuntary biological reactions to external stimuli and what those reactions reveal about your preferences. Heller terms this practice *biometric psychography*: "[T]he gathering and use of biological data, paired with the stimuli that caused a biological reaction, to determine users' preferences, likes, and dislikes."[110]

The biometric monitoring devices that are (or may soon be) incorporated into VR technologies can be used to make ads more persuasive—and manipulative—in other ways as well. For example, VR expert Avi Bar-Zeev explains how companies can use eye tracking in VR to conduct sophisticated A/B testing on what captures users' attention.[111] By tracking where users are looking, VR companies can display different permutations of products, logos, people, etc. in users' periphery. They can then track which permutations lead people to shift their gaze toward the object or person being displayed—does the blue car garner more attention, or the red one?[112] Bar-Zeev also notes how VR companies could use their knowledge of what your face looks like to create advertisements featuring people who resemble you. As he puts it, "facial similarity works to build trust and relationships," and marketers can use that trust to increase the likelihood users will interact with their brands.[113]

For simplicity, I will collectively refer to biometric psychography and other uses of biometric data to craft advertisements, like those identified by Bar-Zeev, as "biometric

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[109] *Id.* at 3.
[110] *Id.* at 6.
[111] *See* Avi Bar-Zeev, *XR Can Read Your Mind, but not the Way You Think*, MEDIUM (Sept. 9, 2022), https://medium.com/predict/xr-can-read-your-mind-but-not-the-way-you-think-29069a4b2b63; *see also* Bar-Zeev, *supra* note 101.
[112] *Id.*
[113] *Id.*; *see also* Rosenberg, *supra* note 4, at 6 ("[T]he manner in which these simulated people appear will be crafted for maximum persuasion—their gender, hair color, eye color, clothing style, voice and mannerisms—will be custom generated by algorithms that predict which sets of features are most likely to influence the targeted user based on previous interactions and behaviors.").

targeting." Biometric targeting in VR advertising sounds like a distant theoretical development in some future dystopian society; something out of Minority Report or a Black Mirror episode, to invoke a couple of over-used pop culture references. But it is not.

First, VR advertising is already happening. In September 2022, the metaverse-like gaming platform Roblox (discussed in further detail below) announced its plans to launch a VR advertising platform in 2023.[114] Roblox intends to include virtual billboards, "portal" ads that will transport users into branded spaces, and native ads where companies can pay to brand various objects in VR worlds, like a basketball in a sports game.[115]

Second, companies are already using biometric monitoring to craft marketing strategies.[116] Many of those monitors can already be integrated with VR technologies, and some of them *must* be integrated for the technologies to function.[117] To take one example, companies are beginning to

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[114] Peter Adams, *Roblox's Ad Expansion Plans Include 3D Portals to Branded Experiences*, MARKETINGDIVE (Sept. 12, 2022), https://www.marketingdive.com/news/roblox-immersive-ads-metaverse-Robux-Gen-Alpha/631622/.

[115] Patrick Kulp, *Roblox is Testing Dynamic Billboards in the Metaverse With New Ad Platform*, ADWEEK (Sept. 9, 2022), https://www.adweek.com/commerce/roblox-testing-dynamic-billboards-in-the-metaverse-new-ad-platform.

[116] Indeed, there is a whole cottage industry of marketing agencies that offer companies the ability to measure consumers' biological reactions to products and messaging. *See, e.g.*, Jessica Davies, *The BBC is Using Facial Recognition to Measure if Native Ads Work*, DIGIDAY (Jan. 21, 2016), https://digiday.com/media/bbc-facial-recognition-native-advertising/; *Affective Introduces New Functionality to Enhance Media Analytics Insight*, AFFECTIVA, https://www.affectiva.com/news-item/affectiva-introduces-new-functionality-to-enhance-media-analytics-insight/ (last visited July 28, 2022); Sophie Charara, *Hollywood is Tracking Heart Pounding Movie Scenes With Wearable Tech*, WAREABLE (Jan. 18, 2016), https://www.wareable.com/wearable-tech/heart-racing-bear-scenes-the-revenant-2186. Further, retailers are already deploying biometric ad targeting in the brick-and-mortar context. *See, e.g.*, Kiely Kuligowski, *Facial Recognition Advertising: The New Way to Target Ads to Consumers*, BUSINESS NEWS DAILY (June 29, 2022), https://www.businessnewsdaily.com/15213-walgreens-facial-recognition.html (discussing Walgreen's use of facial recognition technology to target ads on refrigerator doors in their stores); *Smart Vending Machine Scans Your Face to Serve Up Snacks*, NBC NEWS (Mar. 5, 2014), https://www.nbcnews.com/tech/innovation/smart-vending-machine-scans-your-face-serve-snacks-n45546 (discussing use of facial recognition technology in vending machines to target products based on the consumer's age and gender); Drew Bates, *SMB Innovation Lab: Face Recognition with in-Store Analytics*, SAP (May 18, 2018), https://blogs.sap.com/2018/05/18/smb-innovation-lab-face-recognition-with-in-store-analytics/ (marketing an app that pairs with facial recognition technologies for retailers).

[117] *See* Heller, *supra* note 13, at 29 ("[D]ata that enables biometric psychography *must* be captured for immersive technology to function, which means this field will likely grow as immersive tech expands.").

pair VR technologies with electroencephalography ("EEG") in controlled research environments. EEG is a non-invasive method of measuring electrical waves generated by the brain that can be performed by using a head cap affixed with electrodes.[118] EEG has several medical applications[119] but is also used for consumer research by tracking the electrical activity in subjects' brains when they are shown external stimuli, such as an advertisement.[120] A recent review of market research studies performed using EEG revealed widespread application, with EEG being used to study product characteristics and preferences; gender and cultural differences among consumers; pricing considerations; various advertising techniques; and brand identity.[121] The review also showed that an increasing number of market research studies are combining EEG with other biometric devices, such as eye tracking, electromyography ("EMG") and galvanic skin response ("GSR").[122] EEG devices that can integrate with VR technologies are already available on the market.[123]

EMG, GSR, and electrocardiography ("ECG") can similarly be used to reveal consumers' physiological reactions to external stimuli, such as products or messaging. For instance, a recent market research study utilized EMG—which uses electrodes to measure the electrical activity of the subject's muscles—and an eye-tracking device to measure consumers' responses to various skin care products.[124] The researchers attached electrodes to specific facial muscles associated with smiling and frowning and then tracked how the subjects' facial expressions changed in response to different packaging, pricing, and brands.[125] Similar examples can be found in market research

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[118] *Electroencephalography (EEG)*, JOHNS HOPKINS MED., https://www.hopkinsmedicine.org/health/treatment-tests-and-therapies/electroencephalogram-eeg (last visited Sept. 28, 2022); *see* Heller, *supra* note 13, at 28–29.

[119] *E.g.*, JOHNS HOPKINS MED., *supra* note 118.

[120] *See, e.g.*, Andrea Bazzani et al., *Is EEG Suitable for Marketing Research? A Systematic Review*, FRONTIERS IN NEUROSCIENCE 1, 2–6 (Dec. 2020) (analyzing 113 market research studies performed using EEG since 2000).

[121] *See generally id.*

[122] *Id.* at 6–7.

[123] *See DSI VR300*, WEARABLE SENSING, https://wearablesensing.com/products/vr300/ (last visited Feb. 25, 2022) (advertising a research-grade EEG system that is designed for "VR integration" and that "interfaces seamlessly with the HTC-Vive VR headset").

[124] Gabriel Levrini & Mirela Jeffman dos Santos, M., *The Influence of Price on Purchase Intentions: Comparative Study Between Cognitive, Sensory, and Neurophysiological Experiments*, BEHAV. SCI. 2021 1, 1 (Feb. 2021).

[125] *Id* at 6–8.

literature for GSR (which can reveal the intensity of subjects' emotional states by measuring their sweat gland activity) and ECG (which measures heart rate).[126]

Third, VR advertising platforms, like their 2D internet counterparts discussed above, will have a tremendous financial incentive to improve the accuracy of their predictions about users.[127] And, crucially, these companies will not need to literally read users' minds to improve the effectiveness of their advertising platforms—they don't need to wait until head-to-toe (or brain-to-heart) monitoring is a part of the VR experience (if we ever get that far) to deploy biometric targeting. Since even miniscule improvements in advertising effectiveness translate to huge revenue gains,[128] all biometric targeting needs to deliver is a slightly more accurate prediction about user behavior than companies would be able to garner without it.

The pieces of the puzzle are in place; all that is left is for VR companies to put the pieces together . . . and they already are. In recent years, Meta has filed numerous patent applications for technology the company could use to build its Metaverse's advertising platform.[129] The patent applications contemplate a bidding system, similar to Meta's current ad auction system, in which marketers could bid to sponsor content in its Metaverse.[130] As part of the bidding system, sponsored content would be scored based on how likely the particular user is to interact with it, which would in turn be determined based on "characteristics associated with the user."[131] And which characteristics would best reveal the user's affinity for the sponsored item? The

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[126] *See, e.g.*, Jung Ha-Brookshire & Gargi Bhaduri, *Disheartened Consumers: Impact of Malevolent Apparel Business Practices on Consumer's Heartrates, Perceived Trust, and Purchase Intention*, 1 FASHION & TEXTILES 1, 1, 5 (2014) (using ECG to monitor subjects' reactions to malevolent messaging about apparel businesses); Rafal Ohme et al., *Analysis of Neurophysiological Reactions to Advertising Stimuli by Means of EEG and Galvanic Skin Response Measures*, 2 J. OF NEUROSCIENCE, PSYCH., AND ECON. 21, 21, 24 (2009) (using GSR and other measurements to study consumers' reactions to different versions of an advertisement). *See also* Mascha van 't Wout et al., *Skin Conductance Reactivity to Standardized Virtual Reality Combat Scenes in Veterans with PTSD*, 42 APPLIED PSYCHOPHYSIOLOGY BIOFEEDBACK 209, 209 (2017) (pairing VR technologies with GSR to measure veterans' reactions to depictions of combat).

[127] *See supra* Part II(A).

[128] *See id.*

[129] *See* Hannah Murphy, *Facebook Patents Reveal How It Intends to Cash in on Metaverse*, FINANCIAL TIMES (Jan. 18, 2022), https://www.ft.com/content/76d40aac-034e-4e0b-95eb-c5d34146f647.

[130] Elinor Carmi, *Facebook Patent Shows How You May Be Exploited in the Metaverse*, TECH POLICY PRESS (Nov. 18, 2021), https://techpolicy.press/facebook-patent-shows-how-you-may-be-exploited-in-the-metaverse/.

[131] *Id.* (quoting from the patent application).

applications don't say it outright, but it's not hard to read between the lines. Indeed, a Financial Times analysis of Meta's patents concluded that the company has already "patented multiple technologies that wield users' biometric data in order to help power what the user sees" and that Meta "hopes to use tiny human expressions to create a virtual world of personalised ads."[132]

C. Translation to Political Advertising

Writing about filter bubbles in 2011, Eli Pariser posited that "the state of the art in political advertising is half a decade behind the state of the art in commercial advertising."[133] In hindsight, the use of political ad microtargeting in the 2016 election cycle makes that predicted timeframe seem eerily accurate.

If we are already seeing the seeds being planted for the commercial use of biometric data to target commercial VR advertisements then the time to start examining its political use is now.[134] In this subsection, I identify three forms that political advertising could take in VR environments. I then describe a hypothetical VR campaign rally to illustrate how the political use of biometric targeting threatens to greatly exacerbate the extant problems with microtargeted political ads identified in Part II.

1. Forms of Political Advertising in VR

I anticipate that three general methods of delivering political advertisements in VR environments will emerge, each of which could utilize biometric targeting to individualize messaging to users.

First, political advertising could be delivered through display advertising. A display ad is an ad that displays content in a way that makes it apparent to the user that what the user is seeing is in fact an ad.[135] Billboards, banner ads, pop-ups, and video commercials are generally display ads. When you are viewing content, playing a game, or entering a new space in a VR environment, you may have to view a display advertisement,

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[132] Murphy, *supra* note 129.
[133] PARISER, *supra* note 29, at 154.
[134] *Cf.* Heller, *supra* note 13, at 6–7 (making the same point, three years ago, about commercial advertising in VR environments).
[135] *See, e.g.*, *Display Ads*, MAILCHIMP, https://mailchimp.com/marketing-glossary/display-ads/#Display_ads_versus_native_ads (last visited Feb. 26, 2023) (distinguishing display ads from native ads based on the latter being "less obvious" to users).

just as you currently do before watching a video on YouTube, while scrolling through your Instagram feed, and so on. Some of these display ads may be political ads.

In contrast, a native ad is an ad that is designed to appear like it is content generated by the platform, or by another user, and not by the marketer—an ad that the user is not supposed to know is an ad.[136] Native ads can take different forms. One form is a product placement, such as when your favorite TV character cracks open an ice-cold Pepsi. Product placement opportunities will be plentiful in VR environments. For example, "if a story [in a game] calls for a car, a particular sponsor's car will be introduced for the player to drive. Any object could be replaced based on hidden automatic ad auctions."[137]

Going further, native advertising can take the form of sponsor-generated content. Rather than a company sponsoring a car in a game, the company can sponsor the entire game (or show, or movie, or whatever).[138] This practice has long been common in the gaming world (sponsor-created games are known as "advergames") and in other forms of media.[139] Finally, native advertising can be conducted through paid spokespersons (commonly known as "influencers") who do not disclose that they are being paid to promote a product, service, or brand.[140] In

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[136] *See, e.g.*, Note, Irina Dykhne, *Persuasive or Deceptive? Native Advertising in Political Campaigns*, 91 S. CAL. L. REV. 339, 340 (2018) (describing native ads as those that "match the editorial content of media or technology platforms"); *Native Advertising: A Guide for Businesses*, FED. TRADE COMM'N, https://www.ftc.gov/business-guidance/resources/native-advertising-guide-businesses (last visited Mar, 2, 2023) (describing native advertising as "content that bears a similarity to the news, feature articles, product reviews, entertainment, and other material that surrounds it online").

[137] Brittan Heller & Avi Bar-Zeev, *The Problems with Immersive Advertising: In AR/VR, Nobody Knows You Are an Ad*, 1 J. OF ONLINE TR. AND SAFETY 1, 6 (Oct. 2021); Kulp, *supra* note 115.

[138] Heller & Bar-Zeev, *supra* note 136, at 7 (providing the example of a Jurassic Park game).

[139] Going way back, some Atari and Nintendo games were advergames. Older millennials and Gen-Xers may remember playing Yo! Noid, which featured Domino Pizza's mascot; Cool Spot, a same about the red spot on 7-up cans; or Kool-Aid Man, an Atari game about the Kool-Aid Man. *See Yo! Noid*, MOBY GAMES, https://www.mobygames.com/game/yo-noid (last visited Jan. 25, 2023); *Cool Spot*, MOBY GAMES, https://www.mobygames.com/game/cool-spot (last visited Jan. 25, 2023); *Kool-Aid Man*, MOBY GAMES, https://www.mobygames.com/game/atari-2600/kool-aid-man (last visited Jan. 25, 2023).

[140] *See, e.g.*, Alexandra J. Roberts, *False Influencing*, 109 GEO. L.J. 81, 84–85 (2020) (describing influencer marketing and explaining how sponsored influencer messaging can "masquerade as organic buzz and peer-to-peer testimonial" when it lacks proper disclosures).

VR, these spokespersons need not even be persons; they could be AI-powered avatars.[141]

A recent complaint about Roblox submitted to the FTC by Truth in Advertising.org ("TINA.org") foreshadows the native advertising opportunities that will be available in VR environments.[142] Roblox is, in short, an early version of a metaverse, with a particular focus on gaming.[143] The gaming platform allows users to both create their own games and play games created by other users.[144] Users play the games (called "experiences" on the platform) and interact with other users through self-created avatars, which they can dress and accessorize with virtual items that they purchase with a digital currency called Robux.[145] Roblox has over 100 million monthly active users, including more than half of all American children under 16.[146] The platform is not strictly a VR environment, though some games on Roblox do take place in such environments and can be accessed with a Meta Quest or HTC Vive HMD.[147]

The TINA.org complaint highlights each of the three types of native advertising practices described above. Sponsored content appears within organic games and alongside non-sponsored content in the Roblox avatar store.[148] Roblox lists advergames alongside user-created experiences in ways that give users "no way of knowing which of these [experiences] are unsponsored authentic content and which are corporate-controlled advertisements."[149] And Roblox is replete with undisclosed avatar influencers, some of which are human-created while others are AI-generated.[150] Such native advertising opportunities will continue as VR technologies progress. As

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[141] Rosenberg, *supra* note 4, at 5–6.
[142] *See* Letter from TINA.org to the F.T.C., *Deceptive Marketing on Roblox* (Apr. 19, 2022), https://truthinadvertising.org/wp-content/uploads/2022/04/4_19_22-Complaint-to-FTC-re-Roblox.pdf [hereinafter, TINA Complaint].
[143] *Id.* at 2 (describing Roblox).
[144] *Id.* at 2–3.
[145] *Id.* at 3.
[146] Taylor Lyles, *Over Half of US Kids Are Playing Roblox, and It's About to Hose Fornite-esque Virtual Parties Too*, THE VERGE (July 21, 2020, 7:16 PM), https://www.theverge.com/2020/7/21/21333431/roblox-over-half-of-us-kids-playing-virtual-parties-fortnite.
[147] *See* Roblox, *Roblox VR*, https://en.help.roblox.com/hc/en-us/articles/208260046-Roblox-VR (last visited Aug. 1, 2022) (providing instructions for how to use Roblox with Vive or Oculus).
[148] *See* TINA Complaint, *supra* note 142, at 11–13.
[149] *Id.* at 5.
[150] *Id.* at 13–18.

Brittan Heller and Avi Bar-Zeev put it, one problem with immersive advertising will be that "nobody knows you are an ad."[151]

It is not difficult to imagine how political campaigns can leverage these native advertising opportunities.[152] Indeed, a candidates' likeness or logo can be immersed into users' VR environments just like any other product. Maybe a candidate's campaign shirt will appear as an option in your virtual closet. You might see a candidate's avatar playing alongside you in a game, waving to you while you walk down a virtual street, or singing along to your favorite jam at a virtual concert. Perhaps you'll start playing a game about a post-apocalyptic future and learn that society collapsed after candidate Jones was elected. And that avatar over there—the one holding the "Smith 2032" banner—is that a regular citizen, a paid influencer, or an AI-generated bot?[153]

While display and native advertising are familiar categories, VR technologies unlock the potential for a new, third, form of political messaging, which I call *immersive electioneering environments*. An immersive electioneering environment is, in short, a VR event space dedicated to campaigning. Just as concerts and similar events are already taking place in such spaces,[154] candidates may soon hold campaign rallies, speeches, and more personal meet-and-greets in VR environments. Importantly, campaigns could pay platforms or developers to custom tailor these virtual event spaces, much like an event planner would set up a gymnasium for a big speech.[155] Except

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[151] Heller & Bar-Zeev, *supra* note 137, at 1.

[152] Campaigns began advertising in video games as early as 2008. *See* Dykhne, *supra* note 136, at 363 (describing then-candidate Obama's use of advertising in video games).

[153] *Cf.* Anastasia Goodwin et al., *Social Media Influencers and the 2020 U.S. Election: Paying 'Regular People' for Digital Campaign Communication*, CTR. FOR MEDIA ENGAGEMENT (Oct. 2020), https://mediaengagement.org/wp-content/uploads/2020/10/Social-Media-Influencers-and-the-2020-U.S.-Election-1.pdf (examining the practice of paying social media influencers to promote political content).

[154] *See, e.g.*, Adi Robertson, *Warner Music Group is Launching a Metaverse Concert Hall Where You Can Pay to Be Its Neighbor*, THE VERGE (Jan. 27, 2022, 11:01 AM), https://www.theverge.com/2022/1/27/22904382/warner-music-group-the-sandbox-virtual-real-estate-sale-concert-venue; Bernard Marr, *The World of Metaverse Entertainment: Concerts, Theme Parks, And Movies*, FORBES (July 27, 2022, 2:07 AM), https://www.forbes.com/sites/bernardmarr/2022/07/27/the-world-of-metaverse-entertainment-concerts-theme-parks-and-movies/?sh=5dba7b806531.

[155] There is already a whole industry of companies who specialize in planning events in immersive reality environments. *See Metaverse Events: Immersive Experience for Event Attendees*, EVENTDEX (Dec. 16, 2021), https://www.eventdex.com/blog/metaverse-

these virtual architects won't just be arranging virtual furniture, they'll be constructing environments that collect information about all who enter.

The key aspect of my theorized immersive electioneering environments is that they will enable campaigns to access a wealth of information about users who enter the environments. It will be like when websites collect visitors' information via cookies, or when third-party apps pull data about users from social media platforms, only to a more extreme degree. When a person enters an immersive electioneering environment, the campaign could, in theory, gain access to any of the aforementioned types of (biometric and other) personal information that VR technologies enable it to collect. That could range from basic demographic information, to the user's social connections, to the user's biometric psychographic profile.

While less familiar to readers than display and native advertising, the creation of immersive electioneering environments is less far-off than it may seem at first blush. Sophisticated political campaigns have long been fueled by troves of voter data, often collected and put to use through cutting-edge technologies.[156] VR companies are already making huge investments in virtual concerts and other events.[157] Companies that specialize in virtual event planning already highlight their ability to collect and analyze attendees' data.[158] And prominent politicians in the U.S. have been experimenting with VR technologies and early metaverses since at least 2015.[159]

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events-immersive-experience/; *All the Ingredients to Host a Successful Virtual or Hybrid Event*, VFAIRS, https://www.vfairs.com/features/ (last visited Aug. 1, 2022); *Xyrisid Virtual Trade Show*, XYRIS INTERACTIVE DESIGN, INC., https://xyris.ca/metaverse/ (last visited Aug. 1, 2022); *About Wave*, WAVE, https://wavexr.com/about/ (last visited Aug. 1, 2022).

[156] *See, e.g.*, Rubenstein, *supra* note 80 at 862–66 (describing the role of big data in U.S. elections).

[157] *E.g.*, *Announcing Venues in Horizon Worlds*, META: META QUEST BLOG (June 6, 2022), https://www.oculus.com/blog/announcing-venues-in-horizon-worlds/ (announcing integration of venues into Meta's Horizon Worlds metaverse, which will allow Horizon Worlds users to seamlessly access events, concerts, or "even host [their] own meet-up").

[158] *See vFAIRS*, *Features*, http://www.vfairs.com/features (last visited Aug. 1, 2022) (highlighting the customer's ability to "get deep audience insights with our event reporting" and to "view user behaviour" to "see exactly what went well and what didn't").

[159] *See, e.g.*, Alaa Elassar, *Joe Biden Has His Own Island on 'Animal Crossing' Where You Can Learn About His Campaign*, CNN (Oct. 18, 2020 6:53 PM), https://www.cnn.com/2020/10/18/business/biden-animal-crossing-island-trnd/index.html; Scott Hayden, *2016 Presidential Candidate Bernie Sanders Makes 360 Video Appearance*, ROAD TO VR (July 23, 2015), https://www.roadtovr.com/2016-presidential-candidate-bernie-sanders-makes-360-video-appearance/; Paul Tassi,

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There is little inherently wrong with political advertising in VR environments. Such messaging, if properly regulated, could allow voters to connect with candidates in a more meaningful, interpersonal manner than current technology allows. Indeed, politicians have been using new technologies to better achieve that type of connection for just about as long as there have been politicians.[160]

The problem, of course, lies in how VR technologies may allow campaigns to target their messaging.[161] By supplementing the types of information that social media platforms currently collect about users with data derived from biometric monitoring, campaigns could individualize political messaging—through display ads, native ads, and immersive electioneering environments—with heretofore unseen precision.[162]

2. The Dystopian Extreme: "Rodriguez 2036"

Allow me to provide an example of how the combination of biometric targeting, VR, and associated technologies could lead to unprecedented levels of individualization in political advertising.

AOC Just Gave Her First Ever Commencement Address—In 'Animal Crossing', FORBES (May 9, 2020, 8:43 AM), https://www.forbes.com/sites/paultassi/2020/05/09/aoc-just-gave-her-first-ever-commencement-address--in-animal-crossing/?sh=e90d9477d4c0; Cathy Hackl, *Andrew Yang Turns Himself Into An Avatar And Campaigns In The Metaverse*, FORBES (Jun. 11, 2021, 10:32 AM), https://www.forbes.com/sites/cathyhackl/2021/06/11/andrew-yang-turns-himself-into-an-avatar-and-campaigns-in-the-metaverse/?sh=18eb6e862460.

[160] President Franklin D. Roosevelt's fireside chats and President Kennedy's live televised press conferences are prime historical examples. *See* Margaret Biser, *The Fireside Chats: Roosevelt's Radio Talks*, THE WHITE HOUSE HIST. ASS'N (Aug. 19, 2016), https://www.whitehousehistory.org/the-fireside-chats-roosevelts-radio-talks (discussing FDR's use of radio to connect with the public); *John K. Kennedy and the Press*, JFK PRESIDENTIAL LIBRARY AND MUSEUM, https://www.jfklibrary.org/learn/about-jfk/jfk-in-history/john-f-kennedy-and-the-press (last visited Aug. 2, 2022) (discussing JFK's use of live televised press conferences to connect with the public).

[161] Similarly, one of the most prominent critics of online political advertising, Ellen Weintraub, has argued that online political advertising *sans* microtargeting is a benign practice. *See* Weintraub & Valdivia, *supra* note 50, at 716; Ellen L. Weintraub, *Don't Abolish Political Ads on Social Media. Stop Microtargeting*, WASH. POST (Nov. 1, 2019), https://www.washingtonpost.com/opinions/2019/11/01/dont-abolish-political-ads-social-media-stop-microtargeting/.

[162] *See supra* Part II(A) (discussing social media ad targeting); Part III(A) (discussing biometric psychography).

It is 2036. There is a closely contested congressional race in your district; you've seen the display ads in VR, online, and on your neighbors' lawns. You've also seen people in VR donning the candidates' paraphernalia, some of whom have approached you to discuss their preferred candidate. Through these interactions, you learn about a VR campaign rally for one of the candidates, Rodriguez, and you decide to attend. The campaign announces that there will be three components to the rally: a video montage of Rodriguez on the campaign trail; a series of speeches capped by a keynote address from Rodriguez; and an interpersonal meet and greet with Rodriguez's avatar. You and thousands of other users pre-register for the rally and then head into the virtual venue that has been custom built for this event.

By the time you have registered and walked into the event, the campaign already knows the precise composition of the crowd—and not just the demographic mix. When you and everyone else registered for the rally, the platform made troves of data about registrants available to the campaign, including users' online behaviors and information derived from their biometric psychographic profile. The campaign knows how members of the crowd have reacted to various campaign ads in the past; what issues they care most about; what traits they find most favorable in leaders; and so on. And, once the crowd floods into the venue, the campaign has access to the crowd's real-time (aggregate and individualized) biometric data. That data allows the campaign to read the crowd's mood, determine how carefully the crowd is paying attention, and conduct sophisticated A/B testing for speakers and messages.

The rally begins. The display on your HMD fades to black. Suddenly you hear the sounds of silverware clanking, drinks being poured, and children's voices getting louder all around you. Your display lights back up and you are sitting at Rodriguez's breakfast table, like a member of the family. You watch as Rodriguez sends her kids to school and then hits the campaign trail. You walk with Rodriguez from door to door, watching her talk to voters about the day's issues. Then you are back at Rodriguez's dinner table, joining her family in a brief prayer before their evening meal. The montage concludes with an inspiring message, and the speeches are set to begin.

You look around at the crowd and are pleased at the people you see—a few, even, are familiar faces from your social circle. Then the warm-up speakers begin. A single parent who

went to school with Rodriguez. A community activist who marched with Rodriguez in civil rights demonstrations. A fellow congressperson who works with Rodriguez day in and day out. You learn from these speeches that Rodriguez is intelligent and caring, that she is not afraid to stand up for what is right, and that she's willing to reach across the aisle. By the time it's Rodriguez's turn to speak, your impression is already favorable. She steps to the virtual podium wearing a navy blue suit, a "Peace in Ukraine" pin, and yellow and blue earrings to match the pin. As she speaks, her campaign displays a series of infographics and other visual aids that support her talking points. Her speech is impactful; the crowd cheers her off; and you are swept away into a more intimate setting with an avatar of Rodriguez.

It's your local coffee shop. The avatar is sitting across the table with a steaming hot latte in front of her. It looks so real—the avatar, the latte, all of it. You suspend disbelief and begin engaging in conversation with Rodriguez. You learn more about her family, where she stands on the issues, and even her favorite shows and podcasts. She asks you questions too, and you answer as candidly as if you were chatting with a friend.

Much of what you just experienced was individualized content, tailored to you based in part on your biometric psychography. The display and native advertising you saw in the lead-up to the rally was adjusted to your preferences. The video montage was compiled from a wider selection of video clips; you experienced the family and voter interactions that your profile suggested you would find most appealing. Your crowd placement was dictated based on the positive physiological reactions you previously displayed when interacting with the same or similar people in the metaverse—that's why you saw those aesthetically pleasing faces. You heard the three opening speakers to whom your profile suggested you would react most favorably. Rodriguez's clothes, her pin, her earrings, and the infographics behind her were all tailored to your liking. You didn't notice, but a segment of her speech was actually delivered by a deep-fake avatar (like the one you met at the coffee shop) who discussed Rodriguez's position on the issue about which you are most passionate. The setting and the content of the meet and greet was all customized for you too. Everyone else, of course, experienced the rally differently.

3. Paring (Partially) Back

Let us pull back from the Rodriguez 2036 rally. Even if targeted political advertising in VR environments never reaches this dystopian level of individualization, it is easy to see how campaigns could soon recreate elements of it. For example, campaigns could use aggregate biometric information (along with other data) about crowd makeup to segment virtual crowds into different spaces with different speakers. They could alter infographics and other content based on what users' biometric psychography reveals about their preferences. The content of display and native political advertising could change based on a user's biometric psychography just as it could for commercial products. And as with consumer research, biometric monitoring could be used to test, refine, and target candidate messaging.

Moreover, prominent political campaigns are already experimenting with deepfake versions of candidates. In early 2022, South Korean Presidential candidate Yoon Suk Yeol's campaign developed a digital version of Yoon, known as AI Yoon, using deepfake technology.[163] To the human eye, AI Yoon was indistinguishable from the real Yoon.[164] South Koreans could visit wikiyoon.com and submit questions to AI Yoon, who would respond with "salty language and meme-ready quips" drafted by campaign staffers.[165] The campaign's goal was to use AI Yoon to make the real Yoon more likeable, especially to younger voters.[166] It worked, at least anecdotally. One 23-year-old South Korean reported that the real Yoon was "dull," but the virtual version was "more likable and relatable."[167] The voter planned to cast his ballot for Yoon.[168] Seven million other people visited wikiyoon.com in the run-up to South Korea's election,[169] which Yoon won by less than a percentage point.[170]

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[163] Timothy W. Martin & Dasl Yoon, *Campaigns Hope Avatars Show Human Side of Candidates*, WALL ST. J., (Mar. 8, 2022) (describing AI Yoon and how the campaign built and utilized the virtual candidate).

[164] *Id.*; *see also* WION, *Deepfake of South Korea's presidential candidate AI Yoon ahead of election*, YOUTUBE (Feb. 19, 2022), https://www.youtube.com/watch?v=yIUTvPOXkk8 (showing a news report that includes a video of AI Yoon).

[165] *Deepfake democracy: South Korean candidate goes virtual for votes*, FRANCE 24 (Feb. 14, 2022), https://www.france24.com/en/live-news/20220214-deepfake-democracy-south-korean-candidate-goes-virtual-for-votes.

[166] Martin & Yoon, *supra* note 163.

[167] *Id.*

[168] *Id.*

[169] *Deepfake democracy: South Korean candidate goes virtual for votes*, *supra* note 165.

[170] Choe Sang-Hun, *Yoon Suk-yeol, South Korean Conservative Leader, Wins Presidency*, N.Y. TIMES (Mar. 9, 2022),

AI Yoon is the first iteration of an "AI candidate," but he is unlikely to be the last. Recreate him in a VR environment and select which content to show voters based on some set of the voters' personal information, and the basic elements of what I have described above are in place.

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What will happen to the extant problems with political ad microtargeting when this next generation of targeting techniques comes online in VR: How much damage could a nefarious political actor do with biometric targeting techniques, or by gaining access to the underlying user data (say, through a "Cambridge Analytica-type mass violation of user trust")?[171] How much more impenetrable will biometric targeting, when layered on top of existing political ad targeting tools, make each of our filter bubbles? And how much more difficult will it be for users to seek out political information without the fear that they are being surveilled as they do?

More importantly, what can we do about it?

IV. THE FIRST AMENDMENT MINEFIELD

The most straightforward way to prevent biometric targeting from exacerbating extant problems with political ad microtargeting would seemingly be for governments to restrict its use in VR political advertising. However, such restrictions would face a major impediment in the United States: the First Amendment.[172] Under the Supreme Court's prevailing jurisprudence, as expressed most clearly in *Sorrell v. IMS Health*, restrictions on speakers' use of data to craft speech appear to enjoy the same level of protection as speech itself.[173] Indeed, there is a long-running debate about whether and when restrictions on data flows cause First Amendment speech concerns, with one group of thinkers asserting that restrictions on data flows (typically enacted in the name of privacy) often

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https://www.nytimes.com/2022/03/09/world/asia/south-korea-election-yoon-suk-yeol.html.

[171] Heller, *supra* note 13, at 33 (warning that unregulated sharing of immersive reality user data with developers will leave companies vulnerable to such breaches).

[172] U.S. CONST. amend. I; *see also* Cohen, *supra* note 37, at 641 ("[A]lthough one might wonder whether the data-driven, algorithmic activities that enable and invite [electoral] manipulation ought to count as protected speech at all, the Court's emerging jurisprudence about the baseline coverage of constitutional protection for speech seems poised to sweep many such information processing activities within the First Amendment's ambit.").

[173] 564 U.S. 552 (2011).

violate the Speech Clause, and another group taking the position that such restrictions ordinarily do not implicate free speech concerns.[174] That debate has recently spilled over to the biometric information context.[175] Given that a restriction on using biometric targeting for political advertising would implicate this debate about data flows *and* affect political speech considered to be at the Speech Clause's epicenter,[176] it would be certain to draw ire from skeptical jurists and scholars.

In this Section, I unpack how several aspects of the expansive, libertarian, view of the Speech Clause championed by the Supreme Court and others will hamper the government's ability to restrict political ad targeting in VR environments.[177] In subsection (IV)(A), I argue that *content-neutral* restrictions on biometric targeting will prove politically difficult, and that even if enacted, they face significant uncertainty under current Speech Clause doctrine. In subsection (IV)(B), I address *content-based* restrictions that prohibit targeting techniques as to political advertising. I argue that the Court would likely invalidate any such restriction, repeating mistakes it has made in analogous campaign finance cases.

A. Content-Neutral Restrictions (Under the Libertarian First Amendment)

The government could pass a law restricting the use of biometric targeting on a content-neutral basis. That is to say, the government could eschew a restriction on the biometric targeting of *political* speech in favor of a restriction on the use of biometric targeting for *any* speech. A content-neutral restriction could, for example, take the form of a consent requirement for companies

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[174] *See generally, e.g.*, Eugene Volokh, *Freedom of Speech and Information Privacy: The Troubling Implications of a Right to Stop People from Speaking About You*, 52 STAN. L. REV. 1049 (2000); Neil Richards, *Reconciling Data Privacy and the First Amendment*, 52 UCLA L. REV. 1149 (2005); Jane Bambauer, *Is Data Speech?*, 66 STAN. L. REV. 57 (2014).

[175] *Compare* Brief for First Amend. Clinic at Duke Law and Professors of Law Eugene Volokh and Jane Bambauer as Amici Curiae Supporting Defendant's Motion to Dismiss, Am. C.L. Union v. Clearview AI, Inc. 2020-CH-043553, (Ill. Cir. Ct. Cook Cnty. 2020) *with* Brief for Law Professors as Amicus Curiae Opposing to Defendant's Motion to Dismiss, Am. C.L. Union v. Clearview AI, Inc. 2020-CH-043553, (Ill. Cir. Ct. Cook Cnty. 2020).

[176] *See, e.g.*, McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 346 (1995) (describing political speech as being at "the core of the protection afforded by the First Amendment").

[177] Given the scope of this Article, my First Amendment analysis focuses on biometric targeting; however, most of the analysis applies with equal force to laws that would restrict other political ad microtargeting techniques.

to collect, use, or share the relevant data. Or rather than a process-based restriction (where companies are allowed to use the data so long as they follow a specified process, like obtaining user consent), the government could ban the use of biometric targeting altogether.[178] A total ban would be consistent with laws or proposed laws that prohibit manipulative commercial advertising practices, such as the FTC's truth in advertising rules.[179]

A content-neutral approach to preventing biometric targeting would be ideal. From a policy perspective, the problems attendant to that targeting practice may be most pronounced in the political advertising context, but they are by no means exclusive to that context.[180] The government should restrict the use of biometric targeting in commercial and other settings as well. From a doctrinal perspective, content-neutral speech restrictions avoid the application of strict scrutiny. A reviewing court would instead apply the more lenient standard of review associated with ordinary time, place, and manner speech restrictions. Such content-neutral laws must be "narrowly tailored to serve a significant governmental interest, and [must] . . . leave open ample alternative channels for communication of the information."[181]

A content-neutral approach to restricting biometric psychography would, nonetheless, carry several complications. As a threshold matter, the government may not be able to muster the political support necessary to pass such a law. If successfully deployed, biometric targeting will prove to be incredibly lucrative for companies that participate in the VR advertising ecosystem. Improving the accuracy of ad targeting means

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[178] Woodrow Hartzog & Neil Richards, *Privacy's Constitutional Moment and the Limits of Data Protection*, 61 B.C. L. REV. 1687 (2020) (advocating for a U.S. privacy regime centered around substantive restrictions on data processing, rather than just procedural restrictions like notice and choice).

[179] *See Truth in Advertising*, FED. TRADE COMM'N, https://www.ftc.gov/news-events/topics/truth-advertising (last visited Aug. 9, 2022). As of this writing, the FTC is in the process of updating its guidance document on digital advertising and has sought public input on whether and how it should address "microtargeted advertisements," and "issues that have arisen with respect to advertising that appears in virtual reality or the metaverse." *FTC Staff Requests Information Regarding Digital Advertising Business Guidance Publication*, FED. TRADE COMM'N, https://www.ftc.gov/system/files/ftc_gov/pdf/Digital%20Advertising%20Business%20Guidance%20Request%20for%20Information.pdf.

[180] Heller, *supra* note 13, at 37 (proposing changes in law to protect against the commercial use of biometric psychography).

[181] McCullen v. Coakley, 573 U.S. 464, 477 (2014). "Narrow tailoring" in the content-neutral test is a less exacting inquiry than in the content-based, strict scrutiny context. *See id.* at 486.

billions in additional revenues for the companies that own the advertising platforms, not to mention the service providers who facilitate advertising on those platforms and the companies who advertise products on the platforms.[182] Given the money to be made, laws that have the effect of restricting the commercial use of biometric targeting are likely to face intense political opposition. At a minimum, industry will push for such laws to contain less effectual opt-outs—as some state privacy regimes currently have for targeted advertising—rather than opt-ins or total prohibitions.[183]

Even if the government manages to pass a general restriction on the use of biometric psychography, lawmakers will need to take care to ensure that the law is *actually* content-neutral—a task that may be easier said than done. The Supreme Court has taken a hard line on what counts as a content-based speech restriction.[184] In cases like *Reed v. Town of Gilbert* and *Barr v. American Association of Political Consultants*, the Court has made clear that *any* law that treats one type of content differently from another type of content constitutes a content-based restriction on speech that is subject to strict scrutiny.[185] Thus, seemingly benign distinctions in laws regulating speech can render the law unconstitutional. In *Reed*, the Court applied strict scrutiny and invalidated a town's sign code because the code distinguished between different types of signs (e.g., temporary wayfinding signs versus political signs) and "impose[d] more stringent restrictions" on some types of signs than others.[186] Similarly, in *Barr*, the Court determined that the Telephone Consumer Protection Act ("TCPA") was a content-based speech restriction after Congress added an exception to the law's prohibition on the

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[182] *See supra* Part II(A) (describing how minor improvements in the accuracy of platforms' predictions about user behavior lead to substantial revenue increases).
[183] *See, e.g.*, Va. Code Ann. § 59.1-577(A)(5) (2023) (providing a right to opt-out from targeted advertising); Bennett Cyphers et al., *Tech Lobbyists Are Pushing Bad Privacy Bills. Washington State Can, and Must, Do Better*, EFF (Mar. 6, 2020), https://www.eff.org/deeplinks/2020/03/tech-lobbyists-are-pushing-bad-privacy-bills-washington-state-can-and-must-do (highlighting the lobbying campaign to support "milquetoast privacy bills that will give the impression of regulation without changing the surveillance business model").
[184] *See, e.g.*, Parsons, *supra* note 69, at 2241 (noting the Court's "overly broad approach to identifying content-based laws").
[185] Reed v. Town of Gilbert, 576 U.S. 155, 163–64 (2015) (declaring that even "subtle" content distinctions that "defin[e] regulated speech by its function or purpose" are subject to strict scrutiny); Barr v. Am. Ass'n of Pol. Consultants, 140 S. Ct. 2335, 2346–47 (2020) (explaining that all content-based speech restrictions are subject to strict scrutiny).
[186] *Reed*, 576 U.S. at 159.

use of robocalls (when calling cellphones) for companies trying to collect government-backed debt.[187] As the Court explained, the presence of that exception meant that a person calling to solicit money for a political candidate could not use robocall technology while a person calling to collect government-backed debt could.[188] The law treated the caller differently based on the content of their speech.

Furthermore, laws that are facially content-neutral may nonetheless be treated as content-based and subjected to strict scrutiny in some circumstances. If a facially neutral law cannot be "justified without reference to the content of the regulated speech," or if the government adopted the law because it disagrees with the message the speech conveys, the law must satisfy strict scrutiny.[189] And facially content-neutral laws that draw distinctions based on the identity of the speaker may likewise be subject to strict scrutiny.[190]

As a result of the Supreme Court's (a) broad understanding of what constitutes a content-based speech restriction and (b) its steadfastness in subjecting *all* content-based restrictions to strict scrutiny, litigants have strong incentives to frame seemingly content-neutral laws as being content-based. Recent litigation involving facial recognition technology company Clearview AI provides a particularly germane example. In the case, plaintiffs sued Clearview AI for having "captured, used, and stored their biometric identifiers without first obtaining the written release" required by Illinois' Biometric Information Privacy Act ("BIPA").[191] BIPA, in relevant part, prohibits the collection of biometric identifiers or biometric information without first obtaining the subject's informed consent.[192] While this prohibition appears to be content-neutral, the Duke Law First Amendment Clinic's amicus brief framed BIPA as a content-based speech restriction that must be subjected to strict scrutiny. As the Clinic put it:

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[187] *Barr*, 140 S. Ct. at 2343.
[188] *Id.* at 2346. The Court resolved the case by severing the restriction for government-backed debt collections, rendering the law content neutral. *Id.* at 2343–44.
[189] *Reed*, 576 U.S. at 164 (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989) (internal citation omitted)).
[190] *Barr*, 140 S. Ct. at 2347 (explaining how speaker-based distinctions sometimes "reflect[] a content preference") (citation omitted).
[191] Am. C.I. Union v. Clearview AI, Inc., 2020-CH-04353, at *2 (Ill. Cir. Ct. Cook Cnty. Aug. 27, 2021) (Memorandum Opinion and Order denying Defendant's motion to dismiss) (internal quotation marks and citation omitted).
[192] *See* 740 Ill. Comp. Stat. 14/15(b) (2022).

> BIPA explicitly prohibits faceprints of human faces, but not of any other type of face; Clearview can produce faceprints from pictures of cats without any legal impediment, but nonconsensual faceprints generated from pictures of human Illinois residents are restricted. Thus, the restriction of the law turns on the content of the faceprint—whether it refers to a human subject.[193]

Although the Illinois state circuit court judge disagreed with amici's position (correctly, in my view),[194] the appointment of more libertarian-minded judges during the Trump era may well give amici (and like-minded thinkers) friendlier audiences in future cases.

Consider the consequence of combining the Court's approach to content-based speech restrictions with the Court's reasoning in *Sorrell v. IMS Health* that restrictions on data used to craft speech are treated like restrictions on the speech itself.[195] The apparent result would be that any data protection law that creates distinctions between different types of data (which is to say, virtually every data protection law) would be treated as a content-based speech restriction, provided that the data could be used to facilitate speech.[196] Where the affected speech is commercial advertising, courts would subject the law to the less demanding standard of review applicable to such speech.[197] However, where the affected speech does not fit within that narrow category, the data protection law would have to survive the more stringent, strict scrutiny, standard of review.[198] Under

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[193] Brief for First Amend. Clinic at Duke Law and Professors of Law Eugene Volokh and Jane Bambauer as Amici Curiae Supporting Defendant's Motion to Dismiss at 8, Am. C.L. Union v. Clearview AI, Inc. 2020-CH-04353 (Ill. Cir. Ct. Cook Cnty. Dec. 3, 2020).

[194] Am. C.I. Union v. Clearview AI, Inc., 2020-CH-04353, at *2 (Ill. Cir. Ct. Cook Cnty. Aug. 27, 2021) (Memorandum Opinion and Order denying Defendant's motion to dismiss).

[195] *See* Sorrell v. IMS Health Inc., 564 U.S. 552, 570 (2011). As aforementioned, under the Supreme Court's prevailing jurisprudence, restrictions on speakers' use of data to craft speech appear to enjoy the same level of protection as speech itself.

[196] *See, e.g.*, Ashutosh Bhagwat, *In Defense of Content Regulation*, 102 IOWA L. REV. 1427, 1444–46 (2017) (explaining how the *Sorrell* Court's reasoning, when combined with the Supreme Court's approach to identifying content-based speech restrictions, would render most privacy laws "content-based restrictions on speech").

[197] *Sorrell*, 564 U.S. at 572 (categorizing the *Central Hudson* test as a form of "heightened scrutiny"); *see* Cent. Hudson Gas & Elec. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980) (establishing the test for commercial speech).

[198] *See, e.g.*, Bhagwat, *supra* note 196, at 1444–46.

this line of reasoning, a seemingly content-neutral restriction designed to prohibit the use of biometric targeting would need to survive strict scrutiny if challenged by someone wanting to target political messaging using that technique.

Surviving strict scrutiny is always a tall task, but it is especially so when the case involves political speech. The Supreme Court has repeatedly declared that political speech is the core of what the First Amendment protects.[199] It thus views laws that restrict political speech with tremendous skepticism, even when the proffered government interest is weighty.[200] This leads to a particularly vexing First Amendment problem that Professor Ryan Calo has highlighted in his embryonic work, *Digital Market Manipulation*.[201] Candidates and causes that "leverage individual biases to make their campaigns more effective" pose "an arguably greater threat to autonomy" than commercial actors that adopt similar techniques.[202] However, restrictions on such practices "sensibly occasion more serious pushback from the First Amendment," given the importance of political speech.[203] In other words, the First Amendment provides greater protection for false or misleading *political* speech than for other forms of false or misleading speech even if such speech is comparatively more problematic.[204] Thus, if the government tries to restrict biometric targeting on the ground

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[199] *E.g.*, Eu v. San Francisco Cnty. Democratic Cent. Comm., 489 U.S. 214, 223 (1989) ("[T]he First Amendment 'has its fullest and most urgent application' to speech uttered during a campaign for political office." (quoting *Monitor Patriot Co. v. Roy*, 401 U.S. 265, 272 (1971))). *See also infra* notes 210-216 and accompanying text (citing to Citizens United).

[200] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 359–61 (2010) (concluding that the government's interest in preventing corruption did not justify federal law's restrictions on corporate independent expenditures)..

[201] Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995 (2014).

[202] *Id.* at 1049.

[203] *Id.*

[204] *See* Susan B. Anthony List v. Driehaus, 814 F.3d 466, 472–76 (6th Cir. 2016) (applying strict scrutiny and striking an Ohio law that prohibited persons from disseminating known or recklessly false statements about political candidates); Commonwealth v. Lucas, 472 Mass. 387, 392 (2015) (invalidating, on state constitutional free speech grounds, a statute that criminalized certain false statements about political candidates and ballot measures); 281 Care Comm. v. Arneson, 766 F.3d 774, 784–89 (8th Cir. 2014) (applying strict scrutiny and invalidating a Minnesota law that prohibited known or reckless falsities in paid political advertising about ballot questions); *see also* United States v. Alvarez, 567 U.S. 709, 738 (2012) (Breyer, J., concurring) (applying intermediate scrutiny to a law prohibiting false claims of military valor but distinguishing speech that occurs in "political contexts"); Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 771–72 (1976) ("[M]uch commercial speech is not provably false, or even wholly false, but only deceptive or misleading. We foresee no [First Amendment] obstacle to a State's dealing effectively with this problem.").

that the practice is misleading or deceptive, a reviewing court may well find that government interest to be insufficient in an as applied challenge involving political advertising.

Finally, even if a reviewing court determines that a restriction on the use of biometric targeting is content-neutral, it could conclude that the restriction does not survive the Court's test for content-neutral laws. The Tenth Circuit's reasoning in *U.S. West v. FCC*—a case involving the commercial speech doctrine—demonstrates this point.[205] There, the Tenth Circuit held that an FCC regulation requiring telecommunications customers to opt into the sharing of certain data violated the First Amendment.[206] The court reasoned that the FCC regulation failed both the government interest and narrow tailoring prongs of the *Central Hudson* commercial speech test. Regarding the former prong, the FCC asserted a generalized interest in protecting consumer privacy, which the court, essentially, found to be too wishy-washy to constitute a "substantial" government interest.[207] On the latter prong, the court found that the FCC failed to carry its burden of showing that the opt-in requirement was narrowly tailored; the FCC could have instituted an opt-out rule instead.[208] A similar mode of analysis could doom a content-neutral restriction on biometric targeting, particularly if the government fails to articulate the specific privacy harms the restriction safeguards, and fails to show that less restrictive measures would be insufficient to achieve such protection.

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I do not mean to argue or imply that a reviewing court *should* hold that content-neutral restrictions on the use of biometric targeting violate the First Amendment. My own view is quite the opposite. Rather, I am warning that such restrictions—if enacted—will likely be challenged; that the challengers can exploit several features of current Speech Clause doctrine to paint such restrictions as unconstitutional; and that those arguments may well find receptive audiences at the highest levels of the federal judiciary. Content-neutral restrictions on the use of biometric targeting are not certain to survive the First

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[205] 182 F.3d 1224 (10th Cir. 1999), *cert. denied sub. nom* Competition Pol'y Inst. v. U.S. W., Inc., 530 U.S. 1213 (2000).
[206] *Id.* at 1228.
[207] *Id.* at 1234–35.
[208] *Id.* at 1238–39.

Amendment in an as-applied challenge regarding political advertising.

B. Content-Based Restrictions (Under the Libertarian First Amendment)

If enacting a content-neutral restriction on the use of biometric targeting proves politically implausible, governments may opt to enact content-based restrictions for political advertising. Content-based restrictions on political speech pose a thorny constitutional conundrum: Political speech lies at the core of the First Amendment, yet some restrictions on political speech may be important—and even necessary—to furthering the First Amendment's role in preserving self-government.[209]

Campaign finance restrictions serve as the primary illustration of this tension. U.S. governments have long placed restrictions on campaign contributions and on certain expenditures because the influence of concentrated wealth on elected officials may undermine the link between those officials and the public.[210] Yet, because campaign finance restrictions burden speech and associational rights, the Court has applied strict scrutiny—or, in some cases, exacting scrutiny—and in recent years it has increasingly invalidated such laws.[211]

In this section, I argue that content-based laws restricting the use of biometric targeting for political advertising would be analogous to campaign finance laws. Both would burden political speech (albeit only slightly) but would also serve compelling First Amendment interests related to preserving self-government. As with the Court's modern campaign finance jurisprudence, I warn that the Court would likely fail to

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[209] *See, e.g.*, ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 18–27 (1948) (explaining the First Amendment "paradox" that some speech must be restricted in a "well-governed society" and using the old town hall as a metaphor to demonstrate this point).

[210] *See* Scott Bloomberg, *Democracy, Deference, and Compromise: Understanding and Reforming Campaign Finance Jurisprudence*, 53 LOY. L.A. L. REV. 895, 920–26 (2020) (describing the treatment of the government's interest, in campaign finance cases, of ensuring legislative responsiveness to public opinion); Citizens United v. FEC, 558 U.S. 310, 446 (2010) (Stevens, J., concurring in part and dissenting in part); FEC v. Wisc. Right to Life, 551 U.S. 449, 507–22 (2007) (Souter, J., dissenting) (surveying both the history of legislative and judicial responses to the influence of "concentrated wealth" in elections, and both highlighting concerns with how such wealth degrades legislative responsiveness); s*ee also* ROBERT C. POST, CITIZENS DIVIDED: CAMPAIGN FINANCE REFORM AND THE CONSTITUTION 16 (Harvard Univ. Press 2014) (introducing the concept of "representative integrity" to describe the need for legislative responsiveness in a democracy).

[211] *See* McCutcheon v. FEC, 572 U.S. 185, 196–97 (2014) (plurality opinion); *Citizens United*, 558 U.S. at 365–66; *see generally* FEC v. Cruz, 142 S. Ct. 1638 (2022).

appreciate the nature and importance of the government interest(s) backing such a law, as well as the only modest burden on speech caused by the law. The Court would likely apply strict scrutiny and would almost certainly hold that a content-based restriction on the use of biometric targeting in political advertising fails that test.

First, I worry that the Court would fail to credit the broad privacy- and democracy-related government interests, described *supra* in Part II(B), that government would be pursuing by restricting biometric targeting in political advertising, leaving only an under-inclusive interest in protecting individual informational privacy and an over-inclusive interest in preventing foreign interference. That is because in the campaign finance context, the Court has rejected similar government interests pertaining to protecting democratic functions.

Indeed, in the campaign finance context, the Court's recent decisions have been marred by an extraordinarily narrow understanding of the interest pursued by governments when they restrict election spending. The Court has described the government interest as being limited to preventing the appearance or reality of "quid pro quo" corruption.[212] The government has a compelling interest in preventing the direct exchange of cash-for-votes, but beyond preventing such exchanges, the government cannot restrict the flow of money in elections.[213] Thus, the Court has held that restrictions on independent expenditures are categorically unconstitutional because *independent* expenditures carry no risk of a quid pro quo exchange.[214] The Court has also employed this narrow understanding of the government's anticorruption interest to invalidate aggregate contribution limits.[215]

Early campaign finance majority opinions, more recent dissenting opinions, and several prominent scholars have harshly criticized this "crabbed" view of the government's anticorruption interest.[216] These jurists and scholars advance a much broader

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[212] *Citizens United*, 558 U.S. at 357–58 (framing the government interest in campaign finance cases in terms of narrow *quid pro quo* corruption); *see also* Bloomberg, *supra* note 210, at 914–19 (unpacking the narrow understanding of corruption advanced by some justices in campaign finance cases and contrasting it with a broader understanding advanced by others).

[213] *Citizens United*, 558 U.S. at 357–58.

[214] *Id.* at 365 (overruling Austin v. Mich. State Chamber of Com., 494 U.S. 652 (1990) and McConnell v. FEC, 540 U.S. 93 (2003)).

[215] *McCutcheon*, 572 U.S. at 208–09.

[216] *See, e.g.*, *McConnell*, 540 U.S. at 152 (opinion of Stevens, J.) (criticizing the dissent's "crabbed" view of corruption); *Citizens United*, 558 U.S. at 447 (Stevens, J.

conception of the government's interest in campaign finance cases: preserving "political equality" or "electoral integrity," or preventing amassed wealth from distorting the political process.[217] Under these broader conceptions of the government's interest, governments can restrict money in elections to protect, well, democracy. That is, governments can act to ensure that elected officials are responsive to the public rather than to the wealthy subset of the public that is able to spend virtually without limit in elections.

The jurists who subscribe to the crabbed view of corruption in campaign finance cases will likely advance a crabbed view of the government's interest in response to a content-based restriction on biometric targeting. Namely, proponents of ad-targeting will likely frame the government interest as an interest in protecting individual users' informational privacy—i.e., each users' ability to prevent their information from being shared or used in a manner that the user would not reasonably expect. Indeed, the Court has already taken a similar tack and adopted an unduly narrow conception of privacy harm in the Article III standing context.[218]

A repeat performance in the instant context would make it nearly impossible for limits on biometric targeting in political advertising to pass constitutional muster. If a reviewing court evaluates the law under an individual informational privacy framework—eschewing the broader privacy- and democracy-related interests described *supra*—the law could not survive strict scrutiny. A narrow interest in informational privacy may explain why biometric targeting should be prohibited across the board—on a content-neutral basis—but it would not explain why the government can single out the use of biometric targeting in political advertising. To justify that content-based restriction, the court would need to appreciate and credit the unique harms wrought by the ad-targeting practice in the political advertising

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dissenting) (same argument as in *McConnell*, but in dissent); LAWRENCE LESSIG, REPUBLIC, LOST: HOW MONEY CORRUPTS CONGRESS – AND A PLAN TO STOP IT 241–43 (2011) (critiquing the *Citizens United* Court for conceiving of corruption only in terms of quid pro quo exchanges and failing to recognize the type of corruption caused by legislative dependence on wealthy campaign financiers).

[217] POST, *supra* note 210, at 61–62; *Austin*, 494 U.S. at 659–60; *see* RICHARD L. HASEN, PLUTOCRATS UNITED: CAMPAIGN MONEY, THE SUPREME COURT, AND THE DISTORTION OF AMERICAN ELECTIONS 186–87 (2016).

[218] TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2214 (2021); Daniel J. Solove & Danielle Keats Citron, *Standing and Privacy Harms: A Critique of TransUnion v. Ramirez*, 10 B.U. L. REV. ONLINE 62, 68–69 (2021) (criticizing the *Ramirez* Court for having an inadequate understanding of privacy harms).

context. Otherwise, the law would be grossly under-inclusive to a general informational privacy interest.

Whereas an individual informational privacy interest would render a restriction on biometric targeting for political ads under-inclusive, another interest the courts have credited in the campaign finance context would make such a law over-inclusive: preventing foreign interference in elections.[219] That interest is undoubtedly a compelling one, but the government does not need to restrict *everyone's* speech in order to achieve their goal of preventing the problematic speech. It could achieve the same objective by banning the foreign-funded biometric targeting of political ads.[220]

There is a second issue involving the Court's understanding of the government interest in campaign finance cases that will prove instructive in the instant context as well. In campaign finance cases, liberal Justices have taken the position that First Amendment interests "lie on both sides of the legal equation."[221] These Justices mean that when the government restricts spending in elections, the restriction not only *harms* First Amendment interests by restricting speech, it also *furthers* First Amendment interests by creating a marketplace for speech in which the public's views can be heard and responded to by elected officials.[222] Given that such speech restrictions further First Amendment objectives, these Justices find strict scrutiny inappropriate. Instead, they would apply a less skeptical form of judicial review, giving governments more leeway to manage the democratic process.[223]

The same reasoning applies to restrictions on the use of biometric targeting in political advertising. Even if such

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[219] *See, e.g.*, Bluman v. FEC, 800 F. Supp. 2d 281, 288 (D.D.C. 2011) (opinion by Kavanaugh, J.), *sum. aff'd* 565 U.S. 1104 (2012) ("[T]he United States has a compelling interest for purposes of First Amendment analysis in limiting the participation of foreign citizens in activities of American democratic self-government, and in thereby preventing foreign influence over the U.S. political process.").

[220] *See* John M. King, Note, *Microtargeted Political Ads: An Intractable Problem*, 102 B.U. L. REV. 1129, 1148–49, 1159 (2022) (highlighting the same over-inclusiveness problem in the online political ad microtargeting context); Wash. Post v. McManus, 944 F.3d 506, 520–22 (4th Cir. 2019) (crediting the government's interest in preventing foreign election interference but concluding that the interest did not justify imposing certain transparency requirements on publishers of political advertisements).

[221] *McCutcheon*, 572 U.S. at 235 (Breyer, J., dissenting).

[222] *See* Bloomberg, *supra* note 210, at 928 (identifying this position).

[223] *Id.* (discussing Justice Breyer's position in Nixon v. Shrink Missouri Gov't. PAC, 528 U.S. 377, 402–03 (2000) (that the Court should take a more deferential posture in campaign finance cases).

restrictions would (in some sense) restrict speech, they would also further Speech Clause objectives that are important to sustaining self-government—preventing filter bubbles and protecting intellectual privacy.[224] This undermines the case for applying strict scrutiny in the first place and suggests that such restrictions, like most campaign finance restrictions, should be evaluated under a less hostile standard of review.

Third, in the campaign finance context, the Justices have disagreed about whether restrictions on corporate election spending constitute bans on corporate speech, or instead merely change the means through which corporations must speak. Prior to *Citizens United*, federal law prohibited corporations from making independent expenditures funded by their general treasury accounts but allowed corporations to establish separate segregated funds ("SSFs")—funded by relatively small contributions by employees, shareholders, and members—from which they could make expenditures.[225] To the *Citizens United* majority, this restriction constituted an "outright ban" on corporate-funded speech, amounting to censorship, notwithstanding the availability of speaking through an SSF.[226] To the *Citizens United* dissenters, the burden on speech imposed by federal law fell far short of an "outright ban;" rather, the law merely regulated the channel through which corporations had to speak (through an SSF, rather than a general treasury account).[227]

I anticipate a similar disagreement in the present context. Libertarian jurists are likely to view a restriction on biometric targeting as a significant restriction on speech; one that bans a valuable tool that speakers can use to reach their desired audience. However, the speech burden imposed by a prohibition on the biometric targeting of political ads is far more modest—it does not limit what speakers can say, how much they can say it, or even to whom they can say it. Instead, it imposes a relatively minor efficiency burden on speech. Speakers cannot target their messaging quite as efficiently as they otherwise would, but they would still be able to spread the same message to the same or similar listeners by using somewhat less exacting targeting tools. The primary difference is that more people will hear the message

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[224] *See supra* Part II(B) (discussing the significance of preventing filter bubbles and preserving intellectual privacy to First Amendment jurisprudence).
[225] *Citizens United*, 558 U.S. at 321 (explaining the SSF system).
[226] *Id.* at 337.
[227] *Id.* at 419 (Stevens, J., concurring).

(because it will not be so acutely targeted), and, because more people will hear the message, it will cost the speaker some marginal amount more to reach the segment of the audience they would have reached by employing biometric targeting.

The marginal decrease in the efficiency of speech caused by a restriction on the use of biometric targeting would indeed burden speech, thus making some First Amendment analysis appropriate. But it would be a far cry from the exaggerated claims of censorship used to justify the application of strict scrutiny and the subsequent invalidation of laws in campaign finance cases.

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This First Amendment analysis reveals a field of landmines for policymakers trying to restrict the use of biometric targeting in political advertising. Content-neutral restrictions will likely face political barriers. Even if enacted, opponents will leverage the Court's speech clause jurisprudence to frame seemingly content-neutral laws as actually being content-based. And even if they fail at that threshold step, the opponents would still have several avenues to victory in an as-applied, political speech challenge to a content neutral restriction on biometric targeting.

Content-based restrictions will prove even more fraught under the Court's current First Amendment jurisprudence. If the Court's analogous campaign-finance cases are any indication, such restrictions will be subjected to strict scrutiny, the government interests involved will be minimized, the modest speech restrictions will be characterized as oppressive censorship, and the law will be struck down.

V. CONCLUSION & CONSEQUENCES

The promises of VR technologies sound a lot like the promises of the internet at its dawn: It will greatly increase our interpersonal connectivity and unleash a wave of creative expression, all while generating new economic opportunities for the public. As with the internet, we must strive to achieve those promises while mitigating the potential for harm posed by the new technology. That task will leave privacy scholars with much to write about over the coming years: VR technologies enable the collection and deployment of personal data at a virtually unimaginable scale.

This Article identified a particularly alarming problem with VR technology: Data collected using biometric monitoring can be used for political ads; that practice will exacerbate existing problems with political ad microtargeting; and the Supreme Court's current First Amendment jurisprudence will make it difficult for U.S. governments to constitutionally address those problems. As with other problems with VR, this will be one that scholars and jurists will continue to grapple with as the technology advances and gains more widespread adoption.

While the primary purpose of this Article is indeed to identify this emerging First Amendment problem, let me close by highlighting two consequences that flow from the Article's analysis.

First, the First Amendment uncertainty makes private ordering solutions all the more important. Public interest organizations are already working to ensure that companies design VR environments with privacy and safety in mind. For example, the XR Guild is a newly formed association of developers, researchers, lawyers, business executives, and other professionals who are working to establish a commonly-held set of ethical principles to guide the development of XR technologies.[228] The XR Safety Initiative is a similar group that is working to create standards for privacy, safety, security, and ethics in VR environments.[229]

These organizations and others should work to establish industry-wide rules governing the use of XR technologies in political advertising. Those rules should include restrictions on biometric targeting and other advanced targeting techniques, as well as the use of deepfake technologies. Transparency rules—while not sufficient to prevent the harms discussed in this Article—will also be important to establish if governments fail to act.[230] Providing users with information about whether political messaging is sponsored, who has paid for it, how it is

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[228] Rosenberg, *supra* note 4, at 2 (explaining that the term "XR" is "commonly used as a catch-all for all forms of immersive media," encompassing both virtual reality and augmented reality); *see* XR GUILD, http://www.xrguild.org (last visited Aug. 3, 2022).

[229] XR SAFETY INITIATIVE, *Who We Are*, http://www.xrsi.org/who-we-are (last visited Aug. 11, 2022).

[230] *See generally* The Honest Ads Act, S.1356, 116th Cong. (2019-2020) (imposing some much-needed transparency requirements on online political advertisements).

targeted, and whether it involves deepfake technology can help users evaluate the merits of campaigns' messages.[231]

Establishing these rules on an industry-wide basis will be particularly important. As it stands, each major online platform has their own rules for political advertising. The rules are wildly inconsistent, ranging from complete prohibitions, to limits on targeting, to mere transparency rules.[232] Platforms also use varying definitions to determine what constitutes a political advertisement that is subject to their self-imposed regulations.[233] This patchwork of self-governing policies should not carry over to VR environments. No company should gain a competitive advantage by maintaining lax rules around political advertising, and users should have the same protections no matter which platform's VR environment they access.

Private-sector solutions carry understandable skepticism; a skepticism that I share. Companies act in the best interest of their shareholders and that does not always align with the interests of users or society writ-large.[234] Accordingly, the costs of failing to adopt industry-wide standards for political advertising (and other ethical rules for VR technologies) must exceed the benefits. If a platform refuses to sign on to an industry-wide rule, users must boycott, employees must protest, journalists must shine a light, and commercial advertisers must threaten to take their business elsewhere. We must exact a financial toll if companies allow targeted political advertising in VR environments to go unchecked.

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[231] *Cf.* King, *supra* note 220, at 1154–55 (proposing transparency measures in light of the First Amendment problems with restriction political ad microtargeting).

[232] *Compare* GOOGLE, *Advertising Policies Help: Political content*, https://support.google.com/adspolicy/answer/6014595#zippy= (last visited Aug. 9, 2022) (restricting targeting practices), *with* META, *Ads About Social Issues, Elections or Politics*, https://www.facebook.com/policies_center/ads/restricted_content/political (last visited Aug. 9, 2022) (not restricting targeting practices), *and* TWITTER, *Business: Political content*, https://business.twitter.com/en/help/ads-policies/ads-content-policies/political-content.html (last visited Aug. 9, 2022) (prohibiting political ads), *and* TIKTOK, *TikTok Advertising Political – Industry Entry*, https://ads.tiktok.com/help/article?aid=9550 (last visited Aug. 16, 2022) (prohibiting political ads).

[233] *See id.*

[234] *See, e.g.*, Christiano Lima, *Facebook knew ads, microtargeting could be exploited by politicians. It accepted the risk.*, WASH. POST (Oct. 26, 2021), https://www.washingtonpost.com/politics/2021/10/26/facebook-knew-ads-microtargeting-could-be-exploited-by-politicians-it-accepted-risk/ (reporting on the Facebook Papers leak, showing that the company knew its targeting tools would be used to spread misinformation).

Second, this Article's analysis provides further evidence that the current libertarian First Amendment jurisprudence is unsustainable. As data surveillance becomes more intrusive, extending even to our involuntary biological reactions, it will become increasingly indefensible to assert that the freedom of speech almost always prevents government from restricting data flows to protect privacy (and democracy). Rather, courts should adopt a First Amendment framework—like, for example, the attentional-choice model championed by Professor G. Michael Parsons—that would give governments more leeway to impose sensible restrictions on political ad microtargeting.[235]

[235] *See* Parsons, *supra* note 69 (criticizing the Court's understanding of the marketplace of ideas and arguing that, under an attentional-choice speech framework, microtargeted advertising constitutes anticompetitive conduct in the marketplace for ideas).

FREE SPEECH RIGHTS IN PRIVATE EMPLOYMENT? THE FIRST AMENDMENT, THE PRESENT PATCHWORK, AND A BALANCED IMPROVEMENT

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INTRODUCTION

Since the First Amendment only limits government action, the vast majority of American workers lack constitutional protection for speech in at-will private employment; the amendment can even protect private employers in hiring and firing. Yet private-sector workers can find other sources for unintuitive protections for free speech and political activity, though they remain "spotty and sparse."[1] The nation's robust market economy depends on businesses' ability to maintain functional workplaces, but the foundational place of First Amendment ideals in American democracy need not bow to a *Lochner*-esque emphasis on the sanctity of contract.

This Note argues for more—and more precise—state statutes to improve clarity for both employees and employers while balancing civic and economic priorities. Part I explains how the default of at-will employment means workers generally can be fired for speech or politics. Part II outlines how the First Amendment can protect private employers from compelled speech. Part III examines the limited speech protections provided by federal statutes including the National Labor Relations Act, which applies regardless of union status. Part IV shows how state constitutions and common law might protect free speech in private employment but rarely do. Finally, Part V surveys the promising patchwork of statutes in the majority of states that protect at least some off-duty speech or conduct; this concludes with a proposed model statute balancing First Amendment ideals with legitimate employer interests.

I. "FOR WHATEVER REASON": THE VULNERABILITY OF AT-WILL EMPLOYMENT

Unique among developed democracies,[2] United States law assumes that private employment is an "at-will" contractual relationship—meaning either party can end the relationship at any time, for any reason not otherwise prohibited by law.[3] This

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[1] Cynthia Estlund, *Freedom of Expression in the Workplace*, *in* THE OXFORD HANDBOOK OF FREEDOM OF SPEECH 410, 429 (Adrienne Stone and Frederick Schauer, eds., 2021).

[2] Kate Andrias & Alexander Hertel-Fernandez, *Ending At-Will Employment: A Guide for Just Cause Reform*, ROOSEVELT INST. 4 (2021), https://rooseveltinstitute.org/wp-content/uploads/2021/01/RI_AtWill_Report_202101.pdf; *id*. at 7 (summarizing discharge requirements elsewhere and citing the International Labor Organization Employment Protection Legislation Database).

[3] *Wrongful Discharge* § 1, *in* 82 AM. JUR. 2D (updated February 2023); *see also* Michael A. DiSabatino, Annotation, *Modern Status of Rule that Employer May Discharge At-Will Employee for Any Reason*, 12 A.L.R. 4th 554 (first published in 1982).

common law presumption originated with an 1877 treatise writer's misreading of key precedents[4] but gradually became the default rule, with the U.S. Supreme Court in 1908 stating that workers could be fired "for whatever reason."[5] Critics argue this "divine right of employers" ignores the reality that most employees cannot bargain with employers on equal footing and lets employers unfairly benefit from employees' incorrect assumptions about their rights.[6] Indeed, about three-quarters of American workers incorrectly believe they have more rights in the employment context.[7] On the other hand, defenders see the at-will rule as essential to the dynamic market economy[8] that has fueled the United States' economic prosperity and geopolitical preeminence since World War II.

Of course, employment at-will is a legal default, not an absolute mandate. The parties may agree otherwise by contract, either individually (such as by setting a fixed term) or as a union

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[4] Clyde W. Summers, *The Contract of Employment and the Rights of Individual Employees: Fair Representation and Employment at Will*, 52 FORDHAM L. REV. 1082, 1083 n.7 (1984) (discussing the precedents misread and ignored by Horace Gray Wood in his treatise that won over the common law, *see* H.G. WOOD, MASTER AND SERVANT § 134 (1877)); Jay M. Feinman, *The Development of the Employment at Will Rule*, 20 AM. J. LEGAL HIST. 118, 124–27 (1976); Rebecca Dixon, *Cities Are Working to End Another Legacy of Slavery — 'At Will' Employment*, NAT'L EMP. L. PROJ. (Oct. 19, 2021), https://www.nelp.org/commentary/cities-are-working-to-end-another-legacy-of-slavery-at-will-employment/ (arguing at-will employment "grew out of the soil of slavery and servitude and was cemented in the legal system as a product of industrialists' efforts to repress worker organizing") (citing Lea VanderVelde, *The Anti-Republican Origins of the at-Will Doctrine*, 60 Am. J. Legal Hist. 397 (2020)).

[5] Adair v. United States, 208 U.S. 161, 174–75 (1908) ("So the right of the employee to quit the service of the employer, for whatever reason, is the same as the right of the employer, for whatever reason, to dispense with the services of such employee."), *abrogated on other grounds by* Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 187 (1941).

[6] Clyde W. Summers, *Employment at Will in the United States: The Divine Right of Employers*, 3 U. PA. J. LAB. & EMP. L. 65, 65 (2000); *see also* Andrias & Hertel-Fernandez, *supra* note 2, at 4–18; Lawrence E. Blades, *Employment at Will v. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404 (1967); Summers, *supra* note 4.

[7] Andrias & Hertel-Fernandez, *supra* note 2, at 15. *See also* SAMUEL ESTREICHER ET AL., CASES AND MATERIALS ON EMPLOYMENT DISCRIMINATION AND EMPLOYMENT LAW: THE FIELD AS PRACTICED 4 (5th ed. 2016) ("Employees may not, for instance, understand what it means to have no contractual protection against arbitrary discharge, because they make erroneous assumptions about what employers lawfully may do . . . .").

[8] *In Defense of Employment-at-Will*, MISES INST. (May 23, 2005), https://mises.org/library/defense-employment-will (arguing that "weakening employment-at-will necessarily raises the potential and perceived costs of all hiring decisions" and "labor market flexibility is not just a benefit for entrepreneurs and business people; it is essential to economic growth in general"); *see also* Richard A. Epstein, *In Defense of the Contract at Will*, 51 U. CHI. L. REV. 947, 951 (1984) (discussing the benefits of legal predictability).

with a collective bargaining agreement. One state, several territories, and a few cities have legislatively altered the presumption. The only state is Montana, which in 1987 passed a statute[9] that is not very protective in practice.[10] Senator Bernie Sanders proposed universal just-cause protection while seeking the Democratic presidential nomination in 2019,[11] but such a sweeping national proposal is unlikely to become law.[12] Overall,

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[9] MONT. CODE ANN. § 39-2-904.

[10] Donald C. Robinson, *The First Decade of Judicial Interpretation of the Montana Wrongful Discharge from Employment Act*, 57 MONT. L. REV. 375, 376–77 (1996). Beyond Montana, just cause is required for all workers in Puerto Rico and the U.S. Virgin Islands, for parking-lot workers in Philadelphia, and in New York City for workers at fast-food chain restaurants. Andrias & Hertel-Fernandez, *supra* note 2, at 4 n.1. A restaurant industry group challenged the New York City law, but a federal district judge granted summary judgment to the city in February 2022. Rest. L. Ctr. v. City of New York, 585 F. Supp. 3d 366 (S.D.N.Y. 2022), *appeal pending* (2d Cir. No. 22-491); *see also* Max Kutner, *2nd Circ. Skeptical of Restaurant Groups' 'Just Cause' Take*, LAW360 (May 18, 2023), https://www.law360.com/articles/1589244. Advocates also seek protections in Democrat-dominated jurisdictions including Illinois; New Jersey; and Seattle, Washington. Josh Eidelson, *Most Americans Can Be Fired for No Reason at Any Time, But a New Law in New York Could Change That*, BLOOMBERG BUSINESSWEEK (June 21, 2021), https://www.bloomberg.com/news/features/2021-06-21/new-york-just-cause-law-is-about-to-make-workers-much-tougher-to-fire; *see also* Jeff Schuhrke, *The Movement to End At-Will Employment Is Getting Serious*, IN THESE TIMES (Apr. 6, 2021), https://inthesetimes.com/article/at-will-just-cause-employment-union-labor-illinois.

[11] Ian Kullgren, *How Bernie Sanders Would Boost Unions*, POLITICO (Aug. 21, 2019), https://www.politico.com/story/2019/08/21/how-bernie-sanders-would-boost-unions-1674854.

[12] Even advocates acknowledge "ending at-will employment would represent a major shift in US employment law" that would upend "the bedrock of the legal relationship between workers and employers." Andrias & Hertel-Fernandez, *supra* note 2, at 5, 49. Legislation has not advanced even in blue states, though a management-side observer predicts "statewide legislation to implement just-cause protections is likely to succeed somewhere at some point," but likely limited to certain industries rather than across the board. Mike LaSusa, *4 Types Of Failed Wage and Hour Bills States Could Resurrect*, LAW360 (July 29, 2021), https://www.law360.com/employment-authority/articles/1404915. Any federal bill is dead on arrival in Congress, where only progressive Democrats support such a radical change. The leading advocate is Senator Bernie Sanders, the Vermont socialist who has twice unsuccessfully sought the Democratic presidential nomination; his 2019 call to end the at-will default was so distinctive as to be newsworthy. Bernie Sanders, *The Workplace Democracy Plan*, https://berniesanders.com/issues/workplace-democracy/ (last accessed Mar. 25, 2023); Kullgren, *supra* note 11. The Congressional Progressive Caucus counts 101 of 435 representatives and only one of 100 senators—Sanders. *Caucus Members*, CONG. PROGRESSIVE CAUCUS, https://progressives.house.gov/caucus-members (last accessed June 3, 2023). To reach the president's desk, legislation generally needs 218 votes in the House, and sixty in the Senate, thanks to the filibuster, which is not ending anytime soon. *See* VALERIE HEITSHUSEN, CONG. RESEARCH SERV., FILIBUSTERS AND CLOTURE IN THE SENATE (updated Apr. 7, 2017), https://crsreports.congress.gov/product/pdf/RL/RL30360; *Manchin Again Reiterates His Commitment to Protecting Filibuster*, Office of Senator Joe Manchin (Jan. 13, 2022), https://www.manchin.senate.gov/newsroom/press-releases/manchin-again-reiterates-his-commitment-to-protecting-filibuster.

U.S. employment is generally at-will—covering up to 78.8 percent of all American workers.[13]

Those at-will workers generally can be fired for exercising First Amendment rights. Private employers can discriminate based on politics in a way that would be completely repugnant to fundamental American values if done by the government; indeed, courts have developed an extensive body of case law concerning First Amendment rights in *public* employment.[14] Yet private employers can, and sometimes do, terminate at-will employees for political speech, as these recent incidents illustrate:

- Audrey Lynn Henson founded the nonprofit College to Congress in 2016 to support underrepresented congressional interns and led the organization until November 2021, when she alleges she was "unlawfully terminated, penalized, and mistreated based solely on her conservative values" because she ran for Congress as a Republican.[15]
- Juli Briskman said she was forced to resign her job as a marketing analyst for a federal contractor after drawing national attention for holding up her middle finger to President Donald Trump's motorcade in 2017;[16] a

[13] Calculations based on latest federal data: Some 85% of American workers are in the private sector. Audrey Watson, *Occupational Employment and Wages in State and Local Government*, U.S. BUREAU OF LAB. STAT. (Dec. 2021), https://www.bls.gov/spotlight/2021/occupational-employment-and-wages-in-state-and-local-government/home.htm. Unions represent only 7% of private-sector workers. *News Release*, U.S. BUREAU OF LAB. STAT. tbl. 3 (Jan. 19, 2023) https://www.bls.gov/news.release/pdf/union2.pdf. Montana accounts for just 0.23% of the U.S. population. U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/MT/PST120221 (last visited Jan. 30, 2023); U.S. CENSUS BUREAU, https://www.census.gov/quickfacts/fact/table/US/PST045221 (last visited Jan. 30, 2023).

[14] Paul M. Secunda, *Reflections on the Technicolor Right to Association in American Labor and Employment Law*, 96 KY. L.J. 343, 346–56 (2008); C.R. McCorkle, Annotation, *Governmental Control of Actions or Speech of Public Officers or Employees in Respect of Matters Outside the Actual Performance of Their Duties*, 163 A.L.R. 1358.

[15] Complaint at 2, Henson v. College to Congress LLC, No. 1:22-cv-03483 (D.D.C. Nov. 14, 2022); *see also* Justin Moyer, *Nonprofit Founder Says She Was Fired for Being Conservative Republican*, WASH. POST (Dec. 12, 2022), https://www.washingtonpost.com/dc-md-va/2022/12/12/audrey-henson-interns-capitol-hill/.

[16] Juli Briskman, *Opinion: Why I'm Suing for My Right to Flip Off the President*, WASH. POST (Apr. 5, 2018) https://www.washingtonpost.com/opinions/im-suing-for-my-right-to-flip-off-the-president/2018/04/05/a0abcf10-38e8-11e8-9c0a-85d477d9a226_story.html ("The First Amendment bars retaliation against me by Trump. But Trump doesn't need to punish me for my speech if fear of him spurs my employer to do it.").

Virginia state judge dismissed Briskman's wrongful-termination claim because she was an at-will employee.[17]

- In June 2020, Kris Hauser said she was fired from her longtime restaurant job for refusing to wear a face mask with a "Trump 2020" logo, which the restaurant owner had declared a "[r]equired uniform."[18]
- John Gibson was a cofounder and CEO of the video-game company Tripwire Interactive until 2021 when he tweeted his support for a Texas law that effectively banned abortion after six weeks of pregnancy; he quit following an online outcry and criticism and contract cancellation threats from corporate partners.[19]

While these examples represent extreme instances that made the news, political pressure is not rare: "one in four private-sector employees said in a 2015 survey that they received political messages or requests from their bosses."[20] For instance, while rallying support for the 2017 tax cuts, some companies invited leading lawmakers to address their employees in the workplace.[21]

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[17] Braden Campbell, *Woman Who Flipped Trump Off Loses Unfair Firing Claim*, LAW360 (June 29, 2018), https://www.law360.com/articles/1059108/woman-who-flipped-trump-off-loses-unfair-firing-claim. However, in 2019, Briskman defeated a Republican incumbent to win a seat on the Loudoun County (Virginia) Board of Supervisors, where she remains as of June 2023. Poppy Noor, *'I Don't Regret It': How Juli Briskman Went from Giving Trump the Finger to Winning an Election*, THE GUARDIAN (Nov. 9, 2019), https://www.theguardian.com/us-news/2019/nov/09/trump-middle-finger-julie-briskman-virginia; *see also* Board of Supervisors, LOUDOUN CNTY., https://www.loudoun.gov/86/Board-of-Supervisors (last visited June 3, 2023).

[18] Jelisa Castrodale, *Restaurant Worker Says She Was Fired for Refusing to Wear 'Trump 2020' Mask*, VICE (June 9, 2020), https://www.vice.com/en/article/wxqdwb/restaurant-worker-says-she-was-fired-for-refusing-to-wear-trump-2020-mask.

[19] Even if Gibson had been fired rather than resigning under pressure, he would not have had a viable claim under the at-will default. He might have argued his departure amounted to a constructive discharge. *See* Matt Egan, *Video Game CEO Is Out After Praising Texas Abortion Law*, CNN (Sept. 7, 2021), https://www.cnn.com/2021/09/07/business/tripwire-ceo-texas-abortion-law; Khristopher J. Brooks, *TripWire Interactive CEO Steps Down After Supporting Texas Abortion Law*, CBS NEWS MONEYWATCH (Sept. 7, 2021), https://www.cbsnews.com/news/tripwire-texas-abortion-john-gibson-gaming-tweet/.

[20] Charlotte Garden, *Was It Something I Said? Legal Protections for Employee Speech*, ECON. POL'Y INST. 3 (May 5, 2022) (citing ALEXANDER HERTEL-FERNANDEZ, POLITICS AT WORK: HOW COMPANIES TURN THEIR WORKERS INTO LOBBYISTS (2018)), https://files.epi.org/uploads/215894.pdf.

[21] Richard Rubin, *Companies Promote Corporate-Tax Overhaul*, WALL ST. J. (Aug. 22, 2017), https://www.wsj.com/articles/companies-promote-corporate-tax-overhaul-1503441184 (noting visits with workers at UPS, Best Buy, AT&T, Intel, Boeing, and other companies).

II. THE FIRST AMENDMENT FOR PRIVATE EMPLOYERS, BUT NOT WORKERS

Even a well-informed citizen might think the adverse employment actions described above violated the First Amendment, as online commenters and even news articles sometimes claim.[22] However, the amendment only regulates actions by the government: While "Congress shall make no law . . . abridging the freedom of speech,"[23] private employers are not so limited because their actions are not state actions. As the Supreme Court stated in 1976:

> It is, of course, a commonplace that the constitutional guarantee of free speech is a guarantee only against abridgment by government, federal or state. Thus, while statutory or common law may in some situations extend protection or provide redress against a private corporation or person who seeks to abridge the free expression of others, no such protection or redress is provided by the Constitution itself.[24]

The full Fourth Circuit thus rejected a private right of action for alleged First Amendment violations by private

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[22] Natasha Anderson, *Google Executive Infringed on Fired Engineers [sic] First Amendment Rights by Telling Him NOT to Post His Right Wing Views on Internal Message Boards, Lawsuit Finds*, DAILYMAIL.COM (Sept. 23, 2021), https://www.dailymail.co.uk/news/article-10022371/Emails-Google-exec-broke-labor-laws-firing-conservative-engineer.html. Illustrating the way that governmental pressure can infringe First Amendment rights of *employers*, Google's settlement with the National Labor Relations Board came after President Trump tweeted his support for an ex-employee who said he was fired for expressing unpopular conservative views. Rob Copeland, *Government Orders Google: Let Employees Speak Out*, WALL ST. J. (Sept. 12, 2019), https://www.wsj.com/articles/government-orders-google-let-employees-speak-out-11568284582.

[23] U.S. CONST. amend I. While the amendment explicitly addresses only the national legislature, the Supreme Court has consistently held it also governs the other branches of the federal government. Dan T. Coenen, *Quiet-Revolution Rulings in Constitutional Law*, 99 B.U. L. REV. 2061, 2090 (2019). After the Fourteenth Amendment, the First Amendment was gradually incorporated against the states. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925); Cantwell v. Connecticut, 310 U.S. 296, 303 (1940); Edwards v. South Carolina, 372 U.S. 229, 235 (1963).

[24] Hudgens v. N.L.R.B., 424 U.S. 507, 513 (1976) (citations omitted). *See also* Pub. Utilities Comm'n of D.C. v. Pollak, 343 U.S. 451, 461 (1952) (stating that the First and Fifth Amendments "apply to and restrict only the Federal Government and not private persons").

employers because Congress "notably has refrained from extending free speech rights to the private work force."[25]

Though the First Amendment does not protect private-sector workers from their employers, it does protect employers from the government. The Eighth Circuit explained it succinctly in rejecting an employee's claim that a defendant employer wrongfully fired her for exercising First Amendment rights: "Simply put, the defendant is a private entity, not a governmental entity, and thus is legally incapable of violating anyone's First Amendment rights. *Any First Amendment rights germane to this case are those of the defendant . . . .*"[26]

A. Employers' Speech

The principle of employers' rights features in ongoing high-profile challenges to limits on workplace diversity training. For instance, in April 2022, Florida Governor Ron DeSantis signed a law he called the "Stop WOKE Act."[27] Much of the statute constrained public schools, but it also took aim at the private sector. The law prohibited workplace diversity trainings that endorse ideas including white privilege.[28] Requiring any such training as a condition of employment was deemed an unlawful employment practice,[29] subjecting employers to civil

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[25] Dixon v. Coburg Dairy, Inc., 369 F.3d 811, 819 (4th Cir. 2004) (en banc) (rejecting First Amendment claims of private-sector worker fired after refusing to remove Confederate-flag stickers from his toolbox).

[26] Manson v. Little Rock Newspapers, Inc., 200 F.3d 1172, 1173 (8th Cir. 2000) (affirming summary judgment for defendant-employer newspaper) (emphasis added). That court did not seem to treat a media outlet differently from other employers, but some courts may. Washington state's highest court has held "a state law prohibiting employment discrimination based on an employee's political conduct was not constitutionally applicable to newspaper publishers." Steven J. Mulroy & Amy H. Moorman, *Raising the Floor of Company Conduct: Deriving Public Policy from the Constitution in an Employment-at-Will Arena*, 41 FLA. ST. U. L. REV. 945, 990 n.250 (2014) (citing Nelson v. McClatchy Newspapers, Inc., 936 P.2d 1123, 1127 (Wash. 1997)).

[27] 2022 FL. H.B. 7 (NS); *Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations*, Florida Governor's Office (Dec. 15, 2021), https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/. "Stop the Wrongs to Our Kids and Employees" provided the statute's catchy acronym—a common political signaling technique. *See* Pub. L. No. 107-56 (2001), ("Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism (USA PATRIOT ACT) Act of 2001").

[28] FLA. STAT. § 760.10(8)(a)(3) (2022) (labeling as a divisive concept the idea that a person's "status as either privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin").

[29] § 760.10(8)(a).

liability.[30] A honeymoon registry company and a diversity consultant soon filed a constitutional challenge and, in August 2022, a federal district court blocked the restriction on private employers as "a naked viewpoint-based regulation on speech that does not pass strict scrutiny."[31]

The district court relied on longstanding free-speech principles and precedents.[32] Even if Florida's legislators found some diversity trainings repugnant, "the 'remedy' for repugnant speech 'is more speech, not enforced silence.'"[33] The district court drew on the Supreme Court's longstanding assessment that "the purpose of the First Amendment [is] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[34] "If Florida truly believes we live in a post-racial society, then let it make its case," the district court held—"[b]ut it cannot win the argument by muzzling its opponents."[35] While Florida has appealed the district court's ruling and preliminary injunction,[36] the case illustrates how the First Amendment can protect some speech in the private sector—speech by employers.

The Free Speech Clause can protect private employers even when they do contract work for the government. In September 2020, President Donald Trump signed an executive order heavily penalizing federal contractors that promoted "divisive concepts" in anti-bias trainings.[37] Training providers

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[30] However, the statute does not limit optional trainings, and the topics are not banned entirely—they may be offered "in an objective manner without endorsement of the concepts." *Id.* § 760.10(8)(b); Cristina Portela Solomon & Kate L. Pamperin, *Florida's "Stop Woke" Act Limits the Topics Employers Can Discuss in D&I Training*, FOLEY & LARDNER LLP LAB. & EMP. LAW PERSP. BLOG (Mar. 28, 2022), https://www.foley.com/en/insights/publications/2022/03/florida-stop-woke-act-limits-topics-employers.

[31] Honeyfund.com, Inc. v. DeSantis, 622 F. Supp. 3d 1159, 2022 WL 3486962, at *1 (N.D. Fla. Aug. 18, 2022), *appeal docketed*, No. 22-13135 (11th Cir. Sept. 19, 2022).

[32] *Id.* at *11.

[33] *Id.* (quoting Whitney v. California, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring)). This line has become a fundamental First Amendment principle, notwithstanding the Court's recognition that "*Whitney* has been thoroughly discredited by later decisions." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (citation omitted).

[34] Honeyfund.com, Inc. v. DeSantis, 622 F. Supp. 3d 1159, 2022 WL 3486962, at *11 (N.D. Fla. Aug. 18, 2022), *appeal docketed*, No. 22-13135 (11th Cir. Sept. 19, 2022) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)).

[35] *Id.* The district court also rejected any suggestion that covered speech could fall into the less-protected "commercial speech" category and thus avoid strict scrutiny. *Id.* at *7 (applying the *Central Hudson* test).

[36] No. 22-13135 (11th Cir. Sept. 19, 2022) (state's reply brief filed Feb. 22, 2023).

[37] Exec. Order No. 13,950, 85 Fed. Reg. 60683 (Sept. 22, 2020) (revoked by Exec. Order No. 13,985, 86 Fed. Reg. 7009 (Jan. 20, 2021)). *See also* Alyssa Aquino, *Trump*

challenged the order, and within two months a California federal district court blocked the order nationwide because it likely violated the Free Speech Clause.[38] The district court noted a recent Ninth Circuit statement that "[t]here can be little question that vocational training is speech protected by the First Amendment."[39] Although the government sometimes may impose speech-related conditions on the use of public funds,[40] the district court found the order also violated the First Amendment rights of federal grant recipients because the grants were "wholly unrelated" to the banned concepts.[41] The district court appeared to recognize the government's purpose as suppressing speech based on viewpoint,[42] which precedents declare highly suspect.[43]

While these examples show private employers fending off governmental speech regulation by Republicans, the same First Amendment freedoms also constrain actions that might be favored by Democrats. For example, after a conservative editor jokingly tweeted amid a wave of media labor organizing that

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Outlaws Contractors' 'Divisive' Anti-Bias Trainings, LAW360 (Sept. 23, 2020), https://www.law360.com/articles/1312973 (discussing penalties including contract termination, debarment from federal contracting, and U.S. Department of Justice investigations).

[38] Santa Cruz Lesbian & Gay Cmty. Ctr. v. Trump, 508 F. Supp. 3d 521, 541 (N.D. Cal. 2020) (applying the *Pickering* balancing test first developed for public employees). After a change in administration, the case was dismissed with prejudice in May 2021. However, such laws limiting "divisive concepts" might survive constitutional challenges when limited to public entities. *See, e.g.*, 2021 Ark. L. Act 1100 (S.B. 627) ("A state entity shall not teach, instruct, or train any employee, contractor, staff member, or any other individual or group, to adopt or believe any divisive concepts."), *codified at* Ark. Code § 25-1-902(a). That is because the relatively new "government speech" doctrine effectively exempts official expression from First Amendment scrutiny. *See* Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 695–97 (2011) ("'[T]he Government's own speech … is exempt from First Amendment scrutiny,' even when it has the effect of limiting private speech." (quoting Johanns v. Livestock Mktg. Ass'n, 544 U.S. 550, 553 (2005))); *see also* Michael Kang & Jacob Eisler, *Rethinking the Government Speech Doctrine, Post-Trump*, 2022 U. ILL. L. REV. 1943, 1947–51 (2022).

[39] *Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 542 (quoting Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer, 961 F.3d 1062, 1069 (9th Cir. 2020)).

[40] *Id.* (quoting Rust v. Sullivan, 500 U.S. 173, 193 (1991) (allowing limits on abortion-related speech for federal family-planning funds)). *But see* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 542 (2001) (striking down a limitation on grantee speech because the grant's purpose was "not to promote a governmental message" and the grant did not make the grantee "the government's speaker").

[41] *Santa Cruz Lesbian & Gay Cmty. Ctr.*, 508 F. Supp. 3d at 543 (citing Agency for Int'l Dev. v. All. for Open Soc'y Int'l, Inc., 570 U.S. 205, 218 (2013)).

[42] *Id.* at 546 ("That this Government dislikes this speech is irrelevant to the analysis but permeates their briefing.").

[43] *See, e.g.*, Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." (citation omitted)).

"first one of you tries to unionize I swear I'll send you back to the salt mine,"[44] the Third Circuit found freedom of speech precluded the National Labor Relations Board from penalizing the employer's speech: "To give effect to Congress's intent and avoid conflict with the First Amendment, we must construe the Act narrowly when applied to pure speech, recognizing that only statements that constitute a true threat to an employee's exercise of her labor rights are prohibited."[45]

B. Compelled Speech

The "compelled speech" doctrine also protects private employers from government mandates about workplace training and other matters because "freedom of speech prohibits the government from telling people what they must say."[46] The poorly defined principle dates back to the landmark ruling that public schools could not require students to salute the American flag—even during a world war: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[47] Workplace trainings could amount to compelled speech by implicitly or explicitly requiring workers to support certain ideas, such as gender equality or preferred pronouns.[48]

The doctrine of compelled speech has limits. The Court did not find compelled speech when Congress penalized law schools that excluded military recruiters, partly because "[a] law school's recruiting services lack the expressive quality of a parade, a newsletter, or the editorial page of a newspaper."[49] One commenter suggested a compelled-speech challenge to LGBT pronoun-usage mandates would also fail, because private

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[44] Ben Domenech (@bdomenech), TWITTER (June 6, 2019, 11:39 PM), https://twitter.com/bdomenech/status/1136839955068534784.

[45] FDRLST Media, LLC v. N.L.R.B., 35 F.4th 108, 126 (3d Cir. 2022). However, the decision reaffirmed the NLRB's authority to pursue an unfair labor practice charge regardless of the filer's identity; the statute "empowers a politically-motivated busybody as much as a concerned employee or civic-minded whistleblower." *Id.* at 119.

[46] Rumsfeld v. F. Acad. & Institutional Rts., Inc., 547 U.S. 47, 61 (2006).

[47] W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[48] *See, e.g.*, text accompanying notes 129–133 regarding *Brennan*.

[49] *Rumsfeld*, 547 U.S. at 64.

employers retain "the space and the means to disavow the pronoun laws' required speech."[50]

In a somewhat ironic application, the prohibition on compelled speech also protects private employers from being forced to allow free speech: "[C]ategorical governmental imposition of First Amendment obligations on private parties presumptively conflicts with the First Amendment's core protection against government-compelled orthodoxy—including a government-compelled orthodoxy of the First Amendment itself."[51] Essentially, the Free Speech Clause not only protects the speech of private employers; it also guarantees their freedom from free speech by their workers.[52]

C. Freedom of Association

Another First Amendment right further protects private employers: the implicit freedom of association, the logical byproduct of the express freedoms of speech and assembly that was explicitly recognized in 1958.[53] Like other First Amendment rights,[54] expressive associational freedom applies not just to natural persons but also to corporations and other entities. As a leading scholar put it, "employers may have a legitimate interest in not associating themselves with people whose views they despise."[55] Employers thus have some associational right to hire and fire as they please.

Yet the Supreme Court has long recognized that employers' associational freedom is not absolute,[56] as in the 1937

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[50] Tyler Sherman, Note, *All Employers Must Wash Their Speech Before Returning to Work: The First Amendment & Compelled Use of Employees' Preferred Gender Pronouns*, 26 WM. & MARY BILL RTS. J. 219, 242–43 (citing PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 87 (1980)).

[51] Julian N. Eule & Jonathan D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537, 1539 (1998).

[52] States may provide more speech protection than the federal First Amendment does alone. *See infra* Section IV.

[53] NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 460 (1958); *see also* Democratic Party of U.S. v. Wisconsin ex rel. La Follette, 450 U.S. 107, 121 (1981) (incorporating associational freedom against states); Paul M. Secunda, *The Solomon Amendment, Expressive Associations, and Public Employment*, 54 UCLA L. REV. 1767, 1813 (2007) (noting predecessor cases implying a freedom of association).

[54] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 342–43 (2010).

[55] Eugene Volokh, *Private Employees' Speech and Political Activity: Statutory Protection Against Employer Retaliation*, 16 TEX. REV. L. & POL. 295, 301 (2012) [hereinafter Volokh (2012)].

[56] Phelps Dodge Corp. v. N.L.R.B., 313 U.S. 177, 187 (1941) ("We have already recognized the power of Congress to deny an employer the freedom to discriminate

decision to uphold the National Labor Relations Act and its prohibition on discrimination by union affiliation.[57] Another ruling the same year reversed course from the *Lochner* era to permit minimum-wage legislation and more generally defer to Congress in employment law.[58] Decades later, following the express recognition of associational freedom, the Court said it could yield to nondiscrimination rules and explicitly put employment on the outer fringes of protection, saying that a non-expressive association "such as a large business enterprise" would appear "remote from the concerns giving rise to this constitutional protection."[59] The Court memorably added that "the Constitution undoubtedly imposes constraints on the State's power to control the selection of one's spouse that would not apply to regulations affecting the choice of one's fellow employees."[60]

In an employment ruling the same year, the Court reaffirmed that "'[i]nvidious private discrimination may be characterized as a form of exercising freedom of association protected by the First Amendment, but it has never been accorded affirmative constitutional protections.'"[61] Thus, nondiscrimination statutes may override associational interests of private employers. Federal courts regularly find that nondiscrimination statutes trump employers' First Amendment rights,[62] even to the point of court-mandated promotions.[63]

However, nondiscrimination statutes generally cover status—such as race, religion, or sex—rather than speech or expressive conduct. Furthermore, recent decades have seen an

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in discharging." (citing N.L.R.B. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937))).

[57] *Jones & Laughlin Steel Corp.*, 301 U.S. at 33.

[58] W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 393 (1937) ("In dealing with the relation of employer and employed, the Legislature has necessarily a wide field of discretion . . . .").

[59] Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

[60] *Id.*

[61] Hishon v. King & Spalding, 467 U.S. 69, 78 (1984) (citation omitted) (finding Title VII's ban on sex discrimination in employment did not violate law firm's associational rights).

[62] *See, e.g.*, Norwegian Cruise Line Holdings Ltd v. State Surgeon Gen., Fla. Dep't of Health, 50 F.4th 1126, 1136 (11th Cir. 2022) ("Anti-discrimination statutes ordinarily regulate non-expressive conduct."); Telescope Media Grp. v. Lucero, 936 F.3d 740, 756 (8th Cir. 2019); Greater Philadelphia Chamber of Com. v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020) (upholding city ordinance limiting employers' use of salary history).

[63] Hopkins v. Price Waterhouse, 920 F.2d 967, 979–80 (D.C. Cir. 1990).

"antiregulatory turn in First Amendment law and litigation,"[64] which Justice Elena Kagan has denounced as "weaponizing the First Amendment."[65] It remains to be seen whether private employers beyond religious institutions might be held exempt from certain antidiscrimination rules under freedoms of speech and association,[66] much as courts recognized religious institutions' ministerial exception under the Free Exercise Clause.[67]

III. FEDERAL STATUTES WITH BROAD COVERAGE BUT NARROW PROTECTIONS

A. National Labor Relations Act

While private-sector employees cannot claim First Amendment speech protections, federal statutes shield a surprising breadth of workplace speech. The main coverage comes from the National Labor Relations Act, the 1935 law regulating union representation and establishing the National Labor Relations Board. Along with unionization, the statute protects "the right . . . to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."[68] These "concerted activities for . . . mutual aid or protection" need not take place during a unionization campaign or at a unionized workplace; all employees may take collective action to address workplace matters, regardless of any connection with a union. The Act expressly excludes independent contractors, supervisors, agricultural workers, and domestic workers.[69]

A leading scholar said the NLRA's speech protection remains "[f]irst and still foremost" for most workers, offering "a

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[64] Helen Norton, *Discrimination, the Speech That Enables It, and the First Amendment*, 2020 U. CHI. LEGAL F. 209, 210, 223 (2020).
[65] *Id.* at 223 n.60 (citing Janus v. Am. Fed'n of State, Cty., & Mun. Emps. Council 31, 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting) (describing the majority as "weaponizing the First Amendment, in a way that unleashes judges, now and in the future, to intervene in economic and regulatory policy")).
[66] Charlotte Garden, *The Deregulatory First Amendment at Work*, 51 HARV. C.R.-C.L. L. REV. 323 (2016); Paul Marshall, *Can For-Profit Corporations Be Religious?*, RELIGIOUS FREEDOM INST., https://religiousfreedominstitute.org/can-for-profit-corporations-be-religious/ (last visited Nov. 7, 2022); Burwell v. Hobby Lobby Stores, Inc., 573 U.S. 682, 707–09, 736 (2014) (holding corporations constitute persons under the Religious Freedom Restoration Act without reaching First Amendment claims).
[67] Hosanna-Tabor Evangelical Lutheran Church & Sch. v. E.E.O.C., 565 U.S. 171, 188. Owing to that exception, this Note is limited to secular employers.
[68] 29 U.S.C. § 157.
[69] 29 U.S.C. § 152(3).

rudimentary analogue to the First Amendment for the private sector workplace, complete with its own 'public forum' doctrine."[70] However, "its protections are in some ways the reverse of the actual First Amendment in public sector employment," covering "speech about working conditions, but *not* speech on matters of public concern unrelated to the interests of employees as such."[71]

In a foundational 1978 decision, the Supreme Court held that "mutual aid or protection" requires only that workers be seeking to "improve terms and conditions of employment or otherwise improve their lot as employees [even] through channels outside the immediate employee-employer relationship."[72] The "concerted activities" can range from organizing for a union and starting a worker newsletter to picketing in public and lobbying legislators.

The statute's language is "broad enough to protect concerted activities whether they take place before, after, or at the same time" as communicating collective demands to employers.[73] Discussing pay with coworkers and raising the issue with a supervisor qualifies, the Board held, because "wage discussions among employees are considered to be at the core of" concerted activities and "are often the precursor to organizing and seeking union assistance"—and "an employer violates the Act when it acts to prevent future protected activity."[74]

"Concerted activities" generally require multiple workers, but not always:

> First, individual employees are acting concertedly when they make an appeal on behalf of a group, such as when workers discuss a problem together and then designate one member of the group to discuss the issue with the boss. Second, individual employees act concertedly when they attempt to initiate group activity or make a statement that implicitly seeks support from coworkers, even if the attempt falls flat. Third, individual employees retain NLRA protection when they continue

[70] Estlund, *supra* note 1, at 427. Some workers have more generous protection from other laws.
[71] *Id.*
[72] Eastex, Inc. v. N.L.R.B., 437 U.S. 556, 565 (1978).
[73] N.L.R.B. v. Wash. Aluminum Co., 370 U.S. 9, 14 (1962).
[74] Parexel Int'l, LLC, 356 N.L.R.B. 516, 518–19 (2011) (citations omitted).

> earlier concerted activity, as when one employee asserts rights under a collective bargaining agreement.[75]

The second category—implicitly seeking coworkers' support—memorably protected a single employee who sent a long, companywide, reply-all email in response to management's request for comments on a change to their vacation policy.[76] "Assuming anyone actually cares about the company and being productive on the job," the employee wrote, the new vacation policy would hurt productivity.[77] The Board held the email alone constituted concerted activity because the employee "had a specific objective in mind for which he hoped to elicit 'mutual aid,'" namely, "to incite the other employees to help him preserve a vacation policy which he believed best served his interests, and perhaps the interests of other employees."[78] This protection extends to social media, even merely "liking" a coworker's online criticism of employment practices.[79]

However, protected purposes might be pursued "in so intolerable a manner as to lose the protection" of the Act.[80] Since the 1940s, the governing test has asked if the expression or conduct was "so violent or of such serious character as to render the employee unfit for further service."[81] The Supreme Court held that a "vitriolic attack" on the employer may cross the line into "a demonstration of such detrimental disloyalty as to provide 'cause'" for termination.[82] In the enduring "Jefferson Standard" case, the Court found disloyalty when employees "sponsored or distributed 5,000 handbills making a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income."[83]

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[75] Garden, *supra* note 66, at 34 n.31 (citations omitted).
[76] Timekeeping Sys., Inc., 323 N.L.R.B. 244, 246 (1997).
[77] *Id.*
[78] *Id.* at 248.
[79] Jeffrey M. Hirsch, *Worker Collective Action in the Digital Age*, 117 W. VA. L. REV. 921, 935–36 (2015) (discussing Hispanics United of Buffalo, Inc., 359 N.L.R.B. 368, 369 (2012); Triple Play Sports Bar & Grille, 361 N.L.R.B. 308, 310 (2014)).
[80] *Timekeeping Sys.*, 323 N.L.R.B. at 248 (citation omitted).
[81] N.L.R.B. v. Ill. Tool Works, 153 F.2d 811, 816 (7th Cir. 1946).
[82] N.L.R.B. v. Local Union No. 1229, IBEW, 346 U.S. 464, 468, 472 (1953) ("Jefferson Standard").
[83] *Id.* at 471.

Under that standard, the full Eighth Circuit recently found disloyalty when sandwich-shop workers seeking paid sick leave made public posters noting that sandwiches look the same whether made by sick or healthy employees.[84] However, some jurisdictions are more generous: In affirming the reinstatement of cable technicians who, dressed in company uniforms during TV interviews, accused the employer of pressuring them to "lie to the customers," the D.C. Circuit said public statements are protected unless "the employees' appeal rises to the level of flagrant disloyalty, wholly incommensurate with any employment-related grievance, or if the employees make maliciously untrue statements about their employer."[85]

Employees appealing to the public regarding a workplace grievance featured in a recent high-profile dispute that did not result in litigation. Amid mass protests following George Floyd's murder in May 2020, the *New York Times* published an op-ed by Senator Tom Cotton in which the Arkansas Republican called for sending in the military for an "overwhelming show of force to disperse, detain and ultimately deter lawbreakers."[86] Many *Times* employees responded by tweeting variations of "Running this put Black @nytimes staff in danger."[87] As a media-industry publication noted at the time,[88] this may well have violated the *Times*' social media policy, which said that "journalists should be especially mindful of appearing to take sides on issues that *The Times* is seeking to cover objectively."[89] But the employees'

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[84] MikLin Enters., Inc. v. N.L.R.B., 861 F.3d 812 (8th Cir. 2017) (en banc).
[85] DIRECTV, Inc. v. N.L.R.B., 837 F.3d 25, 28 (D.C. Cir. 2016).
[86] Tom Cotton, *Send In the Troops*, N.Y. TIMES (June 3, 2020), https://www.nytimes.com/2020/06/03/opinion/tom-cotton-protests-military.html.
[87] Laura Hazard Owen, *"This Puts Black @nytimes Staff in Danger":* New York Times *Staffers Band Together to Protest Tom Cotton's Anti-Protest Op-Ed*, NIEMANLAB (June 4, 2020, 2:20 PM), https://www.niemanlab.org/2020/06/this-puts-black-people-in-danger-new-york-times-staffers-band-together-to-protest-tom-cottons-anti-protest-editorial/; Jazmine Hughes (@jazzedloon), TWITTER (June 30, 2020, 7:35 PM), https://twitter.com/jazzedloon/status/1268325453061898243; Jazmine Hughes (@jazzedloon), TWITTER (June 30, 2020, 8:05 PM), https://twitter.com/jazzedloon/status/1268332919652782080 (explicitly framing debate as "a labor issue"). Cotton said he was "enjoying the @nytimes meltdown," concluding that "[t]he @nytimes is now run by the woke mob." Tom Cotton (@TomCottonAR), TWITTER (June 4, 2020, 9:40 PM), https://twitter.com/tomcottonar/status/1268719321473310720; Tom Cotton (@TomCottonAR), TWITTER (June 5, 2020, 7:20 PM), https://twitter.com/TomCottonAR/status/1269046399305486337.
[88] Owen, *supra* note 87.
[89] N.Y. TIMES, *The Times Issues Social Media Guidelines for the Newsroom* (Oct. 13, 2017), https://web.archive.org/web/20200602012916/https://www.nytimes.com/2017/10/13/reader-center/social-media-guidelines.html.

appeals to the public may have constituted collective action protected under the National Labor Relations Act, as noted at the time by a Bloomberg labor reporter[90] and an L.A. Times reporter who is also a union leader.[91]

This NLRA protection applies regardless of the workplace's unionization status and thus offers surprisingly broad protection, but it suffers a critical shortcoming: unreliability.[92] Precedents of the National Labor Relations Board are much less durable than judicial precedents because a new president often names a new partisan majority that reverses course.[93] For example, in a pro-management change late in the Trump administration, the NLRB abandoned a forty-year-old precedent in holding that concerted activity loses protection when it veers into "opprobrious" speech that is uncivil or abusive.[94] Now, under the Biden administration, the NLRB is likely to reverse course.[95]

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[90] Josh Eidelson (@josheidelson), TWITTER (Jan. 3, 2020, 7:56 PM), https://twitter.com/josheidelson/status/1268330795761975296; Josh Eidelson (@josheidelson), TWITTER (Jan. 3, 2020, 9:24 PM), https://twitter.com/josheidelson/status/1268352943603896320.

[91] Matt Pearce (@mattdpearce), TWITTER (June 3, 2020, 7:35 PM), https://twitter.com/mattdpearce/status/1268325344836112385.

[92] Garden, *supra* note 66, at 15.

[93] *See* Robert Iafolla, *Labor Board Repeatedly Topples Precedent Without Public Input*, BLOOMBERG LAW (July 12, 2019, 6:15 AM), https://news.bloomberglaw.com/daily-labor-report/labor-board-repeatedly-topples-precedent-without-public-input; Robert Iafolla, *New NLRB Majority Can Swiftly Alter Labor Law with Cases at Hand*, BLOOMBERG LAW (Sept. 8, 2021, 5:47 AM), https://news.bloomberglaw.com/daily-labor-report/new-nlrb-majority-can-swiftly-alter-labor-law-with-cases-at-hand ("'Board members aren't judges, they're policymakers,' said Anne Lofaso, a labor law professor at West Virginia University and former NLRB lawyer.").

[94] Gen. Motors LLC, 369 N.L.R.B. No. 127, 2020 WL 4193017 at *9 (rejecting Atl. Steel Co., 245 N.L.R.B. 814 (1979)); *see also* Jonathan J. Spitz & Richard D. Landau, *Labor Board Sets New Standard for Determining When Abusive Workplace Conduct Is Unprotected*, JACKSON LEWIS (July 22, 2020), https://www.jacksonlewis.com/publication/labor-board-sets-new-standard-determining-when-abusive-workplace-conduct-unprotected.

[95] Garden, *supra* note 66, at 15; Braden Campbell, *Lawmakers Reopen Rift over Labor, Bias Laws' Intersection*, LAW360 (May 18, 2022, 8:42 PM), https://www.law360.com/employment-authority/articles/1494622/lawmakers-reopen-rift-over-labor-bias-laws-intersection; Braden Campbell, *5 Cases that Could Shift NLRB Precedent in 2022*, LAW360 (Jan. 3, 2022, 12:03 PM), https://www.law360.com/employment-authority/articles/1450602/5-cases-that-could-shift-nlrb-precedent-in-2022; Gary Enis & Amber M. Rogers, *Memo from NLRB General Counsel Signals Upcoming Shifts in Board Precedent*, HUNTON EMPLOYMENT & LABOR PERSPECTIVE (Aug. 26, 2021), https://www.huntonlaborblog.com/2021/08/articles/nlrb/memo-from-nlrb-general-counsel-signals-upcoming-shifts-in-board-precedent/.

B. Whistleblowers and Anti-Retaliation Provisions

Private-sector workers can find some protection under a wide variety of federal statutes that prohibit retaliation against whistleblowers and other employees. The U.S. Department of Labor tallies anti-retaliation provisions in twenty-five distinct laws ranging from occupational safety to finance to health insurance.[96] Anti-retaliation provisions continue to receive fairly broad interpretation to accomplish the legislative purpose of effective enforcement, even as new precedents in other areas often side with management.[97] For instance, the Sarbanes-Oxley Act of 2002 "protects employees who provide information about suspected violations to law enforcement, members of Congress, or their own supervisors, as well as employees who participate in enforcement proceedings"[98]—and not just direct employees but also "employees of contractors and subcontractors."[99] However, a leading scholar calls the anti-retaliation provisions "islands of protection in a sea of employer discretion."[100] They often protect only reporting through specific avenues.

C. Civil Rights Laws

Eugene Volokh found a relatively obscure federal statute that can protect "supporting or advocating for a federal candidate . . . probably, in some circuits":[101] the Civil Rights Act of 1871. The Reconstruction-era statute, also known as the Ku Klux Klan Act, provides a private right of action when "two or more persons" conspire to interfere with civil rights—including "to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner" for candidates in federal elections, "or to injure any citizen in person or property on account of such support or advocacy."[102]

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[96] OSHA, *Statutes*, U.S. DEP'T OF LAB., https://www.whistleblowers.gov/statutes (last visited June 4, 2023).
[97] *See* Richard Moberly, *The Supreme Court's Antiretaliation Principle*, 61 CASE W. RES. L. REV. 375, 416–17 (2010) ("[T]he win-loss record for employees in retaliation cases conflicts with the conventional wisdom that this Court generally favors business interests in employment cases." (footnote omitted)).
[98] Garden, *supra* note 66, at 20; *see also* 18 U.S.C. § 1514A.
[99] Lawson v. FMR LLC, 571 U.S. 429, 459 (2014).
[100] Estlund, *supra* note 1, at 428.
[101] Volokh (2012), *supra* note 55, at 321 (capitalization altered).
[102] 42 U.S.C. § 1985(3).

Crucially for the employment context, Volokh notes a 1998 Supreme Court decision "interpreting a closely analogous portion of the same statute" and holding that injury to property "includes getting the person fired from his job, and that an agreement among two or more managers of a company to get the employee fired from the company may constitute an actionable 'conspir[acy]'"[103]—even though the fired employee was employed at-will. The succinct unanimous opinion by Chief Justice William Rehnquist recognized a viable claim by an at-will employee allegedly fired for obeying a subpoena and testifying about the company's health care fraud,[104] "hold[ing] that the sort of harm alleged by petitioner here—essentially third-party interference with at-will employment relationships—states a claim for relief under § 1985(2)."[105]

But lower courts have "substantially limited, or even erased" the 1871 statute's application in employment.[106] Volokh notes the claim appears precluded in about half of the regional federal circuits "by the 'intra-corporate conspiracy' doctrine, under which a conspiracy is not actionable if the conspirators consist of employees of the same corporation (plus perhaps the corporation itself)."[107] The doctrine does not apply to Section 1985 claims in at least two circuits, perhaps more.[108] Craig R. Senn notes other judicial limitations requiring "'state action' or 'violation of an independent, substantive federal right.'"[109] Although Volokh argues for allowing employment claims under the 1871 statute, Senn views it as a narrow and unreliable path.

In addition, Title VII of the Civil Rights Act of 1964 offers broad protection for workers who participate in relevant investigations or otherwise oppose unlawful workplace discrimination,[110] whether it be intentional "disparate treatment" or statistical "disparate impact."[111]

Of course, anti-discrimination rules can create tension with free-speech principles. Title VII expressly includes

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[103] Volokh (2012), *supra* note 55, at 321 (citing Haddle v. Garrison, 525 U.S. 121, 123, 126 (1998)).
[104] *Haddle*, 525 U.S. at 122–23.
[105] *Id.* at 126.
[106] Craig R. Senn, *Ending Political Discrimination in the Workplace*, 87 MO. L. REV. 365, 395 (2022).
[107] Volokh (2012), *supra* note 55, at 321–22.
[108] *Id.* at 322.
[109] Senn, *supra* note 106, at 400.
[110] *See* Moberly, *supra* note 97, at 408–13, 423–25.
[111] Ricci v. DeStefano, 557 U.S. 557, 577 (2009); *see also* Griggs v. Duke Power Co., 401 U.S. 424, 432–33 (1971).

religion,[112] but the Supreme Court notably held in *Bostock* that it also covers sexual orientation and gender identity within the term "sex."[113] So what happens when religious accommodation and LGBT inclusion are at odds—not under the First Amendment, as in *Masterpiece Cakeshop*[114] and *303 Creative*,[115] but under anti-discrimination law? Two employment-law practitioners posed this hypothetical:

> An LGBTQ employee attends a gay pride celebration, and while there, notices that his colleague (and that colleague's church) are present to protest the celebration. If the LGBTQ employee later complains that the religious employee is harassing him at work, can the employer properly consider whether the religious employee's off-duty conduct suggests an on-duty bias on the basis of sexual orientation?[116]

The practitioners warn that "the employer must carefully balance its response to these allegations to ensure that it is demonstrating sufficient efforts to prevent discrimination or harassment based on sexual orientation without also signaling a bias against religious employees."[117]

Well before *Bostock*, the Ninth Circuit allowed termination for insubordination where a conservative Christian employee refused to take down posters with anti-gay Bible verses amid a diversity campaign.[118] The company did not interfere when the employee of twenty years wrote a letter to the editor decrying the company's push "to promote the homosexual agenda"; it did not limit his parking lot access when he displayed a bumper sticker proclaiming that "Sodomy is Not a Family Value."[119] The court held the plaintiff failed to provide evidence of disparate treatment and made unreasonably inflexible demands for accommodation.[120]

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[112] 42 U.S.C. § 2000e-2(a).
[113] Bostock v. Clayton Cnty., 140 S. Ct. 1731, 1743 (2020).
[114] Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719 (2018).
[115] 303 Creative LLC v. Elenis, No. 21-476 (U.S. argued Dec. 5, 2022).
[116] Shannon S. Pierce & Veronica A. Peterson, *Does the First Amendment Protect Employees in Private Employment? Not Really, but the Answer Is Not That Simple*, 26 NEV. LAW. 11, 11–12 (Nov. 2018).
[117] *Id.* at 12.
[118] Peterson v. Hewlett-Packard Co., 358 F.3d 599, 604–05, 608 (9th Cir. 2004).
[119] *Id.* at 604.
[120] *Id.* at 605, 608.

However, a more recent district court ruling[121] shows how employers might be limited in what LGBT inclusion can be required of traditionalist religious employees. A conservative Christian employee charged that his employer failed to accommodate his religion when it refused to excuse him from an online ethics test that he could only pass by using updated gender pronouns for a hypothetical transgender colleague; in 2019 a federal district judge in Maryland denied summary judgment for the employer.[122] The worker ultimately lost at trial because the jury did not agree that "the plaintiff's sincerely held religious conflicted with an employment requirement" of the employer.[123] Regardless of the trial outcome, this case clearly illustrates the tension that can arise within nondiscrimination requirements—especially given that the employer required the ethics training pursuant to a 2016 EEOC settlement and consent decree following alleged discrimination against a transgender employee.[124]

IV. STATE CONSTITUTIONS AND COMMON LAW: DEAD ENDS FOR EMPLOYEES

While the state-action doctrine means the federal First Amendment does not protect workers' speech in private employment,[125] all but six state constitutions have free-speech provisions not expressly limited to governmental conduct.[126] The wording is typically similar to that which Connecticut adopted in 1818: "Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty."[127] The linguistic lineage appears to stretch back at least to 1776, when Pennsylvania's first constitution used

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[121] Brennan v. Deluxe Corp., 361 F. Supp. 3d 494 (D. Md. 2019).
[122] *Id.* at 508.
[123] Verdict Sheet, Brennan v. Deluxe Corp., 361 F. Supp. 3d 494 (D. Md. 2022) (No. ELH-18-2119), https://www.courtlistener.com/docket/8410371/159/brennan-v-deluxe-corporation/.
[124] Anne Cullen, *Trans Bias Course Didn't Trample Worker's Beliefs, Jury Says*, LAW360 (Mar. 4, 2022), https://www.law360.com/employment-authority/articles/1470922/trans-bias-course-didn-t-trample-worker-s-beliefs-jury-says.
[125] *See supra* Part I.
[126] *See* Note, *Private Abridgment of Speech and the State Constitutions*, 90 YALE L.J. 165, 180 n.79 (1980).
[127] CONN. CONST. art. I, § 4 (amended 1818 (as Section 5, https://www.cga.ct.gov/asp/Content/constitutions/1818_Constitution.pdf)). For a listing of the many states with the phrasing: http://stateconstitutions.umd.edu/Search/Search.aspx (search "freely speak").

similar phrasing.[128] The lack of explicit language limiting the protection to state action opens the door to finding protection against private suppression of free speech.

A liberal lion of the U.S. Supreme Court urged that approach in 1977. After two decades on the Court, Justice William J. Brennan Jr. mourned the end of an era in which the "decisions of the Supreme Court of the United States have returned to the fundamental promises wrought by the blood of those who fought our War between the States, promises which were thereafter embodied in our [F]ourteenth [A]mendment."[129] Early in the conservative backlash to the Warren Court's expansive interpretations, Justice Brennan suggested "the full realization of our liberties" required reaching beyond federal law: "State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law."[130] He argued the federal Supreme Court had grown less protective of First Amendment freedoms,[131] among others, and suggested appeals to state constitutional provisions[132]—even those identical to clauses of the federal Constitution.[133]

As a federal circuit judge focused on state constitutional law explained, "state constitutions provide a greater chance to vindicate rights because state supreme courts, the decisions of which affect only one state, often feel less constrained than does the U.S. Supreme Court and have greater flexibility to tailor their

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[128] "That the people have a right to freedom of speech, and of writing, and publishing their sentiments; therefore the freedom of the press ought not to be restrained." PA. CONST. OF 1776, ch. I, cl. 12. That soon shifted to a permutation of the more common phrasing: "[E]very citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty." PA. CONST. of 1790, art. 9, § 7. This common phrasing is found in Pennsylvania's current constitution. *See* PA. CONST. art. 1, § 7. Notably, the 1776 Virginia Declaration of Rights, a precursor of the federal Bill of Rights, discusses press freedom but not a general freedom of speech. VA. DECLARATION OF RIGHTS § 12 ("That the freedom of the press is one of the greatest bulwarks of liberty and can never be restrained but by despotic governments.").

[129] William J. Brennan Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 490 (1977). *See also* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 549 (1986).

[130] Brennan, *State Constitutions and the Protection of Individual Rights*, *supra* note 129, at 491.

[131] *Id.* at 496.

[132] *Id.* at 502.

[133] *Id.* at 495.

interpretations to 'local conditions and traditions.'"[134] And while federal preemption prevents states from curtailing federal rights, states are free to *expand* those rights.[135]

However, many state constitutions' speech clauses have also been limited to state action even when they do not expressly limit their scope to governmental conduct.[136] For example, although Wisconsin's constitution contains the common phrasing without an express governmental reference, the state's highest court in 1987 limited the protection to state action because "[t]he historical intention of state constitutions, including Wisconsin's, was a reaction to the dire experience with England to recognize rights of the people and protect them from *governmental* interference."[137] The court found strong evidence of the state-action requirement in the second clause,[138] which requires that "no laws shall be passed to restrain or abridge the liberty of speech or of the press."[139]

In many other state constitutions, however, the speech protection stands alone, without any reference to governmental action.[140] The California Supreme Court thus held in 1979 that the state constitution's "protective provision [is] more definitive and inclusive than the First Amendment" to the federal

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[134] Recent Book (reviewing JEFFREY S. SUTTON, 51 IMPERFECT SOLUTIONS: STATES AND THE MAKING OF AMERICAN CONSTITUTIONAL LAW (2018)), 132 HARV. L. REV. 811, 812 n.10 (2018) (citing page 17 of the book).

[135] "The Supreme Court has recognized for some time that the states possess the authority to provide greater protection against encroachments upon individual liberties than those provided under the federal constitution." Gregory Allen, *Ninth Amendment and State Constitutional Rights*, 59 ALB. L. REV. 1659, 1659 (1996) (citing Oregon v. Hass, 420 U.S. 714, 719 (1975) ("[A] State is free as a matter of its own law to impose greater restrictions on police activity than those this Court holds to be necessary upon federal constitutional standards."); Cooper v. California, 386 U.S. 58, 62 (1967) ("Our holding, of course, does not affect the State's power to impose higher standards on searches and seizures than required by the Federal Constitution if it chooses to do so.").

[136] David Schultz & David L. Hudson Jr., *State Constitutional Provisions on Expressive Rights*, THE FIRST AMEND. ENCYCLOPEDIA (2009, updated 2017), https://www.mtsu.edu/first-amendment/article/874/state-constitutional-provisions-on-expressive-rights ("Most state high courts continued to interpret their state freedom of expression guarantees similarly, if not identically, to the way the U.S. Supreme Court has interpreted the First Amendment.").

[137] Jacobs v. Major, 407 N.W.2d 832, 840 (Wis. 1987) (emphasis added).

[138] *Id.* at 837 ("They are related to each other with the first expressing the right to free speech *and* the second stating the entity, the state, against whom the right is shielded.").

[139] WIS. CONST. art. I, § 3.

[140] *See* CONN. CONST. art. I, § 4. California's speech provision stands alone but is followed by this statement: "A law may not restrain or abridge liberty of speech or press." CAL. CONST. art. I, § 2(a).

Constitution.[141] The state high court rejected a private shopping center's decision "not to permit any tenant or visitor to engage in publicly expressive activity," even though "[t]he policy seems to have been strictly and disinterestedly enforced."[142] The state free-speech provision, together with the subsequent petition clause, led the court to "hold that the soliciting at a shopping center of signatures for a petition to the government is an activity protected by the California Constitution."[143] This went far beyond the federal First Amendment's reach at private shopping centers, as interpreted in *Lloyd*[144] and *Hudgens*.[145] Yet the federal Supreme Court agreed that the California high court's interpretation did not "violate the shopping center owner's property rights under the Fifth and Fourteenth Amendments or his free speech rights under the First and Fourteenth Amendments."[146]

Following *PruneYard*, a few other state high courts similarly found broader protection in state speech provisions.[147] Five months after the U.S. Supreme Court's green light, New Jersey's highest court found the state freedoms of speech and assembly went beyond the federal freedoms, requiring a private university to let a visitor distribute political literature.[148] The state high court has more recently emphasized that the New Jersey Constitution's speech provision[149] offers "greater

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[141] Robins v. Pruneyard Shopping Ctr., 592 P.2d 341, 346 (Cal. 1979), *aff'd*, 447 U.S. 74 (1980) (citation omitted).
[142] *Id.* at 342.
[143] *Id.*
[144] Lloyd Corp. v. Tanner, 407 U.S. 551 (1972).
[145] Hudgens v. N.L.R.B., 424 U.S. 507 (1976).
[146] PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 76–77 (1980).
[147] Genevieve Lakier, *The Non-First Amendment Law of Freedom of Speech*, 134 HARV. L. REV. 2299, 2302 (2021) ("Although state constitutional law has proven to be less of an important source of free speech protection than some hoped or predicted after the *Pruneyard* decision, courts in New Jersey, California, and a number of other states have for many decades now interpreted state constitutional guarantees of expressive freedom to confer rights that the First Amendment does not confer." (footnotes omitted)).
[148] State v. Schmid, 423 A.2d 615, 628 (N.J. 1980) ("These guarantees extend directly to governmental entities as well as to persons exercising governmental powers. They are also available against unreasonably restrictive or oppressive conduct on the part of private entities that have otherwise assumed a constitutional obligation not to abridge the individual exercise of such freedoms because of the public use of their property.").
[149] N.J. CONST. art. I, § 6 ("Every person may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that right.").

protection than the First Amendment" with a provision "broader than practically all others in the nation."[150]

Yet New Jersey's high court appears reluctant to extend speech protections to employment, even in the public sector. In 1998, the court acknowledged it sometimes finds broader speech rights under the state constitution but nevertheless applied federal First Amendment case law to a municipal employee.[151] The unanimous decision reinstated discipline against an off-duty firefighter who directed a racial slur at a police officer when pulled over in a drunk-driving traffic stop, finding the slur was not protected under the framework for public employees' speech.[152] The state speech provision received one solitary citation in a 2009 case that relied almost entirely on the federal First Amendment to reject a labor union official's conviction for deploying an inflatable giant rat under "a municipal sign ordinance that prohibited all but a few exempted signs and that expressly prohibited 'portable signs[,] balloon signs or other inflated signs (excepting grand opening signs).'"[153]

An identical speech provision also appears in the Connecticut Constitution.[154] In 2015, the Connecticut Supreme Court said it had "clearly held that at least some employee speech in the workplace is constitutionally protected."[155] The speech provision's "broad and encompassing language supports the conclusion that the state constitution protects employee speech in the *public* workplace on the widest possible range of topics, as long as the speech does not undermine the employer's

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[150] Mazdabrook Commons Homeowners' Ass'n v. Khan, 46 A.3d 507, 513 (N.J. 2012) (citation omitted) (prohibiting private homeowners' association from banning all political signs).

[151] Karins v. City of Atl. City, 706 A.2d 706, 713 (N.J. 1998) ("We rely on federal constitutional principles in interpreting the free speech clause of the New Jersey Constitution."); Siss v. Cnty. of Passaic, 75 F. Supp. 2d 325, 341 (D.N.J. 1999) ("[I]f the New Jersey Constitution does protect public employees against patronage dismissals, its protections are no greater than those under the first amendment to the United States Constitution."), *aff'd*, 234 F.3d 1265 (3d Cir. 2000).

[152] *Karins*, 706 A.2d at 707.

[153] State v. DeAngelo, 963 A.2d 1200, 1202 (N.J. 2009) (brackets in original). Although the opinion does not name the rat, presumably this regarded Scabby. *See* Justin Hicks, *How a Beloved Giant Rat Won Free Speech Rights*, NPR (Aug. 6, 2021), https://www.npr.org/2021/08/06/1024315097/how-a-beloved-giant-rat-won-free-speech-rights; Tim Ryan, *NLRB Tosses Bid to Deflate Scabby the Rat*, LAW360 (July 21, 2021), https://www.law360.com/employment-authority/articles/1405368/nlrb-tosses-bid-to-deflate-scabby-the-rat.

[154] CONN. CONST. art. I, § 4 ("Every citizen may freely speak, write and publish his sentiments on all subjects, being responsible for the abuse of that liberty.").

[155] Trusz v. UBS Realty Invs., LLC, 123 A.3d 1212, 1218 (Conn. 2015) (citing Cotto v. United Technologies Corp., 738 A.2d 623 (Conn. 1999)).

legitimate interest in maintaining discipline, harmony and efficiency in the workplace."[156] As one First Amendment analyst explained,

> [T]he Connecticut state high court rejected the rule articulated by the U.S. Supreme Court . . . that when public employees make statements pursuant to their official job duties, the First Amendment provides them no protection. The *Trusz* decision is significant, because it provides an excellent example of a state high court providing greater protection for free speech under its state constitution than the U.S. Supreme Court did in interpreting the First Amendment of the U.S. Constitution.[157]

Critically for the private sector, the Connecticut Supreme Court held that the state's broad speech-protection employment statute "extends the same protection to employee speech pursuant to official job duties in the *private* workplace."[158]

Connecticut and New Jersey show how state courts might use similar speech provisions in state constitutions to provide protections even in private at-will employment. However, "New Jersey and Connecticut are more exceptions than the rule."[159] This shows that a long-sought[160] approach has yet to gain broad traction, although it continues to draw interest from commentators.[161]

State constitutions have served as one source of public policy for the common law tort of wrongful discharge in violation of public policy, which is recognized at least to some

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[156] *Id.* at 1221 (emphasis added).
[157] David L. Hudson Jr., Trusz v. UBS Realty Invs., LLC *(Conn.) (2015)*, THE FIRST AMEND. ENCYCLOPEDIA (2017), https://mtsu.edu/first-amendment/article/1546/trusz-v-ubs-realty-investors-llc-conn.
[158] *Trusz*, 123 A.3d at 1214 (emphasis added).
[159] Schultz & Hudson, *supra* note 136.
[160] Note, *Free Speech, the Private Employee, and State Constitutions*, 91 YALE L.J. 522, 549 (1982).
[161] *See* Andrei Gribakov Jaffe, Note, *Digital Shopping Malls and State Constitutions–A New Font of Free Speech Rights?*, 33 HARV. J.L. & TECH. 269, 272 (2019); David M. Howard, Article, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 279 (2017) ("The doctrine's policies are even less persuasive under the state constitutions, as the state action doctrine was created partly to protect the system of federalism in this country, allowing the states to use their plenary power to regulate private relationships.").

degree in almost all states.[162] However, that has not proved a fruitful avenue for First Amendment principles. "Most courts do not recognize wrongful-discharge claims against private employers based on free-speech rights because the federal and most state constitutional free-speech protections constrain governments, and thus do not apply to private-sector employers."[163]

Notably, the Third Circuit in 1983 sought to extend protections to private employment in Pennsylvania based on "the importance of the political and associational freedoms of the federal and state Constitutions."[164] The panel in *Novosel* used those sources of public policy to find a wrongful discharge where an insurer's employee alleged he was fired for refusing to lobby state lawmakers about insurance reforms.[165] The decision held that "an important public policy is in fact implicated wherever the power to hire and fire is utilized to dictate the terms of employee political activities."[166] However, the *Novosel* approach never gained traction.[167] The Pennsylvania Supreme Court rejected *Novosel*'s interpretation of the state constitution.[168] Even the Third Circuit retreated from *Novosel*, recognizing the holding as limited to the facts of the case.[169] Indeed, a leading scholar calls *Novosel* the "exception that proves the rule" because it "is widely admired by employment law scholars, but widely criticized or ignored in the courts."[170]

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[162] Stephen P. Pepe and Scott H. Dunham, Avoiding & Def. Wrongful Discharge Cl. § 1:5 (Feb. 2023 update) (identifying Alabama, Montana, New York, and possibly Nebraska as the "few states still reject the common law 'public policy' discharge theory").

[163] Restatement (Third) of Employment Law § 5.02; *see also* Garden, *supra* note 66, at 26; Grinzi v. San Diego Hospice Corp., 120 Cal. App. 4th 72, 81–82 (2004) (finding consistent decisions across jurisdictions).

[164] Novosel v. Nationwide Ins. Co., 721 F.2d 894, 899 (3d Cir. 1983).

[165] *Id.* at 896.

[166] *Id.* at 900.

[167] Edmondson v. Shearer Lumber Prods., 75 P.3d 733, 738–39 (Idaho 2003) (finding *Novosel* was never "endorsed by any other court"); Tiernan v. Charleston Area Med. Ctr., Inc., 506 S.E.2d 578, 589 (W. Va. 1998).

[168] Paul v. Lankenau Hosp., 569 A.2d 346, 348 (Pa. 1990) ("Exceptions to this rule have been recognized in only the most limited of circumstances, where discharges of at-will employees would threaten clear mandates of public policy." (quoting Clay v. Advanced Computer Applications, 559 A.2d 917 (Pa. 1989) (citing Geary v. United States Steel Corp., 319 A.2d 174 (Pa. 1974)))).

[169] Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992), as amended (May 29, 1992); Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107, 112–13 (3d Cir. 2003) ("[W]e have essentially limited Novosel to its facts—a firing based on forced political speech."), as amended (Jan. 20, 2004).

[170] Estlund, *supra* note 1, at 429.

V. THE PRESENT PATCHWORK OF STATE LAWS AND A BALANCED MODEL STATUTE

A. Current Extent

Today, at least 28 states have statutes protecting at least some speech or political activity by private-sector workers.[171] Only half of those states offer comprehensive protection from retaliation for exercising political rights.[172] Eugene Volokh has catalogued some type of protective statute in 27 states along with the District of Columbia and three U.S. territories,[173] later noting Utah's addition.[174] Only five states have statutes that broadly protect off-duty lawful conduct.[175] Another eight specifically cover political activity.[176] Fifteen more protect at least some form of political activity.[177]

A few samples provide illustration and inspiration for a model statute. Connecticut has one of the broadest statutes, which essentially extends to the private sector the protections that public employees enjoy under the First Amendment and the state constitution's speech provision—"provided such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between

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[171] Volokh (2012), *supra* note 55, at 297.

[172] *Id.*

[173] *Id.*

[174] Eugene Volokh, *Opinion: Can Private Employers Fire Employees for Going to a White Supremacist Rally?*, WASH. POST (Aug. 16, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/08/16/can-private-employers-fire-employees-for-going-to-a-white-supremacist-rally/. Interestingly for a red-state statute predating *Bostock*, Utah's 2015 law protecting "religious, political, or personal convictions" also listed sexual orientation and gender identity as protected classes. 2015 Utah Laws Ch. 13 (S.B. 296); UTAH CODE ANN. § 34A-5-106(1)(a)(i)(I)–(J). Express exemptions cover religious entities and the Boy Scouts of America. UTAH CODE ANN. § 34A-5-102(1)(i)(ii)(C). *See also* Eugene Volokh, *Should the Law Limit Private-Employer-Imposed Speech Restrictions?*, 2 J. FREE SPEECH L. 269, 269 (2022) [hereinafter Volokh (2022)] (noting the addition of Utah and various counties and cities).

[175] Colorado, North Dakota, Montana, Connecticut, and New York; the last is probably the most narrow but would still cover most pure speech. Volokh (2012), *supra* note 55, at 296.

[176] California, Louisiana, Minnesota, Missouri, Nebraska, Nevada, South Carolina, and West Virginia, plus Guam. *Id.*

[177] *Holding or expressing political views:* Utah and New Mexico. *Party affiliation:* Iowa and Louisiana, plus D.C., Puerto Rico, and the U.S. Virgin Islands. *Electoral activities:* Illinois, New York, and Washington state. *Signing petitions and initiatives:* Arizona, Georgia, Iowa, Minnesota, Missouri, Ohio, Oregon, and Washington state, plus D.C. *Campaign contributions:* Louisiana, Massachusetts, and Oregon. *Voting and possibly signing petitions:* Hawaii, Idaho, Kentucky, Tennessee, and Wyoming, plus Guam. *Id.*

the employee and the employer."[178] The text of South Carolina's statute looks like fairly broad statutory protection for political activity—forbidding "discharge . . . because of political opinions or the exercise of political rights and privileges guaranteed to every citizen"[179]—but judicial interpretations have narrowed its reach.[180]

B. History

Such statutory protection for off-duty political expression predates the Republic, which should address any qualms about whether such statutes exceed the original understanding of First Amendment principles.[181] As early as 1721, some colonies enacted "the very first American laws banning employment discrimination by private employers--voter protection laws, which barred employers from discriminating against employees based on how the employees voted . . . [in] the era before the secret ballot."[182] Starting in the 1830s, states began adopting statutes to more explicitly forbid economic retaliation for voting.[183] One scholar reports that Democrats sought to protect the party's base of working men: "Fear that Whig-supporting employers were using their economic power to prevent their supporters from voting appears to have motivated at least some of these laws--for example, [an] 1846 Connecticut law."[184]

After the Civil War, a new major political party's self-interest aligned with voter protection. The 1860s saw "a burst of such lawmaking in the Reconstruction-era South, triggered by the Republican concern that southern employers were pressuring their employees to vote against the Republicans."[185] 1868 saw the first explicit protection for political activity beyond voting as

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[178] CONN. GEN. STAT. § 31-51q(b)(1); Henry Voysey, Comment, *Can Political Activism and "At-Will" Employment Coexist?: An Examination of Political Rights in the Private Sector of the Workforce*, 290 UMKC L. REV. 965, 978–79 (2022) (citing Trusz v. UBS Realty Inv'rs, LLC, 123 A.3d 1212, 1220 (Conn. 2015); Schumann v. Dianon Sys., Inc., 43 A.3d 111, 121 (Conn. 2012) (finding the statute "serves to vitiate the state action requirement with respect to private sector employers")).

[179] S.C. CODE ANN. § 16-17-560 (1976).

[180] Voysey, *supra* note 178, at 982–83.

[181] Volokh (2012), *supra* note 55, at 297–98.

[182] *Id.* at 297. The secret ballot was not common in the United States until about 1890. Jamie L. Carson & Joel Sievert, *Electoral Reform and Changes in Legislative Behavior: Adoption of the Secret Ballot in Congressional Elections*, 40 LEGIS. STUDIES Q. 83, 83 (2015), https://doi.org/10.1111/lsq.12066.

[183] Volokh (2012), *supra* note 55, at 299–300.

[184] Lakier, *supra* note 147, at 2333.

[185] Volokh (2012), *supra* note 55, at 300 (footnotes omitted).

"Louisiana and South Carolina banned discrimination against most private employees based on 'political opinion.'"[186]

Aside from narrow protections for political activity, employers often were free to exercise extensive control over workers' lives. In the 1800s, "coal mines and steel mills imported Irish and German immigrants, put them in company housing, saw them off to church and taught them American mores."[187] "Owners of early factories believed they had the right, indeed the responsibility, to strictly control many aspects of their employees' lives, on and off the job."[188] That often included "work rules governing church attendance, place of residence, and nightly curfews."[189] Into the 1910s, Henry Ford had dozens of social workers "investigate employees' neighborhoods, home conditions, finances, and habits to determine if they were worthy of profit sharing bonuses."[190] The automaker distributed a booklet of "Helpful Hints and Advice to Employees" that discouraged "drinking, gambling, borrowing money, taking in boarders and poor hygiene."[191]

One modern wave of state laws protecting employees' off-duty conduct originated as "smoker protection" laws or "Smoker's Rights Acts" that limited how employers could consider smoking, either on or off the job. Twenty-nine states and the District of Columbia have laws protecting smokers from adverse employment actions,[192] with eighteen jurisdictions limited to tobacco while eight states protect the use of all "lawful products" and a handful broadly protect lawful off-duty conduct.[193] Illinois adopted the first in 1987, quickly followed by

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[186] *Id.* at 300–01.

[187] Peter T. Kilborn, *The Boss Only Wants What's Best for You*, N.Y. TIMES (May 8, 1994), https://www.nytimes.com/1994/05/08/weekinreview/the-nation-the-boss-only-wants-what-s-best-for-you.html.

[188] U.S. Congress Office of Technology Assessment, *The Electronic Supervisor: New Technology, New Tensions*, OTA-CIT-333 (1987) at 18–19, https://ota.fas.org/reports/8708.pdf.

[189] *Id.*

[190] *Id.* Ford also "created a department of 100 investigators for door-to-door checks." Kilborn, *supra* note 187.

[191] Kilborn, *supra* note 187.

[192] *State "Smoker Protection" Laws*, AM. LUNG ASS'N, https://www.lung.org/policy-advocacy/tobacco/slati/appendix-f (last updated Oct. 27, 2022).

[193] Joanne Deschenaux, *Is a 'Smoker-Free' Workplace Right for You?*, HR MAG. (July 1, 2011) https://www.shrm.org/hr-today/news/hr-magazine/pages/0711deschenaux.aspx. The application to state-legal marijuana is complicated. *See* Amy. J. Kellogg et al., *A Cannabis Conflict of Law: Federal vs. State Law*, BUS. LAW TODAY (Mar. 21, 2022), https://www.americanbar.org/groups/business_law/publications/blt/2022/04/can

tobacco-friendly Virginia in 1989 and more than twenty additional states in the next three years.[194] "Tobacco interests and, to some extent, the American Civil Liberties Union" engaged in "titanic lobbying struggles" to promote the laws as about 17% of American companies expressed a formal preference for hiring non-smokers.[195]

C. Debating the Merits

In his encyclopedic accounting of statutory speech protections, Volokh surprisingly questions their merit. First, he says, "employers may have a legitimate interest in not associating themselves with people whose views they despise."[196] He also argues that "employees are hired to advance the employer's interests, not to undermine it"—so if "an employee's speech or political activity sufficiently alienates coworkers, customers, or political figures, an employer may reasonably claim a right to sever his connection to the employee."[197] Volokh raises strong objections, later warning that "laws limiting private-employer-imposed speech restrictions might be a cure that's worse than the disease."[198] Do employers have to keep employing, paying, working with, and associating with workers who express controversial views the employers hate?

The point calls to mind the classic First Amendment principle that "the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the

nabis-fed-vs-state-law/; Lisa Nagele-Piazza, *Marijuana and the Workplace: What's New for 2020?*, HR MAG. (Jan. 17, 2020), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/marijuana-and-the-workplace-new-for-2020.aspx.

[194] *State "Smoker Protection" Laws*, AM. LUNG ASS'N, https://www.lung.org/policy-advocacy/tobacco/slati/appendix-f (last updated Oct. 27, 2022) (citing 820 ILL. COMP. STAT. 55/5, VA. CODE ANN. § 2.2-2902, etc.). The statutes' reach varies widely; for example, Virginia is limited to public employers. *See* John Malouff et al., *US Laws that Protect Tobacco Users from Employment Discrimination*, 2 TOBACCO CONTROL 132, 133 (1993), https://www.jstor.org/stable/20747311 ("No two . . . state smokers' rights laws are identical, but there are many similarities among them. All . . . prohibit employers from discriminating against employees who smoke off the job. None of the laws requires employers to allow smoking on the job or on the employer's premises.").

[195] Malouff et al., *supra* note 194, at 132–33 (citing BUREAU OF NAT'L AFFS., *SHRM-BNA Survey No. 55, Smoking in the Workplace: 1991* (1991), https://dl.tufts.edu/pdfviewer/n583z5534/fj236d469.

[196] Volokh (2012), *supra* note 55, at 301 (footnotes omitted).

[197] *Id.*

[198] Volokh (2022), *supra* note 174, at 297.

thought that we hate.'"[199] Or, as Chief Justice John Roberts concluded for eight justices: "As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."[200] We take pride in "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open."[201]

Yet those lofty statements describe the First Amendment's firm opposition to *government* suppression of views, not adverse employment actions by *private* actors. Would Jewish survivors of the Holocaust be required not only to allow a neo-Nazi parade in the town of Skokie, Illinois,[202] but also to continue employing workers who joined the march? Should an employer—whether a small family business, a mission-driven nonprofit, or a large corporation—have to put up with an employee who advocates for insurrection? A conspiracy theory that a major political party is run by a cabal of pedophiles, who may or may not have operated out of a neighborhood pizza joint that suffered an armed attack while filled with families?[203] That part of a major city should be run as an autonomous zone free from police and other state intervention, even when it descends into anarchy and violence?[204] Transgender women's place in sports? Anti-LGBT hatred? Hatred of religion based on traditional beliefs about sexuality?

Broad protections for off-duty speech and conduct might protect much controversial speech that employers understandably despised and did not want associated with their organizations. Such statutes might have blocked the termination of employees who participated in the January 6, 2021 riot at the U.S. Capitol but were never charged with crimes. For instance,

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[199] Matal v. Tam, 582 U.S. 218, 246 (2017) (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting)).
[200] Snyder v. Phelps, 562 U.S. 443, 461 (2011).
[201] New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).
[202] *See* Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977); Vill. of Skokie v. Nat'l Socialist Party of Am., 373 N.E.2d 21 (Ill. 1978); Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied sub nom.* Smith v. Collin, 439 U.S. 916 (7th Cir. 1978).
[203] *See* Marc Fisher et al., *Pizzagate: From Rumor, to Hashtag, to Gunfire in D.C.*, WASH. POST (Dec. 6, 2016), https://www.washingtonpost.com/local/pizzagate-from-rumor-to-hashtag-to-gunfire-in-dc/2016/12/06/4c7def50-bbd4-11e6-94ac-3d324840106c_story.html.
[204] *See* Ashitha Nagesh, *This Police-Free Protest Zone Was Dismantled - But Was It the End?*, BBC (July 12, 2020), https://www.bbc.com/news/world-us-canada-53218448 ("There were four shootings at the [autonomous zone] in a 10-day period towards the end of June, two of which were fatal.").

a Texas-based insurance company fired in-house attorney Paul Davis "based on videos and images he shared on social media that showed the lawyer standing outside the Capitol with others declaring his intent to get into the building."[205] Davis, a University of Texas School of Law graduate who said he was an associate general counsel and human resources director, wrote that he "was not trying to break in. Was just talking to the police officers and praying over them."[206] Davis is not listed among those facing federal charges,[207] so he may have been fired for off-duty speech and lawful conduct that he would call political. His example may provide cause for caution if, as Volokh argues, employers should not be forced to associate with views they despise.

However, two scholars—including Steven J. Mulroy, a tenured law professor with a unique perspective as a Memphis-area county commissioner and recently elected district attorney[208]—articulate the compelling reasons for greater private-sector protection:

> We protect free speech not merely as a means of promoting discussion and participation in democratic government, and not merely to further the discovery of truth through 'the marketplace of ideas,' but also because individual self-expression is good for its own sake . . . . The vast majority of Americans are employees who spend about one-third of their lives, and almost half their waking lives, at their place of work. It is a prime place for them to communicate with their peers, and for them to receive information from their peers. For workers to be denied a certain range of motion in their expression could seriously dampen this individual self-fulfillment, not to mention sabotage the search for truth and diminish the

[205] Anne Cullen, *Employers Have Broad Leeway to Fire Capitol Rioters*, LAW360 (Jan. 8, 2021), https://www.law360.com/employment-authority/articles/1342830.
[206] Michele Gorman, *Texas In-House Atty Fired for Role in Capitol Chaos*, LAW360 (Jan. 7, 2021), https://www.law360.com/articles/1342526/texas-in-house-atty-fired-for-role-in-capitol-chaos.
[207] U.S. Attorney's Office for the District of Columbia, *Capitol Breach Cases*, U.S. DEP'T OF JUST., https://www.justice.gov/usao-dc/capitol-breach-cases (last updated May 17, 2023).
[208] Shelby County District Attorney, *Meet Steve Mulroy*, https://www.scdag.com/meet-steve-mulroy (last visited Jan. 6, 2023).

> vitality of our democracy.[209]

Another commentator suggests that an era of elevated partisanship demands elevated protection: "To leave employees completely helpless against political discrimination in the workplace hinders the effectiveness of a democracy. While modern politics is rapidly seeping into every aspect of life for American citizens, there needs to be protections for private sector employees to express themselves on matters of public concern."[210] Freer speech at work might also benefit democracy by providing "opportunity for those with differing viewpoints to have constructive conversations, which could increase understanding of others and maybe even lead to breakthroughs across the divide. Such healthy public discourse is essential if the country is ever going to sew up these 'divided states.'"[211]

These rationales do not vary from state to state, so some analysts favor a federal fix. One scholar recently endorsed a comparatively simple approach to "ending political discrimination in the workplace"—a federal law with uniform and immediate nationwide effect.[212] Senn, among others,[213] would have Congress add "political affiliation" to the characteristics of Title VII.[214] That would provide greater protection and perhaps greater clarity for both workers and employers.

Another federal option would be a separate statute. David C. Yamada advocated this approach to supersede the current "jumble of inconsistencies" that chills worker speech because it is hard to determine when employees have speech protections.[215] A clear national statute "would empower each worker by giving her a voice, affirm the importance of individual dignity in a free society, and encourage the kind of expression that will promote healthy businesses and overall productivity."[216] Yamada suggests that, "[e]ven if the letter of the First

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[209] Mulroy & Moorman, *supra* note 26, at 989.
[210] Voysey, *supra* note 178, at 986.
[211] *Id.* at 966–67.
[212] Senn, *supra* note 106, at 365–66 (capitalization altered).
[213] Anne Carey, Note, *Political Ideology as a Limited Protected Class Under Federal Title VII Antidiscrimination Law*, 26 J. L. & POL'Y 637, 637 (2018).
[214] Senn, *supra* note 106, at 405–06.
[215] David C. Yamada, *Voices from the Cubicle: Protecting and Encouraging Private Employee Speech in the Post-Industrial Workplace*, 19 BERKELEY J. EMP. & LAB. L. 1, 57–58 (1998).
[216] *Id.* at 57.

Amendment cannot gain entry into the workplace, its spirit should do so."[217]

However, the political feasibility of a federal statutory change is dubious. As a policy matter, it could not pass the Senate with a simple majority under reconciliation rules, so the filibuster would necessitate support from sixty senators.[218] It is hard to fathom sixty senators agreeing on this sweeping change that would surely draw opposition from pro-business conservatives as well as liberals wary of shielding right-wing marchers and activists. Even if a federal statutory change were politically feasible, its consequences would be dramatic, unintended, and unpredictable. Speech protection in private employment seems to be the sort of issue suitable for state-level experimentation in the so-called laboratories of democracy.[219]

These commentators provide valuable points. Volokh presents a strong argument against fully extending the First Amendment into private employment, but Mulroy and Amy H. Moorman successfully address those concerns in describing how employee freedoms can be balanced against legitimate employer interests.[220] Voysey articulates how the workplace relates to democracy, though we should seek rules not just to meet the needs of the current moment but to endure for decades to come.[221] Yamada explains the how First Amendment rationales still matter in the private sector,[222] but he and Senn[223] go too far in seeking a dramatic federal solution. The wiser approach remains the state level.

D. Principles

In crafting and refining state rules, Mulroy and Moorman offer prudent recommendations, which focus on the common law but apply equally for statutes:

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[217] *Id.* at 58.
[218] *See* BILL HENIFF JR. & ROBERT KEITH, CONG. RSCH. SERV., THE BUDGET RECONCILIATION PROCESS: THE SENATE'S "BYRD RULE" (updated Sept. 28, 2022), https://crsreports.congress.gov/product/pdf/RL/RL30862.
[219] *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").
[220] Mulroy & Moorman, *supra* note 26, at 979–92.
[221] Voysey, *supra* note 178, at 966–67, 986–87.
[222] Yamada, *supra* note 215, at 57–58.
[223] Senn, *supra* note 106, at 405–06.

> First, an employer should not be able to discharge an employee for expression protected by the First Amendment taking place while the employee is off-duty and off-premises, unless such activity is against the employer's interest. Expression can run counter to the employer's interest if it (1) aids a competitor; (2) exposes confidential information; (3) runs counter to the avowed mission of the firm or organization; (4) harms the reputation of the employer; or (5) materially and substantially disrupts productivity (e.g., by harming morale) . . . . Speech that is highly offensive but constitutionally protected--e.g., racist or anti-Semitic slurs, or sexually "indecent" but non-obscene speech--could be grounds for termination to the extent it was open, public, and notorious, and could plausibly be connected back to the employer by the public, thus harming the employer's reputation. For speech made on-duty, on-premises, or using the employer's facilities, resources, or materials, the employer should have wide latitude to discipline or terminate an employee.[224]

Volokh floated the idea of a broad multipurpose exemption for when employers would suffer an "undue hardship," borrowing the language, and thus presumably the court interpretation, of Title VII's requirement for religious accommodations.[225] He also suggests another "possibility might be to borrow the *Pickering* balance from government employee speech cases";[226] however, that open-ended balancing test would leave both employers to guess at an individual judge's interpretation. Yamada's proposed federal statute takes a cleaner approach, giving broad protection for free speech both on-duty and off, exempting five specifically defined categories: disruption, disloyalty, insubordination, defamation, and verbal acts of misconduct.[227]

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[224] Mulroy & Moorman, *supra* note 26, at 991–92.
[225] Volokh (2022), *supra* note 174, at 292–93 (citing Trans World Airlines, Inc. v. Hardison, 432 U.S. 63, 84 (1977)).
[226] *Id.* at 293; *see also* Pickering v. Bd. of Ed. of Twp. High Sch., 391 U.S. 563 (1968); 16A Am. Jur. 2d Constitutional Law § 491: Public Employee as Having Right to Freedom of Speech and Press, Generally.
[227] Yamada, *supra* note 215, at 59.

Another commentator recently proposed a thoughtful model statute for states that first forbids "adverse employment action[s] based upon an employee's political beliefs, affiliations, or choice of vote" and additionally protects off-duty lawful conduct (including use of lawful products) and "exercise of rights guaranteed by the First Amendment," so long as "such activity does not substantially or materially interfere with the employee's bona fide job performance or the working relationship between employer and employee."[228]

While that proposal incorporates many important concepts, it is too vague to offer much clarity—especially the final clause generally protecting employees' "exercise of rights guaranteed by the First Amendment." As the Supreme Court has noted, a rule incorporating the First Amendment by reference may be void for vagueness when it gives "officials alone the power to decide in the first instance whether a given activity" is covered "because '[t]he opportunity for abuse, especially where a statute has received a virtually open-ended interpretation, is self-evident.'"[229]

Even in the private sector, the need for democratic discourse and mutual respect across ideological lines demands some protection for expressive and political activities. A strong statute should clearly protect both employees past, present, and future:[230] current workers, applicants, and former employees who can be harmed by defamatory references or other acts. It should take a broad view of "employee" to encompass independent contractors who depend on specific hiring parties for their livelihood, using the broader "economic realities" test for employee status rather than the narrower "right to control" test.[231]

To offer clarity and avoid vagueness, such a statute should not attempt to incorporate First Amendment principles by reference. Protected activities should be listed, though the list need not be exclusive. The list should certainly cover voting, affiliating with a political party, running for office, signing petitions or initiatives, and making political contributions. It

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[228] Voysey, *supra* note 178, at 984 (drawing on CONN. GEN. STAT. § 31-51q). Volokh similarly suggests statutes might "borrow the 'bona fide occupational qualification' doctrine from Title VII's disparate treatment law." Volokh (2022), *supra* note 174, at 293 (citing 42 U.S.C. § 2000e-2).

[229] Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 575–76 (1987).

[230] *See* Mulroy & Moorman, *supra* note 26, at 987 n.238.

[231] *See* ESTREICHER ET AL., *supra* note 7, at 11–22.

should probably include supporting or advocating for political candidates, although this could be drafted in a way that recognizes employers might want to keep such politicking outside the office. It should also cover some amount of political speech and expression, although this too should be drafted to recognize that some hateful speech that substantially interferes with professional relationships could be defended as political.

States might also use these statutes to protect lawful off-duty conduct, including use of products that are lawful (at least under state law, as in the case of marijuana).[232] Such laws could draw broad ideological support: The right would be glad to ban discrimination based on gun ownership or membership in a religious organization that advocates traditional views on sexuality, while the left would want to protect people who use marijuana in states where it is no longer criminalized and prohibit discrimination based on off-duty intimate relationships.[233] They might also require advance notice and the identification of legitimate business interests before employers could demand private information about employees' speech, including on social media.[234] Such issues are beyond the scope of this Note.

However, private employers understandably seek the ability to maintain a productive workplace, avoid association with views they abhor, and protect their reputation. A German tourist agency need not employ a Holocaust denier.[235] As other statutes and writers have suggested,[236] a balanced statute would not protect speech and activity that disloyally harms the employer's interest, tends to seriously harm the employer's reputation, amounts to harassment, or reasonably and materially interferes with critical workplace relationships (without granting

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[232] *See* Amy J. Kellogg et al., *supra* note 193.

[233] This was a contested point about New York's statute, although it would seem *Bostock* provided national protection. "New York courts have limited their off-duty conduct statute by finding that personal relationships do not constitute 'lawful recreational activities.'" PAUL M. SECUNDA ET AL., UNDERSTANDING EMPLOYMENT LAW 79 (3d ed. 2019) (citing McCavitt v. Swiss Reins. Am. Corp., 237 F.3d 166, 167 (2d Cir. 2001)).

[234] Several states already have relevant online privacy statutes that "prohibit employers from demanding access to an applicant's or employee's social media posting." Garden, *supra* note 66, at 28–29.

[235] Mulroy & Moorman, *supra* note 26, at 990 (discussing Berg v. German Nat'l Tourist Office, 670 N.Y.S.2d 90 (N.Y. App. Div. 1998)).

[236] *See* text accompanying notes 224–27.

a heckler's veto).[237] It would need to walk a fine line on speech that might be considered hateful, like the selective citation of Bible verses by the anti-LGBT employee of Hewlett Packard.[238]

Off-duty, off-premises activity should be granted broad protection—up to the point that it harms the employer's legitimate interests. Employers should retain the ability to limit what workers do on employer property, while being paid for work, and when interacting as an agent or employee rather than as a citizen. Examples that should not be protected include divisive political stickers in visible locations of the workplace, campaigning for office during the work shift, and using interactions with customers for personal expressive purposes, such as a plumber who evangelizes with every emergency call.

Some exceptions would be prudent. It would strike a reasonable balance to exempt small employers beneath a certain headcount, as many laws do. As the Supreme Court has suggested, expressive associational rights may be stronger in smaller groups.[239] States might choose thresholds between fifteen and fifty,[240] which would let small businesses employ people with shared values without giving midsize employers license to punish speech. Additionally, Supreme Court case law regarding the ministerial exception would probably require complete exemption for religious employers. A discussion of remedies is beyond the scope of this Note.

E. A Model Statute

Taking into account all these concerns and caveats, and drawing on the scholarship discussed above, here is a model for a strong but balanced statute to protect private-sector workers speech and political activity:

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[237] *See* R. George Wright, *The Heckler's Veto Today*, 68 CASE W. RES. L. REV. 159, 159 (2017) ("Roughly put, the heckler's veto doctrine holds that opponents of a speaker should not be permitted to suppress the speech in question through their own threatened or actual violence."); Patrick Schmidt, *Heckler's Veto*, THE FIRST AMEND. ENCYCLOPEDIA (2009), https://www.mtsu.edu/first-amendment/article/968/heckler-s-veto ("A heckler's veto occurs when the government accepts restrictions on speech because of the anticipated or actual reactions of opponents of the speech.").

[238] *See* text accompanying note 118.

[239] Roberts v. U.S. Jaycees, 468 U.S. 609, 620 (1984).

[240] These are common thresholds for employment laws. Title VII, 42 U.S.C. § 2000e(b), and the Americans with Disabilities Act, 42 U.S.C. § 12111(5)(A), cover employers with at least fifteen employees; the Family and Medical Leave Act only applies to employers with fifty employees within a certain radius, 29 U.S.C. § 2611(2)(B)(ii).

I. It shall be an unlawful employment practice for any employer to take an adverse employment action against an individual because of that individual's political or personal views, affiliations, speech, expression, or other activities, so long as they do not:

a. occur within the scope of employment,
b. constitute disloyalty, insubordination, defamation, misconduct, or material disruption,
c. substantially and reasonably harm job performance,
d. substantially and reasonably interfere with relationships necessary to the employer's activities,
e. directly harm the employer's interests, such as by aiding a competitor, revealing confidential employer information, or running counter to the employer's clearly stated mission or strategy, or
f. reasonably tend to harm the reputation of the employer.

II. Definitions: For the purposes of this section,

a. "Employer" shall include any hiring party that exerts primary economic control over an individual, regardless of formal employment classification.
b. "Individual" shall include any natural person economically dependent upon a primary hiring entity, regardless of formal employment classification. It shall cover prospective, current, and former workers.
c. Protected political activities shall include—but not be limited to—voting, running for office, endorsing or supporting a candidate for office, affiliating with a political party, signing petitions or initiatives, or making campaign contributions.
d. "Scope of employment" shall include:
    1. Activity conducted while occupying or using employer property,
    2. Time for which the individual is compensated, if such employee has a set schedule or is paid on an hourly basis, or
    3. Interactions in which the individual acts as the identifiable agent of the employer.

III. Exceptions: This section shall not apply to

a. Employers with fewer than 15 employees, or
b. Religious organizations, when the individual's position falls within the ministerial exception.

CONCLUSION

The First Amendment represents not just restrictions on government but also core principles of American democracy. The great experiment in self-government depends on citizens who can express and hear opinions, debate in public, and participate in the political process. While private employers might not be constrained by the First Amendment—and are even protected by it—they still should not be able to constrain the civic life of the great majority of American adults who work in the private sector. If states adopt broader and clearer statutes like this proposed model, employees will be protected in their speech and politics while employers will know they can protect their legitimate business interests.

DELAY OF GAIN: HOW NORTH CAROLINA'S NAME, IMAGE, AND LIKENESS LAW UNCONSTITUTIONALLY RESTRICTS STUDENT-ATHLETES' COMMERCIAL SPEECH RIGHTS

Shane Stout*

INTRODUCTION

In 2021, the U.S. Supreme Court unanimously decided *National Collegiate Athletic Association v. Alston*, a landmark case that dramatically changed the landscape of college athletics. Writing for the majority, Justice Gorsuch ruled that the NCAA's longstanding ban on compensation for college athletes related to their name, image, and likeness constituted a violation of antitrust law and was illegal. Importantly, the *Alston* Court did not mandate a particular scheme for how that compensation should proceed. What followed was a patchwork of state legislation providing for name, image, and likeness (NIL) compensation for student-athletes at universities across the country. While these laws overwhelmingly benefitted college athletes and have created a new scheme for college athletics, perhaps because of their novelty and the haste with which they were fashioned, they do not all pass constitutional muster. Specifically, limits imposed on the types and sources of compensation for college athletes constitute overbroad infringements on commercial speech that violate the First Amendment. North Carolina's law is no different, and this paper will explore the provisions that infringe upon the free speech rights of North Carolina college athletes.

This paper will proceed in four parts. Part I will outline the NIL landscape as a whole, including the case law and circumstances that precipitated this stage of NIL evolution, with a focus on *Alston* and the related cases that preceded it. Part II will analyze North Carolina's NIL law in particular and will examine its critical provisions and how they affect athletes in the state. Part III will place the law in the context of the constitutional doctrines of overbreadth and commercial speech and will explore how its critical provisions are overbroad in restricting athletes' commercial speech. Finally, Part IV will propose a better solution to the novel issue of NIL in North Carolina by analyzing similar statutes enacted in other states.

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I. WHAT IS NIL ANYWAY?

Name, image, and likeness is a general term for the new regulatory scheme that allows college athletes to profit off of the rights to their name, appearance, and branding.[1] In the wake of the legal advent of NIL, college athletes can now partner with businesses for endorsements and advertisements in exchange for cash.[2] Athletes may make money in a variety of other ways as well, including selling merchandise, starting their own sports camps, selling their memorabilia, making paid appearances, and charging money for autographs.[3] While the rights to profit from those activities might sound inherent, until July 2021, they were unavailable for the thousands of National Collegiate Athletic Association (NCAA) athletes across the country.[4]

At the center of those restrictions was the idea of amateurism. For more than a century and beginning at the NCAA's inception in the early 1900's, amateurism has been at the heart of college athletics.[5] By 1956, the NCAA had codified those amateurism rules into a scheme by which student-athletes could receive athletic scholarships to attend universities but could not receive any other financial compensation related to their athletic status.[6]

Under that structure, universities were not allowed to provide, and athletes were not allowed to receive, compensation related to athletic participation.[7] In addition, the NCAA required student-athletes to sign a form waiving their right to use their name, image, or likeness for commercial gain.[8] Instead, the NCAA and its member institutions (universities) retained the right to use or sell a student-athlete's rights to a third party for financial gain *without* compensating the athlete whatsoever;[9] all

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[1] James Parks, *What is NIL in College Football? Here's What You Need to Know*, SPORTS ILLUSTRATED (March 23, 2023, 2:20 PM), https://www.si.com/fannation/college/cfb-hq/ncaa-football/college-football-nil-rule-changes-what-you-need-to-know.
[2] *Id.*
[3] *Id.*
[4] Tim Tucker, *NIL Timeline: How We Got Here and What's Next*, ATLANTA J. CONST. (Mar. 18, 2022), https://www.ajc.com/sports/georgia-bulldogs/nil-timeline-how-we-got-here-and-whats-next/EOL7R3CSSNHK5DKMAF6STQ6KZ4/.
[5] *See* Audrey C. Sheetz, Note, *Student-Athletes vs. NCAA: Preserving Amateurism in College Sports Amidst the Fight for Player Compensation*, 81 BROOK. L. REV. 865, 869–70 (2016).
[6] *Id.* at 870–71.
[7] Parks, *supra* note 1.
[8] Sheetz, *supra* note 5, at 873.
[9] *Id.* at 873–74.

profits were returned either to the NCAA or the university.[10] By the mid-2010's, the college sports industry was worth $11 billion, with no portion of that revenue being returned to the athletes who powered it.[11]

Dissatisfied with this structure, college athletes fought back by suing the NCAA in the case of *O'Bannon v. NCAA*.[12] That suit began when Ed O'Bannon, a former college basketball player at the University of California, Los Angeles (UCLA), sued the NCAA on behalf of student-athletes, seeking an injunction preventing the NCAA from enforcing restrictions on athletes' ability to receive compensation for their name, image, and likenesses.[13] O'Bannon initiated the suit after seeing a player bearing his likeness and wearing his UCLA jersey in an EA Sports video game.[14] O'Bannon had not consented to appear in the game, nor had he received compensation for his "appearance."[15] The class action suit alleged more fundamental criticisms of the NCAA as well.[16] Specifically, O'Bannon alleged that the NCAA's amateurism rules constituted an illegal restraint on trade under the Sherman Act because they prevented student-athletes from profiting from their name, image, and likenesses.[17]

The U.S. District Court for the Northern District of California found in favor of O'Bannon, ruling that the NCAA's amateurism rules *did* constitute a restraint on trade and thus violated the Sherman Act.[18] The Ninth Circuit affirmed the district court's ruling that the NCAA was subject to antitrust scrutiny, but it emphasized the limited scope of its decision.[19] The Court held that the NCAA's restrictions had been more "restrictive than necessary to maintain its tradition of amateurism."[20] Finally, the Court concluded that the "Rule of Reason"[21] required that the NCAA permit its member institutions to provide compensation up to the cost of attendance

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[10] *Id.*
[11] *Id.* at 866.
[12] *Id.*
[13] *Id.* at 866–67.
[14] O'Bannon v. Nat'l Collegiate Athletic Ass'n, 802 F.3d 1049, 1055 (9th Cir. 2015).
[15] *Id.*
[16] *Id.*
[17] *Id.*
[18] *Id.* at 1056 (citing O'Bannon v. NCAA, 7 F. Supp. 3d 955 (N.D. Cal. 2014)).
[19] *Id.* at 1079.
[20] *Id.*
[21] The Rule of Reason analysis is "'a fact-specific assessment of market power and market structure' aimed at assessing the challenged restraint's 'actual effect on competition.'" Ohio v. Am. Express Co., 138 S. Ct. 2274, 2284 (2018).

for its student-athletes, but the Court went no further in addressing additional compensation for college athletes.[22]

The *O'Bannon* decision set the stage for the seminal case regarding student-athlete compensation: *National Collegiate Athletic Association v. Alston*. In 2019, current and former college athletes once again brought suit in the Northern District of California against the NCAA and eleven athletic conferences, alleging antitrust violations related to the NCAA's rules limiting their compensation for their athletic services.[23] Following a bench trial, the district court entered an injunction that limited the NCAA's ability to restrict compensation related to education but still allowed the NCAA to continue to fix compensation unrelated to education.[24] As a result, the NCAA retained the right to regulate athletic scholarships because they were considered unrelated to education.[25] Both sides appealed to the Ninth Circuit.[26] The Plaintiffs argued that the court should have enjoined all of the NCAA's compensation limits, including those that were unrelated to education, like "athletic scholarships and cash awards."[27] Conversely, the NCAA argued that the District Court should not have limited its power to restrict compensation at all.[28] The Ninth Circuit affirmed in full, holding that the District Court had struck a balance that both prevented anticompetitive harm to student-athletes and preserved the popularity of college sports.[29]

The Supreme Court unanimously affirmed the Ninth Circuit's ruling but went no further in addressing compensation or NIL.[30] On appeal to the Supreme Court, the student-athletes did not renew their challenges to the NCAA's across-the-board compensation restrictions.[31] As a result, the Court failed to go so far as to limit the NCAA's ability to restrict student-athletes from receiving compensation unrelated to education, the bedrock of NIL.[32] In short, the Court found that the NCAA's amateurism-centric business model violated anti-trust law, but in light of the

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[22] *Id.*
[23] Nat'l Collegiate Athletic Ass'n v. Alston, 141 S. Ct. 2141, 2151 (2021).
[24] *Id.* at 2153.
[25] *Id.*
[26] *Id.*
[27] *Id.* at 2154.
[28] *Id.*
[29] *Id.*
[30] *Id.* at 2166.
[31] *Id.* at 2154.
[32] *See generally id.*

very narrow issue of education-related compensation before it, it took only modest steps to restrict that model.[33]

Nonetheless, certain aspects of the Court's analysis belied a broader skepticism of the NCAA's business model and foreshadowed trouble for the NCAA in similar future litigation. In deciding *Alston*, the Supreme Court upheld the lower court's determination that the NCAA's compensation restraints are subject to the "Rule of Reason" analysis.[34] By using the Rule of Reason analysis, the district court required the NCAA to prove that its restraints on education-related benefits were not anticompetitive.[35] Applying that rule, the district court found that the NCAA's restrictions on compensation were in fact anticompetitive.[36] The Supreme Court, though only considering the issue of restrictions on education-related benefits, agreed.[37] In affirming the lower court's decision, the Supreme Court held that the NCAA itself is not exempt from the Rule of Reason[38] and thus hinted that future antitrust litigation against the NCAA would subject the NCAA's restrictions to the same Rule of Reason scrutiny.

In addition, Justice Kavanaugh's concurring opinion was the strongest evidence of the Court's broader concerns about the NCAA's business model. In his concurrence, Kavanaugh stressed that, although the Court addressed only the narrow issue of education-related benefits in *Alston*, he had serious concerns about the rest of the NCAA's compensation restrictions.[39] Specifically, Kavanaugh opined that

> there are serious questions whether the NCAA's remaining compensation rules can pass muster under ordinary rule of reason scrutiny. Under the rule of reason, the NCAA must supply a legally valid procompetitive justification for its remaining compensation rules. As I see it, however, the NCAA may lack such a justification.[40]

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[33] *See generally id.*
[34] *Id.* at 2156.
[35] *See id.* at 2151.
[36] *Id.* at 2152.
[37] *Id.* at 2166.
[38] *Id.* at 2156 ("Nor does the NCAA's status as a particular type of venture categorically exempt its restraints from ordinary rule of reason review.").
[39] *Id.* at 2167 (Kavanaugh, J. concurring).
[40] *Id.*

Essentially, although the Court did not consider the NCAA's restrictions on compensation wholesale in *Alston*, the NCAA would still have to provide procompetitive reasons to support their suppression of student-athlete compensation in order to satisfy Rule of Reason scrutiny in any future antitrust litigation.[41] Given that much of the NCAA's argument on appeal in *Alston* focused on attempting to invalidate the use of Rule of Reason analysis rather than actual procompetitive justifications for their restrictions, those justifications may simply not exist.

More strikingly, in his concurrence Kavanaugh also explicitly and comprehensively echoed the principal criticism of the NCAA from *O'Bannon* and elsewhere: "The bottom line is that the NCAA and its member colleges are suppressing the pay of student-athletes who collectively generate billions of dollars in revenues for colleges every year."[42] Kavanaugh's concurrence thus added a practical lens through which to view the Court's complex legal decision. In addition to the Court's unanimous view that the NCAA's structure is anticompetitive, and at least partly in violation of anti-trust law, Kavanaugh's concurrence also laid out a more basic argument that that entire structure is inherently unfair.[43] In doing so, Kavanaugh espoused the basic argument that student-athletes had been making against the NCAA since *O'Bannon* and before. That a sitting Supreme Court Justice so clearly disagreed with the basic premise of the NCAA's business model foreshadowed major difficulties for the NCAA's maintenance of its traditional amateurism model in college sports moving forward.

Indeed, though *Alston* did not legally invalidate the NCAA's broad compensation restrictions, in practice, it had that effect.[44] Following its sound defeat before the Supreme Court, the NCAA effectively surrendered its control of student-athlete compensation to schools, conferences, and states.[45] Thus, in the wake of *Alston*, the college athletics landscape changed essentially overnight.[46]

However, due to the nature of *Alston* and the lack of federal NIL legislation, those changes took place on a state-by-

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[41] *Id.*
[42] *Id.* at 2168.
[43] *Id.*
[44] Andrew Brandt, *Business of Football: Supreme Court Sends a Message to NCAA*, SPORTS ILLUSTRATED (June 29, 2021), https://www.si.com/nfl/2021/06/29/business-of-football-supreme-court-unanimous-ruling.
[45] *Id.*
[46] Richard Johnson, *Year 1 of NIL Brought Curveballs, Collectives and Chaos. Now What?* SPORTS ILLUSTRATED (July 12, 2022), https://www.si.com/college/2022/07/12/nil-name-image-likeness-collectives-one-year.

state basis.[47] Neither the Supreme Court nor the NCAA proscribed a methodology for administering NIL. In fact, neither even explicitly allowed NIL at all. Similarly, despite several proposed bills, the United States Congress has yet to pass federal legislation outlining any guardrails for NIL administration.[48] As a result, the development of NIL law has taken place solely at the state level.[49] Following *Alston*, once it became clear that the NCAA would no longer restrict student-athlete compensation, states rushed to enact NIL legislation to avoid college athletic recruiting imbalances that might be created by their inaction.[50] As it were, in anticipation of the *Alston* decision, six states already had laws set to go into effect on July 1, 2021.[51] As of July 2022, 29 states had passed some form of legislation addressing NIL, whether by legislation or executive order.[52]

II. NORTH CAROLINA'S NIL LAW

North Carolina was at the front of the race to authorize NIL.[53] On July 2, 2021, North Carolina, like many other states, passed a law governing NIL in the immediate wake of *Alston*.[54] Unlike some other states, the law came in the form of an executive order from Governor Roy Cooper.[55] North Carolina Executive Order 223 gave North Carolina college athletes the right to profit from their name, image, and likeness in a way they never had been able to before.[56] Specifically, the order dictated that

> Student Athletes enrolled in a postsecondary institution located in the State of North Carolina are allowed by the laws of this state to earn compensation and obtain related representation, for use of their name, image, and likeness while enrolled at the institution and such compensation and representation for their name, image, and

[47] Ezzat Nsouli & Andrew King, *How US Federal and State Legislatures Have Addressed NIL*, SQUIRE PATTON BOGGS (July 13, 2022), https://www.sports.legal/2022/07/how-us-federal-and-state-legislatures-have-addressed-nil/.
[48] *Id.*
[49] *Id.*
[50] *Id.*
[51] *See id.*
[52] *Id.*
[53] Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[54] *Id.*
[55] *See e.g.*, TENN. CODE ANN. § 49-7-2802 (2022); N.C. EXEC. ORDER 223.
[56] Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).

> likeness shall not affect a student-athlete's scholarship eligibility.[57]

In short, student-athletes were finally allowed to profit from their name, image, and likeness without being suspended from competition or disciplined. However, the law did not give student-athletes the *complete* ability to sign whatever deals that they wanted. Instead, the law also allows restrictions on the kinds of brand deals student-athletes can make, including signing contracts that conflict with existing contracts of the university and signing deals with university organizations.[58]

The most problematic of these restrictions is the last one, outlined in Section 1(B)(iii). That section reads:

> An institution may impose reasonable limitations or exclusions on the categories of products and brands that a student-athlete may receive compensation for endorsing or otherwise enter into agreements or contracts for use of their name, image, and likeness to the extent that the institution *reasonably determines that a product or brand is antithetical to the values of the institution or that association with the product or brand may negatively impact the image of the institution*.[59]

At its core, this provision gives individual universities broad control over the kinds of deals student-athletes can make, regardless of whether those deals create a legitimate contractual conflict or conflict of interest. Presumably, that provision is in place to prevent student-athletes from signing deals and advertising with less-than-desirable business partners. The provision is not unique among state NIL provisions; many states enact "vice provisions" that prevent athletes from advertising for specific categories of businesses, such as tobacco, adult entertainment, cannabis, or gambling.[60] Section 1(B)(iii) is North Carolina's version of a vice provision, and it is likely intended to prevent athletes from entering into partnerships that might have the potential to embarrass North Carolina universities.[61] While

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[57] *Id.*
[58] *Id.* § 1(B)(i).
[59] *Id.* § 1(B)(iii) (emphasis added).
[60] Sam C. Ehlrich & Neal C. Ternes, *Putting the First Amendment in Play: Name, Image, and Likeness Policies and Athlete Freedom of Speech*, 45 COLUM. J. L. & ARTS 47, 56–57 (2021).
[61] Exec. Order No. 223 § 1(B)(iii), 36 N.C. Reg. 152, 153 (July 2, 2021).

that cause may be understandable, the poor execution of that goal in Executive Order 223 has constitutional consequences.

Section 1(B)(iii) is most troubling because of its vagueness and the breadth of activity and speech it encompasses. Perhaps because it is an executive order rather than a statute, and thus merely lacks the space to do so, the provision makes no attempt to define what any of its material language means. "[R]easonably determines," "antithetical to the values of the institution," and "negatively impact the image of the institution" are all left undefined.[62] Failing to define those elements renders the provision unfathomably broad. Ostensibly, that language could encompass any number of brand deals that athletes might sign. As a result, the state has given universities near unilateral control over the kinds of contracts their student-athletes can sign and the brands with which they can partner. These restrictions violate North Carolina student-athletes' traditionally protected rights to commercial speech. In addition, these restrictions violate the well-established constitutional doctrine of overbreadth.

A. State Action

In order to constitute a violation of the Constitution, a restriction must include some form of state action. As a result, in order to analyze Executive Order 223 in the context of constitutional viability, one must analyze its state action component. Specifically, the analysis must focus on the issue of whether the NIL law is unconstitutional as applied by all North Carolina universities, whether public or private, or whether it is merely unconstitutional as applied by North Carolina public universities.

It is a bedrock constitutional principle that the guarantee of free speech is a guarantee only against abridgment by the government.[63] While it is well-established that public universities are state actors, the same cannot be said of private institutions.[64] As a result, the state actor analysis for private universities is somewhat more complicated. The Constitution itself thus does not provide protection against abridgment of free speech by individuals or private entities.[65] However, in some circumstances, private action can be converted into government action if that action is compelled by a state or federal law. In

[62] *See generally* Exec. Order No. 223, 36 N.C. Reg. 152, 153 (July 2, 2021).
[63] Hudgens v. NLRB, 424 U.S. 507, 513 (1976).
[64] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988).
[65] *Id.* at 191.

Flagg Bros., Inc. v. Brooks, the Supreme Court pointed out "that a State is responsible for the . . . act of a private party when the State, by its law, has compelled the act."[66]

Some state NIL laws do indeed compel even private institutions to act in accordance with the legislation.[67] In those cases, the statutory language affirmatively prohibits certain behavior by student-athletes regarding NIL compensation.[68] For example, Mississippi's NIL law reads, "No student-athlete shall enter into a name, image, and likeness agreement or receive compensation from a third-party licensee for the endorsement or promotion of gambling . . . ."[69] Similarly, Arkansas' NIL law mandates that "a student-athlete participating in varsity intercollegiate athletics is prohibited from earning compensation as a result of the commercial use of the student-athlete's publicity rights in connection with any person or entity related to . . . adult entertainment . . . ."[70] Rather than merely give universities permission to regulate student-athlete speech, these statutes compel the universities to do so and make no distinction between private universities and public ones. As a result, these statutes almost certainly satisfy the state action requirement laid out in *Brooks*. Thus, because those statutes include a state *compelling* institutions to restrict free speech, such regulations are almost certainly unconstitutional as applied by all universities—even private ones—in those states.

Conversely, some state NIL laws only permit universities to enact certain restrictions on student-athlete commercial speech. The *Brooks* Court further held that when a state law "permits but does not compel" private action, the state action requirement for a constitutional violation is not satisfied.[71] North Carolina's law falls into this category. The language in the executive order that "[a]n institution *may* impose reasonable limitations"[72] is indicative of legislation that is permissive, not compulsive. As a result, private institutions in North Carolina enacting NIL restrictions likely are not subject to the same constitutional scrutiny that either the state itself or its public institutions would be. A litigant challenging the constitutionality of private universities' NIL restrictions would likely have a

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[66] 436 U.S. 149, 164 (1978) (quoting Adickes v. S. H. Kress & Co., 398 U.S. 144, 170 (1970)).
[67] Ehlrich & Ternes, *supra* note 60, at 60–61.
[68] *Id.*
[69] S. 2690, 2021 Leg., Reg. Sess. § 3(13) (Miss. 2021).
[70] H.R. 1671, 93 Gen. Assemb., Reg. Sess. § 1 (Ark. 2021).
[71] *See Brooks*, 436 U.S. at 165–66.
[72] Exec. Order No. 223, 36 N.C. Reg. 152, 1 (July 2, 2021).

difficult time proving the state action requirement, and as a result, those private institutions are not subject to the same liability as the state's public institutions.

Put simply, a private university enforcing restrictions on its student-athletes' NIL deals does not violate the Constitution, while a state university doing the same likely does. As a result, the following analysis applies only to NIL restrictions undertaken by North Carolina's public universities. Nonetheless, because Executive Order 223 still applies to thousands of student-athletes at North Carolina's public universities, it is worthy of scrutiny.

III. EXECUTIVE ORDER 223'S CONSTITUTIONAL DEFECTS

A. North Carolina's NIL law fails the Central Hudson *test for the protection of commercial speech rights.*

North Carolina's NIL law represents an unconstitutional restriction on student-athletes' commercial speech rights. To analyze the constitutional defects with Executive Order 223, one must begin with an understanding of commercial speech. Commercial speech is speech or expression which is "related solely to the economic interests of the speaker and the audience."[73] Under the Supreme Court's decision in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, commercial speech is still subject to constitutional protection, albeit at a lesser level than noncommercial speech.[74] According to *Central Hudson*, "[t]he protection available for particular commercial expression turns on the nature both of the expression and of the governmental interests served by its regulation."[75]

Commercial speech was first recognized by the Supreme Court in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*[76] There, the Court found that "speech does not lose its First Amendment protection because money is spent to project it, as in a paid advertisement of one form or another."[77] In the case of NIL law, the speech at issue pertains to advertisements and other forms of speech that relate to the financial interests of college athletes. Much of the existing NIL

[73] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980) (citing Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 762 (1976)).
[74] *See id.* at 563.
[75] *Id.*
[76] *See* 425 U.S. 748, 761 (1976).
[77] *Id.*

ecosystem centers around brand deals for advertisements, where a company pays a student to promote that company or its products in one way or another.[78] Some college athletes appear as spokesmen in commercials,[79] while others simply make social media posts promoting brands in exchange for money or free merchandise.[80]

In both cases, the activity at issue constitutes commercial speech as outlined in both *Virginia State Board of Pharmacy* and *Central Hudson.* Under *Virginia State Board of Pharmacy*, the speech should be protected even though it comes in the form of a paid advertisement. At their core, NIL deals are paid advertisements in which student-athletes speak on behalf of brands in exchange for monetary compensation. However, Supreme Court precedent dictates that that speech does not lose its constitutional protection merely because it involves the exchange of money.[81] Similarly, under *Central Hudson*, the speech constitutes commercial speech because it relates solely to the economic interests of the speaker and the audience.[82] In the case of NIL promotions, the speakers (the athletes) are promoting brands solely because they receive money to do so. In addition, the speech they promote is intended to advertise the sale of consumer goods and services to the audience. Thus, in both instances, the speech relates only to the economic interests of the speaker and the audience and satisfies the definition of commercial speech laid out in *Central Hudson*. However, commercial speech is not unilaterally protected by the First Amendment in the same way most other speech is, and further analysis is necessary to determine whether the speech deserves First Amendment protection.[83]

In order to determine whether commercial speech is protected under the First Amendment, the Court in *Central Hudson* developed a four-part test.[84] The first prong of the *Central Hudson* test asks whether the speech at issue is protected by the

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[78] Dan Whateley & Colin Salao, *How College Athletes Are Getting Paid from Brand Sponsorships as NIL Marketing Takes Off*, BUSINESS INSIDER (Dec. 19, 2022, 10:58 AM), https://www.businessinsider.com/how-college-athletes-are-getting-paid-from-nil-endorsement-deals-2021-12.

[79] *See, e.g.*, Max Escarpio, *College Football's Most Unique NIL Deals in 2022*, BLEACHER REPORT (Aug. 16, 2022), https://bleacherreport.com/articles/10045014-college-footballs-most-unique-nil-deals-in-2022.

[80] Johnson, *supra* note 46.

[81] *Va. State Bd. of Pharmacy*, 425 U.S. at 761.

[82] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561 (1980).

[83] *See id.* at 563.

[84] *Id.* at 566.

First Amendment generally.[85] In order to be protected by the First Amendment, the speech must simply concern lawful activity and cannot be misleading.[86] If the speech is both lawful and not misleading, then the court must ask whether the government has an interest and, if so, whether the asserted interest is substantial.[87] Finally, if the answer to each inquiry is yes, the court must discern whether the regulation directly advances the asserted government interest and whether it is more extensive than necessary to achieve its stated purpose.[88] If the asserted interest is protected under the First Amendment and the government regulation is more extensive than necessary to advance the government interest, then the regulation fails the test and is unconstitutional.[89]

Given that Executive Order 223 involves commercial speech, we can apply the *Central Hudson* test to determine whether the law is too restrictive. Section 1(B)(iii) applies to all speech "that the institution reasonably determines that a product or brand is antithetical to the values of the institution or that association with the product or brand may negatively impact the image of the institution."[90] Though North Carolina's NIL law does not outline explicit categories of brand deals that are prohibited, many other states' NIL laws do.[91] Those laws routinely restrict athletes from signing deals with alcohol, tobacco, gambling, firearms, pornography, and other morally ambiguous companies.[92]

For the sake of illustration, this paper will assume those types of brand deals are what the Governor intended to allow universities to prohibit. Thus, I will use a student-athlete's hypothetical endorsement deal with an alcohol brand as an example of an agreement that Executive Order 223's language might allow a university to restrict. Under the existing language, the institution might argue that the alcohol brand is antithetical to the values of the institution, and it could argue that allowing one of its student-athletes to advertise for an alcohol brand might reflect negatively on the institution. The institution might argue

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[85] *Id.*
[86] *Id.*
[87] *Id.*
[88] *Id.*
[89] *See id.*
[90] Exec. Order No. 223 § 1(B)(iii), 36 N.C. Reg. 152, 1 (July 2, 2021).
[91] *Laws for College Athlete Name, Image, and Likeness Rights: 50-State Survey*, JUSTIA, https://www.justia.com/sports-law/college-athlete-name-image-and-likeness-rights-50-state-survey (last visited Mar. 23, 2023).
[92] *Id.*

that North Carolina is a traditionalist, southern state, and that many North Carolinians would be upset by one of their universities allowing its student-athletes to advertise for an alcohol brand. Finally, it might also argue that allowing student-athletes to advertise for alcohol brands may promote underage drinking. As a result, student-athletes might be banned from signing endorsement deals to promote alcohol brands and would lose out on any profits they might have made from those deals.

However, using the *Central Hudson* test, this type of restriction would likely be unconstitutional. An athlete's deal with an alcohol brand would satisfy its first prong because it is not illegal or misleading. Assuming the advertisement has no misleading information and that the student is of age, the speech would normally be protected under the First Amendment. As a result, the speech would satisfy the first prong of the test, and the inquiry would proceed to whether the government has a substantial interest in regulating the speech.

The government might assert that it has an interest in protecting the image of its institutions of higher education and that allowing a college student to advertise for an alcohol brand damages the reputation of a state institution. Nonetheless, this prong of the analysis is where the Executive Order is most susceptible to scrutiny. In 2019, the North Carolina legislature allowed the University of North Carolina (UNC) and North Carolina State University (NC State) to sell alcohol at football games for the first time.[93] Later that year at UNC, vendors began selling beer, wine, hard seltzers, and ciders throughout the stadium during UNC home games.[94] In its first three games where alcohol sales were allowed, UNC set records by raking in over one million dollars in concessions sales.[95] In total, UNC sold more than 43,000 units of alcohol in those first three games alone.[96] In short, alcohol sales were, and presumably continue to be, quite profitable for schools like UNC.[97]

Given that a public university like UNC or NC State derives hundreds of thousands of dollars in revenue from alcohol

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[93] Kate Murphy, *UNC and NC State Got the OK to Sell Alcohol in Stadiums. Now, How Do They Make It Work?*, NEWS & OBSERVER (July 3, 2019), https://www.newsobserver.com/news/local/article232189502.html.

[94] Kate Murphy, *Beer and Wine Will Be for Sale at Saturday's UNC Football Game. What You Need to Know*, NEWS & OBSERVER (Sept. 5, 2019), https://www.newsobserver.com/news/local/education/article234701977.html.

[95] Hayley Fowler, *Alcohol Boosts Concession Sales to Over $1M at UNC's First 3 Home Games, Reports Say*, CHARLOTTE OBSERVER (Oct. 12, 2019, 2:59 AM), https://www.charlotteobserver.com/sports/college/football/article236055453.html.

[96] *Id.*

[97] *See id.*

sales at football games, one struggles to imagine how a student-athlete advertising for an alcohol brand would tarnish the university's image. More specifically, alcohol is clearly not "antithetical to the values of the institution . . . ."[98] Not only do public universities condone the consumption of alcohol, they collect significant revenue from it.[99] Nonetheless, Executive Order 223 presumably allows those same universities to restrict athletes from signing brand deals and advertising for the same sorts of products from sales of which it collects a hefty profit.[100] From that perspective, it is difficult to imagine a scenario in which the state maintains an interest in ostensibly regulating student-athletes' compensation from brands that it sells at its flagship universities' football games.

If, for the sake of analysis, one assumes there is a government interest, the next prong of the analysis is whether that interest is substantial. It is reasonable to assume that the government does have a substantial interest in higher education and in protecting the reputation of its colleges and universities. Providing education is a critical function of government, and maintaining a state with prestigious institutions of higher learning could arguably constitute a substantial interest. Allowing student-athletes to advertise with less-than-desirable brands and industries could ostensibly infringe upon that interest. The government might also have a substantial interest in preventing underage drinking, and it could make a colorable argument that allowing student-athletes to advertise for alcohol brands infringes on that interest as well.

However, even assuming that prong of the analysis is satisfied, the law violates the final prong of the test. First, the regulation does not directly advance the state interests. The relationship between a college athlete advertising for an alcohol brand and any negative effect on a university or its academic reputation is too attenuated to survive scrutiny under *Central Hudson*. In applying the *Central Hudson* test to advertising, the Supreme Court in *Lorillard Tobacco Co. v. Reilly* held that "a regulation cannot be sustained if it 'provides only ineffective or remote support for the government's purpose.'"[101] There, the Court found that advertising restrictions on tobacco products

[98] Exec. Order No. 223 § 1(B)(iii), 36 N.C. Reg. 152, 152 (July 2021).
[99] Fowler, *supra* note 95.
[100] *See generally* Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2021).
[101] 533 U.S. 525, 566 (2001) (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 564 (1980)).

were too remote to serve a legitimate government purpose in prohibiting tobacco sales to minors and were thus invalid.[102] Specifically, the restrictions prohibited tobacco companies from placing advertisements less than five feet from the floor in an effort to limit youth exposure to tobacco products.[103] The Court held that a restriction is invalid "if there is 'little chance' that the restriction will advance the State's goal."[104]

In this case, Executive Order 223 provides only remote support for any perceived state interest and has little chance of advancing the state's goal.[105] The restriction at issue in the executive order presupposes that a student-athlete advertising for an "unfavorable" brand will be recognized by consumers and associated with the university to such an extent that public sentiment toward the university will change.[106] Such a possibility is simply too remote to justify a restriction on commercial speech. There is little chance that preventing student-athletes from advertising with alcohol or any other vice brands will have any appreciable effect on the reputation or prestige of a state university. The same can be said about the support for the state interest of preventing underage drinking. Preventing student-athletes from advertising for alcohol brands may well have some effect on preventing underage drinking. However, whatever that effect is, it is not significant enough to justify infringing on commercial speech rights. The restrictions simply do not provide sufficient support for the state's interests.

In addition to only providing remote support for the government's asserted interests, the law is more extensive than necessary to achieve the desired purpose. While there is undoubtedly commercial speech related to NIL deals that the state has a substantial interest in regulating—including deals with companies engaged in illegal activities like gambling or consuming marijuana—it most certainly does not have an interest in regulating all commercial speech.

Thus, the law fails the *Central Hudson* test. However, in order to understand another constitutional deficiency with the law, one must understand the constitutional concept of overbreadth.

B. North Carolina's NIL law is unconstitutional because it is overbroad.

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[102] *Id.* at 567.
[103] *Id.* at 566.
[104] *Id.* (quoting Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 193 (1999)).
[105] *See* Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[106] *See id.*

North Carolina's NIL law is also constitutionally deficient because it is overbroad. The overbreadth doctrine allows courts to invalidate laws that promote a legitimate state interest but also restrict or inhibit significant portions of protected speech.[107] The Supreme Court has held that a law is overbroad if it prohibits a substantial amount of protected speech.[108] The Court first recognized the overbreadth doctrine in the 1940 case of *Thornhill v. Alabama*.[109] There, the Court found that an Alabama statute was overbroad because it outlawed both peaceful and truthful discussions of labor issues as well as violent actions.[110]

The Court also addressed overbreadth that same year in the case of *Cantwell v. Connecticut*.[111] In that case, the Court found that a "breach of the peace" statute improperly restricted protected speech as well as speech that could be regulated.[112] Specifically, the Court pointed out that, "In every case the power to regulate must be so exercised as not, in attaining a permissible end, unduly to infringe the protected freedom."[113] In determining whether a state action is overbroad, the Court has held that "the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep."[114]

Executive Order 223 is overbroad because it encompasses both speech that might be subject to regulation *and* speech that is protected under the First Amendment. Notwithstanding this law, student-athletes would be able to exert their right to commercial speech with alcohol vendors, tobacco vendors, and other similar industries. Commercial speech related to those industries would very likely be protected under *Central Hudson*. Outside of those industries, there are countless other examples of speech that could potentially be inhibited by Executive Order 223. The vagueness of the Order's language means that any number of brand deals could be restricted by virtue of being "antithetical to the values of the institution." As a result,

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[107] Alan K. Chen, *Statutory Speech Bubbles, First Amendment Overbreadth, and Improper Legislative Purpose*, 38 HARV. C.R.-C.L. L. REV. 31, 31 (2003).
[108] United States v. Williams, 553 U.S. 285, 292 (2008).
[109] 310 U.S. 88, 106 (1940).
[110] *See id.*
[111] *See generally* 310 U.S. 296 (1940).
[112] *Id.* at 300, 311.
[113] *Id.* at 304.
[114] Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

Executive Order 223 is unconstitutionally overbroad because it restricts too much speech that would otherwise be protected.

To conclude that Executive Order 223 is overbroad is not to say that the law does not encompass some speech that is worthy of being regulated. As briefly mentioned above, the law was likely intended to prevent athletes from signing deals with marijuana brands, sports betting companies, and other enterprises which are illegal in North Carolina. Those kinds of deals would fail the *Central Hudson* test because they involve illegal activity and would thus be subject to government regulation.[115] Similarly, there is other speech concerning legal enterprises that could also be subject to regulation under *Central Hudson*, provided that there is a substantial government interest and the legislation directly supports that interest.[116] In addition, there are various other legal industries for which allowing student-athletes to advertise could legitimately harm the reputation of the athletes' universities. For example, pornography and firearms would likely fall into this category.

However, this distinction highlights Executive Order 223's deficiency: rather than name these industries individually, it confers public universities broad regulatory power over student-athlete advertising for even innocuous brands and industries. It makes no attempt to distinguish between speech the state has a substantial government interest in regulating and speech it does not. As a result, the law is unconstitutional as a restriction on commercial speech.

C. North Carolina's NIL law also does not fall under the public school speech exceptions under Morse *and* Hazelwood.

Some might argue that Executive Order 223 might survive constitutional scrutiny because of the doctrines outlined by the U.S. Supreme Court in *Hazelwood School District v. Kuhlmeier*[117] and *Morse v. Frederick*,[118] particularly given that the law applies only to public universities. However, this argument is invalid on a number of grounds.

Morse and *Hazelwood* are two of the more recent public school speech decisions by the Supreme Court. In *Hazelwood*, Robert Eugene Reynolds, the principal of a Missouri public high school, censored two articles students sought to publish in their

[115] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563–64 (1980).
[116] *Id.* at 564.
[117] 484 U.S. 260 (1988).
[118] 551 U.S. 393 (2007).

school-sponsored newspaper, called *Spectrum*.[119] The articles were about students' experiences with pregnancy and divorce respectively, and Reynolds believed their content was inappropriate for publication in a school-sponsored high school newspaper.[120] In addition, he believed that students at the school might be able to identify the subjects of the articles, despite the newspaper's attempts at anonymity.[121] As a result, Reynolds, with his superiors' approval, directed the students not to publish the two articles.[122] The students sued the school district in Federal Court, seeking monetary damages and an injunction allowing them to publish the articles and a declaration that their First Amendment rights had been violated, in addition to monetary damages.[123] On appeal to the Supreme Court, a six justice majority found in favor of the school district and ruled that Reynolds did not violate the First Amendment by removing the two articles from publication.[124] In its majority opinion, the Court articulated a new standard for evaluating a public school's restriction on school-sponsored speech. Specifically, the Court held "that educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[125] In this context, the Court recognized "school-sponsored expressive activities" as those that "students, parents, and members of the public might reasonably perceive to bear the imprimatur of the school."[126]

In *Morse*, the principal of Juneau-Douglas High School in Alaska suspended Joseph Frederick, a student at the school, for unfurling a large banner that read "Bong Hits 4 Jesus" during a school-sanctioned event to watch the Olympic Torch relay pass through Juneau.[127] After the school superintendent upheld Frederick's suspension, Frederick brought suit, alleging that the school board and Principal Morse had violated his First Amendment right to free speech.[128] On appeal to the U.S.

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[119] *Hazelwood*, 484 U.S. at 262–63.
[120] *Id.* at 263.
[121] *Id.*
[122] *Id.* at 264.
[123] *Id.*
[124] *Id.* at 274.
[125] *Id.* at 273.
[126] *Id.* at 271.
[127] Morse v. Frederick, 551 U.S. 393, 397–98 (2007).
[128] *Id.* at 399.

Supreme Court, the majority found for Morse.[129] In the majority opinion, the Court cited a number of public school cases that indicate limited constitutional protections for students in public schools given the important nature of public education.[130] In addition, the Court found that the banner could reasonably be regarded as promoting illegal drug use and held that schools can take steps to safeguard their students from such messaging.[131] More broadly, the Court held that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[132] However, the Court indicated that were the restricted speech made by a student *outside* of school, it would be protected.[133]

Though *Morse* and *Hazelwood* expand public school officials' ability to limit student speech, they are not applicable to Executive Order 223 for several reasons. First, those cases arose from speech in the public *high school* context, while Executive Order 223 applies only to students at postsecondary institutions.[134] This difference is critical because the holdings of those cases are presumably limited to the public high school context. Much of the language in *Morse* and *Hazelwood* that allows the restriction of speech is contingent on the context in which it occurred, rather than the speech's content. For example, the *Hazelwood* court referenced "adolescent subjects and readers" as a justification for allowing the restriction of potentially controversial speech in a high school newspaper.[135] Similarly, the *Morse* Court recognized that deterring drug use in "schoolchildren" is a vital government interest that is worthy of protection.[136]

Clearly, the restrictions in Executive Order 223 are distinguishable from those which were acceptable in *Morse* and *Hazelwood*. The restricted speech would be targeted to the public at large primarily through advertising, not pointed at adolescents or schoolchildren in the high school context. Colleges have long been bastions of free speech and the exploration of new ideas. This setting is vastly different than high schools, where teachers and administrators must protect the interests of adolescent

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[129] *Id.* at 410.
[130] *See id.* at 406.
[131] *Id.* at 396.
[132] *Id.* at 404–05 (citing Bethel School Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986)).
[133] *See id.* at 405.
[134] *See* Exec. Order No. 223, 36 N.C. Reg. 152, 1 (July 2, 2021).
[135] Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 276 (1988).
[136] *Morse*, 551 U.S. at 407, 410.

students at a crucial time in their development. As a result, in the college setting, the justifications for allowing the speech in *Morse* and *Hazelwood* (i.e., protecting adolescent students from sensitive topics) disappear. In addition, substantively all of the athletes promoting the speech would be adults given they are college students. Thus, *Hazelwood* and *Morse* flatly do not apply in this context.

In addition, *Hazelwood* is inapplicable because the restricted speech at issue here would not take place in a school-sponsored forum. The speech in *Hazelwood* was problematic in large part because it was to be published in a high school newspaper that bore the school's name and was inappropriate for an audience comprised mostly of high schoolers.[137] Specifically, the Court held that

> Educators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[138]

Here, there are no such concerns about the speech being sponsored by athletes' universities or the public construing it as such. The speech would not take place in a forum analogous to a high school newspaper, and it is unlikely that the views of the individual speaker would be erroneously attributed to the athlete's university. For example, an athlete's deal with a local coffee shop cannot reasonably be perceived to bear the imprimatur of a university in the same way a school-funded high school newspaper would. Support for this assertion can actually be found in the *Morse* Court's discussion of *Hazelwood*.[139] The Court held that the student's speech in *Morse* did not reasonably bear the imprimatur of his school, despite the fact that he was a student at the school and made the speech at a school event.[140] Therefore, simply being a student at a university and making speech in a commercial context cannot reasonably be attributed

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[137] *See generally Hazelwood*, 484 U.S. at 271.
[138] *Id.*
[139] *Morse*, 551 U.S. at 405.
[140] *Id.*

to that university either. In sum, the content of a brand deal is wholly different than content published in a high school newspaper, and the concerns of the *Hazelwood* Court are simply not present here.

Finally, *Hazelwood* and *Morse* are inapplicable because there are no legitimate pedagogical or moral concerns with student-athlete commercial speech at the college level. In *Hazelwood*, the Court's articulated standard for allowing limitations on student speech was that "[e]ducators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[141] Similarly, in *Morse*, the Court held that "schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use."[142] Thus, the ability to limit speech by public high school officials is founded on an interest in shielding students from topics that are too sensitive or mature for them and in promoting learning. As discussed briefly above, those concerns are not present for college students, who learn in a vastly different way in a wholly different setting than high school students do. Even if the athlete's speech at issue here was made in a school-sponsored forum, such as a college newspaper, college administrators do not have the same interests in protecting college students from those topics that high school administrators do. Thus, while *Morse* and *Hazelwood* expanded high school educators' ability to limit the speech of their students, those restrictions have not, and should not, be expanded to the university context. As a result, those cases do not apply in the context of student-athlete commercial speech, and they do not save the constitutionality of Executive Order 223.

IV. THE NORTH CAROLINA GENERAL ASSEMBLY MUST CODIFY A STATUTE THAT BRINGS NORTH CAROLINA'S NIL LAW INTO CONSTITUTIONAL COMPLIANCE.

In sum, North Carolina's NIL law does not pass constitutional muster because it is an overbroad infringement on commercial speech. While North Carolina was on the cutting edge of the NIL landscape at the outset, its current system must be modified in order to better protect the rights of North Carolina college athletes. There are several ways that North Carolina can

[141] *Hazelwood*, 484 U.S at 261.
[142] *Morse*, 551 U.S. at 397.

address these shortcomings while still passing legislation that is beneficial to the state, its universities, and its student-athletes.

The first step in addressing the law's constitutional deficiencies is for the North Carolina General Assembly to codify an NIL law into statute. One of the major problems with the law in its current form is that, even over a year after its inception, it still exists only in an executive order issued the day after *Alston* was decided.[143] More specifically, the current law is only three pages long, and it simply lacks the depth to fully define and explain many of the intricacies associated with NIL legislation.[144] For example, the current law gives no procedures, definitions, or examples of the key concepts it purports to govern.[145] If the legislature were to codify NIL into a statute, it could better address some of these deficiencies. Terms like "antithetical to the values of the institution"[146] could be defined in a way that prevents universities from having carte blanche to restrict any deals that they disagree with. A legislative bill would likely be much more specific than the Executive Order currently is.

To be most effective, the legislature could simply outline specific, appropriate vice industries with whom student-athletes are prevented from signing deals. Such language would stand a much better chance at succeeding under the *Central Hudson* test because the state could more easily prove both a legitimate government interest in regulating the speech and because the restriction would be more likely to directly advance the government's purpose.

Other states have codified statutes that address NIL and its restrictions in a number of ways.[147] While some state NIL statutes raise similar constitutional issues to Executive Order 223, others more appropriately address NIL without violating the Constitution.[148] Generally, there are three categories of restrictions on vice industries in existing NIL statutes.

First, some restrictions, like Executive Order 223, broadly prohibit student-athlete compensation from industries that

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[143] Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[144] *Id.*
[145] *See id.*
[146] *Id.* § 1(B)(iii).
[147] *E.g.*, KY. REV. STAT. ANN. §164.6945(4) (West 2022); *see also* ARIZ. REV. STAT. ANN. § 15-1892(D) (2021).
[148] *E.g.*, KY. REV. STAT. ANN. §164.6945(4) (West 2022); *see also* ARIZ. REV. STAT. ANN. § 15-1892(D) (2021).

infringe on the values of the institution.[149] Tennessee's NIL law falls into this category.[150] Tennessee's NIL statute outlines the framework of NIL compensation for Tennessee student-athletes.[151] Section (g) of that statute includes restrictions on the kinds of compensation those student-athletes can receive.[152] One of those restrictions reads, "[a]n institution may prohibit an intercollegiate athlete's involvement in name, image, and likeness activities that are reasonably considered to be in conflict with the values of the institution."[153] That restriction is very similar to the language used in North Carolina's executive order and it too prohibits a significant amount of otherwise protected speech. Like the Executive Order, Tennessee's statute gives broad authority to universities to prohibit any speech they deem antithetical to their values. Thus, that statute would also fail the *Central Hudson* test for restrictions on commercial speech and is likely unconstitutional. As a result, similar language in a North Carolina statute would make little progress toward passing constitutional muster.

Another category of vice industry restrictions in NIL statutes are statutes that outline specific—often already illegal—industries that are off-limits for student-athlete compensation.[154] Kentucky's NIL law falls into this category.[155] Section 164.6945(4) restricts student-athletes from signing certain NIL deals, but unlike Tennessee's statute or North Carolina's executive order, it enumerates the types of deals that are prohibited.[156] Specifically, that section indicates that:

> A student-athlete shall not enter into an NIL agreement to receive compensation from a third party relating to the endorsement or promotion of: (a) Sports betting; (b) A controlled substance; (c) A substance the student-athlete's intercollegiate athletic association forbids the athlete from using; (d) Adult entertainment; or (e) Products or services that would be illegal for the student-athlete to possess or receive.[157]

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[149] *E.g.*, TENN. CODE ANN. § 49-7-2802(g)(1) (2022).
[150] *Id.*
[151] *Id.* § 49-7-2802.
[152] *Id.* § 49-7-2802(g)(1).
[153] *Id.*
[154] *E.g.*, KY. REV. STAT. ANN §164.6945(4) (2022).
[155] *Id.*
[156] *Id.*
[157] *Id.*

This section is significantly more explicit about what deals are prohibited than North Carolina's law is, and as a result, it is much more likely to be considered constitutional.[158] It specifically outlines the classes of deals that a student-athlete is restricted from signing, rather than offering a blanket prohibition grounded in ambiguous language.[159] As a result, this sort of law has a much greater chance of surviving scrutiny under the *Central Hudson* test. Additionally, much of the prohibited speech is prohibited because the activity underlying it is illegal. Further, the restrictions relating to speech that is not illegal (adult entertainment, for example) are narrowly tailored and no more extensive than necessary to achieve the government's purpose, which is ostensibly to maintain the image of Kentucky's universities. Thus, this statute is almost certainly constitutional. As a result, North Carolina could adopt a similar NIL statute to avoid running afoul of the Constitution.

Finally, the last category of vice restrictions in existing state legislation consists of statutes with no vice restrictions at all.[160] Arizona's NIL law is a good example of this type of legislation.[161] Its law outlines student-athlete restrictions on NIL deals.[162] However, unlike North Carolina, Tennessee, or Kentucky's laws, this law's restrictions are limited only to deals that violate intellectual property laws or existing university contracts and make no mention at all of vice industries or moral restrictions.[163] Specifically, that section reads,

> This section does not authorize student athletes to enter into a contract providing compensation for the use of the student athlete's name, image or likeness if doing so either: 1. Violates the intellectual property rights of any person, including the student athlete's postsecondary education institution. [or] 2. Conflicts with the student athlete's team contract.[164]

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[158] *Compare id.*, *with* Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[159] *Compare* KY. REV. STAT. ANN §164.6945(4) (West 2022), *with* Exec. Order No. 223, 36 N.C. Reg. 152, 152 (July 2, 2021).
[160] *E.g.*, ARIZ. REV. STAT. ANN. § 15-1892(D) (2021).
[161] *Id.*
[162] *Id.*
[163] *Id.*
[164] *Id.*

By avoiding vice restrictions altogether, Arizona's NIL law ensures that it does not violate the Constitution at all. Instead, it gives Arizona student-athletes the ability to sign a wide variety of deals with a wide variety of companies. This category of NIL law is another option for the North Carolina Legislature. In addition to avoiding the constitutional issues involved with vice restrictions, a law like this one might also be attractive to student-athletes deciding where to attend college, since they would have access to a wider variety of NIL deals than in other states. Given that North Carolina Governor Roy Cooper issued the Executive Order with the goal of preventing the state's universities from falling behind in athletic recruiting compared to other states, this consideration might be one that is attractive. Regardless, an NIL statute similar to Arizona's is significantly more protective of commercial speech rights than North Carolina's current law.

CONCLUSION

North Carolina's NIL law was issued with a noble purpose. It sought to allow North Carolina's college athletes to finally profit from their name, image, and likeness in the way they had long deserved, while maintaining what seemed like common-sense protections for universities. However, the rush to authorize NIL in North Carolina had unintentional constitutional repercussions that are borne out in Executive Order 223's restrictive § 1(B)(iii). Specifically, the law infringes on the commercial speech rights of student-athletes. Executive Order 223 has served its purpose. Now, to properly protect North Carolina's student-athletes' commercial speech rights, NIL must be codified into a statute that includes all the constitutional protections those athletes are entitled to enjoy.

As outlined above, there are numerous options the North Carolina General Assembly can choose from when deciding how to draft that statute. Though lawmakers might be enticed to simply codify North Carolina's existing law, they would be better served by following the model set forth by states like Kentucky or Arizona. Otherwise, the state would likely still be in violation of the commercial speech rights of its college athletes. However they choose to do it, the North Carolina General Assembly must draft an NIL statute that at once serves the interests of state universities, student-athletes, and the state at large, all while complying with the Constitution and free speech rights. That reality does not currently exist in North Carolina, and statutory reform is needed to bring North Carolina's NIL law into compliance with the U.S. Constitution.

Thus, until the legislature drafts an appropriate statute, North Carolina's NIL law remains an overbroad violation of college student-athletes' commercial speech rights.