First Amendment Law Review

Volume 23 2024-2025

THE UNIVERSITY OF NORTH CAROLINA
SCHOOL OF LAW

Administration

PETER HANS, B.A., M.A., *UNC System President*
MARTIN H. BRINKLEY, A.B., J.D., *Dean and William Rand Kenan Jr. Distinguished Professor of Law*
CRAIG T. SMITH, B.A., J.D., LL.M., *Associate Dean for Academic Affairs, Assistant Dean for the Writing and Learning Resources Center, and Clinical Professor of Law*
KELLY PODGER SMITH, B.A., J.D., *Associate Dean for External Relations and Careers and Adjunct Associate Professor of Law*
KIMBERLY C. BISHOP, B.A., J.D., *Associate Dean for Experiential Learning and Clinical Professor of Law*
ANDREW HESSICK, B.A., J.D., *Associate Dean for Strategy & Planning and Judge John J. Parker Distinguished Professor of Law*
W. MARK C. WEIDEMAIER, B.A., J.D., *Associate Dean for Faculty Research and Ralph M. Stockton, Jr. Distinguished Professor of Law*
BIANCA MACK, B.A., M.B.A., J.D., *Associate Dean for Equity, Admissions, and Student Affairs and Adjunct Associate Professor of Law*
LOUISE HARRIS, B.S., *Associate Dean for Advancement*
NICK P. GOETTSCH, B.A., B.A., M.P.A, *Associate Dean for Administration*
AMY BAREFOOT GRAEDON, B.A., *Assistant Dean for Communications*
CYNTHIA ANN LOWERY, B.S., *Assistant Dean for Finance*
ROBERT MICHAEL BIRRENKOTT, B.A., M.A., J.D., *Assistant Dean for Career Development and Adjunct Associate Professor of Law*
DAVID WRIGHT, B.A., J.D., *Assistant Dean for Student Development and Adjunct Associate Professor of Law*

Faculty

DAVID S. ARDIA, B.S., M.S., J.D., LL.M., *Associate Professor Law, Reef C. Ivey II Excellence Fund Term Professor of Law, and Co-Director of the Center for Media Law and Policy*
TRACEY BANKS, B.A., J.D., *Clinical Professor of Law*
KEVIN BENNARDO, B.A., J.D., *Clinical Professor of Law*
KIMBERLY C. BISHOP, B.A., J.D., *Associate Dean for Experiential Learning and Clinical Professor of Law*
MARTIN H. BRINKLEY, A.B., J.D., *Dean and William Rand Kenan Jr. Distinguished Professor of Law*
JOHN WESLEY BROOKER, B.A., J.D., LL.M., M.M.A.S., *Clinical Associate Professor of Law*
LISSA LAMKIN BROOME, B.S., J.D., *Burton Craige Distinguished Professor of Law and Director of the Center for Banking and Finance*
KARA J. BRUCE, B.A., J.D., *Professor of Law*
ELLIE CAMPBELL, B.A., M.A., M.A., J.D., M.L.I.S, *Reference Librarian and Clinical Associate Professor of Law*
ALEXA Z. CHEW, A.B., J.D., *Clinical Professor of Law*
ANDREW CHIN, B.S., PH.D., J.D., *Paul B. Eaton Distinguished Professor of Law*
JOHN MARTIN CONLEY, B.A., J.D., PH.D., *William Rand Kenan Jr. Professor of Law*
JOHN F. COYLE, B.A., M.PHIL., J.D., *Reef C. Ivey II Distinguished Professor of Law*
HARMONY DECOSIMO, B.A., J.D., *Visiting Clinical Professor of Law*
NICOLE M. DOWNING, B.S., J.D., M.S.L.S., *Assistant Director for Public Services and Clinical Associate Professor of Law*
MAXINE N. EICHNER, B.A., J.D., M.A., PH.D., *Graham Kenan Distinguished Professor of Law*
KATE SABLOSKY ELENGOLD, B.A., J.D., *Assistant Professor of Law*
LEWIS MOORE EVERETT, B.A., M.A., J.D., *Clinical Professor of Law*
BARBARA A. FEDDERS, B.A., J.D., *Director of Clinical Programs and Associate Professor of Law*
CARRIE LYNN FLOYD, B.A., M.S.W., J.D., *Assistant Professor of Law*
DEBORAH R. GERHARDT, B.A., J.D., *Paul B. Eaton Distinguished Professor of Law*
MICHAEL J. GERHARDT, B.A., M.S., J.D., *Burton Craige Distinguished Professor of Jurisprudence*
CALEB NATHANAEL GRIFFIN, B.B.A.., J.D., *Associate Professor of Law*
RACHEL I. GURVICH, B.A., J.D., *Clinical Associate Professor of Law*
THOMAS LEE HAZEN, B.A., J.D., *Cary C. Boshamer Distinguished Professor of Law*
ANDREW HESSICK, B.A., J.D., *Associate Dean for Strategy & Planning and Judge John J. Parker Distinguished Professor of Law*
CARISSA BYRNE HESSICK, B.A., J.D., *Anne Shea Ransdell and William Garland "Buck" Ransdell, Jr. Distinguished Professor of Law*
JEFFREY MICHAEL HIRSCH, B.A., M.P.P., J.D., *Geneva Yeargan Rand Distinguished Professor of Law*
DONALD THOMAS HORNSTEIN, B.A., J.D., *Aubrey L. Brooks Professor of Law*
MELISSA B. JACOBY, B.A., J.D., *Graham Kenan Professor of Law*
EISHA JAIN, B.A., J.D., *Henry P. Brandis Distinguished Professor of Law*
OSAMUDIA JAMES, B.A., J.D., LL.M., *Professor of Law*
THOMAS A. KELLEY, A.B., J.D., *James Dickson Phillips, Jr. Distinguished Professor of Law*
JOSEPH E. KENNEDY, B.A., J.D., *Martha Brandis Term Professor of Law*
JULIE L. KIMBROUGH, B.A., J.D., M.S.L.S., *Clinical Professor of Law*
AARON S. KIRSCHENFELD, A.B., M.S.I.S., J.D., *Digital Initiatives Law Librarian and Clinical Associate Professor of Law*
P. ANNE KLINEFELTER, B.A., M.S.L.S., J.D., *Henry P. Brandis Distinguished Professor of Law*
JOAN H. KRAUSE, B.A., J.D., *Dan K. Moore Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
HOLNING S. LAU, B.A., J.D., *Willie Person Mangum Distinguished Professor of Law*
DUSTIN MARLAN, B.A., J.D., *Assistant Professor of Law*
WILLIAM P. MARSHALL, B.A., J.D., *William Rand Kenan Jr Distinguished Professor of Law*
JONAS J. MONAST, B.A., J.D., *C. Boyden Gray Distinguished Fellow, Assistant Professor of Law, and Director of the Center on Climate, Energy, Environment & Economics (CE^3)*
ERIC L. MULLER, A.B., J.D., *Dan K. Moore Distinguished Professor of Law in Jurisprudence and Ethics*
GENE R. NICHOL, B.A., J.D., *Boyd Tinsley Distinguished Professor of Law*
CAROLINE L. OSBORNE, B.A., J.D., LL.M., M.S.L.S., *Director of the Law Library and Clinical Professor of Law*
LEIGH Z. OSOFSKY, A.B., J.D., *William D. Spry III Distinguished Professor of Law*
MARY-ROSE PAPANDREA, B.A., J.D., *Samuel Ashe Distinguished Professor of Constitutional Law*
BETH S. POSNER, A.B., M.A., J.D., *Clinical Professor of Law*
KERRI-ANN ROWE, B.A., J.D., M.S., *Reference Librarian and Clinical Assistant Professor of Law*
STACEY L. ROWLAND, B.A., M.I.S., M.S., J.D., *Assistant Director for Collection & Technology Services and Clinical Associate Professor of Law*
OSCAR J. SALINAS, B.A., J.D., M.A., *Director of Academic Excellence Program and Clinical Professor of Law*
MARIA SAVASTA-KENNEDY, B.A., J.D., *Director of the Externship Program and Clinical Professor of Law*
RICHARD S. SAVER, B.A., J.D., *Arch T. Allen Distinguished Professor of Law; Professor of Social Medicine in the School of Medicine; Adjunct Professor in the Gillings School of Global Public Health*
ANNIE SCARDULLA, B.A., J.D., *Clinical Assistant Professor of Law*
THEODORE M. SHAW, B.A., J.D., *Julius L. Chambers Distinguished Professor of Law and Director of the Center for Civil Rights*

Craig T. Smith, B.A., J.D., LL.M., *Associate Dean for Academic Affairs, Assistant Dean for the Writing and Learning Resources Center, and Clinical Professor of Law*
Rick Su, B.A., J.D., *Professor of Law*
Kathleen DeLaney Thomas, B.S., J.D., LL.M., *George R. Ward Term Professor of Law and Director of UNC School of Law Tax Institute*
Sara B. Warf, B.A., J.D., *Clinical Associate Professor of Law*
W. Mark C. Weidemaier, B.A., J.D., *Ralph M. Stockton, Jr. Distinguished Professor of Law*
Deborah M. Weissman, B.A., J.D., *Reef C. Ivey II Distinguished Professor of Law*
Marjorie S. White, A.B., J.D., *Clinical Professor of Law*
Erika K. Wilson, B.S., J.D., *Professor of Law, Wade Edwards Distinguished Scholar, and Thomas Willis Lambeth Distinguished Chair in Public Policy*
Andrew Wisniewsky, B.A., J.D., *Reference Librarian and Clinical Assistant Professor of Law*
Janine M. Zanin, B.A., J.D., *Assistant Director of Externship Programs and Clinical Professor of Law*

Adjunct Faculty

The Honorable Curtis H. "Trey" Allen, B.A., J.D., *Adjunct Professor of Law*
Teresa Artis, B.A., J.D., M.B.A., *Adjunct Professor of Law*
E. Kent Auberry, A.B., J.D., *Adjunct Professor of Law*
Carmen Bannon, B.S., J.D., *Adjunct Professor of Law*
E. William Bates II, B.A., J.D., *Adjunct Professor of Law*
Robert Michael Birrenkott, B.A., M.A., J.D., *Assistant Dean for Career Development and Adjunct Associate Professor of Law*
Seth A. Blum, B.A., M.A., J.D., *Adjunct Professor of Law*
M. Christopher Bolen, B.S., M.B.A., J.D., *Adjunct Professor of Law*
Elizabeth Braswell, B.A., J.D., *Adjunct Professor of Law*
Eric J. Brignac, B.A., J.D., *Adjunct Professor of Law*
Jonathan E. Broun, B.Ph., J.D., *Adjunct Professor of Law*
LeAnn Nease Brown, B.A., M.S., J.D., *Adjunct Professor of Law*
Patricia L. Bryan, B.A., J.D., LL.M., *Professor of Law Emerita and Adjunct Professor of Law*
Felice M. Corpening, B.A., J.D., *Adjunct Professor of Law*
Benjamin A. Davidson, B.S., J.D., *Adjunct Associate Professor of Law*
Mark Davis, B.A., J.D., *Adjunct Professor of Law*
The Honorable Chris Dillon, B.A., J.D., *Adjunct Professor of Law*
Jina Dhillon, B.A., M.P.H., J.D., *Adjunct Associate Professor of Law*
Stuart Dorsett, B.A., J.D., *Adjunct Associate Professor of Law*
Robert E. Duggins, B.S., J.D., *Adjunct Professor of Law*
The Honorable Anita S. Earls, B.A., J.D., *Adjunct Professor of Law*
J. Ford Eubanks, B.A., M.A., J.D., *Adjunct Assistant Professor of Law*
Jillian Franke, B.A., J.D., *Adjunct Associate Professor of Law*
Stephen Greetham, B.A., J.D., *Adjunct Associate Professor of Law*
Mikael R. Gross, B.S., M.S., J.D., *Adjunct Professor of Law*
Ken Hammer, B.S., J.D., *Adjunct Professor of Law*
R. Harper Heckman, B.A., J.D., *Adjunct Professor of Law*
Rebecca B. Howell, B.A., J.D., *Director of International Programs & Special Projects and Adjunct Associate Professor of Law*
Samuel S. Jackson, A.B., J.D., *Adjunct Professor of Law*
Robert O. Jenkins, B.A., M.P.A., J.D., *Adjunct Professor of Law*
Sally C. Johnson, B.S., M.D., *Adjunct Professor of Law*
Valerie A. Johnson, B.A., J.D., *Adjunct Professor of Law*
Tod M. Leaven, B.S., J.D., *Adjunct Clinical Associate Professor of Law*
Mark Kleinschmidt, B.A., J.D., *Adjunct Professor of Law*
Rina Lyubkin, B.S., B.S., J.D., *Adjunct Clinical Assistant Professor of Law*
Bianca Mack, B.A., M.B.A., J.D., *Associate Dean for Equity, Admissions, and Student Affairs and Adjunct Associate Professor of Law*
Richard L. Magee, B.A., J.D., *Adjunct Professor of Law*
Kellie Mannette, B.A., J.D., *Adjunct Associate Professor of Law*
James M. Markham, B.A., J.D., *Adjunct Professor of Law*
Charles Marshall, B.A., J.D., *Adjunct Associate Professor of Law*
C. Steven Mason, B.A., J.D., *Adjunct Professor of Law*
William S. Mills, A.B., J.D., *Adjunct Professor of Law*
Jonas J. Monast, B.A., J.D., *Adjunct Professor of Law*
Sylvia K. Novinsky, B.S., J.D., *Adjunct Professor of Law*
Orla Marie O'Hannaidh, B.A., M.A., J.D., *Adjunct Associate Professor of law*
John V. Orth, A.B., J.D., M.A., Ph.D., *William Rand Kenan Jr. Professor of Law Emeritus and Adjunct Professor of Law*
Barbara Osborne, B.A., M.A., M.Ed., J.D., *Adjunct Professor of Law*
Dawn Osborne-Adams, B.S., J.D., *Adjunct Associate Professor of Law*
Brian Oten, B.S., J.D., *Adjunct Associate Professor of Law*
Kaitlyn Adams Parker, B.A., J.D., *Senior Director of Student Engagement and Adjunct Associate Professor of Law*
M. Scott Peeler, B.A., J.D., *Adjunct Professor of Law*
Tasha Pepper-Dickinson, B.A., J.D., *Adjunct Associate Professor of Law*
Charles Plambeck, B.A., J.D., *Adjunct Associate Professor of Law*
Richard A. Simpson, B.A., J.D., *Adjunct Professor of Law*
Kelly Podger Smith, B.A., J.D., *Associate Dean for External Relations and Careers and Adjunct Associate Professor of Law*
Eric J. Spitler, B.A., J.D., *Adjunct Professor of Law*
Raymond Albert Starling, B.S., J.D., *Adjunct Professor of Law*
Chandra T. Taylor, B.A., J.D., *Adjunct Professor of Law*
Kimberly Tran, B.S., M.A., Ph.D., *Adjunct Associate Professor of Mental Health and the Law*
Jennifer Van Zant, B.A., J.D., *Adjunct Associate Professor of Law*
Evan Vitiello, B.S., M.D.., *Adjunct Associate Professor of Law*
Joni L. Walser, B.A., J.D., *Adjunct Professor of Law*
Charity Wijetunga, B.S., J.D., Ph.D., *Adjunct Associate Professor of Law*

Faculty Emeriti

John Charles Boger, A.B., M.Div., J.D., *Wade Edwards Distinguished Professor of Law Emeritus*
Kenneth S. Broun, B.S., J.D., *Henry Brandis Professor of Law Emeritus*
Caroline Nicholson Brown, B.A., M.A., J.D., *Professor of Law Emerita*
Patricia L. Bryan, B.A., J.D., LL.M., *Professor of Law Emerita and Adjunct Professor of Law*

MICHAEL L. CORRADO, B.A., B.S., A.M., PH.D., J.D., *Arch T. Allen Distinguished Professor of Law Emeritus*
LAURA N. GASAWAY, B.A., M.S., J.D., *Paul B. Eaton Distinguished Professor of Law Emerita*
S. ELIZABETH GIBSON, B.A., J.D., *Burton Craige Professor of Law Emerita*
JOSEPH JOHN KALO, B.A., J.D., *Graham Kenan Professor of Law Emeritus*
RONALD CHARLES LINK, A.B., M.A., J.D., *Dan K. Moore Distinguished Professor of Law Emeritus*
RUTH ANN MCKINNEY, B.A., M.Ed., J.D., *Clinical Professor of Law Emerita*
ROBERT P. MOSTELLER, B.A., M.A., J.D., *J. Dickson Phillips Distinguished Professor of Law Emeritus*
RICHARD E. MYERS, B.A., M.A., J.D., *Henry Brandis Professor of Law Emeritus*
JOHN V. ORTH, A.B., J.D., M.A., PH.D., *William Rand Kenan Jr. Professor of Law Emeritus and Adjunct Professor of Law*
ALICE A. RATLIFF, B.A., M.A., J.D., *Clinical Professor of Law Emerita*
RICHARD A. ROSEN, B.A., J.D., *Professor of Law Emeritus*
WILLIAM J. TURNIER, B.S., M.A., J.D., *Willie Person Mangum Professor of Law Emeritus*
JUDITH WELCH WEGNER, B.A., J.D., *Burton Craige Professor of Law Emerita*
ARTHUR MARK WEISBURD, A.B., J.D., *Reef C. Ivey II Distinguished Professor of Law Emeritus*

The *First Amendment Law Review* is published three times a year by the First Amendment Law Review.
The views expressed in signed contributions to the *Review* do not necessarily reflect the opinions of the Board of Editors.

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

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

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

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.

https://journals.law.unc.edu/firstamendmentlawreview/

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

Dean Martin H. Brinkley

Professor David S. Ardia

Professor Mary-Rose Papandrea

Professor William P. Marshall

University of North Carolina Center for Media Law & Policy

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

Student Bar Association

North Carolina Law

Review

North Carolina Banking Institute

North Carolina Journal of International Law and Commercial Regulation

North Carolina Journal of Law and Technology

North Carolina Civil Rights Law Review

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 23 **ISSUE 2**

ARTICLES

NOTES

SPEECH, ITS BOUNDARIES, AND THE MILITARY

Michael Atkins*

INTRODUCTION

Abraham Lincoln faced a torrent of turmoil in the summer of 1863, a grim shadow over his presidency looming larger by the day. Riots spread across New York City over the first national conscription mandate, signed into law that spring,[1] while the suspension of the writ of habeas corpus raised the unsettling specter of a political purge.[2] Even the President's well-intentioned Emancipation Proclamation, issued on New Year's Day, had become a political liability, feeding criticism that rationales for the Civil War had shifted midstream.[3] Worst of all, dispatches from the battlefront had taken a bleak turn: General Ulysses S. Grant's advances on Vicksburg were bogged down by weather and, to some, the commander's own drinking problem,[4] while a calamitous defeat at Chancellorsville left 17,000 Union troops dead, wounded, or missing.[5] Amid these setbacks, the besieged chief executive encountered yet another scandal. General Ambrose Burnside, relegated to Ohio after costly defeats on the Potomac, had abruptly jailed Clement Vallandigham, an outspoken Copperhead Democrat known for vehement polemics against President Lincoln. Details were disturbing. General Burnside's men had dragged the ex-congressman from his home in the dead of night, charging him with treason for a provocative speech he had delivered at a rally in Mount Vernon, Ohio, a few days earlier.[6] Summarily tried by military commission and sentenced to imprisonment for the war's duration, Vallandigham soon became a *cause célèbre* for the antiwar movement, his highly publicized plight fueling fears of despotism and repression.[7] Compounding the crisis, General Burnside shuttered the *Chicago Times* newspaper for its editorials bemoaning the emancipation policy and increasing casualty counts.[8] This was a crucible

---

* Judge Advocate, United States Coast Guard. J.D., 2022, University of Notre Dame, Notre Dame, Indiana. The author is grateful to Professor Margaret Ryan for her guidance and encouragement. The views expressed herein are solely those of the author and do not reflect the views or opinions of the Department of Homeland Security, the Coast Guard, or any other institution.

[1] *See* DAVID HERBERT DONALD, LINCOLN 448-51 (1995).

[2] *See* BENJAMIN P. THOMAS, ABRAHAM LINCOLN 377-78 (1952).

[3] *See* DONALD, *supra* note 1, at 417-18.

[4] *See* JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 588-90 (1st ed. 1988).

[5] *See id.* at 640-45.

[6] *See id.* at 596-97; DONALD, *supra* note 1, at 419-21.

[7] *See* MCPHERSON, *supra* note 4, at 596-97.

[8] *See* DORIS KEARNS GOODWIN, TEAM OF RIVALS: THE POLITICAL GENIUS OF ABRAHAM LINCOLN 522 (2005).

moment for President Lincoln, pitting the sanctity of free expression against the imperatives of war, with the survival of a staggering nation's soul at stake.

The right to free speech in the United States is derived from the First Amendment to the Federal Constitution, which states in relevant part, "Congress shall make no law . . . abridging the freedom of speech, or of the press."[9] This protection from being jailed, fined, or sued for expressing one's opinions or ideas has been applied broadly and defended fervently in the 230 years since its ratification. Speech is shielded not only from congressional abridgment; the Free Speech Clause also shields restraints by the executive branch[10] and by state and local governments.[11] The First Amendment's references to "speech" and to the "press" have likewise been interpreted non-literally. While verbal utterances and printed broadsheets are protected, so too is expression through a modern medium like the Internet.[12] Even an offensive symbolic representation, like desecrating the American flag, cannot be outlawed.[13]

The First Amendment's reach is broad, but the freedom it confers is not without qualification.[14] Restrictions on defamatory language,[15] obscenity,[16] commercial advertising,[17] and other categories of speech have passed constitutional muster, as have speech limitations imposed on certain people, such as government employees.[18] Content-neutral limitations may be applied, so long as they advance important interests and are narrowly tailored.[19] However, content-based restrictions are presumptively unconstitutional and generally trigger strict

---

[9] U.S. CONST. amend. I.
[10] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714-16 (1971) (Black, J., concurring).
[11] *See* Gitlow v. New York, 268 U.S. 652, 666-72 (1925).
[12] *See* Reno v. ACLU, 521 U.S. 844, 870 (1997).
[13] *See* Texas v. Johnson, 491 U.S. 397, 399, 420 (1989).
[14] *See* Am. Commc'ns Ass'n v. Douds, 339 U.S. 382, 394 (1950) ("Freedom of speech . . . does not comprehend the right to speak on any subject at any time.").
[15] *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 268-69 (1964).
[16] *See* Miller v. California, 413 U.S. 15, 23-25 (1973).
[17] *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770-73 (1976).
[18] *See* Garcetti v. Ceballos, 547 U.S. 410, 417-20 (2006).
[19] *See* Heffron v. Int'l Soc'y for Krishna Consciousness, Inc., 452 U.S. 640, 648 (1981) ("A major criterion for a valid time, place and manner restriction is that the restriction 'may not be based upon either the content or subject matter of speech.'") (quoting Consol. Edison Co. of N.Y. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 530, 536 (1980)).

scrutiny from the courts,[20] while laws targeting mere viewpoints have been summarily invalidated.[21]

The military occupies a discrete domain where the regulation of speech has been traditionally afforded a high degree of deference. This article explores the contours and implications of that unique application, both legislatively and judicially. The article's first half is exposition and explanation, surveying seminal case law and provisions of the military criminal code. The second half fastens upon recent military policies and initiatives aimed at eliminating speech considered corrosive to good order and discipline, examining the prudence and propriety of those actions. An undercurrent coursing throughout is the fundamental tension between civil liberties and national security. As the oft-quoted phrase warns, the Constitution is not a suicide pact,[22] and free speech and other constitutional protections must, at times, yield to other important values, among them public order and safety. The delicate balancing of these values—the stifling of individual rights to preserve collective rights—has posed a perennial dilemma since the nation's founding.

Grappling with this paradox in 1863, President Lincoln quietly commuted Vallandigham's sentence, hastily reopened the *Chicago Times*, and ordered officials not to suppress any more newspapers.[23] Publicly, in a stroke of political genius, the President penned a letter *defending* General Burnside's controversial actions, carefully outlining the constraints on an individual's freedoms in that period of national fragility. Vallandigham, the letter pointed out, was not arrested for mere criticism of the administration but "because he was laboring, with some effect, to prevent the raising of troops, to encourage desertions from the army, and to leave the rebellion without an adequate military force to suppress it."[24] Reprinted in various formats, the letter reached a remarkable ten million readers, dramatically shifting popular sentiment in the President's favor.[25] In the missive's most famous line, President Lincoln posed:

---

[20] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws–those that target speech based on its communicative content–are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.") (citations omitted).
[21] *See* Iancu v. Brunetti, 588 U.S. 388, 392-99 (2019).
[22] *See, e.g.,* Terminiello v. City of Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) ("The choice is not between order and liberty. It is between liberty with order and anarchy without either.").
[23] *See* DONALD, *supra* note 1, at 421; GOODWIN, *supra* note 8, at 523.
[24] GOODWIN, *supra* note 8, at 524.
[25] *Id.* at 525.

"Must I shoot a simple-minded soldier boy who deserts, while I must not touch a hair of a wily agitator who induces him to desert?"[26]

I. A SOCIETY APART

The Supreme "Court has long recognized that the military is, by necessity, a specialized society separate from civilian society."[27] The six military branches often engage in activities and pursue objectives that bear little in common with any civilian counterpart. Broader societal aims may include interpersonal harmony, the free exchange of ideas, and the facilitation of commerce. A military engagement, on the other hand, could involve acute danger to a service member's life in pursuit of an operational objective, like overthrowing a dictator or liberating the denizens of a foreign land. Naturally, a different set of norms and traditions has taken shape within the military. So too has a separate body of law. The maintenance of good order and discipline is an overarching purpose of military law,[28] codified as the Uniform Code of Military Justice ("UCMJ"). Given the military's "very nature and purpose," the UCMJ affords fewer individual protections than those developed in civilian society and in civilian courts.[29] Restriction on speech, as noted, is one clear asymmetry. The Supreme Court has explained that "[w]hile the members of the military are not excluded from the protection granted by the First Amendment, the different character of the military community and of the military mission requires a different application of those protections."[30]

A. Interwoven History

A detailed distillation of free speech doctrines and precepts would stretch this article beyond its intended scope and, frankly, beyond the expertise of its author. It is useful, however, to review just how prominently the military has featured in the broader evolution of First Amendment law. Consider the

---

[26] *Id*.
[27] Parker v. Levy, 417 U.S. 733, 743 (1974).
[28] *Manual for Courts-Martial, United States* (2024 ed.) [*MCM*], pt. I, para. 3 at I-1 ("The purposes of military law are to promote justice, to deter misconduct, to facilitate appropriate accountability, to assist in maintaining good order and discipline in the armed forces, to promote efficiency and effectiveness in the military establishment, and thereby to strengthen the national security of the United States.").
[29] Reid v. Covert, 354 U.S. 1, 36 (1957).
[30] *Parker*, 417 U.S. at 758.

Espionage Act of 1917, which criminalized conveying information that interfered with military operations during war or promoted the success of enemies.[31] Passed shortly after America's entry into World War I, the Espionage Act carried stiff penalties, including potential imprisonment for up to twenty years upon conviction, and also empowered the Postmaster General to impound publications.[32] The law was expanded in 1918 to prohibit any "disloyal, profane, scurrilous, or abusive language" about the government or military.[33] Among the controversial cases that ensued was the prosecution of a Socialist who had printed and distributed anti-draft leaflets, whose conviction the Supreme Court upheld in *Schenck v. United States*.[34] In *Schenck*, Justice Oliver Wendell Holmes, who had suffered near-fatal wounds as a Union officer at Ball's Bluff and Antietam,[35] articulated the "clear and present danger" test for determining punishable speech[36] and delivered arguably the most famous line in the Court's history, "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."[37]

Many other doctrinal waypoints are traceable to military actors and activities. In 1968, during the Vietnam War, the Court upheld a prohibition on symbolic speech, affirming the conviction of an antiwar protestor who had burned his draft card on the steps of a South Boston courthouse.[38] In that case, Chief Justice Earl Warren applied what is now known as the *O'Brien* test:

> [W]e think it clear that a government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or

---

[31] Espionage Act of 1917, Pub. L. No. 65-24, 40 Stat. 217 (codified as amended at 18 U.S.C. §§ 793-794).
[32] *See id.*
[33] Sedition Act of 1918, Pub. L. No. 65-150, 40 Stat. 553 (repealed 1920).
[34] 249 U.S. 47 (1919).
[35] *See* STEPHEN BUDIANSKY, OLIVER WENDELL HOLMES, A LIFE IN WAR, LAW, AND IDEAS 84, 96 (2019).
[36] *Schenck*, 249 U.S. at 52. This test has been expressly adopted by military courts. United States v. Priest, 45 C.M.R. 338, 344 (C.M.A. 1972).
[37] *Schenck*, 249 U.S. at 52. In subsequent cases, Justice Holmes shifted to a posture markedly more protective of civil liberties, swayed by urging from such contemporaries as Learned Hand and Zechariah Chafee. *See* BUDIANSKY, *supra* note 35, at 366-95. Modern courts often rely on the "imminent lawless action" test, formulated by the Warren Court, when weighing the regulation of inflammatory or inciting speech. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969) (per curiam).
[38] United States v. O'Brien, 391 U.S. 367, 369-72 (1968).

> substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.[39]

The next year, the Court pivoted to favor a pacificist's rights, introducing the *Tinker* test to determine, based on a "substantial disruption" inquiry, whether a public school may suppress student speech.[40] In another landmark case, from 1971, the Court ruled that President Nixon could not stop the *New York Times* from publishing the Pentagon Papers, which detailed military involvement in Vietnam.[41]

More recent cases bearing military elements, or at least a more-than-tangential connection, demonstrate a jurisprudential arc bending reliably toward the protection of speech, no matter how unsavory its content. In *Snyder v. Phelps*,[42] decided in 2011, the Court held that speech dealing with a public concern in a public space cannot be the basis of a tort claim for intentional infliction of emotional distress, dismissing a civil action brought by the father of a Marine killed in Iraq after his son's funeral was disrupted by picketers from the Westboro Baptist Church.[43] The next year, the Court struck down the Stolen Valor Act of 2005, which had criminalized false representations of military service, with a plurality deeming a restriction on falsity, in itself, did not survive "exacting scrutiny" and was, therefore, an unconstitutional abridgment of speech.[44]

B. Decorum and Deportment

The UCMJ took effect in May 1951, after enactment by Congress the previous year. Codified in Chapter 47 of Title 10 of the United States Code, the provisions of the UCMJ constitute the governing criminal law of the military.[45] At cursory glance, the punitive articles[46] read like any other criminal code. Yet a closer inspection reveals clear prohibitions on speech—not just

---

[39] *Id.* at 377.
[40] *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 514 (1969).
[41] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 714, 718-20 (1971) (Black, J., concurring).
[42] 562 U.S. 443 (2011).
[43] *See id.* at 447-59.
[44] *See* United States v. Alvarez, 567 U.S. 709, 724 (2012).
[45] *See* 10 U.S.C. §§ 801-946a.
[46] 10 U.S.C. §§ 877-934.

behavior-oriented speech—by those to whom the UCMJ applies.[47] For example, one provision prohibits disrespect toward superior commissioned officers.[48] Another provision, applicable to warrant officers and enlisted members, restricts contemptuous and disrespectful language or deportment when directed at a "warrant officer, noncommissioned officer, or petty officer, while that officer is in the execution of his office."[49] Other articles point to overlap between military and civilian schemes. One such provision proscribes threats to injure another's person, property, or reputation,[50] which is not unlike a state's ability to ban "true threats" in which a speaker means to communicate a serious intent to commit unlawful violence to another person or group.[51] Another punitive article authorizes punishment by court-martial to any member who "causes or participates in any riot or breach of the peace,"[52] while another targets "provoking or reproachful words or gestures" directed at other service members.[53] These provisions are analogous to "fighting words" that are generally unprotected by the First Amendment, an exception described by the Supreme Court in 1942 as applying to words "which by their very utterance inflict injury or tend to incite an immediate breach of the peace."[54]

Perhaps the clearest example of a military-specific abrogation of speech is the provision criminalizing "contemptuous words against the President, the Vice President, Congress, the Secretary of Defense, the Secretary of a military department, the Secretary of Homeland Security, or the Governor or legislature of any State, Commonwealth, or possession in which he is on duty or present."[55] Such speech is prosecutable even if uttered in a private capacity, though it must be "personally contemptuous" and not simply policy criticism

---

[47] *See* 10 U.S.C. § 802. Generally, personal jurisdiction is limited to active-duty members, cadets, midshipmen, reservists on orders, and retirees receiving pay. *Id.*
[48] 10 U.S.C. § 889. The MCM explains that "acts or language" that warrant punishment under this provision "may be conveyed by abusive epithets or other contemptuous or denunciatory language." *MCM*, pt. IV, para. 15.c.(2)(b) at IV-22.
[49] 10 U.S.C. § 891.
[50] 10 U.S.C. § 915.
[51] *See* Virginia v. Black, 538 U.S. 343, 359-60 (2003).
[52] 10 U.S.C. § 916.
[53] 10 U.S.C. § 917.
[54] Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) ("It has well been observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in morality and order.").
[55] 10 U.S.C. § 888.

expressed during a political discussion.[56] Further, "[t]he truth or falsity of the statements is immaterial."[57] The provision's scope is circumscribed to some degree by its text, applying only to commissioned officers, but the rule would still likely surprise any newcomer to this field of law. Certainly, an equivalent restriction on the general public would be antithetical to basic constitutional axioms and, moreover, an encumbrance on our political system.[58] Imagine small-town police swarming to arrest a local politician whose stump speech included "contemptuous words" about an ineffectual state legislature. A laughable scenario indeed, though it does summon the Vallandigham affair of 1863 to mind. One must also consider the enduring, deeply rooted tradition of military subordination to civilian leadership, a deference that predates the nation's founding and pervades foundational documents.[59]

The Court of Military Appeals ("CMA") in 1967 considered the constitutionality of the foregoing provision, codified at 10 U.S.C. § 888, in *United States v. Howe*,[60] a leading case in the military high court's early history. Military police had observed Henry Howe, an Army Second Lieutenant assigned to Fort Bliss, marching in downtown El Paso with antiwar demonstrators and carrying a cardboard sign that read: "LET'S HAVE MORE THAN A CHOICE BETWEEN PETTY IGNORANT FACISTS IN 1968" and "END JOHNSON'S FACIST AGRESSION IN VIET NAM."[61] Howe was convicted at court-martial "and sentenced to dismissal, total forfeitures, and confinement at hard labor for two years."[62] The CMA surveyed an extensive history, beginning with the British Articles of War of 1765 that criminalized the use by officers or soldiers of "traitorous or disrespectful words" against the monarch, as well as behavior or words that expressed "[c]ontempt or [d]isrespect towards the [g]eneral, or other [c]ommander in [c]hief."[63] The

---

[56] *MCM*, pt. IV, para. 14.c. at IV-21.
[57] *Id.*
[58] *But see* 5 U.S.C. §§ 7321-7326 (restricting the partisan activities of federal employees, effectively imposing political neutrality among civil servants).
[59] *See* United States v. Howe, 37 C.M.R. 429, 439 (C.M.A. 1967) ("A tradition has been bred into us that the perpetuation of free government depends upon the continued supremacy of the civilian representatives of the people."); *see also* Reid v. Covert, 354 U.S. 1, 23-30 (1957).
[60] 37 C.M.R. 429 (C.M.A. 1967).
[61] *Id.* at 432.
[62] *Id.* at 431 ("The convening authority reduced the period of confinement to one year and otherwise approved the sentence.").
[63] *Id.* at 434.

Continental Congress later adopted the proscription in its Articles of War and reaffirmed the adoption in 1776, as did the First Congress in 1789.[64] Subsequent congresses re-enacted the provision at least six times with little alteration, apart from removing enlisted personnel from its ambit.[65] Beyond historical pedigree, the court emphasized the importance of military members' subordination to civilian leadership and referenced Supreme Court admonitions that speech is not an "absolute" freedom.[66] Particular weight was given to the World War I-era prosecutions of leafleteers whose convictions were affirmed on grounds that the speech might cause insubordination in the military and obstruction of enlistment during wartime. Applied to Howe's activities in El Paso, also conducted in a time of war, precedents such as *Schenck* made for a clear-cut conclusion:

> [H]undreds of thousands of members of our military forces are committed to combat in Vietnam, casualties among our forces are heavy, and thousands are being recruited, or drafted, into our armed forces. That in the present times and circumstances such conduct by an officer constitutes a clear and present danger to discipline within our armed services, under the precedents established by the Supreme Court seems to require no argument.[67]

The more recent, high-profile case of Air Force Major General Harold Campbell demonstrates the consequences a senior member may face for free-wheeling speech about civilian leadership. During a banquet in the Netherlands in 1993, the former fighter pilot, who had served two tours in Vietnam, called then-President Bill Clinton a "dope smoking, skirt chasing, draft dodging commander in chief."[68] Word traveled stateside fast. General Campbell was soon officially reprimanded by the Air Force Chief of Staff, General Merrill McPeak, as well as fined $7,000 and forced to retire.[69] In comments to the press, General

---

[64] *See id.* at 434-35.
[65] *See id.* at 435-36.
[66] *See id.* at 436-37.
[67] *Id.* at 437-38.
[68] Michael R. Gordon, *General Ousted for Derisive Remarks About President*, N.Y. TIMES (June 19, 1993), https://www.nytimes.com/1993/06/19/us/general-ousted-for-derisive-remarks-about-president.html.
[69] *Id.*

McPeak said the incident was "not a trivial matter."[70] He added that "[t]he chain of command has to be almost pollution free. It runs from the President all the way down to the corporal who pulls the trigger."[71]

The scope of 10 U.S.C. § 888 is narrow and its terms are explicitly prohibitive. Provisions that cover unbecoming conduct and general violations are far broader and more amorphous, and nuances must be noted.[72] Criminal punishment under 10 U.S.C. § 933 applies to "[a]ny commissioned officer, cadet, or midshipman who is convicted of conduct unbecoming an officer."[73] The MCM explains that violative conduct under this section would include "action or behavior in an official capacity that, in dishonoring or disgracing the person as an officer, seriously compromises the officer's character, or action or behavior in an unofficial or private capacity that, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer."[74] Examples of misconduct include "knowingly making a false official statement" and "using insulting or defamatory language to another officer in that officer's presence or about that officer to other military persons."[75] Turning to 10 U.S.C. § 934, an expansive provision known as the General Article, culpability extends to "all disorders and neglects to the prejudice of good order and discipline in the armed forces, all conduct of a nature to bring discredit upon the armed forces, and crimes and offenses not capital, of which persons subject to this chapter may be guilty."[76] By its terms, this final punitive provision functions as a catch-all, rendering punishable a multitude of acts and omissions unaddressed in the preceding provisions. Its first two terminal clauses—prejudicial and discrediting conduct—are most relevant here, although the third clause importantly acts to "assimilate wholesale any Title 18 offense 'not capital' into the military justice system."[77] This would include, for example, advocacy for overthrowing the federal government;[78] advising,

---

[70] *Id.*
[71] *Id.*
[72] *See* 10 U.S.C. §§ 933, 934.
[73] 10 U.S.C. § 933. The statutory text formerly read "officer and a gentlemen," before amendment in 2021. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 541, 135 Stat. 1541, 1695 (2021).
[74] *MCM*, pt. IV, para. 90.c.(2) at IV-140.
[75] *MCM*, pt. IV, para. 90.c.(3) at IV-140.
[76] 10 U.S.C. § 934.
[77] United States v. Rice, 80 M.J. 36, 41 (C.A.A.F. 2020).
[78] *See* 18 U.S.C. § 2385.

counseling, or urging a military member to be insubordinate or disloyal;[79] and, in wartime, spreading false reports or statements to interfere with the military success of the United States, or otherwise promote the success of its enemies.[80] Under clause one of 10 U.S.C. § 934, prohibited acts are those that are directly and palpably prejudicial to good order and discipline, or those breaching a long-established custom of the service.[81] The prohibition on service-discrediting acts, covered by clause two, includes conduct that "has a tendency to bring the service into disrepute or which tends to lower it in public esteem."[82] The MCM affords some specificity, enumerating various offenses that may be charged under 10 U.S.C. § 934. These offenses are wide-ranging and include making disloyal statements, communicating indecent language, orally or in writing, and, a recent addition, committing sexual harassment.[83]

In 1974 the Supreme Court considered the constitutionality of the foregoing punitive articles in *Parker v. Levy*.[84] Captain Howard Levy, an Army doctor stationed at Fort Jackson, was found to have urged enlisted members to refuse deployment to Vietnam and, on at least one occasion, called Special Forces personnel "liars and thieves and killers of peasants and murderers of women and children."[85] In a habeas petition, the physician challenged his convictions under 10 U.S.C. §§ 933, 934 as unconstitutionally vague and overbroad.[86] The Court rejected this argument, reasoning that while the provisions in question included "imprecise" language, long-standing customs and usages had imbued them with plenty of meaning, and statutory construction had been adequately narrowed by judicial precedents and executive orders.[87] The provisions were traceable to British antecedents and a lengthy record of congressional re-enactment. Moreover, Levy had fair notice, because his comments fell squarely within sample offenses featured in the MCM. As to the substantive First Amendment issue, the *Parker* majority focused on differences

[79] 18 U.S.C. § 2387.
[80] 18 U.S.C. § 2388.
[81] *See MCM*, pt. IV, para. 91.c.(1)-(2)(a), (b) at IV-141.
[82] *MCM*, pt. IV, para. 91.c.(3) at IV-141.
[83] Congress mandated sexual harassment be added as a general punitive article. *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 539D, 135 Stat. 1541, 1692 (2021).
[84] 417 U.S. 733 (1974).
[85] *Id.* at 737.
[86] *See id.* at 733.
[87] *See id.* at 746-57.

between military and civilian communities and the laws and traditions applicable to each. Obedience and discipline are of paramount importance in the military, an institution wherein the government serves several roles rolled into one: it is not only the lawgiver but also at times the employer, landlord, and provisioner.[88] One outgrowth of this governmental omnipresence is that certain personal activity, specifically speech, is rendered regulable, as "there is simply not the same autonomy as there is in the larger civilian community."[89]

A forceful dissent from Justice William O. Douglas in *Parker* began by noting that the only military exemptions found in the Bill of Rights pertain to procedural matters: the express grand jury exception in the Fifth Amendment and the jury trial exception implied by the Sixth.[90] Justice Douglas asserted that the First Amendment's text yields no such inference, and that surely Congress could not exercise authority "to curtail the reading list of books, plays, poems, periodicals, papers, and the like which a person in the Armed Services may read."[91] Nor did Justice Douglas believe that Congress would assume authority "to suppress conversations at a bar, ban discussions of public affairs, prevent enlisted men or women or draftees from meeting in discussion groups at time and places and for such periods of time that do not interfere with the performance of military duties."[92] In this case, the military doctor was simply expressing personal views on a controversial topic, not engaging in subversion or sabotage, according to Justice Douglas, who concluded by stating that, "[u]ttering one's beliefs is sacrosanct under the First Amendment [and] [p]unishing [such] utterances is an abridgment of speech in the constitutional sense."[93]

C. Speech on Base

One corollary to this examination is whether, and to what extent, First Amendment protections apply to civilians who express views or convey messages on military installations. Though often unrelated to military members' speech, this question has occupied meaningful space in the judicial bandwidth and warrants acknowledgement here. As a general matter, speech in a public forum is broadly protected and

[88] *Id.* at 751.
[89] *Id.*
[90] *Id.* at 766 (Douglas, J., dissenting).
[91] *Id.* at 768-69.
[92] *Id.* at 769.
[93] *Id.* at 772.

individual speakers are not subject to exclusion. However, on a military base, commanders must prioritize sensitive considerations, such as national security and operational readiness. And neutrality must be maintained in political speech. Allowing one political group would open the door to a theoretically infinite number of other groups; limiting access to a few choice groups, on the other hand, would appear as a command endorsement of those groups' views. Neither option is better than the other, and both are bad. Congress has provided some leverage to military commanders contending with these nettlesome affairs. Under the Federal Criminal Code, a person would be subject to criminal prosecution by entering any military, naval, or Coast Guard property for a purpose prohibited by law or returning "after having been removed therefrom or ordered not to reenter by any officer or person in command or charge thereof."[94]

In *United States v. Albertini*, the Supreme Court upheld the conviction of a civilian who attended an open house at Hickam Air Force Base to protest nuclear weapons nine years after he received a bar letter from its commanding officer ("CO").[95] The letter had been issued for acts of vandalism, and the Court, in an opinion by Justice Sandra Day O'Connor, ruled that a general exclusion of recipients of bar letters did not violate the First Amendment.[96] A military base is not a public forum and does not necessarily become one by hosting an open house, a distinction that serves an important national security interest.[97] The Court distinguished the facts from an earlier case, *Flower v. United States*, which recognized that when the military abandons any right to exclude civilians from an area (e.g., a public thoroughfare), that portion of property is transmuted into a public forum from which protected speech cannot be excluded.[98] The holding in *Flower*, the Court reasoned, was inapposite: The vandalism that led to debarment was not protected activity, and whether or not the open house constituted a public forum, the overriding interest in security justified the content-neutral bar from entry.[99]

Another distinguishable case is *Greer v. Spock*, where a Fort Dix regulation imposed a blanket prohibition on political

---

[94] 18 U.S.C. § 1382.
[95] United States v. Albertini, 472 U.S. 675, 677-78 (1985).
[96] *See id.* at 677, 688-89.
[97] *See id.* at 686.
[98] 407 U.S. 197 (1972).
[99] *See Albertini*, 472 U.S. at 686.

speeches and demonstrations.[100] Political candidates sought to enjoin enforcement of the rule, but the Court held that "the business of a military installation like Fort Dix is to train soldiers, not to provide a public forum."[101] Unlike *Flower*, where a section of a base had been ceded to civilian pedestrians and motorists, this Army post permitted no such free movement. In fact, civilians enjoyed no *carte blanche*, generalized right to politicking on non-public property. Soldiers, Justice Potter Stewart noted, were free to attend rallies off base, and under the Fort Dix regulation at issue, leaflets and other literature could be distributed on base with prior approval. Candidates in the instant case had sought no such approval.[102]

D. The Digital Era

In recent decades, as civilians and service members alike have largely shifted discourse and personal activity to online platforms, courts have adjusted the application of First Amendment doctrines accordingly. In *United States v. Wilcox*, an Army Private First Class had been court-martialed for posting offensive views that bordered on extremism to his AOL profile and conveying similar sentiments in private messages with an undercover agent.[103] By the time the case reached the United States Court of Appeals for the Armed Forces (CAAF),[104] after a circuitous procedural history, the lone issue remaining was whether the posts and messages were sufficient to support a conviction under the second clause of 10 U.S.C. § 934, covering service-discrediting conduct. The court acknowledged that "speech that would be impervious to criminal sanction in the civilian world may be proscribed in the military," but that the evidence in the case was insufficient to support the conviction even under the limited rights afforded to members.[105] Namely, there was nothing beyond speculation that the expressed views interfered with or prevented mission accomplishment, or otherwise posed a clear danger to the loyalty, discipline, mission, or morale of the troops. Distasteful and repugnant as the statements might have been, they were protected under the First

[100] 424 U.S. 828 (1976).
[101] *Id.* at 838-40.
[102] *See id.*
[103] *See* 66 M.J. 442, 443 & n.1 (C.A.A.F. 2008).
[104] *See* National Defense Authorization Act for Fiscal Year 1995, Pub. L. No. 103-337, § 924, 108 Stat. 2663, 2831 (1994) (Congress redesignated the military high court as the Court of Appeals for the Armed Forces).
[105] *Id.* at 447.

Amendment, and evidence failed to demonstrate any deleterious consequence on military operations, internal or otherwise. Out of *Wilcox*, any criminal conviction under the General Article for otherwise protected speech must first survive a threshold inquiry into service connection.[106] If such a nexus exists, between protected speech and the military mission, courts must then employ a balancing test, weighing the severity of the speech's potential impact against the likelihood that it would actually influence the intended audience, to determine whether a conviction was justified.[107]

The CAAF again considered the interplay between free speech and Internet communications in *United States v. Meakin*, a 2019 case involving an Air Force Lieutenant Colonel's conviction under 10 U.S.C. § 933 for sending explicit images and descriptions of child rape and exploitation to at least seventeen contacts.[108] The CAAF, in upholding the conviction, found that the officer's depraved dispatches met the legal definition of obscenity, and as such were afforded no protection under the First Amendment.[109] Moreover, because the obscene messages and photographs were transmitted beyond the confines of the home, Meakin could not claim refuge under *Stanley v. Georgia*, a Supreme Court case that established a right to privately possess pornography.[110] The officer had argued that the 10 U.S.C. § 933 charge was legally insufficient because, in part, his speech at issue had no connection with a military mission. But, unlike the General Article, § 933 is predicated specifically on the high standards of moral character to which commissioned officers are held. Certain unbecoming conduct, the logic goes, erodes trust in an officer's standing to fulfill duties that could include, on occasion, leading troops into battle.[111] The transgression need not be public or directly affect the military service as a whole, rather it "may consist of an 'action or behavior in an unofficial

---

[106] A line of earlier cases had established a "direct and palpable" requirement for conviction under clause one. *Wilcox* effectively extended this requirement to clause two. *See id.* at 448.
[107] *See id.* at 449.
[108] 78 M.J. 396, 398 (C.A.A.F. 2019).
[109] *See id.* at 398, 401 ("'Indecent' language is that which is grossly offensive to modesty, decency, or propriety, or shocks the moral sense, because of its vulgar, filthy, or disgusting nature, or its tendency to incite lustful thought. Language is indecent if it tends reasonably to corrupt morals or incite libidinous thoughts. The language must violate community standards. This Court had long held that 'indecent' is synonymous with obscene.").
[110] *See* Stanley v. Georgia, 394 U.S. 557, 568 (1969).
[111] *See Meakin*, 78 M.J. at 404-05.

or private capacity which, in dishonoring or disgracing the officer personally, seriously compromises the person's standing as an officer.'"[112]

Consider, by contrast, the facts of *United States v. Hiser*, where a Private First Class in the Army was accused of posting pornographic videos made with his wife, who did not consent to the uploads, on the Internet.[113] Prosecutors in that case applied 10 U.S.C. § 917a, which prohibits the wrongful broadcast or distribution of intimate visual images.[114] The CAAF, in upholding Hiser's conviction, rather unflatteringly called 10 U.S.C. § 917a a "prolix" provision, spanning 300 words but only one sentence.[115] On substance, the court emphasized the statutory requirement that the broadcast or distribution bear a "reasonably direct and palpable connection to a military mission or military environment."[116] Because the wife in *Hiser* was also in the military and discovered the videos online, that connection was sufficiently established.[117]

Most recently, the CAAF took up a case involving a Senior Chief Petty Officer convicted under 10 U.S.C. § 891(3) for sending crude messages and modified images to a "Chief's Mess" group text onboard a Coast Guard icebreaker.[118] Calling 10 U.S.C. § 891(3) a "seemingly simple statute" that is "devilishly difficult to interpret," the court ruled that service members may indeed face conviction under that provision even if the disrespectful conduct occurs remotely (outside of the victim's physical presence) through a digital device or via social media, so long as the victim is executing official duties at the time that the disrespectful message is conveyed.[119] This temporal technicality is not without consequence. Guilty verdicts as to two victims were tossed out for want of evidence demonstrating that those recipients were performing official duties when the offending messages and images were sent. A third conviction was upheld, however, because that recipient was working "down in dry dock" at the relevant moment.[120]

---

[112] *Id.* at 404 (citation omitted).
[113] *See* 82 M.J. 60, 62 (C.A.A.F. 2022).
[114] *See id.* at 63.
[115] *Id.* at 64.
[116] *Id.* at 65 (quoting 10 U.S.C. § 917a(a)(4)).
[117] *See id.* at 66.
[118] *See* United States v. Brown, 84 M.J. 124, 125-26 (C.A.A.F. 2024).
[119] *Id.*
[120] *See id.* at 130.

II. ANALYSIS: EXTREMISM IN THE RANKS

Today's culture wars and exceedingly toxic political landscape, as compared to antecedent contexts, might well be viewed by future historians as a singularly fractious period in the broader national narrative. Indeed, one rattles off all-consuming controversies of the recent past with disquieting ease: allegations of sexual misconduct implicating figures of power and influence; widespread social unrest over race and policing; fierce conflicts over vaccine mandates and lockdowns amid a global pandemic; and the upending of decades-long precedents on abortion rights, affirmative action, and the power of administrative agencies. Meanwhile, far-flung wars have fueled fiery debates domestically, across college campuses and other institutions, while fissures only deepened in the runup to the 2024 presidential election, with the withdrawal of an aged incumbent president and the victory of a former president, himself a convicted felon who had survived other state and federal criminal charges and—literally—attempts to assassinate him on the campaign trail. Normalcy, in these times, is an aberration.

The following section offers a brief review and evaluation of one of many flashpoints in this maelstrom that bears upon free speech and expression: ideological extremism, real or perceived, in the ranks. This analysis, principally of military leaders' treatment of this issue, is undertaken with an eye toward one object of recent discord sweeping across the cultural landscape, namely Israel's war against Hamas in Gaza. The objective here is not to advocate or persuade, rather it is to lay out observations that may present a roadmap ahead of the next upheaval, whatever and whomever it may involve. In this period of partisanship and polarization, how the military handles radioactive topical issues, both in terms of top-brass messaging and top-down regulating, can directly affect institutional integrity, public trust, and internal cohesion. It is not difficult to draw a direct line between these predicates and the downstream success, or failure, of the broader military mission.[121]

A. Problems and Solutions

[121] The legal and policy landscape surrounding military free speech and expression is evolving rapidly, with recent executive actions introducing significant changes. Given the fluidity of these issues, portions of this article may be affected by subsequent developments, including potential amendments or rescissions of key directives. Readers are encouraged to consult the most current sources to ensure accuracy.

In early 2021, soon after an angry mob breached the United States Capitol as lawmakers inside certified results of a heavily disputed presidential election, unsettling reports tying the military to that shameful spectacle began to surface.[122] To some, that service members were among rioters amounted to anomalous behavior—just a few bad apples—but to others this revelation exposed an insidious, right-wing ideological fringe festering in the ranks. Some contemporary reports lent credence to this perception. In 2018, for example, a Marine Corps private was court-martialed and kicked out of the service after taking part in the deadly Charlottesville rally and then boasting on social media about his participation.[123] That same year, two other Marines were separated from service after pleading guilty to criminal trespass for climbing a building and unfurling a banner bearing a white nationalist slogan during a Confederate rally in North Carolina.[124] One of them had reportedly posted more than a thousand messages in an online chat forum, including one message questioning "the legality of running over protestors blocking the roads."[125] Then in 2020, a Coast Guard Lieutenant and self-described white nationalist was sentenced to thirteen years in federal prison after prosecutors said he stockpiled weapons and "plotted to kill journalists, Democratic politicians, professors, Supreme Court justices and those he described as 'leftists in general.'"[126] Anecdotal or otherwise, these and similar incidents prompted frenzied media coverage, congressional hearings, and legislative action. In turn, executive policies aimed at ferreting and stamping out pernicious far-right

---

[122] *See* Sara Sidner, Anna-Maja Rappard & Marshall Cohen, *Disproportionate number of current and former military personnel arrested in Capitol attack, CNN analysis shows*, CNN (Feb. 4, 2021, 4:27 PM), https://www.cnn.com/2021/01/31/us/capitol-riot-arrests-active-military-veterans-soh/index.html.

[123] *See* Jennifer Steinhauer, *Veterans Fortify the Ranks of Militias Aligned With Trump's Views*, N.Y. TIMES (June 10, 2020), https://www.nytimes.com/2020/09/11/us/politics/veterans-trump-protests-militias.html; Shawn Snow, *The neo-Nazi boot: Inside one Marine's descent into extremism*, MARINE CORPS TIMES (Sept. 4, 2019), https://www.marinecorpstimes.com/news/your-marine-corps/2019/09/04/the-neo-nazi-boot-inside-one-marines-descent-into-extremism.

[124] *See* Shawn Snow, *EOD Marine separated for ties to white supremacist groups*, MARINE CORPS TIMES (Apr. 19, 2018), https://www.marinecorpstimes.com/news/your-marine-corps/2018/04/19/eod-marine-separated-for-ties-to-white-supremacist-groups.

[125] *Id.*

[126] Michael Levenson, *Former Coast Guard Officer Accused of Plotting Terrorism Is Sentenced to 13 Years*, N.Y. TIMES (Feb. 3, 2020), https://www.nytimes.com/2020/01/31/us/christopher-hasson-coast-guard-terrorism.html.

views were launched, implicating the boundaries of allowable speech within the armed forces.

The primary military policy on point was promulgated in the aftermath of another violent act of extremism, albeit of an altogether different character. In November 2009, Major Nidal Hasan, an Army psychiatrist, murdered thirteen people and an unborn child and wounded thirty-two others at Fort Hood,[127] the largest ever on-base mass shooting.[128] Leading up to the rampage, for which he received a death sentence, Hasan espoused views perceived by colleagues as Islamic extremism.[129] The bloody manifestation of those views led to Department of Defense Instruction ("DoDI") 1325.06, a carefully crafted document covering the distribution of printed and electronic materials, participation in demonstrations, and other generally prohibited activities: "Military personnel must not actively advocate supremacist, extremist, or criminal gang doctrine, ideology, or causes, including those that advance, encourage, or advocate illegal discrimination based on race, creed, color, sex, religion, ethnicity, or national origin or those that advance, encourage, or advocate the use of force, violence, or criminal activity or otherwise advance efforts to deprive individuals of their civil rights."[130] While prescriptively punitive, to be sure, the instruction does signal that a "service member's right of expression should be preserved to the maximum extent possible" and that commanders should balance that right against good order and discipline and national security with "calm and prudent judgment."[131]

Within days of the Capitol siege, senior Pentagon officials emphasized the urgency of rooting out far-right extremism

---

[127] Fort Hood was renamed Fort Cavazos in May 2023. *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 370, 134 Stat. 3388, 3520 (2021).

[128] Elizabeth Wolfe & Brian Ries, *These are some of the deadliest military base shootings in the last three decades*, CNN (Dec. 6, 2019, 3:39 PM), https://www.cnn.com/2019/12/06/us/deadliest-military-base-shootings-trnd/index.html.

[129] Daniel Zwerdling, *Walter Reed Officials Asked: Was Hasan Psychotic?,* NPR (Nov. 11, 2009, 2:54 PM), https://www.npr.org/2009/11/11/120313570/walter-reed-officials-asked-was-hasan-psychotic.

[130] U.S. DEP'T OF DEF., INSTR. 1325.06, HANDLING DISSIDENT AND PROTEST ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES, Change 1 (Feb. 22, 2012).

[131] *Id*. One broadly applied UCMJ offense addresses the failure to obey an order or regulation. *See* 10 U.S.C. § 892.

among service members.[132] One month after, newly installed Secretary of Defense Lloyd Austin made it clear that "[e]xtremism in the ranks" was a top priority, noting that "actions associated with extremist or dissident ideologies" would not be tolerated on his watch.[133] Although he acknowledged that the "vast majority" of Department of Defense members uphold its core values, Secretary Austin commanded supervisors at all levels, in all branches "to conduct a one-day stand-down" within the next sixty days, to address "the importance of our oath of office; a description of impermissible behaviors; and procedures for reporting suspected, or actual, extremist behaviors."[134] In April of 2021, Secretary Austin established the Countering Extremist Activity Working Group ("CEAWG"), tasked with revising DoDI 1325.06, updating screening procedures for new accessions, and adding training programs for those transitioning out of service.[135] At the same time, Congress considered enacting a new UCMJ punitive article focused specifically on violent extremism,[136] but that year's authorization act ultimately only directed the Secretary of Defense to provide recommendations on such an amendment to respective armed services committees.[137]

A glimpse at the CEAWG's work product emerged in December 2021, with the release of a revised policy and recommendations. Updates to DoDI 1325.06 centered on an express prohibition on "[a]ctive participation in extremist activities," and capacious definitions—ostensive rather than

---

[132] *See* Eric Schmitt, Jennifer Steinhauer & Helene Cooper, *Pentagon Accelerates Efforts to Root Out Far-Right Extremism in the Ranks*, N.Y. TIMES (Jan. 20, 2021), https://www.nytimes.com/2021/01/18/us/politics/military-capitol-riot-inauguration.html.

[133] Memorandum from Lloyd Austin, Sec'y of Def., to Senior Pentagon Leadership (Feb. 5, 2021), https://media.defense.gov/2021/Feb/05/2002577485/-1/-1/0/stand-down-to-address-extremism-in-the-ranks.pdf.

[134] *Id.*

[135] *See* Memorandum from Lloyd Austin, Sec'y of Def., to Senior Pentagon Leadership (Apr. 9, 2021), https://media.defense.gov/2021/Apr/09/2002617921/-1/-1/1/MEMORANDUM-IMMEDIATE-ACTIONS-TO-COUNTER-EXTREMISM-IN-THE-DEPARTMENT-AND-THE-ESTABLISHMENT-OF-THE-COUNTERING-EXTREMISM-WORKING-GROUP.PDF.

[136] National Defense Authorization Act for Fiscal Year 2022, H.R. 4350, 117th Cong. § 525 (2021).

[137] *See* National Defense Authorization Act for Fiscal Year 2022, Pub. L. No. 117-81, § 549M, 135 Stat. 1541, 1733 (2021).

stipulative—appear for both elements of that prohibition.[138] For example, the term "extremist activities" encompasses advocating for or participating in the use of force or violence to achieve discriminatory or ideological ends, or the overthrow of the government, as well as encouraging military personnel to disobey lawful orders or engage in subversion.[139] The term "active participation" accommodates the support of extremist activities by donating funds, distributing promotional materials, and displaying paraphernalia, words, or symbols.[140] At the margins, social media activity could fall within this definitional ambit, as could "any other action in support of, or engaging in, extremist activity, when the conduct is prejudicial to good order and discipline or is service-discrediting."[141] The CEAWG's accompanying report highlighted these updates, along with extremism-specific revisions to transition checklists for separating members and accession-point screening procedures.[142] Finally, the report noted that the Institute for Defense Analyses ("IDA") had been commissioned to undertake a comprehensive study of extremist activity across all branches.[143]

B. Outcomes and Observations

Efforts to regulate the content of speech invariably encounter an elusive, amorphous challenge. Symbols and expressions that are benign today may become charged with offensive connotations tomorrow, reflecting ever-evolving societal norms and the subjective nature of determining what is permissible. This inherent fluidity means that regulatory efforts are perpetually reactive, struggling to keep pace with the shifting meanings and disparate reactions to certain language in a multicultural, pluralistic society. Indeed, a "bedrock principle" underlying the First Amendment, as applied to the general public, is that "the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or

---

[138] U.S. DEP'T OF DEF., INSTRUCTION 1325.06, HANDLING PROTEST, EXTREMIST, AND CRIMINAL GANG ACTIVITIES AMONG MEMBERS OF THE ARMED FORCES, CHANGE 2 (Dec. 20, 2021).
[139] *See id.*
[140] *See id.*
[141] *See id.*
[142] *See* U.S. DEP'T OF DEF., REPORT ON COUNTERING EXTREMIST ACTIVITY WITHIN THE DEPARTMENT OF DEFENSE (Dec. 2021), https://media.defense.gov/2021/Dec/20/2002912573/-1/-1/0/REPORT-ON-COUNTERING-EXTREMIST-ACTIVITY-WITHIN-THE-DEPARTMENT-OF-DEFENSE.PDF.
[143] *Id.*

disagreeable."[144] To put a finer point on that, "[s]peech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'"[145]

This bedrock principle does not simply evaporate when a military uniform is worn, nor do the challenges posed by subjectivity and fluidity.[146] Consider the furor that erupted in 2019 when a Coast Guard Lieutenant was captured in the background of a live television shot flashing a gesture with his right hand that was either the age-old "OK" sign or a neoteric "white power" symbol.[147] This sparked a "political and social controversy that reverberated at the highest level" of the military, yet the Coast Guard member in question ultimately received only an administrative letter of censure (that made no mention of any racist intent, suggesting that there was none) as a sanction for the action at issue.[148]

In another illuminating case, the United States Naval Academy attempted to academically dismiss and discharge a Midshipman First Class in 2020 based on his tweets that "concerned topics such as race, racial injustice, police brutality, the social ferment related to those issues, and the government's response to protests that gripped the nation" that summer.[149] The naval cadet filed a federal lawsuit against service leadership on First Amendment grounds, but the parties reached a confidential settlement before any decision on the merits.[150] However, a few

---

[144] Texas v. Johnson, 491 U.S. 397, 414 (1989).
[145] Matal v. Tam, 582 U.S. 218, 246 (2017) (citation omitted).
[146] *See* United States v. Priest, 45 C.M.R. 338, 343-44 (C.M.A. 1972) ("First Amendment rights of civilians and members of the armed forces are not necessarily coextensive, but, in speech cases, our national reluctance to inhibit free expression dictates that the connection between the statements or publications involved and their effect on military discipline be closely examined. As in other areas, the proper balance must be struck between the essential needs of the armed services and the right to speak out as a free American. Necessarily, we must be sensitive to protection of 'the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate.'").
[147] *See* Carl Prine & J.D. Simkins, *Coast Guard member reprimanded for flashing controversial gesture on MSNBC*, NAVY TIMES (Jan. 13, 2019), https://www.navytimes.com/news/your-navy/2019/01/13/coast-guard-officer-reprimanded-for-flashing-controversial-gesture-on-msnbc/.
[148] *Id.*
[149] Standage v. Braithwaite, 526 F. Supp. 3d 56, 62 (D. Md. 2021).
[150] *See* Heather Mongilio, *Midshipman settles case against Naval Academy superintendent, former Navy secretary*, CAP. GAZETTE (Feb. 26, 2021, 12:43 AM), https://www.capitalgazette.com/2021/02/25/midshipman-settles-case-against-naval-academy-superintendent-former-navy-secretary/.

things did become clear: the plaintiff graduated on time the following summer, was commissioned as an Ensign, and was later selected for flight school—a far cry from expulsion.[151] Other cases, such as the Marine Corps' swift punishment of a battalion commander who publicly criticized the Afghanistan withdrawal,[152] or the Army's forced resignation of a West Point graduate who scrawled "Communism Will Win" inside his dress cap,[153] further underscore the military's evolving and often unpredictable approach to service member speech. Together, these incidents aptly capture the fraught exercise of identifying and addressing extremist activity with requisite adaptability and objectivity. The regulator of speech is inevitably one step behind the regulated.

Facing this forecasting problem, Secretary Austin's predecessor Mark Esper issued a policy in 2020 that, by omission, effectively banned the Confederate flag from display on military installations.[154] Cleverly, the policy only outlined *permissible* flags, such as the national ensign and the flags of individual states. Former Secretary Esper stated in issuing this policy that, "[t]he flags we fly must accord with the military imperatives of good order and discipline, treating all our people with dignity and respect, and rejecting divisive symbols."[155] Eschewing specificity might have been less about principle and more about pragmatism—imagine the futility of capturing all that is sufficiently "divisive" to warrant rejection. In its policies, the Coast Guard has attempted a "non-exhaustive" list of prohibitions: nooses, swastikas, "supremacist symbols, Confederate symbols or flags, and anti-Semitic symbols."[156] A disclaimer, however, notes that "[c]reating an exhaustive list of

---

[151] *See* Heather Mongilio, *Naval Academy midshipman who faced expulsion over tweets commissions, will go to flight school*, CAP. GAZETTE (May 29, 2021, 8:14 PM), https://www.capitalgazette.com/2021/05/29/naval-academy-midshipman-who-faced-expulsion-over-tweets-commissions-will-go-to-flight-school/.

[152] *See* Philip Athey, *The Unmaking of Lt. Col. Stuart Scheller*, MIL. TIMES (Mar. 7, 2022), https://www.militarytimes.com/news/your-marine-corps/2022/03/07/the-unmaking-of-lt-col-stuart-scheller.

[153] *See* Alex Horton, *A West Point Grad Wrote 'Communism Will Win' in His Cap. The Army Kicked Him Out.*, WASH. POST (June 19, 2018), https://www.washingtonpost.com/news/checkpoint/wp/2018/06/19/a-west-point-grad-wrote-communism-will-win-in-his-cap-the-army-kicked-him-out.

[154] Memorandum from Mark Esper, Sec'y of Def., on Public Display or Depiction of Flags in the Department of Defense (July 16, 2020), https://media.defense.gov/2020/Jul/17/2002458783/-1/-1/1/200717-flag-memo-dtd-200716-final.pdf.

[155] *Id.*

[156] U.S. COAST GUARD C.R. MANUAL (2020).

hate symbols is neither possible nor desirable, because supremacist and hate groups often add or change symbols and because new groups emerge."[157] Coast Guard commanders are encouraged to consult resources such as the online Hate Symbols Database maintained by the Anti-Defamation League ("ADL") for more information on the topic.[158] No such outsourcing appears in the latest iteration of DoDI 1325.06, perhaps for good reason: The ADL and other third-party advocacy groups are often embroiled in their own controversies, from which the military may be wise to maintain healthy distance.[159] But the Pentagon's instruction has its fair share of shortcomings. Definitions ostensibly cabin the punitive scope to truly flagrant behavior—of the six discrete descriptions of "extremist activities" offered, four expressly reference advocacy for *unlawful* or *illegal* actions, while the other two apply to terrorism and overthrowing the government. But, taken as a whole, the policy is overbroad, circular, and tautological, indubitably confusing to the rank-and-file. For example, the descriptions of "extremist activities" and "active participation" incorporate some form of "advocating" at least twelve times, yet that term goes undefined. The series "paraphernalia, words, or symbols" and the catch-all "any other action" are similarly left to interpretation. The inclusion of single-click social media activity raises still more concerns. As implementation goes, one official called this definitional miasma a "zero-ripple pebble in the pond."[160]

Whenever civil liberties are curtailed, a paramount consideration is whether the curtailment is appropriately calibrated, commensurate in scale to the underlying problem. One must ask: Does the actual prevalence of extremism in the military, beyond anecdotes and intimations, warrant the policies pursued and the resources expended? An answer is difficult to pin down, as imprecision inheres in any attempt to quantify beliefs and opinions, particularly those unacted upon. However, available data suggest extremist views constitute a very rare, almost negligible, exception. A report from 2018 showed that

---

[157] *Id.*
[158] *Id.*
[159] *See, e.g.,* James Bamford, *The Anti-Defamation League: Israel's Attack Dog in the US*, THE NATION (Jan. 31, 2024), https://www.thenation.com/article/society/adl-israel-criticism-antisemitism-claims/.
[160] Zachary Cohen, Oren Liebermann & Haley Britzky, *How GOP attacks on 'wokeism' helped lead the Pentagon to abandon its effort to combat extremism in the military*, CNN (May 20, 2023, 9:53 AM), https://www.cnn.com/2023/05/19/politics/pentagon-combat-extremism-military-republican-attacks-teixeira-leaks/index.html.

over the preceding five years there had been twenty-seven instances of extremist behavior, eighteen of which resulted in disciplinary action.[161] In December 2021, acting on its remit from Secretary Austin, the CEAWG reported "fewer than 100" cases of substantiated extremist activity over the prior year.[162] A more recent figure comes from the Office of Inspector General ("OIG"), which is required to submit annual reports on supremacist, extremist, and criminal gang activity under Section 554 of the Authorization Act for Fiscal Year 2021.[163] In its 2023 report, the OIG noted 183 allegations of extremist activity and fifty-eight allegations of criminal gang activities over the previous year.[164] Out of the total allegations of all types of prohibited activities, sixty-eight were unsubstantiated and sixty-nine were substantiated, with the remainder pending investigation.[165] These figures, if remotely accurate, hardly suggest epidemic proportions of extremism among the more than 1.3 million current active-duty members of the United States military.[166] Yet major news outlets consistently tell a different story. Headlines proclaim that "extremism in the military is a problem,"[167] and that "the military's extremism problem is our problem."[168]

This dissonance between the empirical evidence and the media's drumbeating, pearl-clutching narrative matters because legislators and policymakers have at times appeared more responsive to one of these inputs than the other. This phenomenon deserves further exploration than provided here,

---

[161] Shawn Snow, *27 reports of extremist activity by US service members over the past 5 years, DoD says*, MARINE CORPS TIMES (Sept. 13, 2019), https://www.marinecorpstimes.com/news/2019/09/13/27-reports-of-extremist-activity-by-us-service-members-over-the-past-5-years-dod-says/.

[162] U.S. DEP'T OF DEF., REPORT ON COUNTERING EXTREMIST ACTIVITY WITHIN THE DEPARTMENT OF DEFENSE (Dec. 2021), https://media.defense.gov/2021/Dec/20/2002912573/-1/-1/0/REPORT-ON-COUNTERING-EXTREMIST-ACTIVITY-WITHIN-THE-DEPARTMENT-OF-DEFENSE.PDF.

[163] *See* William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, § 554, 134 Stat. 3388, 3633-36.

[164] 2023 U.S. DEP'T OF DEF. OFF. OF INSPECTOR GEN., ANN. REP. 26-27.

[165] *See id.*

[166] *Armed forces of the U.S. – statistics & facts*, STATISTA, (Feb. 10, 2025), https://www.statista.com/topics/2171/armed-forces-of-the-united-states/#topicOverview.

[167] Tom Nichols, *Extremism in the Military Is a Problem*, THE ATL. (Jan. 4, 2024), https://www.theatlantic.com/newsletters/archive/2024/01/extremism-in-the-military-is-a-problem/677026/.

[168] Michael Robinson & Kori Schake, *The Military's Extremism Problem Is Our Problem*, N.Y. TIMES (Mar. 2, 2021), https://www.nytimes.com/2021/03/02/opinion/veterans-capitol-attack.html.

but a cognitive shortcut offers one plausible explanation. The availability heuristic, identified in the early 1970s by Daniel Kahneman, the pioneering psychologist whose work on decision making earned the 2002 Nobel Prize in Economic Sciences, is the tendency to judge the frequency of a given category or class based on the ease with which instances come to mind.[169] Media coverage, itself biased toward novelty and poignancy, emphasizes unusual events that "are consequently perceived as less unusual than they really are."[170] The world in our heads, Kahneman and his research partner Amos Tversky found, "is not a precise replica of reality; our expectations about the frequency of events are distorted by the prevalence and emotional intensity of the messages to which we are exposed."[171] Legal scholar Cass Sunstein and political scientist Timur Kuran have applied these insights to the regulation of risk in public policy, finding a series of instances where media reports of marginal events have led to a public panic and, ultimately, misguided government action.[172] This self-reinforcing chain reaction, termed an availability cascade, may be stoked by so-called availability entrepreneurs—activists who manipulate public discourse to advance agendas—and can lead to irrational regulation, misspent resources, and priorities influenced by hysteria rather than fact-based data.[173]

Such an availability cascade indeed may have swept through the Pentagon, according to findings recently released by the IDA, the group commissioned to conduct a comprehensive study of extremism under federal contract.[174] The IDA's conclusions, spread across a 262-page report, are difficult to square with the bluster that surrounded the study's genesis in 2021. The research "found no evidence that the number of violent extremists in the military is disproportionate to the number of violent extremists in the United States as a whole."[175] Anecdotal accounts "magnify the actions of a few" and "frequently fail to differentiate between" current service members and veterans who have separated from service,

---

[169] DANIEL KAHNEMAN, THINKING, FAST AND SLOW 129-45 (2011).
[170] *Id.*
[171] *Id.*
[172] *See, e.g.*, Timur Kuran & Cass R. Sunstein, *Availability Cascades and Risk Regulation*, 51 STAN. L. REV. 683, 764 (1999).
[173] *See id.* at 761-68.
[174] *See* PETER K. LEVINE, et al., INST. FOR DEF. ANALYSES, PROHIBITED EXTREMIST ACTIVITIES IN THE U.S. DEPARTMENT OF DEFENSE 197 (2023).
[175] *Id.*

sometimes with less than honorable characterizations.[176] The Department of Defense "should remain cognizant of the fact that violent extremism does not appear to be any more prevalent among service members than it is in American society as a whole, and avoid steps that risk unnecessary polarization or division in the ranks."[177] Further, because of the "inherent gray areas in any definition of extremism . . . a punitive approach to all forms of prohibited extremist activities would risk alienating a significant part of the force."[178]

These revelations, which barely registered in the national media, offer a sobering reference point in the milieu of institutions contending with widespread protests over Israel's military response to the bloody, cross-border attack launched by Hamas in October 2023. As encampments shut down college campuses, disrupted graduations, and led to more than 3,000 arrests, the presidents of at least three prestigious universities were forced to step down.[179] The military is not immune from these tensions. In February 2024, an active duty Air Force senior airman died after setting himself on fire while shouting "Free Palestine!" outside of the front gate of the Israeli embassy in Washington, D.C.[180] Mindful of longstanding support of Israel, an ally, military leaders should heed the warnings and recommendations outlined in the IDA report. For example, although commanders possess a wide range of options to address non-compliance with policy, restraint must be exercised. Counseling and other administrative measures should always be the first option. Regulating speech in an aggressive manner, as the IDA observed, could lead to "widespread polarization and division in the ranks [that] may be a greater risk than the

---

[176] *Id.* at 19.
[177] *Id.* at vii.
[178] *Id.* at v.
[179] *See* Jennifer Schuessler, Anemona Hartocollis, Michael Levenson & Alan Blinder, *Harvard President Resigns After Mounting Plagiarism Accusations*, N.Y. TIMES (Jan. 2, 2024), https://www.nytimes.com/2024/01/02/us/harvard-claudine-gay-resigns.html; Isabelle Taft, Alex Lemonides, Lazaro Gamio & Anna Betts, *Campus Protests Led to More Than 3,100 Arrests, but Many Charges Have Been Dropped*, N.Y. TIMES (July 21, 2024), https://www.nytimes.com/2024/07/21/us/campus-protests-arrests.html; Alan Blinder & Sharon Otterman, *Columbia President Resigns After Months of Turmoil on Campus*, N.Y. TIMES (Aug. 14, 2024), https://www.nytimes.com/2024/08/14/us/columbia-president-nemat-shafik-resigns.html.
[180] Aishvarya Kavi, *Man Dies After Setting Himself on Fire Outside Israeli Embassy in Washington, Air Force Says*, N.Y. TIMES (Feb. 26, 2024), https://www.nytimes.com/2024/02/25/world/middleeast/israel-embassy-man-on-fire.html.

radicalization of a few service members."[181] Any enforcement of these policies, whether minor or severe, should be consistent and impartial. To maintain integrity at the top and cohesion below, leaders should avoid double standards and ideological side-taking, actual or perceived. Inconsistent, capricious messaging, naturally, "could lead to a significant division in the force along political and ideological lines, with some members of the military believing that they are being targeted for their views."[182]

A lesson may be drawn here from tense exchanges that erupted during a congressional hearing in June 2021, when then-Representative Matt Gaetz (R-FL) questioned Secretary Austin and General Mark Milley, then-Chairman of the Joint Chiefs of Staff, about critical race theory and initiatives to address right-wing extremism, citing as an example the relief for cause of a Space Force CO for comments on a podcast alleging that Marxism had infiltrated the service.[183] At the hearing, Secretary Austin dismissed charges that critical race theory had been embraced or endorsed, calling those accusations "spurious," and noting that "99.9 percent of our troops are focused on the right things, embracing the right values each and every day."[184] New policies, Secretary Austin said, were focused on extremist behaviors and "not what people think or political ideas or religious ideas."[185] The tone was measured, diplomatic, and appropriate for the moment. General Milley, however, appeared to lose his composure, firing back at the congressman that he wanted to understand "white rage," implicitly accepting one fringe ideology just as the military sought to eliminate others.[186] Messaging at these rarefied rungs is critically important, and words are understandably parsed and scrutinized. Missteps, however slight, may unnecessarily perpetuate division and polarization within the force—entrenching the very extremism leaders have endeavored to eradicate.

---

[181] LEVINE, *supra* note 174, at iv.
[182] *Id.*
[183] *See Hearing on National Defense Authorization Act for Fiscal Year 2022 and Oversight of Previously Authorized Programs Before the H. Comm. on Armed Services*, 117th Cong. 42-45 (2021) [hereinafter *Hearings*] (statement of Rep. Matt Gaetz)*; see also* Oriana Pawlyk, *Space Force CO Who Got Holiday Call from Trump Fired Over Comments Decrying Marxism in the Military*, MILITARY.COM (May 15, 2021), https://www.military.com/daily-news/2021/05/15/space-force-co-who-got-holiday-call-trump-fired-over-comments-decrying-marxism-military.html.
[184] *Hearings*, *supra* note 183, at 27, 43 (statement of Lloyd J. Austin III, Sec'y of Def.).
[185] *Id.* at 27.
[186] *Id.* at 51 (statement of Gen. Mark A. Milley, Chairman of the J. Chiefs of Staff).

CONCLUSION

That the government may not punish or suppress speech based on disapproval of the ideas or perspectives conveyed is a fundamental principle, enshrined in the First Amendment to the Constitution. For good reason, founders campaigned fiercely for this restraint on state power. Qualified exceptions to the rule are found only in discrete, narrowly defined circumstances. One such circumstance is military service, where good order and discipline are crucial to the success of any meaningful objective. But the deference extended by federal courts is not guaranteed and should not be taken for granted. Doctrines developed over this nation's lifespan are necessary benchmarks to observe, particularly in times of broader cultural tumult. As in a storm at sea, military leaders must batten down the hatches, operating through the turbulence and above the fray, focusing on the chief, overarching mission of national defense and security. Policy prescriptions should, to the furthest extent possible, uphold service members' constitutional rights while ensuring the exercise of those rights does not undermine discipline, unit morale, and operational readiness.

Balancing these interests is a precarious project, requiring deliberate, even-keeled neutrality. Recently revised policy targeting extremism laudably lays out the potential harms caused by those behaviors, such as insubordination and the erosion of public trust. But the solution cannot be more malignant than the problem. Leaders must dispassionately assess the true scale of rot in the ranks, overriding the impulse to regulate speech based on anecdotal reports and guarding against cognitive biases and heuristics. Nor should policies reflexively take cues from this week's moral panic or the latest meme sweeping through social media, fed algorithmically by this faction or that, or from specious op-eds that attract the most clicks online. Punitive measures applied profligately or partially will cause division, polarization, alienation. Of perhaps greater concern are the stultifying effects, the diminished production of thought and progress of ideas, that result from policing "conversations at a bar" and "discussions of public affairs," as Justice Douglas cautioned in his *Parker* dissent.[187]

In the throes of the Vietnam War, the CMA considered the conviction, for disloyal statements, of an enlisted sailor who in 1969 drafted a pamphlet protesting U.S. involvement in the

[187] Parker v. Levy, 417 U.S. 733, 769 (1974) (Douglas, J., dissenting).

controversial conflict.[188] The newsletter, dropped off at newsstands and handed out at Washington Navy Yard, urged resistance against the Government's "illegitimate authority" in "waging aggressive war crimes against humanity."[189] These crimes were perpetrated upon "a peasant people" who were righteously expelling "foreign oppressors from their homeland."[190] The sailor, employing rhetoric not unfamiliar in today's political environment, equated silence with complicity in these injustices. The court upheld the conviction but labored in doing so, scrupulously examining the rights and limitations of speech within the military.

> The armed forces depend on a command structure that at times must commit men to combat, not only hazardous [to] their lives but ultimately involving the security of the Nation itself. Speech that is protected in the civil population may nonetheless undermine the effectiveness of response to command. If it does, it is constitutionally unprotected.[191]

Owing to a "national reluctance to inhibit free expression," however, the "proper balance must be struck between the essential needs of the armed services and the right to speak out as a free American."[192] Any regulation of speech, even of "the thought[s] that we hate," warrants an exacting, scrutinizing inquiry.[193]

---

[188] *See* United States v. Priest, 45 C.M.R. 338, 340-42 (C.M.A. 1972).
[189] *Id.* at 340.
[190] *Id.*
[191] *Id.* at 344.
[192] *Id.*
[193] *Id.*

INTENTIONALLY UNINTENTIONAL: GENAI EXCEPTIONALISM AND THE FIRST AMENDMENT

David Atkinson,* Jena D. Hwang,* and Jacob Morrison*

ABSTRACT

This paper challenges the assumption that courts should grant First Amendment protections to outputs from large generative AI models, such as GPT-4 and Gemini. We argue that because these models lack intentionality, their outputs do not constitute speech as understood in the context of established legal precedent, so there can be no speech to protect. Furthermore, if the model outputs are not speech, users cannot claim a First Amendment speech right to receive the outputs. We also argue that extending First Amendment rights to AI models would not serve the fundamental purposes of free speech, such as promoting a marketplace of ideas, facilitating self-governance, or fostering self-expression. In fact, granting First Amendment protections to AI models would be detrimental to society because it would hinder the government's ability to regulate these powerful technologies effectively, potentially leading to the unchecked spread of misinformation and other harms.

INTRODUCTION

Since ChatGPT first burst into society's collective consciousness toward the end of 2022, scholars have pondered its implications. While discussions of copyright receive the lion's share of attention,[1] and privacy rights consume most of the remaining spotlight,[2] the debate of whether generative AI (GenAI) models should receive First Amendment protections is growing.[3]

It bears emphasizing that whether First Amendment protections apply to GenAI outputs is an unsettled legal

* Assistant Professor of Instruction, Business, Government and Society Department at McCombs School of Business, University of Texas, Austin.
* Research Scientist at the Allen Institute for Artificial Intelligence.
* Predoctoral Researcher at the Allen Institute for Artificial Intelligence.

[1] Katherine Lee, A. Feder Cooper, & James Grimmelmann, *Talkin' 'Bout AI Generation: Copyright and the Generative-AI Supply Chain*, CS&LAW '24: PROC. OF THE SYMP. ON COMPUT. SCI. AND L. (2024).

[2] *See, e.g.*, Chen Ruizhe et al., Learnable Privacy Neurons Localization in Language Models (May 16, 2024) (unpublished manuscript) (https://arxiv.org/abs/2405.10989); Zhipeng Wang et al., Information Leakage from Embedding in Large Language Models (May 22, 2024) (unpublished manuscript) (https://arxiv.org/abs/2405.11916).

[3] *See, e.g.*, Cass R. Sunstein, Artificial Intelligence and the First Amendment (April 28, 2023) (unpublished manuscript). (https://papers.ssrn.com/sol3/papers.cfm?Abstract_id=4431251); Eugene Volokh, Mark A. Lemley, & Peter Henderson, *Freedom of Speech and AI Output*, 3 J. FREE SPEECH L. 651 (2023).

question. The importance of this analysis can't be overstated given the convergence of several factors: (1) the number of GenAI models like GPT-4 and Gemini is proliferating, (2) the use of GenAI in everyday life is becoming more common, and (3) people tend to anthropomorphize things that seem to have human characteristics.[4]

Additionally, the legal implications of assigning First Amendment protection to GenAI, in effect, would necessarily deem its outputs as speech. The repercussions of doing so would be non-trivial, as legal scholars Karl Manheim and Jeffrey Atik explain:

> [If GenAI output is speech, it] would likely prohibit treating AI as a product or attaching liability to harmful outputs. It could also give AI companies free rein to collect and use personal information as data inputs for their algorithmic (constitutionally protected) outputs.[5] It is not just privacy rights that would vanish under such a regime, but many forms of consumer protection and other regulatory objectives.[6]

The potential consequences of assigning protections to GenAI outputs rest on the premise that GenAI models are constitutionally recognizable speakers, and their outputs are, therefore, speech. Works criticizing this premise have pointed out GenAI's tendencies to produce nonsense or asemic language.[7] Others have contended that GenAI cannot be a speaker as it does not participate in communication.[8]

We draw from and build on these works to argue that there are no constitutionally recognized speakers in GenAI because, unlike human beings, models lack communicative intent, akin to

---

[4] The way we talk about chatbots warps our understanding. We "chat" with it and have "conversations." It "responds" based on what it "knows." Since we, as humans evolved over millennia to socialize with others, tend to interpret the outputs of the model in that social context, we also naturally extend the metaphor to believing the model is providing meaningful outputs as expected from another human being.

[5] *See* NetChoice v. Bonta, 692 F.Supp.3d 924, 936–37 (N.D. Cal. 2023) (issuing a preliminary injunction against the California Age-Appropriate Design Code Act on the ground that regulating the collection and use of children's personal information infringed the free speech rights of online tech companies).

[6] Karl Manheim & Jeffery Atik, *AI Outputs and the Limited Reach of the First Amendment*, 63 WASHBURN L. J. 159, 161 (2023).

[7] *E.g.*, Dan L. Burk, *Asemic Defamation, or, the Death of the AI Speaker*, 22 FIRST AMEND. L. REV. 189 (2024).

[8] *E.g.*, Manheim & Atik, *supra* note 9.

stochastic parrots.[9] This, in turn, means there is no speech that the First Amendment can protect. Moreover, if there is no speech, there can be no constitutionally recognized listeners of speech, meaning users of the models generally have either weak or no First Amendment right to receive any model outputs. Consequently, if the First Amendment does not apply, the government can more freely regulate GenAI. We further argue that GenAI outputs are not speech; therefore, no court should take the extraordinary step of extending the highest First Amendment protections and scrutiny to non-speech by non-humans.

Our primary contributions to this discussion include clarifying the legal stakes (such as the unprecedented expansion of free speech rights to a non-human entity) and the most common arguments involved in First Amendment discussions regarding GenAI outputs (like whether the developer, model, or recipients have speech rights that would likely trigger strict scrutiny) by unifying multiple concepts within legal theories, including asemic language, intentionality, human involvement, generation versus use, stochasticity, and substantive constitutional arguments. This research also provides an informed technical description by including AI researchers as co-authors. Finally, the brevity of this paper compared to comparable papers facilitates a concise discussion using accessible prose to make concepts more broadly understandable beyond legal scholars.

A. Scope

There are some important limitations of the following argument: (1) The argument only considers foundation models like GPT-4, Claude, Gemini, and Llama, not all GenAI models, and (2) relatedly, the argument asserts that not all model outputs are protected by the First Amendment, not that no outputs could ever be protected by the First Amendment.[10] Generally, the more directed the model is, the more likely that some protections may

---

[9] Emily M. Bender et al., *On the Dangers of Stochastic Parrots: Can Language Models Be Too Big?*, PROC. OF THE 2021 ACM CONF. ON FAIRNESS, ACCOUNTABILITY, AND TRANSPARENCY 616 (2021).

[10] It seems at least theoretically possible that one day AI could become self-aware, and if so, it could make expressions with intention. But that is not the case today, and there is no reason to believe it will be the case in the near future. Regardless, the First Amendment only applies to humans, another requirement for protected speech.

attach.[11] Our default argument for all foundation models is that virtually none of their outputs are protected speech.

B. How GenAI Works

Before going any further, it is helpful to understand how GenAI functions. In a few words, GenAI models are mathematical functions for predicting what words follow a given input. Models do this by inputting tokens (subcomponents of words) from the prompt into a model, taking its output as the token most likely to follow the input, and repeating this process until the desired output length is achieved.

Tokens are created by a "tokenizer," which is a model that takes in data and separates it into tokens, which are then fed into a model. A token is a series of weights that define the subcomponent of a word, and the weights within the token help define the statistical relationship between different tokens learned during training.[12] On the other hand, the weights within a model are tuned during training to take in tokens and "learn" relationships between them to predict likely outputs. Its primary function, in other words, is to respond to user prompts with plausible-sounding outputs based on what the model was trained to "understand" as likely related tokens. The models can generalize to some extent,[13] and even without referring to an external database they can sometimes memorize and output images and text that is a verbatim or near-verbatim version of the material it was trained on, perhaps indicating the models themselves are a kind of database.

C. The First Amendment

And for the last introductory matter, it is helpful to understand the nature of speech protected by the First Amendment. The Amendment reads:

---

[11] Outputs may only be speech when the developer directs the model to produce a particular or distinct output. Merely applying an insignificant filter does not automatically turn non-speech into speech, as that would make it trivially easy to make all outputs protected speech, subverting the purpose of the First Amendment.

[12] Similar to John Rupert Firth's "You shall know a word by the company it keeps." J.R. Firth, *A Synopsis of Linguistic Theory, 1930–1955, in* STUDIES IN LINGUISTIC ANALYSIS 11 (Oxford 1962).

[13] Some argue it's not true generalization but is instead something like "approximate retrieval". *See, e.g.*, Zhaofeng Wu et al., *Reasoning or Reciting? Exploring the Capabilities and Limitations of Language Models Through Counterfactual Tasks*, CONF. OF THE N. AM. CHAPTER OF THE ASS'N FOR COMP. LINGUISTICS 1819–62 (2024).

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.[14]

We bring attention to the following portion that focuses on speech: "Congress shall make no law . . . abridging the freedom of speech, or of the press[.]"

The Supreme Court has interpreted the First Amendment's freedom of speech clause in a long series of cases. This paper will explore a few relevant quotes later, but for now, it is sufficient to think of it as protecting the "marketplace of ideas," self-governance, and self-expression. The protections extend not only to speakers (the people producing the speech) but also to listeners (the people receiving the speech), because it would undermine the purposes of the First Amendment to allow anyone to say anything but bar others from receiving the communication.

Finally—and this is worth stating clearly—there is no binding case law in the United States that grants First Amendment speech protections to anything that was created absent a human's significant, intentional involvement.[15]

I. THE CODE IS SPEECH, SO MODELS ARE SPEECH ARGUMENT[16]

The first argument many will make is that GenAI functions like code, and code is protected speech; therefore, GenAI outputs are protected speech. This notion is misguided, but it is worth walking through the argument to better understand why the argument is misplaced.

---

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

[15] *See, e.g.*, Miles v. City Council, 710 F.2d 1542, 1544 n.5 (11th Cir. 1983) ("This Court will not hear a claim that Blackie's [the cat's] right to free speech has been infringed. First, although Blackie arguably possesses a very unusual ability, *he cannot be considered a "person" and is therefore not protected by the Bill of Rights*. Second, even if Blackie had such a right, we see no need for appellants to assert his right *jus tertii*. Blackie can clearly speak for himself." (emphasis added)).

[16] The structure of this section of the paper was informed by comments from the Center for Democracy & Technology. Center for Democracy & Technology, *Re: NTIA's Request for Comment Regarding Dual-Use Foundation Artificial Intelligence Models with Widely Available Model Weights as per Section 4.6 of the Executive Order on the Safe, Secure, and Trustworthy Development and Use of Artificial Intelligence*, CDT.ORG (Mar. 27, 2024), https://cdt.org/wp-content/uploads/2024/03/CDT-to-NTIA-comments-on-open-foundation-models-03272023.pdf.

There are at least three cases in multiple circuits where the courts determined that code is speech protected by the First Amendment. The courts decided each case around the turn of the century as software became an unavoidable legal topic with the widespread use of the internet. In two of the three cases (*Junger v. Daley*[17] and *Bernstein v. United States Department of Justice*[18]), the issue was government-export control restrictions that attempted to prevent researchers from sharing cryptographic code.

For example, in *Junger v. Daley*, the Sixth Circuit found that "Because computer source code is an expressive means for the exchange of information and ideas about computer programming, we hold that it is protected by the First Amendment."[19]

Likewise, in *Bernstein*, the Ninth Circuit held that:

> [C]ryptographers use source code to express their scientific ideas in much the same way that mathematicians use equations or economists use graphs . . . . [M]athematicians and economists have adopted these modes of expression in order to facilitate the precise and rigorous expression of complex scientific ideas. Similarly, the undisputed record here makes it clear that cryptographers utilize source code in the same fashion. In light of these considerations, we conclude that encryption software, in its source code form and as employed by those in the field of cryptography, must be viewed as expressive for First Amendment purposes, and thus is entitled to the protections of the prior restraint doctrine. If the government required that mathematicians obtain a prepublication license prior to publishing material that included mathematical equations, there is no doubt that such a regime would be subject to scrutiny as a prior restraint.[20]

---

[17] Junger v. Daley 209 F.3d 481 (6th Cir. 2000).
[18] Bernstein v. Dep't of Just., 176 F.3d 1132, 1141 (9th Cir. 1999), *reh'g granted, withdrawn*, 192 F.3d 1308 (9th Cir. 1999).
[19] *Junger*, 209 F.3d at 485.
[20] *Bernstein*,176 F.3d at 1141. This case was later withdrawn because the U.S. government modified its encryption regulations before the appellate court could hear the case, making the issue moot.

A. Prior Restraint and Functionality

Importantly, the courts applied different standards to the cases. *Bernstein* applied the prior restraint doctrine, which arises when a government action prohibits speech or other expression before the speech happens.[21] Overcoming the scrutiny of a prior restraint is a tall order. The Supreme Court has noted that "[a]ny system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[22] The government must overcome strict scrutiny by showing that (1) there is a compelling interest in the law, and (2) that the law is either narrowly tailored or is the least speech-restrictive means available to the government. In short, this means the government "carries a heavy burden of showing justification for the imposition of such a restraint."[23] There have been very few exceptions to the bar on prior restraints; only things like obscene speech, incitement to violence, and national security concerns have justified them.[24]

Instead of the prior restraint standard, the *Junger* court applied intermediate scrutiny because the law focused on the code's functionality, not its expressiveness.[25] Intermediate scrutiny consists of a two-part test: the challenged law must (1) further an important government interest (which is a lower burden than the compelling state interest required by the strict scrutiny test),[26] and (2) must do so by means that are substantially related to that interest.

Courts have applied intermediate scrutiny in other First Amendment cases and determined that for the first prong (important government interest), the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these

---

[21] Bantam Books v. Sullivan, 372 U.S. 58, 70 (1963).
[22] *Id.*
[23] N.Y. Times Co. v. United States, 403 U.S. 713, 714 (1971) (citing Org. for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971)).
[24] Near v. Minnesota ex rel. Olson, 283 U.S. 697, 716 (1931).
[25] *Junger*, 209 F.3d at 485. Had the regulation instead focused on the content of the code—its expressiveness—strict scrutiny would have likely applied which would require that the law be narrowly tailored to serve a compelling government interest. *See* Am. Libr. Ass'n v. Reno, 33 F.3d 78 (D.C. Cir. 1994).
[26] The Supreme Court has found important government interests. *See, e.g.*, Michael M. v. Superior Ct., 450 U.S. 464 (1981) (prevention of teenage pregnancy); Craig v. Boren, 429 U.S. 190 (1976), (public health); Rostker v. Goldberg, 453 U.S. 57 (1981) (national defense); Dothard v. Rawlinson, 433 U.S. 321 (1977) (physical safety of women); Califano v. Goldfarb, 430 U.S. 199 (1977) (remediation of past societal discrimination).

harms in a direct and material way."[27] For the second prong (substantially related means), the regulation must leave "ample alternative channels of communication."[28]

More recently, in a case challenging provisions of the Digital Millennium Copyright Act (DMCA), a statute meant to prevent the circumvention of protections of access to digital content, the D.C. Circuit noted that the government "conceded that 'if you write code so somebody can read it,' it is 'expressive' speech. All of our sister circuits to have addressed the issue agree."[29] The court went on to conclude that the DMCA applied to the function of the code rather than its expression, applied intermediate scrutiny, and ruled in favor of the government.

Given the cases discussed above, it seems clear that code is speech.[30] This means any content-neutral regulation of code, and perhaps GenAI models, would be subject to intermediate scrutiny, and an expression-based regulation would invite strict scrutiny.

II. IMPLICATIONS

Academics, politicians, and market participants have floated various proposals to regulate large language models. This section will examine the implications of assuming the First Amendment protects GenAI models.

A. Regulations That May Be Prior Restraints

One often-raised proposal is to implement a licensure system whereby a regulator must certify or license a model before the developer can release or deploy it to a wide audience.[31] Other examples would be if the government prevented models from telling users how to build a bomb, make drugs, promote conspiracy theories, create malware, or access pirated movies. Such regulations may trigger the prior restraint doctrine by preventing the model from communicating. As noted above, this is a high bar, and only with the most persuasive justifications may a prior restraint pass constitutional muster.

---

[27] Turner Broad. Sys. Inc. v. FCC, 512 U.S. 622, 664 (1994).
[28] Ward v. Rock Against Racism, 491 U.S. 781, 802 (1989).
[29] Green v. U.S. Dep't of Justice, 54 F.4th 738, 745 (D.C. Cir. 2022) (citation omitted).
[30] Not to stray too far from the topic of speech, but another important fact is that models are not code and are not made up of code.
[31] We acknowledge that the data collectors, data curators, model trainers, and model deployers may all be different entities. For simplicity, we treat them as a single group, and it does not affect the free speech analysis.

B. Other Regulations That May Trigger Intermediate or Strict Scrutiny

Another common proposal is to require certain transparency thresholds for models. At the extreme, transparency requirements could include revealing the model weights and training data, but they could also include reporting impact assessments or the following kinds of information, as suggested by AI researchers at Princeton University.

> [F]or each category of harmful output, transparency reports must:
> 1. Explain how it is defined and how harmful content is detected.
> 2. Report how often it was encountered in the reporting period.
> 3. If it is the result of a Terms of Service violation, describe the enforcement mechanism and provide an analysis of its effectiveness.
> 4. Describe the mitigations implemented to avoid it (e.g., safety filters), and provide an analysis of their effectiveness.[32]

The issue is that courts may construe such reports as compelled speech, and compelled speech invites strict scrutiny. Most compelled speech case law arises when the government requires an entity to convey or allow a particular message or to allow space for a viewpoint the entity may disagree with.[33] That criterion does not neatly apply to models where the transparency reports do not require the model developers to carry a particular message or allow others to transmit messages through the model. Moreover, the courts take a more relaxed stance on transparency reporting when disclosure is purely factual and in a commercial context.[34]

Overall, an analysis of how the First Amendment may apply to transparency reports will require a more nuanced assessment, including examining which models the regulation

---

[32] Arvind Narayanan & Sayash Kapoor, *Generative AI Companies Must Publish Transparency Reports*, AI SNAKE OIL (June 26, 2023), https://www.aisnakeoil.com/p/generative-ai-companies-must-publish.

[33] *See, e.g.*, Miami Herald Pub. Co. v. Tornillo, 418 U.S. 241 (1974); Pac. Gas & Elec. Co. v. Pub. Util. Comm'n, 475 U.S. 1 (1986); Hurley v. Irish-Am. Gay Group, 515 U.S. 557 (1995); Nat'l Inst. of Fam. and Life Advoc. v. Becerra, 585 U.S. 755 (2018).

[34] *See e.g.*, Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626 (1985).

would apply to (All of them? Only those of a certain size? Only those that used a certain threshold of compute? Only those that are available for certain uses or certain audiences?), whether the regulation might affect the speech rights of the model developers, and how burdensome the regulation would be to comply with. The broader the regulation, the more likely it is to invite strict, rather than intermediate, scrutiny.[35]

C. Takeaways

As discussed above, if models, like code, receive First Amendment protections, it could stifle or prohibit meaningful regulation of what many have claimed is a technology as powerful as fire,[36] electricity,[37] the steam engine,[38] the printing press,[39] and more.[40] Notably, none of those technologies has First Amendment protections, so none receive the same insulation from regulation. This could grant the developers of GenAI broader freedoms to experiment, innovate, and disseminate models without the fear of substantial government influence. It could also grant the developers greater influence and far more protection against government intervention than prior technologies may have enjoyed.

---

[35] S*ee* Netchoice, LLC v. Paxton, 49 F.4th 439 (5th Cir. 2022) (requiring disclosure of acceptable use policy likely not a violation of the First Amendment); NetChoice, LLC v. Att'y Gen., Florida, 34 F.4th 1196 (11th Cir. 2022), *vacated and remanded sub nom.* Moody v. NetChoice, LLC, 603 U.S. 707 (2024) (requiring platforms to inform users of changes to platform rules likely not a violation of the First Amendment).

[36] Prarthana Prakash, *Alphabet CEO Sundar Pichai Says That A.I. Could Be 'More Profound' Than Both Fire and Electricity—but He's Been Saying The Same Thing for Years*, FORTUNE (Apr. 17, 2023), https://fortune.com/2023/04/17/sundar-pichai-a-i-more-profound-than-fire-electricity.

[37] Shana Lynch, *Andrew Ng: Why AI Is the New Electricity*, STANFORD GRADUATE SCH. OF BUS. (Mar. 11, 2017), https://www.gsb.stanford.edu/insights/andrew-ng-why-ai-new-electricity.

[38] Hannah Levitt & Bloomberg, *JP Morgan CEO Jamie Dimon Compares AI's Potential Impact to Electricity and the Steam Engine and Says the Tech Could 'Augment Virtually Every Job*', FORTUNE (Apr. 8, 2024), https://fortune.com/2024/04/08/jpmorgan-ceo-jamie-dimon-compares-ai-electricity-steam-engine-tech-augment-every-job/.

[39] Lauren Sforza, *Microsoft President Compares AI to Invention of Printing Press*, THE HILL (May 28, 2023), https://thehill.com/policy/technology/4024394-microsoft-president-compares-ai-to-invention-of-printing-press/.

[40] Bill Gates, *The Age of AI has Begun*, GATESNOTES (Mar. 21, 2023), https://www.gatesnotes.com/the-age-of-ai-has-begun. And these claims are not limited to for-profit organizations. Wired reports that the CEO of the nonprofit Allen Institute for Artificial Intelligence, Ali Farhadi, says he's "100 percent convinced that the hype is justified." Steven Levy, *Don't Let Mistrust of Tech Companies Blind You to the Power of AI*, WIRED (June 7, 2024), https://www.wired.com/story/dont-let-mistrust-of-tech-companies-blind-you-power-of-ai/.

III. LET'S MENTION INTENTIONS

Many legal scholars have assumed that all GenAI outputs are speech for the sake of legal analysis.[41] If their assumptions were correct, their analyses would likely be correct, but we believe they are misplaced.

In cases where courts have found that code is protected speech, they have relied on several analogies: mathematical formulas, foreign languages, player piano paper, and music more generally.[42]

Upon first glance, it appears First Amendment protections could reasonably extend to model weights for a number of reasons if they can apply to mathematical equations, including that the model is essentially a compressed copy of its training data, and the training data is mostly expressive content. The model converts the expressive nature of the training data into numbers and merely transforming the format of speech does not remove its protections (e.g., making a photo a JPEG file, making a document a DOCX file, or making a song an MP3 file does not affect speech protections), or that the model is able to produce outputs that are coherent to humans.

But perhaps such an analysis gets ahead of itself by overlooking the assumption inherent in all the analogies and case law thus far: that someone intended to create the protected speech.[43] The First Amendment does not apply to random strips of black cloth (or any color, for that matter). If it did, garment factories might be in massive violation of the law every day when they discard scraps left over from sewing shirts, pants, dresses, and so on. Similarly, if the random cloth was protected, government regulations that require discarding the scraps for environmental or safety reasons might also implicate the First Amendment. As another example, if you accidentally knock over a can of paint on the sidewalk that spills onto a piece of paper, a police officer can throw the paper away and clean up the mess, ask you to clean it up, or fine you for not cleaning it up, all without implicating the First Amendment.

The reason the First Amendment can protect some pieces of cloth and some paint on paper is that they are imbued with intent

---

[41] *See, e.g.*, Sunstein, *supra* note 6; Volokh, Lemley, & Henderson, *supra* note 6.

[42] *See, e.g.*, Bernstein v. U.S. Dep't. of State, 922 F. Supp. 1426, 1435 (N.D. Cal. 1996).

[43] Consider another famous case where First Amendment protections extended to wearing a black armband to protest the Vietnam War. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

by a human.[44] Intentionality, in turn, requires both sentience (the ability to feel, perceive, or experience subjectivity) and self-awareness (the ability to recognize oneself as an individual).[45] Wearing a black armband was protected speech in *Tinker* because the wearer intended the cloth to convey a particular message. Likewise, if you paint a portrait on a canvas while sitting at an easel on a sidewalk, that painting is protected speech because a person intends to convey something, not merely because some paint is applied to some surface.[46]

To make the claim clearer, we can extend it to the other analogies. Music is protected because someone intended specific sounds. A player piano roll is protected because someone intended the roll to create certain sounds. Source code and object code are protected because someone intended to cause a computer to perform certain actions and communicate the intended actions to fellow coders. The same logic applies to video games and board games. In every case, a person intended for the protected speech to result in some particular message.[47] And because there is intended speech or expression, other humans have a protected right to receive the expressions.

Finally, while intention is a reasonable boundary for the sake of legal analysis—because we are willing to concede that perhaps one day machines will have true intent, and therefore their outputs could be protected—we could also rely on a simpler

---

[44] Mackenzie Austin & Max Levy, *Speech Certainty: Algorithmic Speech and the Limits of the First Amendment*, 77 STAN. L. REV. 1, (2025) (making a powerful argument that the First Amendment requires "speech certainty," which is that the speaker knows what they are saying when they say it. This paper agrees with that criterion but believes requiring intentionality, including sentience and self-awareness, and humanity is also necessary to ensure the definition of what could be speech is properly constrained).

[45] Even gorillas that are sentient, self-aware, and can intentionally communicate ideas that they know they are communicating when the ideas are communicated do not receive free speech protections, and people have no First Amendment right to receive gorilla communications.

[46] This does not mean the painter would win a lawsuit about being asked to move. It could be that content-neutral regulations prohibit people from painting on the sidewalk for any number of good reasons. *See, e.g.*, City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 69 (2022) (finding that content-neutral regulations regarding billboards were not unconstitutional).

[47] Cass Sunstein mentions that the First Amendment would likely extend to Magic Eight Balls, so a government cannot say the ball must reply "Yes" when asked if a particular viewpoint is correct. Sunstein, *supra* note 6, at 11–12. How this would ever be enforced or how a company could possibly rig a Magic Eight Ball in such a way is beyond us. It seems as nonsensical as trying to restrain the speech of newborns. And this, in a way, helps make our point: we are doing too much by trying to hyperextend the First Amendment to cover more and more without a strong justification and by relying on strained analogies.

human-directly-involved/no-human-directly-involved dichotomy for the foreseeable future. The First Amendment has only ever recognized the speech of humans. While other creatures have appeared to make intentional communications, perhaps understanding what they are communicating when they communicate it-such as dogs whimpering for food, parrots requesting crackers, gorillas using sign language, and cats allegedly speaking English-U.S. courts, as Manheim and Atik put it "emphasize[s] the human element, the First Amendment does not protect speech as such, but only 'the freedom of speech.' Freedom is a quality that only humans enjoy. What would it mean for AI to be "free"? Free to speak? Free to believe in religion? Freedom from captivity?"[48]

GenAI lacks intentionality, sentience, self-awareness, and humanness. Therefore, unlike code and other forms of communication, nothing GenAI generates can be considered protectable speech under any reasonable reading of the Constitution or any binding case law.

IV. MODELS, UNLIKE CODE, ARE NOT SPEECH

While the lack of intention is itself dispositive of whether free speech protections should attach, we can also summarily dismiss the notion that there is a speaker by considering the only two possible speakers: the model developers and the model itself.

A. Developers Are Not Speakers

In contrast to the examples in the preceding section regarding music and code, developers do not intend for foundation models to convey any particular message. In fact, large models–the kinds the government is most likely to regulate because they are generally more capable of producing outputs the government would be interested in regulating—are often intentionally trained not to produce a particular output because that would be less interesting and limit their usefulness to a broader audience. That is not to say the model developers have no control over the general types of outputs a model may produce, but developers do not control specific outputs.

The developers of large models also have no way of knowing how the model will associate any given tokens or how it will

[48] Mainheim & Atik, *supra* note 9, at 169.

reply to any given input.[49] While developers may make opinionated decisions about what data to include or exclude, or what types of queries to respond to or refuse, or what kinds of outputs to filter, the model itself is merely a representation or abstraction of these choices, and it has no agency of its own. You also cannot easily "hard-code" any particular responses. As Joshua Batson, a researcher at the AI firm Anthropic, noted in a New York Times podcast,

> [t]hese models are grown more than they are programmed. So you kind of take the data, and that forms like the soil, and you construct an architecture and it's like a trellis, and you shine the light, and that's the training. And then the model sort of grows up here, and at the end, it's beautiful. It's all these little like curls, and it's holding on. But you didn't, like, tell it what to do.[50]

Instead, the outputs are merely statistically plausible tokens formed into words and sentences responding to the statistical association of the tokens created from the words and sentences of the user prompt.[51] GenAI model developers cannot know or understand when, where, or why any particular output will include any particular token.

More generally, the mere fact that a person created something does not mean that everything that entity says or does is potentially acting on behalf of the creator. Imagine if all parents were responsible for everything their teenagers said or did. Or suppose Ford was responsible for everything the eventual buyers did with the vehicles. Society has had the good sense to recognize that mere creation of something does not mean the

---

[49] Set aside, for the purposes of this article, the uncommon scenario of a malevolent developer who curates data to make the model more inclined to do harmful things, or who uses supervised fine-tuning or other techniques specifically to make harmful actions more likely.

[50] Kevin Roose & Casey Newton, *Google Eats Rocks, a Win for A.I. Interpretability and Safety Vibe Check*, N.Y. TIMES (May 31, 2024), https://www.nytimes.com/2024/05/31/podcasts/hardfork-google-overviews-anthropic-interpretability.html.

[51] Prompts, though they may be intricate and very creative to achieve a particular outcome, are not deterministically shaping the actual generated content. Prompt engineering optimizes the model's *likelihood* to generate what the user wants. However, whether the model actually generates what the user desires is dependent on a number of factors beyond the user's control such as the effectiveness of the model's training, the efficacy of the instruction tuning the model received, and the alignment of the model's learned human preference. Thus, the link between the prompt and generation is tenuous. Generation from an AI is intrinsically separate from user intent.

creator always retains all rights and responsibilities associated with the thing they created.

If companies claim a restriction on output is unconstitutional, they must argue that the output is speech. And because GenAI itself cannot create speech as it has been recognized in the U.S. legal system, the speech must be that of the company. This means all GenAI outputs would be the company's speech.

Notably, no large GenAI entity has claimed that any models represent the company's speech. If anything, they expressly disclaim this, noting that the models are experimental and that the models do not represent their views.[52] Additionally, AI developers and most users do not want to claim legal liability for anything harmful the model may output for the simple reason that they have no idea what it might output in response to any given prompt. It is also not clear whether 47 U.S.C. § 230, more commonly known as Section 230, the law that immunizes platforms from most content users post, would protect GenAI developers in the same way it shields large social media platforms, so the hesitancy is logical.[53]

B. Models Are Not Speakers

The model has no intention or even understanding of what it is doing. This is largely why problems like hallucinations and shortfalls in common sense persist.[54] As discussed above, models are merely making probable guesses of which token should go next, given the prior tokens. When an AI model states a falsehood as if it is fact, it is called hallucinating. But *everything* models output is a hallucination; it just so happens that often their outputs align with reality. They have no awareness of what they are outputting, and they do not know if it is accurate or rational. GenAI cannot express itself because it has no self to express. And unlike corporations, discussed below, GenAI is not made up of humans.

---

[52] *See, e.g.*, *Gemini for Google Workspace Cheat Sheet*, SUPPORT.GOOGLE (2024), https://support.google.com/a/users/answer/14143478?hl=en (specifies that "Gemini feature suggestions don't represent Google's views, and should not be attributed to Google").

[53] *See* PETER J. BENSON & VALERIE C. BRANNON, CONG. RSCH. SERV., LSB11097, SECTION 230 IMMUNITY AND GENERATIVE ARTIFICIAL INTELLIGENCE 2–4 (2023).

[54] *See* Bender et al., *supra* note 12, at 610–23; Emily M. Bender & Alexander Koller, *Climbing Towards NLU: On Meaning, Form, and Understanding in the Age of Data*, PROC. OF THE 58TH ANN. MEETING OF THE ASS'N FOR COMP. LINGUISTICS 5185–98 (2020); Zachary Kenton et al., Alignment of Language Agents (Mar. 26, 2021) (unpublished manuscript) (https://arxiv.org/abs/2103.14659).

A model can generate speech the way a parrot can generate speech by mimicking humans. A parrot may produce coherent outputs, but it does not have the capability to fully understand the full extent of what it is producing. A model, like a parrot, generates coherent outputs, but researchers have shown that models do not understand what they generate, no matter how sophisticated the output may appear.[55] In fact, it could be said that a parrot has even more intention than a model because it is producing output on its own initiative and can do so without prompting. Yet, nobody has claimed it would violate a person's First Amendment rights to not be allowed to listen to a parrot. Even if we assume parrots are sentient and self-aware and can speak with intentionality and speech certainty (knowing what it said when it said it), they lack the other fundamental and unavoidable characteristic of protectable speech: human origin.

In fact, the same logic applies to other entities that can communicate a message that is clearly understood by humans, but that would not be protected by the First Amendment, including doorbells, thermostats, school bells, smoke detectors, and house alarms.

The reason is that the First Amendment protects speech, not the mere transmission of information. The fact that someone can ascribe meaning to something does not mean First Amendment protections automatically apply—regardless of how profound the self-imposed meaning may be. I may find the shape of a large rock in a nearby park to convey something profound about the meaning of life, but if the city decides to obscure or destroy the rock, they have not assaulted the First Amendment. I have no First Amendment right to receive the rock's expression, such that it is.[56]

The limitation on the extent of First Amendment protections is necessary. If the mere communication of information were constitutionally protected speech, then virtually nothing could be

---

[55] *See* Nouha Dziri et al., *Faith and Fate: Limits of Transformers on Compositionality*, ACM DIGIT. LIBR. (2024), https://dl.acm.org/doi/10.5555/3666122.3669203; *see also* Peter West et al., *The Generative AI Paradox: What It Can Create, It May Not Understand*, ARXIV (2023), https://arxiv.org/abs/2311.00059.

[56] Note that we are not arguing that analyses and discussion about the rock or cults or religions that spring from worshiping the rock would not receive First Amendment protections. We are only concerned with the receiver/listener's supposed protections to read/view and interpret the rock, because any "insights" would derive entirely from their self-reflection. The resulting self-reflections may result in protected speech from the receiver, but no protections go from the rock to the receiver.

meaningfully regulated, or at the very least, it would trigger waves of incessant litigation where the government would be required to satisfy, at a minimum, intermediate scrutiny each time.

C. Humans Are Not Stochastic Parrots

GenAI models are undeniably impressive as far as producing coherent outputs based on probable tokens. However, they are still only tools. They exhibit intelligence similar to the way a calculator exhibits intelligence: input by user, output by tool.[57] Yet some people still insist that human communication is merely stochastic outputs, meaning that speech is only probabilistic, and that our communication is not meaningfully different from how GenAI creates outputs. Therefore, GenAI and brains should not be treated differently under the law.[58] This is wrong.

Cognitive linguistics has long argued that speakers retain the ability to selectively compose their utterances to coincide with their communicative intent, their attitude, and the intended message.[59] Humans play an active role in organizing and personalizing what we say and how we say things. Similarly, listeners engage in an active process of construing or interpreting the received message, taking into account various contextual cues, such as shared information between the speaker and the listener as well as the intent of the speaker.

It is beyond the scope of this paper to detail all the ways human thinking, creativity, and communication are distinguishable from GenAI outputs. Still, several brief examples are worth mentioning so anyone who wishes to explore the topic further can have ideas to build on. We acknowledge that GenAI can sometimes perform some of the tasks associated with the following examples. But this reminds us of the old saying about broken clocks being correct twice a day. What follows are some of the ways in which GenAI functions is unlike how human minds work.

---

[57] And so far, calculators are better at solving math problems when told what to do with numbers. Thankfully their outputs aren't just based on the probability of, say, 2+2 equals 3 or 4 or 5.

[58] For example, Sam Altman, CEO of OpenAI, famously tweeted "I'm a stochastic parrot, and so r u[.]" Sam Altman (@sama), X (Dec. 4, 2022, 1:32 PM), https://x.com/sama/status/1599471830255177728?lang=en&mx=2.

[59] *See* Ronald W. Langacker, FOUNDATIONS OF COGNITIVE GRAMMAR: VOLUME I: THEORETICAL PREREQUISITES (Stan. Univ. Press 1987); Leonard Talmy, *Figure and Ground in Complex Sentences*, BLS (1975), https://journals.linguisticsociety.org/proceedings/index.php/BLS/article/view/2322/2092.

1. GenAI has no intentionality nor agency.[60] It does not provide any output deliberately, purposefully, or with thoughts, desires, or beliefs because it does not contain the capacity for such conditions. It merely responds to user inputs.

2. GenAI has no theory of mind.[61] It does not have any idea what you may be thinking, desiring, or believing, and it does not spend any time thinking about what you may be thinking versus what it is "thinking."

3. GenAI lacks a notion of truth or belief in what is true versus false, showing tendencies to generate false information and hallucinations.[62] It is trained to associate tokens with other tokens, not to identify truthful information from false information. It does not possess the ability to scrutinize its training data to determine whether what it was trained on is true or not, unlike how a human can question whether the information provided to us is likely true or not.

4. Language requires both form and meaning. An LLM is only trained on form (predicting the most likely next token), so it has no ability to learn or understand meaning.[63] This is why it cannot tell if something is true or false. It does not know what content is trustworthy or not.[64] Coherence does not equal understanding. Past performance (a model being right about something) does not guarantee future results (that

---

[60] *See* Bender et al., *supra* note 12, at 610-23; *See also* Reto Gubelmann, *Large Language Models, Agency, and Why Speech Acts are Beyond Them (For Now)–a Kantian-Cum-Pragmatist Case*, 37 SPRINGER NATURE 32 (2024).

[61] *See* Hyunwoo Kim et al., *FANToM: A Benchmark for Stress-testing Machine Theory of Mind in Interactions,* ASS'N COMPT. LINGUISTICS 14397 (2023), https://arxiv.org/abs/2310.15421; *see also* Mudit Verma et al., *Theory of Mind Abilities of Large Language Models in Human-Robot Interaction: An Illusion?*, HRI '24: COMPANION 2024 ACM/IEEE INT'L CONF. HUM.-ROBOT INTERACTION 36 (2024), https://arxiv.org/abs/2401.05302; Gu, Yuling et al., SimpleToM: Exposing the Gap between Explicit ToM Inference and Implicit ToM Application in LLMs (unpublished arXiv Oct. 17, 2024), https://arxiv.org/abs/2410.13648.

[62] *See* Saurav Kadavath et al., *Language Models (Mostly) Know What They Know*, (July 11, 2022) (unpublished manuscript) (https://arxiv.org/abs/2207.05221); Stephanie Lin et al., *TruthfulQA: Measuring How Models Mimic Human Falsehoods*, PROC. OF THE 60TH ANN. MEETING ASS'N COMP. LINGUISTICS 3214–52 (2022), https://arxiv.org/abs/2109.07958.

[63] *See* Bender & Koller, *supra* note 53, at 5185–98; West et al., *supra* note 54.

[64] *See* Reece Rogers, *Google Admits Its AI Overviews Search Features Screwed Up*, WIRED (May 30, 2024), https://www.wired.com/story/google-ai-overview-search-issues/.

the model will continue to be correct about that topic or any other topic).

5. GenAI cannot make significant innovations.[65] In contrast, humans can create and innovate, which goes beyond mere repetition of patterns. We can compose new genres of music, invent useful technologies that have never existed before, and develop entirely new fields of study (calculus, physics, evolution, cosmology, etc.).

6. GenAI is not self-aware.[66] While humans possess self-awareness and consciousness, which allow us to reflect on our thoughts, experiences, and existence, stochastic models like GenAI entirely lack this level of meta-cognition.[67]

7. GenAI is not great at prediction and adaptation. Unlike GenAI, human learning is not just about mimicking patterns; it is about understanding principles and applying them in novel situations. We can learn from a few examples and generalize to new contexts, a trait that stochastic models struggle with because their knowledge is limited to the information they were trained on. This is why, for example, researchers found that GPT-4 did excellent on coding problems available before GPT-4's data collection cutoff date, but it performed poorly on coding problems available just after the data collection cutoff.[68] It is also why the models must be exposed to several orders of magnitude more content than humans to provide outputs that humans sometimes find useful.

---

[65] *See* Giorgio Franceschelli & Mirco Musolesi, *On the Creativity of Large Language Models* (Mar. 27, 2023) (unpublished manuscript) (https://arxiv.org/abs/2304.00008).

[66] *See* David J. Chalmers, *Could a Large Language Model Be Conscious?* (Mar. 4, 2023) (unpublished manuscript) (https://arxiv.org/abs/2303.07103) (presented at NeurIPS Conference in 2022 as an invited talk).

[67] When we asked Microsoft Copilot, powered by GPT-4, about humans being stochastic parrots it repeatedly referred to itself as being a human. So much for self-awareness.

[68] *See* Arvind Narayanan & Sayash Kapoor, *GPT-4 and Professional Benchmarks: The Wrong Answer to the Wrong Question*, AI SNAKE OIL (Mar. 20, 2023), https://www.aisnakeoil.com/p/gpt-4-and-professional-benchmarks; *see also* Ben Turner, *GPT-4 Didn't Ace The Bar Exam After All, MIT Research Suggests—It Didn't Even Break The 70th Percentile*, LIVE SCIENCE (May 31, 2024), https://www.livescience.com/technology/artificial-intelligence/gpt-4-didnt-ace-the-bar-exam-after-all-mit-research-suggests-it-barely-passed (showing OpenAI's claims about the bar exam are similarly under scrutiny).

> 8. Humans are deeply embedded in social and cultural contexts that implicitly shape how we understand the world. Our language and actions are influenced by these contexts in ways that are not merely stochastic. GenAI, in contrast, generally only knows how and when to adapt to a different culture if told to do so explicitly.

D. GenAI Models are Not Like Corporations

Some claim that GenAI should receive speech rights because other non-human entities, like corporations, receive such rights. But corporations have speech rights they are made up of humans, and all actions corporations take are on behalf of humans. This is because the language of the First Amendment is based on actions that require intention and agency. The fictional entity of "Ford" does not create advertisements; the sales and marketing teams, consisting of humans, do. Ford would not exist without humans. There is no protected corporate speech in the absence of humans.

The distinction between corporations and GenAI becomes more obvious when considering the additional rights corporations possess. For example, corporations can enter into legally binding contracts, but GenAI, like ChatGPT, cannot. Similarly, corporations can own property, but GenAI cannot.[69] It seems odd to think that GenAI cannot own something as trivial as a cup, but some people are eager to grant it powerful First Amendment rights.[70]

E. Listeners Are Not Protected

The above sections focus on the purported speakers. But what about listeners of the alleged speech? We believe that users of models do not have a First Amendment speech right to receive model outputs. If there is no speech from the model developers and the model itself is not a speaker, then there is no speech to "listen" to or receive. If there is no speech, then there are no speech rights. However, what users of GenAI *do* with the outputs

---

[69] This may be a useful frame for thinking about when the First Amendment should apply to something. If it cannot have property rights, then it should not have speech rights.

[70] But even corporations do not have full First Amendment protections. They can be compelled to speak, for example, by SEC rules and regulations about disclosures (S-1s, 10-Ks, 8-Ks, etc.). *See e.g.*, *Form S-1,* SEC, https://www.sec.gov/files/forms-1.pdf. The government cannot similarly compel humans to reveal all the potential risks, of, say, marrying them.

would be protected because the user would be making an intentional communication. We must separate the *generation* of outputs from the *use* of those outputs for proper legal analyses, just as the court in *Tinker v. Des Moines Independent Community School District*[71] implicitly recognized that the production of some black cloth is separate from the *use* of that cloth to protest a war. Use is protected speech.

There is a related argument that people use GenAI outputs to improve their writing or to conduct research, so they should have free speech rights to what the model generates.[72] But this is misguided. Nobody is entitled to the very best of anything, including the best or easiest way to create speech. We are not entitled to a laptop with word processing software that makes composing documents and conducting research easier, and laptops do not receive First Amendment protections for merely existing or because they are more useful than a stone and chisel. GenAI is a tool, no different from pens, paper, and word processors, and using tools, by itself, does not bestow First Amendment protections on the tools themselves or give people a First Amendment right to access the tools in the condition that is most beneficial to the people. It may be that a machine gun would make a more impressive sculpture when fired on a chunk of marble than a hammer and a chisel, but we do not have an unrestricted free speech right to access and use a machine gun just because it can be used to produce what may be protected speech.

Another argument about listeners is that because people can record things and such actions are protected by the First Amendment, using a tool like GenAI also gives users First Amendment protection. But the recording rights hinge on humans intentionally creating the recording, knowing that the cameras will record what they are aimed at. Not to beat a dead horse, but there is no similar 1:1 knowledge with the input and output of GenAI. Nobody expected Google to tell people to put glue in their pizza, for example, but it happened when a user asked how to make cheese stick to the pizza.[73]

---

[71] 393 U.S. 503 (1969).

[72] *See* Volokh, Lemley, & Henderson, *supra* note 6.

[73] *See* Kylie Robison, *Google Promised a Better Search Experience—Now It's Telling Us to Put Glue on Our Pizza*, THE VERGE (May 23, 2024), https://www.theverge.com/2024/5/23/24162896/google-ai-overview-hallucinations-glue-in-pizza ("Add some glue," Google answers. "Mix about 1/8 cup of Elmer's glue in with the sauce. Non-toxic glue will work.").

Moreover, nobody disputes that the government can regulate cameras, recorders, and other tools even though the users of those tools may have First Amendment rights from their use. All other tools that courts have granted some protection to have involved humans trying to communicate a message to other humans: the Internet, film, cable television, etc. No copper wire has been granted First Amendment protections just because it *may* be used to communicate something by transmitting signals. It is the actual *use* or attempted use that matters, not the existence of the *potential* use of a tool.

A more helpful framework would be to consider whether the information received is speech. That is, was it intentional and by a human? If it was, traditional free speech protections apply. If it was not, there are no listener rights and no first-party speech protections. Instead, it is fully non-expressive conduct.

For non-expressive conduct, the proper analysis is whether the government is attempting to forbid the recorder or listener from recording or listening, and if so, does the law improperly target and stifle some kind of downstream speech or speaker.

This is where the analysis, as applied to GenAI, becomes interesting. It cannot be the case that *any* effect on downstream speech or a speaker triggers a First Amendment analysis. If it did, anyone claiming any government action disrupted the person's speech in any manner could file a non-frivolous lawsuit. The key question becomes: at what point does something have a predictable connection to a person's potential expression?

Assuming that GenAI outputs likely impact a person's future expression, what level of judicial scrutiny should apply when the government tries to curtail GenAI outputs? We think that the rational basis test, which requires only a rational relationship to a legitimate government purpose, would be too low a hurdle for the government to meet because a law or action is generally upheld if there's any conceivable, legitimate reason for it. The challenger (the person or entity challenging the law) must prove that the government has no legitimate interest or that there's no rational connection between the law and that interest, and it seems trivially easy to make up a reason to curtail some model outputs.

We also believe strict scrutiny is too high a standard. Instead, strict scrutiny should be reserved for protected speech, which GenAI cannot, by definition, produce. Therefore, the standard that makes the most sense is some form of heightened scrutiny akin to a weak version of intermediate scrutiny.

F. When Would Rights Attach?

Even if one were inclined to give models some speech protections, it is unclear when those rights would attach. A model produces nonsense even after a few hundred training steps.[74] Nobody knows when, exactly, a foundation model becomes coherent. Is the gibberish output from the beginning of training protected speech?[75] If not, when do we decide to attach protections? When the output has a few understandable words? Mostly understandable words? Perfect grammar?

G. Summary

When trying to identify the speaker, perhaps legal scholar Dan L. Burk described it best:

> Certainly, the machine is not a speaker for tort, First Amendment, or related purposes; as a machine, it has no awareness, cognition, or intent. Neither is the user a speaker; although the user's prompts elicit the textual output, the nature and language of the outputs are largely unanticipated and are generated by unknown (possibly unknowable) statistical mechanics. Neither is the designer, creator, or deployer of the LLM likely to be a speaker. In the case of ChatGPT, OpenAI is not aware of the details of any particular machine response, even if they may be informed of a general trend or likelihood of damaging machine responses. . . . [T]he prompter is a cause, but not a creator of the text, and the same may be said of the LLM proprietor. Consequently, LLM texts appear to entail a kind of reader response theory on steroids: essentially *all* the meaning in the text must be supplied by the reader, as there is no meaning supplied by an author.[76]

In sum, there are several reasons one should conclude that GenAI outputs are typically not speech. First, the analogy often drawn from human communicative acts to describe how GenAI models work is a fundamentally misguided basis for claiming speaker-hood, as GenAI is incapable of intentions, agency, or

---

[74] Aatish Bhatia, *Watch an A.I. Learn to Write by Reading Nothing but Jane Austen,* N.Y. TIMES (Apr. 27, 2023), https://www.nytimes.com/interactive/2023/04/26/upshot/gpt-from-scratch.html.

[75] For a helpful explainer and visualization of this process, *see* https://www.nytimes.com/interactive/2023/04/26/upshot/gpt-from-scratch.html.

[76] Burk, *supra* note 10, at 216–17, 222.

thought. Moreover, GenAI outputs have little, if anything, in common with corporate speech, so any analogy between the two fails to accomplish much.

Even if one wanted to assign speakership to GenAI outputs, who that speaker is remains unclear. This is especially murky when the developers of GenAI are eager to disclaim the outputs of their models as their own views. Finally, it is not entirely clear when any speech rights would attach to GenAI as models display a wide variety of levels of generative capabilities depending on factors such as the model's size and training cycles. Thus, any claim of when speech rights begin would be entirely arbitrary.

For all these reasons, there is no speech. Because there is no speech, there is no need for any First Amendment speech analysis. At most, models produce non-expressive conduct, but that conduct is only protectable if a law or regulation improperly targets or stifles some probable downstream speech or speaker.

V. SUBSTANTIVE ARGUMENT

There may be some who read this paper and agree with the analysis that GenAI outputs are not speech under current law but still believe that courts should make the extraordinary extension of human-based free speech protections to GenAI. We believe this would be a bad idea.

A. The Purpose of Free Speech

First, we must consider why the Constitution protects the freedom of speech. We could look at what the founders were thinking when they passed the First Amendment, but, of course, the founders could not have possibly anticipated GenAI like they could commercial speech, corporations, political speech, and the media. What we do know is that in the founding era, protected speech consisted solely of speech where the speaker was a human who spoke with intentionality, understanding what they were saying when they said it.[77] A more fruitful source for deciphering

[77] For an even more fundamental analysis, others have ably explored the text from the founding-era definitions of "speech" and the history and the original meaning of "speech," reaching conclusions that align with this paper. *See, e.g.*, Austin & Levy, *supra* note 47 (". . . a comprehensive survey of Founding-era dictionaries reveals remarkably consistent definitions of speech. These definitions draw sharp distinctions between thoughts and speech, defining speech as the external manifestation of something that previously existed only in the speaker's mind. That external manifestation, by its very nature, will always be capable of certain identification by its speaker. . . in the Founding era "there were essentially three methods of communication: oral, unamplified speech; handwritten correspondence;

the purposes of free speech has been language provided by the Supreme Court.

One of the most cited justifications for the freedom of speech is the "marketplace of ideas," which grew in part from Justice Holmes's dissent in *Abrams v. United States*.[78] He wrote that "the ultimate good desired is better reached by free trade of ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[79]

Justice Brandeis, who concurred with the *Abrams* dissent, built on that idea in *Whitney v. California*[80] by championing freedom of speech as a necessary ingredient for self-governance as well. He noted that "[f]reedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth."[81]

Nearly fifty years later, Justice Marshall made an argument geared more toward the rights associated with self-fulfillment, stating, "The First Amendment serves not only the needs of the polity, but also those of the human spirit—a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity."[82]

These are not the only statements about why freedom of speech is important or perhaps even paramount to a functioning democracy, but they provide a reasonable overview of the key arguments. How, then, does GenAI fit in?

As discussed in the paper, GenAI can neither think nor offer new ideas beyond those learned in training. It is not self-aware and therefore cannot think or participate in self-expression. Thus, it is entirely unclear how granting speech protections to GenAI outputs would enhance a marketplace of ideas, how it would lead to "discovery and the spread of political truth" (GenAI has no agency and cannot investigate, interrogate, explore, or discover), or how it would lend itself to self-

---

and printed materials created using a printing press." Each of these modes of communication are inherently and unavoidably characterized by speech certainty. By their very nature, they require that the speaker be able to identify with certainty what he said at the moment he said it. The act of speaking orally demands that something has been said aloud; writing demands something be written; printing that something be printed.").

[78] Abrams v. U.S., 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

[79] *Id.* at 630.

[80] Whitney v. California, 274 U.S. 357 (1927).

[81] *Id.* at 375.

[82] Procunier v. Martinez, 416 U.S. 396, 427 (1974) (Marshall, J., concurring).

fulfillment (GenAI has no desires and therefore cannot wish to express itself in any particular way).

Moreover, a "marketplace of ideas" argument only works if one legal person is trying to convince another legal person that their position is correct. Humans think, form ideas, and make choices in our expressions based on various factors, including the audience and one's own stance on the topic. Therefore, we have the ability to make a case for our beliefs and convince others of them. GenAI systems, however, have none of that. They do not have an internal belief system—moral, political, or otherwise. They do not have the capacity to persuade anyone of anything, as they lack the capability of thought and self-awareness. In fact, the communications of animals like whales or house pets are closer to the speech we currently protect as they are voluntary expressions that carry meaning. Even so, we do not claim animal communications are protected speech. Even if humans are able to lend meaning to the particular meowing of their cat, that does not mean the cat's meowing becomes protected speech. If anyone is persuaded by an output by GenAI, it is because the user is affixing meaning to the output, and not because persuasion was intended by the model.

Additionally, any argument that more speech is always the cure for bad speech, and therefore we should seek to expand what speech is protected, overlooks the possibility (or the reality, really) of how GenAI can create bad speech more quickly than any human possibly could.[83] The more-speech argument came about when GenAI was unforeseeable and when humans had to craft all the speech.[84] The claim also overlooks that a tsunami of information does not enhance or facilitate any discussion—especially when it overwhelmingly springs from a single source. It is not at all clear to us how GenAI that can hallucinate a false output or be coaxed to produce outputs for the express purpose of undermining democracy at scale through various means (e.g., misinformation, disinformation, manipulation, undermining society's trust in content it encounters generally and from high-quality news sources specifically, etc.) improves our nation in a way that overwhelmingly offsets the potential and potentially irreversible harms.

---

[83] It also overlooks that GenAI models, unlike humans, cannot be dissuaded from bad speech, like defamation or "fighting words" because GenAI does not understand what it is generating.

[84] *See Whitney*, 274 U.S. at 377 ("If there be time to expose through discussion, the falsehoods and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

With GenAI, there is incredible potential to be beneficial. But the benefits will not happen without human intervention. The laws of entropy teach us as much: there are more ways for things to turn out useless, to have no impact, or to be harmful than there are to be beneficial. The resting state of GenAI is not inherently beneficial. The benefits must be willed into existence and then sustained by thoughtful, concerted efforts from everyone who touches on the lifecycle, including regulators.

It is also difficult to see why a model that is incapable of safely and effectively providing medical care, hiring, or legal advice should be protected on the basis that its outputs are vital to democracy itself. It is even more difficult to understand why the First Amendment should be read to disable the government's—and therefore democracy's—ability to protect itself from non-human speech.

B. GenAI Governance

Before handicapping the government's ability to regulate GenAI, we must also ask who else should regulate it. If not the elected government, through a democratic process with input from the elected officials or referendums of a pluralistic society, then we are choosing to cede control to a handful of unelected technologists.

Allowing a small group of people, such as officers and directors of a handful of powerful corporations, to determine what speech is and is not acceptable for tools intended for use in nearly every profession seems anathema to the nation's pluralistic principles.[85] Unsurprisingly, the GenAI entities also lack the incentives and varied demographic and socioeconomic characteristics of the people whose democracy they are supposedly aiding. If GenAI truly is as consequential as electricity and fire, then perhaps it should be regulated as such, meaning oversight by elected officials and sometimes constrained by strict liability.

[85] The news source with the highest subscriber count, the New York Times, has 11.4 million subscribers. https://www.nytimes.com/2025/02/05/business/media/new-york-times-q4-2024-earnings.html#:~:text=The%20New%20York%20Times%20Company%20added%20350%2C000%20digital%2Donly%20subscribers,percent%20from%20a%20year%20earlier. The GenAI system with the most subscribers, GPT-4, has 15.5 million. https://www.theinformation.com/articles/chatgpt-subscribers-nearly-tripled-to-15-5-million-in-2024. A key difference is that news sources create a limited number of articles a day. A year ago, OpenAI claimed its models were used to output 100 billion words per day. https://www.the independent.com/tech/chat gpt-openai-words-sam-altman-b2494900.html.

An exception to our general stance would be if U.S. citizens approve an amendment to the Constitution to grant GenAI full free speech protections. This would mean that society affirmatively chooses to expand the power of GenAI companies and constrain the power of the U.S. government to influence it. We do not think such an action would be wise, but at least it would be a democratic decision.

C. Remaining Protections

Suppose the argument is that if GenAI received no First Amendment protections, it would invite abuse by governments who may, for example, want to silence certain ideas. This overlooks the fact that having no speech protections is not the same as having no protections at all. It is a defining principle in the United States that viewpoint discrimination is frowned upon regardless of the First Amendment, and GenAI developers could make any number of arguments against it: due process, violation of liberty, arbitrariness, bill of attainder, and so on. It is not as if the First Amendment is the single constitutional reed protecting everyone from an overreaching government.

As Lawrence Lessig put it when describing what he called "replicants," which are "processes that have developed a capacity to make semantic and intentional choices, the particulars of which are not plausibly ascribed to any human or team of humans in advance of those choices," he said that:

> None of this is to say that such speech is entitled to no protection at all. This is the insight in Justice Scalia's opinion in *R.A.V. v. City of St. Paul* (1992).[86] We could well conclude that replicant speech is entitled to no protection but also conclude that the government is not free to discriminate among replicant speech. From this perspective, the replicant targeting the ads in Facebook's algorithm would have no presumptive constitutional protection. But the government couldn't decide to ban Republican targeting but not targeting for Democrats. As in *R.A.V.*, that is not because the underlying speech is protected. It is because a second value within the contours of the First Amendment is the value of government neutrality.[87]

[86] R.A.V. v. City of St. Paul, 505 U.S. 377, 387–96 (1992).

[87] Lawrence Lessig, *The First Amendment Does Not Protect Replicants*, *in* SOCIAL MEDIA, FREEDOM OF SPEECH, AND THE FUTURE OF OUR DEMOCRACY 13 (Lee C. Bollinger & Geoffrey R. Stone, eds., 2022).

VI. HUMANS MUST BE TREATED DIFFERENTLY FROM GENAI

While there are close calls regarding the First Amendment and when protections attach, this is not one of them. And, because models are not protected by the First Amendment, we need not consider whether regulating them may stifle someone's ability to speak or to receive speech any more than a regulation on paper or pencils or computers, all of which, like models, are mere tools and none of which, like models, are speech.

We should not go out of our way to give precious protections to entities that neither want nor need them. The fact that some listeners can ascribe meaning to model outputs is not sufficient to claim the output is speech. With models, there is no speaker and there is no intended message, so there can be no speech as it is understood in constitutional law.

Furthermore, models are not code, and, for First Amendment purposes, they are not like code. Blurring the lines for models invites a restraint on democratic governance as the government will be limited in how it can effectively control what many technology luminaries believe is one of the most consequential innovations in human history. Allowing a handful of companies to improperly rely on the powerful shield of the First Amendment when wielding such an indisputably powerful technology with far-reaching implications for democracy and the economy is unwise. A better approach is to require greater democratic participation and accountability. Whatever people may think of the developers of large language models, they probably do not think those developers have too little power.

Finally, if any court should feel tempted to extend free speech rights to GenAI, it must first reckon with the purpose of the First Amendment and whether protecting GenAI does more harm than good for society. Relying on strained analogies to expand legal rights is not the best way to analyze the law. However, one may define GenAI, it is clearly not a human, not an entity comprised of humans, and it is certainly not a citizen of the United States. Therefore, it makes little sense to grant it any speech rights to partake in our democratic processes.

When it comes to GenAI, which CEOs of trillion-dollar companies have compared to the most consequential technological advances in human history, the risks from too little regulation by granting virtually all GenAI outputs full free speech protections, where laws and regulations must satisfy strict scrutiny, likely dwarf the risks of too much regulation. Courts

long ago recognized that having no regulations on fire or electricity would be bad for society. GenAI is no different.

BEYOND PRAYER: HOW *KENNEDY V. BREMERTON* RESHAPES FIRST AMENDMENT PROTECTIONS FOR PUBLIC EMPLOYEE SPEECH

J. Israel Balderas, Esq.*

ABSTRACT

In Kennedy v. Bremerton School District*, the Supreme Court held that a public school football coach's prayer at the 50-yard line after games was protected under the First Amendment.*[1] *While much of the commentary and criticism on* Kennedy *has focused on its Establishment Clause jurisprudence,*[2] *this Article contends that the decision's more significant impact on the Free Speech Clause lies in its potential to reshape the doctrine governing public employees' free speech rights.*[3] *Specifically, this Article argues that* Kennedy *represents a crucial step in undoing the damage inflicted by* Garcetti v. Ceballos *to*

* Professor J. Israel Balderas teaches Media Law and Ethics at Elon University. He is a former broadcast journalist. Heartfelt thanks to Amy Kristin Sanders, Christopher Terry, Daxton "Chip" Stewart, Erin K. Coyle, and Eric Robinson for their valuable feedback. I am also grateful to the organizers and participants of the various AEJMC Law and Policy research presentations where this paper was shared. Special appreciation goes to Frank LoMonte and Kathryn Foxhall, whose legal scholarship on workplace gag rules restricting public employee speech inspired and encouraged this Article.

[1] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022). The Court in *Kennedy* applied the *Pickering-Garcetti* framework to resolve the coach's free speech claim, noting that both parties "share additional common ground" that the speech implicated a matter of public concern and did not raise academic freedom issues. *Id.* at 2423–24. *See also* Garcetti v. Ceballos, 547 U.S. 410 (2006); Pickering v. Bd. of Educ., 391 U.S. 563 (1968). "The parties' disagreement thus turns on" this key question: did Kennedy offer his prayers as a private citizen or in his capacity as a public employee, amounting to government speech? *Kennedy*, 142 S. Ct. at 2424. *Garcetti* held that a prosecutor's internal memo was government speech because it fulfilled a work responsibility. *See* 547 U.S. at 421. Additionally, *Lane v. Franks* held that testimony about information learned through public employment was private speech, focusing on whether the speech was ordinarily within the scope of the employee's duties. 573 U.S. 228, 240 (2014). Applying these precedents, the Court found that Kennedy's prayers were private speech because they were not ordinarily within the scope of his coaching duties or pursuant to government policy, nor was he seeking to convey a government-created message. *Kennedy*, 142 S. Ct. at 2423–24.

[2] *See* Stephanie H. Barclay, *The Religion Clauses after* Kennedy v. Bremerton School District, 108 IOWA L. REV. 2097 (2023); *see also* Robert Roberts, *After* Kennedy v. Bremerton School District*: Managing Religious Diversity in the Public School Workplac*e, 106 NASSP BULL. 298, 298–314 (Dec. 2022); Brett Geier & Ann E. Blankenship-Knox, *When Speech Is Your Stock in Trade: What* Kennedy v. Bremerton School District *Reveals about the Future of Employee Speech and Religion Jurisprudence*, 42 CAMPBELL L. REV. 31 (2020).

[3] Nicholas J. Grandpre, *The Primacy of Free Exercise in Public-Employee Religious Speech*, 98 NOTRE DAME L. REV. 1767, 1772 (2023) ("Thus, the Court may be suggesting that the extent to which one is allowed to engage in nonwork activity is at least partially determinative of whether the employee's speech is pursuant to official duties.").

government workers.[4] *By rewriting "*Garcetti*'s nebulous language,"* Kennedy *rejects the artificial distinction that previously separated public employee speech on private matters from speech on issues of public concern.*[5]

In Garcetti*, the Court held that public employees' speech made pursuant to their official duties is not protected by the First Amendment from employer disciplinary action.*[6] *This ruling placed considerable limits on public employee speech by essentially divesting it of constitutional protection so long as it fell within the duties the employee*

[4] Jessica Reed, *From* Pickering *to* Ceballos*: The Demise of the Public Employee Free Speech Doctrine*, 11 CUNY L. REV. 95, 119 (2007) ("The specter of judicial oversight threatens more frightfully than that of silenced whistleblowers.") As the author points out, quoting Justice Kennedy's opinion in *Ceballos*, the Court "underscored the government's interest in controlling employee speech and the federalism policy of keeping the judiciary out of employment decisions. The slippery slope argument here is that allowing independent review of Ceballos's case 'would be to demand permanent judicial intervention in the conduct of governmental operations[.]'" *Id.* (quoting *Garcetti*, 547 U.S. at 424).

[5] Thomas Keenan, Note, *Circuit Court Interpretations of* Garcetti v. Ceballos *and the Development of Public Employee Speech*, 87 NOTRE DAME L. REV. 841, 842 (2011) ("For these courts, concluding that an employee's speech falls within or without his or her official duties has become an indeterminate affair.").

[6] *Garcetti*, 547 U.S. at 421–22.

was paid to perform.[7] *Legal scholars*[8] *and the press*[9] *widely panned the decision for undermining the vital role public employees play in informing the public about government affairs.*[10] *However, in* Lane v.

---

[7] Chief Justice Roberts expressed this perspective during the first round of oral arguments in *Garcetti*, stating that he had expected the attorney to argue that Garcetti's speech was "speech paid for by the Government, that's what they pay him for, it's their speech; and so, there's no first amendment issue at all." Transcript of Oral Argument at 5, Garcetti v. Ceballos, 547 U.S. 410 (2006) (No. 04-473). Based on this questioning, it appeared that Chief Justice Roberts was suggesting that "[a]n employee performing a job duty speaks at the employer's behest and as the employer's mouthpiece." *Id.* However, this line of thinking was specifically rejected by Justice Gorsuch in *Kennedy v. Bremerton School District*: "To proceed otherwise would be to allow public employers to use 'excessively broad job descriptions' to subvert the Constitution's protections." 142 S. Ct. 2407, 2424 (quoting *Ceballos*, 547 U.S. at 424).

[8] *See, e.g.*, Sonya Bice, *Tough Talk from the Supreme Court on Free Speech: The Illusory Per Se Rule in* Garcetti *as Further Evidence of Connick's Unworkable Employee/Citizen Speech Partition*, 8 J.L. SOC'Y 45, 83–86 (2007) ("I am sympathetic to the Court's desire to reduce the burden of ad hoc balancing by creating a bright line rule of no protection. But in this case, the Court's decision doesn't really create a bright line rule, because the boundaries of what is within an employee's job description may turn out to be quite contestable and will be contested in future cases." (quoting Jack Balkin, Ceballos—*The Court Creates Bad Information Policy*, BALKINIZATION (May 30, 2006), https://balkin.blogspot.com/search?q=Ceballos)); Cynthia Estlund, *Free Speech Rights that Work at Work: From the First Amendment to Due Process*, 54 UCLA L. REV. 1463, 1474 (2007) ("By broadly defining employees' jobs to include any sort of whistleblowing, yet failing to afford any recourse to the employee who is penalized for carrying out those job duties, public employers might game the system to the detriment of both employees and the public."); Sheldon H. Nahmod, *Public Employee Speech, Categorical Balancing, and § 1983: A Critique of* Garcetti v. Ceballos, 42 U. RICH. L. REV. 561, 569–81 (2008) (asserting that the *Garcetti* opinion "is fundamentally inconsistent with the self-government rationale of the First Amendment"). *But see* Kermit Roosevelt III, *Not as Bad as You Think: Why* Garcetti v. Ceballos *Makes Sense,* 14 U. PA. J. CONST. L. 631, 654 (2012) ("[T]he First Amendment is not intended to increase government efficiency. It is intended to facilitate public oversight of government, and that purpose is not served by intra-governmental speech.")

[9] *See, e.g.*, Linda Greenhouse, *A Supreme Court Setback for Whistle-Blowers*, N.Y. TIMES (May 31, 2006) https://www.nytimes.com/2006/05/31/washington/a-supreme-court-setback-for-whistleblowers.html; Charles Lane, *High Court's Free-Speech Ruling Favors Government*, WASH. POST (May 31, 2006) https://www.washingtonpost.com/archive/politics/2006/05/31/high-courts-free-speech-ruling-favors-government-span-classbankheadpublic-workers-on-duty-not-protectedspan/a5adb39c-76bb-47cf-87c6-e1568cfc5505/.

[10] The House Committee on Government Reform, led by Republican Chairman Tom Davis, was concerned about "the wholesale rollbacks of whistleblowers' protections." *What Price Free Speech? Whistleblowers and the* Ceballos *Decision: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 4 (2006) (statement of Sen. Tom Davis, Chairman, H. Comm. on Government Reform). The committee held a hearing on *Garcetti* one month after the Court's decision. *Id.* In his statement before the House Committee on Government Reform, Richard Ceballos focused his opening remarks on the implications of the decision on government transparency and accountability when he told committee members, "[t]his Supreme Court ruling fosters, even encourages, an atmosphere of secrecy in the halls of government, which runs counter to our Nation's open form of government. It protects the corrupt, it

Franks*,*[11] *Justice Sotomayor's majority opinion qualified the* Garcetti *analysis and confirmed what many legal scholars had argued—that* Garcetti*'s scope represented an overreach.*[12] *The* Lane *decision clarified that speech, which "owes its existence" to an employee's professional responsibilities, is unprotected.*[13] *But, speech made in one's capacity as a "citizen on matters of public concern" in the "scope of his ordinary job duties"—as opposed to "official" duties*[14]*—still receives First Amendment protection.*[15] *That is true, Justice Sotomayor wrote, even if it touches on issues relating to the speaker's employment.*[16]

At the heart of the Garcetti-Lane *framework is the Court's balancing of interests between the operational needs of government employers to exercise control over their workforces, and the public value derived from allowing public employees to speak freely on matters of public importance without fear of retaliation.*[17] Garcetti *prioritized the former interest, while* Lane *attempted to carve out space for the latter.*[18] *And while* Lane *somewhat softened* Garcetti*'s impact, Justice Gorsuch's majority opinion in* Kennedy *went further. He focused not on whether the coach's prayers were part of his official duties (Justice Sotomayor's dissent profusely argued that they were), but on whether the coach was speaking as a citizen on a matter of public concern.*[19] *This shift in focus signals a new expansion in the scope of public employees' protected speech.*

---

protects the lazy, it protects the incompetent. It does not protect – and, to a certain extent, punishing the honest, the hardworking, the diligent government employees." *Id.* at 72 (statement of Richard Ceballos).

[11] 573 U.S. 228, 239-41 (2014).

[12] Paul M. Secunda, U.S. Supreme Court Review: Lane v. Franks, Marquette Univ. L. Sch. Fac. Blog (July 10, 2014), https://law.marquette.edu/facultyblog/2014/07/us-supreme-court-review-lane-v-franks/. ("In all, *Lane v. Franks* clarifies the contours of the Garcetti holding by narrowing it to speech that is actually part of the public employee's job.").

[13] Lane, 573 U.S. at 242.

[14] See Garcetti, 547 U.S. at 444, 449–50 (Breyer, J., dissenting) (In his dissent, Justice Breyer used the term "ordinary" twice as it pertained to job duties).

[15] *Lane*, 573 U.S. at 237, 247 (Thomas, J., concurring).

[16] *Id.* at 238–39 (majority opinion).

[17] John E. Rumel, *Public Employee Speech: Answering the Unanswered and Related Questions in* Lane v. Franks, 34 HOFSTRA LAB. & EMP. L.J. 243, 263 (2017) ("Because the Supreme Court gave no explanation for its shift in language from Garcetti's 'official duties' standard to *Lane*'s 'ordinary job responsibilities' test, accurately predicting the threshold standard that the Court will use—a standard based on the roles and duties of the affected public employee—to limit public employee speech rights, is extremely problematic.").

[18] Lemay Diaz, Comment, *Truthful Testimony as the "Quintessential Example as Speech as a Citizen": Why* Lane v. Franks *Lays the Groundwork for Protecting Public Employee Truthful Testimony*, 46 SETON HALL L. REV. 565, 591 (2016).

[19] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2423–25 (2022) ("That Mr. Kennedy offered his prayers when students were engaged in other activities like singing the school fight song further suggests that those prayers were not delivered as an address to the team, but instead in his capacity as a private citizen.").

INTRODUCTION

Kennedy v. Bremerton School District generated immense public attention and scholarly commentary for its implications on the Establishment Clause and religious expression in public schools.[20] For example, the Dean of Berkeley Law, Erwin Chemerinsky, criticized the majority in the case for overruling "a half-century-old precedent in moving constitutional law radically to the right."[21] However, beneath the surface of the high profile Establishment Clause affects,[22] lies a subtle yet significant shift in the Court's approach to public employee speech rights—it once again recognizes the special value of public employees.[23] This Article argues that *Kennedy* represents a notable departure from the restrictive framework established in *Garcetti*, potentially reinvigorating First Amendment protections for government workers.

This Article proceeds in three parts: Part I traces the evolution of public employee speech doctrine from *Pickering v. Board of Education* through *Lane v. Franks*, examining how the Court has progressively refined its approach to balancing employees' expressive interests against government efficiency concerns. Part II analyzes *Kennedy*'s holding and reasoning, demonstrating how it expands protection for public employee speech beyond the narrow confines set by *Garcetti* and its progeny. This section examines *Kennedy*'s critical shift from focusing on "official duties" to "ordinary duties"—a subtle yet significant terminological change with profound doctrinal implications. Following this analysis, the Article analyzes how lower courts have already begun applying *Kennedy*'s context-

---

[20] *See generally* Ben Petok, *The Supreme Court Set a Dangerous Precedent on Coercive Christian Prayer in School*, MINNESOTA REFORMER (July 6, 2022), https://minnesotareformer.com/2022/07/06/the-supreme-court-set-a-dangerous-precedent-on-coercive-christian-prayers-in-school/; Greg Bishop, *When Faith and Football Team Up Against Democracy*, SPORTS ILLUSTRATED (June 13, 2022), https://www.si.com/high-school/2022/06/13/fear-over-scotus-ruling-in-public-school-coach-prayer-case-daily-cover; Adam Liptak, *Coach's Prayers Prompt Supreme Court Test of Religious Freedom*, N.Y. TIMES (Apr. 23, 2022), https://www.nytimes.com/2022/04/23/us/supreme-court-football-coach-prayer.html.

[21] Erwin Chemerinsky, *Op-Ed: The Supreme Court Demolishes Another Precedent Separating Church and State*, L.A. TIMES (June 27, 2022), https://www.latimes.com/opinion/story/2022-06-27/school-prayer-constitution-religious-freedom-precedent.

[22] Tavia Bruxellas McAlister, Note, *From Shield to Sword: Straying from the Original Meaning of the Establishment Clause,* NEB. L. REV. BULL. (2024), https://lawreview.unl.edu/sites/unl.edu.college-of-law.law.law-review-bulletin/files/2024-07/FromShieldtoSword_StrayingfromtheOriginalMeaningoftheEstablishmentClause.pdf.

[23] *See generally* Heidi Kitrosser, *The Special Value of Public Employee Speech*, 2015 SUP. CT. REV. 301 (2015).

driven approach with mixed results, highlighting both its potential to expand speech protections and its limitations. Finally, Part III explores the practical implications of *Kennedy* across different contexts of public employee speech, examining how the decision significantly raises the burden on government employers to justify speech restrictions by requiring concrete evidence rather than speculation. The section concludes by addressing unresolved questions that lower courts will face as they implement *Kennedy*'s citizen-focused approach while still respecting legitimate governmental interests.

By reframing *Kennedy*'s legacy beyond its religious dimensions, this Article contributes to the emerging scholarly attention of its significant impact on the public employee speech doctrine. The potential ramifications for millions of public sector employees across all levels of government demand careful consideration as courts grapple with applying *Kennedy*'s nuanced framework in the years to come. This context-driven approach, with its greater scrutiny of government justifications for speech restrictions and its recognition of the distinction between "official" and "ordinary" duties, represents a crucial step toward realigning doctrine with the critical role government whistleblowers and other employee-speakers play in our system of free expression and democratic accountability.[24]

I. THE EVOLUTION OF PUBLIC EMPLOYEE SPEECH RIGHTS

A. From Pickering *to Present: The Birth of the Balancing Test*

The modern public employee speech doctrine emerged in 1968 with *Pickering v. Board of Education*.[25] Prior to this watershed case, the prevailing "rights-privilege" doctrine gave government employers broad discretion to restrict public employee speech. This approach, epitomized by Justice Oliver Wendell Holmes' famous declaration that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman,"[26] effectively allowed public employment to be conditioned on surrendering First Amendment rights. This restrictive conception of employee speech rights persisted for

[24] Heidi Kitrosser, *Leak Prosecutions and the First Amendment: New Developments and a Closer Look at the Feasibility of Protecting Leakers*, 56 WM. & MARY L. REV. 1221, 1246 (2015) (arguing that public employees serving as whistleblowers requires "robust First Amendment protections" due to "their crucial constitutional role as uniquely informed potential speakers," a principle that *Kennedy*'s context-driven approach better accommodates than *Garcetti's* categorical exclusion).

[25] 391 U.S. 563 (1968).

[26] McAuliffe v. City of New Bedford, 155 Mass. 216, 220 (1892).

decades until the constitutional landscape began to shift dramatically in the 1960s. *Pickering* rejected the Holmesian view. After all, it was an opinion by the Warren Court which was then orchestrating a rare "constitutional revolution" in U.S. history by expanding civil liberties.[27] To that end, *Pickering* recognized a public employee's role in democratic discourse, finding that one should not have to relinquish their First Amendment rights by virtue of where they work.

Writing for the Court, Justice Marshall rejected the notion that public employees could be compelled to relinquish their First Amendment rights, "subjected to any conditions, regardless of how unreasonable" that may be, simply because they work for the government.[28] This holding echoed the Warren Court's push for a "resurrection of rights discourse."[29] Although expanding civil liberties may have been the idealistic stance (as evidenced by Justice Douglas and Black's concurrence criticizing even the majority's approach as too restrictive), *Pickering* itself embraced a more pragmatic acknowledgment that the government holds a legitimate interest in promoting workplace efficiency.[30] To that end, the Court introduced a balancing test to reconcile employees' free speech interests with the government's need for efficient operations.

---

[27] Morton J. Horwitz, *The Warren Court and the Pursuit of Justice*, 50 WASH. & LEE L. REV. 5, 5 (1993).

[28] *Pickering*, 391 U.S. at 568.

[29] Horwitz, *supra* note 26, at 8. Professor Horwitz describes the Warren Court's "resurrection of rights discourse" as a transformative shift in American jurisprudence. *Id.* Previously discredited as a conservative tool for protecting property rights, the concept of natural rights was recast as a progressive instrument for expanding civil liberties. *Id.* This revival enabled the Court to extend constitutional protections to marginalized groups, including racial minorities, religious dissenters, and the economically disadvantaged. *Id.* Such an approach created a tension between the static nature of inalienable rights and the evolving interpretation of a "living constitution." *Id.* at 9. This duality became a hallmark of Warren Court jurisprudence, fundamentally altering the landscape of constitutional law and setting precedents for expansive interpretations of individual rights that continue to influence legal thought today. In *Pickering*, this concept manifested in the Court's recognition of public employees' First Amendment rights to speak on matters of public concern without fear of retaliation. By applying rights discourse to public employment, the Warren Court expanded constitutional protections into new domains, using this "balancing of interests" approach to bring into greater alignment the First Amendment rights to public employees with citizens, against the state's interest as an employer. This approach exemplified the Court's broader trend of using rights-based reasoning to extend constitutional safeguards to previously unprotected areas of American life. *See also* ARCHIBALD COX, THE WARREN COURT: CONST. DECISION AS AN INSTRUMENT OF REFORM 6 (1968) ("One of the principal civil liberties themes of the Warren Court was 'equality,' an idea that 'once loosed . . . is not easily cabined.'").

[30] Ofer Raban, *The Free Speech of Public Employees at a Time of Political Polarization: Clarifying the* Pickering *Balancing Test*, 60 HOUS. L. REV. 653, 671–72 (2023).

The case arose when Marvin Pickering, a high school teacher, was fired for writing a letter to a local newspaper criticizing the school board's handling of a bond issue. In holding that Pickering's dismissal violated his First Amendment rights, the Court established a framework that would shape public employee speech jurisprudence for decades to come. The *Pickering* balance weighs "the interests of the teacher, as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." [31]

The *Pickering* balancing test would be "the high point of modern public employee speech doctrine,"[32] profoundly influencing subsequent First Amendment jurisprudence. The Court's analysis implicitly created a multi-faceted approach, considering the nature of the speech as addressing matters of public concern,[33] the impact on working relationships,[34] the effect on job performance, and the veracity of the statements. These "*Pickering* factors," while not explicitly enumerated as such by the Court, would come to serve as a rough template when applying this balancing test. Their application, however, would prove far from straightforward. The relative weight accorded to each factor would vary significantly depending on the specific context of the case, the composition of the Court, and evolving understandings of government efficiency and employee rights. The legacy of *Pickering*'s analysis lies not just in the specific

---

[31] *Pickering*, 391 U.S. at 568.

[32] Adam Shinar, *Public Employee Speech and the Privatization of the First Amendment*, 46 CONN. L. REV. 1, 6 (2013) ("[P]ublic employees have seen their free speech rights dwindle, the lowest point being the Court's recent decision in *Garcetti*.").

[33] See Pickering, 391 U.S. 563; see also Connick v. Myers, 461 U.S. 138, 146-47 (1983) (Formally establishing the "public concern test" that requires speech touch on matters of public concern to warrant First Amendment protection in the public employment context, and that courts can consider the "content, form, and context" of the speech, as revealed by the whole record).

[34] The impact of speech on workplace relationships has been a key factor in post-*Pickering* jurisprudence. In *Rankin v. McPherson*, 483 U.S. 378 (1987), the Court emphasized the importance of considering the employee's role and the potential for speech to impact office functions. *Id.* at 389. *Connick* introduced the concept of "close working relationships" as a factor in the balancing test. *Connick*, 461 U.S. at 151. While in *Waters v. Churchill*, 511 U.S. 661 (1994), the Court was quite deferential towards a government employer's predictions of workplace disruption, in *Kennedy v. Bremerton School District*, 142 S. Ct. 2407 (2022), the Court's treatment of workplace relationships diverged significantly from traditional post-*Pickering* jurisprudence. While acknowledging the school district's concern about potential disruption due to Establishment Clause concerns, the majority notably downplayed this factor, characterizing it as speculative and insufficient to outweigh Kennedy's free speech interests. *Kennedy*, 142 S. Ct. at 2424-25.

factors it considered, but in establishing a context-dependent approach to public employee speech.[35]

While seemingly straightforward in its phrasing, the *Pickering* balance harbors within it a multitude of implicit value judgments and potential pitfalls.[36] By juxtaposing the interests of the employee "as a citizen" against those of the state "as an employer," the Court unwittingly laid the groundwork for the citizen-employee dichotomy that would later reach its pinnacle in *Garcetti*.[37] This verbal structure, while perhaps unintentional, reflects a fundamental tension in the Court's notion of public employee identity[38]—the false dichotomy that an individual must be speaking either as a citizen OR as an employee, but never simultaneously as both—a tension that continues to resonate in contemporary debates over the scope of First Amendment protections in the public workplace.[39]

The way the Court applied "balancing" in *Pickering* reveals the inherently malleable nature of a doctrine that requires weighing competing interests on a case-by-case basis. The emphasis placed on the public nature of Pickering's speech and its minimal impact on workplace relationships reveals the

---

[35] See, e.g., *id.* at 2434 (Sotomayor, J., dissenting) (Arguing that the "context and history of Kennedy's prayer practice" revealed that the coach's "repeated disruptions of school programming and violations of school policy regarding public access to the field" were "grounds for suspending him.").

[36] Raban, *supra* note 30, at 675 (detailing how the *Pickering* test, while seemingly straightforward, can be complex and contentious in its application by a lower court: "Thus, in the limited context of government employment, the usual principle of courts' neutrality gives way and courts are under a positive obligation to assess the value of speech when determining the constitutionality of adverse employment actions.").

[37] Edward J. Schoen & J.S. Falchek, Garcetti v. Ceballos: *Government Workers, Whistleblowing and the First Amendment*, 17 S. L. J. 131, 148 (2007) ("In short, *Ceballos* has operationally limited First Amendment protection of government worker speech to those government employees who speak in their role as citizen rather than as an employee, and renders the *Pickering-Connick* test inapplicable to government worker speech occurring as part of their employment responsibilities and prevents the court from examining the impact of the speech on the operations of the government agency."); *see also* Randy J. Kozel, *Reconceptualizing Public Employee Speech*, 99 NW. U. L. REV. 1007, 1016 (2005) ("By constitutionalizing a deliberate, case-by-case weighing of the employee's speech interests against the employer's operational interests, the Pickering Court made the line between 'government as regulator' and 'government as employer' much less relevant.").

[38] Randy J. Kozel, *Free Speech and Parity: A Theory of Public Employee Rights*, 53 WM & MARY L. REV. 1985, 1990 (2012) (explaining the "parity theory" which is one justification for protecting employee speech: "Parity theory thus suggests that the doctrine of employee speech should be reoriented around a single inquiry: Is there a valid reason for permitting the government to treat the employee differently from her peers in the citizenry at large?").

[39] *See id.*

Warren Court's implicit prioritization of expressive rights over administrative efficiency concerns. Yet, this seemingly speech-protective stance is complicated by the Court's examination of whether Pickering's statements were accurate or false.[40] By distinguishing between protected good-faith errors and potentially unprotected reckless falsehoods, the Court introduced a content-based assessment that sits uneasily with traditional First Amendment principles, which typically view content-based distinctions with heightened scrutiny.[41] Its lasting impact, however, is perhaps most evident in its implicit recognition of the unique role public employees play in democratic discourse.[42] By emphasizing Pickering was uniquely

---

[40] Pickering v. Bd. of Educ., 391 U.S. 568, 584 (1968) (White, J., concurring in part and dissenting in part) ("As the Court holds, however, in the absence of special circumstances [Pickering] may not be fired if his statements were true or only negligently false, even if there is some harm to the school system. I therefore see no basis or necessity for the Court's foray into fact-finding with respect to whether the record supports a finding as to injury. If Pickering's false statements were either knowingly or recklessly made, injury to the school system becomes irrelevant, and the First Amendment would not prevent his discharge. For the State to be constitutionally precluded from terminating his employment, reliance on some other constitutional provision would be required.").

[41] Reed v. Town of Gilbert, 576 U.S. 155, 172 (2015) ("Not 'all distinctions' are subject to strict scrutiny, only *content*-based ones are."). The *Pickering* Court's treatment of false statements is particularly noteworthy for its nuanced approach. By extending protection to good-faith errors while withholding judgment on knowingly or recklessly false statements, the Court carved out a middle ground between absolute protection and the strict liability often applied in defamation cases involving public officials. This approach, reminiscent of the Court's handling of libel in *New York Times v. Sullivan*, 376 U.S. 254 (1964), reflects a sophisticated understanding of the chilling effect that could result from overzealous punishment of inaccurate speech. However, it also introduces a subjective element into the analysis that has proven challenging to apply consistently in subsequent cases. *See e.g.*, United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 482 (1995) (O'Connor, J., concurring) ("Balancing is difficult to undertake unless one side of the scale is relatively insubstantial."); *see also* Bennett v. Metro. Gov't of Nashville, 977 F.3d 530 (6th Cir. 2020) (Murphy, C.J., concurring in the judgment) ("With significant interests on both sides, what are courts to do? As in other contexts where 'we must juggle incommensurable factors,' I'm not sure I see a 'right' or 'wrong' answer to this balancing question. In my respectful view after struggling with the task, *Pickering*'s instructions to engage in open-ended balancing do not provide helpful guidance to resolve concrete cases.") (quoting Am. Jewish Cong. v. City of Chicago, 827 F.2d 120, 129 (7th Cir. 1987) (Easterbrook, J., dissenting)).

[42] Knight First Amendment Institute, *Protecting—and Punishing—Whistleblowers*, YOUTUBE (April 5, 2024), https://www.youtube.com/watch?v=Z7y8Mv8gYWM. Speakers at this symposium emphasized that "public employees possess unique insider knowledge that is essential to democratic accountability" and that "whistleblower protections serve not just individual rights but collective democratic interest." The event brought together scholars and experts to explore issues surrounding public employee speech rights, featuring panels on First Amendment jurisprudence, democratic theory, and the balance between transparency and managerial autonomy.

qualified to comment on school funding issues because he was a teacher, the Court laid the groundwork for a more expansive view of public employee speech as a vital source of informed criticism of government operations.[43] This perspective would find echoes in later cases dealing with academic freedom and whistleblower protections,[44] though it has also faced significant pushback in decisions like *Garcetti* that have sought to reassert managerial prerogatives.[45]

B. The Public Concern Threshold: When Does Employee Speech Matter?

In *Connick v. Myer*s, the Court upheld the firing of a public employee who claimed her First Amendment rights were violated.[46] The case further refined the *Pickering* framework by introducing a threshold inquiry: whether the employee's speech addresses a matter of public concern. This additional hurdle reflected the Court's desire to avoid constitutionalizing everyday employment grievances while still protecting speech on issues of broader societal importance.[47] It was a pivotal moment in the evolution of public employee speech doctrine, signaling a shift back to affording the government as employer greater discretion.

Connick involved an assistant district attorney, Sheila Myers, who was told she would be transferred from doing trial litigation to working in a probation program for juvenile first offenders. She objected, expressing reluctance to supervisors, including District Attorney Harry Connick. Afterward, Myers compiled and distributed a questionnaire to other ADAs during

---

[43] Toni M. Massaro, *Significant Silences: Freedom of Speech in the Public Sector Workplace*, 61 S. CAL. L. REV. 1, 65 (1987) ("The term 'whistle blower' typically refers to a public employee disclosing some violation of public trust or interest. A private employee speaking out about abuses at work will not be referred to as a 'whistle blower' unless the disclosure involves the public safety, health, or welfare, which usually also means that a state or federal regulation has been violated.").

[44] *See, e.g.*, Perry v. Sindermann, 408 U.S. 593, 598 (1972) ("For this Court has held that a teacher's public criticism of his superiors on matters of public concern may be constitutionally protected and may, therefore, be an impermissible basis for termination of his employment" (citing *Pickering*, 391 U.S. at 568)).

[45] *See* Julian W. Kleinbrodt, Note, *Pro-whistleblower Reform in the Post-*Garcetti *Era*, 112 MICH. L. REV. 111, 113 (2013) (arguing that "[w]histleblower speech is critically important because it helps ensure a well-functioning democracy" and that information provided by government employees can be crucial to securing accountability).

[46] 461 U.S. 138 (1983).

[47] *See* Raban, *supra* note 30, at 664 (noting that "employment grievances can, in principle, rise to the level of public concern—and hence be constitutionally protected."). The example Raban points to is the questionnaire in *Connick*—"the one dealing with alleged pressure on employees." *Id.*

work hours, soliciting their views on office transfer policies, workplace morale, and perceived pressure to work on political campaigns.[48] Her actions were described as "causing a mini-insurrection."[49] Connick fired Myers for refusing to accept the transfer, describing the questionnaire as an act of insubordination. Myers filed suit under 42 U.S.C. §1983,[50] claiming she was wrongfully fired for exercising her First Amendment right to free speech.

At the heart of Justice White's 5-4 majority decision was the introduction of a new framework—a public employee's speech must first be deemed to address a "matter of public concern" to warrant First Amendment protection.[51] This created a threshold inquiry before the *Pickering* balancing of employee and employer interest could be applied. "[I]f Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern," wrote Justice White, "it is unnecessary for us to scrutinize the reasons for her discharge."[52] The Court held that most of Myers' questions did not touch on matters of public concern and thus fell outside First Amendment protection. Only the question about political pressure was deemed to involve a public issue.

By requiring courts to examine the "content, form, and context" of an employee's expression to determine if it involves a matter of public concern,[53] *Connick* injected a highly subjective element into the analysis. This approach has been criticized for potentially excluding valuable speech on workplace issues that may have broader public significance.[54] As Professor Raban states, "[W]hile 'the boundaries of the public concern test are not

---

[48] *Connick*, 461 U.S. at 140–41.
[49] *Id.* at 141.
[50] 42 U.S.C. § 1983 (2021).
[51] Stephen Allred, Connick v. Myers*: Narrowing the Free Speech Right of Public Employees*, 33 CATH. U.L. REV. 429, 447 (1984) ("[T]he Court constructed a continuum along which any given statement by a public employee could fall—from speech which has so little value that the state could prohibit it, to speech on matters of vital interest to the electorate.") As Allred points out, one example the Court in *Connick* gave as a matter of "vital interest" was "Pickering's letter to the newspaper concerning allocation of school funds." *Id.* at 447 n.136.
[52] 461 U.S at 146.
[53] *Id.* at 147.
[54] *See* Cynthia L. Estlund, *Speech on Matters of Public Concern: The Perils of an Emerging First Amendment Category*, 59 GEO. WASH. L. REV. 1, 23 (1990) ("*Connick* thrust the federal courts into the business of deciding on a case-by-case basis which messages implicated matters of public concern and which did not. This approach to First Amendment decision making was unprecedented.").

well defined'…there is no doubt the concept is a broad one…."[55] The competing interests involve factual disputes, including analyzing the content of speech itself.[56] *Connick* appears to establish different levels of protection for public employee speech depending on how substantially it involves matters of public concern. This sliding scale approach disincentivizes speech on the most important and controversial issues. As such, public employee speech is more likely to be deemed disruptive.[57]

Additionally, *Connick* is notably restrictive because it categorically excludes certain types of employee speech from constitutional protection if it falls outside the boundaries of a public concern. This oversimplified classification between "personal grievances" and "matters of public concern" fundamentally misrepresents how public employee speech functions in practice. Public employees rarely speak in such neatly categorized ways. Their workplace complaints often simultaneously address personal working conditions and systemic issues of public importance.

For example, a teacher's complaint about classroom size might reflect both personal working conditions and broader educational policy concerns,[58] or a police officer's internal report about departmental practices might stem from personal workplace frustrations while revealing information vital to public

---

[55] Raban*, supra* note 30, at 661 - 662, *quoting Connick,* 461 U.S. at 146-48. ("…speech is of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.") (quoting Connick*,* 461 U.S. at 146-48). David M. Rabban, a constitutional law scholar at the University of Texas Law School specializing in free speech, has focused on First Amendment issues such as academic freedom. Raban further notes that courts have recognized the concept's broad scope, as *Connick* itself acknowledged that "some employment grievances may be of public concern," exemplified by the questionnaire's inquiry about political campaign pressure. *Id*. at 664.

[56] Kozel, *supra* note 38, at 1998 ("Whatever its precise contours, the public concern requirement garners its force from drawing content-based distinctions between different types of speech.").

[57] Massaro, *supra* note 43, at 24 (1987) ("If a worker speaks alone at work, about work, the speech might not implicate matters of public concern and will not be protected; yet, if a worker engages others to join in the chorus he or she may pose a threat, and thus can be removed. Moreover, that worker can be removed when an employer merely anticipates that the chorus might get too large and disruptive. Hence, the employer can prevent a grievance from spreading and, as it gains support, from capturing the public's interest.").

[58] Weintraub v. Board of Education, 593 F.3d 196 (2d Cir. 2010) (holding that a teacher's filing of a union grievance about classroom discipline was "pursuant to official duties" and thus unprotected by the First Amendment).

safety and accountability.[59] An employee criticizing financial mismanagement within their government agency may be motivated by personal workplace frustrations, but their speech about government waste, improper commissions, and compromised debt collection processes can still have immense public value.[60] By forcing courts to classify speech as either private or public, the *Connick* framework fails to recognize the inherently overlapping nature of these interests and artificially restricts protection for speech that serves both personal and public purposes.

The more troubling aspect about *Connick*, however, was the Court vesting "employers with considerable discretion to penalize employees whose speech they feel will disrupt the functioning of the office."[61] The decision significantly narrowed the scope of protected public employee speech.[62] At its core, Justice White's reasoning stemmed from a desire to avoid constitutionalizing employee grievances, reflecting a judicial reluctance to interfere with routine personnel decisions.[63] He concluded "[g[overnment officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment."[64]

Writing a dissenting opinion, Justice Brennan took issue with how the court took such a narrow approach to what constitutes a matter of public concern. "To the contrary," wrote Justice Brennan, "the First Amendment protects the

---

[59] Hernandez v. City of Phoenix, 43 F.4th 966 (9th Cir. 2022) (finding that a police officer's controversial social media posts about Muslims qualified as speech on matters of public concern despite their inflammatory nature).

[60] Kimmett v. Corbett, 554 Fed. Appx. 106 (3d Cir. 2014) (holding that a supervisor's complaints about financial improprieties in the Attorney General's office were made pursuant to official duties despite their public importance).

[61] Andrew C. Alter, *Public Employees' Free Speech Rights:* Connick v. Myers *Upsets the Delicate Pickering Balance*, 13 N.Y.U. REV. L. & SOC. CHANGE 173, 173, 195 (1984) ("Public employees will not receive adequate first amendment protection until the courts abandon the capricious balancing test currently employed in favor of a more stringent standard with carefully defined and allocated burdens of proof.").

[62] Lawrence Rosenthal, *Permissible Content Discrimination Under the First Amendment: The Strange Case of the Public Employee,* 25 HASTINGS CONST. L.Q. 529, 557 (1998) (stating with respect to the public concern test that "[s]tandardless regulation of speech creates an impermissible risk that the government will use its discretion as a pretext to engage in otherwise forbidden content or viewpoint discrimination").

[63] *Contra Connick*, 461 U.S. at 165 (Brennan, J., dissenting) ("The proper means to ensure that the courts are not swamped with routine employee grievances mischaracterized as First Amendment cases is not to restrict artificially the concept of 'public concern,' but to require that adequate weight be given to the public's important interests in the efficient performance of governmental functions and in preserving employee discipline and harmony sufficient to achieve that end.").

[64] *Id.* at 146 (majority opinion).

dissemination of such information so that the people, not the courts, may evaluate" how the government functions.[65] Brennan's analysis highlights the subjective nature of the public concern standard—the same speech can be characterized as public or private depending on the Court's framing.[66] Moreover, the Court's consideration of context in determining whether speech addresses a matter of public concern was highly problematic. By examining the form, context, and motivation behind the speech, rather than just its content, the Court opened the door to excluding speech on important public issues simply because it arose in the context of a workplace dispute. This approach fails to recognize that public employees are uniquely positioned to identify and speak out about problems within government agencies, even if their speech is motivated in part by personal interests.

The practical consequence of *Connick*'s doctrinal uncertainty is a powerful chilling effect on public employee expression. Without clear guidance on what constitutes a "matter of public concern," risk-averse employees face a troubling dilemma: speak out and potentially lose their livelihoods, or remain silent even when their unique insider knowledge would benefit the public discourse.[67] This self-censorship becomes most problematic where the line between personal grievance and public concern blurs, such as when

---

[65] *Id.* at 166 (Brennen, J., dissenting). Justice Brennan cited numerous Supreme Court precedents upholding the importance of the First Amendment in protecting the right of citizens to receive such information. *Id.* at 160–62 (citing Saxbe v. Washington Post Co., 417 U.S. 843 (1974); Cohen v. California, 403 U.S. 15 (1971); Garrison v. Louisiana, 379 U.S. 64 (1965); Mills v. Alabama, 384 U.S. 214 (1966); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); Stromberg v. California, 283 U.S. 359 (1931)).

[66] *See* Alter, *supra* note 60, at 182 (arguing that courts should have limited discretion in how the public concern threshold is applied, "lest employers convince them to deny protection on public concern grounds to expression that does not threaten the government employer"). In his dissent, Justice Brennan noted that the Court in *Gertz v. Robert Welch, Inc.*, 418 U.S 323 (1974), recognized the danger of letting judges determine what constitutes a public concern. *Connick*, 461 U.S at 164 (Brennan, J., dissenting).

[67] *See Harman v. City of New York*, 140 F.3d 111, 119 (1998) (recognizing that restraints on government employee expression burden "the public's right to read and hear what employees would otherwise" say, as "government employees are often best positioned to know" the issues within their agencies.) (*quoting U.S. v. Nat'l Treasury Emp.'s Union* 115 S.Ct. 1003, 1015 (1995), and *Waters v. Churchill*, 114 S.Ct. 1878, 1887 (1994); *see also Garcetti* 547 U.S. at 419 (2006) (acknowledging that suppressing dialogue between public employees can lead to "widespread costs")).

workplace issues affect government services.[68] The long-term impact so far has been significant curtailment of public employees' free speech rights, with courts frequently dismissing cases at an early stage of litigation without meaningful balancing of competing interests. Even when speech is found to address public concerns, courts typically defer to the government's assertion of workplace disruption. Unfortunately, the Court's own inconsistent application of the public employee speech doctrine adds to this confusion. For instance, *Kennedy* implicitly treated a coach's prayer as touching on a matter of public concern without engaging in *Connick*'s "content, form, and context" analysis. Notably, *Kennedy* never cites *Connick* at all.[69] These inconsistencies have produced varied applications across circuits, leading to calls for Supreme Court clarification.[70] In this way, *Connick* suppresses public employee speech both directly through its restrictive legal standard and indirectly by discouraging employees from speaking at all, ultimately depriving citizens of valuable insights into government operations.[71]

C. The Garcetti *Restriction: Speaking "Pursuant to Official Duties"*

The modified *Pickering-Connick* balancing test shaped the public employee speech doctrine for decades. Under this approach, the Court's two prong analysis began by asking whether the public employee is speaking on matters of public

---

[68] *See Brady v. Tamburini*, 518 F.Supp.3d 570, 582 (D. R.I. 2021) (holding that broad policies restricting speech on "police related matters" could "preclude employees from speaking without permission" on "matters of public health and safety by those with the most knowledge"); *see also Branton v. City of Dallas*, 272 F.3d 730, 740 (5th Cir. 2001) (noting that "that an issue of private concern to the employee may also be an issue of concern to the public").

[69] 142 S. Ct 2407, 2423–25 (2022).

[70] *See, e.g.*, Pengtian Ma, *Public Employee Speech and Public Concern: A Critique of the U.S. Supreme Court's Threshold Approach to Public Employee Speech Cases*, 30 J. MARSHALL L. REV. 121, 144 (1996) ("By subjecting public employee speech to a direct balancing analysis, courts will ensure that the freedom of expression guaranteed to employees has the breathing space it needs to survive."). *Cf.* Bond v. Floyd, 385 U.S. 116, 136 (1966) ("Just as erroneous statements must be protected to give freedom of expression the breathing space it needs to survive, so statements criticizing public policy and the implementation of it must be similarly protected.").

[71] *See Grutzmacher v. Howard Co.*, 851 F.3d 332, 343 (4th Cir. 2017) (emphasizing that "the interest advanced by the public employee speech doctrine 'is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.'") (quoting City of San Diego, Cal. v. Roe, 543 U.S. 77, 82 (2004) (highlighting "[t]he interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it")).

importance,[72] or "merely a private grievance?"[73] If the latter, then the Court would not "scrutinize" the government's action for a potential First Amendment violation.[74] But if the former, then the second prong involved balancing the public employee's right to engage in such speech against the government's interest, as an employer, to operate an "efficient and effective" workplace.[75] While *Connick* narrowed the scope of protected speech by adding a threshold two-step analysis,[76] it was *Garcetti* that truly transformed the landscape by marking a seismic shift in the Court's approach to public employee speech rights.[77]

This case involved Richard Ceballos, a deputy district attorney in Los Angeles County.[78] He wrote a memo to his supervisors recommending that a case be dismissed due to alleged police misconduct.[79] When he voiced these concerns in multiple ways, Ceballos claimed he faced retaliation, including reassignment, transfer to another courthouse, and denial of promotion.[80] Ceballos sued, alleging violation of his First Amendment rights.

Previously, under *Pickering* and *Connick*, courts would have balanced Ceballos' interest in commenting on matters of public concern—which arguably this was—against the government's interest in efficient operations. But in a 5-4 decision, Justice Kennedy's majority didn't even get to weighing

---

[72] *See* Estlund, *supra* note 53.
[73] David L. Hudson, Jr., *No Free Speech for You*, SLATE (Aug. 4, 2017), https://slate.com/news-and-politics/2017/08/anthony-kennedy-has-the-chance-to-undo-his-worst-first-amendment-decision.html.
[74] *Connick*, 461 U.S. at 146 ("*Pickering*, its antecedents, and its progeny lead us to conclude that if Myers' questionnaire cannot be fairly characterized as constituting speech on a matter of public concern, it is unnecessary for us to scrutinize the reasons for her discharge.")
[75] Borough of Duryea v. Guarnieri, 564 U.S. 379, 386 (2011) ("The government has a substantial interest in ensuring that all of its operations are efficient and effective. That interest may require broad authority to supervise."); *see also* Rankin v. McPherson, 483 U.S. 378, 388 (1987) ("[T]he state interest element of the [*Pickering* balancing] test focuses on the effective functioning of the public employer's enterprise.") (alteration in original).
[76] Kozel, *supra* note 38, at 2000 ("[T]his willingness to compromise free expression for the sake of governmental efficiency is striking; in the ordinary course, it would be unusual to accord so much weight to convenience and smooth operations at the expense of speech.").
[77] 547 U.S. 410, 421 (2006) ("[W]hen public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline.").
[78] *Id.* at 413–15.
[79] *Id.*
[80] *Id.*

the equities. While *Pickering* provided "a useful starting point" and "an instructive example,"[81] the Court, wrote Justice Kennedy, did not need to inquire about what "liberties the employee might have enjoyed as a private citizen."[82] That is because the expressions at issue were made pursuant to his official duties as a calendar deputy. Restricting Ceballos' speech pursuant to his work responsibilities, Justice Kennedy concluded, "reflects the exercise of employer control over what the employer itself has commissioned or created."[83] Therefore, the Court ruled, "the Constitution does not insulate their communications from employer discipline."[84]

This new categorical rule, described by First Amendment scholar David L. Hudson as a "*Dred Scott*-type ruling," limited public employee speech rights when engaged in official, job-related speech "to an unacceptable level."[85] *Garcetti* divests a government employee of constitutional protection, so long as his or her speech falls within the duties the employee was paid to perform.[86] Essentially, the Court abandoned its prior approach to the First Amendment rights of public employees by embracing the "emerging First Amendment Law of Managerial Prerogative."[87] "Employers have heightened interests in controlling speech made by an employee in his or her professional capacity," wrote Justice Kennedy. "Official

[81] *Id.* at 417, 419.
[82] *Id.* at 421.
[83] *Id.* at 422.
[84] *Id.* at 421.
[85] David L. Hudson, Jr., *The Supreme Court's Worst Decision in Recent Years*—Garcetti v. Ceballos*, the* Dred Scott *Decision for Public Employees*, 47 MITCHELL HAMLINE L. REV. 375, 377 (2020). David L. Hudson, Jr. is a First Amendment scholar, professor at Belmont University College of Law, and prolific author with over 50 books, specializing in free speech, student rights, and Supreme Court history.
[86] Chief Justice Roberts expressed this perspective during the first round of oral arguments in *Garcetti*, stating that he had expected the attorney to argue that Garcetti's speech was "speech paid for by the Government, that's what they pay him for, it's their speech; and so, there's no first-amendment issue at all." Transcript of Oral Argument at 8, *Garcetti*, 547 U.S. 410 (2005) (No. 04-473). Based on this questioning, it appeared that Chief Justice Roberts was suggesting that "[a]n employee performing a job duty speaks at the employer's behest and as the employer's mouthpiece." *Id.* However, this line of thinking was specifically rejected by Justice Gorsuch in *Kennedy v. Bremerton School District*: "To proceed otherwise would be to allow public employers to use 'excessively broad job descriptions' to subvert the Constitution's protections." 142 S. Ct. 2407, 2424 (2022) (quoting *Garcetti*, 547 U.S. at 424).
[87] Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 33 (2008).

communications have official consequences, creating a need for substantive consistency and clarity."[88]

For some scholars, like Lawrence Rosenthal, *Garcetti*'s formalistic approach offers apparent clarity: if the speech was made as part of the employee's job duties, it is unprotected. Additionally, Rosenthal argues that the emphasis on managerial control preserves "the process of political control and accountability over public offices,"[89] one that prioritizes the ability of elected officials to control government operations over the public's interest in hearing from knowledgeable insiders about government functioning.

But for others, this simplicity comes at a considerable cost. The First Amendment not only protects the interests of the speaker but also that of the public to hear what that speaker has to say.[90] "Because political accountability is the primary means by which the public seeks to ensure that public managers are pursuing public goals," writes Pauline Kim, "speech by public employees plays a particularly important role in self-governance."[91] *Garcetti* fails to account for the complex ways in which public discourse can be shaped by public employees expressing themselves, whether it's a "matter of importance" or it relates to "official duties." By focusing solely on the employee's role rather than the content or context of the speech, *Garcetti* potentially silenced valuable voices within government institutions.

---

[88] *Garcetti*, 547 U.S. at 422.

[89] Rosenthal, *supra* note 86, at 48 (contrasting his argument with that of Cynthia Estlund, a vocal critic of *Garcetti*.) *See* Estlund, *supra* note 8, at 1472 ("In a sense, democracy itself depends on public officials being empowered to direct and evaluate how employees perform their jobs. It is all well and good for voters to elect officials and express policy preferences, but those democratic processes do not amount to much unless those elected and appointed officials can implement those policies. And most policies can only be implemented through the words and actions of public employees. In the simplest and starkest terms, that is why the workplace cannot and should not be run like a public square.").

[90] ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE, 27 (1965) ("Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result must be ill-considered, ill-balanced planning for the general good. *It is that mutilation of the thinking process of the community against which the First Amendment to the Constitution is directed*. The principle of freedom of speech springs from the necessities of the program of self-government. It is not a Law of Nature or of Reason in the abstract. It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage.").

[91] Pauline T. Kim, *Market Norms and Constitutional Values in the Government Workplace*, 94 N.C. L. REV. 601, 642 (2016).

Immediately after the decision, legal scholars[92] and the press[93] widely panned the decision for undermining the vital role public employees play in informing the public about government affairs.[94] Throughout the past two decades, there has been a scholarly consensus critical of *Garcetti* for potentially discouraging whistleblowers and limiting the public's access to important information about government operations.[95] Under *Garcetti*, courts no longer needed to balance competing interests if the speech in question fell within the scope of an employee's job responsibilities. This bright-line rule was justified as necessary to preserve managerial prerogatives and ensure efficient government operations. Unfortunately, it also created perverse incentives.[96] It encouraged public employees to voice their concerns externally rather than through internal channels, potentially exacerbating the very disruptions to government operations that the decision purported to prevent.[97] It also incentivized government employers to broadly define job descriptions to encompass more speech, thereby expanding the scope of unprotected expression. As for lower courts, they no longer needed to balance competing interests if the speech in question fell within the scope of an employee's job responsibilities. All they have to do is interpret *Garcetti* broadly, often finding that speech related to an employee's job fell within their "official duties" even when not explicitly required. Critics argued that *Garcetti* created a perverse incentive for employees to

---

[92] *See, e.g.*, Bice, *supra* note 8; Estlund, *supra* note 8; Nahmod, *supra* note 8. *But see* Roosevelt, III, *supra* note 8.

[93] *See, e.g.*, Greenhouse, *supra* note 9; Lane, *supra* note 9.

[94] *See What Price Free Speech? Whistleblowers and the* Ceballos *Decision: Hearing Before the H. Comm. on Gov't Reform*, 109th Cong. 4 (2006) (statement of Sen. Tom Davis, Chairman, H. Comm. on Gov't Reform).

[95] *See* Caroline Mala Corbin, *Government Employee Religion*, 49 ARIZ. ST. L.J. 1193, 1243 (2017) ("Crucial to self-governance is the ability to hold government officials accountable for their actions. Yet this ability is compromised when potential whistleblowers—public employees—are discouraged from reporting government misdeeds."); *see also* Mark Strasser, *Whistleblowing, Public Employees, and the First Amendment*, 60 CLEV. ST. L. REV. 975, 993 (2013) (arguing that after *Garcetti*, "[i]ndividuals who have a professional obligation to expose government wrongdoing have great incentive to turn a blind eye to objectionable practices, because the First Amendment will provide them no protection.").

[96] Helen Norton, *Constraining Public Employee Speech: Government's Control of Its Workers' Speech to Protect Its Own Expression*, 59 DUKE L.J. 1, 13–14 (2009) ("Although public entities frequently hire workers specifically to monitor and flag dangerous or illegal conditions, *Garcetti* now counterintuitively—indeed, perversely—empowers the government to punish them for doing just that.").

[97] *See Garcetti*, 547 U.S. at 427 (Stevens, J., dissenting) ("[I]t seems perverse to fashion a new rule that provides employees with an incentive to voice their concerns publicly before talking frankly to their superiors.").

voice concerns externally rather than through internal channels, potentially undermining government accountability.

D. Expanding Protection: How Lane *Qualified* Garcetti

The Court's unanimous decision in *Lane v. Franks*[98] in 2014 marked a partial, but significant, "retreat" from *Garcetti*'s restrictive approach.[99] In David Hudson's assessment, the decision was a "welcome relief" for those who agree with Justice Marshall's analysis in *Pickering* that there's a special value in protecting speech by public employees who speak as a citizen on matters of public concern.[100] Most importantly for understanding *Kennedy's* impact on public employee speech doctrine, the Court in *Lane* clarified the scope of *Garcetti*, emphasizing that speech outside an employee's ordinary job duties, even if it relates to his public employment or concerns information learned at work, may warrant constitutional protection. [101]

Edward Lane, a community college program director at Central Alabama Community College (CACC), conducted an audit of the program's expenses. He uncovered[102] that Suzanne Schmitz, a local politician, was getting paid as an employee of the youth program, despite not showing up to work. For that reason, she was fired. In a subsequent criminal trial looking into allegations of fraud, the prosecution compelled Lane to testify under oath against Schmitz. Following his testimony, Lane was among twenty-nine CACC employees laid off for financial reasons. However, all but two employees were quickly rehired, with Lane notably out.[103] Lane's public employee speech—his subpoenaed testimony—became the crux of the constitutional question.

Writing for a unanimous court, Justice Sotomayor's opinion clarified the scope of *Garcetti*, and in the process, narrowed its reach. For First Amendment purposes, Lane's testimonial speech—made as a citizen on matters of public concern—was protected. That is true, even though it involved information learned through his employment. Sotomayor emphasized that this type of expression "lies at the heart of the First Amendment, which 'was fashioned to assure unfettered

[98] 573 U.S. 228 (2014).
[99] Hudson Jr., *supra* note 84, at 390.
[100] Kozel, *supra* note 38, at 1993.
[101] Reed, *supra* note 4.
[102] *Lane*, 573 U.S. at 232.
[103] *Id.* at 233.

interchange of ideas for the bringing about of political and social changes desired by the people[.]'"[104]

Essentially, *Lane* qualified the *Garcetti* analysis. Speech which "owes its existence" to an employee's professional responsibilities is unprotected—it's basically government speech.[105] But speech made in one's capacity as a private citizen on matters of public concern garners First Amendment protection, even if it touches on issues relating to the speaker's employment. Such distinction set the stage for understanding how *Kennedy* represents a potential paradigm shift in public employee speech doctrine. By moving away from *Garcetti*'s restrictive approach, *Kennedy* embraces *Lane*'s more speech-protective reasoning.

"The mere fact that a citizen's speech concerns information acquired by virtue of his public employment does not transform that speech into employee—rather than citizen—speech," Justice Sotomayor wrote.[106] She emphasized that the critical question is whether the speech is ordinarily within the scope of an employee's duties, not whether it merely concerns those duties.[107] This nuanced distinction opened the door for greater protection of public employee speech that draws on job-related knowledge but is not strictly required by official responsibilities. *Lane* signaled a recognition by the Court that *Garcetti*'s bright-line rule may have gone too far in restricting valuable speech. By focusing on whether speech owes its existence to professional responsibilities, *Lane* attempted to carve out space for employees to speak as citizens on public importance, even when speech relates to their employment.

As this Article points out in Part II, *Kennedy* tilts the scale towards the *Lane* side of this balancing act by rejecting *Garcetti*'s expansive conclusion that all speech related to public employment becomes unprotected government speech. Instead, *Kennedy* emphasizes that the critical question in any public employee speech analysis "is whether the speech at issue is itself ordinarily within the scope of an employee's duties."[108] If a government employer wants to condition employment on the relinquishment of constitutional rights, courts cannot rely on

---

[104] *Id.* at 235–36 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)).
[105] *Id.* at 235.
[106] *Id.* at 240.
[107] *Id.*
[108] *Id.*

"some formal and capacious written job description."[109] The analysis has to be practical.[110] Also, in *Lane*, the Court recalled that starting with *Pickering*, there is a balancing of the interests between that of the public employee/citizen against the government efficiency interest. In that process, one must ask the following: does the speech in question either "imped[e] the teacher's proper performance of his daily duties in the classroom" or "interfer[e] with the regular operation of the school generally"?[111] Using this analysis, one must ask: Did Kennedy's speech (prayer after the game) imped[e] the coach's proper performance of his daily duties on the field or interfere with the regular operation of the school generally"?

Lane can be understood as an attempt to recalibrate the balance between managerial prerogatives and First Amendment values. While not overruling *Garcetti*, *Lane* significantly cabined its reach. The decision implicitly recognizes that categorical exclusions risk sacrificing valuable speech that informs public debate and promotes government accountability. This doctrinal evolution reveals persistent tensions in conceptualizing public employees' constitutional status. Are they best understood primarily as government functionaries whose speech can be controlled like other job performance? Or as uniquely informed citizens whose expression warrants robust protection? The Court has vacillated between these poles, at times emphasizing managerial discretion and at others foregrounding democratic discourse. *Kennedy* settles the question.

II. PRAYING ON THE FIELD: HOW *KENNEDY* RESHAPED PUBLIC EMPLOYEE SPEECH RIGHTS

A. The Coach's Prayer: Case Background and Supreme Court Holding

Hired in 2008, Joseph Kennedy, an 18-year Marine veteran and a devout Christian, was an assistant football coach at Bremerton High School, a public school in Bremerton, Washington.[112] He was the school's junior varsity coach and served as an assistant for the varsity team. As Kennedy describes

[109] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022). Essentially, that's what the Bremerton School District was asking Coach Kennedy to do—relinquish your right to pray in public, after a football game because it touches on issues relating to your employment, *id.* at 2417–18.

[110] *Lane*, 573 U.S. at 236 (citing Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 605 (1967); Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968); Connick v. Myers, 461 U.S. 138, 142 (1983)).

[111] *Lane*, 573 U.S. at 237 (quoting *Pickering*, 391 U.S. at 572–73).

[112] Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2416 (2022).

it, it was a "fluke" that the Bremerton School District hired him as a public employee.[113] Inspired by the movie *Facing the Giants*, Kennedy began to pray after each game, giving "thanks through prayer on the playing field."[114] For over seven years, Kennedy made it a practice to kneel at the school's football field on the 50-yard line right after shaking hands with the opposing players and coaches, "praying for approximately 30 seconds" in silence. While at first, he prayed alone, over time, some students voluntarily joined him.

By 2015, these quiet moments of reflection, expressing gratitude for "what the players had accomplished and for the opportunity to be part of their lives through the game of football," had evolved into motivational speeches with religious content. That is also when the Bremerton School District's superintendent first became aware of Kennedy's post-game ritual. One of the opposing team's coaches "commented positively" to the principal about letting Kennedy express his First Amendment rights in such a public manner. The Bremerton School District "had not received complaints up to that point."[115]

Concerned about potential violations of the Establishment Clause, the District launched an inquiry. On September 17, 2015, the District's superintendent sent Kennedy a letter. In that letter, Superintendent Aaron Leavell acknowledged two important factors pertaining to how courts approach the public employee speech doctrine: 1) Kennedy's speech (prayers) "were well-intentioned" and at no time did he interfere with the rights of others because the coach had "not actively encouraged, or required, [student] participation."[116] (2) "Leavell advised Kennedy that he could continue to give inspirational talks, but '[t]hey must remain entirely secular in nature[.]'"[117] In other words, the government employer did not find the post-game expressive activity entirely problematic; just the religious content of the speech was banned. In First Amendment language, the government engaged in viewpoint discrimination.[118]

---

[113] Amy Howe, *In the Case of the Praying Football Coach, Both Sides Invoke Religious Freedom*, SCOTUSBLOG (April 24, 2022), https://www.scotusblog.com/2022/04/in-the-case-of-the-praying-football-coach-both-sides-invoke-religious-freedom/.
[114] *Kennedy*, 142 S. Ct. at 2416.
[115] Kennedy v. Bremerton Sch. Dist., 869 F.3d 813, 817 n.1 (9th Cir. 2017) (*Kennedy I*).
[116] *Id.* at 817.
[117] *Id.*
[118] *See* Rosenberger v. Rector & Visitors of the Univ. of Va., 515 U.S. 819, 829 (1995).

Nonetheless, because the school district was concerned about a potential Establishment Clause violation, Leavell ordered Kennedy to cease this practice of praying after the football game at the 50-yard line. The letter instructed Kennedy to avoid encouraging or discouraging student prayer, which the district believed could be perceived as an endorsement of Christianity. Kennedy complied with these directives for several weeks by praying in private before the games and ceasing public prayers afterward.

However, on October 14, 2015, Kennedy's attorney wrote a letter to the Bremerton School District, informing Leavell that the coach would resume praying on the 50-yard line immediately after games. By requesting a religious accommodation on Kennedy's behalf, the attorneys argued that the district could not prohibit their client from engaging in a brief, private religious expression.[119] The letter to the school district also argued that Kennedy's prayer was "not obviously Christian and occurred 'after his official duties as a coach have ceased.'"[120] This type of expressive activity, insisted the attorneys, was private speech.

True to his word, on October 16, Kennedy knelt and prayed after the game. With several news media reporting on the event, players, coaches, and members of the public joined Kennedy on the field. In the coming days, the school district again wrote to Kennedy, reiterating that his duty to supervise players continued through the post-game period. At the following football game, Kennedy repeated his religious ritual. But this time, the school district placed him on paid administrative leave for violating the government employer directive not to engage in "demonstrative religious activity" while on duty as a coach.[121]

After the season ended, the district gave Kennedy a poor performance evaluation. Because he "failed to follow district policy" regarding religious expression and "failed to supervise student-athletes after games due to his interactions with media and community" the Bremerton High School athletic director recommended Kennedy not be rehired. The district also cited Kennedy for his lack of cooperation in finding an accommodation that would allow him to pray privately.[122] The

[119] Kennedy v. Bremerton Sch. Dist., 443 F.Supp.3d 1223, 1230 (W.D. Wash. 2020).
[120] *Id.* at 1230.
[121] *Kennedy I*, 869 F.3d at 819.
[122] *Id.* at 820.

varsity team's head coach left his job at the end of 2015, and the one-year contracts for all six of the assistant football coaches also expired. Consequently, the District posted job openings for all seven football coaching positions. Although Kennedy was eligible to reapply for his position, he did not do so.[123]

Subsequently, Kennedy filed suit in federal court, alleging that the district had violated his First Amendment rights to free speech and free exercise of religion.[124] Following the Supreme Court's denial of certiorari,[125] the case returned to the United States District Court for the Western District of Washington for further proceedings on the merits. Both parties filed motions for summary judgment. Judge Leighton granted the school district's motion and denied Kennedy's motion. Finding that the district's actions were justified by its need to avoid violating the Establishment Clause, the court maintained its earlier position that Kennedy's speech was not protected under the First Amendment because it was made in his capacity as a public employee. Applying *Pickering's* balancing and *Garcetti*'s restrictive approach, Judge Leighton concluded that Kennedy's 50-yard line tradition "owes its existence" to his employment.[126] Looking at content, form, and context, the district court did acknowledge that "there is a point at which [a coach's] speech is so obviously personal that it is delivered as a citizen."[127]

---

[123] *Id.*

[124] Kennedy initiated his legal proceedings in the U.S. District Court for the Western District of Washington on August 9, 2016. His complaint, filed under 42 U.S.C. §1983, alleged First Amendment violations of free speech and free exercise rights due to the school district's restrictions on his mid-field prayers and subsequent administrative leave. Additionally, Kennedy brought five claims under Title VII of the Civil Rights Act of 1964, including failure to re-hire, discrimination based on a protected characteristic, disparate treatment, failure to accommodate, and retaliation. Kennedy sought declaratory relief and an injunction for reinstatement with accommodations for his religious practices. On August 24, 2016, Kennedy moved for a preliminary injunction based on his First Amendment claims, which the district court denied on September 19. Kennedy appealed, and the Ninth Circuit affirmed, holding that Kennedy's prayers were unprotected speech delivered in his capacity as a public employee. *See* Kennedy v. Bremerton Sch. Dist., 869 F.3d 813 (9th Cir. 2017) (*Kennedy I*). The Supreme Court denied certiorari, though four Justices expressed skepticism about the lower court's reasoning. *See* Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634 (2019). Subsequently, both parties moved for summary judgment on all seven of Kennedy's claims.

[125] Kennedy v. Bremerton Sch. Dist., 139 S. Ct. 634, 637 (2019) (stating "important unresolved factual questions would make it very difficult if not impossible at this stage to decide the free speech question that the petition asks us to review.")

[126] Kennedy v. Bremerton, 443 F. Supp. 3d 1223, 1236 (W.D. Wash. 2020) ("As the Ninth Circuit observed, this is literally the case because only BHS staff and players had access to the field immediately after football games[.]" (citing to *Kennedy I*, 869 F.3d at 827)).

[127] *Kennedy*, 443 F. Supp. 3d at 1235.

"This may be the case," wrote Judge Leighton, "when a coach greets family in the bleachers during a game or a teacher wears a cross around their neck."[128] Nonetheless, the district court, applying the *Garcetti* framework, determined that Kennedy's prayer was speech made pursuant to his official duties as a coach and thus not protected under *Garcetti*. The court reasoned that Kennedy was still on duty when he prayed, as he was responsible for supervising students and serving as a role model.

On appeal, a three-judge panel affirmed the district court's grant of summary judgment to the school district, relying heavily on *Garcetti*.[129] The court concluded that Kennedy's post-game prayers constituted speech as a government employee rather than as a private citizen, and thus not protected by the First Amendment. This determination hinged on an expansive view of Kennedy's job responsibilities, which the court saw as encompassing not just coaching duties but also serving as a mentor and role model for students. The court emphasized that Kennedy's job responsibilities extended beyond just coaching the game and included mentoring students and setting an example. They viewed Kennedy's post-game prayer as an extension of his motivational speeches to players, falling within his official duties.[130]

The opinion also placed significant weight on the context of Kennedy's religious expression.[131] The timing and location of the prayers—immediately following games, on the 50-yard line,

---

[128] *Id.*

[129] Kennedy v. Bremerton, 991 F.3d 1004 (9th Cir. 2021) (*Kennedy II*).

[130] *Id.* at 1015 ("We acknowledge the Supreme Court's warning not to create 'excessively broad job descriptions' that 'convert' expressions of a private citizen into speech as a government employee. But on the record before us, there is simply no dispute that Kennedy's position encompassed his post-game speeches to students on the field." (quoting *Garcetti,*, 547 U.S. at 424 (2006)).

[131] In addressing the school district's Establishment Clause concerns, the court found them to be well-founded. The judges were particularly attuned to the risk of perceived religious endorsement by the school, given Kennedy's authoritative position and the public nature of his prayers. Notably, the court drew a distinction between Kennedy's earlier, private prayers and his later, more demonstrative actions. The latter, in the court's view, had evolved into something akin to delivering a sermon, thereby amplifying Establishment Clause concerns. This decision reflects the ongoing challenge courts face in reconciling free speech rights with Establishment Clause obligations, particularly in the sensitive context of public schools. As Judge Smith noted, "[W]e ask whether an objective observer, familiar with the history of Kennedy's on-field religious activity, coupled with his pugilistic efforts to generate publicity in order to gain approval of those on-field religious activities, would view BSD's allowance of that activity as 'stamped with [his or] her school's seal of approval.' Here, the answer is unquestionably yes." *Id.* at 1018 (quoting Santa Fe Indep. Sch. Dist. v. Doe, 530 U.S. 290, 308 (2000)).

while still on duty—were crucial factors in the court's reasoning. Writing a concurring opinion, Judge Christen undertook a "practical inquiry" to determine whether Kennedy's duties "include teaching non-academic skills such as teamwork, sportsmanship, dedication, and personal discipline.[132] Emphasized the "practical realities" of the situation, Judge Smith's majority opinion noted that Kennedy's role afforded him unique access to the field at a time when his actions were highly visible to students and parents.[133] Therefore, the court found, Kennedy's "expression on the field—a location that he only had access to because of his employment—during a time when he was generally tasked with communicating with students, was speech as a government employee."[134]

B. Redefining "Official Duties": Kennedy*'s Practical Approach*

As Part I detailed, few areas have been as contentious and consequential as the public employee speech doctrine. Since *Pickering*, courts have grappled with the delicate balance between the government's need to function efficiently and employees' rights to participate in public discourse.[135] But *Kennedy* marks a significant shift that tilts the scales in favor of expanding speech protections for millions of public servants across the nation.[136] At first glance, *Kennedy* might seem like a narrow ruling about a football coach's right to pray on the field. But beneath its religious-liberty veneer lies a nuanced recalibration of the public employee speech doctrine.

The Court, in a 6-3 decision authored by Justice Gorsuch, held that the school district violated Kennedy's First Amendment rights to free speech and free exercise of religion. While much of the public attention focused on the case's Establishment Clause implications,[137] the Court's reasoning on

---

[132] *Kennedy II*, 991 F.3d at 1023.
[133] *Id.* at 1015.
[134] *Id.* (concluding that the court's holding had not changed from *Kennedy I*).
[135] Justice Gorsuch described this interplay as the "complexity associated with the interplay between free speech rights and government employment." Kennedy v. Bremerton Sch. Dist., 142 S. Ct. 2407, 2424 (2022).
[136] Kozel, *supra* note 38, at 2017 ("[T]here is no warrant for categorically denying protection to work-related speech based purely on the speaker's status as a government employee.").
[137] In her dissenting opinion in *Kennedy*, Justice Sotomayor criticized the majority for granting the high school football coach "double protection" under both the Free Exercise and Free Speech Clauses of the First Amendment for his practice of praying on the field after games. *Kennedy*, 142 S. Ct. at 2448 (Sotomayor, J., dissenting). However, this view overlooks established Supreme Court jurisprudence recognizing

Kennedy's free speech claim signaled a potentially significant shift in public employee speech doctrine. Justice Gorsuch signaled the Court was moving away from the Holmesian approach the Court had previously retracted towards by subtly refining the framework established in *Garcetti* and *Lane*.[138] This

that the Free Exercise Clause often operates in conjunction with other constitutional liberties like freedom of speech. Justice Sotomayor's bewilderment at the majority's reasoning allowing Kennedy's rights to be "doubly protected" by two clauses against the school's single Establishment Clause defense echoes the skepticism she expressed when examining shifting First Amendment jurisprudence in cases like Carson v. Makin, 142 S. Ct. 1987, 2012 (2022) (Sotomayor, J., dissenting) and Trinity Lutheran Church of Columbia, Inc., v. Comer, 582 U.S. 449, 471 (2017) (Sotomayor, J., dissenting). Yet her critique in *Kennedy* does not fully reckon with the Court's acknowledgment of "hybrid situations" where the Free Exercise Clause reinforces other express constitutional protections. As the Court emphasized in Employment Division v. Smith, 494 U.S. 872, 881 (1990), "The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved . . . the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech." Numerous precedents cited in *Smith*, from *Cantwell*, 310 U.S. 296 (1940) to Wooley v. Maynard, 430 U.S. 705 (1977), illustrate circumstances where laws burdening religious conduct were invalidated under a hybrid rights theory drawing upon both the Free Exercise Clause and rights like free speech. Justice O'Connor's concurring opinion in *Smith* further clarified that "a law that prohibits certain conduct—conduct that happens to be an act of worship for someone—manifestly does prohibit that person's free exercise of his religion." *Smith*, 494 U.S. at 893 (O'Connor, J., concurring). When the government substantially burdens religiously motivated conduct through laws or regulations, even if generally applicable, the Court has long required satisfaction of strict scrutiny by demonstrating pursuits of compelling state interests through narrowly tailored means. *See, e.g.*, Sherbert v. Verner, 374 U.S. 398 (1963). By situating Kennedy's on-field prayer as implicating intertwined free exercise and free speech rights, the majority opinion harmonizes with this doctrinal foundation rather than representing an "absurd" mathematical game of tallying constitutional clauses. Kennedy's expressive conduct of kneeling and praying in view of students was deemed "private speech" unrestrained by his public employment, while also constituting an act motivated by his religious beliefs. Moreover, the Court situated Kennedy's actions as part of the "preferred position" long accorded to core First Amendment liberties like religion, speech, and press freedoms under the Constitution. Justice Gorsuch's analysis coheres with affording Kennedy's hybrid rights claim the heightened protection warranted for speech and religious exercise principles at the essence of the First Amendment. While many lament the majority's broad conception of Kennedy's rights in this case, grounding it in hybrid rights jurisprudence illustrates how the Court did not newly "double protect" religious conduct through "absurd" mathematical logic. *See* Fabio Bertoni, *Justice Neil Gorsuch's Radical Reinterpretation of the First Amendment*, THE NEW YORKER (July 20, 2022), https://www.newyorker.com/news/daily-comment/justice-neil-gorsuchs-radical-reinterpretation-of-the-first-amendment. Rather, *Kennedy* represents an affirmation that laws burdening expressive religious exercise may confront the compounding constitutional hurdles of having to satisfy strict scrutiny under both the Free Exercise and Free Speech Clauses.

[138] *Kennedy*, 142 S. Ct. at 2423 ("[O]ur precedents remind us that the First Amendment's protections extend to 'teachers and students,' neither of whom 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate." (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist. 393 U.S. 503 (1969)).

opens the possibility of a more expansive interpretation of public employees' First Amendment rights. What emerges more now, is what First Amendment scholar, Professor Kozel, calls "the default of parity: employees and other citizens are presumed to be similarly situated for purposes of the First Amendment. This presumption is a natural corollary of repudiating the theory that government employment itself provides a legitimate justification for imposing restrictions on the freedom of speech."[139]

The heart of this shift lies in the Court's emphasis on "ordinary duties" rather than "official duties" when determining whether speech falls under the umbrella of government speech. Specifically, the Court determined that the football coach was not engaged in speech "ordinarily within the scope" of his duties when he prayed at the 50-yard line after games. [140] Instead, it consisted of private speech, as opposed to "a government-created message" based on several factors, such as[141] the prayer occurring after his official coaching duties ended;[142] it being personal in nature rather than owing its existence to his responsibilities as a public employee; coaches and students being free to attend briefly to personal matters; and the prayers taking place on the same field and condition as other members of the public.[143] This context-driven analysis stands in stark contrast with *Garcetti*'s formalistic focus on whether the speech was part of the employee's routine job responsibilities.[144]

---

[139] Kozel, *supra* note 38, at 2011 ("Parity theory thus suggests that the doctrine of employee speech should be reoriented around a single inquiry: Is there a valid reason for permitting the government to treat.") Randy Kozel, a professor at Notre Dame Law School and director of its Program on Constitutional Structure, specializes in freedom of speech, judicial decision-making, and constitutional law.

[140] *Kennedy*, 142 S. Ct. at 2425 (holding that it was not dispositive that Coach Kennedy's prayers took place on the football field, rather, "what matters is whether Mr. Kennedy offered his prayers while acting within the scope of his duties as a coach. And taken together, both the substance of Mr. Kennedy's speech and the circumstances surrounding it point to the conclusion that he did not.").

[141] *Id.* at 2424.

[142] This paralleled the distinction made in *Lane* between official and ordinary duties. Justice Sotomayor made it clear that "*Garcetti* said nothing about speech that simply relates to public employment or concerns information learned in the course of public employment." Lane v. Franks, 573 U.S. 228, 239 (2014).

[143] *Kennedy*, 142 S. Ct. at 2424–25.

[144] The *Kennedy* majority applied the *Pickering*/*Garcetti* framework to resolve the coach's free speech claim but with a crucial modification. Rather than focusing narrowly on whether Kennedy's prayers fell within his official duties as *Garcetti* might suggest, the Court conducted a more holistic, context-driven analysis of whether the speech could fairly be treated as private expression. Key factors in this analysis included: 1) The timing of the speech (after Kennedy's official duties had ended), 2) The location (a place where other staff were free to briefly engage in

Lower courts have embraced *Kennedy*'s context-driven approach with mixed results. In *Wood v. Florida Department of Education*, a federal district court in Florida relied on *Kennedy* to invalidate a state law prohibiting transgender public school employees from using their preferred pronouns.[145] Chief Judge Walker emphasized that *Kennedy* rejected the notion that "everything teachers and coaches say in the workplace [is] government speech subject to government control,"[146] as this would allow the government "to use excessively broad job description" that subverts constitutional protections.[147] Similarly, in *Beathard v. Lyons*, a court protected a football coach who replaced a university-provided "Black Lives Matter" poster on his office door with his own message reading "All Lives Matter to Our Lord & Savior Jesus Christ," finding that he "was not paid by the University to decorate his door or to use it to promote a particular viewpoint, he was employed to coach football."[148]

However, not all post-*Kennedy* decisions have expanded speech protections. In *Washington v. Sunflower County*, the Fifth Circuit applied *Kennedy*'s "practical inquiry" framework but concluded a county administrator's reporting of potential bid-rigging by board members fell within his ordinary job duties.[149] Unlike the coach's prayers in *Kennedy*, which were "personal" and "not pursuant to his official duties," the court found Washington's speech "clearly within the scope of 'carrying out the... directions of the Board'" based on his formal job

---

personal activities), 3) The audience (potentially including members of the general public), and 4) the content and purpose of the expression (personal prayer rather than a government-created message). This nuanced approach represents a departure from *Garcetti*'s formalistic focus on job descriptions and official responsibilities. By emphasizing the circumstances surrounding the speech, Kennedy opens the door for more public employee expression to fall on the "citizen" side of the citizen-employee divide. *But see* Julie D. Pfaff, *The Supreme Court Fumbles School Prayer in* Kennedy v. Bremerton School District, 26 ATL. L.J. 110 (2023) ("[T]he majority's fact-specific inquiry may have the unintended consequence of further limiting the precedential value of the Kennedy Opinion. To characterize Coach Kennedy's prayers as 'private' and 'personal' the majority focused almost entirely on Coach Kennedy's actions. Ironically, this fact specific inquiry may limit the precedential value of the opinion.").

[145] Wood v. Fla. Dep't of Educ., 729 F. Supp. 3d 1255 (N.D. Fla. 2024).

[146] *Id.* at 1276, 1291, fn. 15 (citing *Kennedy*, 142 S.Ct. 2407) ("But *Kennedy* rejects the notion that anything a teacher says at school is automatically government speech").

[147] *Id.* at 1278, finding this is contrary to *Kennedy* and *Garcetti.*

[148] Beathard v. Lyons, 620 F. Supp. 3d 775, 782 (C.D. Ill. 2022), aff'd on other grounds, No. 22-2583, 2025 WL 632975 (7th Cir. Feb. 27, 2025).

[149] Washington v. Sunflower County, No. 23-60072, 2024 WL 3510116 (5th Cir. July 23, 2024), Petition for Certiorari Filed, Washington v. Sunflower County, No. 23-60072 (U.S. Dec. 4, 2024).

description.[150] This demonstrates that *Kennedy*'s context-driven approach cuts both ways—sometimes finding speech protected, other times not.

The divergent outcomes in *Wood* and *Washington* illustrate the critical question emerging from *Kennedy*: when is speech "ordinarily within the scope" of an employee's duties? The answer requires courts to examine not just formal job descriptions but the actual day-to-day practices, the substance of the speech itself, the context in which it occurs, and whether the speech is compelled or expected by the employer. This nuanced approach rejects both *Garcetti*'s rigid categorical exclusion and, equally important, prevents employers from strategically redefining job descriptions to encompass all work-related speech.[151]

This may seem like a semantic distinction between "official" and "ordinary" duties, but in the world of constitutional law, such subtle shifts in terminology can herald tectonic changes in doctrine.[152] By focusing on what public employees actually do on a routine basis, rather than what their job descriptions might theoretically encompass, *Kennedy* narrowed the scope of speech that can be considered government speech—and thus unprotected by the First Amendment—by asking what is the "nature of the speech at issue."[153] With this approach, "speech is protected because of its intrinsic value to

---

[150] *Id.* at 3.

[151] *Kennedy*, 142 S. Ct. 2424 (quoting Garcetti 126 S. Ct. 1951). ("To proceed otherwise would be to allow public employers to use "excessively broad job descriptions" to subvert the Constitution's protection"). As Professor Emily Gold Waldman has noted, this issue is particularly pressing in educational contexts where "individual educators can express and act upon their own views" on contested topics ranging from "curriculum itself to extracurricular activities, bathroom access, and even the names and pronouns that students and educators use for themselves and one another." Emily Gold Waldman, *From Garcetti to Kennedy: Teachers, Coaches, and Free Speech at Public Schools*, 11 BELMONT L. REV. 239, 255 – 256 (2024). Without *Kennedy*'s context-driven approach, government employers could strategically define nearly all educator expression as job-related speech, effectively nullifying First Amendment protections.

[152] The fact-intensive nature of this inquiry has led, as one might expect, to varying approaches in the lower courts. *See* Keenan, *supra* note 5; *see also* Maya Syngal McGrath, Note, *Teacher Prayer in Public Schools*, 90 FORDHAM L. REV. 2427, 2452–53 (2022) (detailing how far all kinds of non-work related is "nonetheless made pursuant to employment duties").

[153] *Kennedy*, 142 S. Ct. at 2423.

individual self-development rather than because the speech is useful to any external system." [154]

Consider the implications. A whistleblower exposing corruption in their agency, a teacher criticizing school board policies, or a police officer speaking out against departmental misconduct—all might find new protections under this refined standard. The Court's warning against allowing employers to use "excessively broad job descriptions" to limit speech rights serves as a powerful bulwark against attempts to silence dissent or stifle public debate.[155]

But the Court's refinement goes beyond mere terminology. It calls for a "practical" and context-specific inquiry into the nature of an employee's speech. This nuanced approach recognizes the complex realities of modern public employment, where job duties are often fluid and the line between professional and personal expression can be blurry. For Coach Kennedy, his expressive speech (the three instances of prayer) was private and therefore protected. Why? The nature of the speech itself was not "ordinarily within the scope of his duties as a football coach."[156] He was not trying to convey an official government-created message. And timing of the speech—the postgame period—demonstrates other government employees were "free to attend briefly to personal matters."[157] By rejecting a formalistic analysis in favor of a more holistic examination, the Court has given lower courts the flexibility to protect a wider range of employee speech by instructing them to look at the substance the public employee speech and the circumstances surrounding it."[158]

The theoretical underpinning of this approach is best described as "functional free speech protection"— a principle that prioritizes the real-world context and practical impact of expression over rigid categorizations. The Court's reasoning in *Kennedy* bears similarities to its approach in *Lane*, where it emphasized the importance of protecting speech on matters of public concern, even when that speech relates to the employee's job. In *Kennedy*, the Court seemed to extend this principle to

---

[154] Risa L. Lieberwitz, *Freedom of Speech in Public Sector Employment: The Deconstitutionalization of the Public Sector Workplace*, 19 U.C. DAVIS L. REV. 597, 603 (1986) (detailing how over time the Supreme Court has shifted its public-employee speech jurisprudence from a democratic process-based First Amendment theory to one based on economic system values, severely restricting public employees' free speech rights).

[155] *Kennedy*, 597 U.S. at 529.

[156] *Id.*(citation omitted).

[157] *Id.* at 530.

[158] *See id.*

religious speech, recognizing its value in the public square.[159] Moreover, the Court's analysis in *Kennedy* appears to give more weight to the employee's rights as a citizen, echoing the balancing test established in *Pickering*. The Court emphasized that public employees do not shed their constitutional rights at the workplace door, a principle that had been somewhat eroded by *Garcetti*'s consequentialist free speech approach.[160]

Critics might argue that this approach could lead to chaos in public offices, with employees feeling emboldened to speak out on any issue without fear of repercussion. But such concerns misunderstand the nuance of the Court's ruling. The decision does not give carte blanche to public employees to say whatever they want. Rather, it recalibrates the initial threshold for when speech might be protected, still leaving room for the careful balancing of interests established in *Pickering*. Moreover, the Court's emphasis on speech that the government "has commissioned or created" and which the employee is "expected to deliver" provides a clear limiting principle. This focus on the origin and expectation of speech helps distinguish between expression that is truly part of an employee's government role and that which stems from their role as a citizen.

C. Government Employer vs. Individual Expression: A New Balance of Power

Perhaps even more significant than its refined approach to categorizing employee speech, *Kennedy* subtly recalibrates the weight given to government interests in restricting that speech. The majority rejected the school district's argument that avoiding an Establishment Clause violation justified suppressing Kennedy's expression, emphasizing that such concerns must be grounded in concrete evidence rather than mere speculation. Justice Gorsuch emphatically rejected Justice Sotomayor's dissent opinion echoing the school district's argument: that the coach's prayer disrupted its operation at the football game, therefore justifying the suppression of a public employee's speech.[161] This heightened scrutiny of government justifications for speech restrictions marks a departure from the extreme deference often afforded to employer interests under *Garcetti. Kennedy* suggests that courts should be more skeptical of claimed

---

[159] *See id.* at 543-44.
[160] *See generally* Erica Goldberg, *Free Speech Consequentialism*, 116 COLUM. L. REV. 687 (2016).
[161] *See Kennedy*, 597 U.S. at 556-79 (Sotomayor, J., dissenting).

operational needs when balanced against an employee's expressive rights, potentially tipping the scales back towards greater speech protection.

Wood v. Florida Department of Education[162] provides a striking illustration of *Kennedy*'s impact on the government's burden to justify speech restrictions. Whereas *Garcetti* often allowed broad claims of operational necessity to override employee speech rights, *Wood* demonstrates *Kennedy*'s demand for concrete evidence rather than speculation. The court required Florida to demonstrate how a teacher's use of her preferred pronouns actually impeded her duties or disrupted school operations—evidence the state could not produce.[163] The court rejected Florida's argument that its interest in enforcing a viewpoint on gender identity automatically trumped the teacher's expressive interests, noting that "government penalization of certain viewpoints is 'the greatest First Amendment sin.'"[164] This heightened scrutiny of government justifications marks a significant departure from the deference often afforded to employer interests under *Garcetti*.[165] As Chief Judge Walker concluded, where not all employee speech would be protected, after Kennedy, "the government must shoulder a correspondingly 'heavier' burden and is entitled to considerably less deference in its assessment that a predicted harm justifies a particular impingement on First Amendment rights."[166]

Notably, *Wood* demonstrates how *Kennedy*'s principles transcend ideological divides. The court opened its opinion with a pointed observation: "Once again, the State of Florida has a First Amendment problem. Of late, it has happened so frequently, some might say you can set your clock by it."[167] Chief Judge Walker then answered with "a thunderous 'no'" the question of "whether the First Amendment permits the State to

---

[162] 729 F. Supp. 3d 1255 (N.D. Fla. 2024), *appeal docketed*, No. 24-11239 (11th Cir. Apr. 22, 2024).

[163] *Id.*at 1283 ("But here, while [the government employers] have identified that Ms. Wood's speech conflicts with the State's viewpoint on pronouns, [the government employers] have provided no evidence for this Court to find that Ms. Wood's speech has impeded her duties as a teacher, or the normal operations of Lennard High School, or the state's interests generally as an employer").

[164] *Id.* at 1284 (quoting *Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1277 (11th Cir. Mar. 4, 2024)).

[165] *See id.* Chief Judge Walker asserted that the government failed to satisfy "even the more lenient standard under *Pickering and Garcetti,*" indicating he read *Kennedy* as imposing a higher burden on governments punishing public employee speech. *Id.*

[166] *Id.* (quoting *Janus v. Am. Fed'n of State, Cnty, & Mun. Emps.*, 585 U.S. 878, 907 (2018)).

[167] *Id.* at 1264-65.

dictate, without limitation, how public-school teachers refer to themselves when communicating to students."[168] This represents a remarkable application of *Kennedy*—a case protecting a Christian coach's right to pray—to shield a transgender teacher's right to self-expression. Just as *Kennedy* determined that a coach's religious expression was personal speech outside his job duties, *Wood c*oncluded that a teacher's gender expression was similarly personal and protected. This cross-ideological application of *Kennedy*'s principles suggests its potential to reshape public employee speech doctrine beyond the specific context of religious expression, creating broader protections for various forms of personal expression in the workplace.[169]

Whereas *Lane* created a limited carve-out to *Garcetti*'s restrictive view, *Kennedy* now swings the pendulum decidedly in favor of expanding once again the First Amendment rights of public employees. Some might argue that *Kennedy*'s holding is difficult to square with key rationales underlying the Court's prior public employee speech cases, especially the emphasis on "managerial discretion" over employee speech within certain government institutions that might undermine governmental efficiency or effectiveness.[170] In doing so, Justice Gorsuch directly undermined a key premise underlying *Garcetti*—and explicitly rejected by Justice Sotomayor in *Lane*[171]—government employers must be given ample leeway to restrict employee speech to maintain an efficient workplace and ensure effective operations. *Kennedy* suggests this "managerial prerogative" now carries less weight when balanced against the speech interests of public employees on matters not directed by their official duties.[172]

In conclusion, *Kenned*y represents a significant development in public employee speech doctrine. It suggests a potential recalibration of the balance between employee rights and government interests and may herald a new era of greater

---

[168] *Id.*

[169] *See id.* at 1275, fn. 14. ("This Court does not want to believe the cynical suggestion by some commentators that *Kennedy* represents only a strained, results-oriented decision to permit school-sponsored prayer.").

[170] *See* Rosenthal, *supra* note 75, at 111 ("Yet managerial prerogative also advances critical First Amendment objectives.").

[171] *Lane*, 573 U.S. at 242 (2014) ("We have also cautioned, however, that 'a stronger showing [of government interests] may be necessary if the employee's speech more substantially involve[s] matters of public concern[.]" (quoting *Connick v. Myers*, 461 U.S. 138, 152 (1983)).

[172] Rosenthal, *supra* note 75, at 33. *But see* David Fagundes, *State Actors as First Amendment Speakers*, 100 NW. U. L. REV. 1637 (2006).

protection for public employee speech. On a broad level, *Kennedy* signals a shift towards enhancing First Amendment protections for public employees to speak as private citizens on matters unrelated to their official duties. By focusing on the circumstances and setting surrounding expressive activity, the decision invites public employees to make coherent claims that their speech falls outside the scope of official tasks prescribed by their job duties—and therefore, is insulated from employer discipline. This expansive view aligns with the philosophical underpinnings of the *Lane* decision while representing a notable departure from the Court's earlier holding in *Garcetti*, which sought to afford government employers wide discretion to control their workforces.

III. BEYOND THE SCHOOLYARD: *KENNEDY'S* RIPPLE EFFECTS ON PUBLIC EMPLOYEE SPEECH

A. Newly Protected Territory: Expanding the Scope of Protected Public Employee Speech

Kennedy's context-driven approach to determining when speech is made as a private citizen has the potential to significantly broaden the range of protected public employee expression. This shift could have far-reaching consequences across various sectors of public employment. Lower courts applying *Kennedy* may be more inclined to find that speech touching on employment issues nonetheless falls outside an employee's official duties if made in settings or circumstances that suggest private expression.

1. Whistleblowers and Internal Reporters

Kennedy may offer stronger protections for government employees who report misconduct or inefficiencies within their agencies. Under a strict reading of *Garcetti*, such reports could be considered part of an employee's official duties, especially if the employee's job involves any form of oversight or compliance. However, *Kennedy*'s nuanced analysis of the circumstances surrounding speech could lead courts to view many internal reports as citizen speech on matters of public concern. For example, consider a government scientist who discovers data manipulation in a study with significant public health implications. Even if reviewing data integrity falls within their job description, *Kennedy* might protect their decision to report concerns to superiors or oversight bodies, particularly if done outside normal reporting channels or work hours.

2. Media Communications

Kennedy could also expand protections for public employees who speak to journalists about workplace issues.[173] While *Garcetti* often led courts to view any job-related speech as unprotected, *Kennedy*'s focus on context might lead to different outcomes. A police officer who speaks to a reporter about systemic issues in the department, for instance, might now have a stronger claim to First Amendment protection if the conversation occurs off-duty and without using official channels. The key would be demonstrating that the officer was speaking as a concerned citizen, not merely performing job functions.

3. Social Media Expression

As public employees increasingly use social media platforms to discuss work-related issues, *Kennedy*'s approach could prove significant. Courts may be more inclined to view social media posts as private citizen speech, even when they touch on employment matters, if made outside of work hours and without using official accounts or resources.[174] This could be particularly relevant for teachers, law enforcement officers, and other public employees whose social media activity has sometimes led to disciplinary action. While not all such speech would be protected, *Kennedy* suggests a more nuanced analysis that could favor employees in many cases.

---

[173] *See* Kathryn Foxhall & Israel Balderas, *In My Words: Unmasking Government Control Goes Beyond Supreme Court Social Media Case*, ELON UNIV. (Nov. 6, 2023), https://www.elon.edu/u/news/2023/11/06/in-my-words-unmasking-government-control-goes-beyond-supreme-court-social-media-case/; Kathryn Foxhall, *The Growing Culture of Censorship by PIO*, COLUM. JOURNALISM REV. (Aug. 3, 2022), https://www.cjr.org/criticism/public-information-officer-access-federal-agencies.php.

[174] *See e.g.* Lindke v. Freed, 601 U.S. 187 (2024) and O'Connor-Ratcliff v. Garnier, 601 U.S. 205 (2024); *see also* Lindke v. Freed *and Government Officials' Use of Social Media*, CONG. RSCH. SERV. (Apr. 9, 2024), https://crsreports.congress.gov/product/pdf/LSB/LSB11146 ("In March 2024, the Supreme Court issued a ruling in *Lindke* opining on when a government official's decision to block citizens from their social media accounts implicates the First Amendment. The case focuses on when an official should be treated as a government actor as opposed to a private actor. *Lindke* provides some guidance for public officials wondering when the Constitution restricts their ability to manage their online accounts, but it leaves open other questions relating to when a public official's account should be treated as a public forum. The decision also has broader implications for lawsuits alleging other types of constitutional violations.").

4. Workplace Protection

This broader application of *Kennedy*'s principles is also evident in *Beathard*, where the court protected a coach's expression of his viewpoint on a social justice issue. The court emphasized that "just because a student or other staff members can see one exercising their freedom of speech does not transform private speech into government speech," echoing *Kennedy*'s focus on the context-driven analysis of the speech rather than merely its visibility in the workplace.[175] These cases demonstrate *Kennedy*'s potential to protect various forms of expression by public employees on matters of public concern, from complaints about discriminatory practices to expressions of personal viewpoints on contentious social issues.

B. Raising the Bar: Heightened Scrutiny of Government Interests

Kennedy's skepticism towards the school district's Establishment Clause justification suggests that courts should demand stronger evidence of operational necessity before allowing restrictions on employee speech. This heightened scrutiny could manifest in several ways:

1. Showing the Receipts: Requiring Concrete Evidence of Disruption

Lower courts may require government employers to provide specific, factual evidence of how an employee's speech disrupts operations, rather than relying on speculative harms. This could involve documented declines in productivity or efficiency, concrete examples of workplace conflict directly attributable to the speech, and evidence of public confusion or loss of confidence in the agency's mission. For instance, a government office might need to show actual instances of disrupted meetings or services, rather than merely asserting that an employee's critical comments could hypothetically undermine morale.

2. Finding Middle Ground: Consideration of Less Restrictive Alternatives

Courts might also require government employers to demonstrate that they considered less speech-restrictive measures before taking adverse action against an employee. This could include, issuing clarifying statements to distinguish

[175] *Beathard,*, 620 F. Supp. 3d 775, 781 (C.D. Ill. 2022).

personal views from official policy, implementing internal dispute resolution procedures, or offering opportunities for constructive dialogue on contentious issues. A school district facing controversy over a teacher's off-duty political activism, for example, might need to show why a public disclaimer was insufficient before resorting to disciplinary action.[176]

3. The Public's Right To Know: Weighing Information Value in the Balance

Kennedy's reasoning suggests that courts should give greater weight to the public's interest in hearing from informed government insiders when balancing against employer interests. This could lead to more protection for speech that reveals potential misconduct or inefficiency in government operations, provides unique insights into the implementation of public policies, or contributes to debate on matters of significant public concern. For example, an environmental regulator speaking about enforcement challenges might receive stronger protection due to the public's interest in understanding how environmental laws are implemented.[177]

This principle of heightened scrutiny is already manifesting in post-*Kennedy* jurisprudence. In *Wood v. Florida Department of Education*, the court flatly rejected the state's argument that its interest in promoting a particular viewpoint on gender identity justified restricting a teacher's speech.[178] The court found that Florida failed to provide "no meaningful justification for the restriction on Ms. Wood's speech," noting that her self-expression "apparently had no effect on her ability to teach her students effectively and efficiently."[179] Rather than deferring to the employer's judgment, the court demanded

---

[176] *See* Rudy Miller, *Fired Allentown Teacher Who Went to D.C. on Jan. 6 Sues Over Free Speech Rights*, LEHIGH VALLEY LIVE (Oct. 13, 2022, 9:28 AM),https://www.lehighvalleylive.com/news/2022/10/fired-allentown-teacher-who-went-to-dc-on-jan-6-sues-over-free-speech-rights.html.

[177] *See Charvat v. E. Ohio Reg'l Wastewater Auth.*, 246 F.3d 607, 615-16 (6th Cir. 2001) (holding that environmental whistleblowers' speech receives First Amendment protection); see also Stephen M. Kohn Micheal D. Kohn, David K. Colapinto, & Matthew H. Sorensen, *Environmental Whistleblowers and the Eleventh Amendment: Employee Protection or State Immunity?*, 15 TUL. ENV'T L.J. 43, 77 (2001) ("Congress carefully crafted the environmental laws so that the whistleblower provisions would protect rights guaranteed under the First Amendment and would remedy states' abridgement of those rights with respect to their employees.").

[178] *See supra* text accompanying notes **Error! Bookmark not defined.**–**Error! Bookmark not defined.**.

[179] Wood v. Fla. Dep't of Educ., 729 F. Supp. 3d 1255, 1284 (N.D. Fla. 2024), *appeal docketed*, No. 24-11239 (11th Cir. Apr. 22, 2024).

concrete evidence of disruption or operational necessity—evidence Florida could not produce.

Similarly, in *Hayes v. Metropolitan Government of Nashville*,[180] the Sixth Circuit allowed a school administrator's retaliation claim to proceed where the evidence suggested her removal was motivated by complaints she had filed, rejecting the district's budget-based justification.[181] The court noted that multiple employees testified about "an atmosphere of retaliation," and a school-budgeting expert determined the reorganization didn't appear to be driven by budget concerns.[182] This skeptical approach to government justifications represents a significant shift from *Garcetti*'s tendency to defer to employer claims of efficient operations. While courts like the Fifth Circuit in *Washington v. Sunflower County* may still find some employee speech unprotected, the current trend shows courts requiring government employers to shoulder a heavier burden when justifying speech restrictions.

C. Unresolved Questions: The Road Ahead for Public Employee Speech

While *Kennedy* represents a potential expansion of public employee speech rights, several challenges and open questions remain:

1. When Are You "On the Clock"? Defining "Official Duties" in the Modern Workplace

As job responsibilities become increasingly fluid and employees often wear multiple hats, courts will face challenges in delineating the boundaries of "official duties" for First Amendment purposes. This may require a more flexible approach that considers, the employee's formal job description, actual day-to-day responsibilities, and the specific context in which the speech occurred. Courts may also have to get involved in content analysis and ask whether the speech was compelled or expected by the employer.[183]

---

[180] No. 23-5027/5075, 2023 WL 8628935 (6th Cir. Dec. 13, 2023).
[181] *See id.* at *5.
[182] *Id.*
[183] *See* Meriwether v. Hartop, 992 F.3d 492, 504-07 (6th Cir. 2021) ("[T]he academic-freedom exception to *Garcetti* covers all classroom speech related to matters of public concern, whether that speech is germane to the contents of the lecture or not. The need for the free exchange of ideas in the college classroom is unlike that in other public workplace settings. And a professor's in-class speech to his students is anything but speech by an ordinary government employee. Indeed, in the college classroom there are three critical interests at stake (all supporting robust speech

Lower courts are already grappling with these definitional challenges. The Fifth Circuit in *Washington*[184] found a county administrator's reporting of potential bid-rigging fell within his ordinary duties because, as outlined in the job description, "reporting the alleged misconduct was speech 'in the course of performing…Plaintiffs' official duties' and therefore unprotected."[185] In contrast, the court in *Beathard* found a coach's expression of his viewpoint on his office door was not within his job duties since decorating his door was not part of what he "was paid to perform."[186] These divergent outcomes highlight the need for clearer standards for determining when speech falls within an employee's official duties.

The growing body of *Kennedy*-inspired jurisprudence also raises questions about what constitutes "personal" expression in the workplace. In *Wood*, a district court found a teacher's use of her preferred pronouns was "personal" and outside her official duties because it "owed its existence not to her professional responsibilities as a math teacher, but instead to her identity as a woman."[187] This decision suggests courts may increasingly protect expressions of personal identity in the workplace, even when those expressions occur during work hours. Yet, as *Washington* shows, courts may still be reluctant to protect speech that has a closer nexus to job responsibilities. This tension will likely continue to shape public employee speech doctrine in the years ahead.

The most promising approach for courts applying *Kennedy* would be to focus on whether the expression in question impedes the actual performances of job duties or disrupts operations, not whether it merely relates to employment or occurs in the workplace. This approach would protect speech like Ms. Wood's use of personal pronouns or Coach Beathard's door poster, while still allowing reasonable restrictions when speech genuinely interferes with job performance or represents official government messaging. As Professor Emily Gold Waldman suggests, the key dividing line should be whether the

---

protection): (1) the students' interest in receiving informed opinion, (2) the professor's right to disseminate his own opinion, and (3) the public's interest in exposing our future leaders to different viewpoints.").

[184] No. 23-60072, 2024 WL 3510116 (5th Cir. July 23, 2024).

[185] *See id.* at *3.

[186] *Beathard*,, 620 F. Supp. 3d at781 (C.D. Ill. 2022) (quoting Garcetti v. Ceballos, 547 U.S. 410, 424 (2006)).

[187] Wood v. Fla. Dep't of Educ., 729 F. Supp. 3d 1255, 1279 (N.D. Fla. 2024), *appeal docketed*, No. 24-11239 (11th Cir. Apr. 22, 2024).

speech involves "the delivery of the educational program" itself rather than merely occurring in an education context.[188]

2. Who's Really Speaking? Reconciling Individual Rights with Government Messages

Kennedy's approach creates significant tension with established government speech doctrine that merits deeper exploration. In cases like *Garcetti*, the Court treated certain employee speech as government speech that could be controlled without First Amendment constraints. However, *Kennedy* appears to narrow this category substantially by focusing on whether speech is "ordinarily within the scope" of duties rather than merely job-related. This shift raises fundamental doctrinal questions.

Prior to *Kennedy*, the Court had developed a robust government speech doctrine in cases like *Pleasant Grove City v. Summum,* holding that "the Government's own speech… is exempt from First Amendment scrutiny."[189] Under this framework, when the government speaks, it can discriminate based on viewpoint and content to control its own message.[190] *Kennedy* complicates the government speech doctrine by potentially recategorizing much employee expression as private rather than governmental. Courts now face challenging questions: When exactly does an employee's speech become attributable to the government? As the Court pointed out in *Garcetti*, a government employer, like its private counterpart, needs to have "a significant degree of control" over the employee's words and actions to ensure proper execution of its functions.[191] But *Kennedy's* context-driven approach may blur this distinction, especially for employees in public-facing roles who may appear to speak for their institution while expressing personal views. How should courts handle "mixed speech" that

---

[188] Emily Gold Waldman, *From Garcetti to Kennedy: Teachers, Coaches, and Free Speech at Public Schools*, 11 BELMONT L. REV. 239, 242, 257-63 (2024). Professor Waldman's insightful framework provides a pragmatic way to distinguish between unprotected speech that directly constitutes the delivery of curriculum or coaching and protected speech that merely occurs in an educational setting but does not constitute the core educational function.

[189] 129 S. Ct. 1125, 1131 (2009) (quoting Johanns v. Livestock Marketing Ass'n, 544 U.S. 550, 553 (2005)).

[190] *See e.g.* Walker v. Texas Division, Sons of Confederate Veterans, Inc. 135 S. Ct. 2239, 2247 (2015) (The Court established factors for identifying government speech, including history of expression, public perception of speaker identity, and government control over the message.).

[191] 547 U.S. at 418.

contains both private and governmental elements? The Court's treatment of Coach Kennedy's prayer as private despite his visible public role suggests a significant recalibration that lower courts will need to navigate.[192]

3. Management's Prerogative vs. Employee Expression: Finding The Balance

While *Kennedy* suggests greater protection for employee speech, courts must still respect legitimate managerial needs. This may require developing more nuanced frameworks for assessing when speech truly undermines workplace harmony or efficiency; the extent to which employers can regulate off-duty speech that impacts job performance; and how to handle speech that reveals confidential information or undermines public trust.

As lower courts grapple with applying *Kennedy*, circuit splits may emerge on these and other issues, potentially requiring further Supreme Court clarification. The coming years will likely see significant litigation as the contours of this new approach to public employee speech are defined and refined through case law. We may see a reshaping of the landscape of public employee speech rights in the coming years. However, the full implications of *Kennedy* remain to be seen. The decision leaves open questions about how to define the boundaries of "official duties" and how to balance employee speech rights with the government's interest in avoiding Establishment Clause violations. It also raises questions about whether this more protective approach will extend to non-religious speech by public employees.

CONCLUSION

Kennedy v. Bremerton School District, though widely discussed for its treatment of religious expression and the Establishment Clause, contains within it the seeds of a significant recalibration of public employee speech doctrine. By moving away from *Garcetti's* rigid focus on official duties and towards a more nuanced, context-driven analysis, *Kennedy* opens the door for greater First Amendment protection of government workers' expression. This shift has the potential to enhance government

[192] See John Langford & Erica Newland, *Government Workers Cannot Be Fired for Their Political Views,* THE ATLANTIC (Feb. 15, 2025), https://www.theatlantic.com/ideas/archive/2025/02/employee-firing-first-amendment/681702/ (arguing that political loyalty tests for government employment violate the First Amendment and explaining how the Supreme Court has repeatedly rejected systems that condition public employment on political affiliation, creating a tension with *Kennedy's* context-driven approach to distinguishing private from governmental speech).

transparency, promote informed public debate, and safeguard individual liberty. However, it also raises challenging questions about the proper balance between employee rights and institutional needs in the public sector.

As courts navigate this evolving landscape, they must remain attuned to the vital role that public employee speech plays in our democratic system while respecting the government's legitimate interest in workplace management. While *Kennedy* represents a significant development in public employee speech doctrine, its impact may be constrained by its religious context. Some courts might distinguish *Kennedy* as primarily addressing religious expression rather than viewing it as a fundamental shift in public employee speech analysis. The Court's emphasis on Coach Kennedy's prayer as a form of personal religious expression could lead lower courts to limit the decision's reach to cases involving religious speech, rather than applying its context-driven approach to all forms of public employee expression.

Nevertheless, *Kennedy's* full impact remains to be seen, but it undoubtedly marks a noteworthy development in First Amendment jurisprudence. Scholars, advocates, and courts alike should pay close attention to how this decision reshapes the contours of protected expression for millions of government workers in the years to come.

A WOMAN'S RIGHT TO KNOW, BUT NOT TO CHOOSE: REVISITING HB854 IN THE WAKE OF *DOBBS* AND *NIFLA*

Anne S. Orndorff*

INTRODUCTION

In the 2024 election, ten states voted on ballot measures to protect abortion and other reproductive rights.[1] These measures came in response to the onslaught of post-*Dobbs*[2] restrictions on abortion, including, in some states, total bans or six-week bans.[3] The abortion protection measures passed in seven of those ten states, marked the shifting public opinion toward protection of abortion since *Dobbs*.[4] Although public opinion appears to favor reproductive rights, the future of abortion access remains uncertain. With formal abortion protection measures passing in several states, anti-abortion advocates and lawmakers are pursuing new strategies to make abortion more difficult to access. These strategies may come in the form of parental consent requirements for minors, increased waiting periods, or, the focus of this Note, informed consent requirements.

Informed consent poses a unique threat to abortion access because of its long-standing role as a legal and ethical mechanism through which patients are properly given information about risks, benefits, and alternatives of a procedure and become able to make a voluntary decision about whether to undergo that procedure.[5] It is a central part of patient safety and "patient-centered medicine," which is perhaps why unsuspecting abortion-seeking patients may be surprised when presented with mechanical state-mandated scripts and extensive consent forms that seem to impose certain ideological assumptions.[6]

In the background of the recent abortion debates stemming from the Supreme Court's 2022 overturning of *Roe v.*

---

* J.D. Candidate, University of North Carolina School of Law, 2026.

[1] Isabel Guarnieri & Krystal Leaphart, *Abortion Rights Ballot Measures Win in 7 out of 10 US States*, GUTTMACHER (Nov. 6, 2024), https://www.guttmacher.org/2024/11/abortion-rights-state-ballot-measures-2024.

[2] Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 215 (2022).

[3] *See id.*

[4] *See id.*

[5] *See* Parth Shah, Imani Thornton, Nancy L. Kopitnik, & John E. Hipskind, *Informed Consent*, NAT'L LIBR. OF MED. (Nov. 24, 2024), https://www.ncbi.nlm.nih.gov/books/NBK430827.

[6] Beth A. Ripley, David Tiffany, Lisa S. Lehmann, & Stuart G. Silverman, *Improving the Informed Consent Conversation: A Standardized Checklist that Is Patient Centered, Quality Driven, and Legally Sound*, 26 J. VASCULAR & INTERVENTIONAL RADIOLOGY 1639, 1639 (2015).

Wade[7] and *Planned Parenthood v. Casey*[8] has been a separate, but related debate over abortion informed consent. What distinguishes abortion informed consent from traditional abortion jurisprudence is its entanglement with the First Amendment and its implications for physicians' free speech. Some scholars have claimed that "the dispute[s] over speech [are] a surrogate for a larger political and legal battle over abortion rights."[9] This was true before *Dobbs* and is perhaps even more true after *Dobbs* as anti-abortion advocates and legislators double down on their commitment to decrease abortions across the states.

This Note will examine the historical context that gave rise to some of the most stringent abortion informed consent laws and how courts across the country have varied in their responses to constitutional challenges against these laws, creating a still unresolved circuit split. With a specific focus on *Stuart v. Camnitz* out of the Fourth Circuit, a challenge to North Carolina's HB854, this Note considers the implications of two recent Supreme Court cases which have changed how abortion-informed-consent laws are analyzed: *National Institute of Family and Life Advocates v. Becerra*[10] and *Dobbs v. Jackson Women's Health Organization*.[11] With the overturning of *Casey*, the Fourth Circuit's approach to HB854 is the only approach left standing; yet it features many of its own flaws.

I. ABORTION INFORMED CONSENT

A. Factual Background

Prior to the enactment of HB854, The Woman's Right to Know Act ("the Act"), abortion informed consent across North Carolina was in line with informed consent required for other types of procedures. Pre-HB854, physicians in North Carolina "were informing each patient about the nature of the abortion procedure, its risks and benefits, and the alternatives available to the patient and their respective risks and benefits and counseling the patient to ensure that she was certain about her decision to

---

[7] 410 U.S. 113 (1973).
[8] 505 U.S. 833 (1992).
[9] Clay Calvert, *Is Everything a Full-Blown First Amendment Case After* Becerra *and* Janus*? Sorting out Standards of Scrutiny and Untangling "Speech as Speech" Cases from Disputes Incidentally Affecting Expression*, MICH. ST. L. REV. 73, 122 (2019).
[10] 585 U.S. 755 (2018) [hereinafter *NIFLA*].
[11] 597 U.S. 215 (2022).

have an abortion."[12] General informed consent requirements before HB854 were meant to ensure that:

> A reasonable person, from the information provided by the health care provider under the circumstances, would have a general understanding of the procedures or treatments and of the usual and most frequent risks and hazards inherent in the proposed procedures or treatments which are recognized and followed by other health care providers engaged in the same field of practice in the same or similar communities.[13]

This standard is still used for most surgical procedures. Generally, "[i]n the medical context, the state may require the provision of information sufficient for patients to give their informed consent to medical procedures."[14] Quoting a concurrence from the Supreme Court, the *Stuart* opinion affirms that "the power of government to regulate the professions is not lost whenever the practice of a profession entails speech."[15] Thus, the foundation for the regulation of informed consent is long-established in both state law and Supreme Court jurisprudence and can be done without violating the free speech rights of physicians.

B. The Rise of "Abortion Exceptionalism"

The distinction of abortion informed consent requirements from general informed consent requirements arose around 2010. Ian Vandewalker, of the Brennan Center for Justice at New York University School of Law, describes this phenomenon as "abortion exceptionalism," defined as "the anti-abortion legislator's strategy to decrease the number of abortions by placing onerous regulations on abortion where similar procedures are unregulated, making abortions more difficult and more expensive to provide."[16] The "abortion exceptionalism" movement coincided with an increase in abortion-restrictive legislation across the states. In 2011, for example, more abortion restrictions were passed than in any year since *Roe* established the constitutional right to privacy protecting abortion access in

[12] Stuart v. Camnitz, 774 F.3d 238, 244 (4th Cir. 2014).
[13] N.C. GEN. STAT. ANN. § 90-21.13(a)(2) (West 2018).
[14] *Stuart*, 774 F.3d at 247.
[15] *Id.* (quoting Lowe v. SEC, 472 U.S. 181, 228 (1985) (White, J., concurring)).
[16] Ian Vandewalker, *Abortion and Informed Consent: How Biased Counseling Laws Mandate Violations of Medical Ethics*, 19 MICH. J. GENDER & L. 1, 6 (2012).

1973.[17] Across the country in 2011, legislators introduced more than 1,100 reproductive health and rights related provisions, with 135 of these provisions being enacted across 36 states.[18] Five states adopted provisions mandating pre-abortion ultrasounds.[19] The two most stringent of these were enacted in North Carolina and Texas; North Carolina's was later enjoined by a federal district court.[20] As of 2012, over half of the states had laws that specifically regulated the informed consent process for abortion.[21] These laws not only featured real-time display requirements, but in several states, they also required women seeking abortions to obtain counseling that included false information about the procedure.[22]

Abortion-informed-consent requirements took vastly different forms from state to state. For example, laws in Alaska, Oklahoma, Texas, and North Dakota required a discussion of the possible link between abortion and breast cancer, either through written materials or physical counseling.[23] Other states, like Missouri, included within their counseling laws a requirement that the patient be warned of the possibility that abortion may cause physical pain to the unborn child.[24] A Kansas law required that each patient be informed by their healthcare provider that "the abortion will terminate the life of a whole, separate, unique, living human being," a statement which is at best misleading, and at worst, a widely contested ideological presumption.[25] In response to these laws, lawsuits sprung up across the country challenging their constitutionality.

---

[17] *Id.*
[18] *Laws Affecting Reproductive Health and Rights: 2011 State Policy Review*, GUTTMACHER (Jan. 1, 2012), https://www.guttmacher.org/laws-affecting-reproductive-health-and-rights-2011-state-policy-review [hereinafter *2011 State Abortion Policy Overview*].
[19] *Id.*
[20] *Id.*
[21] Vandewalker, *supra* note 17, at 13.
[22] *2011 State Abortion Policy Overview*, *supra* note 19.
[23] Vandewalker, *supra* note 17, at 18.
[24] *Id.* at 21.
[25] *2011 Mid-Year Legislative Wrap Up*, CTR. FOR REPROD. RTS., https://www.reproductiverights.org/sites/default/files/documents/state_midyr_wrapup_2011_8.10.11.pdf (last visited Jan. 22, 2025); *see America's Abortion Quandary,* PEW RESEARCH CENTER (May 6, 2022), https://www.pewresearch.org/religion/2022/05/06/americas-abortion-quandary/#:~:text=Among%20Americans%20overall%2C%20most%20people,very%20well%2C%20or%20somewhat%20well.

C. The Act

In North Carolina, abortion-informed-consent requirements came in the form of the Woman's Right to Know Act, which was originally passed "to require a twenty-four-hour waiting period and the informed consent of a pregnant woman before an abortion may be performed."[26] Although the Act contained many novel provisions, this Note will focus primarily on § 90-21.85, the display of real-time view requirement ("the Requirement").[27]

The Requirement mirrored speech-and-display provisions passed by several other states between 2010 and 2011. The first of such provisions was passed in Texas's Woman's Right to Know Act. The Requirement provided that, except in the case of a medical emergency,[28] the physician who is to perform the abortion or a qualified technician working in conjunction with the physician shall:

> (1) Perform an obstetric real-time view of the unborn child on the pregnant woman.
> (2) Provide a simultaneous explanation of what the display is depicting, which shall include the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted. The individual performing the display shall offer the pregnant woman the opportunity to hear the fetal heart tone. The image and auscultation of fetal heart tone shall be of quality consistent with the standard medical practice in the community. If the image indicates that fetal demise has occurred, a woman shall be informed of that fact.
> (3) Display the images so that the pregnant woman may view them.
> (4) Provide a medical description of the images, which shall include the dimensions of the embryo or fetus

[26] H.B. 854, 2011 Gen. Assemb., 2011–2012 Session (N.C. 2011).
[27] *See id.*
[28] The North Carolina statute defines a "medical emergency" as including only imminent physical emergencies. *See id.* Citing to Casey's proposition that "psychological well-being is a facet of health," one author notes that "[t]he lack of a psychological medical emergency provision to the speech-and-display requirements . . . fails to recognize that the requirements themselves may cause psychological harm." Danielle C. Le Jeune, *An "Exception"-ally Difficult Situation: Do the Exceptions, or Lack Thereof, to the "Speech-and-Display" Requirements" for Abortion Invalidate Their Use as Informed Consent?*, 30 GA. ST. U. L. REV. 521, 551 (2014).

> and the presence of external members and internal organs, if present and viewable.[29]

In other words, physicians were required to "display and describe the image during the ultrasound, even if the woman actively 'avert[ed] her eyes' and 'refus[ed] to hear.'"[30]

There was substantial opposition to HB854 as it progressed through North Carolina's General Assembly. The most notable criticism came in the form of Governor Beverly Perdue's Objections and Veto message from June 2011, which characterized the Act as a "dangerous intrusion into the confidential relationship that exists between women and their doctors."[31] Governor Perdue added that "[p]hysicians must be free to advise and treat their patients based on their medical knowledge and expertise and not have their advice overridden by elected officials seeking to impose their own ideological agenda on others."[32]

Additionally, Women of the House Democratic Caucus denounced the Act publicly during a May 2011 press conference for a host of reasons, including First Amendment concerns.[33] One member of the caucus expressed concern that the Act "overlook[ed] the diversity of women who seek abortions and their reasons for doing so," concluding that the Act was "discriminatory."[34] Another speaker at the press conference captured the essence of the opposition to HB845, warning that the bill makes "dangerous assumptions," including an assumption that "one size fits all . . . when it comes to women's healthcare."[35] There is no denying that the opportunity to hear a fetal heartbeat and view a sonogram, particularly in the midst of a challenging, and, in many cases, devastating, decision-making process offers immense value to many patients, but the Women of the House Democratic Caucus accurately pointed out that this is not the case for every woman seeking an abortion.

The primary opposition to HB854, later echoed by the Fourth Circuit, centered on the lack of discretion afforded to

---

[29] H.B. 854, *supra* note 27.
[30] Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014) (citing N.C. GEN. STAT § 90-21.85(b)).
[31] Governor Beverly Perdue, *Governor's Objections and Veto Message*, (June 27, 2011), https://static.votesmart.org/static/vetotext/35827.pdf.
[32] *Id.*
[33] *See* Laura Leslie, *House Dem Women Speak Out on Abortion Rights*, WRAL NEWS (May 17, 2011, 8:46 PM), https://www.wral.com/story/9609571.
[34] *Id.* (quoting Representative Alma Adams).
[35] *Id.* (quoting Representative Tricia Cotha).

physicians to make a case-by-case determination regarding whether an individual patient should be required to view a sonogram and hear a simultaneous, detailed description of the fetus when doing so may substantially harm that patient. Speakers at the press conference also criticized the nearly twenty-minute script required to be read to patients by their provider under the Bill, highlighting the potential need for a more individually tailored script depending on the patient's individual circumstances. The Women of the House Democratic Caucus concluded their remarks by stating that "this Bill is bad for women . . . families . . . doctors . . . [and] healthcare."[36] Despite Governor Perdue's First Amendment warning and substantial opposition by the Democratic Caucus, the General Assembly overrode the gubernatorial veto in July of 2011 and the law went into effect in October 2011.[37]

II. ABORTION INFORMED CONSENT

Although *Planned Parenthood of Southeastern Pennsylvania v. Casey*[38] was the primary precedent in abortion informed consent cases leading up to *Stuart*, two cases before *Casey* dealt with the question of informed consent in the context of abortion: *City of Akron v. Akron Center for Reproduction Health, Inc.*[39] and *Thornburgh v. American College of Obstetricians and Gynecologists*.[40] One of the central holdings from *City of Akron* was that, despite a state's interest in protecting a pregnant woman's health, the state does not have "unreviewable authority to decide what information a woman must be given before she chooses to have an abortion. A state may not adopt regulations designed to influence the woman's informed choice between abortion or childbirth."[41] In *City of Akron*, the Court considered the following provision from the city's ordinance:

> [I]n order to insure that the consent for an abortion is truly informed consent, the woman must be "orally informed by her attending physician" of the status of her

[36] *Id.*
[37] *See* Richa Venkatraman, *Woman's Right to Know Act in North Carolina (2011)*, EMBRYO PROJECT ENCYCLOPEDIA (July 29, 2021), https://embryo.asu.edu/pages/womans-right-know-act-north-carolina-2011.
[38] 505 U.S. 833 (1992).
[39] 462 U.S. 416 (1983).
[40] 476 U.S. 747 (1986). *See* Kimberley Harris, *Ultra-Compelled: Abortion Providers' Free Speech Rights After* NIFLA, 85 ALB. L. REV. 97, 112–13 (2022).
[41] *City of Akron*, 462 U.S. at 417.

> pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth.[42]

The Court took specific issue with subsection three of the ordinance, which required abortion providers to inform their patients that "the unborn child is a human life from the moment of conception," which was inconsistent with the Court's holding in *Roe v. Wade* which held that a state may not adopt one theory of when life begins to justify its regulation of abortions.[43] The Court also took issue with subsection five, which it characterized as a "'parade of horribles' intended to suggest that abortion is a particularly dangerous procedure," despite complication rates from abortion being "extremely low."[44] Ultimately, the Court affirmed the court of appeals' determination that the provision was unconstitutional. The Court determined that the City of Akron went "far beyond merely describing the general subject matter relevant to informed consent," but instead, "placed 'obstacles in the path of the doctor upon whom [the woman] is entitled to rely for advice in connection with her decision.'"[45] *Thornburgh* subsequently upheld the *City of Akron* decision, affirming the Supreme Court's position on abortion informed consent provisions as they intersect with the First Amendment.[46]

Then, in 1992, the Supreme Court overruled both *City of Akron* and *Thornburgh* with its decision in *Casey*.[47] Until the recent *Dobbs* decision, *Casey* was the "gold standard" of abortion informed consent precedent and was subsequently relied upon by the Fifth and Eighth Circuits in their own considerations of informed consent provisions. *Casey* held that there was "no

---

[42] *Id.* at 442 (internal citations omitted).
[43] 404 U.S. 113, 153–54 (1973).
[44] *Id.* at 444. *See also* AM. COLL. OBSTETRICIANS & GYNECOLOGISTS, *Abortion Access Fact Sheet*, https://www.acog.org/advocacy/abortion-is-essential/come-prepared/abortion-access-fact-sheet ("Only about 2% of women who undergo abortion experience a complication associated with the abortion, and most complications are minor and easily treatable with follow-up procedures or antibiotics."); Ushma Upadhyay et al., *Incidence of Emergency Department Visits and Complications After Abortion*, NAT'L LIBR. OF MED. (Jan. 2015), https://pubmed.ncbi.nlm.nih.gov/25560122/#full-view-affiliation-1.
[45] *Id.* at 445 (citation omitted).
[46] *See* Thornburg v. Am. Coll. of Obstetricians and Gynecologists, 476 U.S. 747, 759 (1986).
[47] 505 U.S. 833, 870 (1992).

evidence . . . that requiring a doctor to give the required information would amount to a substantial obstacle to a woman seeking an abortion."[48] Indeed, the Court determined that the informed consent requirements in question furthered the "State's interest in preserving unborn life."[49] Additionally, and perhaps most famously, the Court noted that the fact that "such information might create some uncertainty and persuade some women to forgo abortions only demonstrates that it might make a difference and is therefore relevant to a woman's informed choice."[50] Although *Casey* is widely known for upholding *Roe*, its undue burden standard has done little to deter lawmakers from promulgating stringent regulations of informed consent. This is especially clear in the Eighth and Fifth Circuit Court's considerations of abortion informed consent in *Planned Parenthood v. Rounds*[51] and *Texas Medical Providers Performing Abortion Services v. Lakey*.[52]

In *Rounds*, the Governor and Attorney General of South Dakota appealed a district court's permanent injunction barring enforcement of a South Dakota informed consent statute which required disclosure to patients seeking abortions of "an 'increased risk of suicide ideation and suicide.'"[53] Planned Parenthood sued South Dakota on the grounds that several of the provisions of the informed consent statute "constituted an undue burden on abortion rights and facially violated patients' and physicians' free speech rights."[54] The Eighth Circuit determined that,

> [W]ith respect to First Amendment concerns, "while the State cannot compel an individual simply to speak the State's ideological message, it can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion, even if that information might also encourage the patient to choose childbirth over abortion."[55]

---

[48] *Id.* at 838.
[49] *Id.* at 840.
[50] *Id.*
[51] 686 F.3d 889 (8th Cir. 2012).
[52] 667 F.3d 570 (5th Cir. 2012).
[53] *Id.* at 892 (citation omitted).
[54] *Id.*
[55] *Id.* at 893 (citation omitted).

In analyzing the aforementioned provision, the Court determined that for Planned Parenthood's claim to succeed, it "must show that the disclosure at issue 'is either untruthful, misleading or not relevant to the patient's decision to have an abortion.'"[56] In short, the Court held that the disclosure required under the South Dakota statute at issue was truthful, "non-misleading and relevant to the patient's decision to have an abortion, as required by *Casey*."[57] The appellate court ultimately reversed the district court's grant of summary judgment to Planned Parenthood and vacated the permanent injunction against the enforcement of the suicide risk provision.[58]

In *Lakey*, physicians and abortion providers collectively representing all similarly situated Texas Medical Providers Performing Abortion Services ("TMPPAS") sued Texas state officials under 42 U.S.C. § 1983 for declaratory and injunctive relief against alleged constitutional violations resulting from the newly-enacted Texas House Bill 15 ("HB15") "relating to informed consent to an abortion."[59] HB15 required a

> [P]hysician "who is to perform an abortion" to perform and display a sonogram of the fetus, make audible the heart auscultation of the fetus for the woman to hear, and explain to her the results of each procedure and to wait 24 hours, in most cases, between these disclosures and performing the abortion.[60]

HB15 further stated that, "[a] woman may decline to view the images or hear the heartbeat[,] but she may decline to receive an explanation of the sonogram images only on certification that her pregnancy falls into one of the three statutory exceptions."[61] These statutory exceptions applied only to women whose pregnancies were: (1) the result of a sexual assault or incest, (2) minors, and (3) when the fetus has an irreversible medical condition or abnormality.[62]

The appellees in *Lakey* contended that the information required to be disclosed by the physician under HB15 was "the

---

[56] *Id.* (citation omitted).
[57] *Id.* at 905.
[58] *Id.* at 906.
[59] Tex. Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 572 (5th Cir. 2012).
[60] *Id.* at 573 (citation omitted).
[61] *Id.* (citation omitted).
[62] TEX. HEALTH & SAFETY CODE ANN. § 171.0122(d) (West 2011).

state's 'ideological message' concerning the fetal life that serves no medical purpose, and indeed no other purpose than to discourage the abortion."[63] The court in analyzing the claim in this case relied primarily on the Supreme Court's holding in *Casey*.[64] In particular, the court emphasized the *Casey* assertion that "States may further the 'legitimate goal of protecting the life of the unborn' through 'legislation aimed at ensuring a decision that is mature and informed, even when in doing so the State expresses a preference for childbirth over abortion.'"[65] The *Lakey* opinion determined that the plurality's response to the compelled speech claim in *Casey* was "clearly not a strict scrutiny analysis . . . inquir[ing] into neither compelling interests nor narrow tailoring."[66] *Lakey* presented three key holdings:

> First, informed consent laws that do not impose an undue burden on the woman's right to have an abortion are permissible if they require truthful, non-misleading, and relevant disclosures. Second, such laws are part of the state's reasonable regulation of medical practice and do not fall under the rubric of compelling "ideological" speech that triggers First Amendment strict scrutiny. Third, "relevant" informed consent may entail not only the physical and psychological risks to the expectant mother facing this "difficult moral decision," but also the state's legitimate interests in "protecting the potential life within her."[67]

Although the state in *Lakey* relied heavily on the *Casey* undue burden standard to legitimize its claim, one scholar argues that the language of the *Casey* "holding leaves room to question whether the Court also applied the undue burden standard to the statute's informed consent requirements."[68] Under such a reading, it remains unclear whether the fact that the Court upheld the informed consent provision at issue in *Casey* "permanently separated abortion regulations from First

---

[63] *Lakey*, 667 F.3d at 574.
[64] *See id.* at 574–80.
[65] *Id.* at 575 (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992)).
[66] *Id.*
[67] *Id.* at 576 (citation omitted).
[68] Claire O'Brien, Casey*,* Camnitz*, and Compelled Speech: Why the Fourth Circuit's Interpretation of* Casey *Sets the Right Standard for Speech-and-Display Provisions*, 94 N.C. L. REV. 1036, 1045 (2016).

Amendment jurisprudence."[69] The Fourth Circuit has taken an entirely different approach to this issue than the Fifth and Eighth Circuits, giving rise to a substantial circuit split which has yet to be settled by the Supreme Court.

III. *STUART V. CAMNITZ*: THE FOURTH CIRCUIT APPROACH

A. Factual Background and Procedural History

In 2011, a group of physicians and abortion providers brought a complaint against several defendants, most notably the President of the North Carolina Medical Board ("NCMB"), the North Carolina Attorney General, and the Secretary of the North Carolina Department of Health and Human Services. The action alleged that the Requirement provision of the Act violated physicians' free speech rights by requiring them to describe the details of the fetus[70] to a woman seeking an abortion while simultaneously performing an ultrasound and displaying the sonogram to the woman. The lower court entered summary judgment in favor of the physicians and abortion providers and entered a permanent injunction to halt enforcement of § 90—21.85 of the Woman's Right to Know Act. The defendants appealed to the Fourth Circuit. The court of appeals, after an extensive First Amendment analysis, agreed with the district court, reasoning that "[w]hile the state itself may promote through various means childbirth over abortion, it may not coerce doctors into voicing that message on behalf of the state in the particular manner and setting attempted" via the Requirement.[71]

The Requirement represented a unique intersection between ideological content-based speech and commercial speech, posing a particularly complex First Amendment issue to the court.[72] This dichotomy exists because, according to First Amendment precedent, "regulations that discriminate against speech based on its content 'are presumptively invalid,'" while "commercial speech and professional conduct [regulations] typically receive a lower level of review."[73] In *Stuart*, the physician plaintiffs argued for strict scrutiny to apply to the Act's

---

[69] *Id.* at 1043.
[70] *See* Stuart v. Camnitz, 774 F.3d 238, 243 (4th Cir. 2014) ("[I]ncluding the presence, location, and dimensions of the unborn child within the uterus and the number of unborn children depicted." (quoting N.C. GEN. STAT. ANN. § 90-21.85(a)(2) (West 2011))).
[71] *Id.* at 256.
[72] *See id.* at 244.
[73] *Id.* (citations omitted).

Requirement on the ground that "it is content-based and ideological."[74] The state officials, on the other hand, urged the court to treat the Requirement as a "regulation of the medical profession in the context of abortion and thus subject only to rational basis review."[75] The Fourth Circuit agreed with the lower court "that the Requirement is a content-based regulation of a medical professional's speech which must satisfy at least intermediate scrutiny to survive."[76]

Additionally, the court determined that a regulation compelling speech, such as the Requirement at issue, is "by its very nature content-based, because it requires the speaker to change the content of his speech or even to say something where he would otherwise be silent."[77] As noted by the court in *Stuart*, the reason compelled speech is particularly suspect is because it may inhibit a listener from discerning which message is the state's and which message is the speaker's, "especially where the 'speaker is intimately connected with the communication advanced,'"[78] as is the case between doctors and patients.

Having established that the regulation both compelled speech and was content-based, the court turned to the state's contention "that the Requirement is merely a regulation of the practice of medicine that need only satisfy rational basis review."[79] In this analysis, the court first acknowledged the State's general authority to require informed consent to medical procedures, its authority to impose licensing qualifications on the medical profession, and to "oblige the payment of dues to a professional organization for purposes such as 'disciplining members' and 'proposing ethical codes.'"[80] However, the court (referencing *Casey*) noted that the state's ability to regulate the medical profession in some capacity "does not mean that individuals simply abandon their First Amendment rights when they commence practicing a profession."[81] The court noted its duty "[w]ith all forms of compelled speech" to "look to the context of the regulation to determine when the state's regulatory authority has extended too far."[82]

---

[74] *Id.* at 245.
[75] *Id.*
[76] *Id.*
[77] *Id.* at 246.
[78] *Id.* (quoting Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Bos., 515 U.S. 557, 576 (1995)).
[79] *Id.* at 246–47.
[80] *Id.* at 247 (citation omitted).
[81] *Id.*
[82] *Id.*

B. Disagreement with the Fifth and Eighth Circuits

The Fourth Circuit distinguished the informed consent requirements challenged in *Casey* from the requirements of the Act, noting that the former "deviate[ed] only modestly from traditional informed consent" requirements.[83] However, the Requirement at issue in *Stuart* extended "beyond the modified form of informed consent that the Court approved in *Casey*."[84] The court specifically took issue with the failure of the Act's Requirement to include a "therapeutic privilege exception," which would "permit[] physicians to decline or at least wait to convey relevant information as part of informed consent because in their professional judgment delivering the information to the patient at a particular time would result in serious psychological or physical harm."[85] What really distinguished the Fourth Circuit's position in *Stuart* from the Fifth and Eighth Circuit holdings in *Rounds* and *Lakey* was its application (or lack thereof) of the *Casey* undue-burden standard. The Fourth Circuit was aware of its departure from the Fifth and Eighth Circuit's reasoning, noting, "[i]nsofar as our decision on the applicable standard of review differs from the positions taken by the Fifth and Eighth Circuits in cases examining the constitutionality of abortion regulations under the First Amendment, we respectfully disagree."[86]

The *Stuart* majority criticized the *Rounds* and *Lakey* majorities for their reliance on a single paragraph in *Casey*:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.[87]

While the *Lakey* court held that laws requiring "truthful, nonmisleading, and relevant disclosures do not fall under the

---

[83] *Id.* at 252–53 ("The information the physician had to convey orally in *Casey* was no more than a slight modification of traditional informed consent disclosures.").
[84] *Id.* at 252.
[85] *Id.* at 254.
[86] *Id.* at 248.
[87] *Id.* (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 882 (1992)).

rubric of compelling 'ideological' speech that triggers First Amendment strict scrutiny," and that requiring physicians to provide state-mandated information presented no constitutional concerns,[88] the court in *Stuart* countered that "[t]he single paragraph in *Casey* does not assert that physicians forfeit their First Amendment rights in the procedures surrounding abortions, nor does it announce the proper level of scrutiny to be applied to abortion regulations that compel speech to the extraordinary extent present here."[89]

"The Fourth Circuit focused on the lack of any clear declaration by the *Casey* Court that the undue burden standard should displace First Amendment analysis for speech challenges in the abortion context."[90] This disagreement will be particularly important when considering the effects of the recent *NIFLA* and *Dobbs* decisions. Ultimately, the Fourth Circuit applied what it believed was a more traditional analysis of the speech-and-display requirement, abandoning the *Casey*-undue-burden standard and instead using intermediate scrutiny to determine whether the provision was constitutional from a First Amendment perspective.

C. The Court's Analysis in Stuart

When applying intermediate scrutiny in the speech context, a court will consider whether the state has demonstrated that the statute in question advances a substantial government interest and that the measures taken to advance that interest are "proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message."[91] Additionally, the court must consider how the regulation affects the intended recipient of the speech—an inquiry worth paying particular attention to in the context of informed consent.[92] Courts across the country, including the Supreme Court, have continually recognized that the protection of fetal life, along with ensuring the health and well-being of the pregnant woman, are substantial government interests.[93]

---

[88] *Id.* at 249.
[89] *Id.*
[90] O'Brien, *supra* note 69, at 1050.
[91] *Stuart*, 774 F.3d at 250 (quoting Sorrell v. IMS Health, Inc., 564 U.S. 552, 572 (2011)).
[92] *See id.* ("The court can and should take into account the effect of the regulation on the intended recipient of the compelled speech, especially where she is a captive listener.").
[93] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 163 (1973).

Once a substantial government interest has been established, the court turns to whether the means used to promote that interest "directly advance the interest without impeding too greatly on individual liberty interests or competing state concerns."[94] In *Stuart*, the court determined that the means employed by the Requirement were "far-reaching—almost unprecedentedly so—in a number of respects," in that they interfered with a physician's First Amendment rights "while simultaneously threatening harm to the patient's psychological health, interfering with the physician's professional judgment, and compromising the doctor-patient relationship."[95] While the state's interest in protecting fetal life is indeed legitimate, the Fourth Circuit held in *Stuart* that the state's "commandeer[ing] [of] the doctor-patient relationship to compel a physician to express [the state's] preference to the patient" via the Requirement at issue was not an appropriate means through which to achieve that legitimate government interest.[96] The court concluded its analysis in *Stuart* by aptly stating that "[t]hough the state is plainly free to express [] a preference for childbirth to women, it is not the function of informed consent to require a physician to deliver the state's preference in a setting [] fraught with stress and anxiety."[97]

Although the *Stuart* court determined that a traditional First Amendment analysis was appropriate, it used a sliding scale approach whereby "[w]hen the First Amendment rights of a professional are at stake, the stringency of review thus slides 'along a continuum' from 'public dialogue' on one end to 'regulation of professional *conduct*' on the other."[98] Ultimately, the court determined that the Requirement "reside[d] somewhere in the middle of that sliding scale."[99] Given that the provision also constituted ideological speech,[100] the confluence of all of the factors at play pointed toward applying "a

---

[94] *Stuart*, 774 F.3d at 250.
[95] *Id.*
[96] *Id.* at 253.
[97] *Id.* at 255.
[98] *Id.* at 248 (quoting Pickup v. Brown, 740 F.3d 1208, 1227, 1229 (9th Cir. 2013) (emphasis in original)).
[99] *Id.*
[100] *See id.* at 246 ("The Requirement is quintessential compelled speech. It forces physicians to say things they otherwise would not say. Moreover, the statement compelled here is ideological; it conveys a particular opinion. The state freely admits that the purpose and anticipated effect of the Display of Real-Time View Requirement is to convince women seeking abortions to change their minds or reassess their decisions.").

heightened intermediate scrutiny standard used in certain commercial speech cases."[101] The Fourth Circuit faced a daunting task in deciding *Stuart*, and ultimately, although the decision rejected the *Casey* undue-burden standard in the context of abortion informed consent, it simultaneously stood "firmly within the bounds of the *Casey* decision."[102] Wary of the decision's implications, the *Stuart* court was careful not to contradict the underlying goal of *Casey*: continuing access to abortion for women without undue hardship. This difficult conundrum resulted in a shaky First Amendment analysis.

IV. WHERE DOES THAT LEAVE US?

With informed consent falling into a unique intersection of abortion and First Amendment jurisprudence, it is unclear how the recent *Dobbs* decision will impact First Amendment challenges to state-mandated informed consent requirements. At this point, there exists a circuit split over whether to apply the undue burden standard from *Casey*, as done by the Fifth and Eighth Circuits, or to employ a traditional First Amendment analysis as was the method in *Stuart*.[103] The Supreme Court denied certiorari on appeals from both the Fifth and the Fourth circuits, so it is difficult to predict where it would land on the issue of state-mandated informed consent.

Many scholars have criticized the Fifth and Eighth Circuit approaches to abortion informed consent, arguing that they have "disallowed independent First Amendment analysis of physicians' compelled speech claims by collapsing free speech analysis into the undue burden test."[104] These same scholars argue that the *Casey* undue-burden standard does not foreclose physicians' First Amendment challenges to informed consent laws, because the "truthful, not misleading, and relevant requirement is a condition on the constitutionality of disclosure laws under the Fourteenth Amendment's 'undue burden' standard, rather than a condition of the First Amendment."[105] The disagreement between the Fourth Circuit and the Fifth and Eighth Circuits, along with the Supreme Court's continued denial of certiorari on abortion informed consent cases has

---

[101] *Id.* at 248.
[102] O'Brien, *supra* note 69, at 1038.
[103] *See* Harris, *supra* note 41, at 101–02, 106, 108, 110, 157–58.
[104] Maia Dunlap, *Challenging Abortion Informed Consent Regulations Through the First Amendment: The Case for Protecting Physicians' Speech*, 2019 UNIV. CHI. LEGAL F. 443, 456.
[105] *Id.* at 456–57.

resulted in uncertainty over which standard of review to apply moving forward. Some scholars have proposed that abortion-informed-consent requirements be subject to intermediate scrutiny to alleviate the tension between varying levels of scrutiny applicable to content-based restrictions and compelled speech, respectively, given that content-based restrictions on speech are generally assessed under strict scrutiny while compelled speech is generally subject to rational basis review.[106] However, this approach is not representative of the Supreme Court's most recent and relevant First Amendment analysis.

A. NIFLA *Offers a Potential Path Forward for Abortion Informed Consent Jurisprudence*

Although many scholars argue that the Supreme Court's 2018 decision in *NIFLA* offered a path forward for abortion-informed-consent jurisprudence, it is unclear whether the Court would apply the analysis it crafted in *NIFLA* to the abortion-informed-consent context. However, the *NIFLA* First Amendment analysis may become particularly useful in the wake of *Dobbs*. *NIFLA*, at the very least, provides a useful lens through which to view the Court's stance on First Amendment jurisprudence as it affects abortion providers.

At issue in *NIFLA* was a California law that required clinics providing abortion services to display certain notices to the public. Under the California FACT Act, "[l]icensed clinics [that primarily serve pregnant women] must notify [them] that California provides free or low-cost services, including abortions, and give them a phone number to call. [And] [u]nlicensed clinics must notify women that California has not licensed the clinics to provide medical services."[107] The stated purpose of these requirements by the state of California was, "to ensure that pregnant women know when they are receiving healthcare from licensed professionals."[108]

The Ninth Circuit upheld the requirements for both licensed and unlicensed clinics, relying on the "professional speech doctrine," which affords different rules to "individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.'"[109] The Supreme Court subsequently struck down this professional

---

[106] *See id.* at 467.
[107] *NIFLA*, 585 U.S. 755, 761 (2018).
[108] *Id.* at 755.
[109] *Id.* at 765–67 (citation omitted).

speech doctrine exception, finding no historical support for it and voicing concern that any sort of professional speech exception would threaten free speech generally.[110] The Court has long "been reluctant to mark off new categories of speech for diminished constitutional protection. And it has been especially reluctant to 'exempt a category of speech from the normal prohibition on content-based restrictions.'"[111]

In *NIFLA*, the Court noted that exceptions for professional speech have only been made in two circumstances, neither of which were applicable to the facts of the case: (1) "where a law requires professionals to disclose factual, noncontroversial information in their 'commercial speech,'"[112] and (2) "where States regulate professional conduct that incidentally involves speech."[113] It is worth noting here that the second of these two exceptions is more relevant to the abortion informed consent discussion.

The Court in *NIFLA* distanced itself from *Casey*, noting that the distinction between informed consent before performing a medical procedure, as examined in *Casey*, and clinic notice requirements not tied to any particular medical procedure, as examined in *NIFLA*, warrant distinct First Amendment treatment.[114] Although some argue that the *NIFLA* opinion therefore does not clarify the First Amendment's interaction with informed consent requirements, others propose that the opinion does indeed "seem[] to suggest that *Casey* does not require First Amendment scrutiny at all because informed consent is simply a restriction on the professional *conduct* of performing the underlying medical procedure."[115]

The *NIFLA* opinion hints that strict scrutiny is the appropriate standard of review for content-based regulations, even when those regulations are aimed at professionals, stating that "this Court's precedents have long protected the First Amendment rights of professionals. For example, this Court has applied strict scrutiny to content-based laws that regulate noncommercial speech of lawyers, professional fundraisers, and organizations that provided specialized advice about

---

[110] *See* Robert McNamara & Paul Sherman, NIFLA v. Becerra*: A Seismic Decision Protecting Occupational Speech*, 2018 CATO SUP. CT. REV. 197, 213–14.
[111] *NIFLA*, 585 U.S. at 767 (quotations omitted).
[112] *Id.* at 756.
[113] *Id.*
[114] *See* McNamara & Sherman, *supra* note 111, at 215.
[115] *Id.* at 223 (emphasis in original).

international law." [116] Recognizing that the dangers of content-based regulations on speech exist within the context of professional speech, the Court warned that "regulating the content of professionals' speech 'poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'"[117] So, while the Court's position on abortion informed consent may remain unclear, it did not shy away from expressing its concerns regarding content-based regulations within the medical profession, specifically as a means to amplify a states' ideological position.

B. Dobbs *Seals the Deal*

While *NIFLA* may have further complicated the question of how to treat abortion informed consent requirements in terms of the First Amendment, *Dobbs* dealt a decisive blow to the holdings of the Fifth and Eighth Circuits in *Rounds* and *Lakey*. At the highest level, *Dobbs* overturned *Roe* and *Casey*, extinguishing a constitutionally protected right to abortion.[118] Most relevant to the issue of abortion informed consent requirements, the Court in *Dobbs* was outspoken about the inadvertent effects of *Casey* on other areas of law, including the First Amendment, asserting that *Casey* and *Roe* "led to the distortion of many important but unrelated legal doctrines."[119]

The Court in *Dobbs* further argued that "[c]ontinued adherence to *Casey*'s unworkable 'undue burden' test would undermine, not advance, the 'evenhanded, predictable, and consistent development of legal principles.'"[120] Ultimately, the *Dobbs* decision overturning of *Casey*, along with the Court's criticism of the consequences of the undue burden standard, suggest that the *Rounds* and *Lakey* decisions, both of which relied almost entirely on *Casey*, are at risk. That said, it seems clear from

---

[116] *NIFLA*, 585 U.S. at 771 (citations omitted).
[117] *Id.* ("Throughout history, governments have 'manipulated the content of doctor-patient discourse' to increase state power and suppress minorities.").
[118] *Dobbs*, 597 U.S. at 215 ("The Constitution does not confer a right to abortion; *Roe* and *Casey* are overruled; and the authority to regulate abortion is returned to the people and their elected representatives.").
[119] *Id.* at 220, 287 ("The Court's abortion cases have diluted the strict standard for facial constitutional challenges . . . ignored the Court's third party standing doctrine . . . disregarded standard *res judicata* principles . . . flouted the ordinary rules on the severability of unconstitutional provisions, as well as the rule that statutes should be read where possible to avoid unconstitutionality . . . [and] distorted First Amendment doctrines.").
[120] *Id.* (quoting Payne v. Tennessee, 501 U.S. 808, 827(1991)).

the opinion in *Dobbs* that the momentum as far as abortion informed consent requirements will move toward a separate analysis of the First Amendment question: an analysis where the First Amendment doctrine does not get swept up into the complexity of this nation's abortion jurisprudence.

Dobbs' impact on the Fourth Circuit's decision in *Stuart* is much less straightforward, given that the *Stuart* opinion denounced the application of the undue burden standard, instead pursuing a more traditional First Amendment analysis. Importantly, the *Dobbs* majority expressed concern with the effect of *Casey* on the lower courts:

> In addition to these problems, one more applies to all three rules. They all call on courts to examine a law's effect on women, but a regulation may have a very different impact on different women for a variety of reasons, including their places of residence, financial resources, family situations, work and personal obligations, knowledge about fetal development and abortion, psychological and emotional disposition and condition, and the firmness of their desire to obtain abortions. In order to determine whether a regulation presents a substantial obstacle to women, a court needs to know which set of women it should have in mind and how many of the women in this set must find that an obstacle is "substantial."[121]

This was one of the Fourth Circuit's primary concerns with North Carolina's Act. The *Stuart* court voiced concern that the Requirement lacked consideration of a patient's individualized needs and treatment circumstances, "in direct contravention of medical ethics and the principle of patient autonomy," as well as the Hippocratic Oath[122] *Dobbs* echoes this sentiment, criticizing the over-generalized undue burden standard. The elimination of the undue burden standard altogether begs the question, if the *Stuart* court, despite its departure from *Lakey* and *Rounds*, got it right.

C. What About HB854/Stuart *Moving Forward?*

Although the outcome of *Stuart* would likely not change given intervening First Amendment jurisprudence, the *Stuart*

[121] *Id.* at 282-83.
[122] Stuart v. Camnitz, 774 F.3d 238, 255 (4th Cir. 2014).

court butchered the analysis, a mistake worth reviewing given the current increase in abortion restrictions. The Fourth Circuit applied a "sliding scale" approach to determine the stringency of review required when the law in question implicates both professional speech and professional conduct, ultimately landing on intermediate scrutiny.[123] The first mistake here is that *NIFLA* explicitly rejected the "professional speech" doctrine. Additionally, the informed consent requirement at issue in *Stuart* arguably does not constitute professional conduct (or potentially informed consent, at all). Thus, the *Stuart* court's analysis is unlikely to hold up in the face of *NIFLA*.

Given the disconcerting position that *NIFLA* and *Dobbs* have created, it is difficult to determine what the outcome of *Stuart* would look like today. However, with the surge of restrictive anti-abortion laws post *Dobbs*, it is worth considering how a First Amendment challenge to abortion informed consent laws might shake out.

Because *Dobbs* swiftly weakened the strength of those arguments relying on *Casey* (out of the Fifth and Eighth Circuits), this note focuses primarily on the Fourth Circuit's analysis and whether it survives modern First Amendment jurisprudence. It is useful to start with the carve outs noted by the Court in *NIFLA*, laws that "require[] professionals to disclose factual, noncontroversial information in their 'commercial speech,' and [laws] where States regulate professional conduct that incidentally involves speech."[124] The first carveout is not applicable to the Requirement because it is not commercial speech. In states that require statements conveying when life begins, this exception will likely not apply because in addition to not being commercial speech, that information is controversial.

Although the Court in *Casey* determined that the informed consent requirement in question was a regulation of professional conduct that only incidentally involved speech, the informed consent requirement in *Stuart* was vastly different.[125] It is largely agreed upon that when a law is "directed at certain content and is aimed at particular speakers,"[126] that it does not simply have an effect on speech. It follows that when a regulation does more than incidentally burden speech, it must still be

---

[123] *See* Michael J. Essma, *Speech as Speech: "Professional Speech" and Missouri's Informed Consent for Abortion Statute*, 84 MO. L. REV. 481, 494 (2019).
[124] *NIFLA*, 585 U.S. 755, 756 (2018) (citations omitted).
[125] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992).
[126] Sorrell v. IMS Health Inc., 564 U.S. 552, 567 (2011).

analyzed under strict scrutiny. The *NIFLA* majority seemingly anticipated that this question would come up when it noted "that 'drawing the line' between impermissible content-based regulations of professional speech and permissible content-based regulations of professional conduct can be difficult, recognizing that not all informed consent requirements are inherently legitimate, and warning against the government co-opting the doctor-patient relationship for invidious aims."[127]

Although *NIFLA* suggests that informed consent laws are primarily regulations of conduct that incidentally burden speech, it is fair to say that *NIFLA* recognized that there may be some informed consent requirements (arguably those considered in *Rounds*, *Lakey*, and *Stuart*) that may be motivated by so-called "invidious aims." If the analysis ended here, the Requirement would be subject to strict scrutiny. *NIFLA* reaffirmed that strict scrutiny is appropriate for content-based speech, even when that speech is communicated by a professional. Although *NIFLA* noted two exceptions to this rule, neither are applicable to the Requirement.

There may, however, be an easier route to permanent separation of informed consent and abortion jurisprudence. A post-*NIFLA* First Amendment analysis of the Requirement necessitates a determination of whether speech-and-display provisions even fall within the definition of informed consent, to be sure that States cannot "claim that they compel expression merely as an incidental effect of the nonexpressive goal of ensuring patients' informed consent."[128] In the process of differentiating the licensed/unlicensed notice requirements from true informed consent, the Court in *NIFLA* laid out three requirements that must be met before something can be classified "as an informed consent requirement, and thus part of the 'conduct' of medical practice: (1) [t]he regulation must be 'tied to a procedure'; (2) such a procedure must be 'sought, offered, or performed'; and (3) the regulation must carry information about the 'risks or benefits of those procedures.'"[129] When considering abortion informed consent requirements moving forward,

---

[127] Rebecca Krumholz Gottesdiener, *Reimagining* NIFLA v. Becerra*: Abortion-Protective Implications for First Amendment Challenges to Informed Consent Requirements*, 100 B.U. L. REV. 723, 754-55 (2020).

[128] Laura Portuondo, *Abortion Regulation as Compelled Speech*, 67 UCLA L. REV. 2, 32 (2020).

[129] Thea Raymond-Sidel, *I Saw the Sign:* NIFLA v. Becerra *and Informed Consent to Abortion*, 119 COLUM. L. REV. 2279, 2308 (2019) (citing *NIFLA*, 585 U.S. 755, 770-71

> Instead of blindly accepting states' assertions that these laws are permissible informed consent regulations if they happen to be related to a specific medical procedure, courts should conduct an independent analysis as to whether these laws are truly promoting patients' informed consent, using the traditional definitions of informed consent found in law and medical ethics.[130]

Although the Requirement was tied to a procedure that was sought, offered, or performed, compulsory narrated ultrasounds arguably do not provide information about the risks or benefits of those procedures. Even if probable gestational age is indeed related to the risks and benefits, it is unlikely that a compulsory narrated ultrasound is the only available means to communicate that information to the patient. One can imagine that a physician informing the patient of the probable gestational age verbally, without subjecting that patient to viewing the ultrasound unless they voluntarily consent to viewing, would just as sufficiently deliver the information. *NIFLA*'s proposed return to traditional definitions reveals that, like the notice requirements at issue in that case, that many of the "informed consent" requirements challenged across the country, including those in the Fourth Circuit in *Stuart*, do not constitute informed consent at all. Regardless of which route is taken, the destination is the same, in the face of *NIFLA* and *Dobbs*, the Requirement must be subject to a First Amendment analysis and strict scrutiny review.

CONCLUSION

By reading *NIFLA* and *Dobbs* together, it becomes clear that moving forward, abortion informed consent challenges can be disentangled from the complexities of the *Casey* undue burden standard and analyzed under a First Amendment framework that does not factor in any version of the professional speech doctrine. Although it may be overly simplistic to conclude that abortion jurisprudence will be "permanently separated . . . from First Amendment jurisprudence,"[131] given the ever-increasing political implications of abortion regulations, generally, courts

(2018)) (according to *NIFLA*, if these requirements are not met, then the informed consent provision regulates speech as speech and therefore must be subject to heightened/strict scrutiny).

[130] Harris, *supra* note 41, at 140.

[131] O'Brien, *supra* note 69, at 1043.

will be hard-pressed to dodge a true First Amendment analysis of abortion informed consent requirements in the wake of the Supreme Court's decisive positions in *NIFLA* and *Dobbs*. Although the *Stuart* court's First Amendment analysis is not entirely in line with that in *NIFLA*, its general proposition that "[t]he fact that a regulation does not impose an undue burden on a woman under the due process clause does not answer the question of whether it imposes an impermissible burden on the physician under the First Amendment,"[132] rings even more true today.

Despite continued uncertainty moving forward, "*NIFLA*, while perhaps meaning to leave abortion jurisprudence untouched, in fact, provided the first guidance since *Casey* for how courts should judge state informed consent statutes under a First Amendment framework."[133] Ironically, one scholar argues, "the Court's legal contortions in *NIFLA* taken to advance its ideological anti-abortion position present an opportunity for the abortion rights movement to reclaim the troubling decision as an important doctrinal weapon for advancing reproductive justice."[134] In sum, with the abortion debate reaching a boiling point in the 2024 election, it is unlikely that stringent "informed consent" requirements will be permitted to further anti-abortion law makers' goals of decreasing access to abortion care. Instead, healthcare providers will be able to invoke the First Amendment to protect their ability and duty to provide individualized care to their patients.

[132] *Stuar*t, 774 F.3d, at 249 (4th Cir. 2014).
[133] Raymond-Sidel, *supra* note 130, at 2306.
[134] Gottesdiener, *supra* note 128, at 757.

OBSCENE FOR THEE, BUT NOT FOR ME: TEXAS ATTEMPTS TO PERVERT THE DEFINITION OF OBSCENITY

J. Hunter Wright*

INTRODUCTION

"Experience should teach us to be most on our guard to protect liberty when the Government's purposes are beneficent. Men born to freedom are naturally alert to repel invasion of their liberty by evil-minded rulers. The greatest dangers to liberty lurk in insidious encroachment by men of zeal, well-meaning but without understanding."[1]

Free speech, although protected by the U.S. Constitution,[2] is one such liberty that may be subject to encroachment by well-meaning laws. However, not all speech comes under the umbrella of the Constitution's protection. In fact, the prevention and punishment of "certain well-defined and narrowly limited classes of speech" have long been viewed as constitutional.[3] Among these classes of unprotected speech are profanity, libel, "fighting" words, and obscenity.[4]

The law surrounding what speech constitutes obscenity, and what speech is, therefore, unprotected, has been developed relatively recently. The first case addressing the definition, and the constitutional significance, of obscenity was decided in 1957.[5] In 1973, after years of uncertainty and subtle changes, the Supreme Court settled on the *Miller v. California*[6] standard, which is still in use to this day. However, while all obscene material is sexually explicit, not all sexually explicit material is obscene—some of it remains protected by the Constitution.[7] Further complicating matters, what may be protected speech for an adult may not be afforded the same protections for a minor.[8] A sexually explicit magazine, for example, may not be obscene for an adult but will be obscene for a minor.[9]

---

* J.D. Candidate, University of North Carolina School of Law, 2026.

[1] Olmstead v. United States, 277 U.S. 438, 479 (1928) (Brandeis, J., dissent) (discussing how the purpose behind an unjustifiable intrusion does not make it any less of a violation of constitutional rights).

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

[3] Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942).

[4] *See id.* at 572.

[5] Roth v. United States, 354 U.S. 476 (1957).

[6] 413 U.S. 15, 24 (1973).

[7] *See id.*

[8] *See* Ginsberg v. New York, 390 U.S. 629, 638 (1968).

[9] *See id.*

While the regulation of protected speech is presumed to be invalid,[10] the regulation of unprotected speech, such as obscenity, is permissible so long as the regulation is rationally related to the government's interest.[11] Due to the dual-standard approach to obscenity, states began to regulate protected sexual speech with the hope of protecting minors and children.[12]

In a case currently pending before the Supreme Court, Texas is, effectively, attempting to expand the definition of obscenity to include material not obscene for adults—and otherwise protected—because that same content would be obscene for minors.[13] If material is obscene to minors, Texas argues, it can be regulated as unprotected speech as to adults.[14] Though the Fifth Circuit agrees,[15] it remains to be seen whether this approach is supported by precedent, a misunderstanding of current law, or a clever interpretation that effectively navigates the boundaries of unclear precedents. Is Texas's law a well-meaning but mistaken encroachment of liberty or a permissible attempt to protect minor's from pornography?

I. BACKGROUND

A. You Keep Using That Word. I Do Not Think It Means What You Think It Means.[16]

"We hold that obscenity is not within the area of constitutionally protected speech or press."[17] Justice Brennan, when faced with the question of "whether obscenity is utterance within the area of protected speech and press" made it abundantly clear that the First Amendment does not protect all speech.[18] In *Roth v. United States*, the majority opinion defined obscene material as that which "deals with sex in a manner appealing to prurient interest,"[19] as judged by "the average person, applying contemporary community standards."[20] This definition, though, generally excluded "portrayal[s] of sex, e.g.,

[10] Ashcroft v. ACLU, 542 U.S. 656, 660 (2004).
[11] *See Ginsberg*, 390 U.S. at 643.
[12] *See, e.g.*, TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002 (2023); UTAH CODE ANN. § 78B-3-1001 (2025); N.C. GEN. STAT. §§ 66-500 to -501 (2024).
[13] Brief for Respondent at 24–25, Free Speech Coal. v. Paxton, No. 23-1122 (U.S. Nov. 15, 2024).
[14] *Id.* at 25.
[15] *See generally* Free Speech Coal. v. Paxton, 92 F.4th 263 (2024).
[16] THE PRINCESS BRIDE (20th Century Fox 1987).
[17] Roth v. United States, 354 U.S. 476, 485 (1957) (citations omitted).
[18] *Id.* at 481 (citing many cases in which the court discussed obscenity, but did not outright exclude it from free speech).
[19] *Id.* at 487.
[20] *Id.* at 488–89.

in art, literature and scientific works."[21] In dissent, Justices Douglas and Black warned that any standard "that turns on what is offensive to the community's standards is too loose, too capricious, too destructive of freedom of expression to be squared with the First Amendment."[22]

Jacobellis v. Ohio highlighted the ambiguity of the *Roth* standard when a manager of a theater was convicted of possessing and exhibiting an obscene film.[23] Concurring in the reversal of the conviction, Justice Stewart famously interpreted the standard as "I know it when I see it."[24] Two years later, *Memoirs v. Massachusetts*, a case concerning a book that was declared obscene despite literary and artistic value, forced a clarification of the *Roth* standard.[25] The Court in *Memoirs* held that material must be "utterly without redeeming social value" to be correctly labeled as obscene.[26] It also clarified that each factor of the test for obscenity was to be assessed independently, and not "weighed against nor cancelled by" the others.[27]

The clarification resulted in "the intractable obscenity problem" and years of "obscenity-pornography" cases until a salesman was convicted of violating a California obscenity law for a mass mailing campaign of explicit images.[28] The standard for obscenity received its final adjustment in *Miller* to account for the lingering uncertainty surrounding obscenity since the initial standard was created in *Roth*.[29] According to *Miller*, the standard, which is still followed today, requires evaluating the material based on:

> (a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state

[21] *Id.* at 487.
[22] *Id.* at 512 (Douglas, J. & Black, J., dissenting).
[23] 378 U.S. 184 (1964).
[24] *Id.* at 197 (Stewart, J., concurring).
[25] 383 U.S. 413, 418–19 (1966).
[26] *Id.* at 418.
[27] *Id.* at 419.
[28] Miller v. California, 413 U.S. 15, 16 (1973).
[29] *Id.* at 22 ("Apart from the initial formulation in the *Roth* case, no majority of the Court has at any given time been able to agree on a standard to determine what constitutes obscene, pornographic material[.]").

> law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.[30]

B. Oh, Won't Somebody Please Think of the Children?[31]

While the standards for general obscenity were being developed, the Court was also faced with deciding cases surrounding restrictions on speech as it related to minors. One such case was *Butler v. Michigan*, where the appellant was charged selling a book "containing obscene, immoral, lewd, lascivious language, or descriptions, tending to incite minors to violent or depraved or immoral acts, manifestly tending to the corruption of the morals of youth."[32] Although the trial court found the book to "have a potentially deleterious influence upon youth," the appellant was convicted because he sold the book to a police officer.[33] Although Michigan argued it had the right to promote the general welfare by "quarantining the general reading public against books not too rugged for grown men and women," the Court disagreed.[34] Instead, the law "arbitrarily curtail[ed] one of those liberties of the individual" by "reduc[ing] the adult population . . . to reading only what is fit for children."[35]

A few years before *Miller* clarified the obscenity standard for the last time, *Ginsberg v. New York* addressed a New York obscenity law that prohibited the sale of obscene material to minors.[36] *Ginsberg* differed from other cases, because the basis of the appeal was whether state laws were allowed to adapt the *Roth* standard based on the material's appeal to the prurient interest of minors.[37]

In *Ginsberg*, the appellant was charged with selling "girlie" magazines to a sixteen-year-old boy.[38] The underlying statute made it illegal to knowingly sell materials containing nudity that is harmful to minors, under the age of seventeen.[39] The Court held that this was a permissible variation of the *Roth* standard because the statute did not prohibit the stocking or selling of the magazines to an adult. However, not all Justices

---

[30] *Id.* at 24–25 (citations omitted).
[31] *The Simpsons: Much Apu About Nothing* (Fox television broadcast May 5, 1996).
[32] 352 U.S. 380, 381 (1957).
[33] *Id.* at 382–83.
[34] *Id.* at 383.
[35] *Id.* at 383–84.
[36] 390 U.S. 629, 631 (1968).
[37] *Id.* at 634.
[38] *Id.* at 633.
[39] *Id.*

were convinced this was a permissible censorship on speech,[40] and criticized the Court's role as a "board of censors."[41]

The Court was clear that parents are "entitled to the support of laws designed to aid" in their roles and responsibilities of protecting their children,[42] and states have an interest in protecting the welfare of children.[43] Notably, the Court pointed out that the law did not prohibit parents from purchasing the magazines,[44] nor did the law require adults to prove their age or identity.[45] Using only a rational basis test, the Court held that states have the power to regulate obscene material that is harmful to minors as long as the method of regulation has a "rational relation to the objective[.]"[46]

C. That's Against the Rules, and You Can't Sit with Us.[47]

Now that it has been established that the government can regulate types of speech, what about regulating the location of speech? *Renton v. Playtime Theatres, Inc.* provided the answer.[48] The city of Renton, Washington passed an ordinance prohibiting adult movie theaters within 1,000 feet of residential zones, churches, parks, or family dwellings, and within one mile of schools.[49] Playtime Theatres brought a First Amendment challenge against the ordinance, and the challenge eventually made its way to the Supreme Court.[50] An important factor the Court considered was whether the ordinance was content-neutral.[51] Content-based restrictions on speech are presumptively unconstitutional.[52] If a restriction is content-neutral, however,

---

[40] *Id.* at 656 (Douglas, J., & Black, J., dissenting) ("I would await a constitutional amendment that authorized the modern Anthony Comstocks to censor literature before publishers, authors, or distributors can be fined or jailed for what they print or sell.").
[41] *Id.* ("I do not know of any group in the country less qualified first, to know what obscenity is when they see it, and second, to have any considered judgment as to what the deleterious or beneficial impact of a particular publication may be on minds either young or old.").
[42] *Id.* at 639 (majority opinion).
[43] *See id.* at 642–43; *see also id.* at 639 n.7 (discussing the parental right to the development of their child's morality).
[44] *Id.* at 639.
[45] *Id.* at 643–44 (granting a defense to a seller if there was "further inspection or inquiry of . . . the age of the minor").
[46] *Id.* at 642–43.
[47] MEAN GIRLS (Paramount Pictures 2004).
[48] 475 U.S. 41 (1986).
[49] *Id.* at 44.
[50] *Id.* at 43.
[51] *Id.* at 46–47.
[52] *See id.* at 47 (citing Carey v. Brown, 447 U.S. 455, 462–63, 463 n. 7, (1980); Police Dept. of Chicago v. Mosley, 408 U.S. 92, 95, 98–99 (1972)).

and only regulates the "time, place, and manner," of the speech, it is permissible so long as it is not unreasonably restrictive to speech and serves a "substantial governmental interest."[53]

The *Renton* majority determined that because the city's zoning ordinance targeted "enclosed building[s] used for presenting motion picture films . . . depicting, describing or relating to 'specified sexual activities'"[54] it was not a content-based restriction.[55] Instead, the majority agreed with the district court's finding that the ordinance's "predominate concerns" were to address the "secondary effects of adult theaters." [56] Relying on the analysis from *Young v. American Mini Theaters*,[57] the Court found that ordinances "designed to combat the undesirable secondary effects" are to be reviewed as "content-neutral time, place, and manner regulations."[58] Under this lower level of scrutiny, the Court held that the town of Renton chose a "narrowly tailored" method to further its interest,[59] and because "more than five percent of the entire land" in Renton was available for use by adult theaters, the zoning regulation did not suppress, or greatly restrict, access to lawful speech.[60] In short, cities are allowed to use zoning to "preserv[e] the quality of life of the community at large" by relegating certain adult businesses to specific parts of the city.[61]

D. Help! Help! I'm Being Repressed![62]

The issue regarding obscenity-pornography was revisited nearly 30 years later in *Reno v. American Civil Liberties Union*.[63] In *Reno*, the Court had to determine how its rules on regulating obscene material harmful to minors extended to the internet. While recognizing the importance of protecting children from harmful material, the Court found the statutes at issue

---

[53] *Id.* at 47 (citing Clark v. Community for Creative Non-Violence, 468 U.S. 288, 293 (1984); City Council of Los Angeles v. Taxpayers for Vincent, 466 U.S. 789, 807 (1984); Heffron v. International Society for Krishna Consciousness, Inc., 452 U.S. 640, 647–48 (1981)).
[54] *Renton*, 475 U.S. at 44.
[55] *Id.* at 46.
[56] *Id.* at 48 ("The District Court's finding as to 'predominate' intent . . . is more than adequate to establish that the city's pursuit of its zoning interest here was unrelated to the suppression of free expression.").
[57] 427 U.S. 50 (1976).
[58] *Renton*, 475 U.S. at 49.
[59] *Id.* at 52.
[60] *Id.* at 53–54.
[61] *Id.* at 54.
[62] MONTY PYTHON AND THE HOLY GRAIL (Python (Monty) Pictures 1975).
[63] 521 U.S. 844 (1997).

"abridge[d] 'the freedom of speech' protected by the First Amendment."[64] These statutes were provisions of the "Communications Decency Act of 1996" (CDA) that prohibited the knowing (1) transmission of obscene or indecent messages to minors, and (2) sending or displaying of patently offensive messages in a manner that is available to a minor.[65] The CDA allowed two defenses, one for "good faith, reasonable, effective, and appropriate actions to restrict access by minors" and another for requiring "certain designated forms of age proof."[66]

The constitutionality of the provisions was quickly challenged, and a three-judge panel unanimously granted a preliminary injunction.[67] Each judge wrote a separate opinion, and the Supreme Court later used reasoning from each of the panelists' opinions.[68] One judge was concerned about the breadth of the statute chilling the free expression of adults and the burden it placed on providers to comply with the defenses.[69] Another judge was concerned the statute was too vague and the terms "indecency" and "patently offensive" could be applied too broadly, especially due to the "unique nature of the internet."[70] The last judge believed the First Amendment offered the internet the "highest protection from governmental intrusion."[71]

The Court started with the provisions' vagueness and overbreadth.[72] Since the CDA was a content-based regulation and threatened criminal conviction, the Court found that there was an "obvious chilling effect on free speech" that could "cause speakers to remain silent" if their speech could be arguably unlawful.[73] The Court ultimately concluded that the scope of the CDA was overly broad because the "vague contours of the coverage . . . unquestionably silences some speakers" even though the message would otherwise be protected by the First Amendment.[74]

---

[64] *Id.* at 849.
[65] *Id.* at 858–59.
[66] *Id.* at 860–61.
[67] *Id.* at 862.
[68] *Id.* at 862–63.
[69] *Id.* at 862 ("[Chief Judge Sloviter] concluded . . . that the statute 'sweeps more broadly than necessary and thereby chills the expression of adults.'") (citations omitted).
[70] *Id.* at 862–63 (citations omitted).
[71] *Id.* at 863 (citations omitted).
[72] *Id.* at 870.
[73] *Id.* at 871–72 (citations omitted).
[74] *Id.* at 874.

Using a form of strict scrutiny,[75] the Court determined that the First Amendment requires a statute aimed at protecting children to be precise when regulating the content of speech in order to avoid burdening the rights of adults.[76] While the Court recognized that there is a compelling interest in protecting children from harmful materials,[77] the statute was not narrowly tailored.[78] The Court placed a heavy burden on the government to show that a less restrictive method would be less effective than the CDA, and the government was unable to meet that burden.[79] Indeed, the Court specifically pointed out the existence of less restrictive alternatives, such as parental controls, regulating smaller portions of the internet, or providing for parental choices.[80] Additionally, the "wholly unprecedented" coverage of the CDA placed "open-ended prohibitions" on more than just commercial speech and commercial entities.[81] Instead, the statute was broad enough that it could include a parent who allows their seventeen-year-old to use a computer for purposes the parent deems to be appropriate.[82] The Court was persuaded the CDA was "not narrowly tailored"[83] enough to justify the "unnecessarily broad suppression of speech addressed to adults."[84] The Court affirmed the district court's decision that the CDA was unconstitutional: "[t]he interest in encouraging freedom of expression in a democratic society outweighs any theoretical but unproven benefit of censorship."[85]

1. Justice O'Connor's Concurrence and Digital Adult Zones

Justice O'Connor viewed *Reno* from a different perspective than the majority.[86] In her opinion, the CDA should have been viewed similar to a "zoning law" that created "adult zones" on the internet.[87] While she was quick to state that portions of the law were unconstitutional, she believed it was due

---

[75] At no point in the opinion did the Court use the phrase "strict scrutiny" other than in footnote 45. Instead, it referred to the level of scrutiny as "First Amendment scrutiny." *Id.* at 845, 870.
[76] *Id.* at 874.
[77] *Id.* at 875.
[78] *Id.* at 879.
[79] *Id.*
[80] *Id.*
[81] *Id.* at 877.
[82] *Id.*
[83] *Id.* at 879.
[84] *Id.* at 875.
[85] *Id.* at 885.
[86] *Id.* at 886 (O'Connor, J., concurring in part and dissenting in part).
[87] *Id.* at 886.

to fairly adhering to the blueprint developed by prior cases, such as *Renton*, that allow for the creation of a constitutional zoning law.[88]

Interestingly, Justice O'Connor viewed some aspects of the internet as similar to the real world, and, although "fundamentally different" from the real world, the internet is malleable and "more amenable to zoning laws."[89] She compared the use of a credit card number or identification to access certain websites as being similar to "a bouncer check[ing] a person's driver's license" in order to get into a nightclub.[90] She ultimately concluded that the internet should be evaluated based on its current capabilities since the internet was still evolving and the use of "user-based zoning" was in its infancy.[91]

E. How Many Times Do We Have to Teach You This Lesson, Old Man?[92]

Reno was not the last time the Supreme Court would be forced to intervene in Congress's attempts to regulate internet activity. In *Ashcroft v. American Civil Liberties Union* ("*Ashcroft II*"),[93] the Court rejected Congress's second attempt to criminalize speech on the internet. In response to the Court's holding in *Reno*, the Child Online Protection Act ("COPA") imposed criminal penalties for knowingly posting material harmful to minors on the internet for commercial purposes.[94] Similar to the CDA, COPA also provided for defenses, including restricting access by requiring users to verify their age using credit cards, digital certificates, or "any other reasonable measures that are feasible under available technology."[95]

The Court agreed with the reasoning used by the district court to grant the preliminary injunction, which concentrated on the availability of "plausible, less restrictive alternatives."[96] Pulling directly from *Reno*, the Supreme Court emphasized that a challenge to content-based restrictions places the burden on the government to prove that the alternatives would not be as effective.[97] Further, the Court stated that though the "least

---

[88] *Id.*
[89] *Id.* at 889–90.
[90] *Id.*at 890.
[91] *Id.* at 891.
[92] *SpongeBob SquarePants: The Bully* (Nickelodeon television broadcast Oct. 5, 2001).
[93] 542 U.S. 656, 661 (2004).
[94] *See id.* at 661–62.
[95] *Id.* at 662.
[96] *Id.* at 665.
[97] *Id.* (citing Reno v. ACLU, 521 U.S. 844, 874 (1997)).

restrictive alternative" test may assume the protected speech may be regulated, the regulation can go "no further than necessary" to "ensure that legitimate speech is not chilled or punished."[98]

The primary alternative here was blocking and filtering software. In granting the preliminary injunction, the district court found that the government was "unlikely to disprove" that the blocking and filtering software would be less effective than the current law.[99] The Supreme Court reviewed the filtering software for both restrictiveness and effectiveness.[100] Starting with filters, the Court noted that filters are clearly less restrictive than COPA because they are "not universal restrictions at the source," but, instead, allow selective restrictions at the receiving end.[101] Filters would allow adults without children to avoid having to provide identifying information to access speech they have a right to see, while adults with children may access the same speech by simply turning off the filter.[102] Additionally, filters would not have the same potential chilling effect as criminalizing speech.[103]

In addition to filtering software possibly being a more effective solution to protecting minors from harmful material, the overall effectiveness of COPA was brought into question.[104] For example, the district court found that an estimated 40% of the harmful materials were from overseas and would not be subject to COPA.[105] Not only would this fail to prevent access to those specific harmful materials, it may even encourage providers to move overseas to circumvent the law. Even for the providers that remain subject to COPA, the effectiveness is further diminished because the verification systems "may be subject to evasion and circumvention" if the minor in question happens to have a credit card.[106] The Supreme Court pointed to the findings of the Commission on Child Online Protection, which was created by Congress in COPA, that "unambiguously found that filters are more effective than age-verification requirements."[107] The Court pointed out that not only did the government fail to meet the burden of showing that the

---

[98] *Id.* at 666.
[99] *Id.* at 667 (citing ACLU v. Reno, 31 F.Supp.2d 473, 496–97 (E.D. Pa. 1999)).
[100] *Id.*
[101] *Id.*
[102] *Id.*
[103] *Id.*
[104] *See id.*
[105] *Id.*
[106] *Id.* at 668.
[107] *Id.* (citation omitted).

alternatives are less effective, the government's own commission concluded the opposite.[108]

On remand, the district court found that COPA facially violated the First Amendment for several reasons: the law was not narrowly tailored, there were less-restrictive and equally-effective alternatives, and the law was overbroad and vague.[109] The Third Circuit agreed and applied a strict scrutiny analysis to the bill because COPA was a content-based restriction.[110] While the law served a compelling government interest, it failed strict scrutiny because it was not narrowly tailored to achieve that interest, and there were less restrictive alternatives of advancing that interest.[111]

II. JUST WHEN I THOUGHT I WAS OUT, THEY PULL ME BACK IN[112]

A. Come and Take It[113]

On January 1, 2023, almost twenty years after the *Ashcroft II* decision, Louisiana enacted its age verification law for online adult content.[114] Since then, eighteen other states have passed similar legislation.[115] The Louisiana law creates civil liability for "[a]ny commercial entity that knowingly and intentionally publishes or distributes material harmful to minors on the internet from a website that contains a substantial portion of such material" and fails to use "reasonable age verification methods."[116] Louisiana incorporated the language of *Miller* and *Ginsberg* by including material that the average person would find to have been designed to appeal to "the prurient interest" or sexual material that is depicted "in a manner patently offensive with respect to minors."[117]

---

[108] *Id.*
[109] ACLU v. Mukasey, 534 F.3d 181, 184 (3d Cir. 2008).
[110] *Id.* at 190.
[111] *See id.* at 190–204.
[112] THE GODFATHER: PART III (Paramount Pictures 1990).
[113] *See generally*, "*Come and Take It" Flag*, AUTHENTIC TEX. https://authentictexas.com/come-and-take-it-flag/ (last visited Apr. 29, 2025).
[114] Jonathan Franklin, *Looking to Watch Porn in Louisiana? Expect to Hand Over Your* ID, NPR (Jan. 5, 2023, 5:00 AM), https://www.npr.org/2023/01/05/1146933317/louisiana-new-porn-law-government-id-restriction-privacy.
[115] *State Age Verification Laws*, FREE SPEECH COAL., https://action.freespeechcoalition.com/age-verification-resources/state-avs-laws/ (last visited Jan. 30, 2025).
[116] LA. STAT. ANN. § 9:2800.29(B)(1) (2023).
[117] *Id.* § 9:2800.29(D)(4)(a)-(b).

A common feature between the Louisiana law discussed above, and the laws in other states that followed suit in enacting similar legislation includes use of the *Miller* language, "reasonable age verification methods" that applies to websites exceeding a one-third adult content threshold.[118] Texas passed its own law aimed at preventing minors from accessing pornography within the state, which was set to go into effect on September 1, 2023.[119] The Texas law went further than the Louisiana law, requiring applicable commercial entities to display three specific health warnings on the landing page of their website, as well as a notice at the bottom of each page of their websites containing a phone number to a substance abuse and mental health services helpline.[120]

B. I'm Your Huckleberry[121]

The Free Speech Coalition ("FSC") is a "nonprofit non-partisan trade association" whose "mission is to protect the rights and freedoms of the adult industry."[122] Since its founding in 1991, the FSC has "fought for the rights of producers, distributers, performers and consumers of adult entertainment" at the ballot box, in the press, and, if necessary, in the courts.[123]

On August 4, 2023, the FSC filed a complaint for declaratory and injunctive relief in the Western District of Texas to prevent Texas from enacting the age-verification law.[124] In granting the FSC's motion for a preliminary injunction on First Amendment grounds, the court determined that because the age verification requirement "law restricts access to speech based on the material's content, it is subject to strict scrutiny."[125] Under strict scrutiny, the court found that it was "clear that age verification [was] considerably more intrusive while less effective

---

[118] *Id.* § 9:2800.29(B)(1), (D)(9); UTAH CODE ANN. §§ 78B-3-1001(10), 78B-3-1002(1) (West 2023); N.C. GEN. STAT. ANN. §§ 66-500(8), 66-501(a) (West 2024); TEX. CIV. PRAC. & REM. CODE ANN. § 129B.002(a) (West 2023).

[119] Brayden Garcia, *Can Children Access Pornography in Texas? That's What This New State Law will Prevent*, FORTH WORTH STAR-TELEGRAM (July 6, 2023, 12:45 PM), https://www.star-telegram.com/news/local/article277034458.html.

[120] TEX. CIV. PRAC. & REM. CODE ANN. § 129B.004 (West 2023), *invalidated by* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263 (5th Cir. 2024).

[121] TOMBSTONE (Hollywood Pictures 1993).

[122] FREE SPEECH COAL., https://www.freespeechcoalition.com (last visited Jan. 30, 2025).

[123] *About the Free Speech Coalition*, FREE SPEECH COAL. (last visited Jan. 30, 2025), https://www.freespeechcoalition.com/about-us.

[124] *See* Free Speech Coal., Inc. v. Colmenero, 689 F. Supp. 3d 373, 382 (W.D. Tex. 2023).

[125] *Id.* at 391.

than other alternatives. For that reason, it does not withstand strict scrutiny."[126]

Texas quickly filed an emergency appeal, and the Fifth Circuit "granted Texas's motion to stay the district court's injunction pending appeal."[127] In ruling on the merits of the district court's preliminary injunction, the court of appeals stated that "[t]he proper standard of review is rational-basis, not strict scrutiny. Applying rational-basis review, the age-verification requirement is rationally related to the government's legitimate interest in preventing minors' access to pornography. Therefore, the age-verification requirement does not violate the First Amendment."[128] Citing *Ginsberg*, the court asserted that "regulations of the distribution to minors of materials obscene for minors are subject only to rational-basis review."[129]

The Supreme Court granted certiorari to hear the *Free Speech Coalition* case on July 2, 2024,[130] and the FSC filed its merits brief on September 16, 2024.[131] The crux of its argument is that strict scrutiny applies to content-based burdens on protected speech.[132] The brief argues that the Texas law's age-verification requirement burdens protected speech, such as R-rated movies and romance novels, and the targeted application of the law is a content-based restriction..[133] Additionally, the FSC argues that the Texas law should be subject to strict scrutiny because it embodies speaker-based discrimination.[134]

Texas filed a brief in response on November 15, 2024, arguing that the Fifth Circuit correctly applied the rational basis test, and that the Texas law would survive heightened scrutiny as well.[135] In its argument, the state asserted that FSC's "theories overlook precedent, misread precedent, or miss the point. Regardless, if *Ashcroft II* means what Petitioners say, the Court

---

[126] *Id.* at 404.
[127] Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 266 (5th Cir. 2024).
[128] *Id.* at 267 (vacating the district court's grant of the injunction as to the age-verification requirement).
[129] *Id.* at 269 (citation omitted).
[130] *See* Melissa Quinn, *Supreme Court Agrees to Review Texas Age Verification Law for Porn Sites*, CBS NEWS (July 2, 2024, 9:41 AM), https://www.cbsnews.com/news/supreme-court-texas-porn-sites-age-verification-law.
[131] Brief for Petitioners, Free Speech Coal., Inc. v. Paxton, No. 23-1122 (U.S. Sept. 16, 2024).
[132] *See id.* at 16.
[133] *See id.* at 24–26.
[134] *Id.* at 34.
[135] *See* Brief for Respondent, *supra* note 13, at 17–22, 30–38.

should overrule it because it would contradict other precedent and rest on untrue factual premises."[136]

The Court held oral argument on January 15, 2025.[137] The United States, acting as an amicus curiae supporting the FSC, argued that strict, or at least heightened, scrutiny should apply to the Texas law.[138] One of the concerns of the United States was that using a rational-basis test for content-based restrictions could result in significant overreach under the guise of protecting minors, such as banning certain speech entirely or requiring users to register with the state.[139]

III. YEAH, WELL, HISTORY IS GONNA CHANGE[140]

Texas is hoping that the Supreme Court will follow the reasoning of the Fifth Circuit. Doing so would remove the handcuffs of a strict scrutiny analysis and allow states the ability to regulate, at least some, otherwise protected speech if there is a rational basis for the law. This would require the Court to affirm that *Ginsberg* is the controlling precedent when it comes to restricting material obscene to minors, and that neither *Reno* nor *Ashcroft II* are comparable.

A. Ginsberg *Is A Standard, Not THE Standard*

The Fifth Circuit put a lot of emphasis on the holding of *Ginsberg* when it defined the level of scrutiny for a regulation on the distribution of obscene speech to minors.[141] However, this reliance is misguided. *Ashcroft II* and *Miller* only mention *Ginsberg* in passing. To illustrate, a review of *Miller* shows that *Ginsberg* was only cited three times. One of those times for the assertion that, "a State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults."[142] Further, *Reno* spent a significant amount of time distinguishing *Ginsberg*.[143] At one point, the Court in *Reno* explained that the governmental interest in protecting children expressed in *Ginsberg* does not

---

[136] *Id.* at 22.
[137] *See* Transcript of Oral Argument at 1, *Free Speech Coal.*, No. 23-1122 (U.S. argued January 15, 2025).
[138] *See id.* at 62–65.
[139] *See id.* at 83.
[140] THE GODFATHER: PART III (Paramount Pictures 1990).
[141] *See* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 269–78 (5th Cir. 2024).
[142] Miller v. California, 413 U.S. 15, 36 n.17 (1973) (citation omitted).
[143] *See* Reno v. ACLU, 521 U.S. 844, 864–67 (1997).

justify suppressing speech aimed at adults.[144] Even when discussing protecting children from commercial speech, the Court specifically rejected the idea that internet regulations should be subject to the same "special justifications" as are applicable to traditional broadcast media, because, "the Internet is not as 'invasive' as radio or television."[145] In fact, the Court determined that its "cases provide no basis for qualifying the level of First Amendment scrutiny that should be applied to the Internet."[146]

The Fifth Circuit asserts that rational basis was used in *Ginsberg* even though "adults would presumably have to identify themselves to buy girlie magazines."[147] However, no part of *Ginsberg* required the shopkeeper to ascertain the age of an adult prior to the sale, nor did it allow the state to regulate the sale of the same material to adults; the Court was simply ruling on a statute that made it illegal to knowingly sell or loan material that is obscene for a minor, to a minor.[148] The law at issue in *Ginsberg* provided a defense for selling the magazine to a minor: if the seller made "a reasonable bona fide attempt to ascertain the true age of such minor."[149] *Ginsberg* did not create a new standard for obscenity, instead it merely reiterated that a different definition of obscenity applies to minors than to adults.[150] Therefore, the "girlie" magazines were obscene, but only to the extent that a minor was attempting to purchase or view them, at which moment the magazines cross from protected speech to unprotected speech and become subject to regulation. Simply put, *Ginsberg* did nothing more than clarify that minors have a less robust speech right than adults.

B. Ashcroft II *Was Misunderstood*

Texas, with help from the Fifth Circuit, argues that *Ashcroft II* cannot be relied upon to determine the proper level of scrutiny because "no one contested strict scrutiny's application" in that case.[151] While this is true, COPA (the challenged law in *Ashcroft II*), was not a newly enacted law, instead, it was an

---

[144] *Id.* at 875 ("It is true that we have repeatedly recognized the governmental interest in protecting children from harmful materials. But that interest does not justify an unnecessarily broad suppression of speech addressed to adults.").
[145] *Id.* at 868–69.
[146] *Id.* at 845.
[147] Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 276 (5th Cir. 2024).
[148] *See* Ginsberg v. New York, 390 U.S. 629, 645–47 (1968).
[149] *Id.* at 644.
[150] *See id.* at 638.
[151] Brief for Respondent, *supra* note 13, at 26.

attempt by Congress to "remedy the constitutional defects in the CDA."[152] While the federal government hoped that by regulating commercial speech the statute would be subject to a lower level of scrutiny, the court pointed out that they never pressed the issue nor argued for lower scrutiny to apply at the preliminary injunction hearing.[153] However, the government conceded, that, based on recent history, COPA was a content-based restriction and demanded strict scrutiny.[154]

In *Ashcroft II*, the Court recognized that even though "the Judiciary must proceed with caution and with care before invalidating the Act," the Court is not permitted "to depart from well-established First Amendment principles," but instead "must hold the Government to its constitutional burden of proof."[155] The Fifth Circuit mistakenly believes that "the closest [*Ashcroft II*] comes to ruling on the appropriate standard of review" is a mention of the government's burden.[156] To the contrary, the Court made clear that the standard was strict scrutiny: "the Constitution demands that content-based restrictions on speech be presumed invalid, and that the Government bear the burden of showing their constitutionality. This is true even when Congress twice has attempted to find a constitutional means to restrict, and punish, the speech in question."[157]

C. Evaluating Under the Proper Standard

Ashcroft II reaffirms that strict scrutiny is the proper standard by which to evaluate content-based restrictions on protected speech. The Texas age-verification law is a content-based restriction that imposes a burden that is sufficient to subject it to strict scrutiny. Further, there is a presumption that content-based restrictions on protected speech are unconstitutional and subject to strict scrutiny.[158] What is a law that restricts access to, and distribution of, certain speech because of its content, if not a content-based restriction? The Texas law, by restricting access to speech dependent on its content, is a

---

[152] ACLU v. Reno, 31 F. Supp. 2d 473, 477 (E.D. Pa. 1999).
[153] *Id.* at 493.
[154] *See* Transcript, *supra* note 137, at 64.
[155] Ashcroft v. ACLU, 542 U.S. 656, 660 (2004) (*Ashcroft II*) (citing Ashcroft v. ACLU, 535 U.S. 564, 592 (2002) (*Ashcroft I*)).
[156] Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 274 (5th Cir. 2024).
[157] *Ashcroft II*, 542 U.S. at 660 (citations omitted).
[158] Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) ("Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.").

content-based restriction on adults' access to protected speech.[159] Texas disagrees, arguing that the law is not a content-based restriction but instead, that the law is merely a permissible requirement that speakers gatekeep who hears (or, in this case, views) their messages.[160] Texas further argues that, even if the law is a content-based restriction, the speech is unprotected speech because it is obscene to minors, therefore not subject to strict scrutiny.[161]

Contrary to Texas's belief, its law is not a restriction on unprotected obscene speech. Protected speech to adults does not become unprotected merely because it is unprotected regarding minors. Texas is attempting to redefine unprotected obscene speech to include non-obscene protected speech because is obscene to minors.[162] In doing so, Texas argues that its law is not a regulation of protected speech because they are only "controlling access by a particular community to unprotected speech."[163] Further, Texas argues that protected speech as a whole becomes unprotected if it would be obscene to a portion of the audience, whether or not that portion is the intended audience.[164] The Texas law "regulates all material harmful to minors, which necessarily encompasses non-obscene, sexually expressive—and constitutionally protected—speech for adults. Thus, [the law] limits access to constitutionally protected speech, regardless of whether the viewer is a minor."[165]

1. Age Verification Requirements Are Unconstitutional Burdens

Strict scrutiny requires that a restriction on protected speech serve a legitimate government interest, be narrowly tailored to achieve that interest, and not unnecessarily interfere with the First Amendment.[166] There is no doubt that the Texas age-verification requirement law serves a legitimate government interest. Since *Ginsberg*, the Court has held that protecting the physical and psychological well-being of minors by limiting access to obscene material is a legitimate government interest.[167]

---

[159] *See Paxton*, 95 F.4th at 289 (Higginbotham, J., concurring).
[160] Brief for Respondent, *supra* note 13, at 23.
[161] *Id.* at 23–25.
[162] *See id.* at 24–25.
[163] *Id.* at 23.
[164] *See id.* at 25.
[165] *Paxton*, 95 F.4th at 291 (Higginbotham, J., concurring).
[166] *See* Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989).
[167] *Id.*

Texas claims, and the FSC does not dispute, that the state has a legitimate interest in protecting children from the harms associated with exposure to pornography.[168] But, the legitimate interest is only one prong of the strict scrutiny test: "[i]t is not enough to show that the Government's ends are compelling; the means must be carefully tailored to achieve those ends."[169]

The means employed by the Texas law at issue are not narrowly tailored for three reasons: (1) the law applies to some websites that contain material harmful to minors but excludes social media and search engines, (2) age verification would place a burden on adults to which the material is otherwise protected, and (3) there are less restrictive means.

First, by allowing an exception to social media and search engines, the law does little to prevent a minor from accessing materials that Texas deems harmful. A minor trying to access the material could simply use a virtual private network (VPN) to spoof their location or access foreign websites that choose to ignore Texas's law. Additionally, if a website were to limit the material that is harmful to minors to 25%—below the one-third threshold—they would not be subject to the restriction. For example, Reddit is composed of roughly twenty-four percent sexually explicit material and even has subreddits dedicated to such material.[170] A minor could easily access all of the pornographic material they desire through such a site.

Second, the age verification requirement places a burden on adults in accessing protected speech. There are many concerns about the requirement that an adult upload their identity to access a website.[171] While it is easy to compare uploading your identification to showing a driver's license, they are different. In the real world, showing an identification to gain access to a building, room, or even to purchase certain goods is simple and straightforward. In fact, many locations may not require identification if it is obvious that the customer is clearly old enough to engage in the age-restricted activity. When asked to provide identification, oftentimes, a person can retain control of the identification by simply showing it to the employee. An online verification system, however, is much more involved. The

---

[168] *See* Brief for Respondent, *supra* note 13, at 1, 6–8.
[169] *Sable*, 492 U.S. at 126.
[170] Free Speech Coal., Inc. v. Rokita, 738 F. Supp. 3d 1041, 1066 (S.D. Ind. 2024).
[171] *See* Brief of Internet Law Professors Zachary Catanzaro, Eric Goldman, et el. as Amici Curiae Supporting Petitioners at 4–5, Free Speech Coal., Inc. v. Paxton, No. 23-1122 (U.S. argued January 15, 2025) [hereinafter Brief of Internet Law Professors].

process to use Yoti, a verification vendor mentioned in Texas' argument,[172] involved as many as fifty-two steps, if using a government-issued identification (such as a driver's license or passport) and could take over five minutes to complete.[173] This is significantly longer, and more intrusive, than the process of showing the same identification to a cashier, such as the suggested method—if the customer was believed to be a minor—under the law in *Ginsberg*. Unlike the real world, the online user is unable to know, with certainty, how their data is being used. Uploading an ID, or other personal identifying information, to the internet has a different set of risks.[174] There is the risk of private data being sold or stolen, the user being surveilled, and other privacy concerns.[175]

Lastly, requiring an adult to go through a multi-step age verification process to access protected speech is not the least restrictive means to achieve the state's legitimate interest in protecting minors from pornography; there are other ways to protect minors from such harmful material. *Reno* and *Ashcroft II* both discussed the idea of filtering and screening software in lieu of age verification.[176] A quick Google search brought up many parental internet and device filtering software options, including multiple websites that reviewed the options.[177] While these may not be perfect solutions, they would give control of the content to the parent. They also allow a parent to adjust the controls based on what the parent deems to be appropriate for their child as they age, while the Texas law fails to distinguish between a three-year-old and someone one day shy of turning eighteen.[178]

---

[172] Brief for Respondent, *supra* note 13, at 9–10, 12, 32.
[173] *See* Samantha Cole, *Accessing Porn In Utah Is Now a Complicated Process that Requires a Picture of Your Face*, VICE (May 3, 2023, 1:51 PM), https://www.vice.com/en/article/utah-age-verification-pornhub-xhamster-laws/.
[174] *See* Cheryl Winokur Munk, *The Big Security Risks Behind Meta, Twitter Verified Identity Subscriptions*, CNBC (Feb. 24, 2023, 9:41 AM), https://www.cnbc.com/2023/02/23/biggest-benefits-risks-in-meta-twitter-verification-subscriptions.html; Emma Roth, *Online Age Verification is Coming, and Privacy is on the Chopping Block*, THE VERGE (May 15, 2023, 10:00 AM), https://www.theverge.com/23721306/online-age-verification-privacy-laws-child-safety.
[175] *See* Roth, *supra* note 174.
[176] *See* Reno v. ACLU, 521 U.S. 844, 854–55 (1997); Ashcroft v. ACLU, 542 U.S. 656, 667–68 (2004).
[177] *See, e.g.*, Benedict Collins, *Best Parental Control App of 2025*, TECHRADAR (Jan. 24, 2025), https://www.techradar.com/best/best-parental-control-app-of-year; Cathy Habas & Rebecca Edwards, *The Best Parental Control Apps of 2025*, SAFEWISE (Jan. 15, 2025), https://www.safewise.com/resources/parental-control-filters-buyers-guide.
[178] *See* Free Speech Coal., Inc. v. Paxton, 95 F.4th 263, 301 (5th Cir. 2024) (Higginbotham, J., concurring).

CONCLUSION

Protecting children from harmful material is a well-meaning cause. However, such causes, put in place for a beneficent purpose, can slowly strip away liberty. At the time, the tradeoff may seem worth it. However, precedents that permit minimal encroachments—even those with which we agree—will inevitably be used to argue for more, and we may find ourselves nickel-and-diming away other speech protections for the greater good. For this reason, the laws that place burdens on otherwise protected speech should be examined under the strictest constitutional scrutiny. The Texas age-verification law, however well-meaning, encroaches on fundamental freedoms and liberties. Therefore, this law, and any similar laws, should not be permitted to stay in effect unless they survive strict scrutiny. The Supreme Court must clear the air and provide proper interpretations of *Ginsberg*, *Reno*, and *Ashcroft II*. Will the Court be on guard and repel this invasion of liberty, or will the Court allow Texas to pervert the definition of obscenity? The outcome could have a *Miller*-like effect on modern obscenity-pornography cases for years to come.