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 1**

ARTICLES

NOTES

RECONSIDERING THE LEGACY OF *NEW YORK TIMES V. SULLIVAN*

G. Edward White*

ABSTRACT

This Article argues that the "actual malice" standard for recovery in defamation cases should be abandoned outside cases in which the plaintiff is a "public official," currently defined as an employee of the government whose office invites public scrutiny and comment. The actual malice standard prevents many categories of plaintiffs from recovering substantial amounts of damages without showing, by clear and convincing evidence, that a defendant either intentionally made a false and damaging statement about the plaintiff or made it with reckless disregard as to whether the statement was true or false. The Article identifies four features affecting defamation cases not involving public officials that point in the direction of reconsidering the actual malice standard in those cases. Two are doctrinal: the Court's failure, in New York Times v. Sullivan*, to clearly articulate the source of the actual malice standard because of its concern about southern states' use of defamation law to deter criticism of their resistance to racial integration; and its subsequent misguided application of the actual malice standard to defamation cases that did not raise the constitutional issues it identified in* New York Times*. Two are cultural: the first of those is a change in the landscape of media communications in the sixty years since the* New York Times *decision, notably the more ideological character of mainstream media and an increased frequency of communications on the internet by anonymous persons; the second is the advent of media insurance, which makes it possible even for defendants who have violated the actual malice standard to secure themselves immunity from defamation judgments. The combination of those features has made it very difficult for persons injured by false and damaging statements about them to sue successfully for defamation. Meanwhile, the Court's departure in post-*New York Times *cases from the principal First Amendment concerns in defamation actions, a "chilling effect" on speech that invites media self-censorship unless a "breathing space" for some false and damaging communications is afforded, has served to obscure the central meaning of* New York Times*. The Article proposes a framework for defamation cases that deconstitutionalizes actions in which the plaintiffs are not public officials, restoring much of defamation*

* David and Mary Harrison Distinguished Professor, University of Virginia School of Law. Thanks to Ken Abraham, Charles Barzun, Danielle Citron, John Jeffries, Greg Mitchell, George Rutherglen, Paul Stephan, and participants in a July 23, 2024, workshop at the University of Virginia School of Law for helpful comments on earlier drafts of this Article.

law to its common law roots. That alteration would not necessarily result in more successful defamation actions, as the common law of defamation contains its own privileges and available defamation defendants will continue to be difficult to identify in today's media landscape. The Article invites litigators to consider bringing cases to the current Court in which it has an opportunity to revisit its decisions in Curtis Publishing Co. v. Butts, Associated Press v. Walker, *and* Gertz v. Robert Welch.

INTRODUCTION

It has been sixty years since the Supreme Court revolutionized the law of defamation and set itself on a path to establish the First Amendment as a formidable barrier to successful actions in libel and slander, false light privacy, true disclosure privacy, and intentional infliction of emotional distress ("IIED"). The decision which set that revolution in motion, *New York Times v. Sullivan,*[1] remains in place, along with its "actual malice" standard for recovery in three of those torts, requiring plaintiffs in most defamation, false light, and IIED cases to establish with "convincing clarity" that false and damaging statements about them were made intentionally or with reckless disregard to their accuracy.[2]

Recently two Justices have cumulatively suggested that the doctrinal basis of *New York Times* is unsound and that the landscape in which information about others is disseminated has fundamentally altered since 1964, casting doubt about whether the "actual malice" standard for recovery should be retained in

[1] 376 U.S. 254 (1964).

[2] *Id.* at 280–88. My discussion of doctrinal developments affecting *New York Times* is primarily limited to defamation cases. The Court has not definitively ruled that the *New York Times* actual malice standard applies to false light privacy cases, but since the constitutional interests being balanced in false light cases—freedom of speech and press versus the interests of personal privacy and reputation—seem nearly identical to those in defamation cases, it seems likely that it would treat *New York Times* and its subsequent decision in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974) as controlling in false light cases where a plaintiff is a "public figure," as defined by the Court's defamation cases after *Gertz*. *See, e.g.*, Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 51 (1988). The Court has applied the *New York Times* standard to two IIED cases, one because the plaintiff was a "public figure," *Hustler Mag., Inc.*, 485 U.S. at 56, and the other because the plaintiff was emotionally harmed on a "matter of public concern." Snyder v. Phelps, 562 U.S. 443, 453–58 (2011).

most defamation, false light, and IIED cases.[3] This Article seeks to expand upon that suggestion.[4]

The Article identifies four features of the legacy of *New York Times* that I argue point in the direction of reconsidering the actual malice standard, at least beyond its application in "public official" cases. Two are doctrinal: the *New York Times* majority's choice of the standard itself in the highly charged setting of that case and the Court's subsequent application of the standard to additional categories of defendants beyond the "public officials" it identified in *New York Times*. Two are cultural: changes in the landscape in which false and damaging statements are disseminated, with emphasis on the emergence of digital communications and social media; and the appearance of media insurance, designed to indemnify defendants facing tort liability under the actual malice standard.[5]

I. THE DOCTRINAL LEGACY OF *NEW YORK TIMES*

A. The Actual Malice Standard of Liability

1. The Basis of the Standard

Other than a recital of the solicitude for the protection of freedom of speech and of the press in American history,[6] the *New York Times* majority advanced no doctrinal justification for suddenly constitutionalizing the law of defamation, at least where false and damaging statements were made about "public officials" in their official capacity. Its two principal justifications

---

[3] *See* Berisha v. Lawson, 141 S. Ct. 2424, 2424–25 (2021) (Thomas, J., dissenting from denial of certiorari); *id.* at 2427–30 (Gorsuch, J., dissenting from denial of certiorari).

[4] There has been criticism of the *New York Times* decision and the "actual malice" standard in legal commentary for years. *See*, *e.g.*, Philip B. Kurland, *The Original Understanding of the Freedom of Press Provision of the First Amendment*, 55 MISS. L. J. 225, 248–56 (1985); Richard A. Epstein, *Was* New York Times v. Sullivan *Wrong?*, 53 UNIV. CHI. L. REV. 782, 783–85 (1986); David A. Logan, *Rescuing Our Democracy By Rethinking* New York Times Co. v. Sullivan, 81 OHIO ST. L. J. 759, 776–86 (2020); Elena Kagan, *A Libel Story:* Sullivan *Then and Now*, 18 L. & SOC. INQUIRY 197, 204–15 (1993). Several Justices have also expressed concern about the scope of *New York Times*, or the efficacy of the "actual malice" standard since the case was decided. *See*, *e.g.*, Rosenblatt v. Baer, 383 U.S. 75, 92 (1966) (Stewart, J., concurring); Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 62 (1971) (Harlan, J., dissenting); *id.* at 89–92 (Marshall, J., dissenting); *Gertz*, 418 U.S. at 377, 384–98 (White, J., dissenting); Coughlin v. Westinghouse Broad. & Cable, Inc., 476 U.S. 1187, 1187 (Burger, C.J., dissenting from denial of certiorari); McKee v. Cosby, 139 S. Ct. 675, 681–82 (2019) (Thomas, J., concurring in denial of certiorari).

[5] Cristina Carmody Tilley, *(Re)Categorizing Defamation*, 94 TUL. L. REV. 435, 462–477 (2020) (providing a detailed characterization of the rise and decline of the "professional press" in mid- and late-twentieth century America).

[6] *New York Times*, 376 U.S. at 273–77.

came from the realm of policy. One was a need to protect "citizen-critic[s]" of the government and its representatives who might otherwise be deterred from "vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials" because of fear of lawsuits.[7] The other was the importance of creating a "breathing space" for "erroneous statement[s]" that were "inevitable in free debate."[8] The Court's only support for its holding that "constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood . . . unless he proves that the statement was made with 'actual malice'"[9] was a Kansas case[10] in which a newspaper was sued for alleging that a candidate for reelection to a commission charged with the management of funds for the public schools had manipulated funds in a previous transaction. The Kansas court announced in that case that because of the importance of public discussion of "the character and qualifications of candidates [for public office]," a candidate claiming to be defamed by a comment "must show actual malice or go remediless."[11] The court did not define "actual malice," and may well have meant the conventional understanding of that term in civil and criminal law, animus toward another. It did not advance any constitutional basis for the malice requirement.

The Court's understanding of "actual malice" in *New York Times* was not the equivalent of animus. It was an attitude toward the truth of a statement, not toward the person about whom the statement was made. It was "knowledge that [the statement] was false" or "reckless disregard of whether it was false or not."[12] Although the Court stated that the Kansas court had adopted "a like rule,"[13] its rule was not "like," neither being based on the First Amendment or any free speech provision in the Kansas Constitution nor necessarily being a rule about attitudes toward the truth of a statement, as opposed to the character of a person.

---

[7] *Id.* at 270, 282.
[8] *Id.* at 271–72.
[9] *Id.* at 279–80.
[10] Coleman v. MacLennan, 98 P. 281 (Kan. 1908).
[11] *Id.* at 285–86.
[12] *New York Times*, 376 U.S. at 280.
[13] *Id.*

2. The Scienter Analogy

One might have wondered where the "actual malice" standard came from. It had not been announced in any prior defamation cases decided by the Court and was plainly inconsistent with the common law of defamation in most states, where liability for a false and damaging statement could ensue even when the statement had been negligently made, or even when it was the result of an incidental mistake of fact, such as typographical error identifying a wrong person. There was, however, one instance where common law courts had employed a standard of liability in torts cases that required a showing of intentional or reckless falsehood. That was in the law of "deceit," or fraud, and was termed the "scienter" standard. On its face the "actual malice" standard in *New York Times* appeared to replicate scienter: as in deceit cases, it was directed toward statements reflecting an attitude toward truth on the part of a defendant, an attitude of intentional or reckless falsity.[14]

The scienter standard had evolved in cases where the pleading was in deceit, a common law writ, which was required because the defendant had not warranted the merchantability or safety of a product being sold. When a defendant had made a warranty, the action was treated as being in contract (the writ of assumpsit), the liability was strict, and damages were limited to contract remedies. When, however, a defendant had made an intentional misrepresentation of a material fact about the quality of goods or services or had made such a representation without knowledge of whether the fact was true or false, early common law courts treated an action in warranty as unavailable and required a plaintiff to proceed in deceit, an action that was treated as emanating in tort rather than in contract.[15]

The actual malice standard imposed by the Court in *New York Times* superficially resembled a scienter standard. A showing of factual falsity was necessary for recovery in defamation cases, just as a factual misrepresentation was necessary in deceit. The scienter standard required more than a

---

[14] *See* Paula J. Dalley, *The Law of Deceit, 1790-1860: Continuity Amidst Change*, 39 AM. J. LEGAL HIST. 405, 408 (1995). Professor Kenneth Abraham and I have previously identified the facial connection between the scienter standard of proof in fraud cases and the actual malice standard in *New York Times*. Kenneth S. Abraham & G. Edward White, *First Amendment Imperialism and the Constitutionalization of Tort Liability*, 98 TEX. L. REV. 813, 833 (2020) [hereinafter Abraham & White, *First Amendment Imperialism*]; KENNETH S. ABRAHAM & G. EDWARD WHITE, TORT LAW AND THE CONSTRUCTION OF CHANGE 144–45 (2022) [hereinafter Abraham & White, *Construction of Change*].

[15] *See* Dalley, *supra* note 14, at 412–13.

showing of negligence, as did actual malice under *New York Times*.[16] Punitive damages were available in both instances once deliberate and reckless falsity was shown.[17] But the competing considerations being balanced in fraud cases and those in defamation suits against public officials did not seem comparable, and none of the opinions in *New York Times* alluded to fraud or the scienter standard. Fraud cases originated in a business culture in which parties to transactions were assumed to be favoring their own interests, in which a certain amount of deceptiveness in the form of "puffery" was tolerated, and in which buyers of goods and services were expected to make reasonable efforts to determine the worth of what they were purchasing. At the same time, the culture valued honesty and fair dealing in business relationships. Limiting deceit actions to instances in which a plaintiff could prove scienter was an effort to establish a line between expected self-interest and unjustifiable unscrupulousness. It was one thing if a seller's own negligence resulted in facts being inadequately conveyed. It was another if a seller took advantage of his superior information about the subject of a sale to mislead the buyer. That was dishonorable conduct, appropriate for a deceit action and possibly the punitive damages available under it.[18]

The scienter standard in deceit actions was thus about business practices, business obligations, and business morals. The considerations the *New York Times* Court sought to balance were qualitatively different. On the one hand, was the interest in reputation, an interest of sufficient weight at common law that courts permitted recovery in defamation cases even when a defendant's false and damaging statements about a plaintiff had been utterly inadvertent, not even negligent. On the other, as the *New York Times* Court articulated it, was an interest on the part of members of the public, or their publishers, in commenting upon and criticizing the actions of public officials. That interest had been reflected in the common law of defamation by a privilege of "fair comment" that "extended to an expression of opinion on a matter of public concern,"[19] but the privilege had been limited, in some jurisdictions,[20] to opinions or accurate

[16] *Id.* at 409–10.
[17] *Id.* at 414.
[18] *Id.* at 409–10.
[19] Restatement (Second) of Torts, § 566 (Am. L. Inst. 1977).
[20] *Compare* Post Publ'g Co. v. Hallam, 59 F. 530 (6th Cir. 1893) (requiring statements of fact) *with* Coleman v. MacLennan, 98 P. 281, 283 (Kan. 1908) (requiring "justifiable ends").

factual comments, and in others by the additional requirement that a defendant seeking to exercise the privilege had made comments with "good motives, [and] justifiable ends."[21]

The *New York Times* Court concluded that constitutional considerations needed to be included in the balancing of interests in defamation cases involving public officials, and that those considerations tipped the balance in favor of a more demanding standard for recovery in such cases. It was no longer enough to show that a defendant had made false statements about a public official that would incline a "substantial and respectable minority of [the community]"[22] to think less of him or her. Nor was it enough to show that the false and damaging statements had been a result of the defendant's negligence.

Instead, actual malice, the equivalent of scienter, was required. But actual malice in *New York Times* had nothing to do with business practices, obligations, or morals. It was about preserving the opportunities for "citizen-critic[s]" to comment on the actions of governmental officials and providing a "breathing space" for erroneous statements during that commentary. Respect for both interests in public official-defamation suits was a constitutional imperative, the *New York Times* majority asserted, because otherwise members of the citizenry might be deterred from commenting on the conduct of public officials for fear that unless their factual statements were impeccably accurate, they might be subjected to defamation suits. They had a First Amendment right to criticize the government that was every bit as weighty as the interest in protecting or preserving reputation.

There was one additional feature distinguishing the actual malice standard in public official-defamation suits from the scienter standard in actions for fraud. Actual malice had to be shown, the *New York Times* majority declared, with "convincing clarity," and independent appellate review was available to ensure that a trial court had employed that evidentiary requirement.[23] Whatever "convincing clarity" meant, it was undoubtedly a more demanding standard than the ordinary civil standard of proof, a preponderance of the evidence.

To summarize, the actual malice standard for recovery in public official-defamation cases, although it employed

---

[21] New York Times Co. v. Sullivan, 376 U.S. 254, 295 (1964) (Black, J., concurring) (referencing the strict application of the "fair comment" privilege).
[22] Restatement (Second) of Torts, § 559 (Am. L. Inst. 1977).
[23] *New York Times*, 376 U.S. at 285–86.

terminology identical to that in actions for deceit, bore only a facial resemblance to the scienter standard. It was to be operationalized differently and to involve a weighing of interests and considerations quite distinct from those in fraud cases. And in its balancing of interests, it tipped the scales more decisively in favor of one set of considerations than had the scienter standard. It is possible to see the scienter standard as creating an equal balance between competing interests in cases involving business transactions, the interest reflected in the maxim of "caveat emptor," requiring that a buyer make reasonable efforts to become informed about a prospective purchase, and the interest in honesty and fair dealing. The scienter standard for fraud cases emerged as a compromise between immunity and negligence.

The actual malice standard in public official-defamation cases was not a comparable compromise between the interest in reputation and the interest in freely commenting on the conduct of governmental officials. As noted, in the history of American common law defamation actions, persons who could prove that false comments damaging their reputations had been made were able to recover whether the comments had been intentional, negligent, or not negligent.[24] Moreover, some courts and commentators had stated that false comments impugning the reputation of governmental officials should receive even less protection than comments made about private persons because the former set of comments tended to undermine public confidence in the government.[25] In short, the common law of defamation overwhelmingly favored the interest in reputation over the interest in free comment.

The *New York Times* Court, however, did not effectuate much of a compromise between competing interests in public official-defamation cases. Instead, it held that public officials could not recover if false and damaging statements had been made about them inadvertently, or even negligently. They had to be made with actual malice to permit recovery, and actual malice needed to be shown by clear and convincing evidence. In short, any balance between reputation and free commentary which the common law of defamation might have achieved was dramatically tipped in the direction of free commentary in *New*

---

[24] *See generally* Jeremiah Smith, Jones v. Hulton: *Three Conflicting Judicial Views as to a Question of Defamation*, 60 UNIV. PA. L. REV. 365 (1912).

[25] *See* McKee v. Cosby, 139 S. Ct. 675, 679 (2019) (Thomas, J., concurring in denial of certiorari).

York Times. And in the end the Court did not articulate any explanation for where the actual malice standard in a category of defamation cases had come from.

B. The Scope of the Actual Malice Standard

1. *New York Times* as *Sui Generis*

One might have been inclined to argue, once *New York Times* was decided, that although it was a transformation of at least one region of defamation law, it was a transformation that could have been expected. *New York Times*, at bottom, was a civil rights case. It originated out of resistance in Alabama, and other southern states, to the Court's mandate in *Brown v. Board of Education*[26] and subsequent cases that racial discrimination in public facilities was unconstitutional and needed to be eliminated. The advertisement taken out in the *New York Times* which formed the basis of Montgomery, Alabama police commissioner L. B. Sullivan's defamation suit had accused "Southern violators" of resisting desegregation efforts and harassing students and other civil rights advocates, such as Dr. Martin Luther King, Jr., who sought to protest against those efforts.[27] It was plain from comments in the majority opinion in the *New York Times* case and in Justice Black's concurrence that members of the Court believed that the Alabama courts were seeking to use defamation law as a basis for penalizing civil rights advocates for expressing their opposition to resistance to desegregation in the state.[28]

Seen in that context, the facts of *New York Times* seemed to call for a drastic reformulation of aspects of defamation law that were contributing to its use as a means of suppressing the expression of unpopular criticism of governmental officials or policies. Alabama defamation law, along with several other

---

[26] 347 U.S. 483 (1954).

[27] The portions of the advertisement that were singled out in Sullivan's suit were set forth in *New York Times*, 376 U.S. at 256–58. They referred to the police padlocking a student dining hall at the Alabama State College Campus in an effort to "starve [protesting students] into submission," as well as to "Southern violators" responding to "Dr. King's peaceful protests with intimidation and violence" such as, almost killing his wife and child by bombing his house, "assault[ing] his person," and "arrest[ing] him seven times" for "'speeding,' 'loitering,' and [other] similar 'offenses,' including 'perjury.'" *Id.* at 257–58. The defendants in the *New York Times* case conceded that some of the statements quoted from the ad were inaccurate; the police had not padlocked the dining hall, Dr. King had been arrested four, not seven times, and three of those arrests had taken place before Sullivan became the Commissioner of Police in Montgomery, and that Sullivan had nothing to do with Dr. King's being charged with perjury. *Id.* at 258–59.

[28] *See id.* at 292; *id.* at 294–95 (Black, J., concurring).

states at the time, allowed punitive damages in defamation cases without a showing of actual damages, presuming the falsity and malice of a publication from its having occurred. It considered statements injuring a person in his business, trade, or profession "libelous *per se*," not requiring proof of special damages to be actionable.[29] Both the trial court and the Alabama appellate courts found that comments in the ad, which referred to actions by police in Montgomery, Alabama, could have been understood as referring to commissioner L.B. Sullivan because, "the average person knows that municipal agents, such as police . . . are under the control and direction of the city governing body, and more particularly under the direction and control of a single commissioner."[30] Alabama courts also treated any showing of "good motives" and "justifiable ends" underlying a "fair comment" privilege as going only to the issue of whether the comments showed evidence of malice.[31] Finally, the very attenuated connection between statements in the ad and Sullivan, the *New York Times*' reliance on the reputation of signatories to the ad, and the dubious justification for the conclusion that "the average person" would have taken comments in the ad to refer to Sullivan may have motivated the *New York Times* majority to require that actual malice be proved with "convincing clarity."

All those dimensions of *New York Times* suggested that it may have been a compelling case for the Court to seek to prevent defamation law's being used as a mechanism for suppressing speech, but also that it may have been *sui generis*, the product of a particular moment in the history of race relations in America. From one point of view, the actual malice standard established in *New York Times* was an understandable effort to confer freedom on citizen critics o express their opposition to the actions of governmental officials without being chilled by the prospect of facing large damage awards in defamation suits. From another point of view, however, it was only a fashioned response to a dangerous effort to enlist defamation law in resistance to changes in the law of racial discrimination.

Few Supreme Court decisions come to be seen as *sui generis*, particularly ones invoking the Constitution to alter a legal field as dramatically as the Court appeared to alter the common law of defamation in *New York Times*. Litigators, once supplied

---

[29] *See id.* at 262, 267 (majority opinion).
[30] *Id.* at 263.
[31] *See id.* at 267; *id.* at 295 (Black, J., concurring).

with a constitutional argument in one set of cases, may be tempted to seek its expansion to another set. And it was not long before a different set of defendants sought to expand the scope of the actual malice standard beyond "public officials."

2. *Butts* and *Walker* and the "Public Figure" Category

As the *New York Times* case was being litigated up to the Supreme Court and the Court's decision in that case was handed down, two cases involving defamation suits were decided in lower courts that the Supreme Court concluded it should hear to clarify the potential reach of its recent *New York Times* decision.[32] The plaintiffs in both cases, one originating in a federal district court in Georgia and the other in a Texas state court, were not held by the Court to be "public officials" under the *New York Times* definition.[33] Wallace Butts was the athletic director of the University of Georgia, a state institution, which normally would have made him a "public official" by the *New York Times* criteria. However, Butts' entire salary was paid by the Georgia Athletic Association, a private corporation. The other plaintiff, Edwin Walker, was a retired Army general who had become active in political affairs. Walker was strongly interested in localities resisting physical efforts by federal authorities to enforce desegregation decrees. He had no connection to state or local government.

In the *Butts* case, the *Saturday Evening Post* published an article accusing Wally Butts of revealing the Georgia football team's offensive and defensive plays to Paul Bryant, the Alabama coach, before a game between the two schools.[34] The article was based on a claim by George Burnett, an Atlanta insurance salesman, that he had overheard Butts describe the Georgia team's plays and "all the significant secrets [the team] possessed" to Bryant.[35] Alabama defeated Georgia decisively in the game, the article stating that the Georgia players "took a frightful physical beating" because their plays were known in advance.[36]

---

[32] Curtis Publ'g Co. v. Butts, 388 U.S. 130 (1967); Associated Press v. Walker, 389 U.S. 28 (1967) (per curiam). The Court discussed and decided *Walker* in its *Butts* opinion and subsequently issued a per curiam opinion in *Walker*, reversing and remanding the decision of the Texas Civil Court of Appeals on the authority of its holding in *Butts*. *Butts*, 388 U.S. at 161–62.

[33] *Butts*, 388 U.S. at 154–55.

[34] *See id.* at 135–37.

[35] *Id.* at 136.

[36] *Id.*

Butts subsequently resigned from his position as Georgia's Athletic Director "for health and business reasons."[37] He then sued the Curtis Publishing Company, publisher of the *Saturday Evening Post*, for defamation, seeking punitive as well as compensatory damages. A jury awarded him $60,000 in compensatory damages and $5,000,000 in punitive damages; the trial judge reduced the award to $460,000 by remittitur.[38] A three-judge panel of the Fifth Circuit affirmed, two to one, the majority concluding that the *New York Times* actual malice standard did not apply to Butts because he was not a public official, while the sole dissenter maintained that it should apply because Butts was a "public figure," whose "activities were of great interest to the public."[39]

Walker originated from a September 30, 1962, riot at the University of Mississippi, where a crowd attacked federal marshals who were seeking to enforce a court decree ordering the enrollment of James Meredith, an African American, as a student at the University. Walker was present during the riot and spoke to a group of students. Van Savell, a "stringer" for the Associated Press ("AP"), was an eyewitness to the riot and reported, in a news dispatch to the AP's Atlanta office, that Edwin Walker had taken command of the students, led a charge against the marshals, encouraged the rioters to use violence and given them advice on combating the effects of tear gas. The AP subsequently published Savell's dispatch after the oral version of that dispatch was modified to indicate that Walker had spoken to the students after rather than before approaching the marshals. Walker admitted that he had been present during the riot but asserted that he had counseled the rioters to avoid violence, and that the crowd had rejected his plea. He denied that on any occasion he had taken part in a charge against the marshals.

Walker sued the AP in a state court in Texas, seeking $2,000,000 in compensatory and punitive damages. The trial court instructed the jury that if it found that the two statements in the dispatch, that Walker had "assumed command of the crowd" and that he led a charge against the marshals, were not "substantially true," it could award compensatory damages; and if it found that "the article was actuated by 'ill will, bad or evil motive, or that entire want of care [suggesting that it] was the result of a conscious indifference to the welfare of the person to

[37] *Id.* at 137.
[38] *Id.* at 137–38.
[39] *Id.* at 139.

be affected by it'" it could award punitive damages.[40] The jury awarded $500,000 in compensatory damages and $300,000 in punitive damages. The trial judge refused to enter the punitive damages award, concluding that the AP's failure to investigate the minor discrepancy between the oral and written versions of the dispatch did not constitute the "entire want of care" necessary to establish malice.[41]

The trial judge further said that if *New York Times* were applicable to the case, the entire damage award could not stand because "actual malice" had not been shown, but that *New York Times* was not applicable because the plaintiff was not a public official. The Texas Civil Court of Appeals affirmed both of those rulings, and the Supreme Court of Texas denied certiorari.[42]

a. *Opinions in* Butts *and* Walker

Petitions for certiorari were filed to the Supreme Court of the United States in both *Butts* and *Walker*, and the Court decided to grant both and discuss them in one opinion. The Court first noted that it was important to clarify the scope of its ruling in *New York Times* where defamation actions were "instituted by persons who are not public officials, but who are 'public figures' and involved in issues in which the public has a justified and important interest."[43] One of the Court's assertions in *Butts* and *Walker* was that "[n]either plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy," but at the same time, the Court noted that the visibility of Butts's position as Georgia's Athletic Director and Walker's having "thrust[ed] his personality into the 'vortex' of an important public controversy," would have been enough to label them "'public figures' under ordinary tort rules."[44] Their cases thus squarely raised the question of whether the *New York Times* rules for defamation cases involving public officials should apply to cases where the plaintiffs were public figures.

The Court then added that it had expressly left the scope of its decision in *New York Times* open in that case; and that the question had not yet been settled in its subsequent defamation cases; and that several lower courts had considered the question,

[40] *Id.* at 141 & n.4.
[41] *Id.* at 141–42.
[42] *Id.* at 142.
[43] *Id.* at 134.
[44] *Id.* at 154–55.

resulting in a "sharp division of opinion as to whether the *New York Times* rule should apply only in actions brought by public officials or whether it has a longer reach."[45] At stake, the Court thought, was whether "the *New York Times* rule [should] become a talisman which gives the press constitutionally adequate protection only in a limited field," which it concluded would be "unfortunate."[46] However, what would be equally unfortunate, in the Court's view, would be a decision "which goes far to immunize the press from having to make just reparation for the infliction of needless injury upon honor and reputation through false publication."[47] The *Butts* and *Walker* cases provided the Court with an opportunity to avoid those two consequences.

The Court's opportunity, however, was not grasped with clarity. The absence of consensus among the Justices as to the applicability of *New York Times* to "public figure" cases resulted in opinions in *Butts* and *Walker* being issued in a potentially misleading sequence. The lead opinion, written by Justice Harlan, announced the judgment of the Court, to affirm the Fifth Circuit in *Butts* and to reverse the Texas Court of Appeals and remand in *Walker*.[48] It was, however, only joined by three other Justices, Clark, Stewart, and Fortas.[49] Harlan concluded that when the plaintiff in a defamation action was a "public figure" rather than a public official, the standard was not actual malice, but "a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers."[50] That standard appeared to be the equivalent of gross negligence in tort law, and, when it was applied, the *Saturday Evening Post* was found to have violated it and the AP was not. Butts's suit was thus allowed, and Walker's remanded to the Texas trial court to be dismissed.[51]

Had Harlan's opinion commanded a fifth vote, the categories of public official and public figure in defamation actions would have become constitutionally salient, with future cases needing to emphasize that the status of those two types of plaintiffs led to different conclusions about the relationship of the First Amendment to defamation law, the actual malice standard

---

[45] *Id.* at 134.
[46] *Id.* at 135.
[47] *Id.*
[48] *Id.* at 133, 162.
[49] *Id.* at 133.
[50] *Id.* at 155.
[51] *Id.* at 158–59, 162.

being confined to cases involving public officials. But no fifth vote for Harlan's position was forthcoming in *Butts* and *Walker*, and the views of the other five Justices ended up extending the *New York Times* privilege beyond suits by government officials.

Only one of the other Justices writing opinions in *Butts* and *Walker* directly addressed the relationship between public officials and public figures. That was Chief Justice Earl Warren, who issued an opinion which was characterized as a concurrence in the results of both *Butts* and *Walker.* Chief Justice Warren began his opinion by stating that although he "agree[d] with the results announced by Mr. Justice Harlan" in both *Butts* and *Walker*, he disagreed with Harlan's "reasons for reaching those results," and his disagreement stemmed from Harlan's "departure from the teaching" of *New York Times*.[52] The meat of Warren's opinion then set forth reasons for why the constitutional privilege in defamation cases involving "public figures" should be the same as that in cases where the plaintiffs were public officials.

Because two other Justices, Brennan and White, concurred in Warren's opinion, and Justices Black and Douglas endorsed its extension of First Amendment protection for defendants in defamation suits involving "public figures," Harlan identified Warren's opinion as controlling the disposition of *Butts* and *Walker*.[53] That meant, for future cases, that the category of "public official" in defamation cases was now subsumed in the larger category of "public figure." It was to set in motion a threshold inquiry in such cases about whether a plaintiff was a "public figure" or a "private citizen."[54] But, as we

---

[52] *Id.* at 162 (Warren, C.J., concurring).

[53] Justice Harlan's opinion concluded by stating that on remand, *Walker*'s proceedings should not be "inconsistent with the opinions . . . [of] The Chief Justice, Mr. Justice Black, and Mr. Justice Brennan." *Id.* (majority opinion).

[54] Chief Justice Warren's discussion of the categories of "public officials" and "public figures" in defamation cases was confined to Part I of his opinion. *See id.* at 162–65 (Warren, C.J., concurring). The other parts of his concurrence considered whether a new trial was required in *Butts*, because the jury instructions might have rested on a misunderstanding of the actual malice standard, a question to which he ultimately concluded in the negative and applied an actual malice standard to both *Butts* and *Walker*, affirming the former and reversing the latter. *See id.* at 165–70. Justice Black's concurrence (joined by Justice Douglas) supported Chief Justice Warren's discussion in Part I of his concurring opinion but added that although Justice Black agreed with the disposition in *Walker*, he continued to believe that "the First Amendment was intended to leave the press free from the harassment of libel judgments." *Id.* at 170, 172 (Black, J., concurring). For the aforementioned reason, Justice Black and Justice Douglas dissented from the application of the *New York Times* standard in *Butts. Id.* at

shall see, it took some time for the Court to coalesce around the proposition that the status of a plaintiff was vital to the role of the *New York Times* actual malice standard in defamation cases.

Warren began his discussion of the status of "public officials" and "public figures" in defamation cases with the following observations:

> To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds . . . This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.[55]

Two conclusions followed for Warren from those observations. First, that our society "has a legitimate and substantial interest in the conduct of [public figures]," and that the freedom of the press to engage in uninhibited debate about their involvement in public issues and events is as crucial as it is in the case of "public officials."[56] The fact that public figures were "not amenable to the restraints of the political process" only underscored "the legitimate and substantial" interest that the public had in their conduct, since "public opinion may be the only means by which society could attempt to influence" it. [57]

---

172. Justice Brennan (joined by Justice White) likewise joined in on Part I of Chief Justice Warren's concurrence, agreeing that actual malice should be the standard in "public figure" cases. *See id.* (Brennan, J., concurring). However, Justice Brennan dissented from the disposition of *Butts*, believing that there should be a new trial because the jury instruction invited confusion on the definition of "malice." *See id.* at 173. The result of the concurring opinions was that five justices agreed that "public figure" cases should be governed, at a minimum, by the actual malice standard.

[55] *Id.* at 163–64 (Warren, C.J., concurring).

[56] *Id.* at 164.

[57] *Id.*

Warren's first conclusion thus sought to equate the interest of the public in observing and commenting on the activities of governmental officeholders with that of the public in doing the same for "public figures." That led him to a second conclusion: public figures, by reason of their visibility and prominence, had an ability to respond to critical comments about them akin to that which public officials derived from their offices. As Warren put it, "'public figures' have as ready access as 'public officials' to mass media of communication, both to influence policy and to counter criticism of their views and activities."[58]

Although the effect of Warren's opinion in *Butts* and *Walker* was to apply the actual malice standard to "public figures"—four other Justices concurred with his rationales for doing so—neither of the rationales Warren advanced for extending the *New York Times* rule to public figure cases had drawn upon the original bases for that rule. Nowhere in Warren's opinion did he invoke the "breathing space" rationale, designed to allow the "citizen-critic" more freedom to criticize governmental policies and officials, or the "chilling effect" rationale, designed to prevent critics of the government from suppressing critical comments for fear they might contain factual inaccuracies. Indeed, only one of Warren's rationales for extending the *New York Times* standard raised First Amendment concerns at all and did so merely by asserting that the "public interest" in the activities of visible and prominent persons who did not hold public office should be afforded comparable constitutional weight to that of the interest of citizens in the activities of governmental officials. That assertion does not seem self-evident: an interest in the conduct of those holding official positions would seem directly connected to the self-governance rationale for protecting speech, whereas an interest in the conduct of prominent non-governmental persons would not.

Butts and *Walker* not only differed from *New York Times* because those cases were about the activities of private citizens rather than public officials. Neither *Butts* nor *Walker* involved purportedly trivial factual inaccuracies in reporting, the sort contained in the *New York Times* advertisement. The minor factual discrepancies in the ad on which Sullivan's lawsuit was based had raised concerns among the *New York Times* majority that if defamation law could be used to punish critics of the government who made trivial factual errors in their criticism, it

[58] *Id.*

would become a weapon for chilling hostile critics. The suits in *Butts* and *Walker* were not based on comparably trivial errors. Wallace Butts was accused of revealing the Georgia football team's offensive and defensive plays to the opponent's coach before a game and had vigorously denied doing so. Edwin Walker had been accused of leading a mob of students to attack federal marshals and had also vigorously denied that allegation.

"Breathing space" and "chilling effect" were thus not issues raised by *Butts* and *Walker*. If *New York Times* had fundamentally been about the dangers of using defamation law to suppress hostile criticism of governmental policies and officials, *Butts* and *Walker* were about something else. And over time it became increasingly unclear what that "something else" was.

3. Doctrinal Paths after *Butts* and *Walker*

Butts and *Walker* set the Court on two paths that proved increasingly difficult for it to navigate. One was the path of determining which categories of plaintiffs qualified for the "public figure" designation. That path would become central to both the Supreme Court and lower courts' later twentieth-century defamation cases. The other path, however, came first: determining whether one of Warren's rationales for expanding the actual malice standard to public figure cases, the weight of the public's interest in a whole host of persons, issues, and activities (what subsequently became telescoped as "matters of public concern"), might also apply when a plaintiff was not a public figure, resulting in the actual malice standards governing nearly all defamation cases.

a. Rosenbloom v. Metromedia *and "Matters of Public Concern"*

In *Rosenbloom v. Metromedia*,[59] decided four years after *Butts* and *Walker*, George Rosenbloom, a distributor of nudist magazines in the Philadelphia metropolitan area, was arrested on a charge of obscenity for supplying such magazines to a newsstand in the city of Philadelphia. WIP, a radio station in Philadelphia, was informed of the arrest by the captain of the Philadelphia Police's Special Investigation Squad and made several broadcasts announcing the arrest of Rosenbloom and identifying material confiscated in the arrest as "obscene books"

[59] 403 U.S. 29 (1971).

or "allegedly obscene books." Rosenbloom, asserting that the material in the magazines was not obscene, subsequently sought an injunction against the Philadelphia Police as well as some local news media. WIP reported news of the injunction, referring to distributors of nudist magazines as "girlie-book peddlers" and "smut merchants."[60]

After Rosenbloom was acquitted of obscenity charges six months after WIP's broadcasts of his arrest and injunction suit, he filed a defamation action against Metromedia, Inc., the owner of WIP, in federal district court, stating that his acquittal proved that WIP's broadcasts were false and constituted *libel per se.* A jury agreed and awarded Rosenbloom compensatory and punitive damages, and the trial judge denied Metromedia's motion for j.n.o.v., reducing the punitive award. The U.S. Court of Appeals for the Third Circuit then reversed, holding that the broadcasts involved "matters of public interest," that the *New York Times* actual malice standard applied, and that Rosenbloom had not shown evidence of intentional or reckless falsity on WIP's part. The Supreme Court granted certiorari and affirmed the Third Circuit.[61]

At the time *Rosenbloom* was decided Warren Burger had succeeded Earl Warren as Chief Justice and Harry Blackmun had replaced Abe Fortas. Justices Black and Douglas, who believed that the First Amendment gave the press and other speakers immunity to make false and damaging statements, remained on the Court, as did Justices Harlan and Stewart, dissenters in *Butts* and *Walker*, and Justices Brennan and White, who had concurred in Warren's opinion in those cases. One prominent commentator had argued that the logic of *New York Times* suggested that an actual malice standard should apply to defamation cases involving "matters of public concern,"[62] but the Court had not yet taken that step.

b. Opinions in *Rosenbloom*

A plurality did so, however, in *Rosenbloom*. Brennan's opinion for a plurality of Justices, composed of himself, Burger, and Blackmun, made a forthright attempt to shift the emphasis in the *New York Times* line of cases from the status of plaintiffs in defamation cases to the importance of safeguarding discussion of

[60] *Id.* at 33–34.
[61] *Id.* at 36–40, 57.
[62] *See* Harry Kalven, Jr., *The Reasonable Man and the First Amendment:* Hill*,* Butts*, and* Walker, 1967 SUP. CT. REV. 267, 304.

matters of public concern. Along the way, Justice Brennan endorsed Chief Justice Warren's claims in *Butts* and *Walker* that the lines between the governmental and private sectors had become blurred and that public figures could be as influential and interesting to members of the public as public officials.[63] But Justice Brennan went further, asserting that the core of the First Amendment was protection for the freedom of citizens to comment freely on matters that interested them.[64] The existence of magazines containing nudity and the response of police and municipal officials to those magazines were examples of such matters.

Two more votes for the plurality's disposition of *Rosenbloom* were supplied by Justice Black, who reiterated his view that the First Amendment privilege conferred absolute immunity on reports by the news media,[65] and Justice White, who, while expressing concern about extensions of the *New York Times* actual malice standard,[66] concluded that *New York Times* gave "the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail."[67] Three Justices, Harlan, Stewart, and Marshall, dissented from Brennan's opinion, each expressing concern that the Court was unduly tilting the balance between First Amendment values and the interest in reputation so as to undermine the latter interest.[68]

c. *Towards* Gertz v. Robert Welch, Inc.

Three years after *Rosenbloom* another case came to the Court in which a person who was not a public official, and arguably not a public figure, was defamed on a matter of public concern.[69] A Chicago lawyer, Elmer Gertz, who was visible in some legal circles but not well known to the public generally, was accused by a magazine published by the John Birch Society, an anti-Communist organization, of arranging a "frame-up" in a civil trial against a police officer and of being a "Communist fronter." Gertz sued the magazine's publisher for defamation in federal district court and obtained a jury verdict. Since evidence that the defendant publisher had acted with actual malice was

[63] *Rosenbloom*, 403 U.S. at 41–42.
[64] *Id.* at 43–44.
[65] *Id.* at 57 (Black, J., concurring).
[66] *Id.* at 59 (White, J., concurring).
[67] *Id.* at 62.
[68] *See id.* at 62–78 (Harlan, J., dissenting); *id.* at 80–82 (Marshall, J., dissenting).
[69] Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

lacking, that verdict would have required the jury to conclude that Gertz was neither a public official nor a public figure, a finding that was consistent with the judge's ruling to that effect. After the verdict, however, the judge concluded that the *New York Times* standard should apply to Gertz's situation, anticipating the Court's ruling in *Rosenbloom*, which was decided after Gertz's trial had been concluded. The trial judge accordingly granted judgment notwithstanding the verdict to Robert Welch, Inc.[70]

Gertz appealed to the U.S. Court of Appeals for the Seventh Circuit. By the time that court heard the appeal, *Rosenbloom* had been decided. The Seventh Circuit expressed some doubt about the trial court's ruling that Gertz was not a public figure but concluded that *Rosenbloom* governed the case and that Gertz had not shown actual malice. It therefore affirmed the trial court, Gertz petitioned for certiorari, inviting the Supreme Court to reconsider *Rosenbloom*, and the Court, on which Justices Powell and Rehnquist had replaced Black and Harlan, did so.[71]

4. Powell's Summary of the State of the *New York Times* Privilege

Justice Powell began his opinion in *Gertz* by noting that the "eight Justices who participated in *Rosenbloom* announced their views in five separate opinions, none of which commanded more than three votes," and which "reflect[ed] divergent traditions of thought about the general problem of reconciling the law of defamation with the First Amendment."[72] Powell's characterization of those "traditions of thought" accurately captured the state of post-*New York Times* doctrine at the time *Gertz* came before the Court. He identified three existing approaches to *New York Times* and its progeny.

One approach, personified by Brennan's opinion in *Rosenbloom*, "has been to extend the *New York Times* [actual malice standard] to an expanding variety of situations."[73] That approach described the core of *New York Times* as establishing constitutional protection for false statements about matters in which the public had a general interest unless they were made intentionally or recklessly. The theory animating Brennan's

[70] *Id.* at 329.
[71] *Id.* at 330–32.
[72] *Id.* at 333.
[73] *Id.*

Rosenbloom opinion was freedom in the media to publish even false information about "matters of public concern" to facilitate the dissemination of that information as widely as possible. Only when publishers had intentionally or recklessly failed to ascertain the truth of what they circulate should constraints be placed on their actions in the form of defamation suits.

Under Brennan's approach, the status of a plaintiff in a defamation suit was inconsequential: what counted was not whether the plaintiff was a private citizen or a governmental official, or whether the plaintiff was a visible public figure or a less visible person, but what was said about him or her. In contrast, Warren's opinion in *Butts* and *Walker*, and subsequent decisions seeking to clarify the public figure category of plaintiffs and distinguish it from the private citizen category, saw *New York Times* and *Butts/Walker* as cases seeking to highlight the important differences, for First Amendment purposes, between plaintiffs whose activities made them visible to the public at large and plaintiffs who lacked that visibility. The approach assumed that it was more important, under the First Amendment, to facilitate commentary about the former set of plaintiffs, and that those plaintiffs, because of their prominence, had greater opportunities to counter critical comments made about them by gaining access to the media which was afforded to them because of their status. In short, the status of the plaintiff was vital to inquiries about the scope of the *New York Times* privilege, and *New York Times* was seen as the Court's first recognition that the actual malice standard was status-driven. As Powell put it, the approach sought to "vary the level of constitutional privilege for defamatory falsehood with the status of the person defamed."[74]

Powell described the third "tradition" of views about the relationship of defamation law to the First Amendment as one that "would grant to the press and broadcast media absolute immunity from liability for defamation."[75] Although Powell did not indicate that the third approach held any less weight among his fellow Justices than the others, it was plain, by 1974, that unless dramatic changes took place to the personnel on the Court, that approach was unlikely to attract many Justices as the Court sought to work through the doctrinal legacy of *New York Times*. Black, the originator of the approach, was no longer on the Court, and Douglas, the other Justice to endorse it, was entering the thirty-sixth year of his tenure and not in robust

[74] *Id.*
[75] *Id.*

health. Black and Douglas, by affirming media immunity in defamation cases, had provided important votes for Warren's opinion in *Butts* and *Walker*, and Black had provided a fourth vote for the majority disposition in *Rosenbloom.* But it was clear, by *Gertz,* that the future battleground of First Amendment defamation cases, at least in the short run, was going to be between the first and second approaches Powell described. Was the status of the plaintiff in defamation cases going to be of constitutional significance or not?

5. Opinions in *Gertz*

Powell's opinion, which was joined by Stewart, Marshall, Blackmun, and Rehnquist, was centered on a bright-line distinction between public officials or public figures and private individuals as plaintiffs in defamation cases.[76] Recognizing the strength of protecting the interest of private persons in their reputations as well as the First Amendment concerns in defamation cases, Powell sought to distinguish private individual plaintiffs from public official or public figure plaintiffs in two respects. One was self-help, which Powell called "[t]he first remedy of any victim of defamation."[77] Self-help consisted of "using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation."[78] Public officials and public figures, Warren's opinion in *Butts* and *Walker* had pointed out, "usually enjoy significantly greater access to the channels of effective communication," and thus normally had "a more realistic opportunity to counteract false statements" than private individuals.[79] Consequently, private individuals were "more vulnerable to injury" from false and damaging statements, making "the state interest in protecting them . . . correspondingly greater."[80]

The other feature differentiating private individuals from public officials or public figures in defamation cases was what Powell called "voluntary expos[ure] . . . to increased risk of

[76] The Court has not squarely addressed the question of whether a plaintiff might not be a "public official," but nonetheless be a "public figure." However, in *Rosenblatt v. Baer*, 383 U.S. 75 (1966), Justice Brennan, in delivering the opinion of the Court, stated that the actual malice standard would not be applied "merely because a statement defamatory of some person in government employ catches the public's interest." *Id.* at 86 n.13.
[77] *Gertz*, 418 U.S. at 344.
[78] *Id.*
[79] *Id.*
[80] *Id.*

injury from defamatory falsehood."[81] Powell maintained that not only had persons holding or campaigning for public offices invited greater scrutiny of themselves and their fitness for office, public figures had assumed the risk of heightened public scrutiny as well. Some public figures had "assumed roles of especial prominence in the affairs of society," and could expect that their prominence would be accompanied by a large amount of public attention and commentary.[82] More commonly, persons would become public figures not through general prominence but by "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved."[83] These "limited purpose" public figures could expect to "invite attention and comment" with respect to the controversies in which they were participating.[84]

In contrast, Powell maintained, private individuals had "not accepted public office or assumed an 'influential role in ordering society.'"[85] They had not relinquished an "interest in the protection of [their] own good name[s]."[86] Consequently, they had "a more compelling call on the courts for redress of injury inflicted by defamatory falsehood."[87] They were "more deserving of recovery" in defamation suits than those who had assumed the risk of public scrutiny.[88]

Those distinctions—the different "self-help" and "assumption of risk" dimensions of public and private plaintiffs in defamation cases—constituted the center of Powell's *Gertz* opinion. But Powell recognized that although he was crafting a retreat from the Court's progressive extension of the *New York Times* standard in defamation cases, he was not writing on a clean slate. His opinion accepted the Court's rationales for its formulation of the *New York Times* standard and its extension to "public figure" cases. He recognized the threat that the common law of defamation, with its strict liability basis for recovery and its countenancing of presumed and punitive damages—damages where recovery need not be based on any showing of concrete injury—posed to vigorous commentary on the activities of

---

[81] *Id.* at 345.
[82] *Id.*
[83] *Id.*
[84] *Id.*
[85] *Id.* (quoting Curtis Publishing Co. v. Butts, 388 U.S. 130, 164 (Warren, C.J., concurring in result)).
[86] *Id.*
[87] *Id.*
[88] *Id.*

prominent persons or on the decisions of governmental officials. Once First Amendment concerns had been recognized in defamation law, he implied, it was too late to return to a constitutional regime where defamatory speech was given no constitutional protection.[89]

Moreover, it was clear that a majority of the Justices who decided *Gertz* agreed with Blackmun's observation, in his separate opinion, that "it is of profound importance for the Court to come to rest in the defamation area and to have a clearly defined majority position."[90] Consequently, Powell's opinion made some effort to establish additional constitutional requirements for defamation suits by private individuals. Of particular concern were two features of common law defamation actions, the standard of liability and damages. After noting that the common law had permitted strict liability in those actions, Powell maintained that that standard of recovery was incompatible with the First Amendment and held in *Gertz* that states could establish their own bases for recovery, so long as they did not adopt strict liability.[91]

The other feature was damages. Powell noted that "[t]he common law of defamation is an oddity of tort law," in that it allowed recovery "of purportedly compensatory damages without evidence of actual loss."[92] Both "presumed" and punitive damages could be awarded without any proof that the harm allegedly caused to the subject of a defamation had in fact occurred. Presumed and punitive damages, Powell concluded, invited juries to "punish reprehensible conduct" and thus "exacerbate[d] the danger of media self-censorship."[93] Consequently, *Gertz* held that where a state's defamation law permitted liability under a less demanding standard than *New York Times*, private individuals in defamation suits could normally only recover for "actual" injury, defined as out of pocket losses plus recovery for "personal humiliation" or "mental anguish and suffering" connected to the impairment of their reputation and standing. To recover presumed or punitive damages, private individuals defamed on matters of public concern needed to meet the *New York Times* requirement that clear and convincing evidence of actual malice be shown.[94]

---

[89] *See id.* at 346.
[90] *Id.* at 354 (Blackmun, J., concurring).
[91] *Id.* at 347 (majority opinion).
[92] *Id.* at 349.
[93] *Id.* at 350.
[94] *See id.* at 350.

White charged in his dissent in *Gertz* that Powell's opinion had sought to federalize "major aspects of libel law by declaring unconstitutional in important respects the prevailing defamation law in all or most of the 50 states."[95] The majority in *Gertz* had done just that. It had attempted, as Blackmun put it in his separate opinion, to "withdraw[] to the factual limits of the pre-*Rosenbloom* cases," with their emphasis on the public official and public figure status of defamation plaintiffs, and to fix "the outer boundary of the *New York Times* doctrine."[96] It had sought to associate the constitutionalizing of defamation law with the now inclusive category of "public figure," which would trigger the *New York Times* actual malice standard. Every defamation case would now purportedly begin with an inquiry into the status of the plaintiff. Every such case would invite courts to create subcategories of public figures. The dissenters in *Gertz* raised multiple objections. Burger believing that the majority had established a negligence standard for all "private" defamation cases, undercutting the traditional law of defamation;[97] White objecting to the eradication of strict liability in private cases because that standard was often the only basis by which a plaintiff who could not prove falsity could vindicate his or her reputation;[98] Brennan reaffirming his support for *Rosenbloom* and suggesting that courts would have difficulty distinguishing public figures from private citizens defamed on matters of public concern;[99] and Douglas reiterating his view that the First Amendment established immunity for any false and damaging media publications.[100]

6. Summing Up: The Evolution From *New York Times* to *Gertz*

None of the *Gertz* opinions brought up what had happened to *New York Times* during its doctrinal evolution. The constitutionalizing of defamation law had passed from one stage to another. In the first stage, personified by *New York Times*, a "breathing space" for false statements about the conduct of public officials and the importance of allowing the "citizen-critic" full reign to comment on governmental affairs had formed

[95] *Id.* at 370 (White, J., dissenting).
[96] *Id.* at 353 (Blackmun, J., concurring).
[97] *Id.* at 354–55 (Burger, C.J., dissenting).
[98] *Id.* at 378–80, 389–90 (White, J., dissenting).
[99] *Id.* at 361, 364 (Brennan, J., dissenting).
[100] *Id.* at 355–60 (Douglas, J., dissenting).

the basis of a First Amendment privilege in defamation law, and the "public official" status of plaintiffs had been crucial to the existence of that privilege. In the second stage, being a public official had become merely part of a larger category of "public figure," and the self-help and assuming-the-risk rationales had been identified as vital in separating public figures from other private individuals. Neither of those rationales invoked breathing space or citizen-critics. The *New York Times* standard had come to be associated with the proposition that if one seeks to become a visible or prominent member of society, one invites commentary on one's affairs which may contain false and damaging information.

The *New York Times* standard of actual malice had been formulated in a case in which there was a real danger that defamation law could be used to punish persons who criticized the policies of incumbent officials or their organizations. A series of lucrative damage awards from state and local officials whose reputations were ostensibly lowered by the *New York Times* advertisement could have crippled the paper financially and significantly deterred searching coverage of public officials by the media. But, by *Gertz,* the actual malice standard had come to be associated with commentary on anyone who merited the "public figure" label and had not been discarded in cases where the plaintiffs were private citizens defamed on "matters of public concern." In most "public figure" cases, and seemingly in any *Gertz*-type case, there was little risk that defamation law was being employed to punish defendants for their unpopular views. Plaintiffs in those two sets of cases were simply complaining that something false had been said about them which threatened to damage their reputations.

The recalibration of the salience of the public official and public figure categories that took place from *New York Times* to *Gertz* had resulted in the constitutional concerns in defamation cases seemingly being modified. Instead of the principal concerns centering around a breathing space to allow citizens to freely criticize governmental officials and policies without fear of retribution through defamation suits, the concerns articulated in *Butts* and *Walker*, and in *Gertz*, appeared to center around a different sort of freedom. It was the freedom of members of the public and the media to make comments about the activities of three other categories of persons: "general" public figures, those so widely known that virtually all their activities could be said to be of interest to the public; "limited purpose" public figures,

those who had "thrust themselves into the vortex" of contentious public issues and sought to influence their resolution, and whose conduct, with respect to those issues, was thus of interest to large numbers of the public; and private citizens allegedly defamed on "matters of public concern," plaintiffs for whom the *New York Times* standard of proof was relaxed with respect to "actual injuries" they had suffered but was retained if recovery was sought in presumed or punitive damages.[101]

The core First Amendment concern linking *Butts* and *Walker* and *Gertz* thus seemed to be providing a "breathing space" for comments about people whose conduct was a matter of public interest. This despite the *Gertz* majority having departed from *Rosenbloom* and having declared that identifying the constitutional core of defamation cases as protection for comments about "matters of public interest" was overbroad and unworkable in application.

The assumption by the majority opinions in *Butts* and *Walker*, and in *Gertz*, that the constitutional concerns in public figure cases were comparable to those in public official cases seems problematic. Avoiding a "chilling effect" on speech from persons critical of the operations and policies of governments and their officials has been regularly identified as indispensable to the participation of citizens in a democratic form of government.[102] Avoiding a comparable effect on speech from members of the public or media that is arguably injurious to the reputations of public figures or private citizens defamed on matters of public interest would seem, on its face, less of a First Amendment concern.

In partially constitutionalizing defamation law, *New York Times* had articulated the threats that the body of law posed to free speech, Defamation awards could punish objectionable speech about governmental actors and policies through presumed and punitive damages, strict liability for harmful factual errors, and a burden on defendants to prove that not only were their statements true, but, in some jurisdictions, made with good motives and for justifiable ends. Not only initial speakers but publishers were potential defendants in defamation cases, so the punitive dimensions of defamation law could significantly deter searching inquiries into the conduct of government by citizens and the press. Moreover, the lack of tolerance

[101] *Id.* at 351–52 (majority opinion).
[102] *See, e.g.*, Leslie Kendrick, *Speech, Intent, and the Chilling Effect*, 54 WM. & MARY L. REV. 1633, 1636–37 (2013).

defamation law accorded to factual errors through its strict liability standard of recovery meant that any speaker making a factually false comment damaging to a public official's reputation could face a lawsuit in which the official need not show any actual harm to recover what might amount to a substantial award of presumed and punitive damages. Given those features of defamation law, one could readily understand how critical speech about public officials might be chilled.

Can false and damaging speech about persons who did not hold public office but were visible to members of communities in some other fashion be said to be comparably "chilled" by the liability standards of defamation law? That question might be seen as raising issues qualitatively distinct from those in public official cases. First, can one assume that public figures will seek to stifle or punish critical speech about them in a comparable fashion to the public official plaintiffs in *New York Times* and the other libel cases pending in the Alabama courts when the *New York Times* case was decided? Those cases involved ideological criticism from persons opposing certain decisions and policies, and since those decisions and policies were associated with the officials being criticized, the incentives of those officials to suppress that criticism, and to deter future critics of their conduct, seem apparent.

Are there comparable incentives for public figure plaintiffs? Both central rationales invoked by Justice Powell to justify the application of the *New York Times* actual malice standard to public figures would seem to indicate otherwise. The self-help rationale, premised on the expanded opportunity visible and prominent citizens had to combat comments damaging to their reputation, suggests that public figures may have considerable ability to refute such comments by publishing rejoinders that, because of the figures' visibility, are more likely to be publicly circulated, and therefore fewer incentives to resort to defamation suits to seek refutation when less costly means are available.

As for the assumption of risk rationale—that persons who have achieved visibility or prominence can be expected to understand that expanded public scrutiny of their conduct will accompany those achievements—it also does not seem to suggest that public figures will seek to punish their critics through the medium of defamation suits. One might reasonably assume that those who seek to achieve celebrity status or to take visible action to influence the outcome of contentious issues will either be less

concerned with criticism or better prepared to respond to it than ordinary citizens. As such, they may be disinclined to resort to the expensive tactic of using defamation law to punish their opponents.

So, if the core First Amendment concerns raised by defamation law that *New York Times* had identified are its ability to chill the speech of citizen- critics of public officials and to provide them with a breathing space to make factually false statements during their criticism, those concerns are arguably less implicated in public figure cases. Public figures are not officials of the government. Criticism of their conduct is not directed at governmental policies or activities. In contrast, it is directed at classes of private persons who happen to occupy positions that make them visible to members of the public to a degree that most private persons are not.

What is the First Amendment interest that requires *New York Times*-level protection for critics of such classes of persons? Does it amount to anything more than providing a breathing space to comment on the conduct of people whose activities could be said to be of interest to potentially large segments of the public? How is such a breathing space connected to democracy, self-governance, and a "chilling effect" on political speech? In extending the *New York Times* privilege beyond public officials to public figures, and then, to a limited extent, to private persons defamed on matters of public concern, the decisions in *Butts* and *Walker* arguably lost touch with the constitutional basis for the actual malice standard.

As for *Gertz*, the Court's opinion made much of the fact that neither the self-help nor assumption-of-risk rationales applied to private persons, who may have had limited opportunities to publicly counter comments made about them and had not sought public visibility and the criticism which might accompany it.[103] Yet the *Gertz* majority assumed that some constitutional concerns remained in cases where the plaintiffs were private persons, at least where the subject matter on which they were allegedly defamed was one of "public concern." Since the conduct of those plaintiffs does not raise any issues involving criticism of the government, and they have not sought or achieved visibility or prominence, one might ask where those constitutional concerns lay.

---

[103] *Gertz*, 418 U.S. at 344–45.

As noted, the *Gertz* majority significantly modified the common law of defamation with respect to strict liability and presumed or punitive damages, in effect requiring private plaintiffs defamed on matters of public concern to show actual malice to receive substantial awards. What were the concerns inclining the *Gertz* majority to retain at least a partial constitutionalization of defamation law where the plaintiffs were private? What motivated it to retain "matter of public concern" as a meaningful constitutional criterion when it had suggested that *Rosenbloom* had been misguided in establishing that criterion? I will return to those questions in the concluding Part.

7. Post-*Gertz* Issues

Fifty years after it was decided, *Gertz* continues to set the framework for the constitutional analysis of defamation cases. Over the years, courts have considered a series of issues left open in *Gertz*: whether the constitutional limitations on cases where the plaintiffs are deemed private individuals exist where the defendants are not members of the media;[104] whether *Gertz* applies where a private individual is defamed on a matter not of public concern;[105] whether there is a constitutional privilege for false statements of "opinion," as distinguished from statements of fact, and whether a statement can be considered an opinion if it appears founded on knowledge of underlying defamatory facts;[106] what subcategories of public figures can be said to

[104] Justice Powell's opinion for the Court in *Gertz* held that "so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." *Id.* at 347 (suggesting that *Gertz* might not apply to non-media defendants). *See also* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 756 (1985); *id.* at 773–74 (White, J., concurring) ("Wisely, in my view, Justice Powell does not rest his application of a different rule here on a distinction drawn between media and nonmedia defendants."); *id.* at 781, 782 & nn.6–7, 783 & n.9, 784 & n.10 (Brennan, J., dissenting).

[105] That was the central question in *Dun & Bradstreet*, where five Justices, Justice Powell authoring a plurality opinion joined by Justices Rehnquist and O'Connor, and Justices Burger and White concurring, concluded no, resulting in the Court's creation of another category of defamation plaintiffs—private citizens defamed on matters of "private" concern. *See Dun & Bradstreet*, 472 U.S. at 761–63. In that category the common law defamation rules continue to apply, including strict liability and presumed and punitive damages. *See id.* at 763.

[106] *See Gertz*, 418 U.S. at 339–40 ("We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscious of judges and juries but on the competition of other ideas."). This statement by Justice Powell in *Gertz* led some lower courts to conclude that the Supreme Court had established a

exist;[107] whether, in addition to the constitutional privileges identified in *New York Times* and *Gertz*, a privilege of "neutral reportage," protecting a publisher who repeats a defamatory statement made by another without additional comment, exists;[108] whether the common law presumption of the falsity of an allegedly defamatory statement can be retained in cases where some form of constitutional privilege is taken to exist;[109] and whether the actual malice standard should be applied in cases where the basis of the suit is IIED and the defendant is a public figure[110] or a private individual injured in connection with a matter of public concern.[111] None of those cases, however, have inclined the Court to reconsider *Gertz*, and the Court has not decided a constitutional defamation case in thirty-four years. The doctrinal scope of the *New York Times* actual malice standard has seemingly reached its limit with *Gertz.* But the constitutional

constitutional privilege for opinions. *See, e.g.*, Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984). The Court provided a definitive answer on this issue in *Milkovich v. Lorain Journal Company*, 497 U.S. 1 (1990), explaining that the First Amendment does not require "an additional separate constitutional privilege for 'opinion[.]'" *Id.* at 21. In *Milkovich*, the Court further clarified that the "opinion privilege" dictum in *Gertz* "was not intended to create a wholesale defamation exemption for 'opinion.'" *Id.* at 2 ("Simply couching a statement – 'Jones is a liar' – in terms of opinion – 'In my opinion Jones is a liar' – does not dispel the factual implications contained in the statement.").

[107] *See, e.g.*, Wells v. Liddy, 186 F.3d 505, 532 (4th Cir. 1999) ("[W]e have interpreted *Gertz* as creating three distinct types of public figures: (1) 'involuntary public figures,' who become public figures through no purposeful action of their own; (2) 'all-purpose public figures,' who achieve such pervasive fame or notoriety that they become public figures for all purposes and in all contexts; and (3) 'limited-purpose public figures,' who voluntarily inject themselves into a particular public controversy and thereby become public figures for a limited range of issues.").

[108] Such a privilege has generally not been recognized. *But see* Edwards v. Nat'l Audubon Soc'y, Inc., 556 F.2d 113, 122 (2nd Cir. 1977).

[109] *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 767 (1986) ("In a case such as this one, where a newspaper publishes speech of public concern about a private figure, the private-figure plaintiff cannot recover damages without also showing that the statements at issue are false.").

[110] Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 56 (1988) ("We conclude that public figures and officials may not recover for the tort of [IIED] by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with 'actual malice' . . . [t]his is not merely a 'blind application' of the *New York Times* standard . . . it reflects our considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment.").

[111] *See* Snyder v. Phelps, 562 U.S. 443, 460 (2011) (holding that the speech which was the basis of the plaintiff's IIED claim was on a matter of public concern, that such speech is entitled to heightened First Amendment protection, and that, as such, the private individual plaintiff was barred from recovery); *id.* at 443–46, 453–55. (outlining a test for determining what constitutes speech on matters of public concern).

basis for the imposition of that standard beyond *New York Times* remains uncertain and very possibly confused.

III. THE CHANGING CULTURAL CONTEXT OF THE *NEW YORK TIMES* STANDARD

This Part considers the cultural setting in which false and damaging comments about other individuals have taken place since *New York Times* was decided.[112] It emphasizes two dimensions of that setting. One is the transformation of media speakers, and of the ways in which information about others is circulated, over the last sixty years. The other is a comparatively recent development affecting the liability of media enterprises in defamation cases, the presence of media insurance, apparently insulating insureds from exposure even in cases where they have violated the actual malice standard.

A. The Changing Media Landscape

When *New York Times* was handed down, the American media community primarily consisted of newspapers, magazines, book publishers, and broadcasters of radio and television programs. Those enterprises were perceived as the established conduits by which information was communicated to the public. They were the curators of such information, their standards of "responsible" journalism and broadcasting serving to ensure that most news public audiences received had been vetted for accuracy and fairness. In their capacity as conduits and curators, the traditional media arguably helped sustain a democratic society by conveying information to members of the public that reinforced their participation in governance. The dominant mainstream media, newspapers catering to national audiences and broadcast networks, presented themselves as centrist enterprises committed to "objective" reporting and analysis of news events. Their being regarded as "First Amendment" institutions, worthy of constitutional privileges for responsible newsgathering, seemed a natural component of their status.[113]

In the 1960s a host of additional conduits for information were not significant parts of the media landscape. Cable television, with its multiplicity of outlets aimed at specialized

---

[112] *See* Edward Wasserman, *Digital Defamation, the Press, and the Law*, AM. PROSPECT (Aug. 23, 2021), https://prospect.org/justice/digital-defamation-press-and-the-law/.

[113] *See* Tilley, *supra* note 5, at 465–66.

audiences, was in its infancy. The internet had not yet appeared, with the result that generic sites on the World Wide Web, such as search engines, individual or company websites, and electronic mail addresses, as well as more specialized sites designed to facilitate communication among self-selected users, such as Facebook, Twitter/X, LinkedIn, Instagram, Snapchat, TikTok, and other "social media" outlets, were not in existence. But by the 1990s, the first set of those outlets had appeared, and by the second decade of the twenty-first century the second set was in place and being used by millions of persons.[114]

With the emergence of cable television, channels proliferated and broadcasts catering to niche audiences became part of cable "packages" purchased by households.[115] Although the Federal Communications Commission ("FCC") rule that cable operators were required to carry network programming as part of their packages was upheld by the Supreme Court in 1997,[116] the FCC took few steps to regulate the content of cable broadcasts. The result was that the centrist, "objective" image of television broadcasting was replaced with a more diversified, ideological set of market actors, some outlets openly representing themselves as espousing political views and attitudes. A similar phenomenon took place on AM radio, as stations introduced "talk shows" whose hosts catered to specialized audiences and espoused ideological viewpoints. Those developments served to undermine the image of the media as non-ideological conduits and make it less likely that the content of broadcasts would be self-regulated.[117]

1. Non-regulation of the Internet

As the internet evolved, over the course of the late twentieth century, from a specialized medium primarily frequented by the military, defense, and technical communities to a nearly ubiquitous form of communication, two decisions were made by governmental regulators that would greatly affect the internet's capacity to freely communicate information, and a feature of the medium developed that would distinguish its users from all other media outlets.

---

[114] *See* Logan, *supra* note 4, at 793–807.
[115] *See* Tilley, *supra* note 5, at 502–03.
[116] Turner Broad. Sys. v. FCC, 520 U.S 180, 180–83 (1997).
[117] *See* Tilley, *supra* note 5, at 502–03.

a. Barriers to Entry to the Internet

One regulatory decision was to establish virtually no barriers to entry to internet sites. All that is currently necessary to reach those sites and post information on them is a computer and access to an internet service provider supplying broadband service. Not everyone in the United States is able to take those steps—computers and internet service providers cost money, and not all communities in America have sufficient broadband capacity—but millions of Americans use the internet, the cost of computers has significantly decreased, and their availability significantly increased, and the federal government has pledged to establish and to upgrade broadband capacity throughout the nation. The cost to Americans of getting on the internet in the second decade of the twentieth century is roughly that of gaining access to AM or FM radio signals or to network television broadcasts.

b. The Reach of Internet Communications

In addition to its low cost of access, the internet can distribute communications on it which far exceeds that of traditional print or broadcast media. Postings on the internet can be forwarded instantaneously to other users, sometimes resulting in messages or images "going viral" and reaching millions of "followers." Virality dramatically increases the opportunities for hurtful messages to reach large audiences, and thus increases the audiences for those messages and their capacity to do damage.[118]

c. The Internet Regulatory Model

The other major decision made by prospective regulators of the internet was to treat it comparably to the print media rather than other electronic media. No substantial effort has been made by Congress to regulate the structure or content of internet markets in a fashion comparable to the FCC's regulation of electronic media markets; internet service providers are regulated in a fashion similar to print media enterprises. Their market structure is subject to antitrust laws but not to the sort of oversight the FCC engages in with respect to the joint ownership of broadcast stations or broadcast and print media companies. They are free from governmental regulation of the content of their sites to the same extent as print media.

---

[118] *See* Daniella Keats Citron, HATE CRIMES IN CYBERSPACE 66–69 (2014) (Harvard Univ. Press 2014).

In addition, in Section 230(c) of the Communications Decency Act of 1996, Congress gave internet service providers an advantage over all other media enterprises with respect to the content on their sites. Under that section, "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[119] The effect of that provision on the operators of websites is that when information provided by another party appears on their sites, they cannot usually be made civilly or criminally liable for its content. They have immunity, in almost all instances,[120] from liability as "publishers" of defamatory information that they have circulated.

The drafters of Section 230(c) may have hoped that it would simultaneously encourage free speech on the internet by reducing the incentive of website platforms to regulate the content of comments, and at the same time, incline such platforms to act as "Good Samaritans" in monitoring and blocking offensive postings to avoid the loss of goodwill associated with such postings. But in the years since the Section was drafted, content platforms have responded to their immunity by eschewing content moderation, reasoning, correctly, that they need not fear legal liability.[121]

In addition, the drafters of Section 230 did not anticipate the capacity of commercial websites to gather information about the persons who used their sites. Although the ostensible purpose of commercial website circulation is advertising, the deeper impact of widespread circulation of internet messages has been on their capacity to reveal information about those who "click on" those messages or who "like" or "share" them. Website providers employ algorithms that help to convey that information to them, giving them additional incentives to encourage wide circulation of postings on their sites. In sum, the combination of Section 230 immunity and the advanced capacity of search engines to generate personal information about internet users has virtually negated any incentive for website providers to act as content moderators.

---

[119] 47 U.S.C.A. § 230(c)(1) (West).
[120] *But see id.* § 230(e)(5).
[121] *See* Danielle Keats Citron, *How to Fix Section 230*, 103 B.U. L. REV. 713, 718–19, 722–24 (2023).

2. The Frequency of Anonymous Internet Posting

In addition, there is a characteristic form of communication on the internet which distinguishes it from other variants of communications media. Postings on internet sites can be, and frequently are, anonymous.[122] Theoretically, anonymous content is possible in print and broadcast media as well, and content appears in newspapers and broadcasts that is attributed to anonymous sources or to sources who decline to give their full names. But in those media the anonymous content is associated with an article by a journalist, or a broadcast made by a reporter, and with the media enterprise itself as a publisher, and those associations can expose a newspaper or broadcaster to liability. When anonymous content appears on the internet, in the great majority of instances internet service providers are not legally associated with it.

The treatment of anonymous communications on the internet has two principal effects. First, as noted, the legal exposure of the internet service providers on which anonymous communications are posted is generally minimal. Second, and of equal significance, the incentives of both posters on and operators of websites can be seen to be affected by the fact that the persons legally responsible for the content of those communications are almost always the posters rather than the operators.

The first effect of the treatment of anonymous postings on the internet is that the operators of websites, as we have seen, need not be particularly concerned with who posts content on their sites, or with the content of postings. To be sure, website operators may face civil or criminal liability in some instances, as where they alter the content of postings, or they fail to take steps to discourage obviously criminal activity. But those instances can be said to be rare when compared to the millions of postings whose content a website operator may ignore with impunity. The anonymity of a posting may be said to be of little interest to an operator in the usual mine run of cases, provided that the poster's email address confirms that he or she is eligible to post on the site.

---

[122] *See* Jonathan D. Jones, Note, *Cybersmears and John Doe: How Far Should First Amendment Protection of Anonymous Interest Speakers Extend*, 7 FIRST AMEND. L. REV. 421, 421–25 (2009) (discussing the impact of the largely anonymous nature of internet posts on defamation cases stemming from such posts); Hadley M. Dreibelbis, Note, *Social Media Defamation: A New Legal Frontier Amid the Internet Wild West*, 16 DUKE J. CONST. L. & PUB. POL'Y 245, 258, 262–64, 276 (2021) (speaking about the intersection between defamation and the anonymity of social media posts).

There are thus few incentives for website operators to discourage anonymous postings, which leads to the second effect. From the perspective of posters, there would seem to be some incentives to post anonymously. If anonymous posting does not make it any harder to communicate on the site, and a poster suspects that the content of his or her communications might be provocative or otherwise cause difficulties, posting anonymously makes it far less likely that the identity of the poster would be known to someone objecting to a post's content. The email or URL addresses of posters on websites are typically not disclosed by the sites' operators. At one point this made it very difficult for members of the public to identify the posters. But recently an online ecosystem of website providers, advertisers, and marketers has come into existence so that nearly every form of participation in internet communications can be tracked.[123]

The problem is thus no longer a technical one. Persons offended by postings, if they have sufficient resources, can hire lawyers who can issue John Doe subpoenas on website providers that may well eventually result in the identification of prospective candidates for defamation suits. But there remain the difficulties that most posters lack sufficient assets to be attractive defendants in those suits, while Section 230 insulates website providers and their deeper pockets. In sum, anonymity may no longer itself be a serious bar to bringing suits at all, but incentives for commentators on the internet to post anonymously continue to exist, and most such commentators are not promising defamation defendants.

3. Consequences of the Legal Treatment of Internet Communications: The *Carafano* Case

The 2002 federal district court case of *Carafano v. Metrosplash.com*, *Inc.*[124] illustrates some of the consequences of the developments identified above. In that case, an anonymous poster created a trial profile for the actress Christianne Carafano on Matchmaker.com, a commercial internet dating service. When persons sought to join the service, they filled out a detailed questionnaire which formed the basis of "profiles" posted anonymously on the Matchmaker website. The profiles included information about the persons' age, appearance, and interests, and contained answers to questions that were designed to provide clues to their personality and reasons for joining the

[123] *See* DANIELLE KEATS CITRON, THE FIGHT FOR PRIVACY 8–11 (2022).
[124] 207 F. Supp. 2d 1055 (C.D. Cal. 2002).

service. Once a profile was posted and a fee was paid, persons became members of the service and could view profiles from other members in their locality whose email addresses were supplied by Matchmaker. New prospective members were permitted to post "trial profiles" for a few weeks without paying a fee.[125]

The anonymous poster supplied a trial profile of Christianne Carafano without her knowledge or consent. Carafano had appeared in numerous films and television shows, including multiple appearances on a "*Star Trek*" television series, under the name Chase Masterson, and pictures of her were widely available on the internet. The false profile, ostensibly posted by "Chase529," contained several pictures of Carafano and contained some sexually suggestive answers to questions from Matchmaker's questionnaire, such as that she was "looking for a one-night stand" and "like[d] being controlled by a man in and out of bed."[126]

After the false profile was posted on Matchmaker, it elicited a question on the site about where "Chase529" lived in the Los Angeles area. In response "Chase529" supplied Carafano's home address and telephone number, along with an email address which, when contacted, contained an automatic reply message saying "You think you're the one. Proof it!!"[127] Shortly after the posting of the false profile and that response on the Matchmaker site, Carafano received sexually explicit phone messages, a threatening fax message that also threatened her son, and a barrage of other phone messages and email messages on her professional email account, some also sexually explicit. Carafano felt unsafe in her Los Angeles home, and she and her son stayed away from it for several months.[128]

Eventually, Carafano filed suit, which was removed to a federal district court in California, against Matchmaker and other related parties for defamation, invasion of privacy, and negligence. Matchmaker then moved for summary judgment on all of Carafano's claims. Its defense included a claim of

[125] *Id.* at 1059 ("Many of Matchmaker's members are 'trial members,' who can use the service for a limited period at no charge. To continue after the trial period has expired, a member must agree to pay a monthly fee.").
[126] *Id.* at 1061.
[127] *Id.*
[128] *Id.*

immunity under Section 230(c).[129] The district court opinion rejected Matchmaker's Section 230(c) immunity argument, ruling that although Matchmaker was an "interactive computer service" within the meaning of the Section, it was also an "information content provider" under the Section because it had provided a detailed questionnaire as part of the profiles necessary for membership, and that Section 230(c) immunity only applied when an interactive computer service was not also an information content provider.[130]

The Ninth Circuit's holding on Carafano's appeal from the district court decision, which focused exclusively on the Section 230(c) immunity issue, is one of a series of cases by lower federal courts construing the immunity provided by Section 230(c) quite broadly.[131] The Section remains a considerable barrier to defamation suits against internet service providers, the most visible and often most solvent potential defendants in cases involving internet communications. I want, however, to consider *Carafano* not as a Section 230(c) immunity case but as a garden variety defamation case with the *New York Times* and *Gertz* rules intact. The case demonstrates how difficult it is for persons injured by anonymous postings on internet sites to secure redress for their reputational injuries through defamation suits.

The statements attributed to Christianne Carafano on Matchmaker were clearly false—she was not a member of Matchmaker and had not made or authorized any of them—and very likely damaging to her personal and professional reputation, all the more so because they were accompanied by pictures of her and accurate information about her home address and telephone number.[132] But the combined incentives of posters and service providers on the internet, coupled with the *New York Times*, *Butts/Walker*, and *Gertz* rules, make it virtually impossible for plaintiffs like Carafano to recover in defamation suits.

For the reasons stated above, posters on internet sites may have limited incentives to reveal their identities, and operators of

---

[129] *Id.* at 1064. Because *Carafano* was a comparatively early case asking a court to interpret Section 230(c)(1) immunity, the defendant's invocation of that immunity did not come in the form of a motion to dismiss the complaint after it was filed, as would now be common in cases where internet service providers are defendants. For a recent unsuccessful effort to encourage the Supreme Court to limit the scope of Section 230 immunity, see Doe v. Snap, Inc., 144 S. Ct. 2493 (2024).

[130] *Id.* at 1065–66, 1068. *But see* Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1120–21 (9th Cir. 2003) ("Under the circumstances presented by this case, we conclude that the service is statutorily immune pursuant to 47 U.S.C. § 230(c)(1).").

[131] *See, e.g.*, Zeran v. Am. Online, Inc., 129 F.3d 327 (4th Cir. 1997).

[132] *Carafano*, 207 F. Supp. 2d at 1061.

those sites have few incentives to require that they do so. The poster supplying the false and damaging information about Carafano was anonymous and apparently residing outside the United States. Identifying the poster's identity and securing jurisdiction would have been formidable obstacles to a defamation suit against the poster, as would determining whether the poster had sufficient assets to satisfy a judgment.[133] So Carafano's counsel chose to proceed against the publisher of allegedly defamatory statements about her. Although the decision to proceed against publishers rather than the authors of defamatory comments is routinely based on solvency grounds even when the identity of the authors is known, it was imperative in Carafano's action because of the author's anonymity.

Once Carafano chose to sue Matchmaker as a publisher of allegedly defamatory information, the *New York Times*, *Butts/Walker*, and *Gertz* rules kicked in. Under those rules, Carafano's status was vital to the standard of liability under which Matchmaker would be held. If she were any variety of public figure, the standard of responsibility for Matchmaker's conduct would be actual malice. Even if Carafano were a private person, the subject matter of the defamation—the alleged dating habits of an actress who had appeared in films and on television—would very likely be a "matter of public concern" under the lower court decisions applying *Gertz*.[134] Carafano would then have to prove negligence on Matchmaker's part in publishing the "trial profile" to recover "actual" damages under *Gertz*, and actual malice to recover punitive damages.

The district court did not give Carafano an opportunity to demonstrate that Matchmaker had been negligent, dismissing her defamation claim on the ground that she had not shown clear and convincing evidence of actual malice on Matchmaker's part. In doing so, the district court ruled that Carafano, because she was an actress that had appeared regularly in films and on television, most prominently on the widely syndicated "*Star Trek: Deep Space Nine*" television series, was a "general purpose"

---

[133] In *Calder v. Jones*, 465 U.S. 783 (1984), the plaintiff filed a defamation suit in California state court based on an article that was written and edited in Florida but published in a national magazine with a large circulation in California. *Id.* at 784. The case was litigated all the way up to the Supreme Court, which held that "jurisdiction over [the defendants] in California [was] proper because of their intentional conduct in Florida calculated to cause injury to [the plaintiff] in California." *Id.* at 791. The jurisdictional decision in this case has made it easier for plaintiffs in defamation actions to proceed against out-of-state defendants.

[134] *See, e.g.*, Harris v. Quadracci, 856 F. Supp.513 (E.D. Wis. 1994), *aff'd*, 48 F. 3d 247 (7th Cir. 1995).

public figure.[135] The court relied in part on "case law which support[s] the notion that actors and entertainers are public figures."[136] It then ruled that Carafano had not shown sufficient evidence, let alone "clear and convincing" evidence, that Matchmaker had acted with actual malice, since Matchmaker, after sending a generic "welcome email" to the address listed on Carafano's trial profile, had not even been aware that the automatic response to that email, generated by the anonymous poster, amounted to an invitation to have sex.[137]

One should at this point be aware of how *New York Times* and its progeny can function in today's media landscape. An anonymous person can post false and damaging information about another on a website with little risk of having the poster's identity revealed to the damaged individual. The internet service provider circulating the information is very unlikely to be exposed to liability for doing so because of Section 230 immunity. And even if immunity does not exist in a particular case, a plaintiff suing an internet service provider in defamation will need to surmount the burdens of the *New York Times*, *Butts/Walker*, or *Gertz* rules.

Those rules will make the odds very high that a plaintiff suing for defamation based on an internet communication will be designated a species of public figure or a private person defamed on a matter of public concern. Even though many persons mentioned on internet sites would fall into the "private" category, the very circulation of information about them on a website would tend to make that information a matter of public concern. And although a "private" plaintiff might succeed in avoiding Section 230(c) immunity and in proving a provider negligent in failing to discern the defamatory character of a posting, that plaintiff will only be able to recover "actual" damages. In all other instances, proof of clear and convincing evidence of actual malice is a prerequisite for recovery, proof that the *Carafano* decision suggests will be difficult to obtain.

Christianne Carafano's representative had informed Matchmaker about the false and damaging content of Carafano's trial profile and that Carafano had not authorized it on a Saturday, demanding at the same time that it be removed from the site. Matchmaker did not block public access to the profile until the following Monday and did not remove it until early

---

[135] *Carafano*, 207 F. Supp. 2d at 1070–72.
[136] *Id.* at 1071.
[137] *Id.* at 1072 & n.6, 1073.

Tuesday morning.[138] The court nonetheless held that Matchmaker's actions did not constitute evidence of actual malice because a showing of that attitude was necessary *at the time of publication*, and since Matchmaker did not review the content of answers to its questionnaires or trial profiles when they were posted, it had no reason to know that Carafano's profile contained false information and was unauthorized.[139] That ruling would seem to identify an additional incentive for internet service providers not to scrutinize the content of postings on their sites.

4. From *New York Times* to *Carafano*: A Summary

The *Carafano* case can show us how far the *New York Times* actual malice standard has evolved since 1964. Initially a barrier to the use of the common law defamation to censor and punish unwelcome commentary on the actions of persons holding office and fashioning governmental policies, it has become, as well, a barrier to recovery in many defamation suits in which the plaintiffs have no connection to public office and in which the defendants are not citizen critics of the actions of government but simply publishers of false and damaging information. Not only is the *New York Times* standard applicable to public figures as well as public officials, and the public figure category expansively interpreted, actual malice can serve as a deterrent to bringing suits in which the plaintiff is neither a public official nor a public figure, but a private person defamed on a matter of public concern, a category that has also tended to be expansively interpreted.

Justice Powell's opinion in *Gertz* took pains to emphasize the importance of allowing private persons allegedly defamed on matters of public concern the opportunity to recover if they could show that a publisher or broadcaster had failed to act reasonably to suppress a statement whose content made damage to reputation apparent.[140] But as a practical matter there would be few such persons, since if they failed to prove *New York Times* malice their recovery would often be limited to out of pocket damages, difficult to amass in most defamation cases.[141]

And, more fundamentally, we have seen that neither *Butts/Walker* nor *Gertz*, which together had refocused the central

---

[138] *Id.* at 1061–62.
[139] *Id.* at 1072–73.
[140] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 346–48 (1974).
[141] *See id.* at 347–50.

constitutional inquiries in defamation cases from whether a plaintiff was a public official to whether a plaintiff was a public figure, or someone defamed on a "matter of public concern," had retained the original rationales for partially constitutionalizing defamation law. None of the defendants in *Butts*, *Walker*, or *Gertz* were citizen-critics, seeking a breathing space o occasionally convey false information in their efforts to further self-governance in the form of protests against official actions or policies. The speech that was being "chilled" in *Butts/Walker* or *Gertz*-type cases was not speech about government; it was simply communications about well-known persons or matters about which members of the public could be said to be interested.

It is striking that in the fifty years in which *Gertz* and the *New York Times* actual malice standard have set the constitutional boundaries of defamation law, there has been no discussion of why the free speech concerns in *Butts/Walker* and *Gertz* cases should be treated as comparable to those in *New York Times*. And there seems some reason to think that the free speech concerns in "public figure" and "matter of public concern" cases are not comparably weighty. If the very core of the First Amendment is protection for "political speech," as many scholars have suggested,[142] does protection for false and damaging speech about private persons, even persons of visibility and prominence or persons associated with matters of wide public interest, come close to that core? Or could constitutional protection for that variety of speech amount to a license to communicate inaccurate and hurtful information about other people, so long as large segments of the public are aware of the people being hurt or interested in matters with which those people are associated?

The balance between the First Amendment and defamation law that the *New York Times* Court sought to strike would thus seem not to have been retained once one passes out of the realm of criticism of the government and its officials to the realm of criticism of private persons. And the advent of communications on the internet, with its features of massive, largely unfiltered use, minimal regulation, anonymity, and Section 230(c) immunity, have arguably tipped the balance more decisively against vindicating the interest in reputation. After *New York Times* it was quite hard for public officials to win

[142] *See, e.g.*, David L. Hudson, Jr., *Anti-SLAPP Coverage and the First Amendment: Hurdles to Defamation Suits in Political Campaigns*, 69 AM. U. L. REV. 1541, 1541 (2020) ("First Amendment protection is at its zenith when speakers engage in political speech.").

defamation suits, and it remains so. But after *Butts/Walker*, *Gertz*, and the internet, it now seems hard for anyone to win them.[143]

All of this suggests that a reconsideration of the extension of the *New York Times* actual malice standard beyond the case itself might be in order. But before addressing that question, I want to consider one more feature of the changing cultural context since *New York Times* was decided. That feature is the advent of media insurance, designed to protect media enterprises from direct exposure to defamation suits.

B. Media Insurance

1. The Emergence and State of Media Insurance Against Defamation

Insurance against defamation suits has existed in Commercial General Liability ("CGL") policies and some Homeowners and Umbrella policies for some time.[144] Since at least the early 1960s, specialized policies providing coverage for media liability, either as freestanding policies or as portions of "Cyber Liability" policies, have become readily available.[145] Professor Kenneth Abraham estimates that between 221 and 300million dollars are paid out annually on policies providing protection for defense of and indemnity for speech-torts suits.[146]

Media insurance for defamation suits tends to operationalize itself as follows. A media enterprise purchases a policy that furnishes not only indemnity against defamation judgments or settlements to which the insurer consents, but also protection against the cost of defending defamation suits, which Abraham estimates constitutes about 75 percent of media liability insurers' costs.[147] Virtually all insurance policies, including media policies, contain deductibles or self-insured retentions (SIRs), for which insureds bear the costs.[148]

---

[143] *See* Kenneth S. Abraham, *Free Speech, Breathing Space, and Liability Insurance*, 111 VA. L. REV. (forthcoming 2025) (manuscript at 28), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4820245 ("Between 1980 and 2016, there was a 75 percent decline in the number of defamation trials against media defendants in federal court.").

[144] *See id.* (manuscript at 7–8, 13–15).

[145] *Id.* (manuscript at 8).

[146] *Id.* (manuscript at 9); *see also* RICHARD S. BETTERLY, THE BETTERLY REPORT: INTELLECTUAL PROPERTY AND MEDIA LIABILITY INSURANCE MARKET SURVEY 5 (2023).

[147] *See* Abraham, *supra* note 143 (manuscript at 9–10) (discussing also the insurer's duty to settle).

[148] *See id.* (manuscript at 8 & n.23, 9).

Abraham notes that the amount of insurance a media enterprise is inclined to purchase, and the costs of speech-torts suits it chooses to absorb itself, tends to vary with the size of the enterprise. For example, "[l]arge media organizations retain a significant amount of self-insured risk through a deductible or . . . [SIR], but frequently purchase coverage [in] excess of this self-insured layer."[149] Conversely, medium-size media organizations tend to purchase coverage subject to much smaller self-insurance, but often enough to handle most routine liability . . . while [v]ery small media [such as] small-town weekly newspapers . . . either do not purchase insurance or, when they do, have [very low] deductibles."[150]

A major concern of insurers is combating the "moral hazard" problem, *i.e.*, the creation of incentives for insureds to take additional risks that might expose them to legal liability were they not insured. Abraham identifies several actions media insurers might take to reduce the moral hazard problem emanating from their policies: (1) risk-based pricing, (2) partial insurance (the employment of deductibles and SIRs in policies), (3) exclusions from coverage, and (4) risk management, which "involves advising and coaching policy holders regarding methods of loss reduction and prevention."[151] Of those actions, only one is relevant to this article, exclusions from coverage.

2. Are Judgments Based on *New York Times* Malice Covered?

Media insurance policies typically exclude coverage for what some members of the industry have colloquially termed "bad acts." Examples include exclusions for "fraudulent, dishonest, . . . or malicious act[s] or omission[s], or intentional wrongdoing, or intentionally dishonest acts or those committed by the insured while knowing an act was wrongful, or some combination thereof."[152] The "bad acts" exclusions raise the possibility that one prong of *New York Times* "malice," making a statement with knowledge that it was false, would be excluded from coverage in a media insurance policy. Abraham notes that on its face, intentional knowledge of the falsity of a statement

[149] *Id.* (manuscript at 8–9).
[150] *Id.* (manuscript at 9).
[151] *Id.* (manuscript at 35–38).
[152] *Id.* (manuscript at 10–11).

might qualify as an "intentionally dishonest" or "knowingly wrongful" act, precluding coverage.[153]

Abraham argues, however, that such is not likely to be the case when an insured media enterprise is found to have committed the intentional version of *New York Times* malice in a defamation case. He advances two reasons for that conclusion, both of which seem persuasive. The first is that there is an established principle in insurance law that an interpretation of a policy that would emasculate its coverage should not be adopted.[154] Media insurance policies simply provide coverage against "defamation" without qualification. Since large financial exposure of defendants in defamation suits tends to occur where presumed and punitive damages are available, and in nearly all cases, those damages will only be available when actual malice has been shown, it stands to reason that what media enterprises are seeking to insure themselves against are judgments grounded on actual malice. To construe "bad acts" exemptions in a policy to apply to the intentional version of actual malice would shield media insurers from offering the very coverage that their policyholders are seeking.[155]

Second, there is a common exclusion in CGL policies for statements made "with knowledge of [their] falsity."[156] Media enterprises usually have CGL coverage, so their choosing to purchase media insurance suggests they are finding their CGL coverage against defamation inadequate. And media insurers, in offering coverage, might have inserted the "with knowledge of . . . falsity" exclusion if they had wanted to apply it to defamation judgments based on a finding that statements were knowingly false. Yet the CGL exclusion language does not appear in media insurance policies.[157]

This is not to say that no "bad acts" exclusions for actions connected to defamation suits can be expected to be contained in media insurance policies. If a defamatory statement were shown to have been made with the primary purpose of causing harm to the plaintiff, rather than communicating damaging information

---

[153] *Id.* (manuscript at 11–12).

[154] *Id.* (manuscript at 12) ("[I]n my opinion the courts would not apply these exclusions to garden-variety actual malice, because such an interpretation would emasculate much, though obviously not all, of the coverage that policyholders would firmly expect their media liability insurance policies to provide. That kind of application of a bad-act exclusion would be totally inconsistent with policyholders' understanding of what their policies cover.").

[155] *See id.*

[156] *Id.*

[157] *Id.* (manuscript at 12–13).

about the plaintiff to others, it might be excluded as a "publication of material with an actual intent to cause harm."[158] But defamation suits are rarely centered on the former showing. In sum, the most plausible interpretation of "bad acts" exclusions in media insurance policies is that they are not intended to apply to defamation judgments resulting from a showing of *New York Times* malice and are understood as such by policyholders.

C. *Factoring Media Insurance into the Current Context of* New York Times

The first Section of this Part ended by concluding that when one combines the *Butts/Walker* and *Gertz* rules with the emergence of the internet and the absence of incentives among users and operators of websites to prevent anonymous communications on those sites, the current context of defamation suits makes it quite difficult for anyone to bring a successful defamation suit against anyone else, whether the defendant is a private individual or a media enterprise. Both types of defendants in defamation suits are likely to have some form of constitutional privilege, even where the party being defamed is neither a public official nor a public figure. The emergence of the internet as a major mode of communicating information, and the ubiquity of anonymous postings on internet sites, has made it more difficult to identify defendants circulating false and damaging information and also made it more likely, because of the ability of internet communications to reach very large audiences in short spans of time, that a court will designate an allegedly defamatory communication a "matter of public concern," triggering the *Gertz* privilege where the defendant is a private individual and requiring plaintiffs in *Gertz*-type cases to meet the relatively demanding standards of proving negligence and showing "actual injury." In short, current defamation law establishes formidable barriers for persons seeking redress for false and damaging comments made about them.

One might want to argue, however, that current defamation law strikes the right balance between First Amendment concerns and the interest in reputation, even if that balance appears to preclude most people from bringing defamation suits at all. Such an argument would rest on the assumption that there should be considerable freedom, under the Constitution, for people to comment on the lives and activities

[158] *Id.* (manuscript at 12).

of others, whether those others are visible or not, in part because there is something like a public "right to know" about the comings and goings of one's fellow citizens. In *Snyder v. Phelps*,[159] the majority opinion quoted other Court decisions asserting that speech on matters of public concern "is at the heart of the First Amendment's protection. . . . is the essence of self-government [and] occupies the highest rung on the hierarchy of First Amendment values."[160] The Court then defined speech on matters of public concern as that "relating to any matter of political, social, or other concern to the community."[161]

If one were to grant the apparent assumptions made by the *Snyder* majority, speech on matters of public concern would be deemed as close to the core of the First Amendment as political speech, and the definition of "public concern" is very expansive. Under that view, something like the same "breathing space" and "chilling effect" concerns that the Court identified as contributing to protection for false and damaging speech about public officials would seem to apply to similar speech about matters of public concern. Technically, the *Snyder* approach pertains to IIED cases rather than defamation cases since there was no finding in *Snyder* that picketing near the funeral of a soldier killed in Iraq contained any false statements about the soldier or his family members, who sued the picketers. But the broad definition of "matter of public concern" announced in *Snyder* was not limited to IIED cases.

Let us assume that the current context of defamation cases, therefore, includes a breathing space for false and damaging comments made about "matters of public opinion" that is nearly as broad as that for comments made about public officials or public figures and which extends to a vast number of communications. If one then builds upon the arguments made in the previous sections of this Article, which have suggested that after *New York Times,* the Court did not invoke the breathing space rationale in support of its extension of the *New York Times* privilege to public figure cases and the partial retention of that privilege in cases where private individuals were defamed on "matters of public concern," the *Snyder* case seems to reintroduce

---

[159] 562 U.S. 443 (2011).
[160] *Id.* at 451–52 (citations omitted).
[161] *Id.* at 453 ("Our opinion in *Dun & Bradstreet*, on the other hand, provides an example of speech of only private concern. In that case we held, as a general matter, that information about a particular individual's credit report 'concerns no public issue.'").

that rationale without any discussion of why it should be retained outside public official cases.

And when one factors media insurance into the analysis, there now seems to be a breathing space for defendants communicating false and damaging information about persons that is unrelated to the content of constitutional privileges in defamation cases.[162] If the principal defendants in defamation cases seek to insulate themselves against significant judgments in those cases through insurance, and other defendants profit from the barriers today's media landscape erects against any potential plaintiffs in defamation actions, is there any particular reason to believe that the speech of *anyone* communicating false and damaging information about others will be chilled?

IV. CONCLUSION: RETHINKING THE LEGACY OF *NEW YORK TIMES*

Two conclusions can be drawn from the above description of the current doctrinal and cultural context in which defamation cases arise. First, protection for a breathing space to make factually erroneous comments about public figures or matters of public concern, or the invocation of a potential "chilling effect" of defamation law upon the freedom to communicate about such persons or such matters, have rarely been among the justifications for a First Amendment privilege advanced in any of the Court's defamation cases since the *New York Times* decision. Second, the absence of such justifications has resulted in no analysis, in the Court's majority opinions in those cases since *New York Times*, of the comparative weight of the interest in protecting reputation and the interest in promoting free speech. When such a comparative analysis has appeared, it has solely been in dissenting opinions.[163]

The historical strength of the interest in reputation in American society can be discerned from the ancient state of libel law in American colonies and states, its proliferation despite the First Amendment's speech and press clauses, and the Court's application of those clauses to the states beginning in 1925.[164]

---

[162] *See* Abraham, *supra* note 143 (manuscript at 13).

[163] *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 355–60 (Douglas, J., dissenting); *id.* at 361–69 (Brennan, J., dissenting); *id.* at 369–404 (White, J., dissenting).

[164] *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) ("For present purposes we may and do assume that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental

The dissenters in *Butts*, *Walker*, and *Gertz* tended to focus on protection for reputation in their analyses. But one could engage in a weighing of free speech and reputational interests from the other side of the equation.

Why should there be a "breathing space" for the communication of false and damaging information about some categories of persons and some subjects? And why should one think that because defamation law might impose a "chilling effect" on speakers or publishers who disseminated such information, it should be subject to the quite demanding constitutional restraints of *New York Times* and its progeny? The *New York Times* decision gave a two-part answer to those questions.

The first part of the answer—the "breathing space" part—was that freedom to criticize government and its officials was a fundamental principle of a democratic society and a vital dimension of self-governance, another bedrock principle of democracies. While exercising that freedom, "citizen-critic[s]" needed to be accorded some latitude to make factually erroneous statements. Such latitude was especially important when the source of their criticism was government officials and their policies, because encouraging that criticism was important to the maintenance of a form of government which rested on the consent of the governed. Yet some doctrines of the common law of defamation, such as strict liability for false and damaging statements and recovery in presumed and punitive damages, had the effect of exposing citizen-critics to potentially massive liability for minor inaccuracies in their criticism. They needed a "breathing space" to occasionally make factual errors.

The second part of the answer followed from the first. If one assumed that freedom to criticize the government was fundamental to a democratic society, citizens should not be deterred from doing so by common law doctrines that suggested such criticism could result in exposure to lawsuits mulcting the critics through potentially large damages. Critics might hesitate to engage in full and frank discussions of the conduct of governmental officials because of fear of that exposure. That was the "chilling effect," and defamation law seemed admirably positioned to impose it. The advertisement in *New York Times* had contained some comparatively minor factual inaccuracies, and it was not clear that it had referred to L.B. Sullivan at all.

---

personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States.").

But a series of doctrines of the law of defamation in Alabama had exposed the New York Times to a $500,000 judgment and the prospect of facing more libel suits. The advertisement had addressed the conduct of governmental officials in a contentious and volatile setting: resistance in Alabama to compulsory desegregation of public facilities. The successful recovery of libel damages by Sullivan in the Alabama courts seemed likely to make other potential critics of Alabama officials less inclined to venture criticism in the future.

In the setting in which *New York Times* arose, that answer seemed to make sense. If the common law of defamation could be used to muzzle critics of governmental officials, First Amendment issues did seem to surface. But those issues were directly related to the fact that the plaintiff in *New York Times* was a *public official* and, if he had been singled out at all in the New York Times ad, had been criticized for his *official conduct*. Criticism of the official conduct of those representing the government was arguably at the very core of protected First Amendment activities.

Beyond that justification for constitutionalizing portions of the common law of defamation the *New York Times* majority did not need to go, and it did not. *New York Times* was a classic breathing space and chilling effect case, because it dealt with the use of libel law to potentially stifle criticism of the conduct of governmental officials. It was a case that brought out the strongest First Amendment justifications for modifying the common law of defamation.

But none of the other cases surveyed in this Article, in which the Court continued to apply the *New York Times* actual malice standard to other categories of cases, resembled *New York Times* in being cases where the plaintiffs were governmental officials seeking damages for false and damaging statements made during a criticism of their conduct. They were all cases in which the plaintiffs were private persons. Neither the breathing space nor chilling effect rationales necessarily applied to them because those rationales were centered on a First Amendment right to criticize the government.

The *New York Times* version of actual malice in defamation cases, with its requirement of intentional or reckless falsity and its clear and convincing evidence standard of proof, was designed to make it very difficult for public officials to deter or punish criticism of their conduct through defamation suits. When the Court extended the actual malice standard to

additional categories of cases, it was aware that plaintiffs in those cases would face the same hurdles. But what was the First Amendment interest driving those extensions? Only in the *Rosenbloom* plurality opinion was there an extended discussion of that interest.[165]

But the *Rosenbloom* plurality's decision to extend the *New York Times* actual malice standard "to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous,"[166] was rejected in *Gertz.* The majority opinion in *Gertz* concluded that there was a meaningful distinction between famous and anonymous plaintiffs in defamation cases. Private plaintiffs defamed on matters of public concern were more deserving of recovery because they typically lacked opportunities to publicly counter criticism of their conduct and because they had not assumed the risk of public criticism in their choice of vocation or in their other activities.[167] The principal reference in the *Gertz* majority opinion to the First Amendment interests at stake in defamation cases stated that the *New York Times* actual malice standard "administers an extremely powerful antidote to the inducement to media self-censorship of the common-law rule of strict liability for libel and slander."[168] That was a recognition of the "chilling effect" concern, but the *New York Times* standard had been formulated in a case involving vigorous criticism of the conduct of public officials.

In sum, if *New York Times* was a recognition that some doctrines in defamation law could stifle criticism directed at and punish the opponents of political officials, and that the opportunity to employ defamation law in that fashion could strike at a core First Amendment freedom to scrutinize the conduct of those officials, the progeny of the *New York Times* decision has expanded that "freedom" without ever providing a sustained justification for doing so. *Butts*, *Walker*, and *Gertz* were centrally about the qualities of categories of private plaintiffs in defamation cases, not about First Amendment interests supporting a freedom to criticize private persons. Only *Rosenbloom* hinted that the principle of self-governance was implicated in commentary that went beyond the conduct of

[165] *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 41–49 (1971).
[166] *Id.* at 44.
[167] *Gertz*, 418 U.S. at 344–45.
[168] *Id.* at 342.

public officials, and the *Rosenbloom* plurality's approach to constitutionalizing defamation cases has been rejected.

So, on one side of the equation seeking to balance the interest in reputation against First Amendment concerns in defamation cases, we have only an impoverished rationale for why those concerns should be considered outside of cases involving criticism of the government and its officials. And on the other side, we have the current cultural factors, including media insurance, that are making efforts to vindicate an interest in reputation progressively more difficult and providing additional "breathing spaces" for media enterprises who fail even to meet the *New York Times* standards in their reporting and publishing.

Is there any satisfactory way to respond to the difficulties caused by the present context of *New York Times* and its progeny? On the one hand, the importance of maintaining robust interpretations of the speech and press clauses of the First Amendment seems an abiding concern of the current Court.[169] For example, *Snyder* could be taken as an effort by Court majorities to revive *Rosenbloom*'s claim that self-governance in the form of free commentary extends well beyond criticism of the government to a host of "matters of public concern."

On the other hand, the developments involving communications on the internet described above, notably the frequency and ease with which anonymous online postings can be made, has combined with the constitutional barriers to recovery in defamation cases and Section 230 immunity to make it very difficult for most victims of the dissemination of false and damaging information about themselves to even contemplate possible vindication through defamation suits, let alone recover in such suits. Many commentators have criticized Section 230,[170] but Congress has shown little inclination to revisit it. And if *Snyder* suggests that a majority of the current Court believes there should be a "breathing space" for false and damaging comments on matters of public opinion, media insurance against awards produced by a showing of actual malice seems to respond to that concern, at least with respect to the principal defendants exposed to those awards, media enterprises.

---

[169] *See* Abraham & White, *First Amendment Imperialism*, *supra* note 14, at 839–42.

[170] *See, e.g.*, David S. Ardia, *Free Speech Savior or Shield for Scoundrels: An Empirical Study of Intermediary Immunity under Section 230 of the Communications Decency Act*, 43 LOY. L.A. L. REV. 373 (2010) (providing a particularly detailed critique of Section 230).

I have argued, however, that a survey of the doctrinal evolution of the actual malice privilege since *New York Times* can reveal that Court majorities have made two analytical mistakes, one in equating the constitutional status of "public figures" in defamation cases to the "public officials" afforded the privilege in *New York Times*, and the other retaining "matter of public concern" as a meaningful constitutional category for defamatory statements.

Butts/Walker and *Gertz* still establish the constitutional framework for defamation cases, and *Carafano* reveals how difficult such cases are to win today, especially given the ubiquity of false and damaging communications on internet sites, where many posters are anonymous, and providers have Section 230 immunity. The balance between the interest in furthering freedom of expression and the interest in vindicating reputation through defamation suits has been decisively tipped in favor of the former interest. And the current doctrinal and cultural context of the *New York Times* privilege does not contain any sustained explanation for why the *New York Times* privilege should exist outside of "public official" cases.

There is a comparatively simple doctrinal remedy for this situation. If it were recognized that the central rationale for the *New York Times* actual malice standard in defamation cases is protection for a First Amendment freedom to criticize the government, and that no other *constitutional* basis can be summoned up to comparably protect a freedom to criticize "public figures" or private persons affiliated with "matters of public concern," the remedy might then be to withdraw the constitutionalizing of defamation law from all areas except suits where false and damaging statements are made about public officials. This would require, first, overruling *Butts/Walker* and stripping the category of "public figure" of any constitutional significance; and second, partially overruling *Gertz* by dissolving the category of "matter of public concern" and permitting states to retain the common law defamation rules in all cases not involving public official plaintiffs.[171]

There appear to be at least two difficulties with that proposal. One is the concern, expressed in both *New York Times*

[171] *See* JEFF KOSSEFF, LIAR IN A CROWDED THEATER: FREEDOM OF SPEECH IN A WORLD OF MISINFORMATION (2023) (arguing that any effort to limit the scope of *New York Times* in a digital universe would seriously undermine free speech, and that a better response would be to consider legislative efforts designed to minimize the harms of communicating misinformation).

and *Gertz*, about the traditional standard of strict liability in common law defamation cases. That standard serves to permit recovery for very trivial inaccuracies, such as typographical errors or the confusion of persons with the same names. In cases involving such inaccuracies bringing out the big guns of the common law of defamation, such as recovery for presumed and punitive damages, seems unfair to defendants, especially when self-help remedies, such as the "corrections" by media publishers that currently appear on a regular basis, may be easily available.

But *Gertz*'s mandate that states were no longer permitted to employ a "liability without fault" standard in defamation cases, at least where the subject matter of the lawsuit was "public" in some fashion, has doubtless resulted in very few defamation suits being brought in which the plaintiff is unable to show at least negligence. This Article proposes abolishing any distinction between public figures and private citizens, and dissolving the category of "matters of public concern," so that the ambit of strict liability cases, theoretically confined by *Dun & Bradstreet* to cases where a private person was defamed on a matter not of public concern, might expand. I do not think that is likely to happen,[172] but I recognize, with the *Gertz* majority, that a strict liability standard for defamation may well create a powerful incentive for speaker and publisher self-censorship.

The other issue is the traditional common law rule that statements alleged to be defamatory are presumed to be false; the burden is on the defendant to prove their truth. It took over two decades after *New York Times* for the Court to conclude, in *Philadelphia Newspapers v. Hepps*,[173] that a First Amendment "chilling effect" required reversal of that presumption. The *Hepps* Court was closely divided, with Justice Stevens authoring a dissent in which Chief Justice Burger, Justice White, and Justice Rehnquist joined, arguing that putting the burden on plaintiffs to prove falsity gave defendants license to lie deliberately when they believed that plaintiffs would be unable to show that their lies

[172] The current draft of RESTATEMENT (THIRD) OF TORTS: DEFAMATION AND PRIVACY 8 (AM. L. INST., Tentative Draft No. 4, 2024) states that "[m]ost jurisdictions now require proof of fault" in "private/private" defamation cases, "with many of them doing so as a matter of common law." It adds that despite the Court's apparent invitation in *Dun & Bradstreet*, "few states have returned to strict liability." *Id.* See also a collection of "private/private" recent decisions, only a very few of which have left open the possibility of a strict liability standard being retained in "private/private" cases, and those in which nonmedia defendants were involved. *Id.* cmt. i, at 12–16 (on file with author).

[173] 475 U.S. 767 (1986).

were false.[174] The *Hepps* majority emphasized that its ruling applied only to cases involving matters of public concern.[175] I am inclined to think that if that category were dissolved, restoring the presumption of falsity for all allegedly defamatory statements except those made about public officials might be extremely awkward. Countless statements are made about other people which are perceived by the subjects as hurtful and damaging to their reputations, and yet are hard to establish as incontrovertibly true. Members of the public might be tempted to employ defamation law in their revenge journeys if the great percentage of allegedly defamatory statements were presumed to be false.

Those difficulties might need to be addressed, but the restoration of most of defamation law to the common law of states is not likely to result in a flood of successful defamation actions. The common law has its own privileges in defamation, most notably the privilege to comment on a matter of "common interest," widely invoked in employment cases, and the privilege of "fair comment" on matters of public concern, traditionally invoked in public controversies before *New York Times*. And the grave difficulties in securing accountable defamation defendants that result from the ubiquity of anonymous communications and internet service provider immunity will remain.

The Court is rarely inclined to overrule its established precedents,[176] so a proposal suggesting that both *Butts/Walker* and *Gertz* be discarded may be myopic. But this Article's principal purpose has been broader than a call to jettison much of the legacy of *New York Times*. I have sought to show that the Court headed off in an inappropriate constitutional direction after that decision. Its subsequent efforts to constitutionalize defamation law have missed the central meaning of the *New York Times* decision, expanding the actual malice privilege to categories of cases where a First Amendment basis of comparable weight to the basis articulated in *New York Times* has not advanced and arguably does not exist. I have also sought to show that the current cultural context of defamation cases has combined with the extension of the *New York Times* actual malice standard to most internet postings on the ground that they involve "matters of public concern" to create an almost insurmountable barrier to disaffected subjects of those postings

[174] *Id.* at 780–90 (Stevens, J., dissenting).
[175] *Id.* at 777 (majority opinion).
[176] *But see* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 263–90 (2022).

who contemplate defamation suits as vehicles for restoring their reputations.

Finally, I have noted that a perceived need to preserve a "breathing space" for false and damaging statements about "public figures" or about private individuals in connection with "matters of public concern," one of the purported rationales for extending the *New York Times* actual malice standard to those categories of cases, can be seen as illusory when a defendant has purchased media insurance. Massive defamation judgments against media enterprises that have knowingly or recklessly made false statements damaging to the reputation of individuals are not likely to occur when insurance is present, and there are obvious incentives for large-scale enterprises to obtain it. If one is worried about a "chilling effect" on those commenting on the conduct of public figures or private persons associated with matters of public concern, that effect would seem to be considerably reduced by media insurance.[177]

In sum, it seems a propitious moment to consider the current imbalance in defamation cases between the interest in reputation and any countering First Amendment interests; to recognize how that imbalance has been accentuated by the rise of social media and other internet sites and the protective attitude of Congress toward internet service providers; and to underscore how far the existing constitutional framework for defamation cases has departed from the First Amendment breathing space and chilling effect rationales supporting the *New York Times* actual malice standard. It may be time to gather up the threads discussed in this Article in the form of cases inviting the Supreme Court to revisit some of its post-*New York Times* mistakes.

[177] One would expect that if defamation cases not involving public officials were governed by a negligence standard, more media enterprises would seek to obtain media insurance and the price for that insurance would increase. This might result in some small enterprises not being able to afford insurance and therefore being more vulnerable to defamation judgments. But one should bear in mind that the most practical response of a media enterprise to added exposure from defamation suits is to ensure that reasonable journalistic standards for accuracy in reportage are followed; that following such standards would likely provide successful defenses in most defamation suits; and that very few states have retained strict liability standards for any defamation actions.

THE DANGEROUS RIGHT OF THE AUTONOMOUS LISTENER

Wayne Batchis, J.D., Ph.D.

ABSTRACT

Although there is no scholarly consensus on a singular purpose behind the First Amendment's Free Speech Clause, one of the most familiar and persuasive is remarkably simple: freedom of speech is an essential element of self-governance. Democracy, in short, cannot survive--and is perhaps of questionable legitimacy -- if it does not incorporate a relentless commitment to free expression. It is also quite natural and seemingly rational to acknowledge that, to have this salutary effect, speech must be able to be heard. By definition, communication includes two sides: a speaker and a listener. Thus, the Supreme Court's doctrinal tests have often implicitly accommodated this other side of free expression, asking whether, for example, a content-neutral restraint on a speaker's expression preserves ample alternative paths for reaching willing listeners. The Court's First Amendment jurisprudence, however, has at times veered dangerously close to acknowledging, not merely the listener-side context of a particular free speech claim, but an autonomous right cited in the listener alone—untethered from the right of the speaker. Conventional scholarly wisdom has rarely questioned this subtle transformation—perhaps seeing a listener-based First Amendment right as innocuous at worst, and a vital expansion of a critical constitutional right at best. This piece challenges this convention, arguing that more of a good thing is not always a good thing. The democracy-serving benefits of free expression often turn on democracy's ability to constrain other liberties. A listener-based First Amendment, however, has the potential to inhibit democracy-defending lawmaking. Specifically, it might offer constitutional protection to AI-generated provocations hostile to American interests, placing a flood of computer-produced messages that may incite social or political instability beyond the government's regulatory power. Untethered to a speaker, a listener-based First Amendment may be a dangerous weapon, a constitutional rule that risks obstructing laws needed for a vital democracy.

INTRODUCTION

If a tree falls in a forest, and someone hears it, did that tree "speak?" Surprisingly, a contingent of legal scholars and jurists would effectively answer "yes." While this variation on a common philosophical query may garner a chuckle, such a capacious definition of First Amendment speech—implicit in an autonomous listener-based doctrinal model—is no laughing matter. A listener-based First Amendment right might be seen as an innocuous

broadening of First Amendment claims at worst, and a vital expansion of a critical constitutional right at best. However, more of a good thing is not always a good thing. A listener-based First Amendment has the potential to inhibit democracy-defending lawmaking. Specifically, it might offer constitutional protection to AI-generated provocations hostile to American interests, placing a flood of computer-produced messages that may incite social or political instability beyond the government's regulatory power. Untethered to a speaker, a listener-based First Amendment may be a dangerous weapon, a constitutional rule that risks obstructing laws needed for a vital democracy.

The text of the First Amendment to the United States Constitution is remarkably clear: "Congress shall make no law . . . abridging the freedom of speech."[1] It is the "freedom" of "speech" that may not be "abridge[ed]." The 'why' of this very clear text, on the other hand, is much debated, and has, as with other provisions in the Constitution, rightfully impacted the doctrinal trajectory of the Free Speech Clause. The potential interests served by this prohibition on abridging freedom of speech are numerous and diverse—and not necessarily mutually exclusive. Free speech may be said to aid in the search for truth by promoting an open marketplace of ideas.[2] It may fulfill the inherently human, fundamental need for expressive autonomy.[3] It may be a baseline requirement for a genuine democracy to exist, under the premise that popular sovereignty must allow for all of 'the people' to influence their government by expressing their will.[4] It may be justified by the need to keep government leaders in check by subjecting them to open public scrutiny and critique—and concomitantly, preclude the possibility that a corrupt and unresponsive government may illegitimately maintain power by shielding itself from accountability through censorship.

Some of these reasons focus on the interests of the speakers themselves—such as the human need to express oneself for self-fulfillment, whether it be artistically, intellectually, or emotionally. Others emphasize the interests of the listener, for example, the way a recipient of expression—whether it is a single individual or society more broadly—may move closer to the truth by hearing additional

---

[1] U.S CONST. amend. I.
[2] Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
[3] C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 994 (1978).
[4] *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1st ed. 1948) ("To be afraid of ideas, any idea, is to be unfit for self-government.").

facts, opinions, or theories. Or how citizens hear potential criticisms of government officials, from whom they are better equipped to demand accountability.[5] Finally, there are reasons that serve the interests of both speaker and listener—the benefits of expression that are, in other words, interactive.

When one communicates about elected officials, it is valuable to the speaker, who wishes to see her government improve by sharing relevant facts, opinions or interpretations of the truth, and to the listeners, who will benefit from increased knowledge and understanding to inform their democratic participation. This benefit is arguably present whether these listeners agree or disagree with the speaker; whether the listeners believe the speaker is a knowledgeable source of wisdom, or a cynical fount of falsehoods. Either way, the speech provides listeners with insight into what other citizens believe or want them to believe; whether it is persuasive or not, it provides a window into the speaker. It also provides an opportunity for the listener to become a counter-speaker, not merely to respond critically and allow the *speaker* to play the role of listener, but to inspire new thoughts and expression in the listener. The interactive benefits of free speech might be characterized as a social dynamic that has value greater than its individual parts.

The benefits, what we might call the associated policy interests of a constitutional provision, of course, do not *define* the constitutional right itself. "The right of the people to be secure . . . against unreasonable searches and seizures"[6] in the Fourth Amendment, may promote certain forms of psychological health—the mental well-being that accompanies a sense of control over one's life, home, and belongings. Despite this clear benefit, however, the Fourth Amendment does not provide an individual right to emotional stability. There is a difference between the rights conferred by the Constitution, and the purposes or social benefits those rights may be thought to encourage.

Or take the example of serving on a criminal jury, which may be an edifying experience. It may benefit the juror in numerous ways, providing a greater understanding and appreciation of the judicial process, her role as a citizen in ensuring that justice is served, and the importance of the rule of law. It may also promote the interests of society and democracy more broadly by providing a form of civic education to the significant portion of the population

[5] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. BAR FOUND. RES. J. 521, 523 (1977).
[6] U.S. CONST. amend. IV.

that serves on juries. However, the Sixth Amendment's "right to a speedy and public trial, by an impartial jury"[7] belongs to the criminal defendant. The associated policy interests promoted by criminal juries, as real and important as they may be, do not establish an additional and separate constitutional right for individual citizens to serve on juries. If such a citizen were unfairly denied a place on a jury, their claim would require invoking a different constitutional amendment, the Fourteenth Amendment's Equal Protection Clause. There is an endless array of benefits that may be indirectly associated with particular constitutional rights—but rights and associated benefits remain two distinct concepts.

This, of course, is not to say that purpose is irrelevant in constitutional interpretation. The Free Speech Clause in the Constitution does not speak explicitly to any of the many needed exceptions courts have acknowledged over many decades of First Amendment jurisprudence; and the Supreme Court frequently utilizes purpose to delimit these exceptions. The examples are plentiful.[8] It has long been accepted that defamation under the common law is not fully protected speech. However, when it came to defining the parameters of this reasonable atextual First Amendment exception, the Supreme Court crafted a doctrine that famously considered the adverse impact libel suits might have on the ability to criticize public officials, establishing a higher bar for penalizing speech under such circumstances. In unabashedly purposive terms, Justice Brennan explained that the Court "considered[ed] this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."[9] The interests of the listener may not define the core First Amendment right of a speaker to speak, but they may be factored in when considering the appropriate scope of exceptions to this core right of the speaker.

In recent years, scholars and courts have expressed a range of views on the listener's relationship to the First Amendment. Many confirm what a natural reading of the text of the Free Speech Clause of the First Amendment suggests, that it is the producer of expression, rather than the listener, that is its primary concern. Burt Neuborne has described this as "the Supreme Court's fixation on the

---

[7] U.S. CONST. amend. VI.
[8] See e.g., Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748 (1976) (Commercial Speech); Counterman v. Colorado, 600 U.S. 66, 76 (2023) (True Threats); Miller v. California, 413 U.S. 15 (1973) (Obscenity).
[9] N.Y. Times v. Sullivan, 376 U.S. 254, 270 (1964).

protected interests of the autonomous speaker, to the exclusion of the other residents in Mr. Madison's First Amendment neighborhood."[10] Derek Bambauer referred to listeners as having a "stunted role in First Amendment jurisprudence . . . useful as narrative devices, but ultimately inconsequential."[11] He points out that "First Amendment precedent tends to relegate listeners to the background."[12]

Some have framed the interest in listener's rights as a recent trend limited to a few discrete areas in which listeners have interests that differ from speakers.[13] Others have gone as far as to claim that the listener, as a passive recipient of speech, may assert, independent of the speaker him or herself—and regardless of whether there in fact is a speaker at all—a First Amendment right to hear such "speech."[14] In the process, such thinkers readily conflate constitutional rights and constitutional benefits. Some, in clear contravention with the way the vast majority of courts have confronted free speech claims, have even argued that a First Amendment speech right belongs *exclusively* to the listener—that the speaker, ironically, does not possess speech rights at all.[15] The prominent First Amendment scholar Leslie Kendrick presents a portrait of a Free Speech Clause world turned upside down. Kendrick describes "Free speech theorists [as] virtually united in concluding that listeners are rightsholders—that is, that they have a claim of noninterference against the government."[16] To Kendrick, whose framing would appear to flip constitutional text and standard First Amendment jurisprudence on its head, "[T]he debate is over whether speakers also enjoy speech rights."[17]

I will argue that a listener-based view—when it is untethered to a speaker—is misguided and potentially harmful to representative democracy. Indeed, many of the debates over free expression that scholars and jurists continue to wrestle with, I would contend, have their roots in these underlying questions about the role of the listener in First Amendment jurisprudence. This is true of decisions that

---

[10] Burt Neuborne, *Limiting the Right to Buy Silence: A Hearer-Centered Approach*, 90 U. COLO. L. REV. 411, 412 (2019).
[11] Derek E. Bambauer, *The Macguffin and the Net: Taking Internet Listeners Seriously*, 90 U. COLO. L. REV. 475 (2019).
[12] *Id.* at 476.
[13] *See, e.g.*, RonNell Anderson Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 501 (2019).
[14] LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 8 (Gerald Postema ed., 2005).
[15] Leslie Kendrick, *Are Speech Rights for Speakers?*, 103 VA. L. REV. 1767, 1778 (2017).
[16] *Id.*
[17] *Id.*

remain controversial, such as the Supreme Court's application of the First Amendment to corporations in *Citizens United v. Federal Election Commission*.[18] It is also true of doctrinal mistakes that have yet to be made but are currently at the center of fierce debates, such as prospective free "speech" protection for non-human robots. It turns out that the listener-based model is at the heart of the problem. I will discuss the unique dangers to democracy that a listener-based First Amendment presents, particularly in light of the growing influence of social media and artificial intelligence (AI).

I. FREEDOM OF SPEECH DOES NOT EXIST WITHOUT SPEAKERS

There is a startling, and rarely acknowledged, logical gulf in the way many legal scholars and jurists conceptualize "the freedom of speech" in the First Amendment. Top constitutional thinkers such as Eugene Volokh and Mark Lemley correctly claim that "[t]he First Amendment protects 'speech' and not just speakers."[19] But what is "speech?" Justice Scalia stated the obvious when he explained "that when the Framers 'constitutionalized the right to free speech in the First Amendment, it was the free speech of individual Americans they had in mind.'"[20] Speech must have a source, and that source must be a human speaker. However, Volokh and Lemley reason that because the First Amendment functions to protect self-governance, truth-seeking, and the marketplace of ideas, rights must extend, not just to the speaker, but to those who would receive such speech—the listener.[21]

This is not necessarily objectionable. A listener, after all, may be the recipient of speech produced by a speaker, and, like the speaker, may suffer harm when this speech is abridged by the government. However, the authors then make an unexplained leap in logic. Like a savvy magician drawing our eyes to the shiny coin in his left hand, with our attention diverted, the rabbit (or in our case, the human speaker) disappears without notice. The gleaming benefits of self-governance and truth-seeking obscure the vanishing speaker. Here, those interests are ostensibly served by non-human computer-generated simulated speech. Despite the uncontroversial fact that, by most definitions, to have speech in the first place there needs to be a

[18] 558 U.S. 310 (2010).
[19] Eugene Volokh, Mark A. Lemley & Peter Henderson, *Freedom of Speech and AI Output*, 3 J. FREE SPEECH L. 651, 653 (2023).
[20] *Citizens United*, 558 U.S. at 391 (Scalia, J., concurring).
[21] Volokh, Lemley & Henderson, *supra* note 19, at 655.

human speaker, our gaze has been drawn to the purported benefits robot messages may have for a listener. Presto chango, such a listener must naturally have independent First Amendment rights with or without an actual speaker.

We might consider the arguments of legal theorist Larry Alexander. He opines that freedom of speech should be conceptualized as a right of the audience, rather than of the speaker. Despite conceding that it is "most natural" to understand a right of free expression to belong to the speaker, he goes on to provide several examples in which, purportedly, the right would naturally apply in the absence of a speaker.[22] From this, he concludes that "a human right of freedom of expression is most plausibly a right of the potential audience of the expression, not a right of the speaker."[23]

Alexander's first illustration has intuitive appeal: that of a book whose author is no longer alive. Government interference with the publication of that book would surely implicate the First Amendment's freedom of expression despite the unfortunate demise of its creator. Therefore, according to Alexander, the expressive right must rest with the listener. The speaker, after all, no longer exists. Indeed, from a policy perspective, we might—quite reasonably—be concerned first and foremost with the detrimental effect that suppression would have on potential readers (or audiobook listeners). However, a bit of reflection on the nature of expression reveals this simple logic to be dubious.

There is an inevitable time lapse between the moment speech is expressed and the moment it is received by a listener. In an era where a significant portion of expression is in written or recorded form, whether in an email, a text message, a YouTube video, or a publication by a university press, there will necessarily be a time delay from the moment of creation to transmission, to receipt. We might call this the speaker-listener "pathway." Even verbal speech takes time to reach the ear of a listener. The time elapsed for the speech to reach its destination may be .5 seconds, 5 minutes, or 50 years. Significant intervening events – including the death of the speaker – may occur during this period. However, none of this detracts from the fact that it is the movement of the "speech" sourced in a human speaker along the speaker-listener pathway, not the isolated listener, that is

[22] LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 8 (Gerald Postema ed., 2005).
[23] *Id.* at 7.

protected by the First Amendment. Alexander, in other words, misconstrues the nature of human communication.

Likewise, Volokh and Lemley commit this logical fallacy when they support an autonomous listener's right by pointing out "that dead people have no constitutional rights, but there is certainly a First-Amendment-protected interest in reading the writings of, say, Aristotle or Galileo or Machiavelli."[24] This is certainly true. But these great thinkers' works are protected by virtue of the fact that they are, despite no longer being alive, human speakers. This is what makes their work "speech" protected by the First Amendment. The claim of speech abridgment remains one that necessitates a flesh and blood human source, regardless of what fate may befall that speaker in the interim once their speech is let loose in the world.

Alexander next provides the example of a "thousand monkeys on typewriters, who manage (accidentally, of course) to bang out *Das Kapital*, which the government wishes to suppress."[25] He proceeds to explain that under such circumstances it would be the listener who would stand as the only potential victim from the censorship. Ditto for a government restriction on "watching sunsets" where sunsets were thought to be inspiring "subversive thoughts."[26] Once again, it is difficult to deny that the only likely identifiable human injury resulting from such state action would be to those who might receive meaning from the creations of monkeys or the observation of sublime natural phenomena like a sunset. It is also true that there are certain similarities between the experience of a listener or observer deriving meaning from animal behavior or sunsets and that same audience deriving meaning from human expression. We may even have analogous concerns about the potential harm of government overreach in suppressing these things.

None of these similarities, however, make the flailings of a monkey or the beauty of a sunset a form of human speech protected by the First Amendment. Again, while policy and purpose may be helpful tools for courts when addressing necessary real-world limits on otherwise applicable constitutional principles, Alexander is conflating policy with law and purpose with the Constitution. Put differently, while the First Amendment has certain arguable benefits (restraining

[24] Volokh, Lemley & Henderson, *supra* note 19, at 655.
[25] ALEXANDER, *supra* note 22, at 8.
[26] *Id.* at 8–9.

government overreach and allowing for a human receipt of intellectual stimuli), it does not follow that any time those benefits are not fully realized there has been a First Amendment violation. This is a logical fallacy.

There may be an injury to the thwarted observer of a gorgeous sunset. It may even be an injury addressed by the U.S. Constitution—perhaps a Fourteenth Amendment Substantive Due Process "liberty" claim? But with no human speaker—God doesn't count—that injury is not a First Amendment claim. If God, or nature, or non-human animals, did count, the First Amendment would lose any semblance of a limiting principle. An unexpectedly prolonged appointment at the DMV that causes one to miss that glorious winter sunset on the drive home would become a First Amendment violation, as would a mandatory leashing law that prevents a pit bull from running freely on a public beach and creating artistic-looking spiral patterns in the sand that the pet owner adores.

Protecting "speech" untethered from a human speaker would also distort, and potentially subvert, the very premise of the Constitution: that it is a document for "We the People."[27] Allowing non-human "speakers" to be included within the ambit of the Constitution's protection—via listener's rights—throws into question the fundamental blueprint for our system of government, one that requires a super-majority to amend. It would subvert the very notion of, in Abraham Lincoln's words, a "government of the people, by the people, [and] for the people."[28] Such concerns, associated with a more generous definition of constitutionally protected speech, may appear hyperbolic. However, risks that may have seemed farfetched just a few years ago, before the rapid acceleration of AI technology, today cannot be gainsaid. As applied to AI, an autonomous listener's right could effectively immunize computers from regulation by human institutions.

Had the Framers drafted a different constitution, one that prohibited Congress from making any law "abridging the freedom to listen," Alexander and others who argue for an audience-centered freedom of expression would have been in a stronger position to make their claims. After all, the target of the clause's protection would then have been fundamentally different; instead of protecting the production of expression

---

[27] U.S. CONST. pmbl.

[28] PAUL M. ANGLE, ABRAHAM LINCOLN'S SPEECHES AND LETTERS 1832–1865 259 (J.M Dent & Sons eds., 1957 revised ed. 1907).

emanating from a human speaker, it would be directed at limiting government interference with the use of the human senses – without regard to the source of the stimuli to which those senses are responding. But this is not the constitution we were given. As this article shall discuss in greater detail, from a normative perspective, there is much reason to think that this is a good thing.

II. A THREE-PRONGED DEFINITION OF EXPRESSION

Much of the doctrinal and theoretical dispute over the First Amendment might be traced to a largely unacknowledged and confused definitional foundation of the concept of "speech." The Oxford English Dictionary's first definition of speech is: "The act of speaking; the natural exercise of the vocal organs; the utterance of words or sentences; oral expression of thought or feeling."[29] One rather uncontroversial premise—one that has been accepted from the earliest interpretations of the First Amendment—is that "speech" includes expression more broadly, including written and other symbolic expression such as flying a flag or the use of gesture and movement on stage to communicate a message.[30] As the Court has explained, "While we have rejected 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,' . . . we have acknowledged that conduct may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'"[31] For First Amendment purposes, "speech" extends beyond the "oral" expression of the Oxford definition above. Thus, throughout this article, "speech" and "expression" are largely used interchangeably.

If Oxford's first definition of "speech" emphasizes the action involved, the second listed definition of "speech" centers on its human, communicative, and interactive aspects. This definition reads: "Talk, speaking, or discourse; colloquy, conversation, conference. Commonly const. *with* or *of* (a person), and chiefly occurring in phrases, esp. to have speech."[32] Speech,

---

[29] *Speech*, OXFORD ENG. DICTION., https://www.oed.com/dictionary/speech_n1?tl=true&tab=meaning_and_use#21339526 (last updated June 2024).
[30] *See* Melville Nimmer, *The Meaning of Symbolic Speech Under the First Amend*ment, 21 UCLA L. REV. 29, 30 (1973).
[31] Texas v. Johnson, 491 U.S. 397, 404 (1989).
[32] *Speech*, *supra* note 29.

in other words, is a fundamentally human and communicative act. As the constitutional scholar Melville Nimmer once opined,

> [A]s an irreducible minimum [speech] must constitute communication. That, in turn, implies both a communicator and a communicatee—a speaker and an audience . . . . [W]ithout an actual or potential audience there can be no first amendment speech right. Nor may the first amendment be invoked if there is an audience but no actual or potential "speaker" [. . .] a human communicator intending to convey a meaning by his conduct.[33]

This article takes the position that First Amendment "speech" or "expression" is comprised of at least three elements: (1) an intentional human action, (2) endowed with symbolic meaning, that is (3) received (or receivable by) a human audience. "Speech" requires all three elements. Many of the debates over a listener-based or speaker-based First Amendment boil down to a misleading disaggregation of these three components. A free speech jurisprudence that considered element one to be sufficient, in other words, an approach that conceived of all human conduct to be protected expression, would be untenable. The rule of law is premised on an assumption that human conduct may be criminalized or subject to civil penalties. A world in which government could not hold individuals accountable for harmful conduct—because all such conduct could be said to be, in a sense, "expressive"—would be dystopian, a Hobbesian nightmare in which anarchy would dominate. "Not even the most ardent first amendment advocate would contend that all legislation regulating human conduct must be subject to first amendment restrictions."[34]

Likewise, consider element two: things "endowed with symbolic meaning." Human beings construct meaning from the world around them. As we move through life, the human brain derives meaning from its external environment—whether it be a dense forest of exotic trees and wildlife or a historically designated building. But modernity, and the evolution of human society more broadly, entail the constant modification of this external environment. Visual and audible content is always being altered, with the government frequently playing a prominent

[33] Nimmer, *supra* note 30, at 36.
[34] *Id.*

role, whether that forest is clear-cut to allow for the construction of an interstate highway eliminating the pleasant sounds of birds and other wildlife, or when that beloved art-deco movie theater is demolished to make way for a modern skyscraper. The symbolic content of the world around us cannot be considered to be, in itself, protected free speech. If it were, human progress, indeed on the most basic level, the simple human ability to affect our environment, would be imperiled.

Finally, consider element three: things "received (or receivable) by a human audience." This brings us to the so-called right to listen, and when divorced from the other two elements, it presents dangers I have already discussed and will discuss further. While a potential audience, as Nimmer explains, may be an essential element of the First Amendment equation, the mere existence of an audience alone cannot be sufficient. Indeed, for obvious reasons, the notion that the government could be constitutionally precluded from regulating anything that may stimulate human senses is untenable—most lawmaking would become impossible.

III. WHOSE CLAIM IS IT? THE STANDING ISSUE

To be clear, it is not uncommon for a listener to suffer harm as a result of a free speech violation. Rejecting a constitutional right for the autonomous listener by no means suggests that a listener has no role to play in First Amendment adjudication. In short, this is not intended to be an argument about standing.

Admittedly, there may be some overlap between this query of whom (or what) the Free Speech Clause protects, and the rules for getting through the courthouse door. When the government interferes with the speaker-listener pathway, obstructing the free movement of speech, a listener, as well as the speaker, may consequently suffer a legitimate harm. Yet, the mechanics of standing that at times allow for a listener-instigated legal claim, may be deceptive. Standing does not necessarily answer the important theoretical questions surrounding listeners' rights. In ordinary circumstances, a plaintiff must have suffered an injury in fact that is "concrete and particularized" and "actual or imminent."[35] To have standing there must be a "causal connection between the injury and the conduct complained of" and it must be likely "that the injury will be 'redressed by a

[35] Lujan v. Defenders of Wildlife, 504 U.S. 555, 560 (1992).

favorable decision.'"[36] The concrete and redressable First Amendment injury, however, must still be rooted in a free speech violation – abridgment of genuine human speech must be at the source of the injury.

Standing is distinctive in the First Amendment setting, incorporating the overbreadth doctrine. Free speech standing is uniquely broad in that it allows for challenges to laws that are facially problematic in some contexts, even if it would not be unconstitutional as applied to the defendant. This unusually generous standing rule is typically justified as serving a prophylactic function: preempting the potential chilling of speech. [37] An overly broad statute, even if it is not unconstitutional as applied to a defendant, still risks instilling uncertainty among potential purveyors of expression. The rationally risk-averse speaker facing this uncertainty may simply choose not to speak, despite the likelihood that their expression may very well be constitutionally protected.

A 2010 Harvard Law Review note provides a novel alternative justification for the overbreadth doctrine.[38] It points to discrete cases in which the Supreme Court granted standing, not to those "against whom a restriction on speech is being enforced," but to those who are receiving the information.[39] The note seeks to reframe overbreadth as an example of a listener asserting First Amendment rights.[40] This attempt to reconcile the conundrum of overbreadth, "an ad hoc exception in tension with normal standing principles," ensured that the defendant–as both speaker and potential listener–was indeed a party injured by an overly-broad law.[41] Thus, a speaker who is not injured because the law would not be unconstitutional as to her, could still be said to be injured as a potential listener to the other speakers who will be chilled.

At first blush, the note's argument, as well as its observation that the Supreme Court has granted standing to listeners, might appear to weaken this article's argument against a listener-based Free Speech Clause. However, there is nothing inconsistent about permitting a listener standing if she has been injured by an unconstitutional abridgment of a speaker. Rejecting an autonomous listener-based account does not

---

[36] *Id.* at 560–61 (citation omitted).
[37] *See* Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749, 1752 (2010).
[38] *See generally id.*
[39] *Id.* at 1765.
[40] *See id.*
[41] *Id.* at 1750.

require willfully ignoring the two-sided nature of communication.

Indeed, as the three-pronged definition above makes clear, what makes expression distinguishable from other, non-expressive human conduct, is that it is intended to convey its message to a human audience. The protection against the abridgment of speech is naturally targeted at the speaker himself or herself, as he or she is the creator of this speech. By definition, speech is a communicative dynamic that also incorporates an audience (or potential audience). The Supreme Court, while not always consistent on this conceptualization, has nonetheless acknowledged this reality. When addressing free speech rights in prisons it explained:

> Communication by letter is not accomplished by the act of writing words on paper. Rather, it is [effectuated] only when the letter is read by the addressee. Both parties to the correspondence have an interest in securing that result, and censorship of the communication between them necessarily impinges on the interest of each.[42]

The word "speech" in the Constitution is better (and more naturally) conceptualized as a pathway – a kind of dynamic discourse – rather than two separable interests. Speech is a symbolic action that is comprised of a source, a destination (or potential destination), and a route in between.

The Court's standing doctrine can accommodate the three-pronged understanding of free speech. The Harvard Note is consistent with this conception, concluding "that, constitutionally speaking, all citizens have standing to challenge a statute that distorts the public discourse."[43] The constitutional violation is still, at its core, an intrusion on speech produced by a speaker, and is not isolatable to an independent, disconnected lister's right to receive sensory input. A listener may have standing to bring suit in a case in which they have suffered a sufficiently concrete and particularized harm as a result of government censorship. But such a claim must nonetheless be rooted in an actual constitutional violation – a government restraint on human expression. The Court itself recognized this distinction when, in the case of prison mail, it flatly rejected the

---

[42] Procunier v. Martinez, 416 U.S. 396, 408 (1974), *overruled by* Thornburgh v. Abbott, 490 U.S. 401 (1989).

[43] *Overbreadth and Listeners' Rights*, *supra* note 37, at 1766–67.

notion that it was addressing a "so-called 'right to hear'" simply by acknowledging the recipient as having a cognizable free speech interest.[44] To the Court, it was clear that "the interests of both parties are inextricably meshed."[45]

IV. THE WILLING AND UNWILLING LISTENER

Admittedly, many commentators speak in terms of "listeners' rights." James Grimmelmann has referred to the present as "a golden age for scholarship on listers' rights."[46] But this is something of a misnomer that may contribute to doctrinal confusion. While it is not incorrect to address the interests of listeners under the First Amendment, speaking in terms of dichotomous "speakers' rights" and "listeners' rights" is potentially misleading.

As Grimmelmann astutely observes, free speech can be understood as a "matching problem" in which "speakers and listeners find each other."[47] Many constitutional questions are naturally concerned with whether we are dealing with willing or unwilling listeners. But a willing listener's rights–if asserted as a First Amendment claim–are just a subspecies of a speaker's freedom of expression. An unwilling listener's rights, in contrast, generally refer to a privacy right. This right to be left alone, or to not be intruded upon, is not a First Amendment interest at all. Indeed, the privacy interests of a listener often run directly counter to the speaker's First Amendment interests.

The problem of a speaker attempting to utilize their constitutional freedom of expression to speak to an unwilling listener has been confronted many times by the Supreme Court. The Court has been asked to weigh, for example, whether lewd or vulgar words on the back of a jacket are still fully protected when unwittingly visible to families in a courthouse,[48] or if political advertisements imposed on a captive audience of riders attempting to get from point A to point B on public transit are protected by the First Amendment.[49] Free speech has never meant an unqualified right to force one's ideas to be heard by even the most unwilling of listeners.[50] And to what extent the First Amendment does include the right to expose listeners to

---

[44] *Procunier*, 416 U.S. at 409.
[45] *Id.*
[46] James Grimmelmann, *Listeners' Choices*, 90 UNIV. COLO. L. REV. 365, 408 (2019).
[47] *Id.* at 366–67.
[48] *See* Cohen v. California, 403 U.S. 15, 18–21 (1971).
[49] *See* Lehman v. City of Shaker Heights, 418 U.S. 298, 300–04 (1974).
[50] *See* Kovacs v. Cooper, 336 U.S. 77, 86-89 (1949).

ideas that they themselves would not voluntarily seek out, and perhaps would prefer to avoid, for example, the words of a controversial soap box speaker in a public forum like a town square,[51] has presented a set of knotty doctrinal questions that the Court has fleshed out over the years.

These questions are fascinating and important. But because the Court must sometimes counter-balance a speaker's free speech rights against the non-speech interests of an unwilling listener *not* to listen does not make the latter a First Amendment right. More likely, it is another interest held by the unwilling listener that may be at stake–such as common law nuisance or the liberties derived from the Fifth and Fourteenth Amendments. The Court has emphasized the justifiable need to protect a listener's privacy in their own home against unwanted intrusions of profanity over the broadcast media.[52] It has protected unwilling listeners from the nuisance of loud sound trucks on public streets.[53] The freedom of expression is not absolute. While under certain circumstances the interests of the unwilling listener may enter into the Court's doctrinal calculus when assessing the outer boundaries of a speaker's First Amendment rights, it remains the speaker's not the unwilling listener's–First Amendment rights that are in question.

In contrast, when a willing listener asserts standing to challenge government censorship that prevents that listener from hearing speech produced by a willing human speaker, that listener is harmed by the state's actions – a First Amendment violation against that speaker. As Grimmelmann explains, free speech is about protecting "the entire communicative pathway from willing speaker to willing listener."[54] First Amendment speech does not include isolated non-communicative action on the part of a potential speaker, nor isolated "listening" into the ether. Speech must incorporate a "pathway" in between. The pathway may be literal (radio waves over the FM dial) or figurative (a very unpopular author's wishful thinking–publishing a book no one will actually read). A willing listener *may* or *may not* be found at the end of this pathway. But to be First Amendment speech, a speaker *must* be found at the start of that pathway.

---

[51] *See* Hague v. Comm. for Indus. Org., 307 U.S. 496 (1939).
[52] FCC v. Pacifica Found., 438 U.S. 726, 748 (1978).
[53] *See Kovacs*, 336 U.S. at 87.
[54] Grimmelmann, *supra* note 46, at 379.

Another way to think about this is, a speaker always has First Amendment interests (whether they will always be fully realized is another question), while a willing listener *may* have First Amendment interests (specifically, when they seek to listen to actual speech). This characterization of speaker vs. listener First Amendment interests is consistent with Grimmelmann's observation that there is "asymmetry between speakers and listeners."[55] While their interests may be aligned, as in the case of a willing speaker communicating with a willing listener, they may not be.

Speakers and listeners start from fundamentally different positions. Speakers seek to share knowledge, opinions, or perspectives that are often unfamiliar to their targeted listeners, but certainly familiar to the speakers themselves, so speakers have an informational advantage.[56] Listeners, on the other hand, face a sometimes overwhelming landscape of potential speakers to listen to–some of whom they will hear by choice, some due to happenstance or social media algorithms, some as a result of aggressive marketing. Taking in new ideas requires an investment of time and mental energy by the listener. Time and mental energy are finite resources. While it may at times overlap with the interests of a speaker, a listener's decision-making calculus, and the landscape of the stimuli-universe a listener finds himself in, presents a distinct set of concerns.

V. CITIZENS UNITED AND THE CORPORATE SPEAKER

How speech is defined can have a profound effect on listeners. A capacious definition that does not adhere to the three-prong definition proposed above, might risk inundating listeners with what is, in effect, constitutionally protected noise. A bombardment of the listener's faculties by stimuli that may resemble speech–what we might call simulated speech–may thwart effective listening to true human-created speech. More simulated speech may mean less genuine speech–because the human mind has a finite ability to absorb new content, and human life itself is finite in time.[57] In today's parlance, this has become known as flooding the zone; and it may entail drowning out authentic human speech and diluting the power and import of human expression. The Court rejected an analogous concern

[55] *Id.* at 376.
[56] *See id.* at 377–78.
[57] *See* Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 554–58 (2018).

when, in *Citizens United v. Federal Election Commission*,[58] it reconsidered and overturned its own 1990 precedent, *Austin v. Michigan Chamber of Commerce*.[59]

Concededly, the cases addressed a somewhat different, but related, concern about "drowning out" speech; in *Citizens United* it was unlimited corporate spending on political campaigns that sounded alarm bells. The Court in *Austin* upheld a campaign finance law limiting corporate expenditures on political campaigns under an anti-distortionary rationale.[60] The *Citizens United* majority, however, characterized limitations on corporate spending as "a ban on corporate speech."[61] Further, despite acknowledging "that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires . . . [and] are not themselves members of 'We the People' by whom and for whom our Constitution was established,"[62] even the dissent did not take issue with the concept that corporations can "speak."[63] The dissenters' primary contention was simply that "[i]n the context of election to public office, the distinction between corporate and human speakers is significant."[64]

The *Citizens United* majority and dissent failed to acknowledge just how critical it is to define and justify what speech is, and what it is not, for First Amendment purposes. While *Citizens United* did not explicitly adopt a listener-based Free Speech Clause, it largely brushed aside the question of what it means when we refer to "speech," simply assuming there is something called "corporate speech" that is entitled to First Amendment protection. Like a jeweler emphasizing the beauty of a "diamond" (that is in fact a cubic zirconia) and repeatedly referring to it as such, its rhetoric highlighted the appearance of the ostensible speech-product rather than scrutinizing the critical antecedent questions: What is the source of this so-called "speech?" A forgery may be indistinguishable to the human eye, but this doesn't make it a genuine article.

---

[58] 558 U.S. 310 (2010).
[59] *Id.* at 365.
[60] *Id.* at 350–51 ("Either as support for its antidistortion rationale or as further argument, the *Austin* majority undertook to distinguish wealthy individuals from corporations on the ground that '[s]tate law grants corporations special advantages – such as limited liability, perpetual life, and favorable treatment of the accumulation and distribution of assets.'").
[61] *Id.* at 337.
[62] *Id.* at 466 (Stevens, J., dissenting).
[63] *See id.*
[64] *Id.* at 394.

The Court instead laid out a parade of horribles that could potentially result from the campaign finance law at issue, describing these possibilities as "classic examples of censorship."[65] It described how the law could criminalize an ad "that exhorts the public to disapprove of a Congressman who favors logging in national forests" or "a book urging" voters not to support a Senator in favor of "a handgun ban."[66] On their face, these examples would seem to resemble classic First Amendment speech. But does it matter that they are paid for, not from the Venmo account of a passionate, thinking, individual human being, but instead from the treasury of an intangible corporate entity? As with a work produced by a monkey on a keyboard or the art-like qualities of a natural sunset, a resemblance to speech for the reasons discussed previously, may not be enough.

Granted, a corporation is a human collective, a legal entity comprised of many associated individuals. It may be reasonable to conclude, as Justice Scalia did in *Citizens United*, that an "individual person's right to speak includes the right to speak *in association with other individual persons*."[67] Certainly, there are palatable arguments that expression conveyed (or paid for) by an entity representative of a collection of human beings comes closer to the Framers' concept of First Amendment "speech" than actions of animals or forces of nature. Unfortunately, the Court does not flesh out any of the complexity associated with Scalia's rather simplistic formulation. Who, for example, speaks for that collective legal entity?

Words may be uttered, or money might be spent on political advertisements by representatives of that corporation. But at what point does it constitute "speech" by the entity? If a sizable minority of individual shareholders of the corporation disagree with the message it is sending, is this still constitutionally protected "corporate speech?" Corporations and other collective entities are governed by their own internal rules. What form of authorization to represent the group is sufficient to categorize such action as protected group "speech?" Might a corporate charter that permits a minority of its associated individuals to convey messages that are opposed by a majority of its associates lose its constitutional protection because its "speech" is no longer representative of the views of the

[65] *Id.* at 337 (majority opinion).
[66] *Id.*
[67] *Id.* at 392 (Scalia, J., concurring).

individual persons that comprise it? If many of the individuals that make up the collective are foreigners, with little connection to the United States, is this still "speech" protected by the First Amendment?

Instead of wrestling with these thorny questions, the Court implicitly goes the way of the proponents of the autonomous listener's right. Nuanced determinations of specifically when or if a collective entity's actions may be considered "speech" are deserving of judicial attention. Instead, an absence of analysis suggests a simple message: if it resembles expression, it must be protected by the First Amendment, case closed. The Court treats the answers to highly-contestable questions as self-evident–with an assist from its repeated use of the dubious phrase "corporate speech."[68] Cases such as *Citizens United*, without saying so expressly, set the stage for an autonomous listener's First Amendment, a world in which any potential stimuli qualify as speech. It is a dangerous precedent to set, particularly at a moment in history in which, increasingly, much of the information and stimulation we consume, despite closely resembling classic human speech, does not have a human creator at all.

VI. ARTIFICIAL INTELLIGENCE AND THE PROBLEM OF CHEAP SPEECH-LIKE CONTENT

Today, there can be no question that we have entered an era of "cheap speech."[69] We have moved from a long human history marked by a scarcity of intellectual stimuli to one of hyper-abundance. Modern, technology-saturated society must contend with a flood of information (and misinformation) available on the internet that can overwhelm listeners and necessitate that speakers employ aggressive tactics to gain listeners' attention. And the asymmetry between speaker and listener is particularly relevant. We have discussed how a speaker generally has a clear interest in being heard. But what if there is no speaker to be found? What if there is no human intent or interest behind the voice? Much so-called cheap speech is speaker-less. It is produced by AI. It has been estimated that by

[68] *See generally* Wayne Batchis, *Citizens United and the Paradox of "Corporate Speech": From Freedom of Association to Freedom of The Association,* 36 N.Y.U. REV. L. & SOC. CHANGE 5 (2012).
[69] *See* Wu, *supra* note 57, at 549, 555.

2026, approximately 90% of what is found online may be "synthetic" content.[70]

Computers have long had the ability to communicate decisions, or "algorithmic outputs," to human beings interested in receiving those messages.[71] However, in recent years, the level of sophistication and complexity of these outputs has increased at a startling rate. What might have formerly been received as a series of beeps or lights to communicate a message today looks and sounds like human expression.[72] Computers convincingly simulate human outputs (otherwise known as speech) in both form and function, with capabilities that are advancing every day.

This proliferation of non-human messaging, potentially indistinguishable from true human-produced expression, presents an array of complex policy concerns. A torrent of AI messaging may effectively eliminate transparency along the speaker-listener pathway such that it becomes impossible for a listener to distinguish between human speech and AI-generated messages. It may reduce or eliminate the likelihood that human speakers will be able to be heard at all. Perhaps most worrisome, AI's rapid expansion risks eclipsing many human spheres of influence, dominating its own creators in ways that may ultimately constitute a threat to human happiness, flourishing, and perhaps even existence. A constitutional right to listen would impede efforts to address these concerns. Transforming the explicit protection for speech in the First Amendment into an atextual protection for the autonomous listener risks not merely expanding the constitutional rights to those who were not intended beneficiaries, it opens up a potential pandora's box of rights that may be *in direct tension with* actual First Amendment interests.

Anyone with a passing familiarity with constitutional law understands that there are downsides to all constitutional guarantees and structures. The commerce clause might allow for federal regulation of commerce that is excessive or in some cases counterproductive. Nonetheless, the federal government is unequivocally granted this power under Article I, Section 8 of the United States Constitution. A government taking of private

---

[70] Kevin Frazier, *The Marketplace of Ideas Mandate: What the Postal Power Requires from Congress in the Age of AI*, 34 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 779, 779 (2024).
[71] Lynne Higby, *Navigating the Speech Rights of Autonomous Robots in a Sea of Legal Uncertainty*, 26 J. TECH. L. & POL'Y 33, 36–39 (2021).
[72] *See id.*

property without having to compensate the owner of the property with taxpayer money may facilitate the construction of important infrastructure that might otherwise not get built. However, the Fifth Amendment does not allow the government to make this calculus. And of course, accompanying many years of free speech jurisprudence has been the understanding that freedom of expression has costs. In plenty of circumstances, free speech may cause real harm. Yet, for all of these constitutional provisions, the Framers decided—for better or worse —to lock in the rules of the game. As Justice Black explained, "protecting speech and press may involve dangers to a particular government . . . [but] the Framers themselves did this balancing . . . [t]hey appreciated the risks involved and they decided that certain rights should be guaranteed regardless of these risks."[73]

There is an understandable temptation to apply Justice Black's logic to machine-created "speech,"—while we may have some legitimate concerns about AI, the rules are the rules. As we have seen, however, such a view does not adequately wrestle with what the FFramers meant by the word "speech." And even if we were to accept the claim that the phrase "freedom of speech" is to some extent ambiguous, requiring the Court to engage in what has been called "constitutional construction,"[74] one must nevertheless address the normative arguments for, or against, adopting a more capacious definition.

It has become readily apparent to many commentators that while simulated speech from bots may have benefits, it also has a very real dark side.[75] Society is just beginning to grapple with the implications of the rapidly expanding influence of AI, but there are already many examples of the harm it might inflict, including its ability to spread propaganda and disinformation that distorts the democratic process. Under a listener-centered First Amendment that defines away any need for a human source to constitute "speech," a listener would have a constitutional right to hear simulated speech from bots. Like the default presumption that a speaker has the right to express harmful ideas—unless they fall within a few discrete narrow categories like true threats, incitement, or child pornography—a listener would be guaranteed a default presumption of

---

[73] Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 879 (1960).

[74] *See generally* Randy E. Barnett, *Interpretation and Construction*, 34 HARV. J.L. & PUB. POL'Y 65 *passim* (2011) (defining constitutional construction and differentiating it from the judicial practice of constitutional interpretation).

[75] Helen Norton, *Robotic Speakers and Human Listeners*, 41 SEATTLE UNIV. L. REV. 1145, 1146–48 (2018).

entitlement to hear harmful messages, even nefarious manipulations produced by AI.

Take the example of hate speech. Certainly, hate speech may cause real injury. But like all other speech (barring narrow categorical exceptions), offensive expression is protected by the First Amendment. There are many reasons for this, including that hate speech can be extremely difficult to define. It is a moving target. It is subjective, political, and contestable. And while it may be reprehensible, it can be emotive, exposing a real, albeit ugly, intensity behind certain human expression.[76] Hate speech potentially exposes something very real in the human heart, informing us of the dark feelings and thoughts that weigh down fellow human beings with whom we share our society. Free expression – even for hate speech – provides an opportunity to see this darkness, rather than allowing it to fester in the shadows. It provides an opportunity for its correction with counter-speech. As John Stuart Mill famously opined, "If the [suppressed] opinion is right, [the human race is] deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth produced by its collision with error."[77] The First Amendment is a kind of sunlight, informing us of the existence and perhaps prevalence of bad ideas of those with whom we share our society – even evil ones – and empowering us to resist them by instead promoting good ideas.

Now imagine that it is not a human being sharing these ugly ideas; it is instead a robot flooding the internet with hate speech. At the risk of venturing down a road that some might deem speculative dystopian science fiction, and that others might worry is looking more and more like our present reality, let's suppose that this hate speech is expertly targeted by highly sophisticated algorithms, thereby inflicting maximum social unrest. The effect is to so heighten polarization as to risk the instigation of a second American civil war. This robot expression is not the political speech of misguided angry fellow Americans from whom we might glean – through the ugliness—genuine pain and frustration from a side of the country we rarely encounter. It is not an example of individual self-expression, to

---

[76] *See, e.g.*, Cohen v. California, 403 U.S. 15, 26 (1971) ("[M]uch linguistic expression . . . function[s] [to] convey[] . . . otherwise inexpressible emotions . . . [i]n fact, words are often chosen as much for their emotive as their cognitive force.").

[77] JOHN STUART MILL, ON LIBERTY 31 (Elizabeth Rapaport ed., Hackett Publ'g Co., Inc. 1978) (1859).

many thinkers at the very core of what it means to be a human being. Hearing these bots does not provide an opportunity to constructively engage with, and learn from, people on the other end of a speaker-listener pathway by providing counter-speech. Artificial bot "speech" does not provide us with information about the inner thoughts and emotions of our fellow citizens. It is entirely computer-generated. It is an attack. As Lawrence Lessig queried, posing a similar hypothetical about regulating an AI-driven political campaign content-producer that inflicts significant harm to our republic: "Why would our Constitution prohibit us from protecting our democracy in this way?"[78] The First Amendment is not, and should not be understood to be, a suicide pact.

VII. THE RELATIONSHIP BETWEEN HUMAN SPEECH AND AI SIMULATION

There are difficult questions about where human speech ends and artificial or simulated robot "speech" begins. In an era in which computers are essential and ubiquitous aspects of our daily lives, arguably most human expression is assisted, amplified, or refined in some way with the use of technology. Scholars have debated the extent to which informational output produced by a computer program may still be considered speech of the human coder him or herself rather than the synthetic "speech" of a machine, just as we might debate the point at which the First Amendment should acknowledge corporate or group expression as "speech." Where is the line between man and machine for purposes of the First Amendment?

Commentators have posited that answering this question may "inevitably fall into highly fact-specific inquiries and murky line-drawing."[79] They acknowledge that intentional choices made by human employees at an AI company will to a greater or lesser extent impact the output of that AI, despite the fact that these same human beings will typically not anticipate or even see the writing or speech the AI ultimately produces.[80] However, it would be untenable to provide First Amendment protection to any human action that sets into motion, no matter how indirectly, anything that ultimately produces content that will be imbued with meaning by the human beings who receive it. Such

[78] Lawrence Lessig, *The First Amendment Does Not Protect Replicants*, 3 (Harv. L. Sch., Pub. L. & Legal Theory, Rsch. Paper Series, Working Paper No. 21-34, 2021).
[79] Volokh, Lemley, & Henderson, *supra* note 19.
[80] *See id.* at 652-53.

a test would lack any limiting principle, and potentially make all human conduct unregulable under the Free Speech Clause.

To Lawrence Lessig, the relevant distinction is between creating something and enabling something, the way a parent may be said to enable a child's existence; while that parent likely exerts great influence over their children's ideas and worldview, especially during their formative years, they are not the creator of—nor speaker behind—"the college essay of an eighteen-year-old."[81] A programmer may arguably "speak" in the code that they produce. But once AI has "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,"[82] it is no longer human speech. The speaker-listener pathway, in other words, is severed.

This is not to say that a pathway between a human speaker and listener, once broken, may not be re-established. As mentioned, AI is not merely used to produce and disseminate autonomous robotic "speech," it may also act as an assistive tool to help actual human beings produce genuine speech.[83] It may produce a first draft that a person would edit or build upon, add needed content or language to a human written draft, conduct a research summary, or produce an outline that would act as a foundation for human speech.[84] The question might then arise: would all of these be examples of unprotected speech? The answer would be a qualified no.

As we have defined it in this article, speech consists of at least three elements: (1) an intentional human action; (2) endowed with symbolic meaning; and (3) received (or receivable by) a human audience. The meaning human beings intend to express when they speak is, of course, not generated in isolation. Ideas take shape with the help of inputs from a wide array of external stimuli that the brain processes, synthesizes, and utilizes as creative inspiration. The fact that this article, in making its arguments, draws upon, cites, and quotes the work of other thinkers and jurists does not make it any less the expression of its author. Much of what we communicate comes from elsewhere or is a synthesis of ideas, information, and opinion from a variety of sources. Thus, there is nothing inconsistent in providing First Amendment protection to speech produced with the assistance

[81] Lessig, *supra* note 78, at 4.
[82] *Id.*
[83] Volokh, Lemley, & Henderson, *supra* note 19, at 657.
[84] *See id.*

of AI, or perhaps even the intentional human sharing of purely AI-produced content. A journalist's description or a photographer's portrait of a setting sun is human expression in a way the sunset itself is not. The speech pathway is established anew once it is a human being expressing ideas, whatever their original source.

Admittedly, a practical application of this definition will involve some challenges. One can imagine that such a rule might be exploited as a loophole by those who have an interest in the complete deregulation of AI. We might anticipate a flurry of mechanisms that would create the appearance of human speech through a variety of superficial human interventions in AI content dissemination. Doctrinal rules would need to be fleshed out as to precisely what level, and what kind, of human involvement in the transmission of AI-produced content would suffice to transform content from unprotected synthetic robot "speech," to fully protected First Amendment human expression. While drawing such lines may not be simple, it is a familiar and necessary exercise, not dissimilar from many other areas of constitutional adjudication in which fact-intensive distinctions must be made.

One proposition that must be flatly rejected, however, is the misguided assertion by Volokh, Lemley, and Henderson that AI, by virtue of being a technology "that makes it easier to speak," must itself be protected by the First Amendment.[85] The most obvious reason that this cannot be the rule, once again, is that there is an absence of a limiting principle. The list of "technologies" that could potentially be said to make it easier to speak ranges from orthodontics to scholarships for computer programmers; high-quality nutrition to a universal guarantee of high-speed internet access. To say that all of the things on this list are protected by the Constitution's Free Speech Clause is to stretch the First Amendment beyond recognition. Such a rule would impose constitutional limits and demands on mundane realms in which the power of government to regulate has been, heretofore, taken for granted.

Indeed, the scholars inadvertently reveal the weakness of their argument when they go on to cite the way the specific protection of the "press" in the Constitution itself "refers to one such technology, the printing press, which was of course both immensely valuable and immensely disruptive."[86] This is true

[85] *Id.* at 658–59.
[86] *Id.* at 658.

enough. But there is an explicit Press Clause in the Constitution. There is no Artificial Intelligence Clause. The fact that the FFramers singled out "the press" for First Amendment protection would suggest not that there is a broad constitutional protection for all technologies that make it easier to speak, but rather, a narrow and very specific one, for the press.

VIII. THE DARK SIDE AND THE BRIGHT SIDE OF AI

The very notion of "artificial" intelligence raises extremely weighty, and consequential philosophical questions about what it means to be human. These matters will not be resolved here. However, what is alarming—and centrally relevant to this article—is the way a listener-focused jurisprudence would take these fundamental issues that should be at the center of our attention and make them utterly irrelevant. If all sensory stimuli that may be received by a human listener are "speech," none of these questions matter – and the cost-benefit calculus that the Framers of the First Amendment accepted as a premise of declaring "speech" to be off limits by the law, is radically distorted.

Consider trolling. The harms of disruptive and provocative online behavior that often includes hate speech may appear obvious. But for the trolls themselves, the act of trolling may "be enjoyable precisely because others find it so unpleasant."[87] As a speaker, obnoxious and outrageous expression as long as it does not cross over into unprotected harassment, threats or defamation, is generally still protected speech.[88] With the focus on the speaker, human expressive autonomy and other First Amendment values take precedence. This is a limiting mechanism built-in to the First Amendment. But should the same be true of trolls that are bots? What happens, in this context, when our First Amendment analysis turns its attention to the listener? As Helen Norton observes when discussing online trolling, "[e]ven though hate speech is of no utility to its targets, some bystanders apparently enjoy it. Indeed, many listeners enjoy hateful, false, and outrageous speech when it speaks to and confirms their pre-existing preferences, fears, and grievances."[89] If this listeners-perspective becomes our metric for

[87] Norton, *supra* note 75, at 1148.
[88] *See* Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 55 (1988) ("An 'outrageousness' standard thus runs afoul of our longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience.").
[89] Norton, *supra* note 75, at 1148.

determining whether "speech" is protected by the Constitution, the First Amendment begins to look like, instead of a critical protection of expressive human autonomy, a right to be entertained by inanimate objects—inanimate objects that may be inflicting great harm to our social fabric.

Norton's response is to compare robotic speech to other categorical areas where the Court's First Amendment doctrine has made concessions to listeners' interests, like commercial and professional speech.[90] In those narrow areas, misleading or inaccurate content can be prohibited entirely, and certain disclosures can be mandated. Why not apply a similar treatment for the artificial speech of bots? Norton proposes "protect[ing] robotic speech that is of value to its listeners, while permitting the government to regulate robotic speech to protect listeners from coercion, deception, and discrimination."[91] Norton's solution may be laudable, but is it workable?

Unlike a discrete category such as commercial speech, with distinctive attributes, AI expression could come in any form and serve an unlimited range of purposes or effects. It simulates human expression and it therefore runs the gamut by definition. Is it a reasonable or desirable expectation that courts, not made up of experts in AI technology nor in the complex social effects rampant simulated bot speech may have, be in charge, by fiat, of disaggregating the elements of AI that may be regulated, from those which are precluded from regulation by the Constitution? Could we truly feel confident that "First Amendment doctrine [would retain] a human focus" and would sufficiently attend "both to the value and the dangers of robotic speech to its human listeners[?]"[92] As we shall see, in making this calculus Courts would be bereft of a key element that typically factors into the balance that informs their decision-making in many areas where First Amendment exceptions are justified, the mental state of the speaker. A computer, of course, has no mental state.

IX. WHAT ABOUT THE BENEFITS OF SIMULATED SPEECH?

A skeptic regarding these concerns might query: What then of the benefits of AI? They might point out that, just like human speech, simulated AI speech will have *both* costs and benefits. Would we not be depriving society of the advantages robotic speech might bring if we reject an autonomous First

[90] *See id.* at 1149.
[91] *Id.*
[92] *Id.*

Amendment right for listeners? These benefits might include bringing vastly more information to the marketplace of ideas, enhancing the search for truth, facilitating the democratic self-governance of listeners, and boosting individual autonomy by helping inform listers' choices.[93] A listeners' First Amendment would also arguably protect listeners from unwanted interference by the government.[94]

These concerns, however, conflate the denial of a constitutional right with a denial of a benefit derived from a policy choice. There is an endless range of behaviors, actions or forces of nature, that potentially enhance a person's ability to reason through a particular governance problem, move closer to an understanding of the truth, or provide us with additional insight that we might use to better inform our decisions. Raising a pet snow leopard in a New York City apartment might help the resident or her guests better understand the plight of endangered species. Observing a sunset while high on hallucinogenic drugs may enhance the ability to assess the pros and cons of contending philosophical worldviews that are part of the marketplace of ideas. But neither of these things, despite having benefits we often associate with free speech, are protected by the First Amendment.

There may be very legitimate policy reasons to advocate for a loosening-up of restrictions on pet ownership in large cities, or for the decriminalization of certain illegal drugs. And yes, some of these policy interests may provide certain benefits we also realize through a protection of human-produced speech under the First Amendment. The Framers of our Constitution, however, did not intend constitutional law to be the direct source all – or even most – social policy. As Chief Justice Marshall wisely observed over two centuries ago, "[a] constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind."[95]

That the First Amendment promotes X, Y and Z social goods, does not suggest that all X, Y and Z social goods are themselves protected by the First Amendment. Instead, the people make their case, and advocate for ordinary legislation that will achieve such benefits. All this is to say that rejecting a

[93] *See id.* at 1145–46.
[94] *See id.* at 1146.
[95] McCulloch v. Maryland, 17 U.S. 316, 407 (1819).

listeners' First Amendment does not necessarily mean forfeiting the advantages of hearing information produced by AI. To the contrary, the deliberative process of working through the complex policy considerations as to when, how and in what ways AI may be free of legal constraints for the net benefit of society, will almost certainly take into account the desirability of maintaining spheres in which AI receives First Amendment-like freedom from constraint. There simply is no reason to believe that because something is not acknowledged as a *constitutionally guaranteed* right, society will not enjoy the benefits of that right. It simply means that Congress is empowered to do the hard work of determining in what ways to regulate, and in what ways *not to regulate,* what otherwise would be subject to the blunt instrument of constitutional protection.

X. EMPOWERING SELF-GOVERNANCE

This empowerment of our human-voter-selected representative body serves the interest of democratic self-governance. Indeed, constitutionalizing a listener-based autonomous right to hear would thwart self-determination by indirectly granting constitutional rights to robots – and concomitantly narrowing the range of human governmental decision-making. As evidence that the Framers would not likely have intended the First Amendment's protection of speech to extend to non-human robots, we might look to Madison's original language for what would become the First Amendment, stating, "*[t]he people* shall not be deprived or abridged of their right to speak."[96] The final text in the Constitution, "Congress shall make no law . . . abridging the freedom of speech,"[97] reoriented the clause's emphasis on the boundaries of government power.

However, there is no reason to believe that the ultimate decision to drop the words "the people," and instead frame the provision as a limitation on "Congress," was motivated by the FFramers' concern that inanimate objects might also be deprived of their right to "speak." This language clearly reinforces what a straightforward reading of the final text suggests, that the "speech" the Framers sought to protect in the First Amendment was human speech. It is "their" – "the people['s]" – right that may not be infringed. As Lawrence Lessig confidently opined, when the Framers drafted the First Amendment, "not one of

[96] Black, *supra* note 73, at 874 (emphasis added).
[97] U.S CONST. amend. I.

them contemplated a world in which political speech could be crafted by a machine."[98]

Now, unless one is a strict adherent of original intent originalism, the fact that the FFramers did not imagine a particular modern application of the Constitution is hardly, in and of itself, a reason to reject that application. The world changes, and even an originalist such as Justice Scalia could see the necessity of adapting the Constitution to modern realities.[99] Here, however, interpretive adaptability would mean upending the very heart of the Constitution, securing the welfare and liberty of the people.[100] Admittedly, the Constitution is variable as to the groups of people to which it affords rights and privileges – it may be an individual or minority that is protected against majority tyranny, or it may be a majority or supermajority that may be empowered. However, it is always "people."

In Lawrence Lessig's view, "there is no democratic reason or reason of dignity to extend [the] privilege [of free speech] beyond our species."[101] It is possible to disagree with this position, but at minimum, it is a debate we as a sovereign polity must have if we were to consider such a fundamental, and many might say radical, change to the premise of a democracy rooted in "we the people." However, as pointed out earlier, such a query becomes moot if we adopt a listener-centric approach. The Constitution would have made the decision for us already. We have, after all, our protected "person" in our listener – and we should thus have nothing to say, or object to, regarding the source of the stimuli they are receiving.

Fortunately, such a reading is flatly inconsistent with the language of the First Amendment, the text of which protects "speech" and does not reference its recipient. Constitutionalization of a listener's right to hear inhibits the ability of 'we the people' to self-govern; nullifying the possibility of a deliberative process by which elected representatives may determine through ordinary legislation what simulated "speech" we should encourage and legally protect, and what expressive bot behavior is dangerous and should be legally constrained. It

---

[98] Lessig, *supra* note 78.

[99] District of Columbia v. Heller, 554 U.S. 570, 582 (2008) ("Just as the First Amendment protects modern forms of communications, and the Fourth Amendment applies to modern forms of search[es], the Second Amendment extends, prima facie, to all instruments that constitute bearable arms, even those that were not in existence at the time of the founding.") (citations omitted).

[100] *See* U.S. CONST. pmbl.

[101] Lessig, *supra* note 78, at 10.

would strip democratic government of its flexibility, flexibility it may need to respond effectively to a rapidly evolving technological landscape in which new dangers or risks may be discovered at any time. Finally, it contradicts and constrains the people-centric approach the Court has taken to the First Amendment, one that incorporates core notions of human morality, consciousness, and accountability into its doctrine.

XI. LOW-VALUE SPEECH AND THE SPEAKER'S INTENT

The Court's baseline assumption regarding the inherent humanness of First Amendment speech is particularly evident in certain categorical areas of "low value" speech that receive less than full protection. Three examples of such "low value" speech include incitement, defamation, and true threats. The lesser than full protection under the Constitution for these forms of speech is predicated on a scienter requirement by the speaker. In other words, the determination of whether speech falls within these narrow categories, and is thus unprotected, turns on the level of awareness of the speaker.

Does the speaker intend their language to incite illegal behavior? Ever since *Brandenburg v. Ohio*,[102] the Court has held that although incitement is unprotected, such speech must be "directed to inciting or producing imminent lawless action and [be] likely to incite or produce such action."[103] Subsequent decisions clarified that this standard demands that the speaker either speak with the purpose to incite criminal behavior or, with the knowledge that their expression has this quality.[104] Is a speaker aware of the falsity of an allegedly defamatory statement made against a public official? Ever since *New York Times v. Sullivan*,[105] the Court made it clear that "actual malice" or "knowledge that it was false or with reckless disregard of whether it was false or not"[106] is required if such speech is to be constitutionally penalized through a civil lawsuit. Is a speaker who sends frightening messages to a listener aware of the high risk that her speech will be interpreted as a threat against the

[102] 395 U.S. 444 (1969).
[103] *Id.* at 447.
[104] Counterman v. Colorado, 600 U.S. 66, 76, 81 (2023) ("[T]he First Amendment precludes punishment, whether civil or criminal, unless the speaker's words were 'intended' (not just likely) to produce imminent disorder. [This] rule helps prevent a law from deterring 'mere advocacy' of illegal acts – a kind of speech falling within the First Amendment's core.") ("When incitement is at issue, we have spoken in terms of specific intent, presumably equivalent to purpose or knowledge.").
[105] 376 U.S. 254 (1964).
[106] *Id.* at 280.

listener's physical safety? n 2023, the Court established a similar test to the one devised for defamation – requiring a mental state of reckless disregard – for true threats, stating that the recklessness standard "offers 'enough "breathing space" for protected speech,' without sacrificing too many of the benefits of enforcing laws against true threats."[107]

If a listener-centric approach were appropriate, and "speech" could somehow be divorced from its human source, such standards would be nonsensical. But they are not. They are premised on the inherent, inescapable link between speech and a human speaker. From the perspective of the listener, and the purported harm imposed by the "speech," the intention of the speaker is irrelevant. The message received is the message received. Yet, time and again, the Court has affirmed that the First Amendment's speech clause is, at its core, about the human speaker who conveyed that message. AI is not endowed with degrees of human intentionality. Even more troubling would be the implications of attempting to apply these doctrines to robot speech. In circumstances where a degree of intentionality is required, the Court's First Amendment doctrine would presumably offer non-human AI *much more* protection than the human speaker.[108]

Consider the example of the harmful content discussed in *Counterman v. Colorado*. That case involved "hundreds" of disturbing Facebook messages received by a female musician from a stranger that she had never met, including that she "[f]uck off permanently" that she "Die," and one suggesting that "[s]taying in cyber life is going to kill you."[109] In determining whether or not these messages constituted unprotected true threats of violence, the Court held that "the First Amendment . . . requires proof that the defendant had some subjective understanding of the threatening nature of his statements. . . . [and] that a mental state of recklessness is sufficient."[110]

Now suppose that the defendant who sent these frightening messages was not a "him," but an "it." Suppose those messages were generated by AI. The adverse consequences to the

---

[107] *Counterman*, 600 U.S. at 79–80, 82 ("[R]ecklessness . . . [i]n the threats context . . . means that a speaker is aware 'that others could regard his statements as' threatening violence and 'delivers them anyway.'") ("[R]eckless defendants have done more than make a bad mistake. They have consciously accepted a substantial risk of inflicting serious harm.").

[108] Higby, *supra* note 71, at 48.

[109] *Counterman*, 600 U.S. at 70.

[110] *Id.* at 69.

listener, such as a fear of bodily harm, would be precisely the same – until, and unless, she determined that it was in fact a computer, not a human being, that posed the ostensible threat. Since a "subjective understanding" is a concept that applies to people, and not robots, the Court's standard would suggest that computer-generated threats are necessarily protected by the First Amendment–unless, of course, the Court acknowledges that protected "speech" requires a human speaker. In that case, there would be no need to apply the "true threats" analysis–as non-speech, AI-generated messages would simply fall outside the ambit of the First Amendment.

The majority opinion by Justice Kagan and a concurrence by Justice Sotomayor, joined by Justice Gorsuch, take different approaches to the underlying question. Both, however, are inconsistent with the prospect of a nonhuman speaker. For the majority, "a statement can count as . . . a threat based solely on its objective content."[111] Justice Kagan's rationale for defining a true threat in this way, as opposed to simply as "an intentional act,"[112] is because "[w]hen the statement is understood as a true threat, all the harms that have long made threats unprotected naturally follow."[113]

This might, at first glance, seem to support a listener-based understanding, as it places emphasis on the listener's perspective. However, a closer look reveals that this focus on the listener is directly tethered to a real-life human speaker. Despite the existence of a "threat" for First Amendment purposes, a "mental-state requirement" is still required on the part of the speaker for the exception from protection to apply.[114]The majority's key concern was the "chilling effect" that a categorical exception for true threats would have on free speech.[115] This variable, often used by courts when crafting First Amendment doctrine, emphasizes the way speakers may self-censor out of caution and uncertainty as to where the line between constitutionally protected and criminally prescribable speech lies.[116] The result of this chilling effect may be that much-protected speech goes unspoken, and in the worst-case scenario, a climate of fear sets in. A mental-state requirement is intended

[111] *Id.* at 72.
[112] *Id.* at 83 (Sotomayor, J., concurring).
[113] *Id.* at 74 (majority opinion).
[114] *Id.* at 74.
[115] *Id.* at 74-75.
[116] *Id.* at 75.

to combat some of these dangers.[117] These dangers, however, are premised entirely on certain assumptions about human psychology. Robots do not, as far as we know, fear consequences, nor do they feel the emotional effects of a censorious social climate. Utilizing a "chilling effect" as central to the Court's rationale assumes that speech, by definition, has, at its source, a human speaker.

The *Counterman* concurrence is arguably even more inconsistent with an autonomous listener-based approach to the First Amendment. In a straightforward fashion, Justice Sotomayor joined by Justice Gorsuch explained that "this Court's precedent, along with historical statutes and cases, reflect a commonsense understanding that threatening someone is an intentional act."[118] While the impact on the listener certainly may be relevant, the "true threat" speech cannot exist without intention. The speaker is, in other words, the star of the show; and only human speakers can be said to have intentions. It would, indeed, violate "commonsense" to focus exclusively on the listener when determining the existence of "speech." In our counterfactual *Counterman*, threatening messages from bots – as non-speech (or simulated speech) – would be unprotected by the First Amendment. There would be no need to assess mental state because there was no mind creating the message in the first place. A listener-based approach would completely flip this logic on its head. As a "speaker" incapable of bad intent, threatening harassment from AI would presumably be entitled to full immunity as protected speech.

XII. SPEECH AND MEANING

Freedom of speech is premised on the human ability to convey meaning through language and symbolic action. But what is "meaning?" Or, more specifically, whose "meaning?" Justice Sotomayor's *Counterman* concurrence returns us to the seminal true threats case *Virginia v. Black*,[119] which struck down a state law criminalizing cross-burnings, in part because burning a cross can have many meanings.[120] One possible meaning, of course, is rooted in the ugly history of this symbolic act,

---

[117] *Id.* ("[A]n important tool to prevent that outcome [self-censorship/a chilling effect on speech] – to stop people from steering 'wide of the unlawful zone' – is to condition liability on the State's showing of a culpable mental state.") (citation omitted).
[118] *Id.* at 83 (Sotomayor, J., concurring).
[119] 538 U.S. 343 (2003).
[120] *Counterman*, 600 U.S. at 87–98 (Sotomayor, J., concurring).

"serv[ing] as a message of intimidation, designed to inspire in the victim a fear of bodily harm."[121] However, a burning cross does not always mean a true threat unprotected by the Constitution. It may also mean "group solidarity"[122] for the Klan. It may be "a symbol of hate."[123] And it may mean "we're cold over here" (the cross-like formation of two logs on the pyre mere happenstance).

The plurality's holding in *Black*, Justice Sotomayor points out, turned on the "meaning" given to the burning cross by the defendants, as speakers. It declared the law unconstitutional because, as designed, Virginia made a presumption that the meaning of a cross burning was a threat, or, as the concurrence put it, that "the all-important intent requirement could be satisfied by the mere conduct itself."[124] The fallacy was readily apparent: because speech, whether symbolic or linguistic, can have so many possible "meanings," most of which are fully protected by the First Amendment, we cannot blithely remove an entire expressive act from the ambit of free speech.

But if an act can have multiple meanings, most protected by the First Amendment but some unprotected, whose meaning is to govern? In *Black,* it was the speaker's, not the listeners', nor the state law's assumption about what a particular symbolic action must necessarily "mean." Indeed, how could it be otherwise? Meaning is a mental construct. And the Court has been clear that mere action, such as "aggravated battery," does not implicate the First Amendment. In *Wisconsin v. Mitchell*,[125] a battered victim was selected on the basis of his race, subjecting the attackers to an enhanced sentence.[126] There was no suggestion that the defendants intended to convey symbolic "meaning" by committing this violent act, only that the penalty enhancement was aimed at their bigoted motives for the attack.[127] The Court was quick to dismiss the prospect of utilizing the First Amendment to protect symbolic acts of violence, explaining that "[v]iolence or other types of potentially expressive activities that produce special harms distinct from their communicative impact . . . are entitled to no constitutional protection."[128] While it is not clear what other categories of

---

[121] *Black*, 538 U.S. at 357.
[122] *Id.* at 365–66.
[123] *Id.* at 357 (citation omitted).
[124] *Counterman*, 600 U.S. at 91 (Sotomayor, J., concurring).
[125] 508 U.S. 476 (1993).
[126] *See id.* at 480.
[127] *See id.* at 484–85.
[128] *Id.* at 484 (citing Roberts v. U.S. Jaycees, 468 U.S. 609, 628 (1984)).

symbolic speech may be said to "produce special harms," the Court has repeatedly emphasized that First Amendment protection attaches to a broad swath of symbolic action.[129]

Let us imagine there are five observers (or listeners) who witness what appears to be a nonviolent crime in a public park. They observe a person wearing a headscarf grab a woman's purse that was resting about a foot away from her on the bench where she was sitting. The victim was wearing jewelry bearing a readily visible Star of David. The thief was far from subtle and seemed to intentionally draw attention to her action. Each witness of this act processes their observation differently. Several receive what they feel is a clear, intentional message from this criminal act. One sees it as a statement of resistance to what the observer feels is an oppressive occupation of Palestinian land in the Middle East. Another sees the act as noxious advocacy of antisemitism and harassment against American Jews. Another observer sees the brazen act of theft as a statement against capitalism and consumerism. One observer sees what he believes are two actors from a neighboring college, clumsily rehearsing a scene for an upcoming performance. Another sees a simple crime in which a thief attempted to shield her identity with a scarf; he does not attribute any particular expressive intent to the action.

The experience of each of these respective listener-observers could be valuable in a number of classically First Amendment-like ways – perhaps bringing attention to, or even inspiring action about important social issues. Each of these respective listeners may go out into the world and talk about their ideas with newfound energy. This might be a benefit to the marketplace of ideas, the search for truth, and self-governance. A speaker, of course, cannot ensure the precise message listeners will receive when hearing or observing their symbolic actions, nor the meaning they will attribute to that message. Listeners process stimuli in accordance with an idiosyncratic and complex array of variables over which the speaker has little control – that listener's unique personality, current mood, life experiences, brain structure . . . etc. The First Amendment's protections allow for a diverse array of interpretations by listeners – whether the expression at issue is a work of literature, poetry or political rhetoric. These various interpretations can be fundamentally at odds with one another; they can be inconsistent, irreconcilable, or just plain flat wrong (if judged, for example, against what the

[129] *See*, *e.g.*, Texas v. Johnson, 491 U.S. 397 (1989).

speaker intended to covey). A listener may hear no message at all when a speaker very much intended on sending one, or may, in converse, hear a message where none is being sent.

Should any of the "meanings" attributed by observer-listeners in the hypo above be relevant for purposes of the First Amendment? Suppose just one of two-thousand observers in the park interpreted the ostensible criminal act as symbolic speech, while one-thousand, nine-hundred and ninety-nine saw nothing at all expressive? Should the interpretation of a single outlying listener trigger a limit on the government's ability to enforce its otherwise valid criminal laws? A First Amendment that is sited everywhere is sited nowhere – because the practical consequences of such ubiquity would be untenable. Such would not equate to mere freedom of thought; it would constitute an unlimited right to external stimulation that may provoke thought. A system of law, as John Locke observed, involves voluntarily relinquishing the complete liberty of a state of nature in exchange for a government given the power to establish and enforce laws that serve the general welfare.[130] This must, by necessity, mean regulating or prohibiting a wide range of action that, when observed by fellow Americans, or "listeners," would provoke thought. Under an autonomous listener's First Amendment, either the machinery of law and order would grind to a halt, or, more likely, enforcing the amendment would degenerate into an exercise in cherry-picking by courts. Since it would not be practical for all action that could be conceivably observed by a listener as "expressive" to be immune from the law, First Amendment enforcement would likely become a matter of pure judicial discretion.

When the Court took on the question of whether publicly burning an official government document as a sign of protest was protected by the First Amendment in *United States v. O'Brien*,[131] the protester-defendant emphasized that "he did it in 'demonstration against the war and against the draft.'"[132] Although it ultimately ruled against him, the Court was clear that the First Amendment was implicated, and that the reason this otherwise purely criminal act had both "'speech' and 'nonspeech' elements" had to do with the defendant's intent to

[130] JOHN LOCKE, SECOND TREATISE OF GOVERNMENT (1690), https://www.gutenberg.org/files/7370/7370-h/7370-h.htm#CHAPTER_VIII.
[131] 391 U.S. 367 (1968).
[132] *Id.* at 376.

communicate "ideas by conduct."[133] Never was it suggested that the determination of what is or is not speech would rest with a member of the audience who just might happen to interpret it as expressive. It is not free-floating "meaning" that is protected by the First Amendment. Indeed, as the Court in *Mitchell* acknowledged, the non-expressive meaning – or "motives" – behind a defendant's criminal actions are readily accounted for by the law and penalized accordingly.[134] What matters for purposes of free *speech* is the symbolic message the actor "meant" to convey – if she indeed, meant to convey a message at all. The First Amendment's home must lie with the speaker, as the Court's precedent largely suggests.

.

XIII. CONCLUSION

The question of whether a listener has autonomous constitutional rights under the First Amendment may seem like an esoteric question to be fought in the halls of legal academe – a doctrinal debate of little consequence in the real world. One might posit what common intuition would seem to suggest, that freedom of speech should protect anything that looks like speech or expression, and that a listener, the natural recipient of such expression, should have every right to independently assert a claim to hear or observe it. Not only might this approach seem relatively harmless from a doctrinal perspective, but it may also appear to be an unequivocal boon for traditional First Amendment interests. This is mistaken.

What would be the harm in acknowledging an independent right on the part of a listener without having to trace such right back to any identifiable human speaker, as some scholars have implicitly advocated? An autonomous listener's First Amendment is deeply inconsistent with the text, logic, structure, and likely intent of the Constitution. What on its face might appear to be a broad and expansive First Amendment interpretation with a speech-protective impact, would likely prove to have the very opposite effect, making it less, not more likely, that authentic human-created speech will be heard.

With the emergence of AI, it is more urgent than ever to acknowledge that an autonomous lister's right is a troubling

---

[133] *See id.* ("This Court has held that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.").

[134] *See* Wisconsin v. Mitchell, 508 U.S. 476, 485–87 (1993).

proposition. It risks drowning out genuine human expression with a deluge of computer-generated messages and obscuring the ability to distinguish one from the other. Such a reading has the potential to render the government impotent in its capability to intelligently, thoughtfully, and flexibly regulate a rapidly changing and remarkably complex technological advancement that has the potential to fundamentally reshape American society for good or ill. At best, reading the First Amendment to protect an autonomous listener could hand to the courts a role they were neither designed nor equipped to play; they may be put in the position of carving out ad hoc exceptions to an otherwise default constitutional right for non-human bots. The stakes are simply too high to disempower the political branches – and empower an unelected judiciary – in this way. Unless a listener's right is directly tethered to an intention on the part of a human actor to convey meaning, a listener's First Amendment has the potential to degrade the democratic process and deprive we the people of self-determination.

AVOIDING THE GRAND SIN: A WARNING FOR RELIGIOUS LIBERTY ADVOCATES

Benjamin T. Craig*

INTRODUCTION

In Fyodor Dostoevsky's *The Brothers Karamazov*, a resurrected Jesus Christ appears to the people of Seville, Spain, during the height of the Inquisition.[1] Upon Christ's appearance, throngs of persons immediately recognize Him and follow Him as He performs various miracles.[2] After witnessing Christ raise a young girl from the dead, the Grand Inquisitor (ironically a Catholic Cardinal) arrests Christ and throws him in a dungeon, eventually to be executed as "the worst of heretics."[3] What is Christ's unpardonable heresy? His appearance inhibits the church and the Inquisition by his embrace of freedom and human agency. "Why… art Thou come to hinder us," the Grand Inquisitor bemoans, "[f]or Thou hast come to hinder us, and Thou knowest that."[4]

The Grand Inquisitor chastises his Prisoner by describing the inutility of human agency and freedom, stating that by allowing men to freely choose to follow Him, the Prisoner "la[id] the foundation for the destruction of [His own] kingdom, and no one is more to blame for it."[5] Despite the paradoxical irony of a professed Christian emissary berating the teachings of Christ himself, the Accused Heretic calmly listens and allows the Inquisitor to speak.[6] The Inquisitor proudly states that he has "corrected" the errors of Christ's teachings through coerced obedience and temporal gifts of bread and that his efforts will result in righteousness and happiness in far greater numbers than Christ could ever achieve.[7] At the conclusion of this diatribe, the

---

* Juris Doctoral Candidate at the University of North Carolina School of Law, Class of 2025. I would like to especially thank Professor William P. Marshall, the William Rand Kenan Jr. Distinguished Professor of Law at the University of North Carolina School of Law, as well as Professor Steven T. Collis, Director of the Bech-Loughlin First Amendment Center and Law and Religion Clinic at the University of Texas at Austin School of Law. Without their guidance, this note would not have been possible.

[1] FYODOR DOSTOEVSKY, THE BROTHERS KARAMAZOV 272–74 (Constance Garnett trans., The Lowell Press, 1912) (1880).

[2] *Id.* at 273.

[3] *Id.* at 274–75.

[4] *Id.* at 274.

[5] *Id.* at 274–80.

[6] *Id.* at 274–86.

[7] *Id.* at 279–85.

Inquisitor pauses to hear Christ's response, who says nothing.[8] The Inquisitor releases Christ but orders Him never to return.[9]

The allegory reminds the religious observer to value freedom and humankind's agency to choose right from wrong. However, a second, more veiled lesson emerges when one considers the acts of the Grand Inquisitor. Dostoevsky's allegory demonstrates how easy one can betray the very principles they advocate for when such a betrayal yields a political, religious, or socially advantageous outcome.

In this heightened era of political polarization, many individuals find themselves unable to communicate civilly or find common ground on even the most basic of constitutional principles. Revulsion to differing ideological, political, and religious views often drifts into vitriol, whereby those in one camp become convinced that outsiders are hell-bent on destroying the freedoms of those within. Unfortunately, a casualty of that distrust is a creeping temptation to constrict the rights of ideological counterparts, in order to protect the seemingly threatened camp. In the religious freedom context, those who cherish the First Amendment need to be ever-vigilant not to fall into this temptation. If they do, not only will they will erode the very rights they profess to protect, but they will invite the possibility of reciprocal destruction of their own liberty of conscience.

The case of *Charlene Carter v. Southwest Airlines Co., and Transport Workers Union of America, Local 556*, embodies this principle. In an effort to coerce compliance to a court order and instill religious liberty values among disobedient parties, Judge Brantley Starr of the U.S. District Court for the Northern District of Texas, found three attorneys in contempt and ordered them to undergo religious liberty training at the hands of an openly sectarian public interest firm.[10] The order, a specious victory for religious liberty, strays dangerously close, if not beyond, an impermissible line of coercion through state-sanctioned sectarian indoctrination. Regardless of one's predisposition to agree or disagree with religious liberty advocacy, including as embraced by the Alliance Defending Freedom ("ADF"), the order's legal mandate, requiring three attorneys to undergo training that

[8] *Id.* at 289.
[9] *Id.*
[10] *What is Alliance Defending Freedom?*, ALL. DEFENDING FREEDOM (Mar. 18, 2024), https://adflegal.org/article/what-alliance-defending-freedom/ (describing itself as "an alliance-building legal ministry advancing the God-given right to live and speak the truth").

"combines outstanding legal training with an unwavering commitment to Christian principles," must immediately raise questions regarding government coercion of religious practice.

For religious liberty advocates who stand by the First Amendment's protection for U.S. citizens to worship or not worship how they wish, this case must not be lauded but viewed as a constitutionally problematic flirtation with establishment. In an attempt to emphasize respect for Carters's free exercise rights, the court's order ironically commits the very sin it sought to correct and degraded the contemnors' identical rights. Where one permits the deprivation of religious liberty for another, one simultaneously destroys it for themselves. Though seemingly counterintuitive, this case presents a rare opportunity for religious liberty defenders to find greater protection for the First Amendment in taking the proverbial "L." The Fifth Circuit must seize this chance, declare Judge Starr's order unconstitutional, and recognize that compelling sectarian religious liberty training harms the freedom to worship according to "the dictates of [one's] own conscience" more than any potential utility derived from the training.[11]

Part I of this Note will summarize the underlying litigation that precipitated Judge Starr's contempt order and sanctions, detailing the facts that gave rise to Charlene Carter's case against Southwest and the Union, the procedural background of the case, and Judge Starr's problematic orders. Part II outlines the facially broad contempt powers afforded to federal judges by Rule 70 of the Federal Rules of Procedure but emphasizes the Fifth Circuit's limitation of orders to those that avoid constitutional infringements. Part III will then contend that Judge Starr's sanctions order likely violates the Establishment Clause, even under the more forgiving "historical practices and understandings" analysis, as it compels individuals to subject themselves to sectarian-led religious liberty training. Part IV will then examine how the delicate protection of free exercise and freedom from established, state-sponsored religions rests upon a willingness to permit others to worship according to their own conscience. This section will argue that Judge Starr's order betrays the very principles he wishes to instill upon Southwest's attorneys and opens the door to state disregard of one's liberty of conscience.

---

[11] JOSEPH SMITH JR., *Article of Faith 11*, in THE PEARL OF GREAT PRICE (The Church of Jesus Christ of Latter-day Saints 2013).

I. THE UNDERLYING LITIGATION

A. Factual Background

The tensions that gave rise to this litigation go back nearly a decade. Charlene Carter started working as a flight attendant for Southwest Airlines in September 1996.[12] In 2012, a contentious union board election caused a significant stir among the flight attendants, in which the losing board candidates filed successful disciplinary charges against the winning board members.[13] The successful disciplinary charges led to the winning board members being suspended and removed from board leadership.[14] Carter became upset at the removal of elected union board members, leading her to post various Facebook messages expressing disgust at the matter.[15] Carter's animosity towards the union and what she felt were rigged elections festered for several months, and she resigned from union membership in 2013, and encouraged others to do the same.[16] The central figure of Carter's opposition was union president Audrey Stone, one of the Board members who had replaced the disciplined 2012 election victors.[17] Starting in 2015, Carter sent several personal messages to Stone's Facebook account named "Audrey Stone Twu," and criticized her work and union activities.[18]

In January 2017, Carter learned that Stone and several other union leaders attended the "Women's March on Washington D.C." rally, sponsored by Planned Parenthood, in protest of Donald Trump's inauguration.[19] Members who attended the rally later posted pictures of the march on social media and were featured in the union's newsletter.[20] Carter accused Southwest of standing in solidarity with the actions of the union, stating that photos of the trip showed pink cabin lights being used on Washington D.C. bound flights occupied by union members.[21] Carter, a Christian, later asserted that her "sincere religious beliefs require her to share with others that abortion is

---

[12] Fourth Amended Complaint at 3, Carter v. Southwest Airlines Co., and Transp. Workers Union of Am., Loc. 556, No. 3:17-CV-2278-S (N.D. Tex. Apr. 10, 2019), ECF No. 80.
[13] *Id.* at 4.
[14] *Id.*
[15] *Id.* at 5–6.
[16] *Id.* at 5–7.
[17] *Id.* at 4, 8.
[18] *Id.* at 8.
[19] *Id.* at 9.
[20] *Id.* at 9–10.
[21] *Id.* at 10.

the taking of a human life."[22] This event elevated what had largely been a union squabble into deep political and religious animus surrounding abortion.

On February 14th, 2017, Carter sent five private Facebook messages to Stone containing multiple images and videos of aborted fetuses, along with accusations that Stone was supporting murder.[23] Stone reported the messages to Southwest Airlines management, who conducted a fact-finding meeting in which Carter admitted to sending the messages.[24] The meeting also uncovered several other messages of the same images and videos to another Southwest flight attendant, as well as a message of individuals "wearing costumes depicting the female genitalia."[25] A week after the meeting, Southwest Airlines terminated Carter for violating the company's "Workplace Bullying and Hazing Policy" and "Social Media Policy."[26]

.

B. Procedural Background

After turning down a union-negotiated reinstatement by Southwest[27] and losing an arbitration case,[28] Carter filed suit, alleging five causes of action.[29] She first alleged that Southwest illegally terminated her for engaging in protected speech as prohibited by the Railway Labor Act (45 U.S.C. § 152).[30] Second, that Southwest maintained and enforced vague and overbroad company policies that chill the exercise of protected rights in violation of the Railway Labor Act.[31] Third, that the union breached its duty of fair representation.[32] Fourth, that Southwest and the union retaliated against Carter for exercising her rights protected under the Act and the Constitution.[33] And finally, that Southwest and the union violated Title VII of the Civil Rights Act by discriminating against Carter for her religious beliefs and

---

[22] *Id.*
[23] Southwest Airline Co.'s Brief in Support of Motion to Dismiss Pursuant to FRCP 12(b)(1) and 12(b)(6) at 4–5, Carter v. Southwest Airlines Co., and Transp. Workers Union of Am., Loc. 556, No. 3:17-CV-02278-B (N.D. Tex. Oct. 24, 2017), ECF No. 29.
[24] *Id.* at 5.
[25] *Id.* at 5–6.
[26] *Id.*
[27] *Id.* at 6.
[28] Carter v. Transp. Workers Union of Am. Loc. 556, 353 F. Supp. 3d 556, 566 (N.D. Tex. 2019).
[29] *Id.*
[30] *Id.*
[31] *Id.*
[32] *Id.*
[33] *Id.*

practices.[34] Count I, II, and part of IV were subsequently dismissed with prejudice for failure to state a claim, leaving only the claims of breach of duty for fair representation, retaliation, and religious discrimination.[35] A subsequent jury trial found in favor of Carter on all remaining counts and awarded her $5.35 million.[36] Immediately after the verdict, representatives for both Southwest and Local 556 communicated to the media that they would appeal the verdict to the Fifth Circuit.[37]

C. Judge Starr's First Injunction

Following trial, the presiding judge, Judge Brantley Starr of the Northern District of Texas, issued an order mandating that Southwest reinstate Carter with full seniority and benefits.[38] Additionally, Judge Starr granted various forms of injunctive relief.[39] From a procedural perspective, nothing at this point in the case appears out of the ordinary from a standard jury trial; however, it is Judge Starr's last, seemingly innocuous injunction that gives rise to the primary issue in this note.

In the penultimate paragraph of the order, Judge Starr enjoined the losing parties to "post the jury's verdict and the accompanying Final Judgment in conspicuous places" at the "union hall" and "company bulletin boards for a 60-day period and issue them electronically to all Southwest flight attendants [and all union members]."[40] Additionally, Southwest and Local 556 were "to inform Southwest flight attendants that, under Title VII, they *may not* discriminate against Southwest flight

---

[34] *Id.*
[35] *Id.* at 572–76.
[36] *See generally* Jury Verdict, Carter v. Transp. Workers Union of Am. Loc. 556, No. 02-278-X, (N.D. Tex. Jul. 14, 2022), ECF No. 348.
[37] *Fired Southwest flight attendant Charlene Carter wins $5.1 million verdict*, CBS NEWS TEXAS (Jul. 15, 2022), https://www.cbsnews.com/texas/news/fired-southwest-flight-attendant-charlene-carter-wins/.
[38] Carter v. Transp. Workers Union of Am. 644 F. Supp. 3d 315, 327 (N.D. Tex. 2022).
[39] *Id.* at 336–37. Among the injunctions, Judge Starr enjoined Southwest and the union from "discriminating against Southwest flight attendants for their religious practices and beliefs, including—but not limited to—those expressed on social media and those concerning abortion." *Id.* at 336. The order enjoined the company and union from "failing to reasonably accommodate Southwest flight attendants' sincerely held religious beliefs, practices, and observances." *Id.* And finally, Judge Starr ordered Southwest and the union to refrain from "discriminating against Carter for exercising her rights, under the RLA, to resign from membership in Local 556 and to object to the forced payment of political and other nonchargeable union expenses, including—but not limited to—objections to union expenditures contained in social media posts." *Id.*
[40] *Id.* at 337.

attendants for their religious practices and beliefs, including—but not limited to—those expressed on social media and those concerning abortion."[41] Despite this specific directive, the order did not, on its face, require the parties to write the aforementioned statement verbatim.[42]

D. The Ill-Worded Memo and Judge Starr's Contempt Order

The Southwest Airlines and Local 556 posted the verdict and notification,[43] albeit with a semantic, but—at least according to Carter and the court—significant change in the notice.[44] Rather than copy the court's phrasing that Southwest "*may not* discriminate" on the basis of religious beliefs, the notice read that Southwest "*does not* discriminate."[45] Additionally, the district court took issue with the fact that Southwest doubled down on its social media and employee harassment policy by circulating an internal memorandum which "derid[ed] Carter's 'inappropriate, harassing, and offensive communications."[46] Despite the pending appeal on the jury trial, the court criticized Southwest's "song and dance" of relying on anti-bullying and harassment policies as a "pretext for maligning Carter and violating her federally protected speech rights."[47]

To combat the alleged injustice, Judge Starr expressed that he was considering holding all Southwest in-house counsels involved with the memo's draft in contempt of court and ordering them to undergo "religious liberty training."[48] The court subsequently ordered Southwest to show cause as to why he should not impose such sanctions.[49]

Following expedited briefing and a hearing, Judge Starr granted Carter's motion to hold Southwest in contempt in a

---

[41] *Id.* (emphasis added).
[42] *See Id.*
[43] Though not the subject of this note, it is interesting to note the potential free speech concerns by ordering a corporate entity to essentially admit fault through a notification stating their entity "may not" discriminate, while simultaneously being posted next to a jury verdict that states the entity has discriminated.
[44] Order Directing Southwest to Show Cause at 1–2, Carter v. Transp. Workers Union of Am. Loc. 556, and Southwest Airlines Co., No. 02-278-X, (N.D. Tex. May 16, 2023), ECF No. 423. Motion to Find Southwest Airlines Co. in Contempt at 3, Carter v. Transp. Workers Union of Am. Loc. 556, and Southwest Airlines Co., No. 02-278-X, (N.D. Tex. Dec. 30, 2022), ECF No. 382.
[45] *See* Order, *supra* note 44, at 1–2 (emphasis added).
[46] *Id.* at 2.
[47] *Id.*
[48] *Id.* at 1.
[49] *Id.* at 3.

scathing opinion.[50] Throughout the opinion, Judge Starr rebuked Southwest's counsel for "inverting" the court's notice by using present tense language that "removed the concept of a legal prohibition" against religious discrimination and possibly gave "the impression that [the] Court ruled that Southwest had not discriminated against an employee because of her religious beliefs."[51] Judge Starr likened Southwest's error to God ordering Adam that he "must not eat from the tree," whereby Adam replied, "I do not eat from the tree," despite an apple core resting at his feet.[52]

The district court held that he would release Southwest and their attorneys from contempt by publishing a verbatim statement, written by Judge Starr, that acknowledged the subversion and re-emphasized that Southwest "may not discriminate against Southwest flight attendants for their religious practices and beliefs, including—but not limited to—those expressed on social media and those concerning abortion."[53] Finally, to compel compliance to this contempt order, the court ordered three Southwest attorneys to attend a minimum of eight hours of "religious-liberty training" conducted by the Alliance Defending Freedom and to be completed by August 28, 2023.[54] Southwest Airlines appealed for a temporary administrative stay of the order pending the conclusion of the

---

[50] *See generally,* Carter v. Transp. Workers Union of Am., Loc. 556, 686 F. Supp. 3d 503, 509–10 (N.D. Tex. 2023).

[51] *Id.* at 509–24.

[52] *Id.* at 509. Judge Starr additionally likened the case to where "Gandalf bellows, 'You shall not pass,' the Balrog muses, 'I do not pass,' while strolling past Gandalf on the Bridge of Khazad-dûm."

[53] The full text of the statement is provided below:

> The United States District Court for the Northern District of Texas ordered Southwest to issue the following statement to you: On December 20, 2022, Southwest's Legal Department issued an e-mail to all flight attendants entitled "Recent Court Decision" regarding a federal court judgment against Southwest and Transport Workers Union, Local 556. That e-mail said, "[t]he court . . . ordered us to inform you that Southwest does not discriminate against our Employees for their religious practices and beliefs." The United States District Court for the Northern District of Texas subsequently found that the statement's use of "does not discriminate" was incorrect. Accordingly, the Court has ordered Southwest's Legal Department to issue the following amended statement:
>
> Under Title VII, Southwest may not discriminate against Southwest flight attendants for their religious practices and beliefs, including—but not limited to—those expressed on social media and those concerning abortion.

Id. at 510.

[54] *Id.* at 523.

underlying litigation, which the Fifth Circuit subsequently granted in an unpublished order.[55]

II. BROAD BUT GROUNDED DISCRETION: CIVIL CONTEMPT ORDERS

Before addressing the Establishment Clause issues raised by Judge Starr's order to undergo religious-liberty training, it is necessary to examine the procedural standards of such civil contempt orders to understand why they can implicate the First Amendment.

Rule 70 of the Federal Rules of Civil Procedure grants district courts the latitude to hold a "disobedient party in contempt" upon a finding that "a judgment require[d] a party… to perform any . . . specific act" and the party failed to comply.[56] Apart from that succinct permission, the rules offer no additional guidance as to what process is required before imposing such a sanction or if meaningful limitations exist upon such orders.

However, some common standards prevail among federal courts. Courts may impose civil contempt orders for judicial defiance observed both inside and outside of the courtroom.[57] Generally speaking, trial judges possess the creative ability to formulate contempt orders that coerce compliance with judicial directives.[58] However, as the Fifth Circuit recently re-emphasized, this power nonetheless requires prudence: "A district court's inherent power to sanction contempt is not a broad reservoir of power, ready at an imperial hand, but a *limited* source; an implied power squeezed from the need to make the court function. As inherent powers are shielded from direct democratic controls, they must be exercised with *restraint* and *discretion*."[59]

To that end, regardless of any deference afforded to district court judges to compel compliance,[60] the Fifth Circuit has held that any contempt order must be the "least onerous sanction

---

[55] Unpublished Order at 2, Carter v. Transp. Workers Union of Am. Loc. 556, and Southwest Airlines Co., No. 23-10008, (5th Cir. Sep. 25, 2023), ECF No. 115-1.
[56] FED. R CIV. P. 70(a), (e).
[57] *See* Young v. U.S. *ex rel.* Vuitton et Fils S.A., 481 U.S. 787, 798 (1987) (holding that courts possess contempt power over courtroom disruptors and order subversion).
[58] *See Authority of the Trial Judge*, 52 GEO. L.J. ANN. REV. CRIM. PROC. 726, 742, 746–47 (2023).
[59] *In re United States Bureau of Prisons*, 918 F.3d 431, 438 (5th Cir. 2019) (quotations and citations omitted) (emphases added).
[60] Hornbeck Offshore Servs., L.L.C. v. Salazar, 713 F.3d 787, 792 (5th Cir. 2013) ("We review contempt findings for abuse of discretion….").

which will address the offensive conduct."[61] Finally, one governing, and frankly obvious, principle restrains a judge above all else: The orders themselves must be constitutional.[62] No case exemplifies this principle better than *United States v. Dickinson*.[63]

In *Dickinson*, two reporters, Dickinson and Adams, were found in contempt for violating a federal district court's order prohibiting the publication of testimony arising out of a public hearing for a civil rights activist accused of conspiring to murder the mayor of Baton Rouge.[64] Despite the court's order threatening sanction for anyone who publicized the hearings, the reporters published articles summarizing the hearing "in detail."[65] Recognizing a Supreme Court's decision in *Estes v. State of Texas*, that "reporters of all media… are plainly free to report whatever occurs in open court through their respective media,"[66] the Fifth Circuit vacated the contempt sanctions and remanded the case back to the District Court to consider whether the order, the subsequent sanctions, or both were constitutionally infirm.[67] In its opinion, the appeals court held that "if the order requires an *irrevocable* and permanent surrender of a constitutional right, it cannot be enforced by the contempt power."[68] To put it bluntly, if either an initial order or the subsequent sanctions require a contemnor to forfeit a constitutional right, it exceeds the contempt power.

III. JUDGE STARR'S VIOLATION OF THE ESTABLISHMENT CLAUSE

A. Religious Coercion

The First Amendment's Establishment Clause states that "Congress shall make no law respecting an establishment of religion…."[69] Though facially a mere proscription of Congress legislating an official state religion, the Supreme Court has long held that the Establishment Clause prohibits not just congressional establishment of religion, but also coercive efforts

---

[61] *See* Gonzalez v. Trinity Marine Grp., Inc., 117 F.3d 894, 899 (5th Cir. 1997) (holding that in the context of Rule 37(b) civil contempt of court for violating discovery orders, the selected coercive sanctions must be the "least onerous" to effectuate compliance).
[62] United States v. Dickinson, 465 F.2d 496, 512 (5th Cir. 1972).
[63] *See generally id.*
[64] *Id.* at 499–501.
[65] *Id.* at 500.
[66] 381 U.S. 532, 541–42 (1965).
[67] *Dickinson*, 465 F.2d at 514.
[68] *Id.* at 512.
[69] U.S. CONST. amend. I.

by state and other federal actors in their official capacity to compel religious observance.[70]

For decades, the *Lemon* test, as outlined in *Lemon v. Kurtzman*,[71] determined violations of the Establishment Clause. That test involved examining state action and determining whether the action held a secular legislative purpose that neither advanced nor inhibited religion nor fostered excessive entanglement with religion.[72] The Court later harmonized *Everson*'s incorporation of the Establishment Clause against the states[73] with the *Lemon* test by holding that the Establishment Clause could be violated not just through a statute failing the *Lemon* test, but through state actions or practices as well.[74] However, with the Supreme Court's recent rejection of the *Lemon* test,[75] courts faced with determining the validity or invalidity of state action under the Establishment Clause must look to "historical practices and understandings."[76] This new guidance sought to be more faithful to the Founders' understanding of the First Amendment by requiring courts to focus on "original meaning and history,"[77] and focusing on the structural similarities between the Clause's function and other clauses of the First Amendment.[78]

---

[70] Everson v. Bd. of Educ. of Ewing Twp., 330 U.S. 1, 8, 15–16 (1947) (incorporating the Establishment Clause against the states and recognizing it restrains the federal government beyond Congress); *see also* Frederick Mark Gedicks, *Incorporation of the Establishment Clause Against the States: A Logical, Textual, and Historical Account*, 88 IND. L.J. 669, 670, 678 (2013). However, at least two justices have argued for unincorporating the Establishment Clause because "at the founding, the Clause served only to protect States, and by extension their citizens, from the imposition of an established religion by the *Federal* Government." Espinoza v. Montana Dep't of Revenue, 140 S. Ct. 2246, 2263 (2020) (Thomas, J., concurring, joined by Gorsuch, J.) (quotation, citation, and brackets omitted).

[71] 403 U.S. 602 (1971).

[72] *Id.* at 612–13 (quoting Walz v. Tax Comm'n, 397 U.S. 664, 674 (1970)).

[73] *Everson*, 330 U.S. at 8, 15-16.

[74] Cnty. of Allegheny v. Am. C.L. Union Greater Pittsburgh Chapter, 492 U.S. 573, 592 (1989), abrogated by Town of Greece, N.Y. v. Galloway, 572 U.S. 565 (2014) ("[T]he Court sought to refine these principles by focusing on three 'tests' for determining whether a government *practice* violates the Establishment Clause.") (emphasis added).

[75] Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510 (2022) ("[T]his Court long ago abandoned Lemon and its endorsement test offshoot.").

[76] *Id.*

[77] *Id.* at 536.

[78] Stephanie Taub & Kayla Ann Toney, *A Cord of Three Strands: How Kennedy v. Bremerton School District Changed Free Exercise, Establishment, and Free Speech Clause Doctrine*, THE FEDERALIST SOCIETY (Mar. 9, 2023), https://fedsoc.org/fedsoc-review/a-cord-of-three-strands-how-kennedy-v-bremerton-school-district-changed-free-exercise-establishment-and-free-speech-clause-doctrine.

Though scholars have debated the true meaning and intent behind the Establishment Clause, an examination of historical circumstances, influential philosophers, and the writings of the founders offer a clear perspective as to the fears that motivated its inception. Rather than dangerously rely on the "law office history"[79] of the Supreme Court's countless Establishment Clause opinions, which are themselves a mess,[80] an analysis of pre-First Amendment history offers a sounder basis for interpreting the "historical practices and understandings" of the Establishment Clause.

State establishment of religion permeated through every aspect of English governance.[81] The Church of England was, and still is, the only official state religion.[82] The sovereign British monarch remains the head of the Church of England, serving as "Defender of the Faith."[83] Parliament still legislates the Bible as "official scripture," publishes prayers and Church dogma, and appoints the Archbishop of Canterbury and other high church officials.[84]

Beyond government structure, England's religious establishment once dominated every aspect of public life. In the 1662 version of the Church of England's Articles of Faith, King Edward VI, in an attempt to effect a " universal agreement in the public worship of Almighty God," declared that the only legal place for public worship was the Church.[85] The Conventicles Act of 1664 and Act Against Papist proscribed "unlicensed religious meetings," and other various penal acts criminalized non-Anglicans for engaging in public worship.[86] For those who wished to hold civil, military, ecclesiastical, or academic office, the Test and Corporation Acts barred anyone who was not a participating worshiper of the Church of England.[87] Though tolerance increased with the repeal of the criminal acts baring

---

[79] *See* Michael W. McConnell, *Coercion: The Lost Element of Establishment*, 27 WM. & MARY L. REV. 933, 933 (1986); *see also* Philip B. Kurland, *The Origins of the Religion Clauses of the Constitution*, 27 WM. & MARY L. REV. 839, 842 (1986).

[80] Steven G. Gey, *Life After the Establishment Clause*, 110 W. VA. L. REV. 1, 35 (2007) ("Commentators and jurists on all sides of the debate about the proper scope of the Establishment Clause have long agreed that Establishment Clause doctrine is a chaotic and contradictory mess.")

[81] Michael W. McConnell, *Establishment and Disestablishment at the Founding, Part I: Establishment of Religion*, 44 WM. & MARY L. REV. 2105, 2112–15 (2003).

[82] *Id.* at 2112.

[83] *Id.*

[84] *Id.*

[85] *Id.* at 2113.

[86] *Id.* at 2113–14.

[87] *Id.* at 2113.

non-Anglican public worship, England fell well short of embracing the freedom of religious expression and worship, as Catholics, Jews, Unitarians, non-Protestants, and non-Trinitarians were criminally punished for worshiping as they wished.[88] Even the Bible served as a reminder of English intolerance of non-church sanctioned religious expression, as its English translator and covert distributor, William Tyndale, was himself executed at the behest of King Henry VIII.[89]

Despite their flight from England to the American Colonies to seek religious freedom, religious establishment followed the colonists to the New World, especially in Virginia.[90] Virginia's Diocesan Canons required church buildings for every parish to be constructed, and for each church to be staffed with a paid clergy, both at public expense.[91] Sabbath Day worship was prescribed, along with religious holiday days of worship and fasting.[92] Perhaps most intrusive of all, Virginia criminal laws authorized misdemeanor charges for those "caught swearing, Sabbath-breaking, skipping church, slandering, 'backbiting,' or committing the 'foule and abominable sins of drunkenness fornication and adultery.'"[93] Though religious tolerance was markedly better in colonies such as New England, New York, North Carolina, and Maryland, isolated cases of state-sanctioned religious intolerance remained.[94]

At their core, these laws had a purpose-driven effect: join, practice, conform to the state-preferred faith and corresponding teachings, or lose civic rights and public benefits. Given the prevalence of these coercive laws and practices prior to the Revolution, it is no wonder that the possibility of an anti-establishment provision emerged as a necessity for many framers.[95] Despite the varied perspectives of the Framers and Constitutional Convention delegates regarding disestablishment

---

[88] *Id.* at 2114.
[89] Gale Fineberg, *'Let There Be Light'*, LIBRARY OF CONGRESS (July 1997, accessed Feb. 23, 2024), https://www.loc.gov/loc/lcib/9707/tyndale.html#:~:text=Hunted%20 on%20t he%20Continent%2C%20betrayed,6%2C%201536.
[90] McConnell, *supra* note 81, at 2115–16.
[91] *Id.* at 2118.
[92] *Id.*
[93] *Id.*
[94] *Id.* at 2121–2130 ("In Georgia, . . . the Church of England enjoyed a privileged position, but the Trustees encouraged immigration by welcoming and tolerating a wide variety of dissenters from throughout Europe, including Scottish Presbyterians, French Huguenots, Swiss Calvinists, Lutherans, Moravians, and even Jews, both Sephardim and Ashkenazi. Catholics, however, were excluded.").
[95] Vincent Phillip Muñoz, *The Original Meaning of the Establishment Clause and the Impossibility of Its Incorporation*, 8 U. PA. J. CONST. L. 585, 604, 614–31 (2006).

by complete separation or cautious toleration,[96] a common refrain reverberated throughout the Constitutional debates: the "liberty of conscience" must be preserved.[97]

Much of the discussion surrounding the Establishment Clause centers around Thomas Jefferson's admonition to erect a "wall of separation between Church & State."[98] Admittedly, the now-famous quote holds some interpretative weight. At the time of the founding, there existed a popular desire to avoid both a nationalized religion, as had been the case in England, and coerced religious practice, as had permeated some colonies prior to ratification.[99] Without a doubt, Jefferson's purpose was in line with ensuring all possessed a right to religious or irreligious conviction, free from government intrusion. However, continued, exclusive reliance upon the quote as the sole historical understanding of the Establishment Clause, as the Supreme Court has done through its "law office history" Establishment Clause cases,[100] is extremely problematic for two reasons. First, its seemingly bright-line rule against all government action pertaining to religion obscures the Clause's more nuanced interpretations and purpose.[101] Second, it places substantial weight on the Framer's original understanding of the Clause on a singular Founding Father[102] who was neither present at the Constitutional Convention nor was in the same country and who explicitly acknowledged the inutility of referring to him as a major authority on the Constitution's interpretation.[103]

---

[96] *Id.* at 605 ("In revolutionary America, the relationship between church and state was anything but settled.); *see also id.* at 636 ("[L]eading Founders disagreed over the proper relationship between church and state. Some founders, like George Washington and Patrick Henry, defended non-sectarian support of religion of the sort that was adopted in the Massachusetts Constitution of 1780. Other founders, like Thomas Jefferson and James Madison, railed against state support of religion as such.").

[97] Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398–403 (2002).

[98] Thomas Jefferson, *Letter to the Danbury Baptists* (Jan. 1, 1802), in LIBRARY OF CONGRESS (June 1998, https://www.loc.gov/loc/lcib/9806/danpre.html (last visited Feb. 23, 2024).

[99] *See* McConnell, *supra* note 81, at 2111–45, 2205.

[100] *See* McConnell, *supra* note 79, at 933–34.

[101] *Id.*

[102] *See* Kennedy v. Bremerton Sch. Dist., 597, 555–56 (2022) (holding that the Establishment Clause must be interpreted by examining the historical practices and understandings of the "Founding *Fathers*") (emphasis added).

[103] Thomas Jefferson himself acknowledged that he was not a major authority on the Constitution's original understanding when he corrected Joseph Priestley's assertion that Jefferson, "more than any other individual" planned and established the Constitution:

To gain a more complete picture, it is necessary to go back to the intellectual origins of the refrain for "liberty of conscience" and eventually the Clause itself. The Enlightenment thinker John Locke declared that the "[l]iberty of [c]onscience is every man's natural [r]ight, equally belonging to [d]issenters as to themselves; and that no[-]body ought to be compelled in matters of [r]eligion either by [l]aw or [f]orce."[104] In 1785, no doubt inspired by Locke's conviction, James Madison, the Establishment Clause's eventual author, wrote that all men were entitled to worship "according to the dictates of conscience" and should be afforded "equal freedom" to abstain from religious activity.[105] With these two minds, the seeds of a bar against establishment were planted.

In 1789, largely due to anti-federalist concerns surrounding a lack of explicit prohibition against the national establishment of religion, an Amendment preserving religious rights was proposed by Madison and debated.[106] To the chagrin of an originalist seeking definitive clarity, the Annals of Congress bear no record of any debate regarding the final version of the First Amendment.[107] However, the debate surrounding earlier versions focused on the anti-establishment protections within the Amendment, thus shedding light on the perspectives of multiple Framers, as to their original understanding of the Establishment Clause.[108]

During these debates, several representatives expressed their understanding that the Amendment was designed to

---

> I was in Europe when the [C]onstitution was planned & established, and never saw it till after it was established. [O]n receiving [the Constitution's draft] I wrote strongly to Mr. Madison urging the want of provision for the freedom of religion… [*T*]*his is all the hand I had in what related to the Constitution*.

Thomas Jefferson, *From Thomas Jefferson to Joseph Priestley, 19 June 1802*, Founders Online, National Archives, https://founders.archives.gov/documents/Jefferson/01-37-02-0515 (emphasis added).

[104] JOHN LOCKE, A LETTER CONCERNING TOLERATION 63 (4th ed. 1764).

[105] David E. Steinberg, *Gardening at Night: Religion and Choice*, 74 NOTRE DAME L. REV. 987, 1018 (1999) (quoting James Madison, Memorial and Remonstrance Against Religious Assessments, *reprinted in* THE WRITINGS OF JAMES MADISON 183, 184 (Gaillard Hunt ed., 1901)).

[106] Muñoz, *supra* note 95, at 619–28.

[107] JOHN WITTE JR. ET. AL., *Forging the First Amendment Religion Clauses,* RELIGION AND THE AMERICAN CONSTITUTIONAL EXPERIMENT 93, 108-09 (5th ed. 2022) (online ed., Oxford Academic, May 19, 2022), https://doi.org/10.1093/oso/9780197587614.003.0005, (last visited Mar. 1, 2024).

[108] The first draft of the religion clauses contained three provisions (1) "no religion shall be established by law, nor shall the equal rights of conscience be infringed," (2) "no person religiously scrupulous shall be compelled to bear arms," and "no State shall infringe the equal rights of conscience." *Id.* at 105.

preserve the liberty of conscience, proscribe nationalized religion, and ban compelled religious worship.[109] Elbridge Gerry, an anti-federalist, opposed the ambiguous terms of the Amendment and argued it would be clearer if it proscribed state establishment of "religious doctrine."[110] Daniel Carroll stressed his view that the religious clauses would preserve the "rights of conscience" better than any other proposed amendment, quelling public fears of a more intrusive government.[111] James Madison, the Amendment's author, then explained his view of its proper understanding: "Congress should not *establish a religion*, and *enforce* the legal observation of it by law, nor *compel* men to worship God in any manner contrary to their conscience."[112] Madison then explained that the Amendment's purpose was to "*prevent* these effects."[113] Perhaps recognizing the potential for the Clause to be interpreted as an impenetrable wall barring all government action related to religious practice, and rightly so, Benjamin Huntington expressed fear that its ambiguity could be conveniently interpreted to hurt "the cause of religion," but he nonetheless concurred with Madison's characterization of the Amendment's understanding and purpose.[114] Madison then stood back up and clarified the Amendment's purpose as preventing one preeminent sect or two combined sects from gaining sufficient political influence and/or control to "establish a religion *to which they would compel others to conform*."[115]

No recorded debate exists regarding the Amendment after this initial debate, despite subsequent revisions of the Amendment, and it was ultimately approved by Congress in September 1789.[116] Without more recorded debate, "establishment" as written in the final text, proscribing that the federal government "make no law respecting an establishment of religion,"[117] seems doomed to no clear definition and perpetual ambiguity.

---

[109] THE DEBATES AND PROCEEDINGS IN THE CONGRESS OF THE UNITED STATES (1789-91), *reprinted in* Volume 1 2, 729–30 (Joseph Gales ed., 1834) [hereinafter ANNALS OF CONGRESS].
[110] *Id.* at 730.
[111] *Id.*
[112] *Id.* (emphasis added).
[113] *Id.* (emphasis added).
[114] *Id.* at 730–31.
[115] *Id.* at 731 (emphasis added).
[116] Muñoz, *supra* note 95, at 628–29.
[117] U.S. CONST. amend. I.

But despite this silence, if one examines the commonality between the Amendment's inspirations and the recorded debate by the Framers the "fundamental evil against which the clause is directed" and the most historically faithful understanding of the Clause becomes apparent.[118] All sides, whether by barring nationalized religion, state control over religious doctrine, preserving the liberty of conscience, or ensuring spatial freedom as to the cause of religion, advocated for and ultimately understood the Clause to remedy one commonly feared problem: compulsion or coercion of religious or irreligious belief through state action. With this collective knowledge, the Establishment Clause may be properly understood not to forbid every law that tangentially touches religion, as Jefferson advocated. Rather, it (1) bars nationalized religion, (2) proscribes government intrusions upon the liberty of conscience, and, by extension of the second, (3) bars other forms of coerced or compelled religious worship.

To be fair, any historical analysis contains some determinations as to the interpretative weight of various historical factors, and no "Rosetta Stone" or "smoking gun" quote or interpretation exists to "put[] all evidentiary disputes to rest."[119] However, the combined logic of the Framers who debated the Amendment brings the insatiable constitutional scholar as close as possible to a faithful historical understanding of the Clause. Taken together, the framers feared the government decreeing how its constituents could or could not worship, and it enacted a Clause to preemptively eliminate that risk by proscribing coercive state action. Simply put, coercion or compulsion is not "just an element, it is the essence of establishment."[120]

B. The ADF's Religious Liberty Training

The Armed with a historically diligent understanding of the Framers' steadfastness in protecting against religious coercion, one is now prepared to take a more objective look at Judge Starr's order. In response to using "obfuscated" language in Southwest's jury verdict notification memo, Judge Starr found the three attorneys responsible for drafting the memo to be in contempt and argued that their use of ambiguous language

[118] McConnell, *supra* note 79, at 939.
[119] Witte, *supra* note 107, at 109.
[120] McConnell, *supra* note 79, at 937.

willfully "disregard[ed]" his order.[121] In Judge Starr's view, this willful disregard indicated one of two things: either the three Southwest attorneys understood the impermissible and religiously discriminatory nature of Southwest's civility policy yet disregarded the Judge's order to continue enforcing the policy, or their disregard indicated that the attorneys "do[] not appear to comprehend" religious liberty.[122] Either option appeared equally problematic to Judge Starr, and he issued the order requiring each attorney to attend religious liberty training to "coerce compliance with … the Court's orders."[123] An openly Christian-driven, religious liberty public interest firm, the Alliance Defending Freedom, was set to perform the training.[124]

Admittedly, little is known about the exact nature of the ordered training, which has yet to take place due to the Circuit's stay of the order pending appeal. Additionally, Judge Starr never referenced the specific course he wished the ADF to offer, nor did he detail his desired curriculum, unlike with his verbatim verdict memo.[125] However, Judge Starr offered three key details that may help the objective observer deduce the content of the training, and by so doing, gauge the permissibility of the sanction. Judge Starr's order specified the instructor organization, set the training's minimum acceptable duration, and hinted that he desired training that would mirror some form of continuing legal education ("CLE").[126]

Beginning with the instructors themselves, the Alliance Defending Freedom is "an alliance-building legal ministry advancing the God-given right to live and speak the truth."[127] Rather than shying away from an appearance of sectarian identity, the ADF openly embraces their Christian origin and

---

[121] *See* Carter, 686 F. Supp. 3d at 516–517.
[122] *See id.* at 516, 520.
[123] *Id.* at 520.
[124] *Id.* at 521 ("Because this case also involves an entity's citation to its policies in an apparent attempt to end-run legal protections against religious discrimination based on online activities, ADF is particularly well-suited to train Southwest's employees who are most responsible for the communications at issue here.").
[125] *Id.* at 510.
[126] Judge Starr wrote that where contemnors do "'not appear to comprehend' an area of the law," training "in the relevant subject area" is an appropriate sanction to compel compliance. Of the nine cases Judge Starr cited to support this assertion, at least five of them involved mandated CLE training in the area of law in which the contemnor either offended or did not comprehend. Though not explicit in the order, the focus on CLE education strengthens the contention that Judge Starr envisioned the ADF employing one of its CLE courses on religious liberty. *See id.* at 519 nn. 66–67.
[127] *What is Alliance Defending Freedom?*, *supra* note 10.

composition, stating they "remain steadfast in [their] commitment to the Gospel."[128] To do this, the ADF "unites attorneys, pastors, ministry leaders, and many other like-minded organizations to join [them] in [their] mission to keep the door open for the Gospel by defending life, liberty, and family in the United States and throughout the world."[129] Granted that the definition of what constitutes a religion is murky, and no one would seriously contend that a coalition of inter-denominational and non-denominational Christian legal advocates qualifies as an individual religion or church for Establishment Clause purposes, but the ADF's self-description and mission statements flirt with that quasi-religious line. The ADF all but confirms the veracity of that assertion by crediting God for their "Generational Wins" and stating that Peter and John's apostolic mission in Acts 4 serves as their "guide."[130] Though it does not operate as a traditional religious organization, for the purposes of an Establishment Clause analysis, it is crucial to remember how the ADF principally defines itself: a "legal *ministry*."[131]

Beyond the Alliance Defending Freedom's self-description of the organization globally, the description it provides for its CLE training further signals its inherently religious mission and purpose. As stated above, Judge Starr's order did not enumerate which of the ADF's training courses the contemnors were to undergo, but it is not hard to deduce that the ADF's marketed training would, at the very least, be the basis for the training. Judge Starr specified that whatever training occurred needed to be a minimum of eight hours.[132] On the ADF's website, under the "training" tab, there is a page specifically dedicated to "Attorney CLE."[133] The ADF describes their "Legal Academy" CLE training as "seamlessly combin[ing] outstanding legal training with an unwavering commitment to Christian principles." [134] Further stating that "[w]hatever your area of practice, Academy will train you to effectively advocate for religious liberty, free speech, the sanctity of life, marriage and family, and parental rights."[135] Though the

---

[128] *Id.*
[129] *Id.*
[130] *Id.*
[131] *Id.* (emphasis added).
[132] Carter, 686 F. Supp. 3d at 523.
[133] *Legal Academy*, ALL. DEFENDING FREEDOM, https://adflegal.org/training/legal-academy (last visited Sept. 9, 2024).
[134] *Id.*
[135] *Id.*

training is currently being marketed as part of an upcoming ADF Summit, previous iterations of the training description contained largely identical language.[136] Particularly relevant to the present case is the uniformity of CLE duration credit. In the 2023 description of their CLE training courses, the ADF describes the program as offering six to eight hours of CLE credit.[137] In the 2024 iteration, the ADF markets their CLE course as offering around eight to ten hours of CLE credit.[138]

At this point, one might agree that if the mandated training proceeded as described above, it would constitute some form of coerced religious activity or, at the very least, state-sanctioned, compulsory sectarian instruction. But at the same time, one might question whether the description accurately portrays what the ADF would have subjected the Southwest attorneys to, a justifiable thought to be sure. If the religious liberty training holds a clear theological slant and purpose, a federal judge's compulsion of individuals to attend the training would be problematic under the Establishment Clause.[139] Concededly, until the appeal is resolved, no one will be able to know definitively what would have been offered apart from the ADF instructors themselves. However, in response to that gap in knowledge, one must also be inclined to consider if there is any evidence to suggest the ADF would offer theologically neutral and objective religious liberty training. The ADF does not present a theologically neutral or nonsectarian view of religious liberty, unlike other religious liberty groups such as the Becket Fund[140] or the First Liberty Institute.[141] Instead, the ADF openly

---

[136] *Legal Academy*, ALL. DEFENDING FREEDOM (version Mar 21, 2023), https://web.archive.org/web/20230321181531/https://adflegal.org/training/legal-academy.

[137] *Id.*

[138] *Legal Academy*, *supra* note 133.

[139] *See* McConnell, *supra* note 81, at 2131 (arguing that compulsory church attendance and use of church institutions for public functions were among the forms of historical establishment that the Framers intended to proscribe); *see also id.* ("An establishment is the *promotion* and inculcation of *a common set of beliefs* through governmental *authority*.") (emphasis added).

[140] Per the Becket Fund's website, its mission is to "protect the free expression of all faiths" in a manner that defends "the religious rights of people from 'A to Z.'" *Our Mission*, BECKET, https://www.becketlaw.org/about-us/mission/ (last visited Sept. 9, 2024). The Becket Fund does not espouse any particular religious viewpoint but rather emphasizes a "common vision of a world where religious freedom is respected as a fundamental human right that all are entitled to enjoy and exercise." *Id.*

[141] Per the First Liberty Institute's website, its mission is dedicated "*exclusively* to defending religious liberty for all Americans." FIRST LIBERTY, https://firstliberty.org/about-us/ (last visited Sept. 9, 2024). First Liberty Institute's

acknowledges that it embraces Christian principles and advocates to preserve the "Judeo-Christian beliefs" which the nation once "broadly accepted."[142]

C. The Order's Flirtation with Coerced Religious Activity

As the philosopher John Locke recognized, along with James Madison, Thomas Jefferson, and several other prominent Framers, the "liberty of conscience" is a natural, unalienable right. The Establishment Clause, as irritating as it can be for the cause of religion,[143] nonetheless plays an invaluable role in preserving that right by proscribing government actors from ordering one to believe, worship, or act in a manner that impedes one's ability to choose one religion over another, or the choice to reject religion altogether.[144] All of these valuable purposes when taken together create the proper "historical understanding" of the Clause.[145] Madison, the Clause's author, summed it up perfectly when he contended at the Constitutional Convention that government "should not . . . *compel* men to worship God in any manner contrary to their conscience."[146]

Here, Judge Starr's order commits the very sin that he leveled at his contemnors: a failure "to comprehend" religious liberty law.[147] While Judge Starr may be right in his contentions that religious liberty training is a permissible remedy for the alleged harm observed, his inability to recognize the openly sectarian identity of the entity that was to provide the training rendered the order contrary to the historical understandings of the Establishment Clause. The three Southwest attorneys have no say in the matter. If they lose their appeal, they will not just be coerced but legally *forced* to undergo a minimum of eight hours of religious liberty training provided by an organization run as a self-proclaimed Christian "legal ministry" dedicated to advancing "Judeo-Christian beliefs."[148]

If one puts oneself into the shoes of the sanctioned, it becomes easy to understand how the liberty of conscience would be violated by the order for ADF-led training. To demonstrate,

---

about page further asserts that they "believe that every American of any faith—or no faith at all—has a *fundamental* right to follow their conscience and live according to their beliefs." *Id.*

[142] *What is Alliance Defending Freedom?*, *supra* note 10.

[143] *See* ANNALS OF CONGRESS, *supra* note 109, at 730.

[144] *See* Steinberg, *supra* note 105, at 1018.

[145] Kennedy v. Bremerton Sch. Dist., 597 U.S. at 507, 510 (2022).

[146] *See* ANNALS OF CONGRESS, *supra* note 109, at 730 (emphasis added).

[147] Carter, 686 F. Supp. at 522 (N.D. Tex. 2023).

[148] *What is Alliance Defending Freedom?*, *supra* note 10.

assume for a moment that the three contemnor attorneys were a Christian, a Jew, and a Muslim, and a federal judge ordered them to undergo religious liberty training. If that training were administered by an organization called the "Defenders of Satanist Apologists," whose public CLE offerings included religious liberty instruction through the lens of the Satanist faith, it would be easy for those individual attorneys to argue that involuntary submission to training, likely to include theologically partisan principles of Satanist perspectives, would violate the Establishment Clause. The principal argument would be that the inevitably sectarian slant within the training and its involuntary mandate would be a form of coerced and/or compelled religious worship,[149] church attendance,[150] or state use of church institutions for public functions[151] in direct violation of their liberty of conscience.

At best, Judge Starr's order heavily flirts with an Establishment Clause violation depending on the content of the eventual training. At worst, Judge Starr's order unconstitutionally betrays the very principles he wishes to impart upon Southwest's attorneys by denying their ability to worship or not worship as they wish and subjecting them to conservative Christian views on religious freedom that they may, not just fundamentally, but spiritually disagree with. Regardless of whether one agrees with the ideological, theological, or legal goals of the Alliance Defending Freedom, it is indefensible to profess a commitment to religious liberty yet condone the submission of a religious objector to sectarian training simply because one agrees with the ADF's political, religious, or legal positions.

IV. THE PARADOXICAL SOLUTION: RELIGIOUS LIBERTY ADVOCATES SHOULD HOPE FOR AND REJOICE IN TAKING THE "L"

A. A Potentially Dangerous Precedent for Both Sides

While Southwest pursues its appeal in the underlying action against Mrs. Carter, the three sanctioned attorneys must await their day in court before the Fifth Circuit on the legality of their sanctions. It will likely be many months, if not years before the case of *Carter v. Southwest Airlines Co., and Transp. Workers Union of Am., Loc. 556* is completed, and the Fifth Circuit can hear

---

[149] *See* ANNALS OF CONGRESS, *supra* note 109, at 730.
[150] *See* McConnell, *supra* note 81, at 2131.
[151] *Id.*

the contemnors appeal of Judge Starr's order. However, before a word is ever uttered before the panel, a warning and admonition must be heeded. It certainly is easy to understand how those closely aligned with the mainstream, Judeo-Christian idea of religious freedom might rejoice in the Fifth Circuit stamping its approval on sectarian religious liberty training as a remedial measure for contempt of court. However, rushing to obvious ideological poles would be an ignorant, potentially fatal mistake for the avowed defender of religious liberty and the liberty of conscience. Were the Fifth Circuit to affirm that it is constitutionally permissible to impose religious liberty training at the hands of an openly Christian religious/legal organization, it would operate as a tacit endorsement of one of two positions, both of which would bulldoze the delicate protections of religious freedom.

First, such a holding could be read to mean that a court may constitutionally subject a contemnor to sectarian religious liberty training that directly contravenes one's sincerely held religious beliefs. When looking solely at the facts of this particular case, adherents of the Judeo-Christian model of morality may view such a holding as a win for preserving their traditional values. But consider for a moment the can of worms such a decision would open, and it may no longer appear as a win for those in that historically hegemonic group.

If it is okay to permit Judeo-Christian organizations to carry out compulsory religious liberty training on contemnors, then it would be inevitable that a court must allow sectarian organizations of all faiths, including faiths that directly oppose Judeo-Christian beliefs to run such compulsory training. Judeo-Christian contemnors, under a different judge and different circumstances, might find themselves subjected to legally compelled religious liberty training at the hands of say, *gasp*, the Freedom From Religion Foundation. Or, and perhaps most seriously, if it is constitutionally permissible for contemnors in civil court to be compelled to undergo training in direct contravention of religious belief, could another court order a private religious organization, its members, or leaders to undergo some form of LGBTQ+ advocacy training, a prospect that no doubt Judge Starr would shudder at.

Such a holding cannot stand under the historical practices and understandings of the Establishment Clause. The Framers fought for Locke's principle that no citizen was to be compelled in a manner that directly impeded their ability to worship or not

worship as they please or be compelled in religious issues that contravened their liberty of conscience.[152] Granting the proverbial green light for the ADF's training would simultaneously open the door to a free-for-all of compulsory training performed by openly sectarian entities, destroying the ability for the religious and the irreligious alike to be shielded from compulsory training at the hands of an organization that they theologically disagree with. Regardless of which religious or irreligious entity offered the compulsory training, there is no historical practice or understanding that would justify such a holding, nor would anyone who claims devotion to faith or the First Amendment wish for such a standard to permeate.

Second, even if the Fifth Circuit were to cite some historical state support of Christian entities[153] and limit the holding to approval of training so long as the organization was Judeo-Christian, it would still fly in the face of the Framer's historical understanding of the First Amendment. Despite over 98% of colonial religious congregations in 1776 affiliating with one of the various protestant sects,[154] with the remaining 1.9% divided between Catholic and Jewish congregations,[155] the Framers did not adopt an Amendment designed to favor Judeo-Christian dominance. The Framers, mostly Christians but with a sizeable contingent of deists,[156] fought vehemently to ensure that no one sect combined to "establish a religion to which they would compel others to conform."[157] Regardless of however one might prefer the outcome religiously, this delicate line of anti-establishment must be preserved or risk the ability to exercise or not exercise freely will be greatly diminished.

B. Religious Liberty for All or Religious Liberty for None

The solution to this conundrum is surprisingly simple though seemingly counterintuitive: First Amendment advocates

---

[152] *See* LOCKE, *supra* note 104, at 63.

[153] Due to the lack of education infrastructure, early state governments directly supported private Christian schools through a variety of means to facilitate general education. *See* STEVEN K. GREEN, THE BIBLE, THE SCHOOL, AND THE CONSTITUTION: THE CLASH THAT SHAPED MODERN CHURCH-STATE DOCTRINE 45 (1st ed. 2012); *see also* Lloyd P. Jorgenson, *Historical Origins of Non-Sectarian Public Schools: The Birth of a Tradition*, 44 PHI DELTA KAPPAN 407, 408 (1963).

[154] Rodney Stark & Roger Finke, *American Religion in 1776: A Statistical Portrait*, 49 SOCIO. ANALYSIS, 39, 43 (1988).

[155] *Id.*

[156] David L. Holmes, *The Founding Fathers, Deism, and Christianity*, BRITANNICA (Dec. 21, 2006), https://www.britannica.com/topic/The-Founding-Fathers-Deism-and-Christianity-1272214.

[157] ANNALS OF CONGRESS, *supra* note 109, at 730.

should hope for the Fifth Circuit to overturn Judge Starr's mandated training and hold compulsory religious liberty training at the hands of a sectarian organization unconstitutional. More colloquially, religious liberty advocates, even those who espouse traditional Judeo-Christian beliefs, should hope for and rejoice in taking the "L" in this case. Regardless of the actual faith affiliation of the contemnors or even the content of the training, it is a dangerous precedent to approve religious liberty training by an openly Christian organization. Where one sectarian organization is greenlit to "combine[] legal training with an unwavering commitment to Christian principles" and then compulsorily "train [contemnors] . . . to effectively advocate for religious liberty, free speech, the sanctity of life, marriage and family, and parental rights,"[158] the ability of the Constitution to protect one's right to practice or not practice religion will become considerably weaker.

As the United Nations' Universal Declaration of Human Rights sets forth, unironically reminiscent of the thoughts of one of our greatest framers,[159] "Everyone has the right to freedom of thought, conscience and religion; this right includes freedom to change his religion or belief, and freedom, either alone or in community with others and in public or private, to manifest his religion or belief in teaching, practice, worship and observance."[160] The First Amendment ensures this right by protecting free exercise, alongside a prohibition against establishment, or in other words, government sanction of sectarian activity.

This case offers a prime example of playing upon many Americans' tendency to "protect what [one] believe[s] is good."[161] Here, a federal judge seeks to ensure contemnors understand the harms of infringing upon a Christian employee's religious beliefs and orders religious liberty training. However, it simultaneously exemplifies the dangerous temptation of stepping too far and betraying the very principle one claims to espouse. Where one condones the trampling of another's liberty of conscience, they lose the ability to claim that freedom

---

[158] *Legal Academy*, *supra* note 133.

[159] Recall James Madison's declaration that every citizen held the right to worship *or not worship* "according to the dictates of conscience." *See* Steinberg, *supra* note 105, at 1018.

[160] G.A. Res. 217(A), art. 18, Universal Declaration of Human Rights (Dec. 10, 1948).

[161] D. Todd Christofferson, Religious Freedom – A Cherished Heritage to Defend, Address at Provo Freedom Festival Patriotic Service (June 26, 2016).

themselves. The power of the First Amendment is only as good as our ability to respect the religious freedoms of those who believe differently than we do or who do not even believe at all. As one religious leader and former lawyer stated, we must "respect the faith of all people, even those with very different beliefs. [R]especting religious freedom means tolerating religious beliefs, speech, and practices we disagree with. *That is the price of asking others to respect our own freedoms*."[162]

CONCLUSION

The allegory of the Grand Inquisitor stands as a stark reminder of the ease with which those fighting for an idea can fall into the trap of betraying that same ideal. The Grand Inquisitor sought to establish an idealistic Christian state through executions and the suspension of individual autonomy; but when Jesus Christ, the very deity of that religious state, teaches the people agency and man's right to choose to follow Him, the Grand Inquisitor rejects him and sentences him to death.

In the case before the Fifth Circuit, the court would do well to recall the irony of a Christian crusader condemning the very Christ to death over competing philosophical views. Regardless of whether Southwest's attorneys discriminated against Charlene Carter in their memorandum following the underlying litigation, Judge Starr's order to subject the contemnors to compulsory religious liberty training at the hands of the Alliance Defending Freedom betrays the very liberty he wishes to ensure the attorneys comprehend.

The Framers envisioned a First Amendment that preserved the vital liberty of conscience, a natural right of all persons. Training that is (1) compulsory, (2) offered by a sectarian organization, and (3) possibly Christian-slanted itself runs the risk of betraying that liberty by forcing the theological objector to attend sectarian instruction. While we may never know what the training would have entailed, who exactly would have taught it, or what religious objections the contemnors might have been willing to voice, the principles of religious liberty require First Amendment advocates to call for and hopefully, rejoice in taking a "loss" on the question of sectarian-led religious liberty training. In doing so, religious liberty advocates can avoid the grand sin of the Grand Inquisitor: betraying the very principles we profess to defend.

---

[162] *Id.*

A DANGEROUS DOSE: BACKDOOR DEREGULATION, FIRST AMENDMENT OVERPROTECTION, OFF-LABEL DRUG PROMOTION, AND VULNERABLE POPULATIONS

Alexandria Belton*

INTRODUCTION

The regulatory powers of the United States Food and Drug Administration ("FDA") were established to protect public health by preventing manufacturers from "making poorly or unsubstantiated claims of effectiveness and safety regarding their products."[1]

Federal regulations largely prohibit pharmaceutical manufacturers from promoting their drugs for uses that have not been approved by the FDA,[2] making speech "integral to the FDA's regulatory scheme."[3] However, the FDA's wide-ranging authority over product labeling and advertising conflicts with the First Amendment's protection of drug manufacturers engaging in commercial speech. Of particular concern is off-label marketing, defined as the promotion and advertisement of a drug for something other than its specific FDA-approved use(s).[4]

Off-label marketing is provided heightened First Amendment protection because of the doctrine of commercial speech. Industry stakeholders and drug manufacturers benefit from a muscular commercial speech doctrine because more of their off-label marketing – which directly impacts prescriber practices and consequently patient pharmaceutical usage – is constitutionally protected.[5] Commercial speech in this context requires courts to balance the FDA's interest in protecting the public against the nature of the speech.

---

*J.D. Candidate, University of North Carolina School of Law, 2025.

[1] Gail A. Van Norman, *Off-Label Use vs Off-Label Marketing* (pt. 2), 8 J. AM. COLL. CARDIOLOGY 359, 365 (2023) [hereinafter Van Norman 2].

[2] Elizabeth Richardson, Health Policy Brief, *Off-Label Drug Promotion*, HEALTH AFFS. 1 (2016), https://www.healthaffairs.org/do/10.1377/hpb20160630.920075/full/healthpolicybrief_159-1525375508685.pdf.

[3] Patricia J. Zettler, *The Indirect Consequences of Expanded Off-Label Promotion*, 78 OH. ST. L.J. 1053, 1053 (2017).

[4] *See* Van Norman 2, *supra* note 1, at 359.

[5] Hilary Landgraf Vigil, *In Defense of the Fda's Prohibition Against Off-Label Pharmaceutical Marketing: The First Amendment Does Not Stand in the Way*, 2016 MICH. ST. L. REV. 1409, 1427 (2016).

[6] *See The FDA's Drug Review Process: Ensuring Drugs Are Safe and Effective*, https://www.fda.gov/drugs/information-consumers-and-patients-drugs/fdas-drug-review-process-ensuring-drugs-are-safe-and-effective (Nov. 24, 2017) [hereinafter *FDA Drug Review*].

In the medical community, patient-centric care is high-quality care. Healthcare providers should collaborate with their patients and educate them on their healthcare choices, thus allowing them to make more informed decisions regarding their healthcare. Providers are also expected to prescribe patients with FDA-approved medication when needed. Before pharmaceuticals can achieve FDA approval, they must first be adequately studied in target populations.[6] However, when engaging in off-label pharmaceutical promotion, some drug manufacturers circumvent the rigorous testing and reporting requirements[6] under the Federal Food, Drug, and Cosmetic Act of 1938 ("FDCA"), as well as the FDA approval process, which arguably decreases the quality of patient care. The FDCA requirements facilitate necessary clinical studies that "evaluate the safety of the medication by studying the effect of the drug and are designed to determine the metabolic and pharmacologic actions of the drug in humans, the side effects associated with increasing doses, and, if possible, to gain early evidence on effectiveness."[7]

Treating off-label drug promotions as commercial speech negatively impacts underrepresented groups, which becomes increasingly problematic when such marketing is targeted at vulnerable patient populations.[8] Examples of off-label marketing directed at these populations include: the promotion of antipsychotic drugs for use in elderly patients suffering from mental-health conditions and the promotion of antidepressants and atypical antipsychotics for pediatric patients.[9] Thus, patients rely on clinicians to avoid the "perils of participating in off-market labeling."[10]

In *Central Hudson Gas & Electric Corporation v. Public Service Commission*,[11] the Supreme Court articulated a four-part test for determining when and if commercial speech is entitled to First

---

[6] Wendy Teo, *Fda and the Practice of Medicine: Looking at Off-Label Drugs*, 41 SETON HALL LEGIS. J. 305, 326 (2017).
[7] TREATISE ON HEALTHCARE LAW § 24.11(2)(a) (65th ed. Supp. 2024).
[8] *See* Van Norman 2, *supra* note 1, at 360.
[9] *See* Press Release, U.S. Dep't of Just., Eli Lilly and Company Agrees to Pay $1.415 Billion to Resolve Allegations of Off-label Promotion of Zyprexa (Jan. 15, 2009) (on file with Office of Public Affairs) [hereinafter DOJ Eli Lilly Zyprexa Off-Label Liability Press Reslease]; Press Release, U.S. Dep't of Just., Johnson & Johnson to Pay More Than $2.2 Billion to Resolve Criminal and Civil Investigations (Nov. 4, 2013) (on file with Office of Public Affairs); Press Release, U.S. Dep't of Just., GlaxoSmithKline to Plead Guilty and Pay $3 Billion To Resolve Fraud Allegations and Failure To Report Safety Data (July 2, 2012) (on file with Office of Public Affairs).
[10] Van Norman 2, *supra* note 1, at 359.
[11] 447 U.S. 557 (1980).

Amendment protection.[11] The Court calls this test a form of "intermediate scrutiny," but the test is less rigorous in name only.[12]

Regulation survives the *Central Hudson* test only if the government can establish that (1) the speech at issue concerns activity that is lawful and not misleading, (2) that the regulation is justified by a substantial interest, (3) the regulation directly advances that interest, and (4) the regulation is narrowly tailored to achieving that interest.[13] Applying this test to off-label drug promotion, it is apparent that absent a substantial and compelling interest, the FDA cannot easily satisfy the requirements of intermediate scrutiny. For example, in *Sorrell v. IMS Health, Inc.*,[14] the majority explained that "content-based speech" must satisfy *Central Hudson*.[15]

Though the FDA is understandably anxious to protect vulnerable populations from off-label promotion, *Central Hudson* forces it to walk a tight line. In *Sorrell*, the government's restriction was content-based, thus failing to satisfy *Central Hudson*.[16] Currently, FDA oversight broadly enforces the regulation of pharmaceuticals. However, *Central Hudson* and *Sorrell* could be construed as forewarnings that such broad regulations will not survive future First Amendment challenges.[17] Likely, the restriction of off-label drug marketing to vulnerable populations will require the FDA to conservatively exercise its enforcement powers. This would mean that restrictions should (1) emphasize vulnerability status, (2) focus on the off-label drug recommendations by physicians to vulnerable individuals and (3) highlight the disastrous result of off-label prescribing (harmful health consequences for vulnerable patients).

This Note will argue that off-label advertising of drugs that are prescribed to vulnerable individuals despite appropriate disclaimers conflicts with patient safety. This Note explores the FDA's regulatory restrictions on off-label drug promotion and advertisement. Part I argues that current First Amendment

---

[11] *Id.* at 566.
[12] *See id.* at 573 (Blackmun, J., concurring).
[13] *See id.* at 564 (majority opinion).
[14] 564 U.S. 552 (2011).
[15] *See id.* at 572.
[16] *See generally id.*
[17] *See* Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 512 (2015) ("Although the [*Sorrell*] decision did not formally overturn *Central Hudson*, [the case's language on applying heightened judicial scrutiny] arguably suggests that *no* restrictions on commercial speech will survive the Supreme Court's review if the purpose of the restriction is to restrict truthful, nonmisleading advertising for a legal product.").

overprotection of off-label marketing necessitates a rethinking of the FDA's current regulatory authority. Part II summarizes recent cases on off-label marketing and First Amendment protection. The two primary cases here are *United States v. Caronia*[18] and *Amarin Pharma, Inc. v. U.S. Food and Drug Administration*.[19] Based on the courts' reasoning in these cases, the states have a compelling interest in preserving public health by protecting individuals whose underrepresented status reflects heightened vulnerability.[20] Part III considers a potential off-label regulatory regime. The regime calls for FDA involvement, centered around drug recommendations for vulnerable groups. Based on this analysis, this Note concludes that vulnerable individuals require enhanced protection from off-label promotion and are entitled to a regulatory regime that prevents further harm.

I. LEGAL BACKGROUND

A. The Current Regulatory Framework

Understanding the impact of off-label drug promotion requires understanding how the FDA regulates drug promotion. The FDA "plays a vital public health role;"[21] however, expanded First Amendment protections for off-label advertisements by pharmaceutical manufacturers erode the FDA's regulatory authority over drugs sold in the United States, and thus the agency's ability to fulfill this role.[22]

The FDA regulates the admission of prescription drugs into the American marketplace.[23] In 1938, with the passing of the FDCA, the FDA was authorized to "oversee and regulate the production, sale, and distribution of food, drugs, medical devices, and cosmetics."[24]

In 1962, an amendment to the FDCA provided that "[n]o person shall introduce or deliver for introduction into interstate commerce any new drug unless an approval of an application . . . is effective with respect to such drug."[25] This amendment further defined the FDA's regulatory power, allowing the agency

---

[18] 703 F.3d 149 (2d Cir. 2012).
[19] 119 F. Supp. 3d 196 (S.D.N.Y. 2015).
[20] *See also,* Zettler, *supra* note 3 ("The [FDA] plays a vital role in public health . . . regulating approximately 25% of the U.S. consumer economy.").
[21] *Id.*
[22] *See id.* at 1054.
[23] *See FDA Drug Review*, *supra* note 6.
[24] Clinton Lam & Preeti Patel, *Food, Drug, and Cosmetic Act*, NAT'L LIBR. OF MED. (July 31, 2023), https://www.ncbi.nlm.nih.gov/books/NBK585046.
[25] Rodney A. Smolla, *Off-Label Drug Advertising and the First Amendment*, 50 WAKE FOREST L. REV. 81, 81 (2015) (footnote omitted).

to limit drug manufacturers ability to promote or advertise their products to solely the FDA approved uses for their drugs.[26] Thus, the "on-label" drug, with its many requirements, was born.[27]

The term drug is statutorily defined under federal law as "articles (other than food) intended to affect the structure or any function of the body of man or other animals."[28] If a product constitutes a drug under this definition, then it is subject to the FDA's regulatory requirements, including those on testing and approval.[29] This process is of particular importance to consumers since a rigorous testing process determines the safety and efficacy of a drug. Through the control of market activities for drugs, the FDA attempts to protect the population from the risks associated with unapproved or untested pharmaceuticals.

When a drug is marketed and prescribed for uses unapproved by the FDA it becomes off-label.[30] Consistent with the 1962 amendment, off-label expressly indicates that the drug lacks adequate approval and is advertised and prescribed for a purpose unapproved by the FDA. Although off-label prescribing can be necessary and even beneficial at times, for vulnerable populations, the practice is inherently riskier.[31] Proper screening requires the FDA to approve "a drug to treat a particular disease (or a particular stage of a disease), in a particular patient population, at a particular dose, and in a particular dosage form – all of which is reflected in the FDA-approved labeling."[32] However, when vulnerable populations are prescribed drugs for off-label uses, the typical screening process described above has not been performed for that use of that drug to determine a safe and effective dose, how it treats the particular disease, how it interacts with the target patient population, and the risk associated with consuming this drug for a use other than that approved by the FDA.

B. Clinical Trials

The FDA's method for drug approval is referred to as the Investigational New Drug ("IND") Process. Under this Process, after a drug is developed, and a sponsor seeks its approval by the

---

[26] *See id.* at 81–82.
[27] *See id.* at 82.
[28] 21 U.S.C. § 321(g)(1)(C).
[29] Zettler, *supra* note 3, at 1061 ("If a product is determined to be a drug, it is subject to the FDA's many requirements for drugs.").
[30] *See id.* at 1054.
[31] *See id.* at 1080–85.
[32] *Id.* at 1061.

FDA, the drug must then be tested on animals to check the safety and efficacy of the compound.[33] Following animal testing, an IND application is submitted to the FDA who reviews it.[34] Following the animal testing and IND application and review is the clinical trial stage of the Process, during which the FDA verifies that the necessary human subjects have consented to participation in the trial, and ensures that the clinical trial will not needlessly harm the subjects.[35]

The clinical trial stage occurs in three phases. Phase one evaluates the safety of the medication by assessing the drug's effects.[36] Phase two gathers preliminary information on the drug's efficacy for patients with a particular disease or condition.[37] Finally, phase three weighs the risks versus the benefits of the drug.[38]

A drug sponsor's goal is to receive FDA approval at the end of the IND Process. However, if a drug's potentially harmful effects outweigh its potential therapeutic benefits, then the application will be denied. Thus, the weighing of the drug's risks and benefits during phase three of the clinical trial ultimately determines whether it is safe and can recommended for human use by the FDA. Without IND review, a drug's risks and benefits would not be evaluated.

II. *VULNERABLE POPULATIONS*

A person's status as a member of a vulnerable population is determined by assessing their age, present medical conditions, or classification as an ethnic or racial minority.[39] Such vulnerable persons are typically prone to illness or suffer from some debilitating disease, and their health conditions are often "exacerbated by unnecessarily inadequate health care."[40] Thus, a vexing problem emerges: in a population of vulnerable individuals, how do we reconcile off-label promotion with a lack

---

[33] *See Investigational New Drug (IND) Application*, https://www.fda.gov/drugs/types-applications/investigational-new-drug-ind-application/ (July 20, 2022).
[34] *Id.* ("Once the IND [application] is submitted, the sponsor must wait 30 calendar days before initiating any clinical trials. During this time, FDA has an opportunity to review the IND for safety to assure that research subjects will not be subjected to unreasonable risk.").
[35] *Id.*; General Requirements for Informed Consent, 21 C.F.R. § 50.20–.27 (2024).
[36] 21 C.F.R. § 312.21(a).
[37] 21 C.F.R. § 312.21(b).
[38] 21 C.F.R. § 312.21(c).
[39] *See* David B. Waisel, *Vulnerable Populations in Healthcare*, 26 CURRENT OP. IN ANESTHESIOLOGY 186 (2013).
[40] *Id.*

of clinical testing amongst a population that desperately need access to safe and effective drugs?[41]

Vulnerable populations in this context are traditionally made up of individuals who experience poor health outcomes – which are inextricable from one's age, chronic illnesses, disability, gender, or race. Both a person's physical health and their socioeconomic status factor into their level of vulnerability, but vulnerability as a status extends beyond physical health and cognitive ability. This Note deviates from the traditional interpretation of "vulnerability." Instead, how an individual interacts with off-label drugs will largely define their status as "vulnerable." "Of grave concern is the fact that off-label use of drugs often occurs among very vulnerable patient groups, such as patients with mental health disorders, the elderly, and pregnant women and children who are historically under-represented among subjects of clinical research."[42] Thus, this Note's definition of "vulnerable population" is limited to individuals that have been historically excluded from clinical trials, yet are routinely prescribed off-label pharmaceuticals.

Supporters of off-label prescribing for vulnerable populations emphasize that off-label prescribing provides needed treatment for a patient.[43] Off-label uses expand treatment options when there are no known alternative therapies available for a particular patient.[44] However, this ethos justification ignores the potential physical consequences of off-label drug use, including adverse treatment outcomes that are potentially fatal.[45]

Prescribing physicians recommend off-label drugs to this population as a method to treat conditions tied to their vulnerability. These individuals are commonly excluded from clinical trials due to ethical and safety concerns.[46] This leads to a dearth of data that indicates the safety and efficacy of treatment undergone by a particular vulnerable population. This article will limit discussion to the following vulnerable groups– the elderly

---

[41] *See* Gail A. Van Norman, *Off-Label Use vs Off-Label Marketing of Drugs* (pt. 1), 8 J. AM. COLL. CARDIOLOGY 224, 226 (2023) [hereinafter Van Norman 1].
[42] *Id.*
[43] Lisa E. Smilan, *The Off-Label Loophole in the Psychopharmacologic Setting: Prescription of Antipsychotic Drugs in the Nonpsychotic Patient Population*, 30 HEALTH MATRIX 233, 275 (2020).
[44] Tim Mackey & Bryan A. Liang, *Off-Label Promotion Reform: A Legislative Proposal Addressing Vulnerable Patient Drug Access and Limiting Inappropriate Pharmaceutical Marketing*, 45 U. MICH. J.L. REFORM 1, 13 (2011).
[45] *Id.* at 18–19.
[46] *Id.*

population (focusing on individuals suffering from cognitive decline), cancer patients, pregnant women, and children.

Drug manufacturers disseminate off-label use information for their products to practitioners. Practitioners then distribute off-label drug information to vulnerable patients who depend on their physicians to determine if a prescribed drug is safe, effective, and suitable for treatment. However, these patients are misguided in the belief that the Hippocratic Oath equates to their doctor understanding the safety risks associated with prescribing an unapproved, off-label drug.[47] Physicians do not possess the scientific expertise necessary to review the safety, side effects, etcetera of off-label drug use, especially when compared with the FDA. A doctor's medical opinion does not replace the rigorous FDA drug development process.[48] Studies indicate "that most off-label drug use occurs without scientific support, defined as documentation of the drug's effectiveness as an off-label therapy in clinical trials or observational studies."[49] Moreover, "[t]here are no guidelines for determining which off-label uses are sufficiently supported by medical evidence, and which are not."[50] I argue that off-label prescribing should be subject to significant scrutiny prior to prescribing to vulnerable patients. However, reduced FDA regulation of off-label drugs consequently defers off-label review to physicians ill-equipped to protect vulnerable individuals.

III. CURRENT OFF-LABEL DRUGS AND THEIR HARMFUL EFFECTS

A. Taxotere

The FDA approved Taxotere for chemotherapy use. Taxotere's authorized, or on-label use, is as a second-line cancer treatment option, however, it has been prescribed for off-label use as a first-line treatment for metastatic breast cancer.[51] Both on-label and off-label uses of Taxotere have caused severe

---

[47] *See id.* at 229.

[48] *See* G. Caleb Alexander, *Off-Label Use: Oft Not Evidence Based*, UNIV. OF CHI. MED. (Sept. 1, 2009), https://www.uchicagomedicine.org/forefront/news/2009/september/off-label-use-oft-not-evidence-based/.

[49] Van Norman 1, *supra* note 41, at 229.

[50] *Id.*

[51] *See* First Amended Master Long Form Complaint & Demand for Jury Trial at 123–27, *In re* Taxotere (Docetaxel) Products Liability Litigation, No. 16-md-02740-KDE-MBN (E.D. La. July 25, 2017), MDL No. 2740.

complications in cancer patients.[52] Taxotere has now been linked to eye damage and hair loss.[53]

B. Abilify

The FDA approved Abilify as a part of a class of atypical antipsychotic drugs,[54] and it is mainly used to treat mental health ailments such as schizophrenia or bipolar disorder. While Abilify is FDA-approved to treat mental-health-related conditions, it has also been prescribed for off-label uses. Elderly patients suffering from mental-health conditions may be prescribed anti-psychotics such as Abilify. However, the drug has recently been associated with causing negative reactions in elderly patients.[55]

C. Zyprexa

In 2009, American pharmaceutical company Eli Lilly agreed to pay $1.415 billion for their off-label promotion of Zyprexa.[56] The company admitted to promoting Zyprexa, an antipsychotic drug, to physicians to treat dementia in elderly patients.[57] In 1996 the FDA originally approved the drug to treat symptoms manifesting from psychotic disorders.[58] "In March 2000, FDA approved Zyprexa for the short-term treatment of acute manic episodes associated with Bipolar I Disorder."[59] Then in November of that same year, the FDA approved Zyprexa "for maintaining treatment response in schizophrenic patients who had been stable for approximately eight weeks."[60] However, beginning in September of 1999 and up until at least November in 2003, "Eli Lilly promoted Zyprexa for the treatment of agitation, aggression, hostility, dementia, Alzheimer's dementia, depression and generalized sleep disorder."[61] This resulted in an

---

[52] *See* Toni Matthews-El, *Taxotere Lawsuit Update*, FORBES ADVISOR (Sept. 12, 2022, 9:27 AM), https://www.forbes.com/advisor/legal/product-liability/taxotere-lawsuit-update/.
[53] *See id.*
[54] *See* Press Release, Attorney General Porrino Announces Multi-State Settlement with Bristol-Meyers Squibb over Misleading Promotion of Drug Abilify, https://www.njoag.gov/attorney-general-porrino-announces-multi-state-settlement-with-bristol-meyers-squibb-over-misleading-promotion-of-drug-abilify (last visited Oct. 23, 2024).
[55] *Id.*("[T]he drug can cause adverse reactions such as stroke in elderly patients with dementia-related psychosis, hyperglycemia and other severe conditions.").
[56] *See* DOJ Eli Lily Zyprexa Off-Label Liability Press Release, *supra* note 9.
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*

increased risk of death amongst elderly patients who were prescribed Zyprexa for an off-label use.[62]

IV. THE IMPACT OF *CARONIA* AND *AMARIN*

Prior to the *Caronia* decision in 2012, the FDA's regulatory regime banning off-label drug promotion appeared insulated from constitutional challenge. However, since then arguments advancing off-label promotion have found proponents in the courts.[63] Specifically, the doctrine of commercial speech has been responsible for eroding FDA control.[64] The debate surrounding on-label versus off-label drug uses has now shifted to an analysis focused on whether the advertising and promotion of the drug was "non-misleading" and "truthful."[65]

A. Central Hudson *and Off-Label Promotion*

Central Hudson sets forth the commercial speech standard.[66] In *Central Hudson* the plaintiff argued that a New York Public Service Commission regulation banning promotional advertising by electrical utility companies (such as the Plaintiff) violated its First Amendment rights, and the U.S. Supreme Court agreed.[67] The Court explained that commercial speech serves both the "economic interest of the speaker, but also assists consumers and furthers the societal interest in the fullest possible dissemination of information."[68] The Court also "rejected the 'highly paternalistic' view that government has complete power to suppress or regulate commercial speech."[69] The Court summarized the commercial speech test as follows:

> If the communication is neither misleading nor related to unlawful activity, the government's power is more circumscribed. The State must assert a substantial interest to be achieved by restrictions on commercial speech. Moreover, the regulatory technique must be in proportion to that interest. The limitation on expression must be

---

[62] Zettler, *supra* note 3, at 1064.
[63] *Id.* at 1064–7.
[64] *Id.* at 1063.
[65] *Id.* at 1079–80.
[66] *See* Erin E. Bennett, Comment, Central Hudson-*Plus: Why Off-Label Pharmaceutical Speech Will Find Its Voice*, 49 HOUS. L. REV. 459, 467 (2012).
[67] *Id.* at 467–68.
[68] Cent. Hudson, 447 U.S. at 557, 561–62.
[69] *Id.* at 562.

> designed carefully to achieve the State's goal. Compliance with this requirement may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.[70]

Thus, the Court struck down New York's ban against promotional advertising because the regulation had failed to support the government's interest and did not use the least restrictive means to suppress the speech.[71]

Central Hudson sets out a four-part test: (1) the commercial speech "must concern lawful activity and not be misleading," otherwise it will not be afforded First Amendment protection, (2) the government must assert a substantial interest in the regulation suppressing the commercial speech at issue, (3) the regulation must also directly advance the asserted governmental interest, and (4) the regulation must not be "more extensive than is necessary to serve that interest."[72]

B. Caronia

The Second Circuit decision in *Caronia* weakened the FDA's ability to restrict off-label drug promotion and advertisement. In that case, Alfred Caronia, a pharmaceutical sales representative, was found guilty of misdemeanor conspiracy to introduce misbranded drugs into interstate commerce in violation of 21 U.S.C. §§ 331(a) and 333(a)(1).[73] Caronia promoted the drug Xyrem for off-label uses including, muscle disorders, fibromyalgia, weight loss, excessive daytime sleepiness, and chronic fatigue and pain.[74] Caronia advertised Xyrem as safe, despite the FDA's requirement of a black box warning indicating the extreme risk associated with taking the drug.[75] Xyrem's side effects included "difficulty breathing while asleep, confusion, abnormal thinking, depression, nausea,

---

[70] *Id.* at 564.
[71] *Id.* at 570–72.
[72] *Id.* at 566.
[73] United States v. Caronia, 703 F.3d 149, 152 (2d Cir. 2012).
[74] *Id.* at 157.
[75] *Id.* 155–57 ("The black box warning is the most serious warning placed on prescription medication labels.").

vomiting, dizziness, headache, bedwetting, and sleepwalking. If abused, Xyrem [could] cause additional medical problems, including seizures, dependance, severe withdrawal, coma, and death."[76] Caronia argued that the FDA's off-label promotion restriction violated his First Amendment right to free speech., The court agreed, vacated his conviction, and remanded the case.[77]

The FDA's off-label regulation satisfied the first two prongs of *Central Hudson*.[78] Under the second prong of the test, aside from the general governmental interests in public health and drug safety, which the court stated were substantial, in this case the government specifically asserted an interest in maintaining the integrity and efficacy of the drug approval process, as well as a specific interest in "reducing patient exposure to unsafe and ineffective drugs."[79] However, the court determined that the regulation at issue failed to satisfy the third prong of the *Central Hudson* test, stating that,

> [T]he government's construction of the FDCA's misbranding provisions does not directly advance its interest in reducing patient exposure to off-label drugs or in preserving the efficacy of the FDA drug approval process because the off-label use of such drugs continues to be generally lawful. Accordingly, the government's prohibition of off-label promotion by pharmaceutical manufacturers 'provides only ineffective or remote support for the government's purpose.'[80]

The court also found that the regulation failed under the fourth prong of the *Central Hudson* test because the government's asserted "interests could be served equally well by more limited and targeted restrictions on speech."[81]

---

[76] *Id.* at 155.
[77] *Id.* at 152.
[78] *Id.* at 165–66 ("The first two prongs of *Central Hudson* are easily satisfied here. First, promoting off-label drug use concerns lawful activity (off-label drug use), and the promotion of off-label drug use is not in and of itself false or misleading. Second, the government's asserted interests in drug safety and public health are substantial.").
[79] *Id.* at 166.
[80] *Id.* at 167.
[81] *Id.* at 168 ("The government has not established a 'reasonable fit' amongst its interests in drug safety and public health, the lawfulness of off-label use, and its construction of the FDCA to prohibit off-label promotion."); *see also id.* (providing examples of "less-speech restrictive" means by which the government could have advanced its asserted interests in this case).

The majority concluded that "the proscribed conduct for which Caronia was prosecuted was precisely his speech in aid of pharmaceutical marketing" and that such speech is protected under the First Amendment.[82] The holding of *Caronia* has been interpreted broadly, and such an interpretation risks dismantling the FDA regulatory system. The persistence of off-label promotion creates a troubling concern: the erosion of a robust drug approval process. *Caronia* might "limit, or eliminate altogether, the FDA's ability to rely on off-label promotion as evidence of violations of the FDCA."[83] The FDA declined to appeal the Second Circuit's holding, and instead responded by "updating its draft guidance on journal article dissemination, issuing a statement that it would not change its enforcement activities, and effectively adopting a narrow 'fact-bound' interpretation of the ruling."[84]

Arguably, a broad interpretation of *Caronia* eliminates a needed protective barrier. Pharmaceutical manufacturers are not promoting or advertising directly to patients, instead, drug manufacturers are permitted to distribute articles, and books pertaining to off-label uses directly to physicians.[85] Physicians then interact with patients and influence patient behavior and treatment course (including prescribing off-label medication). Consequently, drug manufacturers transform the physician-patient relationship; no longer is it exclusively between the physician and patient, it now extends to include the drug manufacturer's off-label promotion. Off-label regulation is an important safety concern for vulnerable patients.

C. Amarin

In 2015, Amarin Pharmaceutical challenged an FDA regulation that blocked them from making truthful and non-misleading assertions to healthcare professionals about their drug Vascepa.[86] Amarin alleged that the FDA threatened legal action to hamper Vascepa's promotion.[87] Further, Amarin's complaint stated that doctors

---

[82] *Id.* at 162 (citing Sorrell v. IMS Health, Inc., 564 U.S. 552, 557 (2011)).
[83] Zettler, *supra* note 3, at 1070.
[84] Tim K. Mackey & Bryan A. Liang, Commentary, *After* Amarin v. FDA: *What Will the Future Hold for Off-label Promotion Regulation*?, 92 MAYO CLINIC PROC. 701, 702 (2016).
[85] *See* Van Norman 2, *supra* note 1, at 362.
[86] *See* Amarin Pharma, Inc. v. FDA, 119 F. Supp. 3d 196, 212 (S.D.N.Y. 2015).
[87] *See id.* at 212–13.

> [N]eed truthful and non-misleading information about these drugs to make informed decisions about what is best for their patients, but the [FDA]'s current regime for regulating the flow of 'off-label' information to doctors about prescription drugs . . . severely restricts medical professionals' access to information from the source most knowledgeable about the drugs: the drug manufacturers.[88]

Emphasizing the Second Circuit's holding in *Caronia*, that a misbranding prosecution cannot be based on speech that promotes off-label drug use,[89] the *Amarin* court further suggested that this reasoning should extended.

> [C]ontrary to the FDA's concern, *Caronia* leaves room for prosecuting off-label marketing as misbranding. Two limits to *Caronia*'s holding are worth highlighting. First, the First Amendment does not protect false or misleading commercial speech. *Caronia*'s construction of the misbranding provisions so to exclude truthful promotion speech affords no protection to a manufacturer that uses false or misleading communications to promote an off-label use. Second, the First Amendment protects expression, not conduct. A manufacturer that engages in non-communicative activities to promote off-label use cannot use the First Amendment as a shield. *Caronia* holds protected, and outside the reach of the FDCA's misbranding provisions, off-label promotion only where it wholly consists of truthful and non-misleading speech.[90]

In *Amarin*, the court underscored the significance of the truthful and non-misleading commercial speech standard.[91] This standard strengthens the ability of pharmaceutical manufacturers to advertise and promote off-label uses for their drugs.[92] Drug manufacturers often "distribute articles from peer-reviewed journals and reference books pertaining to off-label uses,"[93] however, "many peer-reviewed studies of off-label use are

---

[88] *Id.* at 213.
[89] *Id.* at 225–26.
[90] *Id.* at 228.
[91] *See, e.g.*, *id.*
[92] *See id.* at 229 ("In the end, however, if the speech at issue is found truthful and non-misleading, under *Caronia*, it may not serve as the basis for a misbranding action.").
[93] Van Norman 2, *supra* note 1, at 362.

actually written by the companies themselves, and many authors assert that such articles are merely marketing literature disguised as scientific evidence."[94] The crux of *Amarin* is the idea that physicians should have access to all information, even if such information lacks credibility.[95]

V. *CENTRAL HUDSON* APPLIED TO VULNERABLE POPULATIONS

Vulnerable populations need a targeted FDA regulatory regime to confront the issue of off-label use. Preferably, this regime would extend beyond the limits set in *Amarin* and *Caronia*. Emphasis also must be given to the definition of "vulnerable populations" and the associated status of being a "vulnerable individual."

The FDA's decision to forego an appeal in *Amarin* indicates that the agency is strategically regulating in a way to maintain some of its oversight. This strategy provides an ideal opportunity for drug manufacturers "to take advantage of this regulatory opening in order to avoid prosecution under the FDCA."[96] Be that as it may, unless the FDA changes course and decides to file an appeal, the agency's only option is to work within the current legal reality–that courts favor commercial speech jurisprudence over stringent regulatory enforcement–and adopt a narrowed regulatory regime within the *Caronia-Amarin* limits.

To determine these limits, the FDA should consider the *Central Hudson* test.[97] The agency should also be cognizant of the severity of the problem of off-label drug promotion to vulnerable groups and adopt the most robust regulatory regime possible. Here, an off-label regulation might satisfy the first two prongs of *Central Hudson*. Under the second prong, however, the government's asserted interest would not be drug safety and public health. Instead, the government's interest in the FDCA's drug approval process would be to specifically protect the health of vulnerable patient populations by assuring the safety, efficacy, and security of off-label drugs. And the interest in minimizing a patient's exposure to untested and ineffective drugs.

The vulnerability status of an individual should be heavily weighed, and consideration should be given to an individual's

---

[94] *Id.*
[95] *See Amarin*, 119 F. Supp. 3d at 212–14.
[96] Mackey & Liang, *supra* note 84, at 703.
[97] Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 564 (1980).

susceptibility to receiving an off-label prescription.[98] Lastly, the government's asserted interest must be narrowly tailored. Thus, the regulatory regime should be the least restrictive means available to protect vulnerable individuals from off-label promotion.

VI. PROPOSED REGULATORY REGIME

The general objective of the FDA is to protect public health and safety, however, in the context of vulnerable populations, the agency needs to narrow its regulatory scope to be able to continue to constitutionally protect the health and safety of vulnerable individuals. Additionally, in the aftermath of *Caronia* and *Amarin*, the FDA has struggled to maintain its regulatory oversight and authority. The FDA's current disjointed regulatory approach does little to confront this erosion of their regulatory power.[99] A new regulatory regime will need to maximize the FDA's regulatory authority while emphasizing a new regulatory goal: protecting vulnerable populations from off-label drug promotion. Developing such a system would permit manufacturers to continue off-label promotion, however, their promotion will now come with guidance from the FDA regarding drugs that are potentially safe or harmful to vulnerable individuals.[100]

Before developing and implementing a new regulatory regime, it is necessary to first understand the effects of *Amarin* and *Caronia* on the FDA's current amount of regulatory and oversight authority on off-label pharmaceutical promotion. *Amarin* held that the FDA "lacked the authority to prohibit nonmisleading forms of off-label speech."[101] *Caronia* held "that the FDA's construction of the FDCA's misbranding provision unconstitutionally restricted [the defendant's] lawful free speech under the First Amendment."[102]

A troubling result of these cases is that now pharmaceutical manufacturers can largely self-regulate what is

---

[98] Off-label use and promotion for drugs that treat patients with rare diseases, cancer, and antipsychotic disorders, or pregnant women should be particularly prioritized. Their status should be weighed to determine if they require increased protection based on widespread off-label use in these patient populations and a lack of data that indicates the safety and efficacy of a particular off-label drug.

[99] *See* Mackey & Liang, *supra* note 84, at 704.

[100] *See id.*

[101] *Id.* at 701.

[102] *Id.* at 702.

to be considered a truthful off-label promotion.[103] Consequently, the quality of health information, patient safety, and basically all other aspects of the healthcare system are at the mercy of market incentives.[104] The FDA needs to create a new regulatory regime that stays within the stringent limitations articulated in *Caronia* and expanded in *Amarin*, but that also adds enforcement and oversight provisions beyond mere self-regulation.[105]

I propose that the FDA's new regulatory regime focus on vulnerable populations. This regime would include a prescreening process, an evaluation of the off-label promotion, including a determination of "non-misleading" and "truthful" speech, evidence-based review of the drug, and FDA-provided recommendations of off-label drugs suitable for vulnerable patients.

The FDA cannot regulate all non-misleading commercial speech, since post-*Amarin* deference is given to drug manufacturers to determine if drug promotion is truthful. Thus, the FDA should limit its off-label guidance to determining if an off-label drug marketed to vulnerable individuals is non-misleading. This narrower regulatory system will allow the FDA to implement evidence-based review of off-label speech and its relation to vulnerability status.[106]

The first step in this proposed new FDA drug recommendation process is prescreening. The prescreening process will allow pharmaceutical manufacturers to submit off-label promotional material to the FDA.[107] The FDA would also evaluate whether the promotional material is "misleading, false, or misbranded."[108] Off-label drug promotional materials that are deemed both misleading and false should be denied approval. Further, the FDA should publicly publish a list of drugs whose off-label promotions have been deemed misbranded.

---

[103] *Id.* at 703 ("Relying on manufacturers to self-regulate truthful and non-misleading off-label promotion activities is concerning given previous billion-dollar DOJ prosecutions for illegal off-label promotion activities and the simple fact that substantial profits can be realized from increased sales emanating from off-label drug uses that can be influenced by physician-targeted promotion.").

[104] *See id.*

[105] *See generally id.* at 704.

[106] *Id.* ("The *Amarin* decision could actually act to facilitate needed dissemination of good evidence-based off-label information to educate clinicians about the treatment options for vulnerable populations who often have no treatment that has been approved for their condition.").

[107] *See* Tim Mackey & Bryan A, Liang, *Off-Label Promotional Reform: A Legislative Proposal Addressing Vulnerable Patient Drug Access and Limiting Inappropriate Pharmaceutical Marketing*, 45 UNIV. MICH. J. L. REFORM 1, 43 (2011).

[108] *See id.* at 43–44.

Next, the FDA should determine whether the off-label use of the drug is appropriate for vulnerable patient populations.[109] This phase could be called the ranking stage, during which the drug would be ranked based on its positive use among vulnerable individuals. Here, the regulatory regime would consider the vulnerability of the patient, specifically taking into account their age (either very young or very old), pregnancy, and/or having cancer. During this phase, it might also be relevant to consider whether the off-label use of the drug is routinely prescribed to vulnerable individuals or is done so rarely.

Lastly, the FDA should publish a final evaluation of the drug that can be seen by patients and physicians. Here, the FDA and industry could work together to disseminate off-label drug usage promotional materials, containing an FDA evaluation score. This collaboration will likely have a positive impact on physician prescribing practices, encourage patient-centered care, and inform vulnerable individuals about their healthcare decisions.

CONCLUSION

Amarin and *Caronia* eroded the FDA's power to help vulnerable populations. Off-label pharmaceutical promotions have been granted too much protection under the First Amendment, and vulnerable individuals are left depending on drug manufacturers to self-regulate. While off-label use has a place, its potential harm to vulnerable populations typically outweighs its benefit. These populations would be helped by the very FDA regulations blocked by the commercial speech doctrine. But even with these obstacles, the FDA has the opportunity to imagine a fresh approach to off-label promotion that could still set up safeguards for vulnerable groups. Therefore, a regulatory regime centered around vulnerability may present a plausible solution to this complex regulatory issue.

[109] *See id.* at 37.