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# FOREWORD

Dear Reader,

As co-presidents of the Bates Law Society, it is our distinct honor to introduce you to the inaugural volume of the Bates Undergraduate Law Review, the first of its kind in the history of Bates College. This has been a labor of great love from our editorial team and authors, and it is deeply fulfilling to see our efforts bear fruit in this volume. We extend our thanks to the staff editors, managing editors, our faculty advisor, and above all, our contributing authors for their passion, dedication, and hard work in putting together this issue.

Volume I covers a wide variety of topics. From discussing the rhetoric behind limiting educators' ability to teach about LGBTQ+ issues to an exploration of religion in public schools, education and the limits of what can be said in the classroom feature prominently. An author delves into the deficiencies of American copyright and its effects on the fashion industry. One article compares viewpoints on how to interpret and apply the Fourteenth Amendment. Another applies legal philosophy to antebellum laws, and still another charts the complicated jurisprudence surrounding free speech online. In a nod to the Law Society's home state of Maine, one author discusses the state's measures to regulate campaign finance.

It is our sincere hope that this project should, like the Law Society that publishes it, become an institution in the College's academic life. If you are inspired to contribute to a future volume, please visit the Bates Law Society website (sites.google.com/bates.edu/bateslawsociety) for more information and to submit an article. With that, please enjoy Volume I of the Bates Undergraduate Law Review!

Sincerely,
Karan Kuppa-Apte
Avi Konduri
Co-Presidents, Bates College Law Society

The views expressed by contributing authors in this volume do not necessarily reflect those of the Bates College Undergraduate Law Review, its editorial team and faculty advisor, or the Bates College Law Society. All efforts have been made to guarantee the accuracy and totality of information within this volume.

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Nicholas Danko

## Introduction

Florida Governor Ron DeSantis signed House Bill 1557, formally known as “The Parental Rights in Education Act,” into law on March 28, 2022. The law, and its subsequent iterations, draw on a cultural and legislative anti-LGBTQ+ history which uses fundamentalist rhetoric to paint LGBTQ+ individuals as a corruptive force in primary and secondary schools. This note examines the history of anti-LGBTQ+ rhetoric in the United States as it relates to HB 1557, arguing that “Don’t Say Gay” laws are only a recent iteration of a complex historical attack on LGBTQ+ individuals, one grounded in biological and religious rhetoric, as well as evolving notions of domesticity among queer individuals. I begin by overviewing the emergence of the modern gay rights movement of the 1970s; its ideological roots situate LGBTQ+ citizens’ shift from a lens of “individual deficiency” to one of “institutional deficiency” leading to a new type of urban LGBTQ+ organization ready to challenge constraints, both codified and social. I also mention the movement’s detractors: the Save Our Children campaign of the 1970s and the AIDS epidemic, along with fundamental cases in establishing LGBTQ+ rights highlight a multivalenced path towards equality. In framing the discussion of “Don’t Say Gay” laws, I examine five types of anti-LGBTQ+ legislation employed in schools across the United States. I highlight common criticisms of HB 1557, using the documented damage it inflicts on LGBTQ+ teachers, children, and parents. I conclude by examining emerging policies from the second Trump administration and the future of legislation relating to LGBTQ+ individuals. Here, I connect the gay rights struggle to that of queer inclusion in educational curricula, as the position of gay-rights was often reflected in its inclusion or absence in schools.

**The Path to HB 1557: Queer Emergence and Conservative Retrenchment**

Modern LGBTQ+ struggles appear in the "baby boomer" generation. Indeed, the urbanization and social work environment of the mid-twentieth century fostered new connections between individuals. This new capitalist system based on the urban workforce impacted gender roles and family structures, destabilizing foundations of heterosexuality and living.[1] Research notes that as LGBTQ+ individuals moved towards urban centers such as Boston and Philadelphia, they established new social networks and communities. LGBTQ+ neighborhoods functioned threefold: first, they offered a 'safe space' where expressions of sexuality were less likely to be met with prejudiced; Second, they offered new social networks and enabled the creation of explicitly LGBTQ+ political and social groups; and third, they provided certain services that either catered to or were tolerant of sexual minorities.[2] The interconnectivity of metropolitanism allowed for a newly assembled LGBTQ+ community to organize in the later half of the twentieth century and fight inequality in criminal, legal, and social realms.[3] From a sociological perspective, gathering for LGBTQ+ individuals exemplifies minority coping in which a stigmatized group established self-enhancing structures and values in the face of stigma.[4] In the social workplace of the mid-twentieth century, the formerly private LGBTQ+ individual entered the public sphere for the first time, forcing an inevitable reconciliation of the dominant heterosexual population with individuals who deviate.

LGBTQ+ liveliness in the 1970s and 1980s is not surprising. In a sociological context, gay individuals changed their self-perception, from one of "individual deficiency" to

[1] Ralph R. Smith & Russel R. Windes, Progay/Antigay: The Rhetorical War Over Sexuality 9 (2000).
[2] Christian Wienke et al., Are 'Gay' and 'Queer-Friendly' Neighborhoods Healthy? Assessing How Areas with High Densities of Same-Sex Couples Impact the Mental Health of Sexual Minority and Majority Young Adults, in *Urban Book Series* 184 (2021).
[3] *Id*.
[4] *Id*. at 183.

"institutional deficiency." In the former, a victim of unjust social or economic conditions was seen as defective and needing to be individually adjusted.[5] In the latter, which represented the prevailing view of the 1980s, the causes of social inequality lie within the institutional structure itself. Scholars argue that by the 1970s, temporal and cultural contexts give rise to challenges on institutional structure, thereby viewing the development of the gay-rights movement in the framework of the ecological revolution, the civil-rights revolution, and the sexual revolution.[6] Virginia Brooks notes that if the end goal of gay individuals is cultural pluralism, they must first redefine themselves, create a positive group identity, and collectively mobilize efforts.[7] Urban queer individuals exemplify all of Brook's criteria. Once an individual is able to situate themselves within a greater community struggle, they are able to challenge the structures of power that oppress or dissuade them from action.[8] Hence, the LGBTQ+ individual of the 1970s and 1980s was newly urban, empowered by a shared community identity, and less likely to internalize discrimination, seeing it instead as an interconnected system of oppressive social, political, and economic institutions.

Pinpointing LGBTQ+ populations in the mid-twentieth century is difficult. A tendency to examine flashpoints such as the Stonewall Riots as indicative of "normal" urban LGBTQ+ life neglects the lived experiences of "normal" LGBTQ+ individuals.[9] Yet, accurately recording "normal" LGBTQ+ individuals in history is challenging. The United States Census has and continues to neglect including questions about sexual orientation and gender identity. The erasure of gay and lesbian couples often involved reassigning their responses as heterosexual

[5] Virginia Brooks, Minority Stress and Lesbian Women 4 (1981).
[6] *Id*.
[7] *Id*.
[8] *Id*. at 5.
[9] Michael Frisch, A Queer Reading of the United States Census, in *The Life and Afterlife of Gay Neighborhoods*: *Renaissance and Resurgence* 61 (Alex Bitterman & Daniel B. Hess ed., 1st ed. 1997).

ones.[10] As recently as 2010, the United States Census' definition of family required one or more people living in the same housing unit and to be related to the householder by "blood, marriage, and/or adoption."[11] Michael Frisch suggests that a "queer reading" of the Census reveals "structured silences" and illuminates neglected and forgotten queer communities in major metropolitan areas.[12] Court cases, however, provide reliable indicators of LGBTQ+ activity in the early years of their organization.

More significantly, LGBTQ+ individuals exited the private sphere and lived relatively more public lives for the first time. The erosion of the boundary between the public and private spheres marked an important shift in progay and antigay political advocacy.[13] Moreover, sexuality in the public realm allowed for critique in the public realm. *Gay Students Organization of University of New Hampshire v. Bonner* (1974) highlighted the increased visibility of gay and gay-adjacent advocacy groups. The suit filed in federal district court alleged that members of the Gay Students Organization (GSO) at the University of New Hampshire were denied their First and Fourteenth Amendment rights.[14] The federal court ruled that the GSO's members had been denied their First Amendment rights.[15] The majority opinion of District Judge Bownes noted student's increasing assertion of their constitutional rights.[16] This and other novel cases received increased media attention. Journalist Edward Alwood noted that the "coverage of gays and lesbians in major newspapers, magazines, and television networks had become frequent and practically routine."[17] The constitutionality of same-sex marriage remained unlikely, as shown in

[10] *Id*. at 62.
[11] *Id*. at 62
[12] *Id*. at 63.
[13] Wienke et al., *supra* note 2, at 2.
[14] Gay Students Org. of the Univ. of N.H. v. Bonner, 509 F.2d 652 (1st Cir. 1974).
[15] *Id*.
[16] Gay Students Org. of U. of New Hampshire v. Bonner 367 F. Supp. 1088, 1090 (W.D. Wash. 1973).
[17] Wienke et al., *supra* note 2, at 3.

*Baker v. Nelson* (1972), where a Minnesota Supreme Court ruled that a state law preventing same-sex marriage was not in violation of the U.S. Constitution.[18] Still, the emergence of an LGBTQ+ population able to fight for their constitutional rights is evident in the early history of the modern LGBTQ+ civil rights movement.

The institutionalization of Queer Studies in academia allowed for both regulation and control of sexuality and sexual excess within the discipline structures of the university.[19] Integration of Queer Studies programs into academia may be attributed to a recognition of an industrial-capitalist model of exploitation seeking to understand growing demographics.[20] In providing a snapshot for the focus of the field in the 1980s, Dennis Allen wrote that scholars need to be aware of the banner of diversity used to justify this area of study and recognize that it may be exploitative and not due to a desire to understand.[21] Much debate surrounded whether Queer Studies was an academic discipline at all as a plenary of the North American Lesbian, Gay, and Bisexual Studies Conference titled "Unified Field or Dysfunctional Family" in 1994 highlighted.[22] Indeed, many Queer Studies courses focused around marketing towards newly "out" queer individuals through marketing techniques in addition to studying their consumer trends.[23] In short, early teachers of Queer Studies note capitalism's effect on marketing towards queer individuals.[24]

On the other hand, the emergence of publicly gay individuals galvanized support for anti-LGBTQ+ rhetoric. The contrasting of a child's innocence with the corrupting potential of a homosexual served as a primary basis for resistance to LGBTQ+ individuals among

[18] Baker v. Nelson, 409 U.S. 810 (1972).
[19] Dennis Allen**,** Lesbian and Gay Studies: A Consumer's Guide, in *The Gay '90s: Disciplinary and Interdisciplinary Formations in Queer Studies* 37 (Thomas Foster et al. ed., 1st 1997).
[20] *Id*. at 39.
[21] *Id*. at 43.
[22] *Id*. at 51.
[23] *Id*. at 39-40.
[24] *Id*. at 37.

fundamentalist populations.[25] Central to counter arguments against LGBTQ+ rights were Christian concerns about familial structures, gender identities, and general attitudes regarding sexuality.[26] This opposition often centered around children in the realms of adoption and education. *National Gay Task Force v. Board of Education* (1978) challenged the idea that schools could fire teachers for identifying openly as gay, arguing that doing so infringed on the teachers' First Amendment rights.[27] The Supreme Court ruled the Oklahoma law unconstitutional.[28] This uncovers a fundamental basis for anti-LGBTQ+ proponents: that a teacher existing outside of heteronormativity inevitably risks the safety of children.

Florida occupies a unique position in the late twentieth century for LGBTQ+ rights. A public struggle for LGBTQ+ rights in the 1970s in Dade County launched a national campaign in which anti-LGBTQ+ protests used Christian ideas of family and childhood innocence to frame the "homosexual" as a molester. This harmful rhetoric heavily informed cases and laws in later decades such as *Lofton v. Secretary of the Department of Children & Family Services* (2004) and "The Parental Rights in Education Act." Rhetoric in Florida and *National Gay Task Force v. Board of Education* in Oklahoma underscores the disseminated narrative framing LGBTQ+ rights as harmful to the child.

In 1976, Bruce J. Winick, working with the American Civil Liberties Union and Professor of Law at the University of Miami, proposed an amendment to the Dade County Human Rights Ordinance to prohibit discrimination on the basis of sexual orientation.[29] Winick's argument centered on a penal law prohibiting "unnatural and lascivious" sexual conduct.[30]

[25] Gillian Frank, The Civil Rights of Parents: Race and Conservative Politics in Anita Bryant's Campaign against Gay Rights in 1970s Florida, 22 J. Hist. Sexuality 126, 140 (2013).
[26] Wienke et al., *supra* note 2, at 9.
[27] Nat'l Gay Task Force v. Bd. of Educ. of Okla. City, 729 F.2d 1270 (10th Cir. 1984).
[28] *Id*.
[29] Bruce J. Winick**,** The Dade County Human Rights Ordinance of 1977: Testimony Revisited in Commemoration of Its Twenty-Fifth Anniversary, 11 Tul. J.L. & Sexuality 1, 1 (2002).
[30] *Id*. at 2.

Winick argued that while the penal law could prohibit conduct, it could not, under the First Amendment, punish preferences.[31] A second psychosocial argument of Winick's, who specialized in mental health and psychology law,[32] held that continued subjugation under laws led gay individuals to live "subterranean" lives, endangering their mental health and emotional well-being; this, he argued, affected the larger community.[33] Winick's proposed amendment constitutes what he deemed as therapeutic jurisprudence: this legal philosophy seeks to examine and maximize the psychological well-being of others and reshape the law accordingly.[34] Statements from the National Institute of Mental Health Task Force on Homosexuality as well as the American Psychiatric Association (APA) were key to Winick's testimony before the Dade County Commission. They proposed a more egalitarian view of homosexuality.[35] In 1973, the APA noted in a statement that homosexuality implied no "impairment in judgement, stability, reliability, or general social or vocational capabilities."[36] The APA also supported the "enactment of civil rights legislation at the local, state, and federal levels that would offer homosexual citizens the same protections now guaranteed to others."[37] The National Institute of Mental Health Task Force on Homosexuality stated "Contrary to the frequently held notion that all homosexuals are alike, they are in fact very heterogeneous."[38] Science, then, saw the homosexual through its similarities to other Americans than through its differences.

While Winick sought to advance a more inclusive world for gay rights, his efforts quickly met resistance from a developing countermovement. Prominent singer and actress Anita Bryant

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[31] *Id*.
[32] Univ. of Miami, Bruce J. Winick, U. Miami Ethics Programs, https://ethics.miami.edu/about/people/in-memoriam/bruce-j-winick/index.html (last visited Mar. 22, 2025).
[33] Winick, *supra* note 29, at 3.
[34] *Id*.
[35] *Id*. at 7.
[36] *Id*.
[37] *Id*.
[38] *Id*.

associated with the *Save Our Children* (SOC) campaign against queer rights to protest the amended Dade County Human Rights Ordinance. Children, she argued, were at increased risk from homosexuals. Her motto: "homosexuals cannot reproduce – so they must recruit," justified, from her perspective, decreased rights and civil liberties for homosexuals.[39] The SOC movement echoes the same rhetoric as HB 1557, aiming to protect the civil rights of parents and save children from the alleged clutches of homosexuals.[40] Movements like the SOC functioned dually: reiterating fears of homosexuals hurting or "recruiting" and connecting them to modern solutions, namely, parental rights.

Bryant's campaign displays the mobilization of southern Christians, specifically Baptists, to position gay rights and parental rights as inherently antithetical. At a hearing on January 18, 1977 before the Board of Commissioners of Dade County Florida, Bryant lamented that the "state's support of gay civil rights infringed upon her status as a parent."[41] The campaign of the SOC was heavily racialized, using the same logic of familial rights that resisted desegregation in the previous decade.[42] Indeed, integrated busing practices suffered parental complaints on similar grounds. One mother at a hearing on busing used similar logic, stating, "We don't want to lose control of our children, and this is what happens when they are bused."[43] Gillian Frank writes, "by 1977 the connections between racial, sexual, and gender politics were sewn together in a widespread and bitter debate about the limits of civil rights."[44] The proposed Equal Rights Amendment (ERA), which guaranteed equal rights under the law regardless of sex, galvanized opposition to modern iterations of family structures and underscores the movement of traditional

[39] Katherine E. Foley**,** Florida queer K12 teachers perceptions of school climate under Florida queer K12 teachers perceptions of school climate under "don't say gay" 43 (2024.)
[40] *Id*.
[41] Frank, *supra* note 25*,* at 127.
[42] *Id*. at 128.
[43] *Id*. at 134.
[44] Id. at 135-136.

values in the 1970s within a national context. Phyllis Schlafly exemplifies the overlap between racial and sexual civil rights with the ERA, noting that the ERA would "interfere with the right of parents to have their children taught by teachers who respect the moral law."[45] Additionally, anti-ERA activists echoed decades-old rhetoric that the passage of the ERA would lead to increased sexual violence towards white women.[46] In her sociological study of lynching, *The Red Record* (1895), Ida B. Wells wrote that allegations of rape and sexual assault were consciously employed to justify a campaign of violence, terror, and a decreased status of living for Southern Blacks.[47] Reference to Wells' work here does not function to join the late twentieth century LGBTQ+ rights to the struggles of the recently emancipated African American in the late nineteenth century; rather, it displays that demonization and justified subjugation of minority populations often occur by positioning them against women and children. Frank writes that "'force,' ever present in antibusing rhetoric and evoking powerful fears of black men as rapists, became equated with the rape of children in antigay rhetoric."[48]Accordingly, anti-ERA discourse appealed to antimiscegenation and anti-integration ideas.[49] Indeed, Frank argues that the foundation of the SOC's membership was white women who led active church lives and stressed their role as parents.[50] Included in the resistance against the SOC campaign were gay and lesbian communities, which organized nationally and on large scales, raising hundreds of thousands of dollars through community events to advertise against the SOC and to uphold their rights in the Dade County Human Rights Ordinance.[51] The vote struck down the progressive Amendment

[45] Id. at 137.
[46] Id. at 138.
[47] Ida B. Wells, The Red Record: Tabulated Statistics and Alleged Causes of Lynching in the United States 45 (1895).
[48] Frank, *supra* note 25, 144.
[49] *Id*. at 138.
[50] *Id*. at 142.
[51] *Id*. at 156.

with Frank arguing that the "dubious opposition…continues to allow many voters to see sexual rights as antithetical to their own best interests and those of their families."[52]

It is essential to highlight the AIDS epidemic of the 1980s and 90s and its effect on the perceptions of gay men as some conservative groups interpreted it as showing perversion and biological differences from heterosexual counterparts.[53] A CDC study on HIV and AIDS in 2001 noted that "Among Americans who reported knowing a gay person, more than one in five (21%) said they had become less comfortable around that person since learning about AIDS."[54] Other polls showed similar discriminatory attitudes with one noting that in 1987 and 1988, between 43% and 44% of Americans believed that AIDS might be God's punishment for immoral sexual behavior.[55] These statistics reflect how the AIDS epidemic devastated the gay community physically and reputationally. In addition, it entrenched harmful stereotypes that provided fuel for fundamentalist populations to justify campaigns against gay and LGBTQ+ rights.

The following decades witnessed a complex interplay between the growing visibility of LGBTQ+ individuals and ongoing oppression.The Defense of Marriage Act (1996), limited marriage to a union between a man and a woman,[56] despite criticism that it was a misuse of Article IV, Section 2 of the United States Constitution, "Full Faith and Credit," which notes that states must respect and enforce each other's laws and judicial decisions.[57] *Lofton v. Secretary of the Department of Children & Family Services* (1994) upheld a Florida ban on same-sex individuals adopting children, despite concerns of a denial of due process.[58] The court held that

[52] *Id*. at 160.
[53] Justin McCarthy, *Gallup Vault: Fear and Anxiety During the 1980s AIDS Crisis*, Gallup (June 28, 2019), https://news.gallup.com/vault/259643/gallup-vault-fear-anxiety-during-1980s-aids-crisis.aspx.
[54] *Id*.
[55] *Id*.
[56] Defense of Marriage Act, Pub. L. No. 104-199, 110 Stat. 2419 (1996).
[57] Robert P. George & David L. Tubbs, The Defense of Marriage Act (DOMA): Its Impact on Those Seeking Same-Sex Marriages, 48 Loy. L. Rev. 1, 1 (2002).
[58] Lofton v. Sec'y of the Dep't of Child. & Fam. Servs., 358 F.3d 804 (11th Cir. 2004).

Florida's blanket ban on gay adoption was constitutional because "there are plausible…reasons for the disparate treatment of homosexuals and heterosexual singles."[59] While the constitutionality of LGBTQ+ civil rights raised questions about the limits of Fourteenth Amendment's due process clause, LGBTQ+ individuals saw significant victories. The verdict of *Lawrence v. Texas* (2003) held that Texas state laws criminalizing sodomy were unconstitutional. The Supreme Court of the United States, in a six to three decision, invalidated all sodomy laws across the United States, making consensual same-sex sexual activity legal in every State and United States territory.[60] Before *Lawrence v. Texas* sodomy was punishable by fines, a life prison sentence, or a combination of both.[61] The decision here too relied on the substantive due process clause of the Fourteenth Amendment, making it both a vehicle for liberation amongst gay individuals and a justification for oppression depending on the case.[62] In addition, the Supreme Court stated that moral disapproval did not provide an appropriate justification for Texas's law criminalizing sodomy and that individuals were entitled to respect in their private lives.[63] The majority opinion in this case, written by Justice Kennedy, overturned the previous ruling of the Supreme Court precedent on the same issue in *Bowers v. Hardwick* (1986), where it upheld a Georgia statute criminalizing sodomy, and did not find a constitutional protection of sexual privacy.[64] At this point LGBTQ+ rights were pronounced and accepted enough to obtain private protection even amongst disapproval in the more public realm of marriage. At the base of opposition to the Fourteenth Amendments' inclusion of gay individuals were the "conservative

[59] Christopher D. Jozwiak, Lofton v. Secretary of the Department of Children & Family Services: Florida's Gay Adoption Ban under Irrational Equal Protection Analysis, 23 Law & Ineq. 407, 409 (2005).
[60] Lawrence v. Texas, 539 U.S. 558 (2003).
[61] Lawrence v. Texas, Legal Info. Inst., Cornell L. Sch., https://www.law.cornell.edu/wex/lawrence_v._texas (last visited Mar. 15, 2025).
[62] *Id*.
[63] *Id*.
[64] Bowers v. Hardwick, 478 U.S. 186 (1986).

family values and patriarchal heterosexual marriage…vigorously promoted by influential right-wing social movements and more deeply institutionalized through important public policy initiatives and court decisions."[65] Yet, LGBTQ+ civil rights often prevailed in the 1990s and 2000s due to continued organization.

Other forms of oppression, often extra-legal and hidden, consisted of racialized and gendered profiling by law enforcement. For example, those charged in Louisiana under Crimes Against Nature (CAN) laws for the solicitation of prostitution were required to register as sex offenders for fifteen years while others changed under similar state laws were not required to register.[66] Andrea Ritchie of the Urban Justice Center discovered that those who changed under the CAN law were by and large gay, men of color, and transgender women.[67] Indeed, the narrow definition of sodomy and prostitution laws cultivated a culture in which "many [were] arrested simply for being present in LGBT[QIA+] bars or other LGBT[QIA+] institutions, or for consensual expressions of [queer] sexual interest and affection"[68] Additionally, Queer rights were often framed as a violation to religious freedom. In 2015, Mike Pence, then Indiana governor, passed the Religious Freedom Restoration Act, which "effectively condemn[ed] discrimination based on an individual's religious beliefs."[69] While Indiana has provisions that protect sex and race, it does not offer the same protections to gay individuals.[70] Moreover, a business owner in Indiana may deny a customer due to their sexual orientation because of their religious beliefs.[71] Yet, using religious beliefs to justify not serving a customer on racial grounds is prohibited.[72]

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[65] Brenda Cossman, The Politicization of Marriage in Contemporary American Public Policy: The Defense of Marriage Act and the Personal Responsibility Act, 5 Citizenship Stud. 203, 203 (2001).
[66] Carrie L. Buist and Emily Lenning, Queer Criminology: New Directions in Critical Criminology 29-30 (2016).
[67] *Id*.
[68] Taylor Masamitsu, Florida's House Bill 1557: How We Got Here, 50 Am. Educ. Hist. J. 47, 47 (2023).
[69] Buist, *supra* at note 66, at 31.
[70] *Id*.
[71] *Id*.
[72] *Id*.

Some argue that a lack of protections in states such as Indiana and Florida create a "State-supported closet" in which individuals are afraid to acknowledge their identity for fear of a lower social status and legal protections.[73]

In this section, I have roughly sketched out a relevant history that situates the following discussion of HB 1557 and other "Don't Say Gay" laws in a larger context. The urban LGBTQ+ communities of the "baby boomer generation" created new social networks in major metropolitan areas such as New York City and Boston. These communities allowed for LGBTQ+ individuals to organize collectively against social inequality and inevitably be catapulted into public discourse.

Queer Studies as an academic discipline developed respectability. Whether these studies emerged to understand queer individuals or capitalize on the marketability of identity is uncertain. For whatever reason, queer individuals continued to enter the public realm. Their detractors were equally fervent. The SOC movement positioned Florida as a battleground state for gay rights and highlighted resistance among religious fundamentalists. With the decimating AIDS epidemic still fresh in the minds of Americans the queer individual entered the twenty-first century bruised, yet confident in their ability to fight for integration. Still, hidden and racialized forms of oppression targeted queer individuals and people of color. Of greater importance to this note: the rights of LGBTQ+ individuals experienced a multivalenced history in which their rights and parental and religious rights were positioned as mutually exclusive. This sets the framework for the rhetorical and ideological environment where "Don't Say Gay" laws would come to be known and contested.

[73] *Id*. at 32.

**The Legal, Emotional, and Political Impacts of 'Don't Say Gay' Legislation**

Some consider Republican Glenn Youngkin's victory in Virginia's 2021 gubernatorial election as the beginning of a new wave of anti-LGBTQ+ sentiments.[74] Youngkin's campaign centered parental rights in children's education on race and same-sex individuals.[75] His victory highlighted a new GOP tactic of appealing to suburban voters by addressing parental control of schools.[76] Soon after Youngkin's victory, other Republican politicians and strategists planned to use similar campaign tactics in elections on all levels.[77] Youngkin's campaign addressed real concerns of parents. One study noted that 48% of parents said that they should be able to opt their children out of learning about sexual orientation and gender and 33% said that parents should not have these rights.[78] Political analysts argue that the outrage to conservative values garners headlines, which results in clickbait, which according to filmmaker Andrew Stanton, "taps deep into our emotional cores to increase loyalty to our own tribe while escalating animosity of the other side."[79] However, as previously noted, questions regarding parent's control over their children's exposure to social topics such as race, gender, and sexuality, has lived on in Florida and across the United States since the 1970s, exemplified by Anita Bryant's SOC campaign.

Modern anti-gay curriculum laws fall roughly under five categories. "No promo homo" laws prevent the promotion of homosexuality.[80] These laws are perhaps the oldest, and rely on

[74] Romer Has It, 136 Harv. L. R. 1936. 1936 (2023).
[75] *Id*.
[76] Hannah Natanson, *Parental Say in Schools, Resonant in Va. Governor's Race, Bound for GOP National Playbook*, Wash. Post (Nov. 3, 2021), https://www.washingtonpost.com/local/education/parental-say-in-schools-resonant-in-va-governors-race-bound-for-gop-national-playbook/2021/11/03/5f3a5e58-3c9e-11ec-a493-51b0252dea0c_story.html.
[77] *Id*.
[78] *Id.*
[79] Andrew Stanton, *Can GOP's Culture War Gamble Help it Win in 2024?*, Newsweek (Jan. 26, 2023), https://www.newsweek.com/can-gops-culture-war-gamble-help-it-win-2024-1775914.
[80] Clifford Rosky, Anti-Gay Curriculum Laws, 117 Colum. L. Rev. 1461 (2017).

the idea that queer ideas spread through "subtler dynamics of indoctrination, role modeling, and public approval."[81] For example, Arizona law prohibits "instruction which…(1) promotes a homosexual life-style…(2) portrays homosexuality as a positive alternative life-style…(3) suggests that some methods of sex are safe methods of homosexual sex."[82] 'Anti-Homo' laws require that teachers portray homosexuality as unacceptable and a primary cause of sexually transmitted diseases.[83] "Promo Hetero" laws call for the promotion of the benefits of a monogamous heterosexual marriage and abstinence.[84] Abstinence until marriage is another category promoted, and follows much of the same frameworks as the previously noted categories. Finally, "Don't Say Gay" laws are defined as those which prevent educators from talking about relationships other than heterosexual ones. South Carolina decreed that health education programs "may not include a discussion of alternate sexual lifestyles from heterosexual relationships including, but not limited to, homosexual relationships except in the context of instruction concerning sexually transmitted diseases."[85] In recent years, the number of anti-LGBTQ+ curriculum laws have increased from 41 bills in 2018 to 238 bills in less than three months of 2022.[86] As it will be examined later, sections of HB 1557 fall into multiple categories, underscoring that the distinctions between categories are often faint and laws are a combination of multiple categories of anti-LGBTQ+ legislation.

"The Parental Rights in Education Act" or HB 1557 emphasizes parents' authority to make decisions regarding the education of their children, and expands on notification procedures

[81] *Id*.
[82] GLSEN**,** *Laws that Prohibit the 'Promotion of Homosexuality': Impacts and Implications* (2018), https://www.glsen.org/research/laws-prohibit-promotion-homosexuality-impacts-and-implications.
[83] AZ Rev. Stat. § 15-716(c) (2014).
[84] GLSEN, *supra* note 80.
[85] SC Code § 59-32-30 (2024).
[86] Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC News (Mar. 20, 2022), https://www.nbcnews.com/news/us-news/nearly-240-anti-lgbtq-bills-filed-2022-far-most-target-trans-people-rcna20418.

for parents.[87] Additionally, it states that "classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3."[88] HB 1069 extends these prohibitions, "prohibiting classroom instruction on sexual orientation or gender identity from occurring in prekindergarten through grade 8."[89] In addition to expanding other gender and sexuality related prohibitions from grades nine through twelve, HB 1069 includes "teaching the benefits of monogamous heterosexual marriage."[90] These laws together make up a majority of Florida's "Don't Say Gay" laws. Analysis of these laws takes two routes: the emotional impact on vulnerable populations and the constitutionality of the laws themselves.

Scholars arguing against HB 1557 and HB 1069 say that these laws damage the emotional wellbeing of LGBTQ+ teachers, families, and children. Moreover, scholars note that increased LGBTQ+ visibility has little to no effect on heterosexual individuals. Katherine Foley argues in her dissertation that "Florida queer K-12 teachers' perceptions of school climate under 'don't say gay,' [are] used against them [homosexuals] to promote a narrative of sexual abuse because of their identity."[91] A study of several focus groups by Foley revealed that transgender and non-binary teachers have less support from the school community than other queer teachers, leading them to view their workplace as unsafe.[92] Queer teachers noted that they felt afraid to discuss their personal life in the classroom to relate to students. LGBTQ+ teachers suggested support from their administration was a key determining factor in the perceived safety of their job and workplace.[93] In addition, the focus group also suggested that LGBTQ+ teachers in

[87] Fla. Stat. § 1001.42(8)(c)(3) (2023).
[88] *Id*. at §1(c)1.
[89] CS/CS/HB 1069, § 2, 2023 Leg., Reg. Sess. (Fla. 2023).
[90] *Id*.
[91] Foley, *supra* note, at 42.
[92] *Id*. at 137.
[93] *Id*. at 144.

Florida often feel like they have to hide their identities in the classroom.[94] Another group affected by the legislation is LGBTQ+ parents. The laws focus on the rights of heteronormative parents rather than the rights of every parent. Queer parents worry that the "Don't Say Gay" laws will make it difficult for their students to speak about their families in the classroom.[95] A study by Abbie Goldberg and Randi Garcia noted that "Parents who reported more negative school climate[s] reported more child victimization. Children with higher levels of parent-reported victimization had higher levels of parent-reported internalizing and externalizing symptoms."[96] Finally, scholars worry that legislation like HB 1557 will deepen discrimination in schools for LGBTQ+ children. According to GLSEN's "School Climate for LGBTQ+ Students in Florida," "Only 31% of LGBTQ+ students reported that their school administration was somewhat or very supportive of LGBTQ+ students."[97] Only 9% of LGBTQ+ students attended schools that included specific sections in their anti-bully policies that protect students based on sexual orientation and gender identity.[98] Only 7% had guidelines to support transgender and nonbinary students.[99] Proponents of the laws offer that education surrounding gender expression and sexuality creates an adverse environment for heterosexual youth. While gathering information to research the validity of this claim is difficult, one study of homosexual neighborhoods noted that no association was observed between the proportion of same-sex couples in a neighborhood and mental health outcomes for heterosexual young adults.[100]

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[94] *Id*. at 145.
[95] *Id*. at 141.
[96] Abbie E. Goldberg & Randi L. Garcia, Community Characteristics, Victimization, and Psychological Adjustment Among School-Aged Adopted Children With Lesbian, Gay, and Heterosexual Parents, 11 Frontiers in Psychol. 372, 372 (2020).
[97] GLSEN, *School Climate for LGBTQ+ Students in Florida* 3 (2019), https://www.glsen.org/sites/default/files/2021-01/Florida-Snapshot-2019.pdf.
[98] *Id*.
[99] *Id*. at 7.
[100] Wienke et al., *supra* note 2, at 195.

Florida Governor Ron DeSantis said that the state should "make sure that parents can send their kids to school to get an education, not an indoctrination."[101] However, legal scholars note that restricting information about queer individuals raises First Amendment questions about whether it limits access to speech that is essential to kids' sense of self and development.[102] One note writes that HB 1557 focused on outlining parental rights and "only glancingly mentioned minors' privacy rights."[103] The fear amongst educators is real and sustained. Members of the Orange county Classroom Teachers Association alleged that educators were warned not to wear rainbow clothing and to remove any pictures of their same-sex spouses from their desks.[104] Another provision of contention requires school staff to notify parents about "critical decisions affecting a student's mental, emotional, or physical health or well-being," which is interpreted by some as a deliberate outing of gay or trans students.[105] Furthermore, some argue that laws like HB 1557 and HB 1069 amount to governmental overreach into the private sphere of children's lives by mandating state-imposed morals in schools.[106]

Caroline Lester in "Say Gay: Why H.B. 1557 is an Unconstitutional Infringement on Minors' First Amendment Right to Receive Information" (2023) cites *Tinker v. Des Moines Independent Community School District* (1969). In the landmark case, the Supreme Court stated that students do not lose their First Amendment Rights upon entrance to school, unless it causes a "substantial disruption."[107] Cases following *Tinker*, such as *Bethel School District No. 403 v. Fraser* found that schools could discipline students for sexually explicit speech made during a

[101] Caroline Lester, Say Gay: Why H.B. 1557 is an Unconstitutional Infringement on Minors' First Amendment Right to Receive Information, 25 Geo. J. Gender & L. 142, 143 (2023).
[102] *Id*. at 162-163.
[103] *Id*.
[104] *Id*. at 144.
[105] *As Florida's 'Don't Say Gay' Law Takes Effect, Schools Roll Out LGBTQ Restrictions*, Yahoo News, https://www.yahoo.com/news/floridas-dont-gay-law-takes-171858778.html.
[106] Lester, *supra* note 99, at 146.
[107] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969).

school assembly.[108] Chief Justice Burger held "that the First Amendment does not prohibit school officials from punishing 'vulgar and lewd speech' that undermines 'the school's basic educational mission.'"[109] The Court of Appeals for the Ninth Circuit warned of giving school districts total control over determining discourse, arguing that it would "increase the risk of cementing white, middle-class standards for … proper speech and behavior in public schools."[110] As stated by Florida Community Innovation, tying LGBTQ+ visibility in schools to fundamental rights and educational equity helps undermine the legal basis for the censoring of LGBTQ+ topics.[111]

Unlike the Dade County Human Rights Ordinance of 1977, public and celebrity reaction to HB 1557 centered on its drawbacks. Former President Joe Biden responded to the bill in an unvarnished statement on X, writing that he wanted "every member of the LGBTQI+ community — especially the kids who will be impacted by this hateful bill — to know that you are loved and accepted just as you are."[112] A formal statement from the White House read, "Today, conservative politicians in Florida rejected those basic values by advancing legislation that is designed to target and attack the kids who need support the most — LGBTQI+ students, who are already vulnerable to bullying and violence just for being themselves."[113] In another statement, the National Institutes of Health (NIH) wrote that "Laws like Florida's HB 1557 emphasize the need for methodological approaches that emphasize collaborative engagement between

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[108] Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675 (1986).
[109] Lester, *supra* note 102, at 96.
[110] Id. at 93.
[111] Julian Baro, Kiersten Comer, Kyla Freeman & Nakia Robinson, *Florida Resource Map: A Deep Dive into the Effects of The Parental Rights in Education Act on LGBTQ+ Communities* 24 (2024), https://floridainnovation.org/wp-content/uploads/2024/05/Florida-Resource-Map_-A-Deep-Dive-into-the-Effects-of-The-Parental-Rights-in-Education-Act-on-LGBTQ-Communities.docx.pdf.
[112] Jo Yurcaba, *White House Condemns Florida's 'Don't Say Gay' Bill*, NBC News (Feb. 8, 2022, 7:58 PM), https://www.nbcnews.com/nbc-out/out-politics-and-policy/white-house-condemns-floridas-dont-say-gay-bill-rcna15585.
[113] *Id.*

researchers and community members."[114] On an episode of "Watch What Happens Live," Andy Cohen stated that Florida Republicans are "pretending to solve a problem that doesn't exist"[115] in reference to the indoctrination of young children by teachers. In addition, the popular television host criticized a tweet by Christina Pushaw, DeSantis's press secretary. Pushaw wrote, "If you're against the Anti-Grooming Bill, you are probably a groomer."[116] Speech like this others those who oppose the bill. Additionally, by calling HB 1557 and Anti-Grooming bill Pushaw reiterates historically damaging and villainizing rhetoric. This explicit association of LGBTQ+ topics with groomers highlights HB 1557's attachment to decades-old arguments that are harmful to LGBTQ+ individuals.

To claim that all parents who object to an LGBTQ+-inclusive curriculum base their opinions on hateful rhetoric only acknowledges the most extreme, yet powerful, perspectives. Research shows that a majority of Americans do not believe that young kids should have access to LGBTQ+ themes in a classroom setting.[117] Additionally, one study shows that cultural diversity in curricula increases engagement amongst low-engaged students: "the causal effects of an ethnic studies curriculum [show] … increased ninth-grade attendance by 21 percentage points, GPA by 1.4 grade points, and credits earned by 23."[118]

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[114] Nolan S. Kline et al., Responding to 'Don't Say Gay' Laws in the US: Research Priorities and Considerations for Health Equity, 19 Sexuality Res. & Soc. Pol'y 1397 (2022).
[115] Season 20, episode 39, *Watch What Happens Live with Andy Cohen* (March 9, 2022).
[116] Danielle J. Brown, *'The Culture War of All Culture Wars'; HB 1557 Continues to Draw in Protesters*, Fla. Phoenix (Mar. 7, 2022), https://floridaphoenix.com/briefs/the-culture-war-of-all-culture-wars-hb-1557-continues-to-draw-in-protesters/.
[117] Andre Perry & Michael Nettles, *Opinion: Most Americans Don't Believe Young Kids Should Read or Learn LGBTQ Themes*, Hechinger Rep. (July 27, 2023), https://hechingerreport.org/opinion-most-americans-dont-believe-young-kids-should-read-or-learn-lgbtq-themes/.
[118] Joel Breakstone et al., *From Professional Development to Instructional Practice: Educators and the Challenge of Implementing the Common Core*, 54 Am. Educ. Res. J. 311 (2017).

Only 50% of Democrats and 10% of Republicans agree that LGBTQ+ topics should be covered in elementary school curricula.[119] It is not coincidental that HB 1557 was approved by Governor DeSantis first, and HB 1069 second; the former was far less controversial than the latter. One USC study claimed that "Democrats were much more likely to favor teachers when it comes to influence over what is taught. Almost 30% of Democrats said teachers should have the most influence, double the rate of Republicans."[120] Another study noted that Americans "overwhelmingly" want high school to be a place where students learn about multiple perspectives of controversial topics and have access to books on those topics.[121] One survey found that Americans also opposed topics as bland as economic concepts in elementary school education.[122] Hence, parents note reservations against their children learning multiple topics, not just LGBTQ+ ones. Thus, the debate over inclusion into curriculum takes two different paths: one of elementary aged-children and another of children in secondary schools. Amongst the latter category, research and peer-groups show that LGBTQ+ clubs within schools as well as extra-curricular support groups may be effective in the states such as Florida.[123] Some states move opposite to Florida in their legislation. For example, Nevada and six other states require schools to teach history and science curricula that are inclusive of LGBTQ+ people and identities.[124]

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[119] Perry and Nettles, *supra* note 116.
[120] Laura Meckler & Scott Clement, *Most Americans Support Teaching About Racism, but Not on Sexual Orientation, Poll Finds*, Wash. Post (Oct. 12, 2022), https://www.washingtonpost.com/education/2022/10/12/poll-teaching-lgbtq-crt-books/.
[121] *Id.*
[122] Perry and Nettles, *supra* note 116.
[123] Nate Spicer, *Student Voice: Middle Schooler Says LGBTQ Clubs in Schools for Queer Students Are a Lifeline*, Hechinger Rep. (June 1, 2023), https://hechingerreport.org/student-voice-middle-schooler-says-lgbtq-clubs-in-schools-for-queer-students-are-a-lifeline/.
[124] Tiffani Velez, *Six States Have Now Passed LGBTQ-Inclusive Curriculum Legislation—Each with a Different Definition of Inclusion*, New America (July 15, 2019), https://www.newamerica.org/education-policy/edcentral/six-states-have-now-passed-lgbtq-inclusive-curriculum-legislationeach-with-a-different-definition-of-inclusion/.

In HB 1557 and HB 1069 the rights of parents are centered against the inclusion of queer material into curricula in primary and secondary schools. This traces back several decades as noted in a previous section, yet the most recent iteration is tied to Glenn Youngkin's 2021 gubernatorial win. His victory reiterated to GOP members that parental rights were a powerful rallying-cry for voters. Following a significant increase in bills targeting LGBTQ+ individuals, HB 1557 falls in between several categories of Anti-LGBTQ+ curriculum laws such as "Don't Say Gay" and "Promo Hetero" categories.

This section examines numerous studies that display adverse effects of these bills on LGBTQ+ students, teachers, and parents. In the legal realm, critics argue that HB 1557 and HB 1069 infringe on students' First Amendment rights to receive information as shown through *Tinker v. Des Moines Independent Community School District* (1969). Some detractors of these bills argue that while the laws do not directly harm LGBTQ+ individuals, they cause students to suppress their identity, which may lead to negative mental health outcomes. Public and celebrity backlash against the bills was swift and largely unanimous with former President Joe Biden along with media personalities criticizing the laws as harmful and unnecessary.

I am careful here to note that not all parental endorsements of these bills stem from hateful rhetoric and ideas, with an estimated majority of American parents citing concerns about the appropriateness of sexuality to children in primary schools. With regards to secondary schools, parental views on LGBTQ+ topics are more clearly drawn across partisan lines. Research shows that culturally relevant pedagogy may boost academic engagement for "at risk" students. Furthermore, while Florida narrows its perspective of education, states such as Nevade and California require LGBTQ+-inclusive themes in history and science classes, showing state-level divergence on educational policy. In short, HB 1557 and HB 1069 reflect a larger

tension between what values are reflected in education. The debate splits across grade-level lines and contributes to an environment of fear amongst LGBTQ+ students, teachers, and parents, while having unconfirmed effects on each of the categories' heterosexual counterparts.

**Recent Developments**

Since the passage of HB 1557 and HB 1069, Tennessee, Texas, and Oklahoma have introduced similar bills into conversation. Tennessee proposed a prohibition on "discussing sexual orientation and gender identity in primary school."[125] Similar laws in Texas and Oklahoma were proposed in 2023 and 2024 respectively. In *Equality Florida v. Florida State Board of Education* (2022), civil rights attorneys and educators pushed back against HB 1557 and similar Florida laws leading to a decision that allows students and teachers to discuss sexual orientation and gender identity so long as it is not part of instruction.[126] Much of the educators' arguments centered around their rights to due process, equal protection under the law, and First Amendment rights.[127] As of March 2025, HB 1557 and HB 1069, still stand, but so do their detractors. One article noted that as of 2024, "The success in beating back some of the most harmful bills is due to a confluence of factors that include the growing grassroots movement, Governor DeSantis's changing political fortunes, and the weakening of Moms for Liberty and other allied groups."[128]

President Trump's executive action, "Ending Radical And Wasteful Government DEI Programs And Preferencing" (2025), is indicative of the President's stance on diversity and loosely in support of HB 1557 and HB 1069. Trump's restructuring of the Department of

[125] HRC Staff, *BREAKING: Tennessee Senate Passes Bill to Codify Discrimination Against LGBTQ+ People Into Law*, Human Rights Campaign (Mar. 13, 2023), https://www.hrc.org.
[126] Alexandra Martinez**,** *Civil Rights Attorneys Win Settlement in 'Don't Say Gay'*, Prism (Mar. 14, 2024), https://prismreports.org/2024/03/14/civil-rights-win-settlement-dont-say-gay/.
[127] M.A. v. Fla. State Bd. of Educ., No. 4:22-cv-00134-AW-MJF (N.D. Fla. filed Mar. 31, 2022).
[128] PEN Am., *Cracks in the Facade: The New Wave of Anti-LGBTQ+ Laws and the Threat to Free Expression* (2023), https://pen.org/report/cracks-in-the-facade/.

Education (DoE) along with his previously mentioned stance on DEI puts civil liberties in danger.[129] The DoE workforce is responsible for "enforcing civil rights laws in schools, supplying student loans and grants and tracking student achievement."[130] Indeed, the previous month saw a significant reduction of $600 million in federal grant funding to training programs which were characterized as "supporting divisive ideologies."[131] Florida Community Innovation (FCI) suggests that while HB 1557 remains in effect for the foreseeable future, students, parents, and educators should expand LGBTQ+ resources through partnerships with community-based organizations.[132] These resources, FCI argues, are crucial to fostering a sense of community and resonance within a broader struggle towards equality inside and outside of classrooms.

**Conclusion**

The future for LGBTQ+ curriculums and rights remains caught in tension between anachronistic values and progressiveness. Insistence on community-building, like that which allowed LGBTQ+ individuals of the sixties and seventies to leap forward into the public realm, will prove an effective way of combating laws like HB 1557 and HB 1069. While LGBTQ+ individuals emerge publicly in schools and the labor-force, the continued goal of these individuals remains the same: incorporation into the American identity. Jurisprudence seeks only to insist that LGBTQ+ individuals be incorporated into our powerfully diverse nation through

[129] Paige Fernandez, *Trump's Attack on the Department of Education, Explained*, ACLU (Oct. 7, 2020), https://www.aclu.org/news/racial-justice/trumps-attack-on-the-department-of-education-explained.
[130] Laura Meckler**,** *What Trump's Cuts to the Department of Education Mean for Schools and Students*, NPR (Mar. 12, 2025), https://www.npr.org/2025/03/12/nx-s1-5325731/what-trumps-cuts-to-the-department-of-education-mean-for-schools-and-students.
[131] Annie Ma, *Trump Slashed Teacher Training, Citing DEI. Educators Say the Grants Fought Staff Shortages*, Associated Press (Mar. 12, 2025), https://apnews.com/article/trump-education-department-teacher-training-doge-34f1a56f7394ee3343412e6a96b635c7.
[132] Julian Baro et al., *Florida Resource Map: A Deep Dive into the Effects of The Parental Rights in Education Act on LGBTQ+ Communities* 2 (2024). https://floridainnovation.org/wp-content/uploads/2024/05/Florida-Resource-Map_-A-Deep-Dive-into-the-Effects-of-The-Parental-Rights-in-Education-Act-on-LGBTQ-Communities.docx.pdf.

codification, yet cultural pluralism exists only as much as a disadvantaged group melds into the general consensus. This melding must not strip the uniqueness of the minority group in the process of incorporation, but must open the hegemonic structure to include their identity.

What I have sketched in this note is a dynamic rhetorical history that puts the LGBTQ+ individual in a socio-political context. In the 1970s, the Anita Bryant-led *Save Our Child* campaign othered the LGBTQ+ individual to America by pitting LGBTQ+ rights and child safety against each other. The AIDS epidemic of the 1980s and 90s provided a seemingly biological basis for othering. Yet, conceptions of family and the rights of LGBTQ+ individuals expanded too; *Lawrence v. Texas* held that same-sex couples engaged in sexual activity were entitled substantive due process under the Fourteenth Amendment. *Lofton v. Secretary of the Department of Children & Family Services* decided that LGBTQ+ individuals in some regions would never be American, or more specifically, parents of adoptees. If one chooses to view the LGBTQ+ community as one which needs to move towards being American, we fail, because we assume the American identity is static. Hence, LGBTQ+ struggles in the twenty-first century must be viewed as something that primes the elasticity of the American identity through legal and social change.

I hope to convey that HB 1557 is not an isolated bit of legislation; rather, it is a recent iteration of anti-LGBTQ+ rhetoric dating back to at least to the 1970s. This rhetoric pits LGBTQ+ individuals against children's innocence. Opponents of an LGBTQ+-inclusive curriculum weaponize parental rights and echo earlier claims that justify censorship and discrimination. This debate centered tension between freedom of speech and information and morality-based regulation, ignoring the fact that LGBTQ+ individuals themselves only recently became the full beneficiaries of their First and Fourteenth Amendment rights. While its roots

draw on religious fundamentalism, parental reservations about LGBTQ+ inclusion in the curriculum also center on mundane anxieties surrounding the inherent sexualization of LGBTQ+ individuals. Noted here are the emotional impacts of anti-LGBTQ+/LGBTQ+-absent curricula in schools to LGBTQ+ families, teachers, and students. Detractors to legislation such as HB 1557 claim that it violates students' First Amendment rights to access information. Surveying public opinion shows that while support for LGBTQ+-inclusive education in secondary schools is less controversial, resistance towards elementary school curriculums remains.

Further understanding necessitates a sociological lens to examine why homosexuality is inappropriate for children. In stipulating, I would argue that the emergence of the LGBTQ+ individuals into public life made their sexuality identity less separable from other aspects of their life. As previously noted, the National Institute of Mental Health Task Force on Homosexuality recognized the heterogeneity of the foreign ‘homosexual,’ revolutionizing common conception. Yet, whether LGBTQ+ individuals are separate from their sexuality in the eyes of the majority of Americans remains uncertain. Thus, one can not acknowledge an LGBTQ+ individual without their identity being a large part of the discussion.

There are several parallels drawn in this note between African Americans and LGBTQ+ individuals. Whether in the southern busing debate or recent polls comparing the willingness of parents to opt their children into LGBTQ+ topics to lessons on slavery, both groups are often compared. Before furthering comparisons, I would note their unique histories and continuing trajectories in modern society. Both African American and LGBTQ+ individuals come from unique roots, but the treatment and othering of both groups during certain periods allows for easy comparison. I would compare the lack of white heteronormative magnanimity towards African

American individuals to those aimed at LGBTQ+ individuals during the 1970s. The SOC campaigned against two struggles: LGBTQ+ equality and integrated busing.

Legislation often reflects or defines the status of the LGBTQ+ individual. Public perception has been shown to move in the direction of legislation over time. With regards to gay marriage, a Pew Research Center survey conducted in March 2016 found that 55% of Americans were in favor of same-sex marriage, while 37% were opposed.[133] A Gallup poll in May 2022 found that 71% of Americans were supporters of same-sex marriage.[134] This is to say that among the work to be done against the rhetoric of a portion of the majority, the LGBTQ+ community itself must define its own agency and agenda in the twenty-first century. The LGBTQ+ community, in responding to the growing power of its own community, must balance a distinctive and explicitly proud LGBTQ+ culture with integration into the American identity. If the former fails to mesh with the latter, LGBTQ+ rights will continue to be seen as antithetical to Americanism and traditional family models. At its best, the meshing of the LGBTQ+ community with America will reject the necessity of heteronormative standards of family, life, and culture, while seamlessly combining with the recognizable traits of America.

[133] Pew Research Center, *Support for Same-Sex Marriage Grows, Even Among Groups That Had Been Skeptical*, Pew Research Center (June 26, 2017), https://www.pewresearch.org/politics/2017/06/26/support-for-same-sex-marriage-grows-even-among-groups-that-had-been-skeptical/.
[134] Gallup, *Gay and Lesbian Rights*, Gallup News, https://news.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx (last visited Mar. 22, 2025).

# Copy, Cut, Steal:

# The Legal Struggle Over Fashion's Creative Ownership

Kosi Moneke

## Introduction: The History of U.S. Copyright Laws

The protection of intellectual property in the United States has its origins in Article 1, Section 8, Clause 8 of the U.S. Constitution, which, written in 1787, states "[The Congress shall have Power…] To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."[1] This constitutional directive, obliged by Congress, brought the enactment of the first federal copyright statute on May 31, 1790, the Copyright Act of 1790, An Act for the Encouragement of Learning, by Securing the Copies of Map, Charts, and Books to the Authors and Proprietors of Such Copies.[2] The statute was modeled after Britain's 1710 Statute of Anne and protected books, maps, and charts for an initial fourteen years, renewable for another fourteen years just once.[3] However, these early interpretations of copyright laws were heavily contested in the early 19th century, as courts grappled with the scope and purpose of these rights. Such was the case in the first landmark Supreme Court ruling *Wheaton v. Peters* (1834) where the Court rejected the notion of a perpetual common-law copyright, asserting that copyright protection exists solely as a creation of statute, and is not a natural right.[4]

[1] U.S. Const. art. 1, § 8, cl. 8.
[2] *Copyright Timeline: A History of Copyright in the United States*, Ass'n of Research Libraries (last visited April. 10, 2025), https://www.arl.org/copyright-timeline/.
[3] *Id.*
[4] Wheaton and Donaldson v. Peters and Grigg, 33 U.S. 591 (1834).

> Since the statute of 8 Anne, the literary property of an author in his works can only be asserted under the statute. . .. That an author, at common law, has a property in his manuscript, and may obtain redress against anyone who deprives him of it, or by improperly obtaining a copy endeavors to realize a profit by its publication cannot be doubted; but this is a very different right from that which asserts a perpetual and exclusive property in the future publication of the work, after the author shall have published it to the world.[5]

While this ruling cemented the necessity for legislative clarity on intellectual property rights, significant ambiguities persisted, particularly concerning the extent to which copyrighted materials could be used without authorization. A pivotal case that addressed this issue was *Folsom v. Marsh* (1841), in which Justice Story set a groundbreaking principle: some use of copyrighted material could be permissible if it constituted a "justifiable use of the original materials."[6] Story's decision emphasized the need to consider factors such as "the nature and objects of the selections made, the quantity and value of the materials used, and the degree in which the use may prejudice the sale, or diminish the profits, or supersede the objects, of the original work."[7] This decision formed the foundation of the modern "fair use" doctrine, which codified in Section 107 of the Copyright Act of 1976, permits the unlicensed use and production of copyright-protected works for purposes such as criticism, commentary, news reporting, teaching, scholarship, and research, provided that such use meets the statutory criteria.[8] Despite these advancements, the legal landscape for creative industries remained uneven. On February 2, 1903, a pivotal legal recognition expanded copyright protection to encompass commercial art, sending the message that visual creations held such strong economic and artistic value, they deserved legal protection.[9] This development marked a turning point for industries reliant on

[5] *Id.*
[6] *Folsom v. Marsh*, 9 F. Cas. 342 (C.C.D. Mass. 1841).
[7] *Id.*
[8] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in 17 U.S.C. §§ 101-1332).
[9] *Bleistein v. Donaldson Lithographing Co.*, 188 U.S. 239, 23 S. Ct. 298 (1903).

visual apparel, including fashion, but still, enough ambiguities remained that prompted the Copyright Office to announce on July 31, 1939, that prints and labels could be formally registered, which was a process previously handled by the Patent Office.[10] Over time, Congress continued to expand the scope of copyright protection through successive legislative reforms, culminating in the Copyright Act of 1976, which remains today, the principal statute governing intellectual property rights in the U.S.[11] Despite these profound legal changes, one creative industry remained conspicuously excluded from robust copyright protection: fashion.

One of the most prevailing legal doctrines contributing to the exclusion of fashion designs from copyright protection is what is known as the "useful article" doctrine.[12] Under 17 U.S.C. § 101, this doctrine excludes functional objects, including clothing, from copyright protection unless their artistic elements can be "conceptually separated" from their utilitarian purpose.[13] In essence, for a design to be copyrightable, its creative elements must be identifiable and appreciable independently of the article's functional aspects.

To illustrate this distinction, consider two examples: a decorative carving on the back of a chair may qualify for copyright protection because the design itself can be perceived as a separate work of art, despite it being a part of a functional chair. In this case, the artistic element of the article (chair) has merit beyond its utility. Conversely, consider a chair with a unique and aesthetically appealing shape. This would likely not be copyrightable because the shape is an essential part of the article's function as a seating device. The inability to separate the artistic design of the shape of the chair from the chair's utility disqualifies it from copyright protection.

[10] P. J. Federico, *Copyrights in the Patent Office,* 21 J. Pat. Off. Soc'y 911 (1939).
[11] Copyright Act of 1976, Pub. L. No. 94-553, 90 Stat. 2541 (codified as amended in 17 U.S.C. §§ 101-1332).
[12] 17 U.S.C. § 101 (2012) ("A 'useful article' is an object having an intrinsic utilitarian function that is not merely to portray the appearance of the article or to convey information. Examples are clothing, furniture, machinery, dinnerware, and lighting fixtures.").
[13] 17 U.S.C. § 101 (2012).

Consider another example: a dress adorned with a beautifully intricate pattern of flowers and abstract shapes. The pattern itself may qualify for copyright protection as a work of art, as it can exist independently from the garment. In contrast, the overall cut and silhouette of the dress—its elegant draping, fit, or structural elements—are likely not copyrightable. These aspects are functional elements essential to the dress's purpose as a wearable piece of clothing, and their utility cannot be separated from the design itself.

While this doctrine may serve practical purposes for items like furniture or industrial tools, its rigid application to clothing and appearance raises complex issues. Clothing, by its nature, straddles the line between utility and artistry. While garments undeniably fulfill functional roles, fashion designs also encompass much more than mere utility. Fashion is a dynamic art form, a medium through which cultural identity, personal expression, and social and political commentary are visually articulated, yet this legal blind spot reduces fashion to a purely utilitarian domain, ignoring its artistic value.[14] It leaves designers vulnerable to rampant copying, particularly by fast fashion retailers, which thrive on replicating high-end designs for mass production at lower costs.[15] Small and independent designers, especially, bear the brunt of this

[14] Meera Nair, Fashion as Cultural Expression: Exploring the Intersection of Identity, Society, and Style, 1 Shodh Sagar Journal of Language, Arts, Culture and Film. 31–35 (2024). https://doi.org/10.36676/jlacf.v1.i1.6. ; Jennifer McLeod, *The Closet Door, the Gateway to the Self?: Fashion, Identity, and Self-Expression,* Concordia Uni. (2002), https://spectrum.library.concordia.ca/id/eprint/1605/. ; Christine Hauser, *A Handmaid's Tale of Protest*, N.Y. Times, (June 30, 2017), https://www.nytimes.com/2017/06/30/us/handmaids-protests-abortion.html. ; *See Senate Women Wear White for Women's Suffrage*, Illinois Senate Democrats (March 22, 2024), https://www.illinoissenatedemocrats.com/caucus-news/5474-senate-women wear-white-for-women-s-suffrage. ; *See* Annie Karni, *A.O.C.'s Met Gala Dress Triggered Strong Reactions*, N.Y. Times (September 15, 2021) https://www.nytimes.com/2021/09/15/style/aoc-met-gala-dress.html. ; (*See* Alexandra DeMarco, *Traditional Garments, Elegant Gowns, and out-of-This-World Outfits: Bates Has a Passion for Trashion*, Bates News (November 22, 2024), https://www.bates.edu/news/2024/11/22/traditional-garments-elegant-gowns-and-out-of-this-world-outfits-bates-has-a-passion-for-trashion/.).

[15] Rashmila Maiti, *Fast Fashion: Its Detrimental Effect on the Environment*, Earth.org, (January 20, 2025), https://earth.org/fast-fashions-detrimental-effect-on-the-environment/.

exploitation, as they often lack the resources to challenge larger corporations or the legal means to protect their creative works adequately.[16]

This article will explore the inadequacies of U.S. copyright law in protecting fashion design, particularly through the lens of the "useful article" doctrine, and examine how the resulting legal vulnerabilities undermine the creative and economic interests of designers.[17] It will critically assess how this exclusion, while seemingly practical, hampers innovation within the fashion industry and contributes to the unregulated proliferation of knockoffs by fast-fashion retailers. The article will also discuss potential legislative remedies and alternative legal strategies, such as design patents and trademark protections, that designers have utilized to safeguard their work, all while questioning whether more comprehensive legal protection for fashion design are warranted. Throughout, the article will argue that the current legal framework fails to sufficiently balance the interests of copyright owners with the public good, ultimately stifling artistic expression, consumer appreciation, and economic opportunity in the fashion industry.

***Louboutin v. Yves Saint Laurent* (2012): Trademarking the Red Sole**

The landmark case *Christian Louboutin S.A. v. Yves Saint Laurent America, Inc.* (2012) reshaped the landscape of fashion law by examining the role of color trademarks in the luxury fashion industry.[18] Circuit Judge José A. Cabranes stated, "The question presented is whether a single color may serve as a legally protected trademark in the fashion industry and, in particular,

[16] Tiffany F. Tse, Coco Way Before Chanel: Protecting Independent Fashion Designers' Intellectual Property Against Fast-Fashion Retailers, 24 Cath. U. J. L. & Tech, 401, 403 (2016) ; Lisa Wang, The Copying of Independent Fashion Designers: Perils and Potential Remedies in a Post–Star Athletica World, 75 Stan. L. Rev. 979, 981–1030 (2023).
[17] 17 U.S.C. § 101 (2012) (*See* Barton R. Keyes, Note, Alive and Well: The (Still) Ongoing Debate Surrounding Conceptual Separability in American Copyright Law, 69 OHIO ST. L.J. 109, 111, 114 (2008)).
[18] Christian Louboutin S.A. v. Yves Saint Laurent Am. Holding, Inc., No. 11-3303 (2d Cir. 2012).

as the mark for a particular style of high fashion women's footwear."[19] At the heart of the dispute was French luxury fashion designer, Christian Louboutin's claim to the exclusive use of red lacquer on the outsoles of his-heeled shoes—a design feature consistently employed by the luxury fashion brand since 1992 and formally registered as a trademark with the United States Patent and Trade Office (PTO) in 2008.[20]

Central to Louboutin's argument was the doctrine of secondary meaning, a foundational principle codified in 15 U.S.C. §1052 of the Lanham Act.[21] The doctrine recognizes that even descriptive or non-distinctive elements, such as colors, may acquire trademark protection if they develop a unique association with a specific producer in the minds of consumers. As written, "A term which is descriptive… may, through usage by one producer with reference to his product, acquire a special significance so that to the consuming public the word has come to mean that the product is produced by that manufacturer."[22] Principally, secondary meaning occurs when the primary significance of a design, color, or term is no longer merely the product itself but the identity of its producer—even if that producer remains anonymous to the public.[23]

Louboutin successfully argued that the red sole has acquired this distinctive association, symbolizing the luxury and exclusivity of his brand, to which the court acknowledged by upholding the designer's trademark for the red sole but imposed a critical limitation: the trademark protection only applied when the red sole contrasted with the rest of the shoe.[24] This decision, though affirming the protectability of a single color under the Lanham Act, restricted

[19] *Louboutin*, 696 F.3d at 211.
[20] *Christian Louboutin - Official Website | Luxury Shoes and Leather Goods*, Christian Louboutin (last visited Apr. 10, 2025), https://us.christianlouboutin.com/. ; *(See* Anne H Hocking and Anne Desmousseaux, Why Louboutin Matters: What Red Soles Teach Us About the Strategy of Trade Dress Protection, 105 L.J. Int. Trademark Assoc. 1337, 1351 (2015).
[21] 15 U.S.C. §1052.
[22] *Id.*
[23] *Id.*
[24] *Louboutin*, 696 F.3d at 212.

Louboutin's claim and allowed the French luxury brand, Yves Saint Laurent to escape infringement liability with its monochromatic red shoes.[25]

The court's analysis was heavily guided by the precedent set in *Qualitex Co. v. Jacobson Products Co.* (1995), where the U.S. Supreme Court held that a single color could function as a trademark if it served a source-identifiable role.[26] This ruling paved the way for numerous famous trademarks across industries. Perhaps the most notable is Tiffany & Co. successfully registering Tiffany Blue as a color trademark in 1998, cementing its association with the brand's identity.[27] The recognition of such a color trademark, beyond legality, showcases the commercial and cultural value of color as a branding element and a brand identity.

While a big victory for Louboutin, the case also shows the inherent limitations of trademark law in the fashion industry. While the decision protected the brand's contrasting red sole design, it also left significant gaps for competitors to replace broader shoe designs without violating trademark law.[28] The inadequacy of existing legal protections for fashion designs is apparent, and for designers, significant challenges exist in safeguarding their creative work under the current legal framework. The exclusion of fashion from copyright protection under the useful article doctrine further exacerbates these vulnerabilities, forcing designers to navigate complex and often insufficient legal strategies, such as design patents and limited trademark protections.

**Gucci America, Inc. V. Guess?, Inc. (2012): Protecting Distinctive Design Elements**

The case of *Gucci America, Inc. v. Guess? Inc.* (2012) is another example of the complications inherent in utilizing trademark law to protect fashion design elements, especially

[25] *Id.*
[26] Qualitex Co. v. Jacobson Products Co. (93-1577), 514 U.S. 159 (1995).
[27] *Tiffany Blue*, TIFFANY (last viewed March 20, 2025), https://press.tiffany.com/our-story/tiffany-blue/.
[28] *Louboutin,* 696 F.3d at 212.

in the absence of strong copyright protections in the fashion industry.[29] Gucci, a global luxury Italian fashion brand renowned for its distinctive design features and identity, filed a suit against American clothing brand Guess? for trademark infringement and dilution, alleging that Guess? had unequivocally copied several of Gucci's iconic design elements.[30] Among the disputed features were Gucci's green-red-green stripe, the interlocking "G" logo, the repeating GG pattern, and various shoe designs.[31] The foundation of Gucci's argument was the same "secondary meaning" doctrine used in the Christian Louboutin case, and for Gucci specifically, this doctrine is vital for a fashion house like theirs, where distinct patterns, colors, and logos serve as primary brand signifiers in an intensely competitive market.[32]

In its decision, the Southern District of New York affirmed that Guess? had indeed infringed upon some of Gucci's trademarks.[33] Judge Shira Scheindlin found that Guess? had imitated Gucci's trade dress in ways likely to cause consumer confusion, considering factors for likelihood of confusion outlined in *Polaroid Corp. v. Polarad Electronics Corp.*[34] These factors include the strength of the mark, the similarity of the marks, the proximity of the goods, and the likelihood that consumers may be confused.[35] The court ruled in favor of Gucci, concluding that Guess?'s designs were sufficiently similar to Gucci's trademarks to cause confusion, and awarded the brand $4.66 million in damages—substantially less than the $221 million initially sought.[36] Notably, however, the court refused to find Guess? liable for trademark dilution under

[29] Gucci America, Inc. v. Guess?, Inc., 09 Civ. 4373 (SAS) (S.D.N.Y. May. 21, 2012).
[30] *Id.*
[31] *Id.*
[32] 15 U.S.C. §1052 . ; (*See Louboutin*, 696 F.3d at 211 ; Danielle, Naer, *House of Gucci: The History and Story Behind the Iconic Gucci Logo*, EDITORIALIST, (Jan. 20, 2024), https://editorialist.com/fashion/gucci-logo-history/.)
[33] *Gucci Am.*, *Inc.,* 868 F. Supp. 2d at 242.
[34] Polaroid Corp. v. Polarad Electronics Corp., 287 F.2d 492 (2d Cir. 1961) (establishing the Polaroid factors, a multi-factor criteria test used to determine the likelihood of consumer confusion in trademark infringement cases).
[35] *Polaroid Corp.,* 287 F.2d at 492. ; *Gucci Am.*, *Inc.,* 868 F. Supp. 2d at 242.
[36] *Gucci Am.*, *Inc.,* 868 F. Supp. 2d at 242.

both the Lanham Act and New York law, reasoning that Gucci's evidence did not meet the high burden required to demonstrate that Guess?'s actions had diluted the distinctiveness of its trademark.[37] (The judge also noted that Gucci was aware of Guess?'s infringing conduct for several years, and possibly more, before filing a suit.)[38]

The court's decision, while affirming the protectability of Gucci's design elements under trademark law, is also telling of the inherent limitations of this legal framework. Trademarks by virtue of their inherent design, are focused on source identification rather than the protection of creative expression. As a result, trademark law does not safeguard the overall aesthetic or design of a garment; it only protects specific elements that have acquired distinctiveness.[39] This is a narrow scope of protection that leaves significant aspects of fashion design vulnerable to imitation, particularly by fast-fashion retailers who can mimic border design concepts without infringing on specific trademarks.[40]

To build a distinctive and identifiable logo within the luxury fashion sector is a privilege granted to a select few brands that have spent decades cultivating a brand identity and heritage closely associated with notions of exclusivity and luxury. For these established brands, a logo or design element can become synonymous with status and prestige, such that the mere presence of it is sufficient to justify premium prices in the hundreds to thousands, and command consumer loyalty. In an episode of *Project Runway*, fashion designer Brandon Maxwell critiqued a contestant for slapping her logo all over an outfit, pointing out that, at that stage in her career, she

[37] *Id.*
[38] *Id.*
[39] 15 U.S.C. §1052(f).
[40] *See* Layla, Ilchi, *Kim Kardashian Calls Out Fashion Nova for Designer Knock-Off*, WOMEN'S WEAR DAILY, (Feb. 19, 2019), https://wwd.com/feature/kim-kardashian-fashion-nova-mugler-knockoff-1203037428/. ; *See* Ellie Violet Bramley, '*Details I Made, They Made' – Designers Hit Back at Shein's Imitation Game*, THE GUARDIAN, (Sept. 2, 2023), https://www.theguardian.com/business/2023/sep/02/details-i-made-they-made-designers-hit-back-at-sheins-imitation-game.

had yet to build the kind of brand power that would make consumers want to buy and wear her logo: "My first thought was we don't need branded straps or bags from you. You have not become a big brand yet. It takes a lot of time to get to a place where people want a bag so much, [...] they want your name on it big."[41] Logos are often the result of decades of brand-building and reputation, and when we buy them—whether luxury or not, as brands like Nike, Adidas, and Apple, too, have cultivated similar brand image power—we're not just buying the items, we're buying a perception, image, narrative, and lifestyle.[42] Logos represent carefully curated images that transcend the physical item itself. They become about aligning oneself with a set of values, an identity, or an aspiration. These logos embody not just the product, but the status, lifestyle, and the perceived personality of the consumer who chooses them.[43]

Where does this same legal framework leave smaller, independent brands and designers that may not have the financial resources or decades of established brand heritage to secure recognizability, and therefore cannot rely on distinctive logos as their primary marketing tool? Trademark law favors those who have established secondary meaning, thus meaningful protection is accessible only to a select few.[44] Those who have not—small and independent designers who find brand recognition a less reliable marketing ploy—are left vulnerable to imitation with insufficient legal resources.[45] So, while trademark laws offer some protection to

[41] *Project Runway,* season 18, episode 13, "Finale, Pt.1," aired December 5, 2019, on Bravo.
[42] *See* Carolina Coco et al., *Dress with Finesse: Why People Wear Clothes with Logos*, 17 Int. J. Fashion Design, Tech. and Edu. 260–75 (2024).
[43] *id.*
[44] 15 U.S.C. §1052.
[45] *See* Chavie Lieber, *Fashion Brands Steal Design Ideas All the Time. And It's Completely Legal.*, Vox (April 27, 2018, 7:30 AM), https://www.vox.com/2018/4/27/17281022/fashion-brands-knockoffs-copyright-stolen-designs-old-navy-zara-h-and-m. (*See* Vendela Dente, *Fashion Design Piracy: An Issue of Intellectual Property or Economic Impact?* 2 Fordham Undergrad. L. Rev. 25–34 (2020)).

fashion brands with established brand identities, it fails to address the challenges faced by emerging and small designers.

***Star Athletica v. Varsity Brands* (2017): Clarifying Separability in Copyright Law**

The distinction between trademark and copyright protection becomes even more apparent in fashion when we examine cases involving both. While trademark law seeks to protect source identification through logos and brand names, copyright law offers protection for the creative expression embodied in a work.[46] A case in this domain is *Star Athletica v. Varsity Brands* (2017), a Supreme Court decision that clarified the concept of separability in copyright law, particularly in relation to cheerleading uniforms.[47] Varsity Brands, Inc. (Varsity), a brand that designs athletic clothing and accessories, including cheerleading uniforms, and holds copyrights for the two-dimensional artwork of the designs, sued Star Athletica, LLC (Star) for copyright infringement, alleging Star had used similar designs, to which Star countered by claiming Varsity's designs weren't copyrightable because the uniform design failed the "separability" text.[48] The question at the heart of the case was how does one actually and accurately determine whether a feature of a "useful article" is copyrightable under the Copyright Act? Were these elements protectable as works of art or were they "conceptually or physically" inseparable from the utilitarian function of the uniforms?[49]

The Supreme Court, in a 6-2 decision, ruled in favor of Varsity Brands, holding that the design elements of the cheerleading uniforms were indeed separable from the utilitarian function

[46] 17 U.S.C. § 102(a) (2000). (The Copyright Act includes works of authorship in the following categories: "(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.")
[47] *Star Athletic, LLC v. Varsity Brands, Inc.*, 580 U.S. 405, 137 S.Ct. 1002, 197 L.Ed.2d. 354 (2017).
[48] *Id.*
[49] *Id.*

of the garment, because the clothes remained functional as athletic wear when the design elements were removed, and removing the design did not affect its utility.[50] The Court emphasized that while uniforms, being clothing, are useful articles that "possess both utilitarian and aesthetic value," their utilitarian features—"shape, style, cut, and dimensions"—cannot be copyrighted.[51] However, the design on the clothing could be.[52]

The key to understanding the decision lies in knowing the Court's interpretation of the separability test, which "depends solely on statutory interpretation."[53] The statute requires consideration only of conceptual separability, which has two distinct elements: (1) the artistic feature "can be identified separately from" the useful article (separate identification, or in other words, 'can you point to the artistic part without thinking about the article itself?'), and (2) the feature is "capable of existing independently of the utilitarian aspect of the article" (independent existence).[54] Essentially, to determine independent existence, it must be asked: can the artistic feature(s) be imagined as existing on a blank canvas instead of the useful article? If yes, then the feature may be eligible for copyright protection.

The Supreme Court rejected several alternative approaches proposed by Star Athletica and the U.S. government. First, it dismissed the argument that a design feature must be able to stand alone as a copyrightable work while leaving the useful article equally functional.[55] The Court rejected the traditional distinction between "physical" and "conceptual" separability,

[50] *Id.*
[51] *Id.*
[52] *Id.*
[53] *Id.*
[54] *Id.* (*See* Mala Chatterjee, *Conceptual Separability as Conceivability: A Philosophical Analysis of the Useful Articles Doctrine*, n.d.: at 3, 8, 16, and 17).
[55] *Star Athletica, L.L.C.,* 580 U.S. 405.

clarifying that the statute focuses solely on the separability of the feature itself, not on whether the remaining article remains functional without it.[56]

Next, the Court rejected Star Athletica's proposal to include objective tests that consider whether the design reflects artistic judgment independent of functionality or whether it had marketability without its utilitarian function.[57] According to the Court, the statutory inquiry is limited to "how the article and features are perceived, not how or why they were designed."[58] And lastly, the Court dismissed concerns about potential conflicts between copyright protection and Congress's exclusion of industrial design from copyright eligibility, asserting that copyright and design patent protections are not mutually exclusive.[59]

Nonetheless, the ruling's scope was still limited. While it confirmed that Varsity Brands' designs are eligible for copyright, it did not offer comprehensive protection for entire garments, but instead, required a clear distinction between creative elements and functionality.[60] Protection then, would likely be awarded only to the two-dimensional artistic designs of the garment, and not the overall shape or structure.[61] Once again, this decision reinforced the longstanding application of the "useful article" doctrine, which categorically denies copyright protection for garments because they are inherently functional objects.[62]

A more recent case can be drawn to further illustrate this point. In the world of luxury fashion, few items are as revered—or as mythologized—as the Hermès Birkin bag. But in 2024, that myth met its match in an unlikely place: Walmart.[63] Enter the 'Walmès Wirkin,' a

[56] *Id.*
[57] *Id.*
[58] *Id.*
[59] *Id.*
[60] *Id.*
[61] *Id.*
[62] 17 U.S.C. § 101.
[63] Stephanie McNeal, *The Walmart 'Birkin' Bag, Explained*, Glamour (January 3, 2025), https://www.glamour.com/story/the-walmart-birkin-bag-explained.

near-identical knock-off of the Birkin—widely regarded as one of the most coveted luxury items, retailing for tens of thousands to hundreds of thousands—sold by third-party vendors on the retail giant's website.[64] For luxury fashion enthusiasts, the discourse was palpable. The 'Wirkin' had it all: the same recognizable rectangular, tote-like sleek silhouette, structured handles, and signature clasp—everything but the Hermès logo and name.[65]

"It's difficult to know what, exactly, to think about it apart from the fact that it irritated me—annoyed me," says Hermès CEO Axel Dumas.[66] "Making a copy like this is quite detestable—it's stealing the creative ideas of others."[67]

Beyond the social media discourse and memes, the 'Wirkin' raised a compelling legal question: without the Hermès branding, are these knockoffs actually illegal? Are they in fact, perfectly fine and anyone who takes a stance in opposition is an elitist? How could a company like Hermès, valued at over $200 billion dollars, not take legal actions? Where does the law draw the line when it comes to protecting fashion designs? While the 'Wirkin' has no trademarked logo or brand name, any potential of a strong suit from Hermès would need to stem from a challenge under the trade dress subset of trademark law on the basis that the 'Wirkin' bag creates likelihood of confusion among consumers.[68] Hermès has no trademarked logo, but what it does have is a trade dress registration for the Birkin's distinctive shape.[69] However, given that the Hermès logo and name are conveniently absent from the 'Wirkin', and neither Walmart, nor the

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[64] *Id.*
[65] *Id.*
[66] Jordan Hart, *Hermès CEO Says He Was 'irritated' by Viral Fake Birkins*, Business Insider (February 14, 2025), https://www.businessinsider.com/hermes-ceo-viral-wirkin-walmart-birkin-bag-copies-2025-2.
[67] *Id.*
[68] 15 U.S.C. § 1125(a)(1).
[69] Cara O'Hanlon, *Brand Spotlight - History of The Hermes Trademark - Watson & Young*, Edited by Zara Watson, Esq, Watson and Young *(*Sept.17, 2020), https://watsonandyoung.com/2020/09/17/brand-spotlight-history-of-the-hermes-trademark/.

third-part vendors marketed the 'Wirkin' as the real thing, making a substantial case may be unlikely for the French luxury brand.

**Comparison Between European Union**

To understand how U.S. copyright constraints compare on a global scale, it's insightful to explore the design protection mechanisms in the European Union. In the EU, fashion is protected through a dual system of registered and unregistered design rights by the Community Design Regulation.[70] Registered Community Designs (RCDs) require a formal application and provide protection for up to 25 years, with the option for renewal every five years.[71] These rights safeguard the aesthetic aspects of a product, including its lines, contours, colors, shapes, textures, and materials.[72] Protection also extends beyond copies, encompassing designs that create a similar overall visual impression, which ensures that fashion designers are shielded against imitations.[73] To be eligible for registration, a design must meet two criteria: it must be new and possess individual character.[74] A design is considered new "if no identical design has been made available to the public before the date of filing of the application [...], or if priority is claimed, the date of priority."[75] As for individual character, "A design shall be considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any design which has been made available to the public."[76] (In other words, when viewed by someone knowledgeable in the field, does the design create a distinct impression compared to other existing designs?) Importantly, this protection also

[70] Council Regulation 6/2002, art. 1, 2002 O.J. (L 3) 1.
[71] Council Regulation 6/2002, art. 12–13, 2002 O.J. (L 3) 5–6.
[72] Council Regulation 6/2002, art. 3, 2002 O.J. (L 3) 4.
[73] Council Regulation 6/2002, 2002 OJ (L 3) 2.
[74] *Id.*
[75] Council Regulation 6/2002, art. 5, 2002 OJ (L 3) 4.
[76] Council Regulation 6/2002, art. 6, 2002 OJ (L 3) 4.

covers designs applied to components of "complex product," as long as the component "remains visible during normal use" and fulfills the requirements of novelty and individual character.[77]

In addition to RCDs, the EU also provides Unregistered Community Design (UCD) rights, which are applied automatically upon the public disclosure of a design within the EU and last three years.[78] This system provides a practical solution without the bureaucratic hurdles of registration, and is particularly valuable in the fashion industry, where trends can shift rapidly, and designers may lack the time or resources to undergo the formal registration process. This does not come without guidelines, however, as the EU defines publicly "disclosed" with specific criteria. For a design to be considered publicly disclosed, the design must be known in the "normal course of business" to those within the specialized circles of the industry operating in the EU.[79] This means that for a design's disclosure to be recognized, it must be known at least to the relevant stakeholders within the sector, and the date of disclosure must be verifiable. Imagine a designer presents a new collection at a fashion show attended by industry professionals like buyers and journalists, and the event is covered by a publication—the design would be considered publicly disclosed. Or perhaps, if a designer posts their creation on a well-followed industry-specific website or social media, where fashion enthusiasts, influencers, and buyers regularly engage, the design could be considered disclosed. As long as the design is accessible to the relevant sector and the date is clear, the designer's work may be eligible for protection under the EU's disclosure standards.[80]

[77] Council Regulation 6/2002, art. 3, 2002 OJ (L 3) 4. ("'Complex product' means a product which is composed of multiple components which can be replaced permitting disassembly and reassembly of the product.")
[78] Council Regulation 6/2002, art. 11, 2002 OJ (L 3) 5.
[79] Council Regulation 6/2002, art. 7, 2002 OJ (L 3) 5.
[80] Council Regulation 6/2002, art. 7, 2002 OJ (L 3) 5.

Despite the advantages of this more inclusive and flexible system, the U.S. continues to grapple with its restrictive "useful" doctrine, which excludes fashion designs from meaningful copyright protection.[81] The difference between the U.S. and EU systems highlights a critical point of divergence: the U.S. remains fixed in a model ill-suited to address the realities of the modern fashion industry. This failure is more than a bureaucratic oversight—it's a fundamental misunderstanding and dismissal of fashion as a creative discipline worthy of protection. In an industry where ideas are currency and innovation can often mean survival, the absence of sufficient legal safeguards leaves designers exposed, and their ingenuity plundered without recourse. And when creativity is not defended, it inevitably suffers.

**Fast Fashion**

Fast fashion brands like H&M, Zara, and Forever 21 thrive on their ability to replicate runway trends at an unprecedented speed, churning out new collections in a matter of weeks.[82] The term fast fashion itself was coined in 1989 by *The New York Times* journalist Anne-Marie Schiro when Zara opened a store in New York, marveling at the brand's ability to take a garment from design to market in just 15 days.[83] One could say that Zara didn't just popularize what we know today as fast fashion—it invented it. This business model depends on the rapid extraction of design elements from other fashion brands, often without credit or compensation to the original creators, which has long raised (and continues to raise) serious concerns and questions about the legality and ethicality of fast fashion.[84] One of the most significant legal battles within

[81] 17 U.S.C. § 101.
[82] Annie Linden, *An Analysis of the Fast Fashion Industry*, Bard Digital Commons (January 1, 2016), https://digitalcommons.bard.edu/senproj_f2016/30.
[83] Anne-Marie Schiro, *Fashion; Two New Stores That Cruise Fashion's Fast Lane*, N.Y. Times (December 31, 1989), https://www.nytimes.com/1989/12/31/style/fashion-two-new-stores-that-cruise-fashion-s-fast-lane.html.
[84] Brian Hilton, Chong Ju Choi, and Stephen Chen, *The Ethics of Counterfeiting in the Fashion Industry: Quality, Credence and Profit Issues*, 55 J. Business Ethics, 345–54 (2004).

the fast fashion industry is the ongoing string of lawsuits filed against these brands for copyright infringements. A notable example is *Shein v. Dr. Martens,* in which the heritage footwear brand accused the online retailer Shein of copying its signature combat boots.[85] Similarly, *Forever 21 v. Adidas* revolved around Forever 21's alleged unauthorized use of Adidas's federally registered Three-Strip Mark.[86]

Cases such as these highlight a persistent legal dilemma: to what extent can copyright and trademark law serve as effective deterrents against fast fashion's rampant replication of designs? While brands like Dr. Martens and Adidas have successfully pursued legal action to protect their intellectual property, these lawsuits are often reactive rather than proactive. The sheer speed at which fast fashion companies operate means that by the time litigation concludes, the alleged knockoff may have already been sold, cycled out, and replaced with the next trend.[87] The issue with the current legal framework lies in the time lag that accompanies litigation. While a designer may be successful in proving that a fast fashion brand copied their work, by the time a verdict is delivered, the design could have already flooded the market and generated significant profit for the infringing party.[88] There's a fundamental disconnect between legal protections and the realities of a system designed to prioritize speed and efficiency over original creative output.

The fashion world is undeniably one of creativity, expression, and individualistic exploration, yet it remains uniquely vulnerable to design piracy due to a lack of legal safeguards

[85] *Shein and Romwe v. Dr. Martens AirWair Group Ltd.*, No. 20-cv-07696-SI, 2021 U.S. Dist. LEXIS 1–7 (N.D. Cal. 2021).
[86] *Adidas Am. v. Forever 21 Inc.*, 3:17-cv-00377-YY (D. Or. Oct. 12, 2023).
[87] Keyon Lo, *Stop Glorifying Fashion Piracy: It Is Time to Enact the Innovative Design Protection Act*, 21 Chicago-Kent J. Intell. Prop. 160, 180, 194 (2022).
[88] *Innovative Designs Protection and Piracy Prevention Act: Hearing Before the Sub.comm. on IP., Competition, and the Internet of the H. Comm. on Judiciary,* 112th Cong. 112-46 (2011) (statement of Lazara Hernandez. on behalf of the Council of Fashion Designers of America (CFDA).

akin to those in other creative industries.[89] As the creative process in fashion continues to be subjected to widespread copying without consequences, designers often find themselves stifled, leading to a diminished incentive to create new and innovative work.[90] Over the past decade, several attempts have been made to remedy this gap and introduce formal protections for fashion designs through the introduction of bills such as the Design Piracy Prohibition Act (2009), the Innovative Design Protection and Piracy Prevention Act (2010), and the Innovative Design Protection Act (2012), yet none of these legislative efforts have succeeded in granting fashion design the same level of protection afforded to other creative industries.[91] The purpose of intellectual property protection is to encourage creativity and innovation by granting creators and innovators ownership rights over their work. This principle is evident across various industries, where IP rights incentivize the creation of new products by assuring creators they will reap the benefits of their labor.[92] When such rights are not extended to fashion designs, it signals that their work is not as valued, thus deterring them from pursuing new designs.[93] In fact, the lack of protection sends a harmful message that undermines the very essence of fashion as an art form.

The core of this issue lies in the fact that, unlike other forms of creative work, fashion designs are not automatically granted the same level of protection under copyright law.[94] Fashion, despite its often-dismissed status as "just clothes," holds immense creative and cultural value, and this dismissive attitude toward it is in fact, very misleading. As one writer puts it,

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[89] Casey E. Callahan, *Fashion Frustrated: Why the Innovative Design Protection Act is a Necessary Step in the Right Direction, But Not Quite Enough*, 7 Brooklyn J. Corp., Financial & Commercial Law. 195, 197 (2012).
[90] *Id.*
[91] H.R. 2196, 111th Congress. §2 (2009). ; S. 3728, 111th Congress. §2 (2010). ; S. 3523, 112th Congress. §2 (2012).
[92] Howard Anawalt, IP Strategy: Complete Intellectual Property Planning, Access and Protection, § 1:1 (2015 ed. 2012).
[93] *Intellectual Property Rights and International Trade*, Congressional Research Service (May 12, 2020), https://www.congress.gov/crs-product/RL34292.
[94] Callahan, *supra* note 89.

"Such a statement is akin to saying that paintings are nothing more than wall coverings, or a sculpture by Michelangelo is nothing more than a hat rack. Just because these works may also serve functions does not take away their copyright protection either."[95] Indeed, anyone who claims fashion is not art has surely never encountered the work of Robert Wun Haute Couture SS24 and FW24, Schiaparelli FW24/25 or Thierry Mugler Haute Couture FW1995.[96] These collections push the boundaries of creativity and blend design and craftsmanship to produce pieces that are on par with the finest works of visual art. The assertion that fashion serves only a functional role ignores its broader impact on culture, identity, and expression. "It is no more logical to denigrate the value fashion choices confer upon consumers than to denigrate the value of the best-selling thriller many are reading or the hit song many are listening to."[97] The functionality of fashion should not exclude it from IP protections. A statement like "fashion is just clothes" is as reductionist as declaring a Da Vinci "just a wall covering."[98] It ignores the aesthetic, symbolic, and communicative value embedded in both. "People vary in their judgement of the artistic value afforded to some works over others, but this difference in opinion is still an opinion—even if it may be shared by the masses—and a judgement of low artistic value does not equate to a lower entitlement of copyright protection."[99]

[95] Callahan, *supra* note 89, at 201.
[96] *See SS24 COUTURE*, Robert Wun (2024), https://www.robertwun.com/ss24-couture. ; *See* Tiziana Cardini, *Robert Wun Fall 2024 Couture Collection*, Vogue *(*June 27, 2024), https://www.vogue.com/fashion-shows/fall-2024-couture/robert-wun. ; *See Maison Schiaparelli - Haute Couture Fall-Winter 2024/25*, Schiaparelli (2024), https://www.schiaparelli.com. ; *See* Condé Nast, *Mugler Fall 1995 Couture Fashion Show*, Vogue Runway *(*2025), https://www.vogue.com/fashion-shows/fall-1995-couture/mugler/slideshow/collection.
[97] C. Scott Hemphill & Jeannie Suk, *The Law, Culture, and Economics of Fashion,* 61 Stan. L. Rev. 1147*,* 1162 (2009).
[98] Callahan, *supra* note 89.
[99] Callahan, *supra* note 89, at 202.

A broader argument against more sufficient fashion copyright protection stems from the belief that it may reinforce social hierarchies.[100] Yes, it is true that the historical sumptuary laws "were appointed specifically to control dress, defined the types, quality and quantity of items that each social group was allowed to wear," and ancient Roman Emperors did indeed adopt the color purple as a sign of imperial power due to the high cost of producing the color, however, our understanding and relationship with fashion have no doubt evolved well beyond strict elitist laws and more than showcases of status.[101] This argument is posited from the perspective that fashion—still today—serves solely as "visible markers of status," thus, this belief that restricting access to 'high fashion'—(for the sake of the article, the term 'high fashion' is referring to what the general fashion industry considers luxury fashion—high-end, expensive, and often exclusive. At times, it may be placed in quotes to highlight the fluidity of the term or to tangentially call attention to the way it is socially constructed rather than fixed. In other instances, the omission of the quotation marks signals a reference to the established industry definition, treating it as a widely accepted category)—designs would disproportionately benefit the wealthy who can afford expensive and exclusive garments, while the less affluent might be denied access to affordable knockoffs.[102] On the surface, this may seem to justify the status quo, in which copying and mimicking fashion designs is prevalent and widely accepted. However, this perspective fails to account for the diverse purposes fashion serves, far beyond signaling wealth or class. While it undoubtedly has the capacity to denote status, it also allows for personal expression, creativity, and the exploration of cultural ideas. In a system that adequately protects fashion designs, we

[100] Alan Hunt, Governance of the Consuming Passions: A History of Sumptuary Law, 172 (1996).
[101] *Sumptuary Laws*, Refashioning the Renaissance (last visited April 10, 2025), https://refashioningrenaissance.eu/archival-work/sumptuary-laws/. ; Mary Pons, *Tyrian Purple: Its Evolution and Reinterpretation as Social Status Symbol During the Roman Empire in the West,* Brandeis Uni. 2, 3 (May 2016).
[102] Hemphill & Suk, *supra* note 97, at 1179-1180.

would likely see a broader range of innovative designs, moving beyond the confines of luxury and into the realm of imaginative exploration.[103]

Without copyright protection, designers are left far too exposed to the harmful effects of design piracy. The current U.S. system of IP protection in fashion, which primarily focuses on trademarks and trade dress, leads to significant misrepresentation in the industry.[104] Trademark and trade dress protections, while valuable for established companies and brands, do not sufficiently support smaller or newer designers who lack the resources to build up brand recognition.[105] In fact, these existing protections favor larger, incumbent brands, which can afford to invest in creating "secondary meaning" for their products—something that small designers simply cannot do.[106] As the late Karl Lagerfeld once said, copying "can be very damaging for small firms, though for a house like Chanel, it means a lot less."[107] Thus, the lack of design-specific protection prevents smaller firms from entering the market or thriving in it, while perpetuating the dominance of large, established luxury brands. This is where critics' concerns gain validity, as this results in a lack of diversity in fashion innovation that pushes the industry to restructure its focus to more status-signaling products and less on the development of original, creative designs that expand the creative possibilities of fashion as an art form.[108]

One could in fact argue that the current IP framework tends to favor status-signaling designs, which are often those protected by trademarks or trade dress.[109] As a result of this, designers and brands that can leverage these protections are more inclined to create products that

[103] *Id.*
[104] *Id.*
[105] *Id.*
[106] Hemphill & Suk, supra note 102 ; 15 U.S.C. §1052.
[107] Godfrey Deeny, *Lauren Fined by Paris Court, and So Is Berge*, Women's Wear Daily (May 19, 1994, 12:00 AM), https://wwd.com/fashion-news/fashion-features/lauren-fined-by-paris-court-so-is-berge-1162425/.
[108] Hemphill & Suk, *supra* note 103.
[109] *Id.*

signify exclusivity which pushes the conversations and interpretations of fashion towards status symbols rather than true creative expression.[110] According to one writer,

> The current intellectual property regime, in which legal protection from design copying is lacking, tends, if anything, to push fashion consumption and production in the direction of status and luxury rather than more polyvalent innovation. In sum, we have noted two distortions. The first is towards the creation of designs that are legally more difficult to copy. [...] The second distortion is toward the creation of goods that are naturally (as opposed to legally) more difficult to copy [...]—for example, goods involving unusual or expensive materials or difficult workmanship.[111]

The absence of protecting against copying limits the scope of creative possibilities and leads to a narrow and predictable fashion ecosystem. In an ideal world where designers were protected, the industry would likely shift toward more diverse and experimental expressions, creating a richer, more "polycentric language of fashion" that enables designers to draw from a wider array of influences and inspirations.[112]

The discouraging effect this lack of protection has on emerging designers can be seen the case of Lazaro Hernandez, a designer who testified before the House Judiciary subcommittee on Intellectual Property, Competition, and the Internet on behalf of the Council of Fashion Designers of America (CFDA), stating that the brand he co-founded, Proenza Schouler, faced significant losses due to copyists replicating their runway designs within days.[113] (These imitations flooded the market before the company could even fulfill its first orders.)[114] When designers are under the constant threat of having their work stolen and used to gain profits for another (individuals or large corporations), "many ask themselves, 'why bother to create?'"[115]

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[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Innovative Designs Protection and Piracy Prevention Act: Hearing Before the Sub.Comm. on IP., Competition, and the Internet of the H, Comm. on Judiciary,* 112th Cong. 112-46 (2011) (statement of Lazara Hernandez. on behalf of the Council of Fashion Designers of America (CFDA)).
[114] *Id.*
[115] Silvia Beltrametti, *Evaluation of the Design Piracy Prohibition Act: Is the Cure Worse than the Disease? An Analogy with Counterfeiting and a Comparison with the Protection Available in the European Community*, 8 NW. J. Tech. & and Intell. Prop. 147, 163 (2010).

Further arguments against firm copyright laws for fashion design is the notion that the absence of copyright protection in fashion somehow democratizes access to trendy designs by making knockoffs more accessible to consumers.[116] Proponents of this viewpoint believe that by allowing knockoffs (copying), the market fosters the creation of affordable alternatives that bridge the gap between high fashion and everyday wear, thereby reducing visible markers of class disparity.[117] However, while this may initially appear progressive, it's yet again another stance that overlooks the broader (and progressive) potential of fashion as a powerful medium for self-expression and communication. This reductionist view towards fashion risks commodifying creativity and diminishing the value of originality. An environment that normalizes widespread copying stifles innovation and discourages designers from punching creative boundaries.

Some might argue that concerns about creativity and innovation being stifled by knockoffs only apply to what is considered 'high fashion,' and is in no way relevant to the everyday clothing worn by the average consumer.[118] However, this assumption ignores a fundamental truth: fashion ideas do not exist in a vacuum.[119] Fashion in its nature is an interconnectedness of a cultural and economic ecosystem. "That blue represents millions of dollars of countless jobs," and countless hours of creative labor that shape trends at every level of fashion.[120] 'High fashion' inevitably trickles down into mass-produced everyday wear,

[116] Hemphill & Suk, *supra* note 102.
[117] *Id.*
[118] Colleen Jordan Orscheln, *Bad News Birkins: Counterfeit in Luxury Brands*, 14 J. Marshall Rev. Intell. Prop. L. 249, 258 (2015).
[119] *See* Kelly L. Reddy-Best, *Fashion Theories*, Iowa St. Uni. Digital Press (August 1, 2020), https://iastate.pressbooks.pub/dressappearancediversity/chapter/fashion-theories/. ("Trickle-down, or upper-class theory, is one example of a fashion theory (Simmel, 1904). This theory is based on ideas related to social class. It explains that individuals of higher socioeconomic status set the trends, and then those of lower socioeconomic statuses follow these trends.")
[120] The Devil Wears Prada (Fox 2000 Pictures, 20th Century Studios, Rat Pac Enterprises, Inc., Dune Entertainment 2006).

influencing the colors, cuts, and styles that dominate department stores, fast fashion retailers, and our closets.[121] Even those who believe they are opting out of the fashion industry's influence are, in fact, participating in its ripple effects. As Miranda Priestly famously explains, that seemingly simple blue sweater "was selected for you [...] from a pile of '*stuff*.'"[122]

**Metaverse and Fashion in the Digital**

This relationship between high fashion and everyday wear illustrates how fashion extends beyond the physical realm and creates ripples that touch all aspects of life. Yet as fashion continues to influence our lives and cultural landscape, it's no longer confined to the tangible world. With the advent of digital platforms and virtual environments, the boundaries of fashion have expanded further, introducing new challenges that demand a rethinking of intellectual property in an increasingly digital age.[123] When debates over copyright protections in fashion were still largely centered on the balance between accessibility and creativity, few could foresee a challenge such as the rise of the metaverse, and that digital fashion—clothing that exists solely in virtual spaces—would become a lucrative industry, let alone a legal battleground.[124] Today, however, virtual garments, Non-Fungible Tokens (NFTs), and digital luxury goods pose

[121] *supra* note at 119 ; *See* Sarah Halzack, *How fashion trends actually make it from the runway to your closet,* The Wash. Post (July 18, 2015), https://www.washingtonpost.com/business/art-of-bring-high-fashion-down-to-earth/2015/07/17/4fe7a244-2963-11e5-bd33-395c05608059_story.html.
[122] *supra* note 120.
[123] Hannah Hedberg, *How Digital Fashion and the Metaverse Change the Clothes We Will Wear,* Inuru (January 17, 2024), *https://www.inuru.com/post/how-digital-fashion-and-the-metaverse-change-the-clothes-we-will-wear.*
[124] Bof Studio, *The Five Strategies Defining Fashion's Future in the Metaverse,* The Business of Fashion (January 14, 2025), *https://www.businessoffashion.com/articles/technology/five-strategies-defining-fashion-industry-metaverse-future-through-nfts-ai/.*

significant intellectual property concerns as traditional laws struggle to adapt to the complexities of a rapidly evolving digital marketplace.[125]

One of the most prominent cases of this challenge is *Hermès International v. Mason Rothschild,* in which the French luxury fashion house Hermès filed a suit against digital artist Mason Rothschild for creating and selling "MetaBirkins" NFTs—virtual handbags resembling the quintessential Hermès Birkin Bag, where he was estimated to have made about $125,000 from the NFTs, both from initial sales ($450) and royalties from secondary sales (where the bags were selling for between $13,000 to $65,000).[126] Rothschild had acquired the domain name *metabirkin.com* and began commercializing NFTs under the "MetaBirkins" name, prompting Hermès to sue for trademark infringement, dilution, and cybersquatting.[127] In their suit, Hermès described Rothschild as a "digital speculator who is seeking to get rich quick" and asserted that the MetaBirkin brand "simply rips off Hermès' famous Birkin trademark."[128] As Rothschilds argued that his NFTs constituted artistic expression protected under the First Amendment, it's clear how convoluted it becomes when trying to apply trademark law to digital fashion.[129] The federal jury, in February 2023, nonetheless unanimously ruled in favor of Hermès, citing that Rothschild's use of the "MetaBirkins" name had indeed infringed on Hermès' trademark rights and was guilty of cybersquatting by misleading consumers and unlawfully capitalizing on the Hermès brand.[130] In doing so, the jurors found that NFTs were not absolute protected speech under the First Amendment, with Judge Rakoff noting that Rothschild would've been entitled to

[125] *Non-Fungible Tokens and Intellectual Property*, United States Patent and Trademark Office (USPTO) (March 12, 2024),https://www.uspto.gov/sites/default/files/documents/Joint-USPTO-USCO-Report-on-NFTs-and-Intellectual-Property.pdf.
[126] *Hermes Int'l v. Rothschild*, No. 22-CV-384-JSR, (S.D.N.Y. Feb. 2, 2023).
[127] *Hermès Sues Artist Over 'MetaBirkins' NFTs*, The Fashion Law (2022).
[128] *Hermes Int'l v. Rothschild*, No. 22-CV-384-JSR, (S.D.N.Y. Feb. 2, 2023).
[129] *Id.*
[130] *Id.*

full protection under the First Amendment against Hermès' claims had the jury found even the slightest elements of artistic expression, "unless Hermès proved that Rothschild intentionally misled consumers into believing that Hermès was backing its products."[131] Instead, the jury found Mason Rothschild (real name: Sonny Estival) to be nothing but "a swindler."[132]

Brands such as Gucci, Nike, and Balenciaga have also proactively sought trademark protection in digital spaces to preemptively combat infringement.[133] Nike filed lawsuits against online reseller StockX for selling unauthorized "Nike Vault" NFTs, alleging trademark infringement and false advertising.[134] Similarly, luxury brands have expanded their trademark registrations to cover digital assets, aiming to establish exclusive rights over their virtual products before third parties attempt to exploit their brand equity.[135] However, despite these legal efforts, the enforcement of intellectual property rights in the metaverse remains challenging. The decentralized nature of blockchain technology, coupled with the global reach of digital

[131] *Id.*
[132] *Id.*
[133] Maghan McDowell, *Gucci CEO Bizzarri Talks Metaverse Strategy and Why It's 'Already a Very Real Place for Us,'* Vogue Business (March 28, 2022), https://www.voguebusiness.com/technology/gucci-ceo-bizzarri-talks-metaverse-strategy-and-why-its-already-a-very-real-place-for-us. ; Maghan McDowell, *How to Trademark the Metaverse*, Vogue Business (January 11, 2022), https://www.voguebusiness.com/technology/how-to-trademark-the-metaverse. ; Katie E. O'Brien, *Trademark Infringement in the Metaverse: Nike Sues Online Resale Platform Alleging Infringing Use of Logo in StockX NFT*, Kattison Avenue (May 12, 2022), https://katten.com/trademark-infringement-in-the-metaverse-nike-sues-online-resale-platform-alleging-infringing-use-of-logo-in-stockx-nft. ; D. Young and Co LLP-Gabriele Engels, *The (EU) Metaverse: Trade Mark Protection and Enforcement*, Lexology (January 4, 2024), https://www.lexology.com/library/detail.aspx?g=1a082aa9-72a2-4857-a57c-648cbc4aa7dc. ; Michele Glessner and Richard Milchior, *Digital Fashion and Trademarks: The Protection of Self-Expression in the Metaverse*, Int. Trademark Ass'n (January 17, 2024), https://www.inta.org/perspectives/features/digital-fashion-and-trademarks-the-protection-of-self-expression-in-the-metaverse/.
[134] *Nike, Inc. v. StockX LLC*, 22-CV-00983 (VEC)(SN) (S.D.N.Y. Jan. 9, 2023).
[135] Igor Demcak, *Brands in the Metaverse: Recounting Most Notable Digital Trademark Applications of 2022*, tramatm (December, 2022), https://www.tramatm.com/en/blog/category/software/brands-in-the-metaverse-recounting-most-notable-digital-trademark. ; *From Gucci to Walmart: Growing Number of Brands Are Applying for NFT-Related Trademarks*, Lexology (September 30, 2022), https://www.lexology.com/library/detail.aspx?g=e5bca4f6-2f27-4245-aaef-6e19fe1a533d. ; Sudeshna Banerjee, *A Brand New World – Protecting Trademarks in the Virtual Era*, The Global Legal Post (May 24, 2023), https://www.globallegalpost.com/news/a-brand-new-world-protecting-trademarks-in-the-virtual-era-1824422719.

marketplaces, complicates jurisdictional claims and enforcement mechanisms.[136] Moreover, as digital fashion continues to grow in popularity—both among consumers purchasing virtual goods for personal avatars and investors trading high-value NFTs—fashion houses will now be left to adopt innovative strategies to safeguard their designs in an increasingly borderless digital landscape.[137]

**Current Legal Protections for Fashion**

With the growing problem in digital fashion and the limitations of copyright law in protecting fashion designs, it makes sense to ask: what are businesses and designers doing?

Industry stakeholders rely on alternative legal mechanisms to safeguard their work, of which include trademark law, trade dress protections, design patents, and contractual agreements.[138] Each of these avenues offer distinct advantages and drawbacks in addressing the challenges posed by rampant copying in the fashion industry, and while none of these protections offer comprehensive coverage equivalent to copyright law, they collectively provide designers with some level of legal recourse.

**Trademarks**

One of the most effective tools for fashion brands is trademark protection, which allows designers to secure exclusive rights over brand names, logos, phrases, and distinctive patterns.[139] Trademarks are particularly useful in preventing counterfeit goods from entering the market, as

[136] Luis Fernando Bermejo and John Halski, *Jurisdiction and Enforcement Issues in the Metaverse*, Int. Trademark Ass'n (November 2023), https://www.inta.org/wp-content/uploads/public-files/advocacy/committee-reports/20231218_JURISDICTION-AND-ENFORCEMENT-ISSUES-IN-THE-METAVERSE.pdf.
[137] Glessner & Milchior, *supra* note 133.
[138] *What Is a Trademark?* United States Patent and Trademark Office, https://www.uspto.gov/trademarks/basics/what-trademark. ; 15 U.S.C. § 1125(a); 35 U.S.C. § 171; 18 U.S. Code § 1905; 10 USC 2260; Non-Compete Clause Rule, 2024, Rule 38342.
[139] *What Is a Trademark?* United States Patent and Trademark Office, https://www.uspto.gov/trademarks/basics/what-trademark.

they protect recognizable brand identifiers that signal authenticity to consumers.[140] Take the famous Nike swoosh that's been embellished on Nike products since 1971.[141] It's a simple yet powerful logo that has become synonymous with the brand's identity and reputation, and when consumers see that swoosh, they know it's Nike. Other examples include the British luxury fashion house, Burberry, which successfully registered its signature plaid pattern as a trademark, making the unauthorized reproduction of the distinctive checkered design liable for trademark infringement.[142] Similarly, Louis Vuitton's 'LV' logo and Chanel's interlocking 'CC' logo are legally protected under trademark law, granting these brands the ability to take considerable legal action against counterfeiters and infringers.[143]

However, trademark law has limitations—while it's effective in preventing unauthorized use of a brand's symbolic elements, it alone does not stop competitors from copying the overall structure or aesthetic of a garment.[144] A fashion house may own the rights to a logo, but if a competitor produces a nearly identical bag without the logo, trademark law alone may not be sufficient to challenge the identical design.[145] To add, as previously mentioned, the enforceability of trademark protections often hinges on substantial brand recognition and consumer association, thus a challenge is presented for emerging designers who lack the resources or market presence to establish their brand identity as a legally protected trademark.[146]

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[140] *Id.*
[141] SWOOSH, Registration No. 2164810.
[142] Burberry Plaid Pattern, Registration No. 6225074. ("The mark consists of a repeating plaid pattern consisting of a tan background, light tan vertical and horizontal lines, black vertical and horizontal lines, white squares, and red vertical and horizontal lines. The pattern will appear on the entire surface of the goods or various portions of the surfaces of the goods.")
[143] LV, Registration No. 0297594; CHANEL CC, Registration No. 1464711.
[144] 15 U.S.C. § 1127.
[145] *See* Sophie Cannon, *The 12 Best Designer Dupes of 2023 and Where to Buy Them*, N.Y. Post (March 9, 2024), https://nypost.com/article/best-designer-dupes/.
[146] Lo, *supra* note 87.; Wang, *supra* note 16.

**Trade Dress**

A more expansive form of protection is trade dress, which safeguards the overall "commercial image (look and feel) of a product or service that indicates or identifies the source of the product or service and distinguishes it from those of others."[147] The case of Christian Louboutin and Yves Saint Laurent in which Louboutin's red-soled shoes were granted legal protection under U.S. trademark law after the court ruled that Louboutin had successfully established secondary meaning, is an example of this protection.[148] Still however, much like the limitations that come with traditional trademark laws, trade dress protection, too, requires designers to prove that their designs have acquired distinctiveness in the minds of consumers.[149] Additionally, trade dress does not protect functional design elements, meaning that features considered necessary for the product's functionality cannot be legally protected, making trade dress protection a more selective rather than comprehensive solution.[150]

**Design Patents**

Design patents provide another legal avenue for protecting fashion designs by granting exclusive rights over new and original ornamental designs.[151] Unlike trademarks and trade dress, which focus on brand identity, design patents uniquely protect the aesthetic elements of a fashion item itself which prevents others from copying its exact appearance.[152] Patents can particularly be

[147] 15 U.S.C. § 1125(a).; T*rade Dress*, Int.Trademark Ass'n (last visited March 20, 2025), https://www.inta.org/topics/trade-dress/.
[148] *Louboutin*, 696 F.3d at 211, 212.
[149] 15 U.S.C. § 1125(a).
[150] 15 U.S.C. §§1052(e)(5).
[151] 35 U.S.C. § 171.; *Design Patent Application Guide*, United States Patent and Trademark Office (Sept. 2024), https://www.uspto.gov/patents/basics/apply/design-patent.
[152] *Id.*

useful for accessories, such as handbags and shoes, where innovative structural features and designs are frequently applied.

However, design patents are not without their flaws and come with significant barriers to accessibility:

1. High Cost - The cost of obtaining a design patent can range from $1,500 to $5,000, making it a costly option for independent designers and very small brands.[153]
2. Lengthy Approval Process - The patent application process can take one to three years, which can be impractical in an industry where trends shift rapidly.[154]
3. Limited Duration - Design patents are valid for only 15 years (with no renewal option), after which the design becomes part of the public domain.[155]

Due to these challenges, design patents remain a less commonly used form of protection in the fast-moving word of fashion, though they are still a viable option for protecting unique, high-value designs.[156]

**Contractual Agreements**

Given the shortcomings of traditional intellectual property protections, many designers rely on contract law as a way of safeguarding their world. These agreements include:

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[153] Vendela Dente, *Fashion Design Piracy: An Issue of Intellectual Property or Economic Impact?* 2 Fordham Undergrad. L. Rev. 25, 30 (2020).
[154] *Pendency | Patents Dashboard | USPTO*, United States Patent and Trademark Office (2025), https://www.uspto.gov/dashboard/patents/pendency.html.
[155] 35 U.S.C. § 173.
[156] *U.S. Patent Statistics Summary Table, Calendar Years 1963 to 2020, 05/2021 Update*, United States Patent and Trademark Office (March 28, 2025), https://www.uspto.gov/web/offices/ac/ido/oeip/taf/us_stat.htm. (In 2020, there were a total of 47,828 design patent applications filed, which represents only about 7.4% of the total number of patent applications filed in 2020.)

1. Non-Disclosure Agreements (NDAs): Fashion houses frequently require manufacturers, suppliers, collaborators, and employees to sign NDAs to prevent leaks of upcoming designs before they reach the market.[157]
2. Licensing Agreements: Designers can grant third parties the legal right to produce and sell their work while maintaining intellectual property control. This allows brands to monetize their designs without relinquishing ownership.[158]
3. Employment Contracts with Non-Compete Clauses: Some brands used to require employees to sign contracts preventing them from working for direct competition for a certain period, with the goal of reducing the risk of design theft by former employees.[159] However, on April 23, 2024, the Federal Trade Commission (FTC) banned most non-compete clauses in employment agreements, reasoning that such agreements were unfair methods of competition and violated the Federal Trade Commission Act.[160]

While contracts provide targeted protection, they only apply to the individuals and entities legally bound by them.[161] They do not prevent external parties (e.g. fast fashion retailers)

[157] Anuj Kumar, *Protecting Original Fashion Designs: The Role of Non-Disclosure and Non-Compete Clauses*, Fashion and Law Journal (November 12, 2024), https://fashionlawjournal.com/protecting-original-fashion-designs-the-role-of-non-disclosure-and-non-compete-clauses/.

[158] *See Michael Kors and Fossil Group, Inc., Fossil Group, Inc., Announces Continued Partnership with Michael Kors to Great Watches and Jewelry*, Fossil Group (February 15, 2025), https://www.fossilgroup.com/fossil-group-announces-continued-partnership-with-michael-kors-to-create-watches-and-jewelry/. (*See Michael Kors and Fossil Group Renew Global Licensing Agreement for Watches and Jewelry,* Fossil Group (November 14, 2014), https://www.fossilgroup.com/wp-content/uploads/2016/06/fossil-group-and-michael-kors-renew-global-licensing-agreement-for-watches-and-jewelry.pdf.) (In 2004, Michael Kors entered a licensing agreement with Fossil Group, Inc., the licensor. The agreement granted Fossil Group an exclusive right to design, develop, produce, and distribute Michael Kors branded watches and jewelry, but Michael Kors still maintained creative control over the products and branding.)

[159] Kumar, *supra* note 157.

[160] *FTC Announces Rule Banning Noncompetes*, Federal Trade Commission (April 23, 2024), https://www.ftc.gov/news-events/news/press-releases/2024/04/ftc-announces-rule-banning-noncompetes.

[161] *Contract*, LII / Legal Information Institute, https://www.law.cornell.edu/wex/contract.; (*See* Winterbottom v. Wright, 10 M & W 109 (1842) – Though an English case, it was widely adopted in early U.S. contract law, establishing that only contracting parties could sue for breach.)

from mimicking designs that were never covered by an agreement. Additionally, taking legal action against contractual breaches can be costly and time-consuming, making it even more inaccessible to small and independent brands.[162]

**France**

Unlike the United States where fashion designs receive only indirect protection through general IP laws, France has long recognized fashion as a unique form of creative property where copyright automatically protects the "rights of authors in all [original] works of the mind, whatever their kind, form of expression, merit or purpose."[163] Accordingly, in France, originality alone is sufficient to confer legal rights and designers do not need to go through a registration process.[164] However, should they choose to, French IP code allows for the registration of designs that are "new and [have] individual character."[165] Registration though, is a low-cost simple procedure for an industry "which frequently renew the shape and decoration of their products."[166] Article L.512-2 states:

> In the case of designs for industries which frequently renew the shape and decoration of their products, registration may be made in a simplified form under conditions laid down by decree in the Council of State. The forfeiture of the rights arising from such a filing is pronounced where it has not been made to comply with the general requirements laid down by this decree at the latest six months before the date set for its publication.[167]

The approach is a stark contrast to U.S. copyright law, which excludes fashion designs from copyright protection unless they feature "separable" artistic elements—a standard that's

[162] Jodi Esposito, *The U.S. Lawsuit System Costs America's Small Businesses $160 Billion*, Institute of Legal Reform (January 4, 2024), https://instituteforlegalreform.com/blog/the-us-lawsuit-system-costs-americas-small-businesses-160-billion/. ; Klemm Analysis Group Washington, DC, *Impact of Litigation on Small Business,* Small Business Administration (October 2005), https://www.bryantoconnor.com/wp-content/uploads/sites/1102931/2022/11/rs265tot.pdf.
[163] French Intellectual Property Code, Art. L112-1.
[164] French Intellectual Property Code, Art. L112-2.
[165] French Intellectual Property Code, Art. L511-2.
[166] French Intellectual Property Code, Art. L512-2.
[167] *Id.*

notoriously difficult to meet.[168] The advantages of a system such as French's are clear: it provides immediate, broad protection to designers without requiring expensive and time-consuming registration processes. It also reflects an understanding of the fast-paced nature of the fashion industry, where trends change rapidly, and legal safeguards must be agile enough to keep up. By contrast, the U.S. approach remains highly fragmented where designers seeking protection must navigate a complex legal landscape, relying on a combination of copyright (for fabric prints or separable artistic elements), trademark (for distinctive brand identifiers), and design patents (which require lengthy approval processes and is largely unpopular for that reason and more).[169]

**A Multi-Faceted Approach**

A multifaceted approach—one that expands copyright protection, integrates a hybrid legal framework, and considers the broader ethical implications of fast fashion—could pave the way for a more equitable and sustainable industry. The following recommendations propose legal and policy reforms that not only protect designers but also address arguments brought up by critics regarding protection that still fosters innovation and accountability in the fashion industry.

**Expanding Copyright Law to Protect Fashion Designs**

One of the most pressing gaps in U.S. fashion law is the excursion of most apparel from copyright protection. Under the Copyright Act of 1976, clothing is classified as a "useful article" and is only eligible for protection if it contains artistic elements that are physically or conceptually separable from the garment itself.[170] This legal standard reaffirms in *Star Athletica, L.L.C. v. Varsity Brands, Inc., has* created ambiguity and inconsistency in determining what

[168] *Star Athletica, L.L.C.,* 580 U.S. 405.
[169] Copyright Act of 1976, 17 U.S.C. §§ 115 (2012). ; 15 U.S.C. §1052,; 35 U.S.C. § 171.
[170] *Copyright Act of 1976*, 17 U.S.C. § 101.

aspects of a fashion design qualify for copyright protection.[171] To address this, the U.S. could implement a limited-duration copyright protection for fashion designs—modeled after the European Union's Unregistered Community Design Right, which grants automatic, short-term protection (three to five years) for newly disclosed designs.[172] This approach would:

1. Prevent immediate copying of original designs, allowing brands to monetize their creative work before mass-market reproduction floods the market.
2. Offer an accessible remedy for independent and small designers, who often lack the financial resources to pursue costly litigation under existing IP frameworks.
3. Provide a balanced solution, ensuring that protection is temporary and incentivizes creativity and does not hinder fashion's natural trend evolution and inherent culture of inspiration and adaptation.

**A Hybrid Legal Approach: Combining Copyright, Design Patents, and Stronger Enforcement**

Copyright protection alone isn't a panacea. Many fashion designers, particularly those that emphasize structural innovations or technical features, may still fall outside its scope. A hybrid legal system—one that streamlines design patents, expands copyright protections, and strengthens enforcement mechanisms—could offer a more comprehensive solution.

1. Streamlining Design Patent Protection: Design patents provide a stronger, more enforceable legal tool than copyright, but they come with significant barriers to accessibility. Currently, the average processing time for a design patent exceeds 15

[171] *Star Athletica, L.L.C.,* 580 U.S. 405.
[172] Council Regulation 6/2002, art. 1, 2002 O.J. (L 3) 1.

months, making it arguably impractical for an industry driven by rapid seasonal collections.[173] To make design patents more viable for designers, the USPTO could implement an expedited review process tailored specifically for apparel and accessories. A six-month "fast track"—similar to the existing accelerated process granted to medical and tech patents—would allow designers to secure legal protection before their designs become obsolete in the fashion cycle.[174]

2. Strengthening Enforcement Against Design Theft: Even when legal protections exist, enforcing them remains a challenge, especially against fast fashion companies with global supply chains. Many brands outsource production to jurisdictions with weak IP enforcements, allowing them to replicate designers without facing legal consequences.[175] To combat this, U.S. policymakers could:
    1. Increase statutory penalties for proven design theft, making it less financially viable for retailers to engage in mass copying.
    2. Expand the authority of the U.S. Customs and Border Protection (CBP) to seize counterfeit or infringing fashion goods at ports of entry.[176]
    3. Require online marketplaces (such as Shein, Temu, and Amazon) to verify originality claims before allowing third-party sellers to list fashion items.[177]

[173] *Pendency | Patents Dashboard | USPTO*, United States Patent and Trademark Office (2025), https://www.uspto.gov/dashboard/patents/pendency.html.
[174] *Accelerated Examination*, United States Patent and Trademark Office (2016), https://www.uspto.gov/patents/initiatives/accelerated-examination.
[175] Emma Ross, *Fast Fashion Getting Faster: A Look at the Unethical Labor Practices Sustaining a Growing Industry*, George Wash. L. (October 28, 2021), https://studentbriefs.law.gwu.edu/ilpb/2021/10/28/fast-fashion-getting-faster-a-look-at-the-unethical-labor-practices-sustaining-a-growing-industry/.
[176] *Intellectual Property Rights Seizure Statistics: Fiscal Year 2024,* U.S. Customs and Border Protection (June 2024), https://www.cbp.gov/sites/default/files/2024-06/ipr-seizure-stats-fy23-508.pdf ("For the last three years, the top commodities seized for IPR infringement have been (1) handbags/wallets, (2) watches, and (3) jewelry.")
[177] Prarthana Prakash, *Temu, Shein, and Amazon to be held liable by EU for the dangerous and illegal products they sell, reports says*, Fortune (Feb. 3, 2025), https://fortune.com/europe/2025/02/03/temu-shein-amazon-liable-eu-dangerous-illegal-products/.

**Fast Fashion's Ethical and Environmental Impact**

Any discussion of fashion IP protection must also acknowledge the ethical and environmental consequences of fast fashion, which thrives on mass-producing cheap knockoffs at an unsustainable rate.[178] While legal reforms can help curb design piracy, additional policies should target the broader structural issues that allow fast fashion giants to exploit both labor and creativity. A significant percentage of fast fashion's counterfeit and copied goods are produced in factories with exploitative labor practices, therefore strengthening supply chain transparency laws could discourage major retailers from profiting off stolen designs produced under unethical conditions.[179] A model of this already exists in the Fashion Sustainability and Social Accountability Act, a proposed bill in New York that if passed and signed would require companies to disclose their environmental and labor data.[180] If implemented on a national scale, similar legislation could ensure that brands:

1. Publicly report where and how their garments are produced
2. Take legal responsibility for labor violations within their supply chain
3. Ensure that outsourced production doesn't involve IP infringement

**Conclusion**

While no single legal framework is perfect, the future of fashion law requires a comprehensive, multi-tiered approach—one that recognizes both the legal and ethical dimensions of design protection. The current limitations of U.S. copyright law in protecting fashion designs under the useful article doctrine leaves designers exposed to widespread

[178] Ross, *supra* note at 175.
[179] *Id.*
[180] N.Y. State S7428/A8352, 2022 Reg. Sess. (N.Y. 2022), https://www.nysenate.gov/legislation/bills/2021/A8352.

imitation which directly undermines their creative and economic interests. As the industry continues to evolve, the legal framework must evolve and adapt as well to ensure better safeguards for designers' work while nurturing the creativity and innovation that form the foundation of the industry. To achieve this, the U.S. must adapt copyright protection to cover fashion designers, streamline the design patent process, and enhance enforcement mechanisms against infringement. However, these reforms should also address the broader ethical and environmental implications of unchecked replication. A well-balanced legal framework would be one that both safeguards designers' rights and promotes sustainability and fairness within the industry. This would ensure that fashion remains a dynamic, creative field where originality is celebrated, protected, and rewarded.

# Online Speech and the Virtual Public Square:

# Applying the First Amendment to Social Media Platforms

Karan Kuppa-Apte

## Introduction: Move Fast and Break…the Law?

From its inception, social media has proven to be a disruptive force. In the realms of business, culture, and communication, it has revolutionized almost every aspect of peoples' lives, in many ways for the better. However, as with all new technologies, it comes with considerable pitfalls: from cyberbullying to disinformation campaigns, the dark side of social media is a source of near-constant controversy and debate. As with other social ills, the law is seen as a tool to curb the worst excesses of the internet. It is no surprise, then, that as American policymakers improve their understanding of how social media works, it has come under increasing regulatory scrutiny. Many of the resulting laws are laudable; prohibitions on certain obscene content, online harassment, and internet scams are essential to creating a safe and accessible digital world.

However, in this process, regulators must be careful not to undermine core civil liberties that people are entitled to, online or not. Noteworthy among these is the right to freedom of speech under the First Amendment.[1] A growing number of legal challenges to laws that abridge users' and companies' freedom of speech is worthy of attention; as the "virtual public square"[2] seems only to grow in prominence, recent precedents as well as pending and future cases will have a considerable impact on the health and shape of American democracy for generations to come. They also touch upon a key constitutional question: are social media platforms (also referred to here as "platforms") entitled to the protections of the First Amendment?

[1] U.S. Const. amend. I.
[2] Allison Stanger, The First Amendment Meets the Virtual Public Square, 153 *Daedalus* 3 (2024): 187–207. This is the first use of the term I encountered, and I use it throughout this article.

This note seeks to answer that question with a resounding "yes." Indeed, I argue that, just like other companies that traffic in communication such as broadcasters and newspapers, social media platforms are constitutionally shielded from government-mandated statements about their content moderation policies, as well as state interference with their editorial discretion as the aggregators and publishers of users' speech. It should be noted that this entitlement is robust, but not unqualified; within the labyrinth of First Amendment case law, there is much room for debate about the nuances of platforms' right to freedom of speech — but that right stands on firm constitutional grounds.

This note proceeds in four parts. It begins with a primer on the relationship between free speech law (from the First Amendment and elsewhere) and the internet, followed by an introduction to platforms' free speech rights as they stand currently. Part Two discusses laws that compel platforms to disclose their content moderation policies, and the questionable legal grounds for such requirements. Part Three moves on to the more controversial matter of platforms content moderation policies in themselves, and the compelling arguments for and against limiting their editorial discretion. Part Four concludes this note by taking stock of notable pending cases regarding platforms' speech rights, with an eye towards future debates over freedom of expression on the internet.

## I. The Law as it Stands

Much of the complexity and controversy of all speech regulation — including constraints upon online speech — stems from the practical concern that in an ordered society, expression cannot be totally unfettered. For one, it is well understood in legal scholarship that "freedom of speech" in the American legal context is simultaneously narrower and farther-reaching than the literal term implies. On one hand, the First Amendment is understood to protect not "the full

range of human conduct, but only some narrower class of conduct."[3] Plenty of actions involving speech, from the drafting of contracts[4] to the words uttered in the heat of anger[5] can be subject to government regulation. To make things even more confusing, expressive acts that cannot be classified as "speech" in the verbal sense — wearing armbands[6] or financing political advertisements[7] — are indeed protected by freedom of speech. Clearly, since the text of the First Amendment cannot be literally applied to cases involving the abridgement of expression (actual speech or otherwise), we must turn to the rich body of case law that clarifies its truer meaning.

Discussions around regulating online speech are, like the internet itself, relatively new. Robust debates exist over the extent to which platforms should be held responsible for the content they publish. Because of the novelty surrounding online speech, scholars have borrowed precedents from the disruptive communication technologies of the past. To enter this discussion, then, we must look beyond the First Amendment, to the storied free speech canon outside of the Constitution's explicit content. Genevieve Lakier's article on the non-First Amendment tradition of free speech is an excellent starting point.

She holds that the laws protecting public discourse — particularly the Postal Acts of the 18th and 19th Centuries, as well as common carriage and worker protection statutes of the past hundred years — reflect a legal tradition in legislatures that is far more majoritarian and concerned with threats to free expression posed by private economic power.[8] For example, the Post Office Act involved state intervention in order to facilitate the spread of newspapers across the country in service of a more vibrant marketplace of ideas.[9] The basis of justification for these

[3] Frederick Schauer & Walter Sinnott-Armstrong, Philosophy of Law: Classic and Contemporary Readings with Commentary 354 (1996).
[4] *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).
[5] *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
[6] *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).
[7] *Citizens United v. FEC*, 558 U.S. 310 (2010)
[8] Genevieve Lakier, The Non-First Amendment Law of Freedom of Speech, 134 Harv. L. Rev. 2299, 2351 (2021).
[9] Id. at 2310.

laws did not come from the First Amendment, but from principles like freedom of information and the necessity of public discourse for a healthy democracy.

Lakier's argument may stretch the bounds of constitutionalism. She argues against Justice Brennan's conception of the relationship between state and federal constitutional law, stating that the non-First Amendment tradition is entirely separate from the federal Constitution, that it does not build off of the "floor" of the First Amendment.[10] That may be so, but the notion that extraconstitutional law can legitimately challenge settled constitutional doctrines runs contrary to *Marbury*[11] and the fundamentals of constitutional law, whereby federal law overrules state law, and the US Constitution is supreme.[12]

In the specific case of free speech law, numerous cases support the primacy of the First Amendment over laws that, in theory, go beyond the Constitution in their defense of free expression.[13] That being said, *Pruneyard v. Robins* may introduce a carveout for state constitutions that guarantee a more expansive right to free speech than that of the US Constitution. However, key to that decision was the Court's finding that California's free speech statute did not unduly violate the property owner's Fifth Amendment right to private property.[14] Moreover, the inherently-political nature of non-First Amendment statutes suggests that courts should review these laws to check legislatures, per the original vision for the federal judiciary.[15]

Touching on the internet itself, one piece of non-First Amendment law is especially noteworthy: Section 230 of the Communications Act, enacted as part of the Communications

[10] Lakier, supra note 8, at pages 2304–5; William J. Brennan, Jr., The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights, 61 N.Y.U. L. Rev. 535, 550 (1986).
[11] *Marbury v. Madison*, 5 U.S. 137 (1803).
[12] U.S. Const. art. 6, cl. 2.
[13] *Miami Herald Pub. Co. v. Tornillo*, 418 U.S. 241 (1974); *Buckley v. Valeo*, 424 U.S. 1 (1976); *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994); *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018); *Janus v. AFSCME*, 585 U.S. 878 (2018); *Brown v. Entertainment Merchants Association*, 564 U.S. 786 (2011).
[14] *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980), at 84.
[15] The Federalist No. 78 (Alexander Hamilton) (Clinton Rossiter ed., 1961).

Decency Act of 1996 (CDA). Section 230 was intended to encourage the free development of the internet and stimulate the growth of "interactive computer service"[16] providers and users, while also encouraging private actors to self-regulate by limiting access to content deemed “obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable.”[17] Under broad interpretation from courts, Section 230 shields online speakers and providers of information (including platforms[18]) from liability for the speech of others, as well as limiting or enabling others to limit access to undesirable online content.[19] It thus reflects a similar goal to that of the Post Office Acts — to encourage the spread of valuable new communicative tools across the country — but by creating legal immunities for the private sector rather than policy obligations for the public sector.

Unlike newspapers, which may be liable for publishing libelous or obscene content, under Section 230 platforms are likened to libraries or newsstands — not publishers, but intermediaries — and thus are only liable if they knowingly distribute unlawful content.[20] The law was designed with *Stratton Oakmont, Inc. v. Prodigy Services Co.* in mind, a case in which the New York Supreme Court held that Prodigy, a website that hosted anonymous online messaging boards, was to be considered the publisher of posts made by users and therefore was liable for defamatory statements made on its platform.[21] Bipartisan concern over "perverse incentives" for websites to abandon content moderation efforts eventually led to the inclusion of Section 230 in the Communications Decency Act.[22]

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[16] 47 U.S.C. § 230(f)(2) (2024).
[17] 47 U.S.C. § 230(f)(2).
[18] *Klayman v. Zuckerberg*, 753 F.3d 1354 (D.C. Cir. 2014).
[19] Valerie C. Brannon & Eric N. Holmes, Cong. Rsch. Serv., R46751, Section 230: An Overview (Jan. 4, 2024), https://crsreports.congress.gov/product/pdf/R/R46751.
[20] *Cubby, Inc. v. CompuServe Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991).
[21] *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).
[22] Mark Stepanyuk. "Stratton Oakmont v. Prodigy Services: The Case that Spawned Section 230." *Washington Journal of Law, Technology & Arts* (2022).

The first case dealing with the scope of immunity under Section 230 was *Zeran v. America Online, Inc.*, where the Fourth Circuit interpreted Section 230 to preclude "lawsuits seeking to hold a service provider liable for its exercise of a publisher's traditional editorial functions — such as deciding whether to publish, withdraw, postpone or alter content."[23] Since that 1997 decision, many cases have been decided in favor of interactive computer service providers — including platforms like Facebook and MySpace.[24]

*Zeran* therefore constitutes a landmark case for online speech regulation, placing platforms (and interactive computer service providers in general) in a murky category as distributors of information with the right to exercise "a publisher's traditional editorial functions," but without being considered publishers in the legal sense. This puts platforms, and free online discourse, in a remarkably strong position; firms retain the freedom of editorial choice enjoyed by, for example, a newspaper, and the limited liability for the speech they distribute faced by booksellers. Platforms' not-quite-publisher status carries important implications for the *nature* of the speech that they carry: whether or not social media posts on a given site are a "coherent speech product" — a strange-sounding term that lies at the heart of debates over content moderation, discussed at length in Part Two.

Finally, moving past formal regulation, we may turn our attention to concerns over informal, indirect encroachments on freedom of speech by governments. Though widely-understood to be illegal in theory, in practice courts and scholars disagree on whether specific situations constitute improper government pressure on platforms. This is understandable; as a fundamentally social undertaking, measuring the "chilling effect" of state action on free

[23] *Zeran v. Am. Online, Inc.*, 129 F.3d 327 (4th Cir. 1997).
[24] Doe v. Backpage.com, LLC, 817 F.3d 12 (1st Cir. 2016); Doe v. MySpace, Inc., 528 F.3d 413 (5th Cir. 2008; Chicago Lawyers' Comm. for Civil Rights Under Law, Inc. v. Craigslist, Inc., 519 F.3d 666 (7th Cir. 2008); Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019); Universal Commc'n Sys., Inc. v. Lycos, Inc., 478 F.3d 413 (1st Cir. 2007); Klayman, 753 F.3d at 1357; Hassell v. Bird, 5 Cal. 5th 522, 234 Cal. Rptr. 3d 867, 420 P.3d 776 (2018).

expression and assessing whether the authorities have exercised undue pressure on a speaker or distributor quickly becomes unclear.

The most obviously-forbidden form of government pressure to censor speech is direct coercion — threatening state sanction if a speaker or distributor does not block or restrict certain speech. *Bantam Books, Inc. v. Sullivan* established a firm precedent against such behavior, after the Rhode Island state legislature created a commission to prevent the sale of books it deemed "obscene" and threatened bookstores with prosecution if they did not comply.[25] Justice Brennan's majority opinion held Rhode Island's actions to be unconstitutional prior restraint of speech, that although "the Commission [had] no power to apply formal legal sanctions … it [acted] as an agency of the State in making the determinations and in publishing its notices," amounting to coercive state behavior.[26] He insightfully notes that ""[i]t is characteristic of the freedoms of expression … that they are vulnerable to indirect … assaults, and effective informal suppression can be as fully subject to constitutional limitations as a direct criminal prohibition."[27]

Other instances have been less cut-and-dry, especially when considering the invisible power imbalance favoring the government over the governed. Eugene Volokh discusses this policy dilemma — what is intended as an *ask* may be heard as a *demand* when the speaker has power over the listener.[28] He likens the dynamic to employers' speech to their employees, bringing up *NLRB v. Gissel Packing Co.* (1969), where the Court noted that "any balancing of [the employer's and employee's] rights must take into account the economic dependence of the employees on their employers."[29] In his analysis, while such power imbalances do not preclude

[25] *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58 (1963).
[26] *Id.* at 68.
[27] *Id.* at 66.
[28] Eugene Volokh. "The Future of Government Pressure on Social Media Platforms." 153 *Daedalus* 3 (2024): 403–422, at 412.
[29] Volokh, supra note 27, at 413, citing *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), at 617.

government communication to private entities, officials must be cautious in how they request businesses and individuals to behave.

*Murthy v. Missouri* (2024) is the case most directly-relevant to government pressure on platforms to self-censor, but does little to clarify the nuances of coercion. In that case, Louisiana, Missouri, and five social media users accused federal officials of unduly pressuring social media companies to remove content criticizing the Biden Administration's COVID-19 response or questioning the results of the 2020 presidential election. A District Court issued an injunction against officials' pressuring social media platforms, which the Fifth Circuit upheld.

Justice Barrett's opinion for the Court held that the plaintiffs failed to meet Article III's "cases and controversies" requirement for standing. Plaintiffs' claims of direct censorship and impingement upon the right of others to hear censored expression, the Court held, did not show "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling."[30]

For one, the Court found a "lack of specific causation findings with respect to and discrete instance of content moderation" — that "platforms had independent incentives to moderate content and often exercised their own judgment."[31] It also noted the lack of uniformity among plaintiffs, who included users of different platforms that communicated with a variety of defendants (the White House, Center for Disease Control, Surgeon General, and federal law enforcement), complicating the requirement that plaintiffs demonstrate standing for each charge being made.[32]

Moreover, the Court found that plaintiffs failed to prove that their injuries could be traced to government actions — the timing of platforms' actions against content and records of

[30] Murthy, 603 U.S. at 9, citing Clapper v. Amnesty Int'l USA, 568 U. S. 398, 409 (2013).
[31] *Id.*
[32] *Id.*

government communications with those platforms (which in some cases do not even exist) did not line up. As for the threat of future harm (i.e. continued content removal), the Court noted that as the pandemic subsided, so too did the frequency of communication between officials and platforms. Absent that ongoing pressure, it continued, it is plausible that platforms were free to end their policies without input from officials.[33] The ruling is narrow and technical, citing more cases on Article III standing than the First Amendment.

The Court briefly considers the limits of free speech when addressing the plaintiffs' claim that others have the "right to listen" to speech they claim an interest in, balking at its broadness. It states that this theory "would grant all social-media users the right to sue over someone else's censorship—at least so long as they claim an interest in that person's speech."[34] It invokes precedent to say that the listener must have "a concrete, specific connection to the speaker."[35] The Court notes that state plaintiffs fail to identify specific, interested speakers and cannot claim *parens patriae* standing.[36] Thus, while the Court hints at limitations on the First Amendment on social media, the decision "begin[s]—and end[s]—with standing."[37]

In such uncertain territory, this note seeks to shed some light on how the First Amendment — and non-Constitutional free speech law — apply to social media. Considering Section 230, longstanding free speech precedents, and case law on revolutionary communication technologies of the past, it finds that two policy strategies to curtail online speech are unconstitutional: first, mandatory disclosures of how platforms moderate content; and second, efforts to restrict platforms' control over the content that may be published on their platforms.

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[33] *Id.*
[34] *Id.*
[35] Id., citing *Kleindienst v. Mandel*, 408 U. S. 753, 762 (1972) and *Virginia Bd. of Pharmacy v. Virginia Citizens Consumer Council*, *Inc*. 425 U. S. 748, 756–757 (1976).
[36] *Id.*, citing Brackeen, 599 U. S., at 295, n. 11.
[37] *Id.*

## II. Disclosure Requirements and Compelled Speech

The less stringent — and more constitutionally suspect — of the laws being discussed are those requiring platforms to publish disclosure statements where they detail their content moderation policies, including how they decide which posts violate platform guidelines. The notion that a private entity's removal of speech from its property is, in itself, speech may appear counterintuitive, but it has a strong precedential basis. State disclosure requirements have been overturned because of how they force platforms to engage in certain speech and simultaneously have a chilling effect on platforms' editorial expression — that is, they both suppress and coerce expression on the part of social media platforms.

The coercion piece is fairly obvious. Characteristic of the First Amendment's basis in negative liberties, freedom of speech includes the freedom to *refrain from speaking*. The landmark case on this matter is *West Virginia State Board of Education v. Barnette* (1943), where the Court held that students could refuse to salute the American flag for religious reasons and Justice Robert Jackson famously asserted that "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."[38] Decades later, the Court once upheld the compelled speech doctrine to prevent a man from being punished for covering a state motto on his license plate.[39]

The other piece — the chilling effect — is slightly more complex. In free speech cases, a chilling effect is when would-be speakers refrain from exercising their First Amendment right for fear of facing legal repercussions. Rather than laws explicitly abridging one's expression, laws

[38] *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).
[39] *Wooley v. Maynard*, 430 U.S. 705 (1977).

with a chilling effect tend to be overly broad or vague and indirectly threaten to punish speech.[40] Online communication laws have already been scrutinized for their tendency to "chill" freedom of expression, as in *Reno v. American Civil Liberties Union* (1997), when the Court unanimously found that the CDA's prohibition of "obscene or indecent" messages and the knowing display of "patently offensive" materials to minors online to be so broad as to threaten protected as well as unprotected speech.[41] Thus, precedent suggests that any policy involving communication online may be scrutinized for the potential chilling effect it has on free expression.

Platform disclosure requirements most certainly fit into the compelled speech doctrine, as federal courts have ruled. Take California's AB 587, which included (1) a requirement for platforms to publicly post their terms of service (TOS), including processes for flagging content and taking action against flagged content;[42] (2) a requirement for platforms to submit to the California attorney general a semiannual report explaining how their TOS define and address categories of content deemed objectionable by the state,[43] plus data on content that the company flagged;[44] and (3) a penalty whereby platforms may be sued for omitting or misrepresenting the aforementioned required information and fined up to $15,000 per violation, per day.[45] AB 587 thus required platforms to communicate with the public (by publishing their TOS) and the government (by providing content moderation reports).

The social media platform X (formerly known as Twitter) sued the California Attorney General Robert Bonta, asserting that AB 587 violated the First Amendment's free speech clause

[40] Chilling Effect: An Overview, FIRE, https://www.thefire.org/research-learn/chilling-effect-overview (last visited Mar. 28, 2025).
[41] Sara L. Zeigler, Communications Decency Act and Section 230 (1996), First Amendment Encyclopedia, Free Speech Center at Middle Tennessee State University (May 23, 2023), https://firstamendment.mtsu.edu/article/communications-decency-act-and-section-230/.
[42] Cal. Bus. & Prof. Code § 22676
[43] Content Categories: (A) Hate speech or racism. (B) Extremism or radicalization. (C) Disinformation or misinformation. (D) Harassment. (E) Foreign political interference. (F) Controlled substance distribution.
[44] See supra note 41, at 22677.
[45] *Id.* at 22678.

and the Dormant Commerce Clause, and was precluded by our old friend, Section 230. In court, the state argued that AB 587's use of compelled speech was consistent with the *Zauderer v. Office of Disciplinary Council* (1985), which held that certain commercial speech containing "purely factual and uncontroversial information about the terms under which his services will be available,"[46] could be compelled by authorities.

California's argument was rejected by the Ninth Circuit because the required reports on categories of content (the Content Category Reports) go beyond mere commercial speech; they "require a company to recast its content moderation practices in language prescribed by the State, implicitly opining on whether and how certain controversial categories of content should be moderated."[47] Writing for the unanimous panel of judges, Judge Milan D. Smith, Jr. observes that the Content Category Reports go beyond regular commercial speech, which "does no more than propose a commercial transaction,"[48] nor are the reports a form of advertising or existing commercial speech,[49] and they conflate platforms TOS and content moderation policies (which may be considered commercial speech) with the company's views on "intensely debated and politically fraught topics"[50] — sensitive information that a platform should not be compelled to divulge in the name of transparency. The case was then handed back to the district court to decide whether the Content Category Reports could be severed from the rest of the law.

The court focuses on the coerced speech aspect of California's law, ruling convincingly that content moderation reports necessarily involve platforms weighing in on controversial topics such as hate speech and foreign political interference. Not only does this stretch far beyond the limited definition of commercial speech, it suggests a chilling effect on platforms' exercise of

[46] *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985).
[47] *X Corp. v. Bonta*, No. 24-271, slip op. at 22 (9th Cir. Sept. 4, 2024).
[48] *United States v. United Foods, Inc.*, 533 U.S. 405 (2001)
[49] This is one of the requirements for a state's speech restrictions to fall under intermediate scrutiny, per *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983).
[50] See supra note 47, at 24.

their editorial discretion. Fearing that its content moderation policies do not sufficiently align with California's views on how the Content Categories ought to be policed, platforms could have faced pressure to follow the state's lead instead of their own conscience as to which posts should be removed from a site. This represents *indirect* restriction of platforms' editorial expression, unlike the direct restrictions discussed in Part 3.

Another noteworthy point not mentioned in *Bonta*: content moderation reports represent the unfair targeting of social media platforms as the latest communication technology on the block. At AB 587's Assembly floor analysis, its author, California State Representative Jesse Gabriel, asserted that "[X], along with other social media platforms, has been implicated as a venue for hate groups to safely grow."[51] While this may be true, no rationale is given for targeting social media platforms specifically. Consider the film camera and projector, which over a century ago were like the social media of their day — allowing information to be conveyed to large audiences in theaters like never before. Improvements in film technology allowed for the production of *The Birth of a Nation*, a film about the American Civil War and subsequent Reconstruction with abhorrently racist themes.[52] Its favorable portrayal of the Ku Klux Klan was a major factor in the hate group's revival in the early 20th Century.

The incident curiously echoes accusations against X and other platforms that they advance far-right beliefs held by their owners, amplified by algorithms. Yet although there were troubling instances of censorship directed at the film itself,[53] nobody thought to deprive the American people of exciting new film technologies by requiring studios to craft detailed reports on how they handled hate speech in their scripts. Of course, the analogy here is imperfect. But

[51] Assemb. B. 587, 2021-2022 Leg., Reg. Sess. (Cal. 2022).
[52] Allyson Hobbs, A Hundred Years Later, 'The Birth of a Nation' Hasn't Gone Away, The New Yorker (Dec. 13, 2015), https://www.newyorker.com/culture/culture-desk/hundred-years-later-birth-nation-hasnt-gone-away.
[53] *Mutual Film Corp. v. Industrial Comm'n of Ohio*, 236 U.S. 230 (1915).

the point remains that no other communicative enterprise is subject to such onerous disclosure requirements. Today, newspapers, television broadcasters, radio stations, and other media outlets are not required to send reports of how they make editorial choices to the states in which they operate. While the content on social media platforms is more explicitly attributed to individual users than it is for other entities, rather than the platform as a whole, the fact remains that as the private hosts of speech, platforms' right to editorial discretion should not be ignored entirely.

Ultimately, forcing platforms to justify their decision about content moderation amounts to the state requiring a private actor to opine on controversial topics — compelled speech that goes well beyond the "factual and uncontroversial" commercial speech of *Zauderer* and indeed may undermine platforms' economic interests if users disagree with the rationale for content moderation choices. Additionally, that such compelled speech should fit the mold of government-defined content categories induces a chilling effect on platforms' editorial discretion, encouraging deference to the state's perspective on content categories.

## III. Independence vs. Access: How to Govern the Virtual Public Square?

Counterintuitively, the subtler method of circumscribing platforms' speech rights (that is, disclosure requirements) rest on shakier legal ground and are a less popular strategy than more brazen efforts to take on platforms' very ability to moderate content in the first place. This is in large part due to the special place that freedom of expression occupies in the American political fabric, stretching well beyond the text of the First Amendment and the state action doctrine.[54] There is a faith in the marketplace of ideas, and a general concern that powerful individuals (i.e.

[54] This doctrine applies constitutional restrictions only to state — that is, government — actors (i.e., not private ones). The definition of "state" has been broadened by *Lebron v. National Railroad Passenger Corporation*; 513 U.S. 374 (1995); and *Marsh v. Alabama*, 326 U.S. 501 (1946), and, more recently, narrowed in *Manhattan Community Access Corp. v. Halleck*, No. 17-1702, 587 U.S. ___ (2019). In the context of the First Amendment, it means that private actors — that is, entities that do not regularly carry out activities identical or near-identical to a government entity of any branch — are not enjoined from restricting speech on premises within their lawful control (i.e., their private property).

social media platforms) can stem or manipulate the flow of ideas for their own benefit. To that end, lawmakers on both sides of the political spectrum have taken aim at platforms' editorial autonomy, accusing platforms of censorship or using their power to push agendas.

Indeed, concerns about concentrated economic power undermining online expression are justified; Alison Stanger argues that tech companies have become "the gatekeeper[s] of our virtual public sphere" because of their outsized wealth and political power,[55] pointing out the Meta Global Oversight board's ability to act without direct accountability to a government and its decision to deplatform President Trump's social media accounts because of his connection to the January 6th attack on the US Capitol. More recently, Elon Musk has been accused of censoring his critics after acquiring X by suspending journalists' accounts on the platform.[56] However, in managing these legitimate fears of an internet dominated by the wealthy, it is important to remember the legal and constitutional guardrails in place to preserve freedom of speech, whether online or offline.

We have already discussed platform transparency requirements and the danger they pose to the online First Amendment. Others have called for the repeal of Section 230 liability, a threat not just to the primacy of the American internet industry, but also a direct assault on platform users' freedom of speech; if platforms can be liable for what their users post, what people can post online will be stringently limited as censorship will have been delegated from the government to the platforms themselves — a fairly obvious violation of *Norwood v. Harrison* (1973), wherein the Court forbade government support for the private undertaking of unconstitutional acts (such as censorship).[57] The truth is, there is no getting around the

[55] Stanger, see supra note 2 at 356.
[56] Mark Joyella, Elon Musk Accused Of 'Silencing His Critics' As X Suspends Journalists, Forbes (Jan. 9, 2024), https://www.forbes.com/sites/markjoyella/2024/01/09/elon-musk-silencing-his-critics-as-journalists-are-suspended-by-x/.
[57] *Norwood v. Harrison*, 413 U.S. 455 (1973).

government's desire to limit platforms' content moderation powers. Perhaps the solution is to own that urge and to embrace limits on their editorial discretion?

With a little honesty on the part of those looking to restrict how platforms govern themselves, we can begin to explore the constitutional nuances of how governments can regulate platforms editorial discretion, and by necessary extension potential users' access to those platforms. Looking at past communicative technologies and how their access and content were regulated can be a helpful guide; in certain limited contexts, there may be room for the government to encourage access to the virtual public square, perhaps even compel platforms to host users if a sufficient interest in doing so exists; however, platforms' control over the content that users post on their sites is ironclad and should remain so.

In the Supreme Court's October 2023 term, the First Amendment community held its breath for an answer to some of these thorny questions in the twin cases, *NetChoice, LLC v. Paxton* and *Moody v. NetChoice, LLC*, two cases challenging two state laws (Texas and Florida respectively) seeking to curtail the content moderation policies of social media platforms.[58] The Texas law (HB 20) prohibits platforms from removing, demonetizing, or restricting user content based on its political content, and must provide users with an appeals process to overturn content moderation decisions. Florida's law (SB 7072) specifically disallows the deplatforming of political candidates. Both laws target large social media companies (with a threshold for users to define the category), establish content moderation disclosure requirements for social media companies within their jurisdiction, and establish fines and civil liability as punishment for noncompliance.[59]

[58] *Moody v. Netchoice*, 603 U.S. 707 (2024).
[59] H.B. 20, 87th Leg., 2d Spec. Sess. (Tex. 2021); S.B. 7072, 2021 Leg., Reg. Sess. (Fla. 2021).

*Moody* was largely overturned by the Eleventh Circuit, which made the important finding that platforms' content moderation is a form of expressive conduct, despite lacking a "common theme" between posts being moderated or a clearly-articulable message behind moderation decisions, per *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston* (1995) and *Miami Herald Publishing Co. v. Tornillo* (1974).[60] Moreover, the clear ideological motivation behind the law was found to constitute viewpoint discrimination in itself, clearly by political conservatives against what they perceived to be "leftists" and "tech oligarchs."[61] Thus, it was found that Florida's efforts to restrict the First Amendment rights of private entities was, per the state action doctrine, likely to be unconstitutional. However, the court also found that some of SB 7072's disclosure requirements were constitutionally sound — worth highlighting are the requirements to make users' data accessible to them and notify them of changes to the platform's rules. These could conceivably fit into *Zauderer*'s requirements.

*Paxton* found more sympathy at the Fifth Circuit, where HB 20 was fully upheld as the court rejected platforms' claim of expressive conduct through content moderation. The court held that platforms are the hosts of content, not the creators, and thus resemble a telegram company (which has common carrier status) more closely than a newspaper company. It also adopted an odd characterization of platforms' speech rights through content moderation as censorship of other viewpoints, without reconciling such a view with the state action doctrine, or First Amendment case law at all.

Ultimately, the Supreme Court vacated both judgements and remanded each case to its respective federal circuit, holding that neither had conducted sufficient fact finding to rule on the facial challenges brought by NetChoice to either law. It is therefore back to the drawing board on

[60] NetChoice, LLC v. Att'y Gen., State of Fla., 34 F.4th 1196, 1234–35 (11th Cir. 2022).
[61] *Id.* at 50.

the matter of platforms' editorial freedom. Despite its constitutionally strange opinion, the Fifth Circuit does hit upon an important distinction in the services provided by social media platforms: what Eugene Volokh calls the "hosting" and the "recommendation" function. Hosting refers to platforms allowing users onto their sites in the first place, and recommendation is the algorithmic sorting of content to fit the preferences of users.[62] Volokh's distinction is insightful and helpful to our investigation.

Looking at hosting requirements, the Court presents a mixed record on whether the state can constitutionally compel platforms to host speakers (i.e., prohibit platforms for banning users for the content they post.) *Lloyd Corporation v. Tanner* (1972) establishes that the First Amendment itself does not require owners of public-access private property (whether a shopping mall or an online forum) to open their premises up to speakers. However, *PruneYard Shopping Center v. Robins* (1980) permitted the California state constitution to do just that, building off of the baseline floor established by the First Amendment. Whether a mere state statute is afforded that power is uncertain, but doubtful; a state constitutional amendment would not carry the suspect political motivations that HB 20 and especially SB 7072 do.

That being said, the Court also upheld the Solomon Amendment in *Rumsfeld v. FAIR* (2006), requiring law schools to allow military recruiters onto their campuses — even if they disagreed with the military's "don't ask, don't tell" policy — in order to keep federal aid. However, the Court did not seek to justify compelled speech in that case; it did not find sufficient evidence of compelled speech to begin with. After all, the speech of military recruiters was "plainly incidental to the Solomon Amendment's regulation of conduct,"[63] and their presence on campus did not sufficiently interfere with law schools' message or mission. Compared to a case

[62] Eugene Volokh, Treating Social Media Platforms Like Common Carriers?, 1 J. Free Speech L. 377 (2021), https://www.journaloffreespeechlaw.org/volokh.pdf.
[63] *Rumsfeld v. FAIR* (547 U.S. at 62).

like *Hurley*, which involves the assembling of a coherent speech product, the facts of *Rumsfeld* could plausibly not be called compelled speech.

The last major compelled-speech case to consider is *Turner Broadcasting System v. FCC* (1997), which introduces the complicated question of a government interest in compelled speech, returning us to the federal realm. That case allowed the FCC to require broadcasters to include local news in their channel selection due to a government interest in supporting economically-disadvantaged news programs. The notion that the government can compel hosting speech on the basis of a policy interest bears an interesting resemblance to the early Postal Laws, in which the US government saw its role as supporting the free flow of ideas and information across the country for a healthy marketplace of ideas. This is a laudable goal for the government to take up, but perhaps it should stick to postal subsidies instead of regulating speech — especially given the precedent set by *Lloyd Corp.* that the First Amendment alone does not require private entities to host speech.

The government therefore may have a duty to promote peoples' access to the marketplace of ideas — and by extension the digital public square — perhaps through some level of compelled hosting. What is much clearer, however, is that the government is firmly barred from excluding people from online discussion. Two cases of note in this area: *Knight First Amendment Institute v. Trump* (2019), in which the 2nd Circuit held that public figures cannot block individuals from their official accounts (which amount to a public forum), and *Packingham v. North Carolina* (2017), in which the Supreme Court held that a state law banning registered sex offenders from accessing social media sites was overbroad and violated the First Amendment. This area of the law is thus fairly uncomplicated and consistent with intuitive notions of free

speech; in a democracy, the government should not be able to dictate who can participate in the marketplace of ideas.

The matter of getting onto social media platforms may be up for debate, but for users on platforms, editorial freedom is and should remain ironclad. Such are the precedents laid by past cases: Already discussed here are *Tornillo*'s overturning a state's right-to-reply statute, and *Hurley*'s allowing the exclusion of a float from a parade in order to preserve the integrity of its message. Other notable cases include *Democratic National Committee v. CBS* (1973) and *Manhattan Community Access Corporation v. Halleck* (2019), both cases where private broadcasters were found to have no legal requirement to carry the speech of others (perhaps the government did not have a sufficient interest in promoting it.) Directly relating to the internet, *Twitter v. Taamneh* (2023) found that the social media company was not liable for its failure to remove posts supporting terrorism — exercising its freedom *not* to conduct content moderation.

With some uncertainty around the power of the government to compel platforms to host speakers, but a firm guarantee of platforms' ability to moderate the content that makes it to their sites, a question emerges: are those speakers whose access to a platform has been compelled by the state entitled to a degree of protection from content moderation? After all, the current legal landscape could theoretically allow the government to compel a platform to host users, only for the platform to turn around and moderate those users' content into oblivion (not quite shadowbanning, but heightened scrutiny), a *de facto* removal of undesired users from the platform. Closing this glaring legal loophole may shed some light on the ambiguous nature of required platform hosting, but until that happens we remain in the dark.

## IV. Answers for Online Speech: Watch This Space!

The internet has in many ways broadened how we understand commonplace issues of law and policy because of its novel technology and ubiquitous position in society. However, it has not ultimately changed the facts of American political behavior, or what is needed for a robust, healthy democracy. Social media platforms, like any other communicative enterprises, should be free from compelled speech and retain control over how they moderate content. However, there is clearly some level of government right and responsibility to require platforms to open up access to their services. The Supreme Court has shown much hesitance in making a landmark ruling on these tangled constitutional questions, so we must rely on precedents that often predate the internet or rule on questions adjacent to the ones presented here.

It would appear that the area of the law most in need of clarification is the status of compelled hosting on social media platforms. American legal history demonstrates that the government has long held an interest in promoting the free interchange of ideas, and now that the virtual public square is among the foremost spaces for communication it stands to reason that the government should have some mechanism to allow its citizens to fully participate. *Turner Broadcasting* implies that if the government meets a certain standard it can constitutionally require communicative enterprises to make room for speakers. However, establishing common carrier status for the companies that manage the internet's basic infrastructure, thus shifting the burden of carriage from platforms to providers. This would certainly reduce strain on the First Amendment, as internet communication in itself is far less tied up with matters of speech than access to a social media platform.

The matters of platforms' clearly-expressive conduct are much less ambiguous, namely compelled speech through content moderation disclosures and the editing or removal of that

content itself. The rationale for platform freedom in this respect is understandable; it maintains the vibrancy of our public discourse and enables social media platforms to distinguish themselves with a unique editorial flavor. Perhaps it is the robustness of this protection — supported by *Tornillo*, *Hurley*, *DNC v. CBS*, *Halleck*, and others — that so galls the political branches; too often, the First Amendment is embraced when it protects the expression that people agree with, and just as quickly attacked for protecting unpopular speech. Those who view the First Amendment as an object of convenience instead of the bedrock of American democracy would do well to remember that the law always cuts both ways.

# Dworkin's Concept of Law:

# A Response to the Fugitive Slave Act of 1850

Avielle Krendel-Smyslov

With polarization and tension between the North and South of the United States growing on the debate of slavery's role in the Union, compromises and deals were made to appease both sides. Namely, the Compromise of 1850, a series of laws passed after the Mexican-American War that included the Fugitive Slave Act. The Fugitive Slave Act of 1850 were laws that required the U.S. government to help slave owners regain control of their slaves. Runaway slaves were to be returned to their enslavers if caught. These laws were controversial and hard to enforce, for citizens and judiciaries alike. Abolitionist judges were often caught in a problem of the penumbra, where they didn't know how to rule. Many judges were caught in a question between morals and rules. Different legal philosophies on the concept of law have different answers to this question.

Aquinas' Natural Law view holds that laws and morals are completely interconnected, and that laws are not valid if they are not moral. Hart's Positivist view contends that rules and morals are completely separate entities and one should not interfere with the other. Finally, Dworkin's conception of law believes that the legal system is not so black and white, judges must rule based on rules, principles, and precedent alike. Abolitionist debates during the time period about if the Constitution was a "pro-slavery" document or not also contributes to this conversation. While Aquinas' Natural Law theory, Hart's Positivism, and Dworkin's conception of law each provide distinct interpretations of legal obligation and judicial duty, I find Dworkin's approach most compelling for its emphasis on principles that integrate morality with legal reasoning, particularly in cases like the Fugitive Slave Act. Under a Dworkinian philosophy, I

believe that an abolitionist judge would rule against sending enslaved people back to their enslavers due to different legal principles and morals.

Each philosopher's conception of law discusses the role of morals in law and has implications for the Fugitive Slave Act if applied. Aquinas believed that all law must follow four criteria: it must be a rule of reason for the common good promulgated (made known) by the Sovereign[1]. Aquinas' concept of law is that the legal system is rooted and based in morals and reason. He stated that "An unjust law is no law at all."[2] An abolitionist judge who applied Aquinas' concept of law would likely not uphold the Fugitive Slave Act of 1850. The judge would see the acts as unjust and immoral, making them lack legal validity. Hart's Positivist view would likely result in a very different outcome. Hart's Positivism viewed law as a system of primary and secondary rules. This concept also believes that law and morality are conceptually distinct. The Rule of Recognition establishes the validity of rules and determines the hierarchy of rules[3]. With laws and morals being distinct, an abolitionist judge would likely uphold the Fugitive Slave Act. The Fugitive Slave Act is a valid and recognized set of laws and therefore must be applied in cases where it is relevant, regardless of judges' personal moral beliefs. Dworkin's concept of Law as Integrity is less black and white than Aquinas and Hart. Law as Integrity follows that the legal system is a set of rules that is publicly enforced, but there are always going to be new unsettled cases in which judges need to use discretion to rule. Weak discretion is when judges use existing law to rule on a case. Strong discretion is when judges have to consider more than just rules, they must use principles, precedent, and morals to rule and

[1] Thomas Aquinas, *Summa Theologica*, in *Readings in the Philosophy of Law* 25–29 (Keith Culver ed., 2d ed. 1993).
[2] ISI. "An Unjust Law Is No Law At All: Excerpts from 'Letter from Birmingham Jail.'" *Intercollegiate Studies Institute*(blog), January 18, 2021. https://isi.org/an-unjust-law-is-no-law-at-all-excerpts-from-letter-from-birmingham-jail/.
[3] H.L.A. Hart, *Law as a System of Rules*, in *Readings in the Philosophy of Law* 120–31 (Keith Culver ed., 2d ed. 1993).

fill a gap in the legal system. Dworkin believes that rules are all or nothing and all have the same weight. Principles and policies, however, are not all or nothing, have different weights, and can be applied differently based on interpretation[4]. Under a Dworkonian philosophy, an abolitionist judge would likely use principles of human rights; justice; and the Constitutions' language of freedom and equality for all to rule to not uphold the Fugitive Slave Act.

Dworkin's approach is the strongest as it considers society as a whole. Dworkin's concept of law views the legal system as part of society, not something that simply governs it. Law as Integrity incorporates more than just laws that were written a long time ago, but considers the current framework of society and recent developments in the legal field. This system also allows for a more uniform, and less arbitrary justice system. For example, Dworkin believes that principle and precedent should be applied similarly in similar cases. So, applying principle and precedent is not strong discretion, but rather following the way that the gap was filled in the past. Hart's Positivist theory means that there will consistently be gaps in the legal system that will never be filled until a new law is passed. A great example of this is the case of Riggs v. Palmer[5]. Dworkin would consider the judges applying the "Slayer Rule" as weak discretion, because judges were just following the principle applied in the past of not benefiting off of your wrong doing. Judges following Hart's theory would be stuck in a problem of the penumbra. When judges are forced to rule on cases with unclear language Hart says that judges must interpret the law using social aims. This allows for judges' personal biases to affect the legal system. With every person having different implicit biases that affect their judgment, not considering precedent as something to follow, similar cases would be ruled arbitrarily and not

[4] Ronald Dworkin, *The Model of Rules*, in *Readings in the Philosophy of Law* 150–69 (Keith Culver ed., 2d ed. 1993).
[5] "Riggs v Palmer." Accessed April 22, 2025. https://www.nycourts.gov/reporter/archives/riggs_palmer.htm.

uniformly. Aquinas' natural law theory is extreme in the other way. Ignoring laws simply because they don't align with morals will lead to an arbitrary application of rules. In relation to the Fugitive Slave Act, an abolitionist judge would rule to not uphold the law because it does not follow their morals. However, Aquinas believes that all law must serve the public good. The Fugitive Slave Act was passed to avoid the Civil War, a war that ended up being the deadliest in American history[6]. Therefore, a judge not upholding a law they personally deem immoral would be an arbitrary application of law that would lead to unwanted consequences. Dworkonian philosophy is the best theory of law, both in general and for the application of the Fugitive Slave Act. Dworkin's Law as Integrity allows for a uniform and standardized legal system. Judges may apply their morals, but only in the context of law in cases open to interpretation. If a case doesn't have a clear answer, or the law is not 100% applicable in the case, judges may rule in ways that are debatable based only on law. For example, if a judge morally disagrees with a case that has a very clear and applicable rule, the judge can not just rule against it like Aquinas would. However, in a case with less clear answers the judge doesn't have to abandon their morals or rule solely on social standing, like Positivism would suggest, the judge can look at prior cases and principles to see if there is an answer that is backed by the judicial system and more closely aligns with their morals. For this reason, I believe that an abolitionist judge who follows Dworkin's Law as Integrity theory would not uphold the Fugitive Slave Act.

While the Fugitive Slave Act itself has a clear language and answer, its relation to the legal framework of the US as a whole makes it a penumbral case that judges could use to their advantage. The Constitution uses language that promotes the idea of freedom and equality for all. As stated by abolitionists who viewed the Constitution as an "anti-slavery" document, like

[6] How Many Died in the American Civil War?, HISTORY (Aug. 23, 2023), https://www.history.com/articles/american-civil-war-deaths.

Fredrick Douglas, said that it was important to differentiate the text and the unwritten intentions of it. The document itself has no mention of African slavery or the idea of people as property. The Constitution is a living document that changes with time and with society. While the Constitution was written by slave owners, that same Constitution is used today in a society with no slavery. If a judge was to view the Constitution, the highest law in the land, as an "anti-slavery" document, then they would likely not uphold the Fugitive Slave Act. They would likely argue that the law, while clear, goes against the Constitution (which outweighs the acts) and moral frameworks of society, making it invalid.

As is the case with every philosophy, there are implications to every concept. Out of the three philosophies I examined: Aquinas' Natural Law theory, Hart's Positivism, and Dworkin's Law as Integrity, I view Dworkin's theory as the strongest. Dworkin's theory does not just operate as an independent factor, it considers the context of society around it, while making sure that the legal system is just and not arbitrary. In the context of the Fugitive Slave Act of 1850, I believe that a judge following a Dworkonian perspective would rule to not uphold the Fugitive Slave Act in alliance with Frederick Douglass' view of the constitution as an "anti-slavery" document. The legal framework that the US is built upon vouches for freedom and equality for all, Law as Integrity would consider that and use it in its application.

# A Living Constitutional Case for Anti-Classification: Equal Protection as a Civic-Republican Ideal

Avi Konduri

## I. Introduction

Over the last century, few constitutional provisions have generated more profound moral and doctrinal disagreement than the Equal Protection Clause of the Fourteenth Amendment. Nowhere is this more evident than in the Supreme Court's shifting treatment of race-conscious policies. Both critics and defenders of such policies lay claim to the moral and legal legacy of *Brown v. Board of Education*. That decision declared racial segregation in public schools inherently unequal, yet it has come to represent two diametrically opposed constitutional visions.[1] On one side are proponents of the anti-subjugation approach, championed by Justice Thurgood Marshall and others, who argue that the Constitution permits, and often requires, race-conscious remedies to dismantle systemic inequities. On the other hand are advocates of anti-classification, favored by the Court's current majority, who maintain that the Equal Protection Clause prohibits racial distinctions altogether, even when deployed for remedial purposes.

This interpretive divide reflects more than a disagreement over doctrine; it exposes a deeper conflict in constitutional methodology. The case for anti-classification, as articulated in landmark decisions such as *Adarand Constructors v. Peña*, *Parents Involved in Community Schools v. Seattle School District No. 1*, and *Students for Fair Admissions v. Harvard*, is typically grounded in originalist or textualist reasoning. In contrast, supporters of anti-subjugation invoke

[1] *Brown v. Bd. of Educ., 347 U.S. 483 (1954).*

a living constitutionalist framework that emphasizes evolving moral values, structural injustice, and historical context. These interpretive grammars often speak past one another, like constitutional architects attempting to construct a shared edifice using incompatible blueprints. The result is a Tower of Babel: a fractured discourse in which the meaning of equality becomes obscured by the inability to agree on its constitutional grammar.

Yet the Constitution contains resources for both traditions. In *Brown*, the Court recognized that racial separation "generates a feeling of inferiority as to [Black children's] status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[2] That insight reflected not only the psychological harms of segregation, but a broader moral promise: that the state must not divide its citizens by race.[3] This promise echoed Justice John Marshall Harlan's dissent in *Plessy v. Ferguson*: "In the view of the Constitution, in the eye of the law, there is no superior, dominant, ruling class of citizens in this country. There is no caste here. Our Constitution is color-blind, and neither knows nor tolerates classes among its citizens."[4]

This Article argues that the anti-classification principle, though often associated with conservative originalism, can and should be defended through a living constitutionalist, teleological reading of the Equal Protection Clause. Properly understood, the Constitution's evolving moral promise requires race-neutral laws that affirm individual dignity, civic equality, and national unity not racial classifications that risk entrenching division, resentment, and bureaucratic essentialism.

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[2] Ibid.
[3] Ibid.
[4] Plessy v. Ferguson, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

In this respect, the argument builds on and inverts Jack Balkin's theory of *Living Originalism*. Balkin contends that original meaning and living constitutionalism are not in conflict but in harmony, and uses that synthesis to defend progressive doctrines like anti-subjugation.[5] This article takes up the other side of the coin. It employs a living constitutionalist methodology not to justify race-conscious remedies, but to articulate a forward-looking, civic-republican defense of anti-classification. The same interpretive tools used to vindicate racial remedies can support a morally sustainable regime of race-neutral governance grounded in equal personhood and a shared democratic identity.

Contrary to conventional wisdom, one does not need to be an originalist to support a colorblind Constitution. This Article draws from across the ideological spectrum. Drawing on the works of Ronald Dworkin, Cass Sunstein, Richard Epstein, David Bernstein, and Michael McConnell, this reframes anti-classification as a living constitutional aspiration. The Constitution must be read not only in light of its origins, but in light of its purpose: to bind together a diverse polity under a common civic identity. Race-conscious legal regimes, however well-intentioned, risk perpetuating racial essentialism, entrenching group identity in law, and undermining the moral coherence of equal protection. The telos of the Equal Protection Clause is not permanent race-consciousness, but a legal order in which law recognizes persons, not groups.

In this regard, the article is divided into seven parts. Part II traces the doctrinal evolution of equal protection from Brown to Students for Fair Admissions, highlighting the Court's shift from an anti-subjugation to an anti-classification paradigm. Part III unpacks the interpretive divide between originalism and living constitutionalism. Part IV develops a normative argument for anti-classification grounded in civic morality, democratic legitimacy, and individual dignity.

[5] Jack M. Balkin, Living Originalism (Harv. Univ. Press 2011).

Part V turns to case law, demonstrating how race-neutral doctrine can express the civic ideals underlying equal protection. Part VI addresses key objections to anti-classification, including critiques from scholars such as Mills, Siegel, and Lawrence. Finally, Part VII offers a conclusion: that anti-classification, grounded in living constitutionalism, provides a unifying moral and legal language capable of transcending the Babel-like fragmentation of contemporary equal protection jurisprudence.

## II. From Anti-Subjugation to Anti-Classification: The Doctrinal Evolution of Equal Protection

The Supreme Court's interpretation of the Equal Protection Clause of the Fourteenth Amendment has undergone a significant transformation. What began as a constitutional mandate to confront racial subordination has evolved into a rigidly colorblind framework, one that rejects virtually all race-based distinctions regardless of their remedial purpose. While both interpretive modes claim lineage from *Brown v. Board of Education* (1954), the Court has increasingly embraced a formal equality model that limits the government's ability to use race-conscious policies.

The anti-subjugation principle interprets the Equal Protection Clause through the lens of America's history of racial discrimination. It holds that racial classifications should be permissible, indeed, necessary, when used to dismantle systemic inequities and promote substantive equality. Justice Thurgood Marshall tied this approach to the Fourteenth Amendment's original intent: protecting newly freed Black Americans from systemic oppression.[6] Under this view, policies like affirmative action fulfill the Amendment's goal of

[6] Thurgood Marshall, The Impact of the Bicentennial of the Constitution on the Black Community, 20 Howard L.J. 1, 6 (1977).

racial justice rather than violate it, because racial disparities are deeply embedded in American institutions and cannot be remedied by race-neutral policies alone. Instead, active measures are necessary to ensure genuine equal opportunity.

In contrast, the anti-classification approach contends that laws must be race-neutral and that any government action differentiating by race is inherently suspect, even if intended to remedy past injustices. Advocates of this approach argue that equal protection is best served when race is not a factor in decision-making, emphasizing a colorblind reading of the Constitution. Under this doctrine, race-conscious policies must survive strict scrutiny, which requires a compelling governmental interest and narrow tailoring. This interpretive approach has shaped modern equal protection jurisprudence, leading to Supreme Court decisions that increasingly reject race-based policies.

The doctrinal roots of both approaches lie in *Brown v. Board of Education*, where the Court unanimously struck down racial segregation in public schools, declaring that "separate but equal" was inherently unequal and thus rejecting racial classifications that perpetuated social hierarchies.[7] At the same time, *Brown* did not explicitly address whether race-conscious remedies were constitutionally permissible; later interpretations of the decision diverged. The anti-subjugation view understands *Brown* as a mandate to dismantle racial inequality; the anti-classification perspective sees it as requiring race-neutrality in all government actions. As Chief Justice Warren wrote, "To separate [African American children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community."[8] This language laid the foundation for both doctrinal trajectories: one seeking

[7] Brown v. Bd. of Educ., 347 U.S. 483 (1954)
[8] *Ibid.*

affirmative remedies to undo structural harm, the other insisting that government classification by race is itself a form of subjugation.

The Court's decision in *Regents of the University of California v. Bakke* (1978) illuminated this divide.[9] Allan Bakke, a white applicant, sued UC Davis for rejecting him while admitting minority applicants with lower test scores. The Court struck down racial quotas but, per Justice Powell's controlling opinion, permitted considering race as a limited admissions factor under strict scrutiny.[10] This marked the Court's shift from a group-rights to an individual-rights understanding of equal protection, transplanting *Brown*'s principles into higher education. While *Brown* had condemned segregation for its systemic harms, *Bakke* reframed equal protection as a doctrine centered on fairness to the individual, while still acknowledging diversity's value. Powell rejected what he termed a "two-class theory," stating that "the difficulties entailed in varying the level of judicial review according to a perceived 'preferred' status of a particular racial or ethnic minority are intractable."[11] His reasoning, drawn from *Brown*'s rejection of racial classifications, suggested that even remedial affirmative action risked reinforcing the racial distinctions the Equal Protection Clause sought to minimize. The majority thus advanced an early form of the anti-classification principle.

Justice Marshall's dissent in *Bakke*, however, reflected the anti-subjugation perspective.[12] He viewed *Brown* not as a prohibition on all racial considerations, but as a call to confront entrenched inequality. Marshall argued that affirmative action was necessary to counteract centuries of discrimination, noting that for over 200 years, "this Court sanctioned the most

[9] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978).
[10] *Ibid.*
[11] *Ibid.*
[12] *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 387–402 (1978) (Marshall, J., dissenting).

odious forms of class-based discrimination against the Negro." [13] In his view, race-conscious policies were essential to fulfill *Brown*'s promise to outlaw discrimination and overcome it substantively and formally. As such, Justice Marshall and Powell looked to *Brown*; they drew opposite conclusions: Powell interpreted it as imposing strict limitations on racial classifications, while Marshall saw it as a license to pursue racial justice through race-conscious means. This interpretive divergence would become even more apparent in the decades to follow.

The Court briefly returned to an anti-subjugation approach in *Metro Broadcasting, Inc. v. FCC* (1990), which upheld a federal policy to promote minority ownership of broadcasting licenses.[14] In doing so, the Court applied intermediate scrutiny to racial classifications that aimed to enhance diversity. Justice Brennan, taking up the mantle from Justice Marshall, writing for the majority, argued that "just as a 'diverse student body" contributing to a "robust exchange of ideas" is a "constitutionally permissible goal" for race-conscious admissions for the diversity of views and information on the airwaves serves essential First Amendment values.[15] This reasoning aligned closely with the anti-subjugation principle: the policy's goal was not racial balancing for its own sake, but broadening participation in a historically exclusive industry. *Metro Broadcasting* underscored the Court's fleeting commitment to diversity as a compelling government interest. However, this approach would be quickly and decisively repudiated.

In *Adarand Constructors v. Peña* (1995), the Court overruled *Metro Broadcasting* and held that all racial classifications, regardless of purpose or context, must be reviewed under strict scrutiny.[16] Whether a policy aims to include or to exclude, to remedy or to harm, its reliance on

[13] *Ibid.*
[14] *Metro Broad., Inc. v. FCC*, 497 U.S. 547 (1990)
[15] *Ibid.*
[16] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200 (1995).

race renders it inherently suspect under the Equal Protection Clause. Writing for the majority, Justice O'Connor declared that "any preference based on race … must necessarily receive the most searching examination: by the Court."[17] In concurrence, Justice Thomas emphasized that "[a]s far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged."[18] With *Adarand*, the Court ended the intermediate scrutiny framework established in *Metro Broadcasting* and solidified the dominance of the anti-classification principle.

Legal scholar Stephen Engel has helpfully traced the broader shift reflected in this doctrinal change. He observes that early scrutiny doctrine, particularly as articulated in *United States v. Carolene Products Co.* (1938), focused on protecting "discrete and insular minorities" whose political powerlessness justified more searching judicial review.[19] But over time, Engel notes, the Court gradually shifted from scrutinizing laws based on the *status* and vulnerability of the group affected to evaluating laws solely based on whether they involved *suspect classifications*, such as races.[20] On Engel's account, the result was a jurisprudence increasingly fixated on the presence of a racial classification, rather than an interpretation of the historical or material realities surrounding it.[21]

This transformation became doctrinally entrenched in *Parents Involved in Community Schools v. Seattle School District No. 1* (2007), where the Court struck down voluntary school integration plans that used race as a factor in student assignment.[22] Chief Justice Roberts, writing

[17] *Ibid.*
[18] *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 240 (1995) (Thomas, J., concurring).
[19] *United States v. Carolene Prods. Co*., 304 U.S. 144, 152 n.4 (1938).
[20] Stephen M. Engel, *Fragmented Citizens: The Changing Landscape of Gay and Lesbian Lives* 125–28 (2016).
[21] *Ibid.*
[22] *Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).*

for the majority, reiterated the strict scrutiny standard and famously declared: "The way to stop discrimination on the basis of race is to stop discriminating on the basis of race."[23] In concurrence, Roberts, along with Justice Thomas, drew on the legacy of *Brown* and Justice Harlan's dissent in *Plessy v. Ferguson* to support a colorblind constitutional mandate.[24] Engel points out that while such appeals to "colorblindness" draw rhetorical strength from these precedents, they also mark a departure from the historical concern with race-based exclusion and institutional inequality.[25]

Justice Breyer, in dissent, defended the anti-subjugation view.[26] He argued that voluntary integration plans were essential to fulfill *Brown*'s promise, stating: "A longstanding and unbroken line of legal authority tells us that the Equal Protection Clause permits local school boards to use race-conscious criteria to achieve positive race-related goals, even when the Constitution does not compel it."[27] He warned that the Court's decision threatened the progress made since *Brown*, concluding that the plurality's approach "threatens the promise of *Brown*."[28]However, despite Breyer's dissent, the doctrinal trajectory was clear. *Parents Involved* marked the complete ascendancy of the anti-classification principle.

That trajectory reached its zenith in *Students for Fair Admissions v. Harvard* (2023), where the Court struck down affirmative action in university admissions and rejected the diversity rationale that had once linked *Bakke* and *Grutter*.[29] Chief Justice Roberts wrote for the

[23] *Ibid.*
[24] **Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1**, 551 U.S. 701, 748 (2007) (plurality opinion) (Roberts, C.J.)
[25] Stephen M. Engel, *Fragmented Citizens: The Changing Landscape of Gay and Lesbian Lives* 125–28 (2016).
[26] **Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1**, 551 U.S. 701, 803–48 (2007) (Breyer, J., dissenting).
[27] *Ibid.*
[28] *Ibid.*
[29] Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll., 600 U.S. 181 (2023).

majority, "Eliminating racial discrimination means eliminating all of it," reaffirming the Court's commitment to a strict anti-classification principle.[30] The decision marked the final doctrinal shift away from remedial or contextual uses of race and toward a vision of formal equality rooted in race-neutrality. Whether one views this development as progress or loss, Engel's framework provides a compelling lens through which to understand the Court's evolving equal protection jurisprudence, shifting focus from historical subordination to the presence of racial classification as the constitutional injury.[31]

## III. Constitutional Method and the Equal Protection Divide

The doctrinal evolution of the Equal Protection Clause cannot be fully understood without considering the interpretive methodologies that inform it. The competing visions of anti-subjugation and anti-classification do not merely reflect policy disagreements; they are rooted in fundamentally different constitutional grammars. These grammars, originalism, closely aligned textualism, and living constitutionalism, shape how jurists interpret history, institutional legitimacy, and the moral aims of the Constitution itself. As a result, the constitutional debate over race-conscious policies often becomes a methodological impasse, in which legal actors speak past one another while appealing to entirely different sources of constitutional meaning.

Yet, it is possible to view this impasse as more illusionary and surface-level than inevitable. For example, constitutional theorist Jack M. Balkin has long argued that originalism and living constitutionalism need not be mutually exclusive.[32] In *Living Originalism*, Balkin contends that fidelity to the Constitution requires adherence to its original meaning and

[30] *Ibid.*
[31] Stephen M. Engel, *Fragmented Citizens: The Changing Landscape of Gay and Lesbian Lives* 125–28 (2016).
[32] Jack M. Balkin, Living Originalism (Harv. Univ. Press 2011).

interpretive constructions that allow its principles to evolve.[33] "Fidelity to the Constitution requires fidelity to its original meaning and the basic principles it enacts," Balkin writes.[34] "But it also requires applying those principles in ways that reflect our best understanding of them in our own time." [35]In this view, the Equal Protection Clause offers a framework rooted in equal citizenship that must be implemented through doctrines that reflect contemporary democratic values. This article project is a little different: to develop a teleological, moral, and living constitutional defense of anti-classification, not despite modern social realities, but because of them. However, Balkin's hybrid approach may provide some theoretical grounding for creating a living constitutionalist defense of anti-classification that promotes civic unity, shared dignity, and individual liberty without resorting to racial essentialism.

Originalism, in its dominant forms, holds that the Constitution's meaning was fixed at the time of its enactment and that judicial fidelity requires adherence to that original public meaning. As Justice Antonin Scalia famously said, "The Constitution that I interpret and apply is not living but dead—or as I prefer to call it, enduring."[36] For originalists, constitutional legitimacy depends on consistently applying historically grounded principles. This framework places high value on legal continuity, judicial restraint, and the constraint of personal discretion. Scalia repeatedly emphasized that courts are not empowered to rewrite the Constitution in response to shifting societal preferences: "The Equal Protection Clause is not a license for courts to judge the wisdom, fairness, or logic of legislative choices." [37] Under this framework, race-neutrality is not only a textual requirement but a safeguard against arbitrary governance. Closely related to originalism, though conceptually distinct, is textualism. While originalism focuses on historical

[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*
[36] Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* 38 (Amy Gutmann ed., 1997).
[37] *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993) (Scalia, J.).

meaning, textualism emphasizes the Constitution's plain semantic meaning, how a reasonable reader at the time of ratification would have understood the words, rather than the framers' intent.

Building on these interpretive foundations, conservative originalist scholars such as Michael McConnell have defended the anti-classification principle as consistent with the original meaning of the Fourteenth Amendment.[38] In his article *Originalism and the Desegregation Decisions*, McConnell argues that "the historical evidence strongly suggests that the framers and ratifiers of the Fourteenth Amendment did not intend to permit racial classifications, even for remedial purposes."[39] On this view, the colorblind Constitution is not a modern invention, but a continuation of the Radical Republicans' commitment to equal legal treatment under law. McConnell contends that affirmative action and similar race-conscious policies may be well-intentioned but ultimately violate the framers' original understanding of equal protection.[40]

By contrast, living constitutionalism asserts that the Constitution must be interpreted in light of evolving societal values, and that its enduring principles must adapt to changing moral and political conditions. Living constitutionalists reject the notion of frozen meaning and instead emphasize the Constitution's capacity for renewal. Justice William J. Brennan offered one of the most forceful articulations of this approach: "The genius of the Constitution rests not in any static meaning it might have had in a world that is dead and gone, but in the adaptability of its great principles to cope with current problems and current needs."[41] From this perspective, the

[38] Michael W. McConnell, Originalism and the Desegregation Decisions, 81 Va. L. Rev. 947 (1995).
[39] *Ibid.*
[40] *Ibid.*
[41] William J. Brennan, Jr., *The Constitution of the United States: Contemporary Ratification*, 27 S. Tex. L. Rev. 433, 437 (1986).

Equal Protection Clause is not merely a prohibition on explicit classifications; it is a moral imperative to address the realities of inequality in a racially stratified society.

Accordingly, living constitutionalists have tended to favor the anti-subjugation approach. They argue that the Clause permits race-conscious policies when they are designed to counteract systemic injustice. Justices such as Marshall, Brennan, and Breyer have long emphasized the need to recognize the social meaning of race and the state's role in shaping racial hierarchies. Race-conscious remedies are not exceptions to equal protection but fulfillments of its core mission. The law must not be blind to structural inequality when it plays a central role in maintaining it.

Reva Siegel has provided one of the substantive accounts of this position in her article *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*.[42] She argues that, through her "preservation through transformation" framework, constitutional principles endure not by rigid adherence to their original forms, but by adapting to new historical circumstances.[43] As she puts it, "Antisubordination values reflect a living tradition of constitutional interpretation that adapts to changes in law and society, preserving the Constitution's meaning by transforming its application."[44] In this view, anti-subjugation readings of the Equal Protection Clause are not distortions but continuations and are most faithful to the Amendment's spirit even if they depart from a specific interpretation of the letter of the law.

The result or consequence of this oppositional framework and discourse is a methodological stalemate. Each is able to derive its conclusions from a coherent internal logic,

[42] Reva B. Siegel, Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action, 49 Stan. L. Rev. 1111 (1997).
[43] *Ibid.*
[44] *Ibid.*

but those logics seem incommensurable. For originalists and textualists, race neutrality is a constitutional imperative grounded in text and history; for living constitutionalists, race-conscious policy is a moral necessity dictated by evolving norms and persistent inequality. The jurisprudential battlefield appears to render the project of understanding what equality under law means under the Constitution a sort of Tower of Babel: a space where constitutional interpreters speak different languages, each confident that they alone are honoring the Fourteenth Amendment's true purpose. The consequence of this productive debate is mutual incomprehension and a rhetorical impasse, as well as a contribution to fracturing national identity and discourse.

## IV. The Civic-Republican and Moral Foundations of Equal Protection

In contemporary constitutional discourse, the anti-classification principle is often associated with originalist or textualist approaches to interpretation. The dominant narrative, in both case law and scholarship, holds that the argument for a colorblind Constitution belongs to jurists like Scalia, Thomas, and Roberts, and is grounded in a commitment to fixed historical meaning or textual constraint. In contrast, the case for anti-subjugation is typically advanced by living constitutionalists, who view the Constitution as a dynamic instrument for addressing historical and structural injustices. This division, while intuitive, is neither necessary nor normatively satisfying.

This article contends that anti-classification can be grounded in a living constitutionalist, teleological framework, one that draws from evolving moral insights, civic values, and the Constitution's aspirational commitment to equal citizenship. This vision does not outright reject the insights of originalism or textualism. Instead, it builds upon a richer understanding of

constitutional meaning: one rooted in the belief that the Constitution must be interpreted in light of the civic future it seeks to create. In doing so, it inverts Jack Balkin's *Living Originalism*, not to defend race-conscious policies, but to articulate a moral reading of anti-classification as a path to democratic unity and civic equality.

This claim begins by revisiting the moral logic embedded in the Equal Protection Clause. As Ronald Dworkin argued in *Law's Empire*, constitutional principles must be interpreted in ways that treat individuals with "equal concern and respect."[45] For Dworkin, law is not simply a set of commands or historical compromises; a community attempts to act by principle.[46] While he supported some forms of affirmative action, Dworkin also maintained in *Freedom's Law* that equal treatment is the right "not to be disadvantaged by the arbitrary fact of being born into a particular group."[47] This right is not merely procedural. It is substantive, moral, and civic. Though Dworkin believed that the Constitution should be interpreted in light of modern moral understanding, he also insisted that legal principles stand above shifting policy preferences. As this article does, one might thus reasonably conclude that the state's use of race, even for benevolent purposes, risks violating the moral ideal of equal personhood that Dworkin thought the Constitution exists to protect.

Hence, what Dworkin hints at, and what this article seeks to develop, is that a genuine moral reading of the Constitution may require not more classification, but its eventual elimination. Equal concern cannot co-exist with institutional frameworks that assign opportunity based on race, however well-intentioned. A genuinely living Constitution refuses to freeze

[45] Ronald Dworkin, Law's Empire (Harv. Univ. Press 1986).
[46] *Ibid.*
[47] Ronald Dworkin, Freedom's Law: The Moral Reading of the American Constitution (Harv. Univ. Press 1996).

individuals into inherited identities or place them into racial castes in the name of justice. To treat people as bearers of dignity and not demographic proxies is not to deny injustice, but to insist on justice that transcends identity and affirms shared personhood.

Moreover, the path toward race-neutral constitutionalism is not a departure from founding ideals, but a recovery of them in a sense the reaffirmation of the Constitution's promise to bind individuals into a shared civic community. In *The Federalist No. 10*, James Madison warned that "the public good is disregarded in the conflicts of rival parties," and that a well-constructed union must "break and control the violence of faction."[48] The Constitution, in this vision, seeks not only to prevent tyranny but to sustain a political order capable of acting as one. Race-based policies, however well-intentioned, fracture that unity. They recast law as a battlefield of group claims, rather than a covenant among equals.

This moral civic-republican vision, echoed not only by Madison but by Rousseau, centers the state's legitimacy on shared self-governance and the reconciliation of individual wills into a common political identity. In *The Social Contract*, Rousseau argued that law derives its legitimacy from the general will, the shared commitment of citizens to self-governance in common.[49] The purpose of a political community is to eliminate domination and cultivate freedom through mutual recognition. "Each citizen, while uniting himself with all, obeys no one but himself and remains as free as before." [50] In this vision, the state is not the protector of group interests, but the forum where individual wills are reconciled into a common identity. Race-based policies, no matter how well-meaning, fracture that unity. They recast law as a battlefield of

[48] *The Federalist No. 10* (James Madison) (Clinton Rossiter ed., 1961).
[49] Jean-Jacques Rousseau, *The Social Contract* 49–50 (Maurice Cranston trans., Penguin Classics 1968) (1762).
[50] *Ibid.*

group claims, rather than a covenant among equals. Anti-classification, therefore, is not a mere prohibition; it is an affirmation of civic identity over tribalism.

As Balkin has demonstrated, a moral reading of the Constitution can reconcile fidelity to the original meaning with evolving interpretation. His theory of *Living Originalism* proposes that "constitutional redemption" involves both honoring the commitments of the past and applying them in light of the community's best moral understanding in the present.[51] This article builds on that vision to argue that anti-classification is not a distortion of the Fourteenth Amendment; it is its fulfillment. The Constitution lives not by clinging to old forms, but by animating new understandings of justice. In our moment, those understandings increasingly demand race-neutral law not despite moral evolution, but because of it.

Thus, it is clear that the anti-classification principle, typically associated with conservative formalism, can be defended on progressive grounds. For it emerges not as a betrayal of living constitutionalism, but as its realization: the aspiration to bind a diverse polity into one people through law that recognizes citizens, not categories; individuals, not identities. This civic-republican vision, drawing from Rousseau's general will and Madison's fear of faction, offers not merely an idealistic aspiration but a constitutional compass. It clarifies the moral trajectory of equal protection and demands that we ask not only what the law permits, but what kind of civic identity it affirms. What follows, thus,  is not a retreat into abstraction. Still, a confrontation with law as it is practiced, where principles must respond to objections, and doctrine must evolve without losing moral coherence. The lessons of American and comparative experience challenge us to build a constitutional order worthy of our civic ideals. The task of the

[51] Jack M. Balkin, Living Originalism (Harv. Univ. Press 2011).

Constitution is not to mirror our divisions, but to transcend them. To speak, not in the tongues of faction, but in the language of civic unity. That is how we come down from the Tower of Babel, not by ignoring our differences, but by refusing to let them define the structure of our law.

**V. Race-Neutral Doctrine as a Civic Expression of Equal Protection**

These philosophical commitments are not merely aspirational; they have concrete implications for how the Constitution should be interpreted in practice. This Section turns from theory to doctrine, demonstrating how the Supreme Court's evolving Equal Protection jurisprudence reflects, and at times betrays, the moral and civic logic outlined in the previous section. The cases examined here reveal a tension between the judicial recognition of individual dignity and civic equality and the Court's inconsistent application of these principles over time. By situating anti-classification within a broader doctrinal trajectory, this section demonstrates that a living, civic-republican defense of race neutrality is not only possible but also necessary for doctrinal coherence and public legitimacy.

In *City of Cleburne v. Cleburne Living Center* (1985), the Court invalidated a zoning ordinance that denied a special-use permit to a group home for the intellectually disabled[52]. Though the case did not involve race, it stands for a broader principle: the state may not codify stigma into law. Justice White, writing for the majority, held that laws grounded in "mere negative attitudes" or "irrational prejudice" fail even rational basis review. [53]This insight directly translates to race-conscious policies that, however well-intentioned, risk reinforcing the very civic stigma they seek to redress. By categorizing citizens into presumed disadvantage, the state undermines the principle of equal concern at the heart of the Equal Protection Clause.

[52] City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432 (1985).
[53] *Ibid.*

This logic found firmer constitutional grounding in *Palmore v. Sidoti* (1984), a custody case in which the Court unanimously reversed a decision that removed a child from the custody of her white mother because she had remarried a Black man. [54] The lower court had cited concerns over societal prejudice. Chief Justice Burger, for the Court, rejected that rationale: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect." [55] This holding affirms a constitutional imperative echoed by Dworkin and Rousseau: the state must not respond to social division by institutionalizing it. Rather, it must affirm civic unity by rejecting legal recognition of prejudice, even when responding to structural realities.

The Court has occasionally recognized this imperative in race-specific cases. In *Gratz v. Bollinger* (2003), it struck down a University of Michigan admissions policy that automatically awarded minority applicants 20 points on a 150-point scale.[56] The majority found that this mechanical allocation of points, absent individualized consideration, failed strict scrutiny.[57] From a living constitutionalist perspective concerned with civic dignity, *Gratz* serves as a cautionary tale: even progressive policies can undermine the Equal Protection Clause when they reduce identity to demographic categories. Justice Kennedy, concurring in *Gutter v. Bollinger* (2003), emphasized that such policies must be "limited in time." [58] The logic was not simply prudential; it reflected a civic trajectory: that the Constitution must move toward race-neutral governance, not institutionalize racial salience indefinitely.

*Richmond v. J.A. Croson Co.* (1989) reinforces this concern. There, the Court invalidated a municipal quota system for awarding construction contracts, warning that even

[54] *Palmore v. Sidoti*, 466 U.S. 429 (1984).
[55] *Ibid.*
[56] *Gratz v. Bollinger*, 539 U.S. 244 (2003).
[57] *Ibid.*
[58] *Grutter v. Bollinger*, 539 U.S. 306, 342 (2003) (Kennedy, J., dissenting)

well-intentioned race-conscious policies risk "promoting notions of racial inferiority and leading to a politics of racial hostility."[59] Justice O'Connor underscored the civic consequences of racial classification, stating that "a system of individual merit" must prevail over group preferences.[60] Her reasoning affirms a republican insight: policies grounded in race, even if framed as remedies, can ultimately degrade civic trust and deepen group antagonism.

Justice Clarence Thomas has echoed this theme forcefully across multiple cases. In *Grutter v. Bollinger* (2003), he warned that race-based admissions "insult minority achievement" by presuming deficiency.[61] In *Fisher v. University of Texas* (2016), he argued that racial preferences, however cloaked in benevolence, "demean us all." Thomas's language, while emerging from an originalist framework, resonates deeply with the civic-republican account advanced here.[62] It is a moral objection grounded in equal personhood and shared citizenship: that race should not determine one's legal identity, nor serve as a credential for state recognition.

These concerns find historical precedent in *Shelley v. Kraemer* (1948), where the Court held that judicial enforcement of racially restrictive covenants constituted state action in violation of the Equal Protection Clause.[63] Although the covenants were private agreements, the Court rightly reasoned that state enforcement amounted to constitutional complicity. *Shelley* thus affirms the state's duty not merely to avoid animus, but to refrain from institutionalizing private forms of racial exclusion. [64] If the Constitution prohibits state enforcement of exclusionary contracts, it also calls into question state policies that embed racial categories into access to education, employment, and opportunity.

[59] *Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).
[60] *Ibid.*
[61] *Grutter v. Bollinger*, 539 U.S. 306, 371 (2003) (Thomas, J., concurring in part and dissenting in part).
[62] *Fisher v. Univ. of Tex. at Austin* (Fisher II), 579 U.S. 365, 394 (2016) (Thomas, J., dissenting).
[63] *Shelley v. Kraemer*, 334 U.S. 1 (1948).
[64] *Ibid.*

Cass Sunstein's anti-caste principle further clarifies the normative stakes. In his view, the Constitution prohibits systems that institutionalize caste-like hierarchies. While Sunstein has defended affirmative action under narrow, transitional conditions, he has also warned, particularly in *One Case at a Time*, that sweeping, race-based jurisprudence risks undermining democratic legitimacy and fostering civic disillusionment.[65] His theory of judicial minimalism advocates for narrowly tailored rulings that minimize the potential for exacerbating societal divisions.[66] From a living constitutionalist perspective, this suggests a shift toward policies that are morally sustainable, publicly intelligible, and broadly unifying, criteria often absent from bureaucratic racial classification regimes.

Critiques from outside the progressive tradition reinforce this trajectory. David Bernstein, in *Classified: The Untold Story of Racial Classification in America*, exposes the administrative incoherence of racial categorization in federal and state law.[67] He shows that classifications often rely on self-identification, inconsistent ancestry rules, or arbitrary metrics.[68] These systems are neither scientifically credible nor constitutionally stable. Richard Epstein, from a libertarian standpoint, adds that state classification by race substitutes one form of "racial tyranny" for another, replacing personal accountability with identity-based redistribution. [69]While Epstein and Dworkin differ in method, they converge in rejecting the legitimacy of racial sorting as a function of democratic law.

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[65] Cass R. Sunstein, One Case at a Time: Judicial Minimalism on the Supreme Court (Harv. Univ. Press 1999).
[66] *Ibid.*
[67] David E. Bernstein, Classified: The Untold Story of Racial Classification in America (Bombardier Books 2022).
[68] *Ibid.*
[69] Richard A. Epstein, Forbidden Grounds: The Case Against Employment Discrimination Laws (Harv. Univ. Press 1992).

Thus, the anti-classification principle, when grounded in civic equality and moral individualism, offers a constitutional path forward. It rejects both racial erasure and bureaucratic essentialism. It affirms a legal order in which the state sees persons, not proxies—dignity, not demographics. This doctrinal vision complements the philosophical one, forming a unified constitutional grammar rooted in civic identity and equal concern. Without a stable, civic constitutional grammar, equal protection risks collapsing back into the Babel-like confusion of rival frameworks, each pulling the law toward incompatible ends. Anti-classification, by contrast, offers a unifying grammar: one that recognizes citizens, not categories.

## VI. Objections and Replies

To make an argument for anti-classification, especially one defended through a living constitutionalist framework, it is necessary to address critiques that have shaped modern equal protection discourse. Scholars such as Charles Mills, Reva Siegel, and Charles Lawrence have argued that colorblindness, far from a neutral ideal, often functions as a veil that conceals the persistence of racial hierarchy and systemic exclusion. Mills, for example, contends that liberal ideals of equality and personhood have historically operated within what he terms a *Racial Contract*, a tacit political agreement that privileges whiteness as the baseline of full civic membership.[70] The defense of anti-classification offered here, however, does not rest on originalist foundations; it is grounded in a living constitutionalist approach that shares with these critics a concern for structural injustice, but offers a different constitutional remedy.

Nonetheless, the critique deserves serious engagement. Indeed, race-neutral legal regimes often operate in societies still shaped by deeply entrenched racial stratification. Structural

[70] CHARLES W. MILLS, THE RACIAL CONTRACT (Cornell Univ. Press 1997).

inequality, historical exclusion, and generational wealth gaps persist. But the argument advanced here is not that these inequities are unimportant; it is that state racial classification is not a legitimate or sustainable remedy. Indeed, a legal regime that continually encodes race as the central axis of distribution and legitimacy may reproduce the very divisions it claims to redress. It may foster resentment, bureaucratize identity, and shift the goal of racial justice from integration to entrenchment. In doing so, it contradicts the civic-republican foundations of the American constitutional project.

On similar ground, Siegel has argued that the meaning of the Fourteenth Amendment evolves through contestation and social struggle and must reflect our deepening understandings of inequality and subordination in *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over Brown*.[71] However, as the Constitution lives, so must its conception of civic equality. A living constitutionalism that remains permanently race-conscious risks ossifying the past into the present, preserving remedial exceptionalism as a permanent feature of the legal landscape. Instead, a living Constitution should strive toward moral and civic convergence, creating a polity in which the state views its citizens not as representatives of groups, but as individuals bound together in a shared civic enterprise.

This vision is deeply republican in the classical sense of the term. It echoes Rousseau's belief that the legitimacy of law derives not merely from its form, but from its capacity to embody the general will, a civic identity rooted in common purpose rather than factional rivalry. As Rousseau writes, "The law is a public expression of the general will. When the entire people enacts laws for the entire people, it considers only itself; and if a particular association arises, it

[71] Reva B. Siegel, Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles Over Brown, 117 Harv. L. Rev. 1470 (2004).

is only a part of the whole."[72] The American constitutional tradition, as envisioned by Jefferson, Lincoln, and the framers of the Fourteenth Amendment, was animated by the same aspiration: individuals could be free and equal not in isolation, but through shared governance under a common rule of law.

That republican ideal found expression in the Declaration of Independence's promise of "life, liberty, and the pursuit of happiness," and in the Constitution's Preamble: "to form a more perfect union, establish justice, ensure domestic tranquility… and secure the blessings of liberty to ourselves and our posterity." [73]These need not be seen as empty phrases; they are constitutional aspirations. A republic built on liberty and equality cannot long endure if its citizens are permanently sorted into racial categories and governed accordingly. Race-based policymaking may be adopted in the name of justice, but when unbounded, it undermines the unity and civic trust that republican self-government requires.

Charles Lawrence has also emphasized that racism is not merely a matter of intentional discrimination but is embedded in systems, habits, and unconscious norms. *The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism*.[74] That insight is crucial. However, systemic inequality does not entail that race must be encoded into law. Those systems are often best dismantled not through racial labeling, but through race-neutral policies that target material exclusion, expand opportunity, and reinforce institutional fairness. Class-based interventions, investment in public infrastructure, education reform, and robust anti-discrimination enforcement remain essential tools, none of which require the state to re-racialize its legal frameworks.

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[72] Jean-Jacques Rousseau, *The Social Contract* 60 (Maurice Cranston trans., Penguin Classics 1968) (1762).
[73] The Declaration of Independence para. 2 (U.S. 1776); U.S. Const. pmbl.
[74] Charles R. Lawrence III, The Id, the Ego, and Equal Protection: Reckoning With Unconscious Racism, 39 Stan. L. Rev. 317 (1987).

Race-neutral constitutionalism is not color evasion; it is a policy reorientation focused on class-based uplift, educational equity, infrastructure investment, and universal opportunity that does not require re-racializing the legal system. Thus, it targets exclusion through class-based uplift, institutional reform, and neutral norms that do not entrench group identity as the price of remedy.

The civic consequences of entrenched identity-based governance are not hypothetical; they are a reality. Comparative experience, particularly in India, offers a cautionary tale of how constitutional remedies, once justified, can evolve into structural impediments to civic unity. For instance, in India, the constitution has permitted affirmative action for historically disadvantaged caste groups and other minorities, which has persisted for decades. While initially remedial, these policies have hardened into a politically entrenched structure of identity-based entitlements. Scholars like Christophe Jaffrelot have demonstrated that caste-based affirmative action in India, although initially intended as remedial, has become entrenched in political and bureaucratic systems in ways that risk perpetuating caste identity as a condition of state access.[75] This has transformed the Indian republic into what he describes as a "multi-caste polity," complicating efforts to construct a unified civic identity and making it difficult to exit identity-based governance once it becomes institutionalized.[76]

The concern, moreover, is legitimacy at its core. Even the compelling interest in diversity, as articulated in *Grutter* and its progeny, can be pursued through broader, race-neutral means.[77] The Constitution does not prohibit efforts to build inclusive institutions; it prohibits those that

[75] Christophe Jaffrelot, India's Silent Revolution: The Rise of the Lower Castes in North India (Columbia Univ. Press 2003).
[76] *Ibid.*
[77] Grutter v. Bollinger, 539 U.S. 306, 328–33 (2003)

make race legally dispositive. To say that race cannot determine who is admitted to school, hired for a job, or awarded a contract is not to say that identity doesn't matter. It is to say that the law should not reduce identity to race, nor enshrine race as a citizenship credential. As *Palmore v. Sidoti* reminds us, the government may not adopt policies that reflect or validate social prejudices, even if those prejudices are real.[78] The state must lead toward equality, not mirror back the divisions of civil society. A legal system that insists on race as a condition of access ultimately contradicts that civic and moral imperative.

The most common objection, however, is that anti-classification is a conservative project and that it has been deployed as a tool to dismantle civil rights gains rather than promote them. However, as this article has shown, this critique conflates methods with meaning. It is no better than ad hominem. While conservative jurists have most prominently advanced anti-classification, they do not need to own it, and their motivations need not be scrutinized with such suspicion. This article presents a distinct foundation: a living, civic-republican, teleological defense of anti-classification, grounded not in judicial minimalism or dogma, but in a constitutional vision that views individuals as citizens, not abstractions, each a participant in a shared democratic order. As Jack Balkin has argued, living constitutionalism does not mean discarding original meaning, but applying the Constitution's principles to reflect our best moral understanding in the present.[79] And as Ronald Dworkin emphasized, constitutional interpretation must treat each person with equal concern and respect, not as a member of a group, but as a moral individual.[80] This article applies those insights to argue that anti-classification, far from betraying the promise of equal protection, in fact best fulfills it.

[78] Palmore v. Sidoti, 466 U.S. 429 (1984).
[79] Jack M. Balkin, Living Originalism (Harv. Univ. Press 2011).
[80] Ronald Dworkin, Law's Empire (Harv. Univ. Press 1986).

As such, the great challenge of equal protection is not simply how to remedy inequality, but how to do so without entrenching new forms of legal separation. To embrace anti-classification is not to erase history. It is to insist that history does not forever dictate the categories through which law must operate. The Constitution must remember injustice without replicating it. Ultimately, race is now widely regarded as a social construct, rather than a biological reality. There is no compelling reason why the Constitution should be enlisted to perpetuate that construct through legal classification. Thus, in a constitutional culture increasingly fractured by incompatible interpretive grammars and rival frameworks of justice, anti-classification offers a common civic language to recover the promise of equal protection as a unifying, rather than divisive, principle. In this way, anti-classification offers more than a doctrinal position; it provides a civic and moral language through which constitutional actors might once again understand one another. Thus, in a legal culture fractured by rival interpretive grammars, this principle offers a common tongue, one capable of restoring coherence to equal protection and dignity to its subjects. Moreover, this doctrinal vision complements the philosophical one, forming a unified constitutional grammar rooted in civic identity and equal concern. Thus, it provides a path out of the Tower of Babel conundrum, where legal actors, though seemingly share similar core values, speak past one another in incompatible moral and doctrinal languages.

## VII. Conclusion

The Equal Protection Clause is not merely a shield against invidious discrimination; it also serves as a safeguard against arbitrary government action. It is a constitutional promise, a pledge that our law will recognize persons, not categories; citizens, not castes. While the historical struggle for racial justice has often required the law to reckon with race directly, the

more profound aspiration of equal protection is not to enshrine race in perpetuity, but to transcend it. This article has argued that the anti-classification principle, too often associated with conservative formalism, can and should be reimagined as a living constitutional commitment that affirms civic equality, moral individualism, and the unity of a pluralistic republic.

This is not a denial of injustice. It is a call to remedy it justly. As Race-neutral legal frameworks are not a form of color evasion, they are a deeper affirmation that dignity inheres in individuals, not in demographic proxies. The law must confront structural exclusion, not by reinscribing race into our public institutions, but by investing in the material conditions of freedom: reforming school funding, strengthening public infrastructure, and promoting economic inclusion for those historically locked out of opportunities. Justice requires more than symbolism. It demands structures that uplift without sorting by skin.

Living constitutionalism teaches that constitutional meaning evolves, not arbitrarily, but through democratic deliberation and civic experience. That evolution now points toward anti-classification. The American public, even in progressive states like California, has grown weary of race-based lawmaking. That fatigue is not regression; it is a moral signal. A Constitution animated by public trust must listen. If the promise of equal protection is to endure, it must be capable of commanding allegiance from courts and citizens.

This vision is not partisan. It draws on Ronald Dworkin's demand for moral integrity in law, Rousseau's vision of a shared civic identity, and Jack Balkin's concept of living fidelity to founding principles. This is what a genuinely "color-blind Constitution" looks like: not a retreat into formalism, but a principled framework that views Americans as equal citizens, not as

permanent members of distinct groups. Anti-classification is not a rejection of the Constitution's past; it is its fulfillment. While scholars like Reva Siegel have argued that anti-classification risks ignoring ongoing structural inequality, this article contends that civic equality and shared personhood remain central to the Constitution's evolving moral promise. And it is the only path forward capable of restoring the legitimacy of equal protection in our fractured legal and political culture.

Indeed, in a moment when constitutional interpretation increasingly resembles a Tower of Babel, its architects divided by competing grammars, clashing methodologies, and moral incomprehension, anti-classification offers a common tongue. It allows us to recover the civic clarity that once gave Brown its moral force and to speak again in the universal language of citizenship. The task of the Constitution is not to enshrine our divisions, but to transcend them. Ultimately, the promise of the Fourteenth Amendment is not that the law will reflect our identities, but that it will elevate our shared humanity. That is the true legacy of equal protection, not a mandate for race-conscious engineering, but a commitment to civic equality, individual liberty, and national unity. As Justice Scalia reminded us: "In the eyes of government, we are just one race here. It is American."[81]

[81] Adarand Constructors, Inc. v. Peña, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part and concurring in the judgment).

# The Unconstitutionality of Religion in Public Schools

Whitney Moore

## Introduction

The First Amendment of the Bill of Rights is notoriously vague, and its enumerations regarding religion have generated decades of legal conflict. While the Establishment Clause ensures the separation of church and state, the Free Exercise Clause prevents the creation of a law that would hinder "free exercise" of religion[1]. Although these protections do not directly contradict each other, their application often seems to support contrasting acts and legislation. This contradiction has led to landmark cases such as *Engel v. Vitale* 370 U.S. 421 (1962) and *Lemon v. Kurtzman* 403 U.S. 602 (1971). More recently, cases such as *Kennedy v. Bremerton School District* 597 U.S. _ (2022) and the ongoing case of *Roake v. Brumley* have attempted to answer the conundrum of the application of the religion clauses in public schools. The plethora of cases and longevity of the legal issue regarding religion in the sphere of public education suggest that there is no clear, defined answer given by the Constitution. In contrast, the Constitution itself is the source of such contention, and a definite solution may never be reached.

In the political fabric of the United States, there are two main conflicting views regarding the role of religion in public schools. Those who believe that religion has no place in any school function or school-sponsored event place an emphasis on the Establishment Clause. In contrast, those who insist upon a wide application of the Free Exercise Clause defend the presence of prayer and religious symbols in public school events. Despite the spectrum of opinions and the lack of elaboration of the First Amendment, the Bill of Rights contains both the Establishment Clause and the Free Exercise Clause. This suggests that the founders intended both to be valued

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

and implemented. While it may be difficult to employ both simultaneously with equal weight, prudence and sound judgment based upon legal precedents and the law of the land can generate a solution of equilibrium.

In order to clarify the vagueness of the Constitution, it is necessary to analyze it with the mindset of a loose constructionist. If strict interpretation of the Constitution were applied to reconcile the Establishment Clause with the Free Exercise Clause, there would not be enough information to make educated decisions of the role of religion in public schools. The religion clauses of the First Amendment must be analyzed in the context of the rest of the Bill of Rights, the Constitution, and the current state of American society. Such an approach would not undermine the supremacy or stability of the Constitution because any viable solution consistent with the explicit rights and limitations delineated in the document reinforces its legitimacy.

The First Amendment states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof…,"[2] but does not elaborate beyond this. As a result, citizens and legislators must derive a clearer meaning from these phrases that are compatible with the Constitution as it applies today. The question revolving around the religion clauses is not surrounding their legitimacy in American democracy, but the extent of their application in society. The Establishment Clause establishes separation of church and state, which is not largely disputed. The uncertainty is derived from the question of the extent of the state. This leads to the Free Exercise Clause, which prohibits Congress from preventing the free exercise of religion. The combination of these gives rise to questions such as: To what extent are individuals included as a component of the state? To what extent should an individual's free exercise of religion be limited, if at all, due to this direct involvement in the state? I propose a possible solution here based upon interpretation of the Constitution, laws, and

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

legal precedents combined with an understanding of current circumstances of society without personal bias. The religion clauses should work in tandem with each other, acting as a balance in order to uphold individual rights to free exercise while providing reasonable limits when the individual acts on behalf of the government.

**Defining Individual Rights**

A. The Difference Between An Individual and A Component of A Unit

Due to the vague language of the religion clauses, it seems that one of the main sources of disagreement arises from the lack of discernment between the individual and the state. This distinction is not as obvious as it may seem on its face, and it is crucial to determining the correct distribution and limits of rights. The Establishment Clause elicits the question of how an establishment of religion is created. Originally, this prevented the government from sponsoring a certain religion. More recently, the decision of *Lemon v. Kurtzman* 403 U.S. 602 (1971) provided the Lemon test in an attempt to define "establishment" more clearly. This legal test states that if the state aids a certain religion with a nonsecular intent, promotes or hinders a religion, or causes "excessive entanglement" between church and state, then the action violates the Establishment Clause.[3] However, the Lemon test fails to determine the extent to which individuals are subject to the clause as servants of the state. Insofar as an individual is not employed by or is otherwise directly involved in the affairs of the government, then the Free Exercise Clause applies in all cases. However, if an individual directly furthers the means of the state or acts in a way that is supported by the state (i.e., employment), their actions are necessarily limited by the Establishment Clause. Therefore, any teacher, coach, administrator, or other employee of a public school system on school property, during school hours, or performing a school-sponsored activity must not support or restrict any religion.

[3] *Lemon v. Kurtzman*, 403 U.S. 602 (1971). https://www.oyez.org/cases/1970/89 (last visited Mar 28, 2025).

There have been many landmark cases in which the Supreme Court expanded the definition of various individual rights, but none of them contained a conflict with the individual as a component of the state. For example, the Court ruled in *Gideon v. Wainwright* 372 U.S. 335 (1963) that the Sixth Amendment ensures the right of every person to an attorney, even in noncapital cases. However, a person being tried in court is not acting in a capacity that serves the government and does not have conflicting duties or interests.[4] Similarly, *Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969) ensured that the Free Speech Clause of the First Amendment applied to students in a school, and free speech can only be limited under strict scrutiny if there is evidence of disruption.[5] This case may seem to be parallel to the question of religion in public school; however, the facts of the case create a clear distinction that prevents the same reasoning for expansion of free speech to be applied to the expansion of freedom of religion. In *Tinker* 393 U.S. at 503, free speech was extended to students, who are individuals only and are in no way servants of the state.[6] By attending public school, an individual receives privileges provided by the state, but does not act as a part of the state itself. Therefore, individual rights, including the free exercise of religion, are ensured by the Bill of Rights insofar as the law does not extend beyond the individual scope. If a law were created that allows free exercise of religion to infringe upon the free exercise of other individuals, then it is in violation of the very right it was supposedly intended to protect.

While the cases that involved individual rights answered questions that involved people only as individuals, the issue of religion in public schools is more complex because it contains a conflict between the individual and the state within the same body instead of as two separate

[4] *Gideon v. Wainwright* 372 U.S. 335 (1963). https://www.oyez.org/cases/1962/155 (last visited Mar 28, 2025).
[5] *Tinker v. Des Moines Independent Community School District* 393 U.S. 503 (1969). https://www.oyez.org/cases/1968/21 (last visited Mar 28, 2025).
[6] *Id.* at 503

entities. The Bill of Rights is intended to protect the rights of individuals from infringement by the state. However, it does not address which of these takes precedence over the other in cases where the two components are merged in one person.

In *Kennedy v. Bremerton School District* 597 U.S. _ (2022), a football coach of a public high school prayed with students during and after games, refusing to end the practice after the school district asked him to do so. Kennedy then sued the school district, and the case was eventually appealed to the Supreme Court. The Court ruled that the Free Exercise Clause protected Kennedy's actions because any limit imposed on his practice of religion by the public school district would interfere with his free religious exercise.[7] The Court also answered the question of the District's request relating to the freedom of speech. Using the "time, place, and manner" precedent set by *Cox v. New Hampshire* 312 U.S. 569 (1941)[8], the Roberts Court asserted that Kennedy's prayers were constitutional because they were conducted during a time after the game when he was not performing his duties as a coach.[9] While it may be true that the circumstances do not provide a "compelling" and specific basis on which to claim a reasonable limit on free speech, the same argument cannot be utilized for the Establishment Clause. The replacement of the Lemon test by an analysis of "historical practices and understandings" has caused a regression in the available tools of the courts used to reduce the divergence in opinion on the vague clauses of the Constitution. As Justice Sotomayor illustrated in her dissenting opinion, Kennedy's prayer not only involved students, but also occurred at a school-sponsored event. Justice Sotomayor noted that the District stated that any employee of the District was permitted to engage in religious practices, such as prayer, unless it influenced or altered duties

[7] *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022). https://www.oyez.org/cases/2021/21-418 (last visited Mar 28, 2025).
[8] *Cox v. New Hampshire*, 312 U.S. 569 (1941). https://www.oyez.org/cases/1940-1955/312us569 (last visited Mar 28, 2025).
[9] *Kennedy v. Bremerton School District*, Oyez, https://www.oyez.org/cases/2021/21-418 (last visited Mar 28, 2025).

associated with the job.[10] As a result, the District's statement and the Establishment Clause would have been respected if all of Kennedy's prayers occurred privately, away from students during school activities.

Although Kennedy made some concessions, such as ending his practice of inviting others in the game to pray with him, he admitted that he had done this in the past. Additionally, as an employee of the District, Kennedy had a responsibility to oversee the students during and after the game. The District mentioned that the prayers occurred while the students were on the field, the stadium lights were on, and the participants of the game remained in uniform.[11] Under these circumstances, Kennedy is considered a representative of the public school district, and therefore of the government. As a result, the Establishment Clause carries more weight in this case than the Free Exercise Clause. As a private individual, Kennedy maintains the right to free exercise, as does every other individual. However, public school employees operating as agents of the state via the fulfillment of any duty related to their job are subject to the same responsibility to act secularly as the state itself. Thus, Kennedy was reasonably restricted by the Establishment Clause to refrain from prayer while performing duties in the capacity of the school district, whether during or after the game.

B. Religion As a Right

The Free Exercise Clause prevents the infringement of religious practice by Congress, suggesting that this is a foundational right along with the freedom of speech. However, as seen in cases regarding the latter, rights are not limitless. Even in free societies, the government is obligated to provide and enforce reasonable exceptions for the application of rights in order to prevent chaos. Admittedly, this is a dangerous argument. The language used in discussions in

[10] *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022) (Sotomayor, J., dissenting).
[11] *Kennedy v. Bremerton School District*, 597 U.S. ___ (2022).

which rights are involved is often vague and ambiguous. In order to reduce this uncertainty to the greatest extent possible, "reasonable exceptions" should be defined. Since precedent provides the most stability and consistency, it should be employed in constructing this definition. For example, in *Schenck v. United States* 249 U.S. 47 (1919), Justice Oliver Wendell Holmes argued that the freedom of speech could not be protected for a person shouting "fire" in a theater because it would compromise the safety and well-being of others.[12] The "clear and present danger" test was replaced by the "imminent lawless action" test of *Brandenburg v. Ohio* 395 U.S. 444 (1969), which allowed speech to be restricted if it could incite another person to act against the law.[13] While these legal precedents differ in various ways and do not approach the subject of religion, they contain similarities in their foundational reasoning. Most significantly, the decisions in both *Schenck* 249 U.S. at 47 and *Brandenburg* 395 U.S. at 444 permitted limits to be placed on the freedom of speech in circumstances in which the speech in question influenced surrounding people in a way that would hinder their ability to carry out their duties as a member of society. If this is applied to the Free Exercise Clause, it is evident that any practice of religion that subjects others to unwilling participation in that practice infringes upon those people's personal liberties. A law or action taken by the government or an entity under its direct control to limit free exercise in such a case is necessary to maintain the free exercise of everyone else.

In *Christian Legal Society Chapter v. Martinez* 561 U.S. 661 (2010), the Court affirmed the Ninth Circuit Court's decision that the policy at the Hastings College of Law, which required clubs to allow any student to participate, was reasonable and constitutional. This prevented the Christian Legal Society from obligating students to state their Christianity in order to become members. In effect, the ruling did not restrain the Society from expressing religious beliefs or

[12] *Schenck v. United States,* 249 U.S. 47 (1919). https://www.oyez.org/cases/1900-1940/249us47 (last visited Mar 28, 2025).
[13] *Brandenburg v. Ohio*, 395 U.S. 444 (1969). https://www.oyez.org/cases/1968/492 (last visited Mar 28, 2025).

engaging in religious practices.[14] Free exercise was therefore maintained, and each individual retained their right to religious expression. The target of the ruling was the exclusion of students based upon their religious beliefs, which infringes upon the right of religion of non-members. This illustrates reasonable limits on the exercise of religion while ensuring that the integrity of the right itself remains intact. Although *CLSC v. Martinez* 561 U.S. at 661 applies to graduate school, the same reasoning can be applied to religion in public schools. Like the Hastings School of Law, students who attend public school do not adhere to a specific religion and do not consent to be influenced by a specific religion during school-related events. As a result, each student has the right to free exercise, which would be jeopardized if a group affiliated with the school or an individual representing the school in some way coerced participation in or prevented abstention from religious practice.

**The History of Religion in Public Schools**

A. The Importance of Supreme Court Precedents

The use of precedents set by the Supreme Court is a reliable way to maintain integrity in the justice system by ensuring the consistency of the interpretation of the Constitution. Although precedents are far from perfect, they are often useful for ensuring that the Supreme Court remains on a similar course of impartiality, and for keeping the lower courts in accord with its superior. While there are many examples of lauded precedents that have been used to expand human rights, there are also many that were struck down. Critics of the use of precedents in court cases may argue that each circumstance is unique, and the changing times cause a change in application of the laws. Others may cite the shifting ideology of the Court as an excuse to strike down precedents. However, precedents have persisted despite these criticisms, and will continue

[14] *Christian Legal Society Chapter v. Martinez*, 561 U.S. 661 (2010). https://www.oyez.org/cases/2009/08-1371 (last visited Mar 28, 2025).

to influence the courts. In the realm of the relationship between public education and religion, many cases have arisen. This once again indicates the urgency of the situation created by the vague wording of the Constitution. In order to fulfill their roles as the judicial guides, the courts must establish a relatively stable, consistent set of parameters for the involvement of religion in public schools that abides by and expands upon the Constitution.

One landmark case that illustrates the crucial role of the Supreme Court in interpreting the Constitution is *Engel v. Vitale* 370 U.S. 421 (1962). In 1951, the New York State Board of Regents required all public schools to conduct a voluntary prayer every day, led either by teachers or by a student. A group of parents sued Herricks School District, arguing that the prayer violates the Establishment Clause. The petitioners argued that prayer that is voluntary in theory is not voluntary in practice due to peer pressure and discomfort in students who would choose not to participate.[15] Although the prayer is voluntary, it is conducted by either a figure of authority or a classmate. From the point of view of a student, this makes it difficult to abstain from participation due to the threat of judgment or a perceived sense of obligation. The location and time of the prayer, in a classroom during the school day, also increases the likelihood that students are subjected to religious activity of which they may not wish to be a part. Since attending school is required by law, students are unable to avoid the prayer by staying home. The only way to avoid the influence of the religious practice completely is to exit the room, which could reduce the sense of belonging in the student and reduce self-esteem. As a result, the Court ruled that the prayer violated the Establishment Clause because it caused an unnecessary entanglement between church and state due to the influence of the prayer on students and the involvement of public school teachers, who are employees of the government. Additionally, *Engel v. Vitale* 370 US 421 (1962) was decided by a majority of six to one, with associate

[15] *Engel v. Vitale*, 370 U.S. 421 (1962). https://www.oyez.org/cases/1961/468 (last visited Mar 28, 2025).

justices Frankfurter and White not participating.[16] This relatively high majority out of the participating justices that spanned the ideological spectrum suggests that the Supreme Court viewed the voluntary prayer as a clear violation of the Constitution.

First, the writing of the prayer by the New York State Board of Regents involved an entanglement of church and state. Although the prayer was nondenominational, a component of the government created a religious statement and mandated its recitation in public schools, another part of the government. Not only had religion become the business of the government, but it had also infiltrated secular public education. In his dissenting opinion, Justice Potter Stewart countered the majority with the assertion that the prayer did not establish an "official religion" due to its voluntary nature.[17] This highlights the difficulty of interpretation that the vague wording of the Constitution causes, as "establishment" could refer to the implementation of a state-sponsored religion at any level of government, as Stewart implies. However, this narrow analysis provides the government with a wide latitude to involve itself in religion as long as it does not explicitly mandate the observance of a single religion. If this interpretation were adopted, the government could reasonably promote any religion as long as no statute or law existed that created an official religion of the United States. This would represent a severe encroachment of the government upon the liberties of its citizens, and there would likely be many government-sponsored items and activities related to a specific religion that would not be categorized as "official." Therefore, the ruling in *Engel v. Vitale* 370 U.S. 421 (1962) is justified because the Court upheld the Establishment Clause's requirement for the maintenance of separation of church and state.

[16] *Id.* at 421
[17] *Id.* at 421

B. *Roake v. Brumley*

To their critics, Supreme Court precedents often seem antiquated or inapplicable in varying circumstances. However, they can be useful in determining how to analyze a specific argument when the facts and question of the case correspond to each other.

The ongoing case of *Roake v. Brumley* exemplifies the topical character of the debate regarding the extent to which the Establishment Clause limits religion in public schools, and how that interferes, if it does at all, with the Free Exercise Clause. In June 2024, the state of Louisiana passed H.B. 71 and it was signed into law by Governor Jeff Landry. The law requires all public schools to display the Ten Commandments in classrooms by January 1, 2025. In response, a lawsuit was filed in federal district court against the Middle District of Louisiana by the American Civil Liberties Union, the ACLU of Louisiana, Americans United for the Separation of Church and State, the Freedom of Religion Foundation, and Simpson Thacher Bartlett LLP. This led to a preliminary injunction on November 12, 2024 that prevented the law from going into effect, and an emergency appeal was then made to the U.S. Court of Appeals for the Fifth Circuit. The plaintiffs, represented in the style of cause by Reverend Darcy Roake, are nine families whose children are enrolled in the public schools of Louisiana, and represent a variety of religions. The families are non-religious, Christian, Jewish, and Unitarian Universalist, which demonstrates that the argument is not based upon religious views, but solely on the supreme laws of the Constitution. The Superintendent of Education of the State of Louisiana, Dr. Cade Brumley, is the respondent in the case. The state, represented by Louisiana attorney general Liz Murrill and solicitor general Ben Aguiñaga, argued in its defense that the law mandating the display of the Ten Commandments and the recitation of scripture in all Louisiana public schools did not violate the Establishment Clause and that the courts do not have jurisdiction to decide the

case. Louisiana emphasized in the oral arguments held on January 23, 2025 that no public funds were required in order to obtain a copy of the Ten Commandments, and that religious symbols have been a prominent presence in American culture for centuries. Louisiana mentioned that the Ten Commandments are depicted in the Supreme Court, and that the flags, seals, and buildings of state and local governments contain religious symbols, which represents the significance of Christianity in both the culture and history of the United States. Davis stated that "religion has been a natural and welcome part of our American public life…;"[18] however, the scope of the word "our" and the definition of "American" are crucial to determine the extent to which this phrase is true and just.

In the twenty-first century, the United States is made up of a diverse population that practices a plethora of religions, and some people do not hold any religious beliefs. Just as "We the people"[19] should encompass at least every American citizen, the phrase "our American public life"[20] should incorporate every aspect of contemporary society in the United States as would be contributed by the current "We the people." With this definition, it seems that religion neither is, nor has been, a both "natural" and "welcome" aspect of American society. While the United States has undergone an undulation between religious fervor and ignorance, there have always been groups of people who do not compose the religious majority. It is true that democracy in many cases dictates majority rule, but this does not apply in the case of religious freedom. The system of majority rule often finds its rightful place in the political structure, for example, to maintain order and some form of efficiency in the legislature. However, the Bill of Rights protects individual freedoms regardless of the prevalence of a certain characteristic. If this were not the case, those who constitute a minority in the debate on any given issue would not have a

[18] *Roake v. Brumley*, No. 24-30706 (5th Cir. 2024)
[19] U.S. CONST. pmbl.
[20] *Roake v. Brumley*, No. 24-30706 (5th Cir. 2024)

freedom of speech equivalent to that of the majority. Applying this to the Free Exercise Clause, all individuals have the right to practice their own religion.

However, like the freedom of speech, the freedom of religion must have a caveat: each individual may practice any religion they choose unless it interferes with the freedom of others or poses a grave threat. This is where the Establishment Clause is useful, especially in the setting of public schools. First, the government— and thus public schools— is not an individual, and therefore does not enjoy the protections and freedoms promised by the Bill of Rights. Secondly, any attempt by teachers or faculty to enforce the learning or recitation of the Ten Commandments or any other specific religious text without the inclusion of many other religions is a violation of the establishment clause. Employees of public schools are employees of the state and are bound to refrain from practicing or promoting a religion in schools or at a school-sponsored event. In the case of *Roake v. Brumley*, the presence of the Ten Commandments in every public school classroom not only suggests that the government of Louisiana promotes Christianity, but it also implies that employees are involved in manipulating available information in such a way that makes it difficult for students to ensure the integrity of their personal religious beliefs.

Additionally, the argument for the respondents focused on the Supreme Court case *Stone v. Graham* 449 U.S. 39 (1980), which represents a precedent that parallels *Roake*. In 1978, a law was passed in Kentucky that obligated a copy of the Ten Commandments to be visible in every classroom of all public schools. In response, parents, including Sidell Stone, filed a claim against the superintendent of the state of Kentucky, James Graham. Similar to *Roake,* the Court ruled in favor of the petitioner. Although the decision was five to four, liberal and moderate justices were represented in the majority, with Justice Blackmun included among the dissenters despite his

reputation as a ruling with a more liberal stance on First Amendment cases.[21] This indicates that the dispute of the religion clauses within the realm of public schools is not mainly a question along ideological lines. Consequently, it appears that there is an intrinsic variation in understanding the Constitution, particularly the First Amendment, that may be based more upon reasoning than personal beliefs. In a per curiam decision, the Burger Court argued that the first part of the Lemon test had been violated by the Kentucky law.[22] The Lemon Test serves as a strong and reliable precedent because it was decided by an eight to zero majority. In 1968, Pennsylvania required that the state subsidize teaching materials and salaries for private religious schools. Rhode Island followed suit in 1969, contributing to fifteen percent of private school teachers' salaries. While the Pennsylvania district court dismissed the case, the Rhode Island district court ruled that the Establishment Clause had been violated. The cases were then combined in the Supreme Court, which ruled that government funding for private religious schools violates the Establishment Clause. This gave rise to the Lemon Test, which states that all statutes must be intended for secular legislation; they can neither support nor hamper religion, and they cannot lead to "excessive government entanglement with religion."[23] Returning to *Stone v. Graham* 449 U.S. 39 (1980), the Court found that the implementation of the Ten Commandments in public schools had a clearly religious purpose due to the content of that document. The mandated display of non-secular content in secular public schools, especially phrased as requirements, implies that the government acted with the intent of persuading its citizens to adopt certain religious beliefs.[24] This certainly carries a non-secular significance, as well as reduces the free exercise of religion.

[21] *Stone v. Graham*, 449 U.S. 39 (1980). https://www.oyez.org/cases/1980/80-321 (last visited Mar 28, 2025).
[22] *Id.* at 39
[23] *Lemon v. Kurtzman*, 403 U.S. 602 (1971). https://www.oyez.org/cases/1970/89 (last visited Mar 28, 2025).
[24] *Stone v. Graham*, 449 U.S. 39 (1980). https://www.oyez.org/cases/1980/80-321 (last visited Mar 28, 2025).

Finally, both of these precedents are reliable and relevant to *Roake v. Brumley*. Although *Lemon v. Kurtzman* 403 U.S. 602 (1971) involved the question of government funding for non-secular schools, it defined the Establishment Clause in a clearer and more detailed manner than it appears in the First Amendment. As previously argued, the Court erred in ruling in favor of Kennedy in *Kennedy v. Bremerton School District* 597 U.S. _ (2022), unreasonably abandoning the Lemon Test. The test should be used as a precedent in *Roake* as it was in *Stone* 449 U.S. at 39 due to the similarity of the cases and the status of the Lemon Test as the most coherent interpretation of the Establishment Clause. Additionally, the courts should adhere to the precedent set by *Stone* 449 U.S. at 39 and rule in favor of Roake in order to continue judiciary consistency. Despite the relatively large time gap between the two cases, circumstances such as the presence of religious diversity in public schools and the duty of the government to remain secular have not changed. Therefore, a ruling against Roake would generate greater confusion and instability in the court system, undermining the role of stability expected of the judiciary.

**Harmony in the Religion Clauses**

A. Limiting Rights Does Not Restrict Individual Freedoms

The Bill of Rights was originally written to appease the worries of the Anti-Federalists regarding the power the Constitution awarded to the federal government by ensuring that the rights of individuals were secured. In *The Imperial Presidency*, Arthur Schlesinger denoted a pattern in the U.S. presidency of overreaching constitutional powers, which continues in the twenty-first century.[25] This has perhaps caused the American people to become accustomed to the use of greater, and at times unconstitutional, powers by all levels and branches of government. Consequently, the proper role of the Bill of Rights has become difficult to discern, with clauses either over-emphasized or dismissed depending on ideology or circumstance.

[25] Schlesinger, Arthur. *The Imperial Presidency.* Mariner Books, 2004.

Therefore, it is essential that the courts take and hold a more defined stance on legal issues, especially on that of the implementation of religion in public schools. The independent judiciary branch has a duty to exercise the capabilities given it by the Constitution to prescribe a clearer definition of its ambiguous amendments. A frequent concern of such leadership of the judiciary is that the freedom that has defined the United States for centuries will be diminished, or in the most extreme cases, eradicated. However, it is necessary to both incorporate an analysis of the political system and society as a whole, as well as to understand the difference between rights and freedoms. While it may be challenging to view the judicial system as an ally, the courts require trust to effectively influence society. In the case of the religion clauses, a reduction of rights held by employees and administrations of public schools does not encroach on individual freedoms. All people working for a public school district are employed by the government, which is the very entity from which individuals are protected by the Bill of Rights. This indicates that, while people act in the capacity of the government, they are subject to a limitation of their religious actions in order to fortify the religious freedom of every individual. By curtailing the religious rights of teachers and administrators, the courts augment the religious freedom of society in general.

B. The Coexistence of the Religion Clauses

It often seems as if the Establishment Clause is competing with the Free Exercise and Free Speech clauses of the First Amendment in cases that involve religion in public schools. However, they were not written in the same amendment due to coincidence or with the intention of inciting conflict. The First Amendment contains the most fundamental rights that the founding fathers believed to be intrinsic to liberty and indispensable to the free democracy that the Constitution established. The appearance of the religion clauses in this amendment suggests that

they each have an equal importance. However, this does not mean that if one is violated, the other nullifies or overshadows that violation. In other words, if the Establishment Clause is violated by an overtly religious act affecting other students or faculty in a public school, the Free Exercise Clause does not have the power to override the infraction. It is necessary to view the religion clauses in this way in order to avoid conflicts that often arise regarding the role of religion in public schools. If each individual's right to free exercise is protected, and the separation of church and state is similarly ensured, then individual rights and the good of society are equally preserved.

Evidence of the Establishment Clause and the Free Exercise Clause working in tandem is illustrated in *Santa Fe Independent School District v. Doe* 530 U.S. 290 (2000). Before 1995, the chaplain of Santa Fe's high school student council prayed over the school's intercom system preceding each home football game. Two families, one Mormon and one Catholic, filed suit against the school district, arguing that this practice violated the Establishment Clause of the First Amendment. During the case, Santa Fe School District created a policy that allowed, but did not force, students to vote whether or not there should be prayers at home games, and the person who should deliver them. The students then voted to allow the "invocations," but the Court of Appeals ruled that the prayers continued to violate the Establishment Clause. After the District submitted a writ of certiorari, the Rehnquist Court upheld the Court of Appeal's ruling in a six to three majority. In the majority opinion Justice Paul Stevens explained that prayer during football games was a clear example of government sponsorship of religion. Despite the fact that the prayers were led by students and accepted by a majority vote of the student body, the speech was not "private" because its audience included the entire attendance of the games. Additionally, the prayers were sanctioned by school policies and occurred on school property, which are both

components of the government.[26] This case displays the proper balance between the religion clauses. The student's right to free exercise was not infringed upon because the ruling did not target a personal, truly private expression of religion. Instead, the students were performing a non-secular task permitted by the school district, which also subjected other students to prayer. This reverberating effect on the students' peers illustrates that it is not the true implementation of the Free Exercise Clause, which should not burden any other individual's free exercise. As for the role of the Establishment Clause in this case, the school district overstepped the boundary separating church and state. As the Lemon Test suggests, all legislation must have a secular intent, which is extended to the states and every agency operated by it by the Fourteenth Amendment. The policy of the Santa Fe School District clearly stated that students could vote to allow prayer, which is explicitly non-secular. It does not matter whether or not a public school policy mandates the incorporation of religion in school-sponsored activities. It is sufficient for the district solely to permit a religious activity to be considered in support of a religion.

As a result, this use of the Lemon Test may seem too broad, but it maintains the standard of strict scrutiny. In all possible infringements of the Establishment Clause, the state has a compelling interest to prevent the statute or policy responsible for the violation. If public school districts combine or allow the combination of religion with any school-related activity, group of people, or property, then the government risks unnecessary entanglement. Such an infringement can be avoided by relying on the Free Exercise Clause to act as a naturally balancing presence for religion. It can be inferred that the purpose of any public school policy that is non-secular in nature is to encourage students to exercise religion. If this is the case, then the Free Exercise Clause can work in tandem with the Establishment Clause. While the school avoids non-secular

[26] *Santa Fe Independent School District v. Doe,* 530 U.S. 290 (2000). https://www.oyez.org/cases/1999/99-62 (last visited Mar 28, 2025).

legislation and "excessive entanglement," as implicitly instructed by the Establishment Clause, students are able to exercise their right to practice any religion they choose in the private sphere. In this solution, the school district avoids justified lawsuits due its violation of the Establishment Clause, and students may exercise a religion of their choosing without causing undue influence on their peers.

In conclusion, a resolution of the tensions between the Free Exercise Clause and the Establishment Clause is difficult but possible to attain. By differentiating between individuals who act separately from the government and those who are directly involved in it via employment or service, a correct apportionment of the rights of free exercise can be determined. Along with this categorization, stable and logical precedents should be referenced by courts in order to make firm and consistent decisions, which would decrease the uncertainty surrounding the religion clauses due to the vagueness of the Constitution. Faith could then be restored to the justice system, providing it with more strength to operate as the independent branch rooted in rational non-ideological justice. With this decisiveness, the judiciary should join the religion clauses to work in harmony with each other, maintaining free exercise without drawing the government closer to religion or encroaching upon the rights of surrounding individuals.

# Maine's Stand Against Corruption in Campaign Finance

Campbell MacDonald

"*In the full enjoyment of the gifts of Heaven and the fruits of superior industry, economy, and virtue, every man is equally entitled to protection by law; but when the laws undertake to add to these natural and just advantages artificial distinctions, to grant titles, gratuities, and exclusive privileges, to make the rich richer and the potent more powerful, the humble members of society—the farmers, mechanics, and laborers have a right to complain of the injustice of their Government.*"

– Andrew Jackson

## Introduction

The destruction of the American campaign finance system didn't occur overnight — it eroded slowly, case by case, until the floodgates opened. Over the past half-century, the Supreme Court has steadily expanded the ability for financial influence in politics under the banner of free speech. The courts have curated a toxic regulatory landscape, expanding the rights of corporations, unions, and wealthy individuals to finance political causes and candidates, while striking down statutes designed to protect the integrity of our elections. *Citizens United v. Federal Election Commission* (2010) is frequently seen as the pivotal case in this transformation, but it was preceded by critical rulings such as *Buckley v. Valeo* (1976), *First National Bank of Boston v. Bellotti* (1978), and *McConnell v. FEC* (2003), all of which gradually undermined the federal government's ability to regulate election spending. Together with the D.C Appeals court decision in *SpeechNow.org v. FEC* (2010), these decisions established the precedent that money constitutes a form of protected speech, dismantled key restrictions on independent political expenditures, and set the stage for the current era of campaign finance.

The fallout from these rulings is vast, but is most plainly visible in the rise of Super PACs: political action committees permitted to raise and spend unlimited sums of money. This legal loophole has initiated a torrent of special interest money designed to shape the political landscape, with corporate, union, and individual wealth playing increasingly dominant roles in American elections. Election after election, there has been a steep increase in campaign spending, in addition to a growing public perception that the political system favors the wealthy and well-connected.

The American public sees the problem even if the Court doesn't. In 2023, eight in ten American adults believed that campaign donors have too much influence over members of Congress.[1] Seven out of ten Americans supported limiting how much money organizations and individuals can give to campaigns, indicating widespread, bipartisan concern about campaign finance.[2] But time and time again, courts have curtailed regulation. The legal pathway towards free and fair elections seems to be shrinking by the year.

This fall, Maine became the first state to draw a line in the sand, taking an unprecedented step by passing a legislation that directly challenges the federal campaign finance regime. The amendment limits individual donations to Super PACs to just $5,000 per year, designed to combat the very type of unrestricted political spending enabled by Citizens United and its progeny.[3] As the first state to implement such a restriction, Maine is testing the outer boundaries of what is legally permissible under current Supreme Court doctrine.

The implications of Maine's amendment are profound.  As Maine positions itself for a potential legal battle, its action will serve as either a model or a warning for other states seeking to return democratic sanctity to their elections. This article examines the development of

[1] Pew Research Center, American's Dismal Views of the Nation's Politics, 53
[2] Id, 60
[3] Maine Revised Statutes, Title 21-A: ELECTIONS Chapter 9: CONDUCT OF ELECTIONS

campaign finance, Maine's amendment, and their implications for future reform. By analyzing the legal and political context, it assesses whether Maine's model is a feasible path to reverse the increasing influence of money in American politics.

**A History of Campaign Finance**

The history of campaign finance in America is, quite simply, a history of corruption. How to contain it, how to disguise it, and how it keeps wriggling its way back in. Loosely, it resembles a game of whack-a-mole to close one loophole while making room for another; a long list of half measures. The original menace to civil service was the widespread practice of political patronage — the appointment of staff to government posts based on partisan loyalty. The first federal regulation of election financing dates back to 1867, when Congress passed a law prohibiting federal officers from soliciting contributions from Navy Yard workers. Over the next century, various laws aimed at reducing the influence of powerful interest groups and patronage systems regulated campaign financing, primarily by limiting contributions. In 1883, the Pendleton Civil Service Reform Act was passed, making it illegal for government officials to solicit contributions from any civil service worker or award positions based on anything but merit. Previously, tacit extortion meant that government workers were expected to make campaign contributions in order to keep their jobs.

As the Gilded Age minted tycoons and monopolies at an unprecedented scale, and political machines continued to thrive on patronage, 20th-century reformers set out to reclaim democracy from the grip of the wealthy and powerful. Teddy Roosevelt, elected by millions of dollars of corporation money, and later addressed congress on the need for reform. In 1907 the Tillman Act later prohibited banks and corporations from contributing to election campaigns.

Later, The Federal Corrupt Practices Act of 1910 established disclosure requirements and imposed spending limits on candidates. Suspicion of new levels of corporate wealth and the shifting social climate meant that the time was ripe for democratic reform. The 17th Amendment (1913) introduced the direct election of Senators, and the 19th Amendment (1920) granted women suffrage, significantly expanded the electorate, and increased the importance of campaign financing. This democratic ethos continued when the 1924 Democratic Party platform included a campaign plank, sponsored by William Jennings Bryan, which advocated for public funding of federal candidates. Instead, the Republican congress passed the 1925 amendment to the Federal Corrupt Practices Act, which strengthened disclosure requirements and spending limits but lacked enforcement mechanisms. President Lyndon B. Johnson later described it as "more loophole than law."

Problems grew faster than legislation could answer through the Great Depression. The Hatch Act (1935) prohibited contributions to federal candidates from federal workers and contractors and limited individual contributions to $5,000 per year. The rise of labor contributions to campaigns, such as the Congress of Industrial Organizations (CIO) $500,000 donation to the Democratic Party in 1936, led to further restrictions. The Smith-Connally Act was passed over FDR's veto in 1943. The Taft-Hartley Act of 1947 prohibited direct contributions from labor unions, corporations, and interstate banks to federal candidates. In 1944, the CIO formed the first political action committee (PAC), funded through voluntary contributions instead of union treasury funds in order to circumvent these new restrictions. And yet, the new restrictions continued to be circumvented: laws in the first half of the 20th Century

"did little to stem the overall flow of money into campaigns, due to weak enforcement mechanisms and various loopholes that could readily be exploited."[4]

As such, campaign finance that tiptoed the line of morality if not legality. However, the 1970s saw a scandal that was a bridge too far for the American public, dragging the machinery of slush money and influence into the national spotlight. As television and radio became the dominant media for federal campaigning, Federal campaign spending boomed from $155 million in 1956 to over $300 million in 1968. The Federal Election Campaign Act (FECA) of 1971 introduced stricter disclosure requirements, capped spending, and permitted unions and corporations from forming PACs. Enforcement remained weak, and the Watergate scandal (1972) revealed extensive campaign finance abuses, including millions in secret donations to President Nixon's reelection campaign.

In the immediate aftermath of Watergate, Congress sought to definitively regulate political spending, but the Supreme Court, in *Buckley v. Valeo*, drew a constitutional distinction between contributions and expenditures that would shape campaign finance law for decades. In response to the scandal's slush funds, Congress passed the 1974 FECA amendments and tasked the new Federal Election Commission (FEC) with enforcing the new laws. The law was comprehensive and powerful, imposing limits on contributions to candidates for federal office (2 U.S.C. §441a), expenditures by candidates and their committees (18 U.S.C. §608(c)(1)(C-F)), a $1,000 limitation on independent expenditures 18 U.S.C. §608e), and a limitation on expenditures by candidates from their funds (18 U.S.C. §608a). In *Buckley*, the Burger Court struck down many of the reforms. A *per curiam* court ruled that while regulating contributions was constitutional, the expenditure limits violated the First Amendment by restricting political

[4] Smith, Bradley. *The Myth of Campaign Finance Reform*, 81-2

speech, reopening the floodgates. In 1979, the FEC ruled that political parties could spend unregulated or "soft" money (a contribution to the political party rather than a specific candidate) for non-federal administrative and party-building activities. This money began to be used for candidate-related issue ads, which led to a substantial increase in soft money contributions and expenditures in elections. In 1980, election spending reached $192.1 million.

Throughout the 1980s and 1990s, bipartisan efforts to enact further reforms repeatedly failed, with bills being killed in the House, blocked by filibusters, and presidential vetoes. Campaign spending continued to rise, reaching $403.7 million in 1990 and $650.8 million in 1996. The Supreme Court's Austin v. Michigan State Chamber of Commerce (1990) upheld restrictions on corporate campaign spending, but the FEC v. National Conservative Political Action Committee (1985) ruling extended Buckley's protections on spending to independent expenditures, meaning that limits on PACs violate the protections of the First Amendment. Reform efforts found a foothold with the passage of the Bipartisan Campaign Reform Act (BCRA) of 2002. The BCRA banned soft money contributions to national political parties and regulated "electioneering communications," which are political ads funded by corporations or unions. However, subsequent Supreme Court rulings, such as FEC v. Wisconsin Right to Life (2006), weakened these efforts.

Building on the framework established in *Buckley*, the Court's decision in *Citizens United* marked an aggressive endorsement of money as political speech: it struck down restrictions on corporate independent expenditures, emphasizing that the identity of the speaker could not justify limits on political speech. Unlike *Buckley* and *FEC v. NCPAC*, which primarily dealt with individual and PAC spending, *Citizens United* explicitly struck down the precedent set in *Austin v. Michigan Chamber of Commerce (1990)*, which had upheld restrictions on corporate

independent expenditures. Shortly after the decision, a subsequent D.C. Circuit case, *SpeechNow.org v. FEC* (2010), applied the *Citizens United* reasoning to strike down contribution limits to independent expenditure-only committees, effectively giving rise to Super PACs. As long as these new coalitions of independent interests did not contribute directly to candidates or coordinate with campaigns, they can spend unlimited amounts on ads, messaging, and other political activities intended to influence elections. In the decade following *Citizens United*, outside spending in elections surged, with billions flowing into federal campaigns from corporate and nonprofit entities. In 2020, the total amount of election spending reached $18.3 billion.

**The Existing Constitutional Framework**

The modern legal framework governing campaign finance is anchored in the First Amendment's protection of political speech. The bedrock of modern campaign finance law was established in response to the 1971 Federal Election Campaign Act. In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court struck down the law's limits on a candidate's spending, but upheld contribution limits to candidates, establishing the foundational dichotomy. Restricting the amount of money a candidate spent on campaigning was unconstitutional because "A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression." Conversely, limits on how much donors could give to said campaigns were upheld because they "entail only a marginal restriction upon the contributor's ability to engage in free communication," and could be justified by the government's interest in "prevent[ing] actual corruption and the appearance of corruption."

Under Buckley, contribution limits would be upheld if the government could demonstrate that they are a "closely drawn" means of achieving a "sufficiently important" governmental

interest (*Buckley,* 424 U. S. 26). Expenditure limits are subject to strict scrutiny because they impose a substantial restraint on speech. This framework was reaffirmed and refined in *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld the Bipartisan Campaign Reform Act's (BCRA) soft money ban, observing that "money, like water, will always find an outlet," and that unregulated funds funneled through parties posed a direct threat to anti-corruption interests.

However, the Court significantly narrowed the permissible scope of regulation in *Citizens United v. FEC*, 558 U.S. 310 (2010), where it struck down restrictions on independent expenditures by corporations and unions. The majority concluded that "the First Amendment does not permit Congress to make these categorical distinctions based on the corporate identity of the speaker," explicitly overruling *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990), which had upheld such restrictions on the theory that corporate political spending could distort democratic discourse. The *Citizens United* Court rejected this distorted rationale, making the bold assertion that "the appearance of influence or access… will not cause the electorate to lose faith in our democracy." Instead, it held that only quid pro quo corruption—"dollars for political favors"—was a constitutionally sufficient justification for restrictions. In the Court's view, independent expenditures, by definition, cannot corrupt because they are made without coordination with candidates. This logic laid the groundwork for the D.C. Circuit's decision in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010), which struck down limits on contributions to Super PACs, concluding that "contributions to groups that make only independent expenditures also cannot corrupt or create the appearance of corruption."

The Court continued to sharpen this line, tightening the standard of a valid government interest in preventing *quid pro quo*. In *McCutcheon v. FEC*, 572 U.S. 185 (2014), the Court ruled that aggregate contribution limits on individuals didn't meet the holding that the government

may only regulate contributions where there is "a direct link between the donor and a candidate or officeholder" that risks quid pro quo corruption. The plurality emphasized that "ingratiation and access… are not corruption," reinforcing the narrow scope of governmental interest. Similarly, in *FEC v. Wisconsin Right to Life*, 551 U.S. 449 (2007), the Court held that restrictions on corporate-funded electioneering communications could not apply to ads that could reasonably be interpreted as issue advocacy, thus further narrowing BCRA's reach. Underlying these decisions is the Court's philosophical commitment to robust political speech, even by powerful actors. As it stated in *First National Bank of Boston v. Bellotti*, 435 U.S. 765 (1978), "the fact that advocacy may be undertaken by corporations does not diminish the value of the speech." Together, these rulings establish a high bar for any regulation: the restriction must be narrowly tailored to prevent quid pro quo corruption without burdening the broader marketplace of ideas. Yet this rigid framework has drawn criticism for underestimating the systemic and structural influence of money in politics.

**Maine's Path to Reform**

While *Citizens United* removed limits on independent expenditures by corporations and unions, it left open the question of whether the *contributions* funding such expenditures could still be subject to restriction. The decision permitting unlimited contributions to Super PACs emerged not from *Citizens United* itself, but from the D.C. Circuit's decision in *SpeechNow.org v. FEC*, which reasoned that if independent expenditures cannot corrupt, then neither can the contributions funding them. That logic was never directly endorsed by the Supreme Court. In *McCutcheon v. FEC*, 572 U.S. 185 (2014), the Court struck down aggregate limits on individual contributions to candidates and political committees, reaffirming that *quid pro quo* corruption can justify contribution limits under the First Amendment. Yet *McCutcheon* also preserved the

distinction between contributions and expenditures, holding that contribution limits, unlike expenditure caps, are subject to a lower standard of scrutiny. The boundary between *McCutcheon's* recognition of permissible contribution limits and *SpeechNow's* sweeping immunity for contributions to Super PACslies at the heart of the Maine litigation. Whether and how courts resolve that tension will shape the future of campaign finance law.

At the core of the Maine litigation is the unresolved question of whether limits on contributions to independent expenditure-only committees violate the First Amendment. *Citizens United* addressed only expenditures, not contributions to the entities making them. The subsequent D.C. Circuit ruling in *SpeechNow.org v. FEC*, 599 F.3d 686 (D.C. Cir. 2010) (en banc), extended *Citizens United* by striking down contribution limits to Super PACs, holding that if the expenditures are constitutionally protected, so too must be the funds enabling them. Although *SpeechNow* has effectively governed federal campaign finance for over a decade, the Supreme Court has never granted certiorari to review it. Thus, while widely followed, it lacks the binding authority of Supreme Court precedent.

A court reviewing Maine's law must decide whether *SpeechNow* correctly interpreted *Buckley v. Valeo*, 424 U.S. 1 (1976), which distinguished between contribution and expenditure limits. *Buckley* upheld limits on contributions to candidates under "closely drawn" scrutiny, finding them permissible to prevent actual or apparent corruption. However, it struck down limits on expenditures by candidates and individuals as impermissible restraints on core political speech. The key issue, then, is whether contributions to Super PACs should be treated like candidate contributions because they may still facilitate corruption or its appearance. Suppose the court finds that the formal independence of Super PACs does not insulate them from the reality of donor influence or strategic coordination. In that case, it may conclude that such

contributions are more akin to those in *Buckley* than to the independent expenditures protected in *Citizens United*. Such a finding would mark a doctrinal shift, recognizing that legal formalism around "independence" may no longer reflect the practical operation of campaign finance in a post-*Citizens United* world.

To uphold Maine's contribution limit without overturning *Citizens United*, a court must carefully navigate the distinction between *expenditures* and *contributions* that has long structured campaign finance jurisprudence. In *Citizens United*, the Court held that the government may not prohibit corporations or unions from making independent expenditures, reasoning that the absence of coordination with candidates eliminated the risk of quid pro quo corruption. But *Citizens United* explicitly preserved the *Buckley* framework: "[T]his Court has upheld contribution limits to prevent corruption or the appearance of corruption." 558 U.S. at 357. Thus, the Court did not invalidate contribution limits generally, only those applied to independent *spending*. Maine's law, by contrast, targets contributions *to entities* making such expenditures, and so arguably falls within *Buckley*'s contribution side of the ledger.

To distinguish *SpeechNow* and carve out limits on Super PAC contributions, a court could follow the reasoning in *McConnell v. FEC*, 540 U.S. 93 (2003), which upheld portions of the Bipartisan Campaign Reform Act by deferring to Congress's empirical judgment about the corruptive potential of large donations to party committees. *McConnell* emphasized the legitimacy of regulating not just quid pro quo corruption but also the "appearance of corruption" and the circumvention of contribution limits through nominally independent vehicles. A court sympathetic to Maine's position could extend this logic, finding that large contributions to Super PACs functionally resemble party contributions or candidate donations, especially given the increasing coordination between candidates and nominally independent groups, often via shared

consultants, aligned messaging, or temporal proximity. The Court in *FEC v. Beaumont*, 539 U.S. 146 (2003), also upheld limits on direct corporate contributions even when channeled through nonprofit advocacy groups, reaffirming that the identity and structure of the recipient do not immunize contributions from regulation.

Moreover, the Supreme Court has never held that the First Amendment demands *absolute* protection for contributions to all political entities. In *California Medical Association v. FEC*, 453 U.S. 182 (1981), a plurality upheld limits on contributions to PACs under the *Buckley* standard, finding that "it is unnecessary to decide whether such expenditures are constitutionally protected... if Congress may constitutionally limit the amounts that may be contributed." Although that case involved a multicandidate PAC rather than a Super PAC, it underscores the principle that contributions—even to entities making independent expenditures—may be regulated where corruption risks persist. The distinction, then, becomes empirical rather than categorical: Are Super PACs truly independent in a way that negates any corruption risk, or has practice overtaken doctrine? As the Court itself acknowledged in *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868 (2009), even the appearance of undue influence is sufficient to damage public confidence in the judiciary, and the same is true for electoral institutions. A regime that allows billionaires to fund "independent" groups operating in functional concert with candidates is one in which the free functioning of democratic institutions is very much at stake.

If a reviewing court finds that the independence of Super PACs is largely formalistic, it could apply *closely drawn scrutiny*, rather than strict scrutiny, and uphold Maine's limit as "closely drawn to avoid unnecessary abridgment of associational freedoms" while serving the important interest in preventing corruption or its appearance. While striking down aggregate contribution limits, *McCutcheon v. FEC*, 572 U.S. 185 (2014) reaffirmed that base contribution

limits may still serve valid anti-corruption purposes, and explicitly acknowledged the government's interest in "preventing corruption or the appearance of corruption." Id at 206–207. A court could treat Maine's $5,000 cap as a *base* limit on contributions to a non-candidate entity rather than as an impermissible ceiling on independent expenditures.

In *Buckley*, the Court chose to qualify its application of the highest level of scrutiny to expenditure limits, arguing that "there are governmental interests sufficiently important to outweigh the possibility of infringement," particularly when the "free functioning of our national institutions" is at stake. (*Communist Party v. Subversive Activities Control Bd.*, 367 U.S. 1 (1961).) That cautionary principle has roots stretching back farther than campaign finance regulation. It reflects a longstanding judicial recognition that certain structural threats can justify carefully tailored limits on political activity. The free functioning of our national institutions is patently under threat. The electorate of Maine has called out for reform, and the court must hear their cry.

This case affords the Supreme Court an opportunity to correct course. It allows the Court to reaffirm *Citizens United*'s narrow holding on independent expenditures while drawing a principled, fact-specific distinction on contributions to Super PACs. This would mean acknowledging that the post-*Citizens United* campaign finance regime has functionally eroded the distinction between "independent" and "coordinated" spending, and that the explosion of unlimited contributions has created a shadow campaign system in which the wealthiest actors dominate electoral messaging. To insist, as Justice Kennedy did, that "the appearance of influence or access… will not cause the electorate to lose faith in our democracy" is to ignore the clear empirical reality of the last fifteen years. Public trust in elections has cratered, and the Super PAC structure has become the clearest conduit for elite capture of political speech. A

factual reevaluation of contribution limits does not repudiate precedent, it applies the Constitution in light of the actual conditions under which democracy now operates.

The Court must return us to the principles and promises that our country has aimed at since our founding centuries ago. Maine's amendment must be heard and upheld not only because the law raises novel constitutional questions, but because it gives voice to the highest democratic ideals – among them that concentrated wealth should not translate into concentrated political power. Whether it was the rise of the Jacksonian Democrats against corrupt banks, the Progressives against the Robber-Barons in the Gilded Age, or the post-Watergate reforms of the 1970s, America has pushed back when private power threatened public institutions. Maine's amendment belongs to that lineage. As Andrew Jackson warned, "when the laws undertake to add to these natural and just advantages artificial distinctions… the humble members of society — the farmers, mechanics, and laborers have a right to complain of the injustice of their Government." That is what the people of Maine have done. The Court should listen.