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ARTICLES

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European Court of Human Rights Climate Case Decisions within the Context of Global Juridical Precedents: An Academic Inquiry

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Global climate litigation is increasingly invoking human rights law to define states' obligations to protect citizens from the most severe effects of climate change. This paper argues that courts worldwide apply the precautionary principle, extraterritoriality, collective responsibility, and human rights protections in similar yet distinct ways. Greenhouse gas emission data, projected human costs, and scientific findings are being quantified to link climate science with legal remedies. This study examines the evolution of climate-related human rights rulings, highlighting areas of convergence and divergence across jurisdictions. Specifically, it focuses on the recently decided *KlimaSeniorinnen Schweiz and Others v. Switzerland* and *Duarte Agostinho v. Portugal* before the European Court of Human Rights (ECtHR), analyzing their invoked rights under the European Convention on Human Rights (ECHR) and their broader implications in Latin America, the Caribbean, Asia, and other European jurisdictions.

To structure this analysis, the paper first examines how courts worldwide frame climate-related human rights claims, distinguishing between individualist and collectivist legal interpretations. It then explores the ECtHR's reliance on Article VIII (right to private and family life) over Article II (right to life) and the implications of this shift. Finally, it contrasts European jurisprudence with climate litigation in the Global South, highlighting differences in extraterritoriality, intergenerational responsibility, and the precautionary principle.

I. Global Juridical Background

In the legal context, decisions have traditionally been framed in terms of states' stewardship obligations. Randall Abate stated that a paradigm of "command and control" existed to regulate environmental

resources and pollution. [1] The framing of the regulatory paradigm focused on an anthropocentric view of a nation's perceived obligation. Thus, the legal justification for environmental law began to address the protection of resources, not the health-related impacts of climate on people. The lack of people-centric language created a legal gap in which scholars began deliberating whether existing judicial rulings encompassed the right to a healthy environment. Although the stewardship doctrine did not explicitly encompass the human-based impact of environmental regulatory decisions, Abate argues that the doctrine can also encompass the rights of the people to the enjoyment of said protected resources. [2]

However, to ensure the adequate protection of human rights, Ademola Jegede argues that protecting the right to a safe climate should be considered a new human right. [3] He states that conceptualizing the human right to a stable environment encompasses the idea that "the effects of climate change negatively affect human dignity; climate impacts are universal; notwithstanding its connection with several other human rights, the right to a safe climate does not replicate an existing right; there is strong judicialization of climate issues in several countries; and the right to a safe climate is sufficiently precise to identify specific rights and duties." [4] From this moment, mention of "right to stable climate," "right to healthy environment," or other variations of this right will encompass the same notion of right to protection of climate change effects.

Understanding a safe climate as a fundamental right also aligns with 150 countries around the world, including the "United Nations Human Rights Council's 48/13 resolution as well as the General Assembly's July 28, 2022 vote, [which] recognize the human right to a

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[1] Randall S. Abate, *Atmospheric Trust Litigation: Foundation for a Constitutional Right to a Stable Climate System?,* 10 GEO. WASH. J. ENERGY & ENVTL. L. 33 (2019).
[2] *Id.*
[3] Joana Setzer & Delton Carvalho, *Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional to a Stable Climate*, 30 REVIEW OF EUROPEAN, COMPARATIVE & INTERNATIONAL ENVIRONMENTAL LAW 197 (2021).
[4] *Id.* at 203.

clean, healthy and sustainable environment at the international level." [5] The international recognition of the threats that climate change poses to existing human rights and the previously mentioned global judicialization of the right to a safe climate show increasing attention afforded to the matter.

There has been substantial documentation on the increased success in cases where rights are defined as the crux of the challenge. As Ray and Cooper state in *The Bioethics of Environmental Injustice: Ethical, Legal, and Clinical Implications of Unhealthy Environments*, "Quantitatively, researchers have demonstrated that the success rate of rights-based environmental litigation increases whenever the right to a healthy environment is specifically invoked." [6] The first case argued based on the climate impacting human rights can be found in *Inuit Circumpolar Conference vs. Bush Administration*. In this case, a petition was submitted by the International Criminal Court to the Inter-American Commission on Human Rights (IACHR) in 2005 to judge whether the human rights of the Inuit had been violated based on government action and inaction. [7] The Inuit Conference argued that the Bush Administration had violated their human rights, citing the 1948 American Declaration on the Rights and Duties of Man, by failing to account for the impacts of global warming on their way of life and existence. [8] The specific human rights violated were argued under the Organization of American States (OAS), including: "the right to life (Article I); the rights to residence and movement (Article VIII); the right to the inviolability of the home (Article IX); the right to the preservation of health and well-being (Article XI); the right to benefits of culture (Article XIII); and the right to work (Article XIV)." [9] Ultimately, the IACHR ruled in favor of the Inuit, stating that their

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[5] Keisha Ray & Jane Fallis Cooper, *The Bioethics of Environmental Injustice: Ethical, Legal, and Clinical Implications of Unhealthy Environments*, 24 AM J BIOETH 9, 1 (2024).
[6] *Id.*
[7] Juliette Niehuss, *Inuit Circumpolar Conference v. Bush Administration: Why the Arctic Peoples Claim the United States' Role in Climate Change Has Violated Their Fundamental Human Rights and Threatens Their Very Existence*, 5 SUSTAINABLE DEVELOPMENT LAW & POLICY 66, 1 (2005).
[8] *Id.*
[9] *Id.* at 2.

rights were violated by the government of the United States, but lacked proper enforcement capabilities for effectual remediation. [10] Since then, climate rights challenges have increasingly emerged in the global context, particularly in nations classified as the Global South. [11]

This analysis focuses on key cases from this region, including *Salamanca Mancera v. Presidencia de la República de Colombia*, *Lhaka Honhat Association v. Argentina*, *Ashgar Leghari v. Federation of Pakistan et al.*, and *Federal Environmental Agency – IBAMA v. Siderúrgica São Luiz Ltd. and Martins* (*IEA v. Brazil*). These cases illustrate a growing recognition of the intrinsic connection between previously established rights and the broader right to a safe climate. In the case of *Salamanca Mancera v Presidencia de la República de Colombia*, the Court agreed with the applicants in their assertion that the judiciary should protect the rights guaranteed under the Constitution and that "fundamental rights, such as the right to life, health, freedom, and dignity, are entirely dependent on a healthy ecosystem." [12] Likewise, in the context of *Ashgar Leghari v Federation of Pakistan et al.*, the Court recognized "the right to a healthy environment as implicit in the right to life, which is enshrined in the Constitution of Pakistan." [13] Furthermore, the *Lhaka Honhat Association v Argentina* case was brought before the Inter-American Court of Human Rights. The Court utilized the American Convention on Human Rights, specifically Article 26, which focuses on guaranteeing progressive development. [14] The Court then "ordered specific restitution measures, including actions to provide access to adequate food and water, the recovery of forest resources and

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[10] M. Meguro, *Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN JOURNAL OF INTERNATIONAL LAW 933, 939 (2020).
[11] Pau de Vilchez Moragues & Annalisa Savaresi, *The Right to a Healthy Environment and Climate Litigation: A Game-Changer?*, YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 7 (2022).
[12] *Id.* at 10.
[13] *Id.* at 13.
[14] Maria Antonia Tigre, *The Right to a Healthy Environment in Latin America and the Caribbean: Compliance through the Inter-American System and the Escazú Agreement*, INTERNATIONAL COURTS VERSUS NON-COMPLIANCE MECHANISMS: COMPARATIVE ADVANTAGES IN STRENGTHENING TREATY IMPLEMENTATION 262, 264 (2022).

Indigenous culture." [15]

Regarding specific restitution measures, *IEA v Brazil* was similar but also novel in that the Court analyzed the specificity of the government of Brazil's requirements related to specific environmental data, the government's failure to regulate properly, and its impact on fundamental rights. In this case, the Court agreed with the Prosecutor in arguing that the government was not on track to fulfill climate goals that were established in the "national climate law and the Brazilian Nationally Determined Contribution (NDC), including its commitment to reduce the annual rate of deforestation by 80 percent." [16] By grounding the legal argument on protecting human rights in the domestic legal context, the applicants avoided questions related to the legally binding nature of the Paris Climate Agreement or other agreements in a domestic setting. [17] In the cases examined above, the claimants have tended to make their arguments on a constitutional basis.

As Setzer and Winter de Carvalho have argued, grounding environmental human rights arguments in the constitution of a given locality, there are several advantages associated with the recent shift from individualistic interpretations of national Constitutions in the Pakistani, Latin American, and Caribbean context (LAC) to be more related to collectivist attitudes. The respective legal system of each nation has adopted a more collectivist approach to human rights than an individualistic approach, like those more common in Europe. [18] To contextualize the existing case law in Europe, for the sake of the European Court of Human Rights (ECtHR), the present analysis will also draw on the decisions in *Urgenda Foundation v the Netherlands* and *Cordella and Others v Italy* as potential explanatory factors for the ultimate decisions in the ECtHR cases.

In *Urgenda v Netherlands*, the plaintiffs asserted that the government had an obligation to "keep the country habitable and

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[15] *Id.*
[16] Joana Setzer & Delton Carvalho, *Climate Litigation to Protect the Brazilian Amazon: Establishing a Constitutional to a Stable Climate*, 30 REVIEW OF EUROPEAN, COMPARATIVE & INTERNATIONAL ENVIRONMENTAL LAW 200 (2021).
[17] *Id.* at 204.
[18] *Id.*

protect the planet" while invoking Article 21 of the Dutch Constitution. [19] The Netherlands Supreme Court upheld the argument relating to the violation of Article 21 of the Dutch Constitution, but also found that because the State had failed to pursue more aggressive Greenhouse Gas emission (GHG) reductions, it had violated the ECHR. [20] Specifically, the Court "reached this conclusion by characterizing climate change as a threat to the right to life (Article II) and the right to health and respect for private and family life (Article 8), building upon the case law of the ECtHR to the extent that it is characterized as a national problem." [21]

To quantify the future-oriented impact that the climate crisis will have on the citizens of the Netherlands, the Court utilized the scientific-political consensus of a 25-40 percent reduction in GHG emissions as necessary to protect the interests of individuals and, thus, the rights outlined within the ECHR. [22] Although potentially not intentional, Varvastian argues that the Court had a significant impact on human rights litigation by "redesigning the architecture of obligations set by the United Nations Framework Convention on Climate Change (UNFCCC) negotiation by transposing environmental claims into human rights claims to vindicate normative commitments on climate change." [23] In effect, protecting human rights under the ECHR relies on a government's actionable measures connected to reducing GHGs. [24]

Cordella and Others v Italy similarly concerned pollution and its impact on the community. In this case, the *Cordella* party alleged that the State of Italy had violated their rights under the ECHR because

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[19] Samvel Varvastian, *The Human Right to a Clean and Healthy Environment in Climate Change Litigation*, MPIL 10 (2019).
[20] *Id.*
[21] M. Meguro, *Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN JOURNAL OF INTERNATIONAL LAW 933, 940 (2020).
[22] Samvel Varvastian, *The Human Right to a Clean and Healthy Environment in Climate Change Litigation*, MPIL 10 (2019).
[23] M. Meguro, *Litigating Climate Change through International Law: Obligations Strategy and Rights Strategy*, 33 LEIDEN JOURNAL OF INTERNATIONAL LAW 933, 941 (2020).
[24] Jacqueline Peel & Hari Osofsky, *A Rights Turn in Climate Change Litigation?*, 7 TRANSNATIONAL ENVIRONMENTAL LAW 1, 38 (2017).

of the existence of the Ilva plant, a pollution-inducing factory. The ECtHR ruled in favor of *Cordella*, stating that Italy had violated the party's rights under the ECHR, specifically Article VIII. [25] With this ruling, the Court affirmed the precautionary principle in determining a State's obligations to exercise due diligence when analyzing the impact of its regulations on the enjoyment of its citizens' rights. [26]

Cordella v. Italy differs significantly from *Smaltini v. Italy*, another case brought before the ECtHR concerning the same factory. The primary distinction is that *Cordella* relied more heavily on Article VIII than Article II. [27] This omission of Article II in both cases highlights the Court's reluctance to explicitly recognize the connection between the right to life (Article II) and the impacts of climate change. This shift in approach reflects the evolution of the Court's jurisprudence on environmental human rights.

II. History of Cases and Relation to ECHR and ECtHR

The cases in the European Court of Human Rights (ECtHR), *KlimaSeniorinnen Schweiz and Others v. Switzerland,* and *Duarte Agostinho v Portugal* connect topics addressed in other judicial contexts. The cases were brought before the ECtHR to address alleged violations of their human rights under the ECHR. Specifically, all three instances contained alleged violations of Articles II (the right to life) and VIII (the right to respect for private and family life).

With respect to Article II, it states: "Everyone's Right to life shall be protected by law. No one shall be deprived of his life intentionally save the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law." [28] As an interpretive lens, Article II applies a more stringent standard of

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[25] Corina Heri, *Article Navigation Journal Article Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, 33 EJIL 925, 938 (2022).
[26] *Id.*
[27] *Id.*
[28] European Court of Human Rights, *European Convention on Human Rights*, 7, https://www.echr.coe.int/documents/d/echr/convention_ENG (2025).

review when analyzing case facts. [29] In the Urgenda case, as mentioned previously, the Supreme Court of the Netherlands used Article II as an interpretive tool to analyze the potential impact on the state of human rights within the case. In essence, through the Dutch Court's findings, it can be argued that the lives of the people affected are thus protected under an overarching human rights claim against the most harmful effects of climate change.

Furthermore, under Article VIII, the right is defined as "Everyone has the right to respect for his private and family life, his home and his correspondence." [30] As opposed to Article II, Article VIII is defined as a broader, less critical approach to highlighting the ill effects of climate change. In *Cordella v Italy*, the primary reason why the plaintiffs brought the case under Article VIII, as Heri states, "Instead of aiming to hold the state responsible for harm by demonstrating a causal link to ill health effects, [utilizing Article II to frame the issue] the applicants denounced the absence of state measures to protect their health and the environment." [31] As this example shows, the precedent established under *Cordella* would later contribute to the reasoning of the decision in *KlimaSeniorinnen Schweiz and Others v. Switzerland.*

The present introduction of the facts of the *KlimaSeniorinnen Schweiz and Others v. Switzerland* case will be more encompassing than the descriptions that will later be found for *Duarte Agostinho v Portugal,* given that the *KlimaSeniorinnen* case was the only case deemed permissible by the ECtHR. *KlimaSeniorinnen Schweiz and Others v. Switzerland* concerned a group of applicants that alleged that the State of Switzerland's climate policy puts them at increased risk of significant health impacts and death resulting from "future heat waves caused or exacerbated by climate change." [32] The applicants stated that

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[29] Helen Keller & Corina Heri, *The Future Is Now: Climate Cases Before the ECtHR*, *in* REFLECTIONS ON THE FUTURE OF HUMAN RIGHTS 153, 170 (1 ed. 2023).
[30] European Court of Human Rights, *European Convention on Human Rights*, 11, https://www.echr.coe.int/documents/d/echr/convention_ENG (2025).
[31] Corina Heri, *Article Navigation Journal Article Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, 33 EJIL 925, 938 (2022).
[32] Helen Keller & Corina Heri, *The Future Is Now: Climate Cases Before the ECtHR*, *in* REFLECTIONS ON THE FUTURE OF HUMAN RIGHTS 153, 155 (1 ed. 2023).

"the federal authorities' failure to initiate a revision of the existing climate legislation, in particular the *Federal CO2 Act*, and their allegedly lenient implementation of the statutory provisions were tantamount to a violation of the positive obligations stemming from the right to life and the right to respect for private and family life enshrined in the European Convention on Human Rights (ECHR)." [33] By connecting the state's obligations under the *Federal CO2 Act*, reminiscent of the *Urgenda v Netherlands* and *IEA v Brazil* cases in which the plaintiffs mentioned required regulatory parameters, the applicants charged that their human rights were violated under Articles II, the right to life, and VIII, the right to respect for private and family life, as defined under the ECHR. It should be noted that the individuals in *KlimaSeniorinnen* had exhausted all domestic remedies before bringing their case before the European Court of Human Rights; it was the first climate case of its kind before the Court. However, it is vital to cite the *Cordella v Italy* case, as the admissibility of *KlimaSeniorinnen* could hinge on the precautionary principle established in *Cordella*. The reason is that the case applicants had not yet experienced the perceived rights-infringing effects of climate change. For this reason, the Federal Supreme Court of Switzerland argued that "the 'group of women older than 75 years' failed to be 'particularly affected by the impacts of climate change' and would thus not be affected 'in a specific and distinct manner.'" [34] For the case to be admissible, the Federal Supreme Court of Switzerland argued, there must have been a previously demonstrated, measurable impact on the affected parties.

Reich, Flora, and Boss have stated in *Climate Change Litigation Before the European Court of Human Rights: How Senior Women from Switzerland Might Advance Human Rights Law* that "such reasoning points to a major challenge that mitigation-related climate change litigation against governments faces. The judicial process is typically designed to provide relief exclusively to those

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[33] Johannes Reich, Flora Hausammann & Nina Boss, *Climate Change Litigation Before the European Court of Human Rights: How Senior Women from Switzerland Might Advance Human Rights Law*, VERFASSUNGSBLOG: ON MATTERS CONSTITUTIONAL 2 (2022).
[34] *Id.*

individuals who have suffered specific, measurable, and unlawful harm at the hands of the party bearing legal responsibility for the infringement." [35] As the analysis will later show, this judgment relies on an individualistic doctrine to question a State's legal responsibility to protect rights, as opposed to the collectivist doctrine used in the Latin American and Caribbean (LAC) cases presented previously. In the LAC context, the Courts, as in the *IEA v Brazil*, acknowledge that the state has an all-encompassing precautionary obligation to protect the interests of future generations. This idea is reflected in the advisory opinion issued by the Inter-American Court of Human Rights (IACtHR) on November 15, 2017, which states that "the right to a healthy environment is an autonomous right, that has collective scope as a universal norm owed to present and future generations, and at the same time has individual application in itself and in relation to other substantive rights, such as the right to health, life, or personal integrity." [36]

Before the *KlimaSeniorinnen* decision was handed down, the question for scholars then became whether judicial systems in the European context were designed to process cases in which the affected parties were not yet documented victims of a climate catastrophe. As studies from the World Economic Forum have shown, there will be an estimated 14.5 million climate change-related deaths by 2050 as the world crosses crucial climate tipping points, quantified by the threshold of 2.5° to 2.9° Celsius above pre-industrial levels. [37] The increase in deaths will be attributed to the amounts of greenhouse gas emissions (GHG) emitted in the current period by current entities. It should be argued that judgments that argue against the application of a precautionary principle in judicial decisions effectively place the burden of evaluating victim status on future judicial entities, when the environmental damage will already be done. Furthermore, it may be argued that the parties engaging in the majority of the rights infringement actions will not be prosecutable when the full extent of the victimization from climate change is measurable. Waiting to

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[35] *Id.* at 3.
[36] Environmental Law: Is an Obligation Erga Omnes Emerging?, *IUCN* (2018).
[37] René M. Van Westen, Michael Kliphuis & Henk A. Dijkstra, *Physics-Based Early Warning Signal Shows That AMOC Is on Tipping Course*, 10 SCI. ADV. (2024).

visualize the full scale of the climate catastrophe for all people within the context of Europe is reprehensible. Thus, the precautionary principle identified in *Cordella v Italy* is the most apt response within *KlimaSeniorinnen Schweiz and Others v Switzerland*.

In *Duarte Agostinho v Portugal*, the applicants, notably Portuguese children, brought claims against the State of Portugal and 33 other high-emitting member states for their role in causing past, present, and future climate harms that impact their rights under the ECHR. [38] Specifically, such as in *KlimaSeniorinnen*, the applicants also charged that the States were violating Articles II and VIII.

The primary difference between *KlimaSeniorinnen Schweiz and Others v Switzerland* and *Duarte Agostinho v Portugal* lies in the recourse to other provisions of the ECHR. In *KlimaSeniorinnen Schweiz and Others v Switzerland* and *Duarte Agostinho v Portugal*, the applicants alleged violations of Articles VI and XIII. Article VI, as defined by the ECHR, encompasses the right to a fair trial; Article XIII, the right to an effective remedy. Given the succinct nature of the ruling to be discussed, the ECtHR did not rule on Articles VI and XIII.

Furthermore, in *Duarte Agostinho v Portugal*, applicants alleged that their rights under Article XIV had also been violated. Per the ECHR, Article XIV guarantees the prohibition of discrimination. The petitioners argued that their rights in adulthood were being preemptively violated by the States' roles in exacerbating the damaging effects of climate change. The ECtHR also did not rule on this matter, given that the inadmissibility of extraterritoriality superseded the consideration of the matter.

III. Decisions in Cases and Implications Discussion

As stated, *Duarte Agostinho v Portugal* was deemed inadmissible because the ECtHR did not have adequate jurisdictional powers to determine extraterritoriality. Additionally, the Court found the case inadmissible because the applicants did not exhaust all

[38] Helen Keller & Corina Heri, *The Future Is Now: Climate Cases Before the ECtHR*, *in* REFLECTIONS ON THE FUTURE OF HUMAN RIGHTS 153, 157 (1 ed. 2023).

domestic remedies before bringing it to the ECtHR. The case was unique in its approach to climate litigation through an extraterritorial lens, while also invoking the precautionary principle highlighted in *Cordella* and *KlimaSeniorinnen*. Keller and Heri stated, "While the Court has considered over 300 environmental cases to date, it has never issued findings concerning transboundary environmental harms." [39] If the Court had ruled on this aspect of the case in particular, the decision would have addressed the very nature of the collective burden-sharing issue at the core of the general climate policy failure. The Court's decision in this manner would have intrinsically linked the implications of human rights to the principle of collective burden-sharing, as Courts have done in Latin American and Caribbean countries. *KlimaSeniorinnen Schweiz and Others v. Switzerland* was the only climate-related case deemed admissible by the ECtHR. Its admissibility rested on two key grounds: the exhaustion of all domestic remedies and the association's legal standing to represent individual interests. [40] The applicants in *KlimaSeniorinnen* had fully exhausted domestic legal remedies, as required under Article XIII of the ECHR, which guarantees the right to an effective remedy. Article XIII states: *"Everyone whose rights and freedoms as outlined in this Convention are violated shall have an effective remedy before a national authority, notwithstanding that the violation has been committed by persons acting in an official capacity.*" [41]

In a landmark ruling, the ECtHR found that Switzerland had violated the applicants' rights under Article VIII of the ECHR, which guarantees the right to respect for private and family life. [42] The Court specifically held that the Swiss government failed to uphold its "positive obligations" under the Convention.

However, the Court ruled that the four individual applicants did not meet the victim-status criteria under Article 34 and declared their complaints inadmissible. To bring a claim before the ECtHR, applicants must demonstrate that they are personally and directly

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[39] *Id.* at 159.
[40] European Court of Human Rights, *European Convention on Human Rights* 21 (2025).
[41] *Id* at 13.
[42] *Id* at 11.

affected by government action or inaction, as the Convention does not permit general public-interest complaints, or *actio popularis*. [43] In this case, the individual applicants failed to show a direct and specific impact from Switzerland's failure to adopt stronger climate policies. However, the case was deemed admissible because the association that was representing the individuals had proper jurisdiction where complaints arose, a demonstrable purpose to defend the collective rights of people within the area against the effects of climate change, and a genuine capacity to defend the human rights of the individuals under the convention. [44]

As the advisory opinion alluded to earlier, the Inter-American Court of Human Rights, in its November 2017 ruling, recognized the intergenerational rights issue posed by climate change. This was one of the primary reasons why the Court allowed the challenge presented by the associations: as climate change is an issue of common concern for humankind and there is a need to promote intergenerational burden-sharing, the Court found it was appropriate to allow recourse to legal action by associations. [45]

The precedent of a Court ruling on the climate change regulatory measures of a country relating to the respect and fulfillment of human rights, like in the *IEA v Brazil* and *Urgenda v Netherlands* cases, the ECtHR ruled that the climate change victim challenge "depends on two key criteria: (a) high intensity of exposure of the applicant to the adverse effects of climate change, and (b) a pressing need to ensure the applicant's protection." [46] When analyzing the scope of the impacts of climate change on the applicants, it considered the "probability of the adverse effects of climate change, the magnitude and duration of the harmful effects, and the scope of the risk." [47] As mentioned in the case law examples in the global judicial context, the Courts increasingly rely on scientific evidence of the effects and scope of climate change, i.e., GHG levels and populations

[43] Klass v. Germany, 2 Eur. H.R. Rep. 214 (1978).
[44] Verein KlimaSeniorinnen Schweiz v. Switzerland, Eur. Ct. H.R. (2024).
[45] *Legal Summary - Verein KlimaSeniorinnen Schweiz and Others v. Switzerland*, HUDOC - EUROPEAN COURT OF HUMAN RIGHTS 6 (2024).
[46] *Guide to the Case-Law of the European Court of Human Rights* 97 (2025).
[47] *Id.*

affected by climate change, to make determinations in human rights matters. The usage of data related to the pictured impacts of climate change and relating it to the enforcement of human rights, Pau de Vilchez and Annalisa Savaresi, argue that, although there is not an explicit environmental clause within the ECHR, the Court is engaging in a process of "greening" of the ECHR with the present cases. [48] Using future-oriented data helps current Courts picture future cases of climate change and their imagined impact on the communities presenting cases before them. Therefore, the Court uses the precautionary principle outlined above, even if not in an individualized manner.

As stated, the Court ruled that the Swiss government violated the petitioner's rights under Article VIII concerning private and family life. Although the ruling is monumental in using Article VIII to protect people from the ill effects of climate change, the level of scrutiny applied in the case is the problem. As mentioned above, when the Court utilizes Article VIII instead of Article II, there is a difference in the level of criticism of the defendant party that committed the transgression. As in *Cordella*, in which the applicants did not invoke Article II to establish a causal link between the government's actions and their ill health, they utilized Article VIII to criticize the government's regulatory inaction on climate change. [49] By establishing a causal link between government action and health effects, the Court in *KlimaSeniorinnen* may have found that the regulatory measures were only one aspect of the development of harmful health effects within an individual or group. If the Court is to have more closely fine-tuned levels of analysis for the direct impact of climate change, Article II must be invoked. [50]

IV. Conclusion

[48] Pau de Vilchez Moragues & Annalisa Savaresi, *The Right to a Healthy Environment and Climate Litigation: A Game-Changer?*, YEARBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 4 (2022).
[49] Corina Heri, *Article Navigation Journal Article Climate Change before the European Court of Human Rights: Capturing Risk, Ill-Treatment and Vulnerability*, 33 EJIL 925, 938 (2022).
[50] Helen Keller & Corina Heri, *The Future Is Now: Climate Cases Before the ECtHR*, *in* REFLECTIONS ON THE FUTURE OF HUMAN RIGHTS 153, 170 (1 ed. 2023).

The evolution of climate litigation reflects a shifting perception of states' obligations to protect their citizens from the adverse effects of climate change. A growing body of global jurisprudence highlights the interconnectedness of state-led mitigation efforts and the recognition of a human right to a stable environment. Across jurisdictions, claims increasingly invoke Article II (right to life) and Article VIII (right to private and family life) of the ECHR, underscoring the near-universal nature of these rights in climate cases. The European Court of Human Rights' recent rulings reinforce the transition from an environmental stewardship framework to a human rights-centered approach, signaling a broader legal shift that demands stronger state accountability in the face of climate change.

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Modern Trustbusting: How Visa and Google Faced Monopoly Scrutiny

Jacob Jahreis

This paper examines the resurgence of antitrust enforcement in the 21st century through detailed case studies of Visa and Google, two corporations whose market dominance has raised significant legal and economic concerns. By revisiting the history and development of U.S. antitrust laws since the early 20th century, the paper provides context for the recent government actions against these companies. It explores the monopolistic practices of Visa in the payment processing sector and Google in digital advertising and search, highlighting how these practices suppress competition and innovation. The Department of Justice's lawsuits and the ensuing court rulings are analyzed to demonstrate the application of the Sherman and Clayton Acts in modern contexts. The paper argues for the necessity of robust antitrust regulation to preserve fair competition, foster innovation, and protect consumer interests in a rapidly evolving digital economy. The discussion extends to the implications of concentrated power in the hands of a few, particularly in emerging technologies like artificial intelligence, emphasizing the need for decentralized control to prevent the risks of overreliance and censorship. Ultimately, the paper calls for continued vigilance and proactive regulatory measures to ensure a competitive marketplace that aligns with the foundational principles of capitalism.

I. Introduction: Antitrust Laws in a Capitalistic Economy

In a capitalistic economy, competition drives innovation, operational efficiency, and diverse consumer choices. At its heart, capitalism thrives on the entrepreneurial dream, offering businesses of all sizes the opportunity to succeed based on merit rather than on arbitrary advantages or exclusive privileges granted to a select few. However, monopolies threaten this ideal by concentrating market power, stifling innovation, and undermining the foundations of fair competition. A monopoly, defined as the exclusive control of a commodity or service in a particular market, inherently opposes the

principles of capitalism by eliminating competition and suppressing new market entrants. [1] This concentration of power constrains the freedom to create and innovate.

To safeguard competition, governments have long relied on antitrust laws to prevent monopolies from dominating markets unchecked. These laws aim to dismantle monopolistic structures, prohibit anti-competitive practices, and restore balance to the marketplace. [2] In this system, the government acts as a referee to ensure that businesses compete on a level playing field where merit, skill, and respect – not aggression and rule-breaking – determine success. Without robust enforcement, the game descends into chaos, where monopolies impose higher costs on consumers, block smaller competitors, and erode incentives for continuous improvement and innovation.

For too long, the referees have looked the other way as monopolistic businesses have expanded unchecked, placing undue burdens on consumers and small businesses alike. Recent government actions, however, mark a potential revival of trustbusting efforts, signaling a new chapter in antitrust enforcement. The cases against Visa, the dominant force in payment processing, and Google, the leader in search and digital advertising, exemplify this renewed commitment to preventing monopolistic dominance and reinvigorating modern trustbusting. These efforts represent a critical step toward restoring the core values of capitalism and revitalizing the entrepreneurial American spirit. By examining these cases, we can better understand the essential role of antitrust enforcement in preserving fair competition and fostering a marketplace where innovation thrives.

II. Background on U.S. Antitrust Laws

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[1] *Monopoly, n. Meanings, Etymology and More | Oxford English Dictionary*, https://www.oed.com/dictionary/monopoly_n (last visited Jan. 30, 2025).

[2] *Monopolization Defined*, FEDERAL TRADE COMMISSION (June 11, 2013), https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/monopolization-defined.

U.S. antitrust laws trace back to the early 20th century, a period shaped by the aggressive trustbusting efforts of Presidents Theodore Roosevelt and William Howard Taft. During the Progressive Reform Era (1900-1917), the term "trust-busting" emerged to describe the bold policies these leaders advanced to rein in corporate power. [3] Roosevelt, nicknamed the "Trustbuster," argued that unchecked monopolies threatened economic fairness and democratic governance, reflecting widespread public concern over the growing influence of large corporations. By the time he took office, monopolies had expanded rapidly and dominated the nation's key industries. Standard Oil, the era's most powerful oil company, used its immense wealth to secure favorable legislation and regulatory treatment, leaving smaller competitors at a severe disadvantage. This pattern was repeated across the economy: Standard Oil controlled roughly 90% of U.S. oil refining capacity; major railroads, such as Union Pacific and Pennsylvania Railroad, controlled about 75% of national transportation networks; and U.S. Steel commanded approximately 67% of the steel market. [4] Together, these concentrations illustrate the overwhelming market power that prompted the rise of federal trustbusting.

This dominance not only led to inflated prices and restricted market access for competitors, but also enabled these monopolies to exploit workers, suppressing wages in the absence of meaningful competition. Consumers suffered as well, facing artificially high prices and few, if any, alternative options as monopolies drove smaller businesses out of the market and reduced overall diversity in available goods and services. The combined effect was an economy increasingly tilted toward the largest corporations, where innovation slowed, opportunity narrowed, and the basic principles of fair competition were eroded. [5]

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[3] John Milton Cooper, *Theodore Roosevelt*, BRITANNICA (Oct. 27, 2025), https://www.britannica.com/biography/Theodore-Roosevelt/The-Square-Deal#ref673090.

[4] KENNETH WARREN, BIG STEEL: THE FIRST CENTURY OF THE UNITED STATES STEEL CORPORATION 1901-2001 45 (2008).

[5] *Broken Trust*, NATIONAL ARCHIVES FOUNDATION, https://archivesfoundation.org/newsletter/broken-trust/ (last visited Jan. 30, 2025).

The Supreme Court of the United States (SCOTUS) decision in *Standard Oil Co. of New Jersey v. United States* became a landmark victory in the fight against monopolistic practices. [6] The Court held that Standard Oil had violated the Sherman Antitrust Act of 1890 by engaging in unreasonable restraints of trade, applying the "rule of reason doctrine," which distinguished between lawful and unlawful monopolies based on whether their conduct suppressed competition. [7] As part of its judgment, the Court ordered the dissolution of Standard Oil into 34 independent companies, including what would later become ExxonMobil, Chevron, and Amoco, to eliminate its monopolistic structure. [8] This mandated breakup significantly reduced Standard Oil's dominance and laid the foundation for greater competition within the oil industry. The ruling set a lasting precedent for antitrust enforcement, affirming that concentrated power could be checked through federal action.

By 1917, after several years of trustbusting efforts, the oil sector had become less concentrated, fostering innovation and accessibility. Similarly, the steel and railroad industries saw significant surges in competition due to antitrust enforcement. The dominance of U.S. Steel, which once controlled nearly 67% of the steel market, began to erode under regulatory scrutiny, although the company was not formally broken up. Increased competition in the steel sector ultimately led to more efficient production methods and lower prices for manufacturers. In the railroad industry, reforms targeted monopolistic practices such as rate discrimination and exclusive contracts, forcing major players like Union Pacific and Pennsylvania Railroad to compete more fairly. This resulted in improved access for smaller shipping businesses and lower transportation costs, which had previously burdened both consumers and small enterprises.

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[6] *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911)

[7] Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7 (2025)

[8] Mike Saelee, *Research Guides: Standard Oil's Monopoly: Topics in Chronicling America: Introduction*, https://guides.loc.gov/chronicling-america-standard-oil-monopoly/introduction (last visited Jan. 30, 2025).

Trustbusting policies not only lowered prices but also fostered innovation and empowered small businesses. [9] During World War I, these policies played a pivotal role in bolstering U.S. manufacturing by decentralizing production and making the industrial sector more adaptable to the high manufacturing demands of wartime. [10] By breaking up monopolies, production capabilities were distributed across a broader array of companies, creating a more resilient supply chain. [11] This silenced many critics who had argued that dismantling monopolistic corporations would disrupt economies of scale, potentially reducing efficiency and innovation during a time when industrial capacity was critical.

Central to the efforts of trustbusting was the Sherman Antitrust Act of 1890, the first federal statute designed to combat anti-competitive practices. It prohibited behaviors such as price-fixing, cartels, and restraint of trade – activities that respectively set prices artificially high, limit supply, and suppress competition. By establishing a legal framework to curb monopolistic practices, the Sherman Act laid the foundation for modern antitrust enforcement. One of its most notable applications was in the Standard Oil case, where the Act empowered the government to dismantle a monopoly that had grown excessively large and oppressive. However, the broad language of the Sherman Act left significant room for interpretation, leading to inconsistencies in its application that necessitated additional legislation to address more specific anti-competitive practices.

In an effort to close these gaps, Congress enacted the Clayton Act of 1914, a more targeted law designed to prevent monopolies before they fully formed. [12] The Clayton Act outlawed price discrimination (charging different prices to different buyers without justification), exclusive dealing agreements (contracts requiring buyers to purchase only from the monopolist), and mergers that would "substantially lessen competition." One example of the Clayton Act in

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[9] U.S. Bureau of Corporations, *Report of the Commissioner of Corporations on the Petroleum Industry* (1907–1911).

[10] DANIEL YERGIN, THE PRIZE: THE EPIC QUEST FOR OIL, MONEY & POWER (1991).

[11] ALFRED D. CHANDLER, JR., THE VISIBLE HAND: THE MANAGERIAL REVOLUTION IN AMERICAN BUSINESS (1997).

[12] Clayton Act, 15 U.S.C. §§ 12–27, 29 U.S.C. §§ 52–53 (2025).

action was the 2016 case in which Staples' merger with Office Depot was blocked because it would have reduced competition in the office supply market. [13] This forward-looking approach remains a cornerstone of antitrust enforcement. While the Sherman Act addresses monopolies already in existence, the Clayton Act seeks to prevent them from forming in the first place.

The Federal Trade Commission (FTC), established by the Federal Trade Commission Act of 1914, plays a central role in enforcing antitrust laws and safeguarding consumers from deceptive practices. [14] Its primary functions include investigating unfair trade practices, reviewing proposed mergers for potential anti-competitive risks, and litigating cases to uphold market fairness. The FTC plays a critical role in regulating rapidly evolving industries, particularly within the technology sector, where the balance between innovation and consumer protection is continually tested. These same concerns appear in modern digital markets, including the payment and advertising ecosystems examined in this paper.

Throughout the 20th century, trustbusting efforts evolved alongside economic and technological advancements. Landmark cases like the 1982 antitrust settlement in *United States v. American Telephone & Telegraph Co.* led to the breakup of AT&T's monopoly over the telecommunications industry. [15] AT&T had maintained near-total control of long-distance phone services, stifling competition and innovation within the industry. [16] The settlement, a consent decree, required AT&T to divest its local telephone service operations, leading to the creation of seven regional companies known as the "Baby Bells." [17] The restructuring, which took effect in 1984, introduced

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[13] *Staples/Office Depot, In the Matter Of*, FEDERAL TRADE COMMISSION (Dec. 7, 2015), https://www.ftc.gov/legal-library/browse/cases-proceedings/151-0065-staplesoffice-depot-matter.

[14] Federal Trade Commission Act, 15 U.S.C. §§ 41–58 (2025).

[15] United States v. American Tel. & Tel. Co., 552 F. Supp. 131 (D.D.C. 1982).

[16] *Antitrust Division | The AT&T Divestiture: Was It Necessary? Was It a Success?*, (June 25, 2015), https://www.justice.gov/archives/atr/att-divestiture-was-it-necessary-was-it-success.

[17] Adrian Gianforti, *AT&T Monopoly History - Breakup/Divestiture of the Bell System*, HISTORY FACTORY (Jan. 24, 2022), https://www.historyfactory.com/insights/this-month-in-business-history-bell-system/.

greater competition in the telecommunications industry and spurred innovation in phone services and infrastructure.

While the breakup of AT&T was widely hailed as a victory for fair competition, concerns over potential disruptions to service reliability were raised. These fears largely proved unfounded, however, as the newly formed Baby Bells successfully maintained infrastructure and service levels. In fact, increased competition in the years following the breakup spurred technological advancements, lowered costs, and improved service offerings for consumers. [18] The AT&T case remains a benchmark for large-scale antitrust enforcement, serving as an example of how dismantling monopolies can reinvigorate competition and drive innovation without sacrificing service quality.

III. Case Study #1: Visa

If you own a debit card, there's a high chance it's a Visa card. In 2023, Visa's debit cards accounted for approximately $3.19 trillion in purchase volume in the United States, representing 74% of the market. [19] Visa serves as an intermediary between merchants and banks, facilitating electronic payments by securely processing transactions and transferring funds. For example, when you swipe your Visa card at your local coffee shop, Visa handles the technical infrastructure that ensures your payment reaches the shop's bank account. In return, the coffee shop pays a small transaction fee to Visa for using its network, which may include a percentage of the sale plus a flat rate. This arrangement ensures a seamless payment experience for consumers and merchants alike. However, Visa's overwhelming market share raises concerns about potential antitrust violations, particularly with whether the company's dominance stifles competition and innovation in the payment processing ecosystem.

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[18] ROBERT W. CRANDALL, AFTER THE BREAKUP: U.S. TELECOMMUNICATIONS IN A MORE COMPETITIVE ERA (1991).

[19] Jack Caporal, *Credit and Debit Card Market Share by Network and Issuer | The Motley Fool*, (Oct. 12, 2020), https://www.fool.com/money/research/credit-debit-card-market-share-network-issuer/.

In September 2024, the U.S. Department of Justice (DOJ) filed a civil antitrust lawsuit against Visa, alleging that the company engages in monopolistic practices that stifle competition in the debit card market. [20] The DOJ contends that Visa employs exclusionary agreements – contractual terms that discourage merchants and financial institutions from using alternative payment networks. For instance, Visa allegedly offers financial incentives to merchants who commit to processing the majority of their debit transactions through Visa's network while imposing penalties on those who opt for competing networks.

Consider a small coffee shop that wishes to offer its customers multiple payment options, including networks that charge lower transaction fees than Visa. If Visa's agreements require the shop to process a significant portion of its transactions exclusively through Visa to receive favorable rates, the shop may find it financially unfeasible to use alternative networks. This limits the shop's ability to reduce costs and restricts consumer choice, thereby reinforcing Visa's dominant market position.

Visa's business practices have raised significant concerns regarding their impact on small businesses and financial technology (fintech) companies. Fintech firms, which depend on access to payment networks to offer innovative services, often find themselves at a disadvantage when Visa enforces restrictive agreements or binds merchants to exclusive contracts, hindering the growth of emerging financial services.

Small businesses are particularly affected by Visa's dominance. They frequently encounter higher transaction fees and have fewer processing options, which can erode their profitability. In contrast, large retailers like Walmart possess the leverage to negotiate more favorable terms with Visa and secure lower transaction fees due to their substantial transaction volumes. [21] This disparity places small

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[20] *Office of Public Affairs | Justice Department Sues Visa for Monopolizing Debit Markets | United States Department of Justice*, (Sept. 24, 2024), https://www.justice.gov/archives/opa/pr/justice-department-sues-visa-monopolizing-debit-markets.

[21] *Department of Justice Sues Visa, Alleges the Card Issuer Monopolizes Debit Card Markets*, AP NEWS (Sept. 24, 2024), https://apnews.com/article/visa-antitrust-justice-department-debit-card-fees-d139de6d803e55a00ab4987ef867c3a4.

businesses at a competitive disadvantage, as they lack the bargaining power to obtain similar concessions.

In a Senate Judiciary Committee hearing on November 19, 2024, Senator Josh Hawley directly confronted Visa executives over business practices he described as disproportionately burdening small businesses. [22] Hawley highlighted the case of a small, family-owned restaurant in Missouri struggling to stay afloat under the weight of Visa's high transaction fees. Unlike large retailers such as Walmart, which can negotiate significantly lower fees thanks to their transaction volume, small businesses lack similar leverage. As a result, they are forced to pay fees that average 2-3% of each transaction, amounting to thousands of dollars annually. [23] For a small business operating on tight margins, these fees can mean the difference between surviving and shutting down.

Visa's practices are particularly troubling given the company's extraordinarily high profit margin, which consistently exceeds 50% and far outpaces the average for most financial institutions. [24] Hawley underscored this imbalance by noting that Missouri businesses collectively pay approximately $1.5 billion annually in transaction fees to Visa – a financial burden he deemed both unfair and avoidable. [25] "You are able to give the shaft to small businesses," Hawley stated, "because they don't have a choice, because you control so much of the market." His remarks highlighted the growing resentment among small businesses and lawmakers toward Visa's dominant market position and practices that exacerbate financial pressures on smaller enterprises.

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[22] *Breaking the Visa-Mastercard Duopoly: Bringing Competition and Lower Fees to the Credit Card System | United States Senate Committee on the Judiciary*, https://www.judiciary.senate.gov/committee-activity/hearings/breaking-the-visa-mastercard-duopoly-bringing-competition-and-lower-fees-to-the-credit-card-system.

[23] Jack Caporal, *Average Credit Card Processing Fees and Costs in 2025 | The Motley Fool*, (Sept. 13, 2019), https://www.fool.com/money/research/average-credit-card-processing-fees-costs-america/.

[24] *Visa (V) - Real-Time Price & Historical Performance*, https://ycharts.com/companies/V (last visited Jan. 30, 2025).

[25] Marshall Griffin, *Hawley Accuses Visa and Mastercard of Operating as a 'Monopoly,'* MISSOURINET (Nov. 20, 2024), https://www.missourinet.com/2024/11/20/hawley-accuses-visa-and-mastercard-of-operating-as-a-monopoly/.

Visa's monopoly also places a burden on consumers, who ultimately pay higher prices as businesses pass on these fees. Senator Dick Durbin has been a vocal critic of credit card swipe fees, arguing that Visa and Mastercard's control over 83% of the credit card market inflates costs for everyday goods. [26] To combat this, Durbin has proposed the Credit Card Competition Act, which would require large banks to support at least two unaffiliated networks for credit card transactions, introducing competition and potentially lowering fees. [27] Senator Roger Marshall, a co-sponsor of the bill, emphasized that such reforms are necessary to give small businesses and consumers relief from these hidden costs. [28]

This lawsuit from the DOJ isn't the first time the U.S. government has confronted Visa's market power. In 2020, the DOJ moved to block Visa's planned $5.3 billion acquisition of Plaid, a fintech company that connected consumer bank accounts with financial applications and was widely seen as an emerging competitive threat. [29] Regulators argued that the deal would allow Visa to eliminate a potential rival before it could meaningfully challenge the company's dominance in the payments market. Under mounting pressure, Visa abandoned the acquisition. The episode illustrated how even the threat of regulatory action can deter monopolistic expansion by signaling to

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[26] *Durbin Questions Visa Witness During Senate Judiciary Committee Hearing On Enhancing Competition In The Credit Card Market, Lowering Fee | U.S. Senator Dick Durbin of Illinois*, https://www.durbin.senate.gov/newsroom/press-releases/durbin-questions-visa-witness-during-senate-judiciary-committee-hearing-on-enhancing-competition-in-the-credit-card-market-lowering-fee (last visited Jan. 30, 2025).

[27] *Durbin, Marshall, Welch, Vance Introduce Bipartisan Credit Card Competition Act | U.S. Senator Dick Durbin of Illinois*, https://www.durbin.senate.gov/newsroom/press-releases/durbin-marshall-welch-vance-introduce-bipartisan-credit-card-competition-act (last visited Jan. 30, 2025).

[28] *Sen. Marshall Reintroduces Bipartisan Credit Card Swipe Fee Legislation, Standing With Main Street Over Wall Street*, SENATOR ROGER MARSHALL, https://www.marshall.senate.gov/newsroom/press-releases/sen-marshall-reintroduces-bipartisan-credit-card-swipe-fee-legislation-standing-with-main-street-over-wall-street/ (last visited Jan. 30, 2025).

[29] *Office of Public Affairs | Justice Department Sues to Block Visa's Proposed Acquisition of Plaid | United States Department of Justice*, (Nov. 5, 2020), https://www.justice.gov/archives/opa/pr/justice-department-sues-block-visas-proposed-acquisition-plaid.

dominant firms that attempts to absorb or neutralize future competitors may face meaningful scrutiny. [30]

Visa's practices, as outlined in the DOJ's September 2024 antitrust lawsuit, are alleged to violate provisions of the Sherman Antitrust Act and the Clayton Act. The complaint focuses on several specific tactics Visa uses to block competition: (1) requiring banks to sign network agreements that make Visa the default and often exclusive routing option for debit transactions; (2) offering large financial incentives to merchants and payment processors on the condition that they route nearly all debit transactions over Visa's network; and (3) imposing penalties or withholding rebates when merchants attempt to use cheaper rival networks. According to the DOJ, these arrangements effectively prevent competing networks from gaining scale, allowing Visa to preserve its dominant share of the debit market and continue charging higher fees that ultimately harm both merchants and consumers.

The most likely outcome of the DOJ's lawsuit involves behavioral and structural remedies, the two standard categories of antitrust relief historically used in cases involving dominant network firms. Behavior remedies – such as banning exclusionary agreements or requiring nondiscriminatory access to Visa's network – align with past antitrust actions in the payments sector. For example, in *United States v. Visa Inc.* courts prohibited Visa from restricting banks from issuing cards on competing networks, a remedy designed to open the market to rivals without restructuring the company. [31]

These remedies illustrate how courts traditionally address dominant platform firms and frame possible outcomes in the present Visa litigation. Structural remedies, though less common, are used when a firm's dominance stems from its integrated market position rather than individual business practices. The most prominent examples include the breakup of Standard Oil in 1911 and the dissolution of AT&T's monopoly in 1984, both of which were ordered

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[30] *Office of Public Affairs | Visa and Plaid Abandon Merger After Antitrust Division's Suit to Block | United States Department of Justice*, (Jan. 12, 2021), https://www.justice.gov/archives/opa/pr/visa-and-plaid-abandon-merger-after-antitrust-division-s-suit-block.

[31] U.S. v. VISA USA, Inc., 344 F.3d 229 (2003).

to reduce concentrated control and promote long-term competition. These precedents illustrate the range of remedies typically considered when regulators confront entrenched market power in network-based industries like payments.

Understanding these historical approaches helps contextualize the DOJ's action against Visa. Whether through a judicial remedy modeled on earlier antitrust cases or through legislative reforms such as the Credit Card Competition Act, efforts to curb Visa's exclusionary practices reflect a broader push to restore competition in the financial services market and reduce the structural advantages held by dominant incumbents.

IV. Case Study #2: Google

Google's dominance in search and digital advertising has placed it at the forefront of antitrust scrutiny. As of 2025, Google controls almost 90% of the global search engine market, making it the primary gateway to online information for billions of users. [32] Google's products are highly desired due to their efficiency, accuracy, and seamless integration across various services. Its search engine's proprietary algorithms deliver highly relevant results tailored to user intent, while platforms like YouTube and Google Ads empower businesses to target specific audiences with unparalleled precision, leveraging Google's vast troves of user data. This data-driven approach, coupled with its ability to monetize digital interactions at scale, has made Google an indispensable tool for advertisers and a dominant force in the tech industry.

In the digital advertising sector, Google commands approximately 38% of global digital ad revenue, placing it as a leading player in the multibillion-dollar advertising ecosystem. [33] Platforms like Search Ads and YouTube capitalize on Google's unmatched data collection capabilities and sophisticated targeting algorithms, offering

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[32] Danny Goodwin, *Google's Search Market Share Drops below 90% for First Time since 2015*, SEARCH ENGINE LAND (Jan. 13, 2025), https://searchengineland.com/google-search-market-share-drops-2024-450497.

[33] *Google Global Ad Revenues 2027*, STATISTA, https://www.statista.com/statistics/539447/google-global-net-advertising-revenues/ (last visited Jan. 30, 2025).

advertisers a level of reach and efficiency that competitors struggle to replicate. By analyzing user behavior across its expansive ecosystem of interconnected services, Google provides highly targeted advertising opportunities. These factors collectively reinforce Google's market position, raising concerns about its suppression of competition and its potential to stifle innovation across the digital economy.

Legal challenges against Google have mounted over the years, beginning with the U.S. Department of Justice's 2020 lawsuit, which accused the company of maintaining monopolies in search and search advertising. [34] The DOJ alleged that Google engaged in anti-competitive practices, including signing exclusionary agreements with device manufacturers that required Google's search engine to be set as the default option on smartphones and web browsers. Simply put, this meant that when users bought a new phone or opened a browser like Chrome, Google Search was automatically preselected, making it difficult for competitors to gain visibility or market share. This strategy, the DOJ contended, locked competitors out of key access points to the internet, effectively cementing Google's dominance in search.

A second lawsuit, filed in 2023, focused on Google's dominance in digital advertising technologies. [35] The government argued that Google unfairly leveraged its control over critical tools, including Google Ad Manager, a platform that facilitates the buying and selling of digital ad space, and AdX, a marketplace where publishers auction their ad slots to advertisers. Together, these tools dominate the digital advertising ecosystem, giving Google a commanding position on both the supply and demand sides of the market. According to the DOJ, Google manipulated these platforms by using its privileged access to data and market insights to favor its own

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[34] *Office of Public Affairs | Justice Department Sues Monopolist Google For Violating Antitrust Laws | United States Department of Justice*, (Oct. 20, 2020), https://www.justice.gov/archives/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.

[35] *Office of Public Affairs | Justice Department Sues Google for Monopolizing Digital Advertising Technologies | United States Department of Justice*, (Jan. 24, 2023), https://www.justice.gov/archives/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies.

services. For instance, AdX was structured in ways that routinely gave Google's own exchange priority over rival bidding systems. Furthermore, Google allegedly bundled its advertising services, requiring publishers to use Google Ad Manager in order to access AdX. This created a closed-loop system where competitors were excluded from key parts of the market, forcing publishers and advertisers to rely on Google's ecosystem for transactions. This behavior limited revenue opportunities for publishers, who were forced to accept unfavorable terms and lower payouts, while increasing costs for advertisers, who had fewer competitive options. By controlling both the supply of ad space and the demand from advertisers, Google's dual role allowed it to stifle competition, solidify its market dominance, and disadvantage smaller rivals. These practices raised significant concerns about Google's ability to suppress innovation and maintain an unchallengeable grip on the digital advertising market.

The rulings in these cases have led to significant developments in antitrust enforcement against Google. In August 2024, U.S. District Judge Amit Mehta ruled that Google violated the Sherman Antitrust Act, which prohibits monopolistic behaviors and the restraint of trade, and the Clayton Act, which targets anti-competitive practices such as exclusive agreements that substantially lessen competition. [36] Judge Mehta found that Google's use of exclusionary agreements, such as requiring manufacturers and browsers to set Google Search as the default option, unfairly suppressed competition and entrenched its dominance in online search and search advertising.

Following this ruling, the DOJ proposed a significant remedy: requiring Google to divest its Chrome browser. [37] Simply put, this means Google would be forced to sell Chrome to another company. The DOJ argued that Chrome, when integrated with Google Search, creates a closed ecosystem that reinforces Google's control over the search market. Since Chrome is one of the most widely used web

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[36] United States v. Google LLC, 747 F. Supp. 3d 1 (D.D.C. 2024).

[37] *US Regulators Seek to Break up Google, Forcing Chrome Sale as Part of Monopoly Punishment*, AP NEWS (Nov. 21, 2024), https://apnews.com/article/google-search-monopoly-penalty-justice-department-84e07fec51c5c59751d846118cb900a7.

browsers, with more than 68% market share, divesting it would open the door for other search engines, like Bing or DuckDuckGo, to compete for users by offering their services as default options on Chrome. [38]

Whether Google will actually lose Chrome is still unclear. The DOJ's proposal will likely face legal challenges from Google, which is expected to argue that divesting Chrome would disrupt user experience and weaken its ability to innovate. If the courts ultimately side with the DOJ, Google may be required to sell Chrome or significantly restructure how it operates the browser, such as ensuring other search engines have equal access to integrate as defaults. The final decision will depend on ongoing negotiations and additional rulings in the case. In addition to the Chrome proposal, discussions have emerged about potentially requiring Google to divest its Android operating system, another cornerstone of its market dominance. A significant issue raised by regulators is Google's practice of compelling device manufacturers to pre-install Google apps and services, such as YouTube, Google Chrome, Google Maps, and Google Search, on Android devices. When consumers purchase an Android smartphone, these Google apps are pre-installed and prominently positioned, often as the default options; this creates a barrier to competition. By pre-loading its apps, Google effectively limits consumer exposure to rival services and reinforces its ecosystem's dominance. For example, if a user wants to explore alternatives like Firefox for browsing or Bing for search, they must go through the additional steps of downloading and setting up these apps, while Google's offerings remain seamlessly integrated from the start. This default placement gives Google an overwhelming advantage, as many users stick with the pre-installed options out of convenience or familiarity.

The DOJ and other regulators argue that this practice stifles innovation by discouraging competitors from investing in new technologies, knowing they will struggle to compete with Google's entrenched position on Android devices. It also limits consumer choice by prioritizing Google's ecosystem over potentially better or more

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[38] *Browser Market Share Worldwide*, STATCOUNTER GLOBAL STATS, https://gs.statcounter.com/browser-market-share (last visited Jan. 30, 2025).

diverse alternatives. These concerns have led to proposals that Google be required to cease its pre-installation agreements or divest Android entirely, which would allow manufacturers greater freedom to include competing apps and services on their devices.

The implications of these legal actions are profound for the technology industry and innovation. If Google is forced to divest key assets such as Chrome or Android, it could drastically reshape the competitive dynamics of the digital marketplace. Increased competition would likely drive innovation as companies strive to differentiate their offerings and attract users, leading to the emergence of alternative products and services. Furthermore, these cases set critical precedents for applying antitrust laws to digital markets, where traditional metrics like price and market share are less clear-cut. They provide a framework for regulating the practices of other tech giants, ensuring that monopolistic behaviors do not stifle competition in rapidly evolving industries.

For consumers, the outcome could bring tangible benefits. More diverse and accessible services would emerge, offering increased options for users dissatisfied with Google's practices. Google has faced long-standing accusations of nonconsensually collecting user data and censoring information on its platforms. For users concerned about these issues, a competitive marketplace would likely introduce widely used search engines and services designed to address these concerns. Alternative providers could prioritize enhanced privacy protections, transparent data policies, and uncensored access to information, offering consumers meaningful choices that currently do not exist at scale.

Ultimately, these legal actions against Google have the potential to usher in a new era of fairness and innovation in the digital marketplace, challenging dominant players to uphold higher standards while empowering competitors to emerge. The antitrust actions highlight the complexities of regulating powerful technology companies within a rapidly evolving digital economy. As these cases progress, their outcomes are poised to set critical precedents for the future of antitrust enforcement, shaping how governments balance the need for competition with fostering innovation in an era increasingly defined by digital platforms and global connectivity.

V. Structural Limits of Modern Antitrust Enforcement

The recent actions against Visa and Google showed that federal antitrust enforcement remains an active tool for protecting competitive markets.[39] But these cases also highlight an important reality: modern antitrust enforcement often depends on structural and institutional constraints rather than the intentions of any particular administration. Antitrust agencies must work within limited resources, complex markets, and statutory frameworks that have remained largely unchanged for more than a century.[40] As a result, enforcement naturally tends to be selective and incremental.

Digital and network-based markets present additional challenges. Many of today's dominant firms operate in sectors where competition turns not on price but on data access, platform effects, and long-term ecosystem control–issues the Sherman and Clayton Acts were not designed to address directly.[41] Courts have been cautious in extending additional antitrust doctrines into these areas, and regulators must meet high evidentiary burdens to show competitive harm.[42] These legal and practical hurdles mean that even well-intentioned enforcement efforts can take years to resolve and may reach only a small number of dominant firms.

This landscape reflects a broader truth familiar since the Progressive Trustbusting Era: health markets cannot rely solely on episodic enforcement actions, no matter how significant. Theodore Roosevelt's trustbusting legacy emphasized not constant intervention, but consistent vigilance–ensuring that no private entity accumulates enough economic power to distort markets or block new entrants.[43] Modern antitrust enforcement operates within that same tradition. Its

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[39] Opinion, *United States v. Google LLC*, No. 1:20-cv-03010 (D.D.C. Aug. 5, 2024).

[40] Christopher Koopman & Matthew Mitchell, *U.S. Antitrust Laws: A Primer*, Mercatus Ctr. at George Mason Univ. (2019)

[41] Keith N. Hylton, *Digital Platforms and Antitrust Law*, 94 B.U. L. Rev. 1845 (2019).

[42] Herbert Hovenkamp, *Structural Antitrust Relief Against Digital Platforms*, 1 Colum. Bus. L. Rev. 1 (2020).

[43] Theodore Roosevelt, *Second Annual Message to Congress* (Dec. 2, 1902), in 17 *The Works of Theodore Roosevelt* 139 (Herman Hagedorn ed., 1926).

limits point not to failures of leadership, but to the need for a steady, principle-driven approach that preserves open markets, supports small businesses, and keeps competition strong.

VI. The Future of Antitrust Regulation

Antitrust enforcement remains a cornerstone of maintaining fair and competitive markets in our capitalistic economy. The regulations and legal framework are already in place; America needs enforcement. By preventing the concentration of power within a single entity or a select few companies, enforcing these laws ensures that innovation thrives, consumers benefit, and small businesses have the opportunity to succeed. This is the foundation of an economy that works for its consumers and employees, not the will of monopolies. The cases against Visa and Google represent significant benchmarks in 21st-century trustbusting, reflecting public frustration with modern monopolies that manipulate market structures, stifle competition, and harm economic dynamism.

While these actions are commendable, the consistent application of antitrust enforcement is crucial to preserving its legitimacy and effectiveness. Selective enforcement risks undermining public trust in regulatory institutions, allowing other monopolies to continue unchecked. Industries across the economy feature firms with substantial market power, raising similar concerns about competition, innovation, and consumer welfare. To truly protect the ideals of a free and fair marketplace, we must look beyond Visa and Google and investigate others who may be violating antitrust laws. Focusing on a few high-profile companies while ignoring others compromises the broader goal of creating a fair and competitive economy.

The need for vigilance in monitoring and regulating monopolistic practices cannot be overstated. Regulators must remain proactive, particularly in addressing the emerging challenges posed by rapidly evolving industries such as artificial intelligence (AI). As AI becomes the backbone of global innovation, its development and application must not fall into the hands of a select few dominant players. Concentrating AI power could result in censorship, as control over information and algorithms could be manipulated for profit or political

influence. Overreliance on a few entities could leave society vulnerable to disruptions or abuses of power.

In addressing monopolistic power, America must look in two directions. First, look to the past: to Adam Smith's vision of competitive markets grounded in merit rather than concentrated economic power, and to Theodore Roosevelt, who recognized that excessive corporate dominance undermines opportunity, suppresses innovation, and harms both consumers and workers. Then, look to the future: to young entrepreneurial tech students who dream of creating, innovating, and designing their own products to change the world. They want fewer barriers to entry in the marketplace so they can stand up and stand out by competing on merit, not by navigating systems tilted toward entrenched monopolistic giants.

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Higher Education, Higher Standards: Why the Hazelwood Test Doesn't Belong in Universities

Opal Kendall

The basis of our governments being the opinion of the people, the very first object should be to keep that right; and were it left to me to decide whether we should have a government without newspapers or newspapers without a government, I should not hesitate a moment to prefer the latter.

Thomas Jefferson, Letter to Edward Carrington[1]

I. Introduction

In the fall of 2000, the *Innovator,* a student-run newspaper at Illinois's Governors State University, ran a story criticizing the administration's refusal to renew the teaching contract of a popular professor. In response, the Dean of the College of Arts and Sciences and the University President issued a joint statement accusing the paper of irresponsible and defamatory journalism, insisting that the staff either issue a retraction of factual statements they had deemed false or print the university's objections to the article.[2] When the newspaper rejected these demands, the Dean of Student Affairs and Services, Patricia Carter, directed their printer not to publish issues she had not reviewed and approved. Because the printer was unwilling to print without the promise of pay, and the students were unwilling to submit their work for prior review and restraint, the newspaper stopped printing. Almost twenty-five years later, it has yet to publish a single article since.[3]

This situation raised critical questions about the scope of First Amendment protections for college students and the capacity of post-secondary institutions to censor student speech. Did Carter's actions violate First Amendment prohibitions against government censorship? Are the standards for restricting student

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[1]Thomas Jefferson, *Letter to Edward Carrington* (January 16, 1787) (Univ. of Virginia Press: Founders Online). https://founders.archives.gov/documents/Jefferson/01-11-02-0047.

[2] Hosty v. Carter, 412 F.3d at 731 (7th Cir. June 20, 2005).

[3] A new school-sponsored student newspaper, the GSU Phoenix, was formed in the place of the Innovator. Student Press Law Center, *Appeals Court Extends Hazelwood to Colleges*, (September 1, 2005). https://splc.org/2005/09/appeals-court-extends-hazelwood-to-colleges/.

speech different in high schools and universities? In *Hosty v. Carter*, the U.S. Court of Appeals for the Seventh Circuit answered both questions in the negative, holding that Carter was well within her rights to regulate such school-sponsored student speech and that the standards for permissible censorship were the same in secondary and post-secondary institutions.[4] Judges applied the Supreme Court's standard previously determined in *Hazelwood v. Kuhlmeier* in 1988 to the university level, finding that, in both primary education and beyond, public schools have the broad authority to censor school-sponsored speech for "legitimate pedagogical purposes."[5] In doing so, it dramatically reversed more than thirty years of standing case law that granted sovereignty to university student publications and bound adults to a highly restrictive free speech doctrine whose initial purpose was to protect minors.

The Seventh Circuit wasn't alone. When the Supreme Court declined to evaluate the applicability of the *Hazelwood* standard at the university level, these determinations were put in the hands of the lower rungs of the federal judiciary system. In the years following the original decision, these courts diverged significantly on the issue, with an equal number choosing to opt in and out of applying the *Hazelwood* standard.[6] As a result, what was once a unified benchmark for student censorship devolved into a fragmented jigsaw in which university students' rights depended overwhelmingly on their geographic location.

This paper explores the implications of applying the *Hazelwood* standard to higher education, arguing that this approach ignores the fundamental philosophical, legal, and practical distinctions between secondary and post-secondary institutions. The first section situates the original *Hazelwood*

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[4] Hosty, 412 F.3d at 731

[5] Hazelwood School District v. Kuhlmeier, 484 U.S. 260 (1988)

[6] Similarly to the original application of *Hazelwood v. Kuhlmeier*, which set a censorship standard only for public K-12 schools, as private schools are not government entities bound by The First Amendment, later applications of the *Hazelwood* standard to post-secondary institutions apply only to public colleges and universities. Moreover, these extensions can only apply to student speech directly sponsored by the university, meaning that, for example, student-run newspapers that are unaffiliated with university administration are exempt from the standard set out in *Hazelwood*. The applicability of this standard to newspapers, productions, and other forms of student speech affiliated with and funded by post-secondary institutions is the crux of this paper and will be discussed in later sections.

precedent in the context of prior jurisprudence and explores how it departs from the tradition of student speech protection. The second section lays out the patchwork of tests governing student expression at the university level as a result of lacking federal guidance and the consequent ambiguity that impacts administrators and students alike. Finally, the third section analyzes the differences in the educational goals, conditions of speech, and openness of communicative forums in each setting, contending that the extent of the *Hazelwood* precedent erodes essential free speech protections, unnecessarily stifles student expression, and contradicts the democratic values universities are designed to uphold.

II. *Hazelwood v. Kuhlmeier* in the Evolution of Student Speech Jurisprudence

However, before it ever reached universities, *Hazelwood v. Kuhlmeier* first revolutionized the Supreme Court's approach to student speech jurisprudence in high schools, irrevocably altering the balance between administrative authority and student speech rights. These competing interests—schools' functional obligation to maintain order and ensure that their students absorb the intended educational value of activities versus students' constitutionally guaranteed rights within the schoolhouse gate—are the same in any student speech case. It is the question of how to reconcile these interests, or, more specifically, the extent to which schools can regulate student expression to fulfill their pedagogical missions without infringing on constitutionally protected freedom of expression, which has challenged the Court since the early days of student speech jurisprudence.

The fulcrum for this balancing act was first articulated in *Tinker v. Des Moines,* which quickly became the gold standard for student speech protection. In this case, the Court both upheld the mere existence of students' constitutional rights within schools and established a powerful assumption in favor of free student speech—that schools may only limit expression that "materially and substantially" interferes with the operation of the school and its educational objectives.[7] The emphasis this standard places on

[7] Tinker v. Des Moines Independent Community School District, 393 U.S. 503 (1969)

the tangible impact of student speech in determining the constitutionally permissible response creates a natural supposition against prior restraint, meaning that schools cannot preemptively censor student speech and must instead demonstrate a real, immediate consequence to justify suppression.

However, this standard was not an absolute endorsement of unregulated student speech— even in broadly protecting students' rights, the Court still had an interest in ensuring that schools could fulfill their educational obligations. Although students retain their constitutional rights in schools, the educational context of such institutions creates unique protective nuances. This distinction allows administrators to regulate student speech that the government could not otherwise regulate in adults. In the context of *Tinker*, for example, an adult's simply disruptive speech is not necessarily a censorable offense, whereas for K-12 students, it is. Moreover, simply disruptive off-campus speech is also not necessarily a censorable offense, whereas on campus, it is. Similarly, in *Bethel School District v. Fraser*, the same analysis was used to carve out non-disruptive, yet, simultaneously censorable, speech from the broad protections granted in *Tinker*. The Court found that speech only needs to be sexually explicit, not legally obscene, for school administrators to constitutionally suppress it. Such speech, it said, is "wholly inconsistent with the 'fundamental values' of public school education," again emphasizing that "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."[8] This focus on regulating speech through its contextual appropriateness rather than simply its disruptive effect set the stage for subsequent limitations on student speech, including, most famously, *Hazelwood v. Kuhlmeier*.[9]

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[8] Bethel School District v. Fraser, 478 U.S. 675 (1986)

[9] Although the precedent for the Court's decision in Hazelwood v. Kuhlmeier can be traced back to earlier student speech jurisprudence, the case was still a marked departure from tradition. Even in cases like Bethel v. Fraser, which, like *Hazelwood*, expanded administrative discretion to regulate non-disruptive student speech based on inappropriate content, the scope of limitations on student speech were relatively narrow. Fraser dealt only with "vulgar" or "sexually explicit" personal speech, and, more importantly, only endorsed the subsequent punishment of suspect speech, upholding the Court's presumption against prior review. The standard set in the case was a targeted carve out from the *Tinker* test. In contrast, *Hazelwood v. Kuhlmeier* created an entirely new framework for evaluating student speech, in which all school-sponsored expression, regardless of content or type of speech, was governed by

In May of 1983, the student newspaper at Hazelwood East High School, *The Spectrum,* was preparing to publish its last issue of the school year, which notably included stories about teen pregnancy at the school and the impact of divorce on students. Per the school's formal editorial oversight process, the teacher of the class through which the paper was published submitted page proofs to the principal to review before publication. Objecting to the teen pregnancy article's discussion of sexual activity and birth control as inappropriate for younger students and the divorce article's discussion of a parent's behavior as journalistically unethical, the principal deleted the pages containing the problematic stories, and, in doing so, also eliminated five stories that did not contain objectionable content. Student journalists sued the school, claiming that it had violated their First Amendment rights by censoring student speech that did not materially disrupt school operations, per the standard previously established in *Tinker v. Des Moines*, nor violate the fundamental values of public schools set out in *Bethel v. Fraser.*

First to hear the case, the United States District Court for the Eastern District of Missouri found that no such violation had occurred, ruling that school officials may restrict student speech in curricular activities, provided that such regulations are reasonably grounded in the school's educational mission.[10] The Court of Appeals for the Eighth Circuit reversed this ruling, finding that the newspaper was both a curricular activity and a functional communicative platform, thereby prohibiting school officials from censoring any content beyond the *Tinker* test.[11]

The case asked a very simple question: do schools have additional authority to regulate student speech when it does not simply occur on school property but is facilitated by the school itself? In a 5-3 decision, the Supreme Court answered affirmatively—that there is indeed a distinct difference between mere toleration of student speech and affirmative promotion of expression. The Court's reasoning for this unprecedented

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a significantly lower censorship standard. Moreover, the case allowed schools to censor speech prior to its expression. These distinctions are essential to understanding how historical protections for student speech devolved since the *Tinker* decision in 1969, culminating in the *Hazelwood* decision in 1988.

[10] Kuhlmeier v. Hazelwood School Dist., 578 F. Supp. 1286 (E.D. Mo. 1985)

[11] Kuhlmeier v. Hazelwood School District, 795 F.2d 1368 (8th Cir. 1986)

expansion of administrative authority lay not in the typical *Tinker* analysis of student speech cases, but in a question of public forum doctrine.

This doctrine regulates the extent to which the government can limit expression on public property. While first vaguely originating in 1930s non-school jurisprudence, it didn't officially become the governing framework for these situations until the 1980s when the Court formally articulated the three different types of forums, their unique characteristics, and their designated First Amendment protections.[12] The first and most protected category of forum is the traditional public forum, which includes parks, sidewalks, streets, and other spaces historically held in public trust for open communication and free assembly. On these lands, the government may only engage in content-neutral restrictions on expression's time, place, and manner that are narrowly tailored to serve a specific government interest. Moving down a step are designated public forms, or those spaces that the government has intentionally opened for exchange, like university meeting rooms or municipal theatres. While the government has no obligation to keep these spaces open to the public, so long as they are reserved for communication and congregation, they must be afforded the same First Amendment protections as traditional public forums. However, in nonpublic forums, like military bases or polling places, where neither tradition nor designation applies, the government may enact broad content-based restrictions, so long as they are reasonable and viewpoint-neutral.[13]

Because the distinctions between these categories lie primarily in government selection, the natural question is when courts will recognize a public forum's creation, or, more simply, how explicit a government entity must be in opening spaces for public exchange.[14] Here, the Court has long held that the

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[12] David L. Hudson, Jr., *Public Forum Doctrine*, First Amendment Encyclopedia, Middle Tennessee State Univ. (Aug. 10, 2023, last updated July 2, 2024), https://firstamendment.mtsu.edu/article/public-forum-doctrine/

[13] "Forums," LII / Legal Information Inst., n.d., https://www.law.cornell.edu/wex/forums.

[14] The public forum doctrine has been widely criticized for being both overly formalistic and convoluted, detracting from the real First Amendment questions at play and lacking clarity in the number of forum categories and the characteristics for each. The doctrine nonetheless remains a staple feature of modern jurisprudence and the Court's evaluation of First Amendment cases, including in *Hazelwood v. Kuhlmeier*. Daniel A. Farber and John E. Nowak, "The Misleading Nature of Public Forum Analysis: Content and Context in First

government's intent, not the public's independent use, is the determining factor in establishing whether or not a public forum exists. In *Perry Educational Association v. Perry Local Educators' Association*, for example, the Court wrote that unless government authorities have "by policy or by practice" opened facilities for "indiscriminate use by the general public" or a subsection of the general population, no such public forum has been created.[15] Similarly, in *Cornelius v. NAACP Legal Defense and Educational Fund, Inc.* the Court found that "the government does not create a public forum by inaction or by permitting limited discourse, but only by intentionally opening a nontraditional forum for public discourse," again emphasizing the government's intent over the practical use of spaces.[16]

In *Hazelwood*, the Court applied this doctrine to a student rights case for the first time, finding that the newspaper and the accompanying journalism program were not public forums explicitly opened for community discourse, but curricular "laboratory situation[s]"[17] designed to develop students' journalistic skills and ethics.[18] This distinction in the purpose of the course comprised the entire foundation for the court's reasoning as to the administration's authority over student speech within it— because the newspaper was a closed forum, it could be subject to a whole host of additional restrictions otherwise not permitted by The First Amendment. The educational context and school sponsorship of the student speech at hand justified the prioritization of administrative authority over student expression, meaning, more concretely, that content-based restrictions were permissible so long as they were "reasonably related to legitimate pedagogical concerns."[19] This standard, known as the Pedagogical Concerns Test, found that in closed forums schools only overrun student speech rights when restrictions have absolutely no valid

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Amendment Adjudication," *Virginia Law Review* 70, no. 6 (September 1, 1984): 1219, https://doi.org/10.2307/1072999.

[15] Perry Educ. Ass'n, 460 U.S. at 37

[16] Cornelius v. NAACP Leg. Def. Fund, 473 U.S. 788 (1985)

[17] Hazelwood School District, 484 U.S. at 260

[18] Because public schools are government entities–operated in line with state standards and funded by public tax dollars–school newspapers, and other similar programs, are government property subject to the public forum doctrine.

[19] Hazelwood School District, 484 U.S. at 260

educational purpose.[20] The reasons for this powershift were threefold: (a) to allow schools the latitude to ensure that educational goals are met, (b) to allow schools to protect younger students from potentially inappropriate content, and (c) to allow schools to dissociate themselves from individual student speech that may be erroneously attributed to the institution itself. Provided the school had not explicitly relinquished control over these initiatives, the Court treated the terms "curricular activity" and "closed forum" interchangeably, meaning that prior restraint was entirely permissible for most school-sponsored publications, student government, performances, and classroom assignments, so long as the justification for suppression could be tangentially tied to educational objectives.[21]

For K-12 students, this test not only lowered the threshold for what constitutes permissible censorship but also set a precedent that emphasized the institution's interests over the rights of individuals, fundamentally altering the balance of power between students and the administration that serves them. However, for other students, the Court decided that it "need not now decide whether the same degree of deference is appropriate with respect to school-sponsored expressive activities at the college and university level," postponing their verdict rather than clarifying whether or not this newly established legal standard should extend beyond high schools and into a post-secondary context.[22]

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[20] Although the Court has long held that the construction of educational policy should lie more locally with educators and school boards, this standard and the level of discretion it grants to administrators' interpretation of educational objectives has been widely criticized as unspecific and excessively broad. Many critics say that the vagueness of this standard has been co-opted to paint all potentially controversial student speech as inappropriate and fundamentally incompatible with schools' "pedagogical concerns," allowing censorship of student expression far beyond that intended in *Hazelwood*. Carrie Faust, *Hazelwood Is Everyone's Problem*, JEA (Jan. 31, 2013), https://jea.org/press-rights/blog13a-hazelwood-is-everyones-problem/.

[21] Because of the emphasis that *Perry, Cornelius,* and *Hazelwood* placed on explicit government statements regarding the openness of a forum, many students' rights activists and journalism think tanks encourage student publications to secure declarations of their freedom from school sponsorship to protect them from prior review.

[22] Hazelwood School District*,* 484 U.S. at 260

III. The Patchwork of Application

Since this deferral in their 1988 ruling, the Supreme Court has continued to delay a substantive decision on *Hazelwood's* applicability to institutions of higher education, making only cursory or tangential references to its relevance, if at all. In *Board of Regents of University of Wisconsin System v. Southworth*, a case concerning the allocation of university funds to student organizations, Justice David Souter invoked *Hazelwood* as an instance in which the Court's jurisprudence was confined to a single level of education. Souter used the case as evidence that the relationship between high schools and their students is "at least arguably distinguishable" from that of universities, suggesting support for distinct censorship standards for secondary and post-secondary student speech.[23] However, ten years after the *Southworth* decision, the Court again cited *Hazelwood* in *Christian Legal Society v. Martinez*, a case about university membership requirements for student organizations. This time, *Hazelwood* was invoked to bolster the idea that courts should not substitute their own conceptions of good educational policy for that of actual educators, signaling a willingness to uphold administrative discretionary authority at the university level.[24] In the thirty-six years since the case, these brief citations are the whole of the Supreme Court's guidance on the applicability of *Hazelwood* to higher education institutions, a question created and identified by the Court itself in the original opinion. Even together, two nonspecific and nearly nonexistent references do not form a sufficiently definitive clarification of case law. In fact, the penumbras cast by these citations do not even function in tandem—they point towards opposite understandings of *Hazelwood's* role in college speech, further muddying already murky legal waters.

In the absence of formal guidance from the highest court, federal district and appeals courts have taken on the responsibility of clarifying the censorship standards for school-sponsored speech

[23] Board of Regents of Univ. of Wis. System v. Southworth, 529 U.S. 217 (2000)

[24] Christian Legal Soc. Chapter of Univ. of Cal., Hastings College of Law v. Martinez, 561 U.S. 661 (2010)

in university settings. However, like the Supreme Court itself, these lower courts remain deeply divided.[25]

The polarity of this issue emerged almost immediately after the *Hazelwood* decision, when in 1989 both the First and Eleventh Circuit Courts issued contrasting rulings on whether the pedagogical concerns test should be applied to universities. These cases, as well as those that came later, primarily turned on the court's application of the public forum doctrine—an analysis that became more nuanced in the context of universities' unique educational obligations and the extracurricular nature of many post-secondary activities. In *Alabama Student Party v. Student Government Association of the University of Alabama*, for example, the Eleventh Circuit Court found that student government elections were not established as open forums for communication, but rather learning simulations designed to foster democratic understanding. Thus, *Hazelwood* was applied as an endorsement of the idea that universities can place reasonable restrictions on closed educational experiences, including, but not limited to, student government elections under its jurisdiction.[26] Simultaneously, the First Circuit Court found that because student organizations at colleges and universities are typically extracurricular, they function as designated public forums, which, by default, renders the *Hazelwood* test entirely inapplicable.[27]

As time went on, these two early circuit court cases were used as foundational precedent in others as, gradually, each heard a case involving school-sponsored student speech and fell into one of two camps— either denying or affirming *Hazelwood's* appropriateness for post-secondary education. In agreement with the Eleventh Circuit, the Tenth Circuit applied *Hazelwood* in *Axson-Flynn v. Johnson*, upholding a university's decision to

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[25] While almost every circuit court has, in some sense, made its own ruling on the relevance of *Hazelwood* to universities, some cases' applications are more tangential than others. Some simply cite the pedagogical concerns test as evidence in a university case, while others explicitly state that this standard also concerns student speech on college campuses. Regardless of the directness with which *Hazelwood* is invoked in these cases, they are all considered the governing standard in that district.
Adam Schulman, *Hazelwood Goes to College*, Student Press Law Center, September 5, 2018, https://splc.org/2011/06/hazelwood-goes-to-college/.

[26] Alabama Student Party v. Student Govt. Ass'n, 867 F.2d 1344 (11th Cir. 1989)

[27] Student Govt. v. Bd. of Tr. of Univ. of Mass, 868 F.2d 473 (1st Cir. 1989)

require a student to read lines she claimed violated her religious beliefs, as the curricular context justified closed forum regulations.[28] Similarly, the Seventh Circuit's famous decision in *Hosty v. Carter*, the first post-*Hazelwood* case to deal with a university newspaper and the most explicit ruling on the applicability of the pedagogical concerns test to date, found both that university newspapers were, by default, closed forums and that *Hazelwood's* framework undoubtedly applied to university student publications. Where other cases expanding the pedagogical concerns test were relatively indirect in their applications, simply invoking the case as relevant precedent and thereby implying its relevant legal footing at the university level, *Hosty v. Carter* was explicit— "there is no sharp difference between high school and college papers" and thus, the Court wrote, "*Hazelwood's* framework applies to subsidized student newspapers at colleges as well as elementary and secondary schools."[29] Even later, in 2010, the Fifth Circuit applied *Hazelwood* to evaluate the constitutionality of a university's student code of conduct, using it to buttress their argument that a school need not tolerate certain speech when it is incompatible with its educational values.[30] When presented with a similar case in the same year, the Third Circuit decided the opposite, articulating the major differences between high schools and universities as being that the pedagogical concerns test "cannot be taken as gospel" in university speech cases.[31] Similarly, and yet in direct opposition to the *Hosty* ruling, the Sixth Circuit determined in *Kincaid v. Gibson* that a university yearbook was a designated public forum and therefore was protected from *Hazelwood's* content-based restrictions.[32] In the Ninth Circuit, the Court originally extended *Hazelwood's* regulatory authority to college campuses,[33] only to retract that decision just five years later by holding that the applicability of the pedagogical concerns test could not be decided.[34]

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[28] Axson-Flynn v. Johnson, 356 F.3d 1277 (10th Cir. 2004)

[29] The case was appealed to the Supreme Court, which declined to take it on. Hosty, 412 F.3d at 731

[30] Esfeller v. O'Keefe, 391 F. App'x 3 (5th Cir. 2010)

[31] McCauley v. Univ. of the Virgin Islands, 618 F.3d 232 (3rd Cir. 2010)

[32] Kincaid v. Gibson, 236 F.3d 342 (6th Cir. 2001)

[33] Brown v. Li, 308 F.3d 939 (9th Cir. 2002)

[34] Flint v. Dennison, 488 F.3d 816, 829 n.9 (9th Cir. 2007)

Some district courts have, moreover, expanded these applications of *Hazelwood* to apply not simply to school-sponsored speech, but what is arguably independently generated student expression, going so far as to overrun the *Tinker* standard itself.[35] In *Heenan v. Rhodes*, for example, Judith Heenan was expelled from the Auburn University School of Nursing for criticizing its disciplinary policy. The district court found that although her speech was clearly not attributable to the school or sponsored by the institution, it was functionally curricular because "grievances…were made to, or in the presence of, her instructors and supervisors and were related to her training" and thus remained regulable under the *Hazelwood* doctrine.[36] This reasoning was not an isolated occurrence. In *Keeton v. Anderson-Wiley*, the Southern District Court of Georgia similarly found a counseling student's anti-LGBTQ statements, which had no explicit bearing on her willingness to treat members of that community, violated the principles of her program's curriculum and thus, under *Hazelwood*, were sufficient grounds for expulsion. This expansion was upheld by the Eleventh Circuit Court.[37]

This absence of national guidance and distortion of the *Hazelwood* standard has left the landscape of student speech at the university level both uncertain and fragmented. The lack of consistency not only undermines the very sanctity of The First Amendment— meant to be a universal defense against injustice unequivocally assured to all citizens regardless of circumstances— but also creates a disjointed and unreliable environment for both students and universities. Without clear standards defining what speech is protected and to what extent schools can impose restrictions, institutions struggle to navigate free speech policies while students face undetermined risks regarding the scope of their constitutional rights. This ongoing uncertainty demands a reevaluation of the legal doctrine governing student speech in higher education to ensure that it is clear, consistent, and sufficiently protective.

IV. A Unique Standard for Universities

[35] Schulman, *Hazelwood Goes to College*.
[36] Heenan v. Rhodes, 761 F. Supp. 2d 1318 (M.D. Ala. 2011)
[37] Keeton v. Anderson-Wiley, 664 F.3d 865 (11th Cir. 2011)

Rooted primarily in the regulatory needs of early education, the extension of *Hazelwood v. Kuhlmeier* to college campuses ignores the fundamental differences between the two institutions. Philosophically, where K-12 education is merely instructional, designed to prepare students for the workforce or further education, universities are spaces for critical thought, engagement, and intellectual debate. Legally, where educators in high schools act in the place of parents in protecting minors, colleges have significantly less authority over adults. Functionally, where secondary education requires a certain sense of order and discipline, hindering speech in a post-secondary environment has far greater consequences. These inherent differences underscore the inappropriateness of applying *Hazelwood's* standard to higher education.

A. Age-Related Legal Distinctions

The Court has long endorsed two major nuances relevant to *Hazelwood's* applicability in university settings: that the protected rights of minors and adults are fundamentally different, and that the unique environments of high schools and colleges necessitate different standards for constitutional censorship. This dichotomy has prompted the development of similar yet distinct jurisprudential tests for each specific context that, while running parallel to each other, may diverge in certain situations or place greater emphasis on the same protections in others.

In terms of age and legal authority, this difference is quite straightforward: in K-12 schools, where the students in question are minors, educators are widely recognized to act in *loco parentis,* meaning in "place of the parent," taking on a guardian's duties to protect children from inappropriate content and ensure that they develop a properly aligned civic and moral compass.[38] This obligation naturally expands primary and secondary schools' authority over their students. Simultaneously, the Court itself has recognized that the rights of public school students are not inherently the same as that of adults in other settings, suggesting that the government has more limited authority over adults.[39] This

[38] Robert J. Havighurst, *Teaching*, Encyclopedia Britannica, July 26, 1999, https://www.britannica.com/topic/teaching.

[39] Bethel School District, 478 U.S. at 675

legal distinction between the government's relationship with minors and adults serves as a key justification for differing standards of censorship in two environments principally defined by the age of their residents. Minors are both culturally and legally considered less mature and more impressionable, making them more vulnerable to the potential harms of unfiltered speech, whether that be indecent material, disruptive behaviors, or harmful ideologies. Consequently, schools must be granted broader authority to regulate speech to maintain a safe, stable learning environment, conducive to effective instruction and prosocial moral development. In *Hazelwood* itself, for example, one of three justifications for the case's expansion of administrative authority was to ensure that younger students could be adequately protected from inappropriate or mature material, a concern that simply has no basis in a university where effectively every student is a legal adult. Those in college environments are again culturally and legally presumed to possess the maturity and critical thinking skills necessary to navigate potentially problematic material without undue harm.

B. Functional Legal Distinctions

Similarly, the legal distinctions made concerning the functions of each educational institution provide a similar foundation for a more expansive approach to student speech in universities. Unlike high schools, which by the nature of their educational objectives must prioritize order and discipline, colleges naturally emphasize free intellectual exploration, critical thinking, and robust debate. Consequently, for this function to be even remotely successful, the threshold for permissible speech regulation in universities must be higher, allowing controversial and offensive expression to exist on the same plane as the socially acceptable ideas of the majority. Around individually generated expression, Supreme Court jurisprudence already differentiates between the constitutional conditions for student speech suppression in secondary and post-secondary institutions precisely because of the function of universities as hubs for exchange. For example, while the broad protections of student speech established in *Tinker v. Des Moines* are now guaranteed to both high school and college students, functional differences have led the Court to

identify major differences in the force with which these safeguards apply.[40] *Healy v. James* found that colleges and universities are not sectoral enclaves beyond the reach of First Amendment protections, but uniquely important forums for intellectual discussion and development that demand even more robust free speech protections than the educational institutions described in *Tinker*. As the Court itself put it:

> The precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'[41] The college classroom, with its surrounding environs, is peculiarly the 'marketplace of ideas,' and we break no new constitutional ground in reaffirming this Nation's dedication to safeguarding academic freedom.[42]

In *Papish v. Board of Curators*, the Court similarly differentiated the protective standards for student speech at the high school and university level, finding that unlike the standard that would be set for secondary institutions in *Bethel v. Fraser*, colleges could not regulate independent student speech simply because it was inappropriate or violated the school's conventions of decency.[43]

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[40] Because of the specific secondary context of *Tinker v. Des Moines*, the disruption test developed therein originally only applied to K-12 public schools. It wasn't until *Healy v. James* approximately eight years later that the Supreme Court formalized the same protections for university students.

[41] Healy v. James, 408 U.S. 169 (1972), quoting Shelton v. Tucker, 364 U. S. 479 (1960)

[42] Taking inspiration from competition in the free economic marketplace, the marketplace of ideas is a common defense for free speech and condemnation of government censorship. It suggests that the objective truth will naturally emerge from the competition of ideas in transparent public discourse, as based concepts are held up against falsehoods, poking holes in their validity. The relevance of the marketplace of ideas in a modern, highly polarized society that relies so heavily on social media for communication has been heavily debated by contemporary critics. However, the Supreme Court has continued to uphold the relevance of this doctrine in defining the unique characteristics of the university environment, so it is included in the analysis regardless of any potential grounds for its criticism.
John Stuart Mill, *On Liberty and Other Essays*, (1859), http://ci.nii.ac.jp/ncid/BA20664801.

[43] Papish v. Board of Curators, 410 U.S. 667 (1973)

This case law around independent student speech and the separate standards for its regulation on college campuses serves as a broader constitutional mandate for the protection of the marketplace of ideas— a principle that becomes increasingly important in the context of school-sponsored speech. Although the marketplace of ideas cannot function in the face of government censorship, the ideological stagnation and segmentation of today effectively necessitates the active promotion of free exchange if it is to occur at all. Thus, universities do not simply have an obligation to permit uninhibited student discourse, as is the result of independent student speech, but a duty to encourage it, as with school-sponsored student speech. In the language of *Hazelwood*, the most important "pedagogical concern" of universities is the simple promotion of exchange and debate. This requires ensuring that school forums do not become vehicles for institutional censorship of the uncomfortable under the guise of maintaining propriety. However, the extension of the *Hazelwood* standard enshrines absolute deference to university administration, a privilege which, in every aforementioned circuit or district court case, has been abused and distorted to permit exactly the institutional censorship that earlier university speech jurisprudence cautioned against. Even if this expanded authority were not corrupted, the very existence of such broad censorship authority over student speech undermines the essential freedom of the marketplace of ideas. College-sponsored platforms should be a place where diverse viewpoints, even those that are socially uncomfortable, are vigorously protected and every student's right to free speech is unequivocally ensured. In these circumstances, the diffusion of the *Hazelwood* doctrine weakens the commitment to the free discourse needed for intellectual development and societal advancement, fundamentally compromising the core value of higher education.

C. Practical Distinctions

Even so, even at its best, when the doctrine is not distorted to serve an institution's interests in stability or silence the marketplace of ideas, the practical reality of extending the legitimate pedagogical concerns test to post-secondary education is such that an expansion comes with far greater consequences than

the application of the same test in secondary education. The application of *Hazelwood* to primary education created a massive hampering effect on student speech in which students self-censored otherwise permissible expression for fear of punishment under such a nebulous and subjective censorship standard. When students did dare to express controversial or potentially inappropriate ideas, the courts upheld school officials' decision to censor almost without exception.[44] Extending *Hazelwood* to universities risks amplifying this effect. University classes, which are undeniably a school-sponsored forum in which *Hazelwood* could apply, often ask students to engage with controversial and provocative ideas as exercises in intellectual development. The fear of administrative censorship under a standard as vague and discretionary as "legitimate pedagogical concerns" would naturally discourage students from exploring sensitive topics or critiquing the surrounding institutions, ironically undermining the pedagogical goals of the class. Moreover, this self-censorship and protective conformity would stifle the diversity of voices and perspectives that universities strive to achieve, eroding the most basic principles that distinguish colleges from high schools, and cyclically creating the very conditions that would justify using the same broad-brush approach to evaluating First Amendment violations.

D. The Narrowed Scope of Relevance

Beyond questions of appropriateness, the extension of the *Hazelwood* test also presents basic questions about the extent to which the standard could reasonably be employed in the unique conditions of university life. To start, the application of the *Hazelwood* standard in any context relies principally on two criteria: the presence of school-sponsored speech and, provided that the first is met, the presence of a closed forum. In *Hazelwood* v. Kuhlmeier the court defined school-sponsored speech as that which occurs "as part of the school curriculum, whether or not they occur in a traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular

[44] Amicus Brief in Support of Petitioners, Hosty v. Carter (U.S. Sup. Ct.), FIRE, https://www.thefire.org/research-learn/hosty-v-carter-amicus-brief-us-supreme-court

knowledge or skills to student participants and audiences."[45] This definition emphasizes the curricular nature of school-sponsored speech as its defining characteristic, making no mention of financial commitments as having any bearing on the affiliative status of a student publication or production. The natural implication of this understanding is that under the greater umbrella of school-affiliated speech, there exists two distinct categories— school-sponsored student speech and school-subsidized student speech— only the former of which is covered by *Hazelwood* because only it, by definition, can have pedagogical goals. Where the majority of school-affiliated speech in primary education is directly sponsored by the school under faculty supervision with specific curricular targets, the majority of school-affiliated speech at universities is simply school-subsidized: receiving funds, but not curricular guidance or content direction from the university. Often, what is deemed curricular in high school typically becomes extracurricular in college. Take, for example, the archetypal student newspaper funded by the school. In high schools, these publications are typically run through a designated journalism class, principally designed not to put out a paper covering the happenings of the school, but to educate students on the principles of ethical journalism and create a simulation in which they can apply these skills. In universities, the same publication is often a purely extracurricular activity that takes place on students' own time, outside the classroom, and without the same narrow, institutionally-governed content control. Moreover, they are not the "laboratory situation" described in *Hazelwood*, but legitimate publications designed to uplift those that would otherwise go unnoticed and hold those in power accountable.[46]

Although the recognition of a public forum is highly nuanced and context-dependent, university student groups, performances, and publications naturally trend toward openness. Situated in institutions inherently committed to academic freedom and the exchange of ideas, university-affiliated student speech typically operates in forums designed to encourage diverse perspectives and public discourse, rather than the closed environments envisioned under *Hazelwood* and the public forum doctrine.

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[45] Hazelwood School District, 484 U.S. at 260

[46] Hazelwood School District, 484 U.S. at 260

V. Conclusion

These realities mean that extensions of *Hazelwood* through the university gates are far more than niche legal trends with little bearing on the lives of citizens— they are fundamental threats to the very sanctity of the First Amendment in higher education. By treating adults as if they were children, unnecessarily prioritizing institutional control over intellectual exploration and expansion, and forcing students to self-censor their speech for fear of unknown repercussions, this approach entirely ignores the most basic functions of post-secondary institutions: to function as crucibles of ideas, in which original preconceptions are melded with other criticisms to form totally new perspectives. With intellectual debate and critical thought pushed to the side, the roar of uninhibited discourse becomes nothing more than a quiet murmur.

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Equal Protection for All: Pathways to Gender-Affirming Healthcare for Transgender Youth

Susanna Prieto

As state legislation concerning transgender individuals continues to expand, questions surrounding transgender rights have moved to the forefront of discussion in the field of constitutional law. Civil rights and LGBTQ+ advocates alike are challenging laws regulating transgender adults and minors. As of 2025, twenty-seven states have banned transgender minors from receiving gender-affirming care, or the range of medical, behavioral, psychological, or social interventions intended to affirm and support a person's gender identity. [1] This can include hormonal treatment, surgery, or counseling. These measures help transgender people align biological, emotional, and interpersonal aspects of their lives with their gender identity. [2] The Supreme Court has recently heard *U.S. v. Skrmetti* (2025), which examines the constitutionality of such laws. Since the creation of the Equal Protection Clause, the Court has established precedent determining that laws regulating certain classes should undergo different levels of scrutiny to ensure equal protection under the law. This work argues that transgender identity should be considered a suspect classification, and laws restricting transgender minors should be subjected to strict scrutiny.

Designating transgender people as a suspect class would allow laws regulating the community to be struck down based on their discriminatory nature. A suspect classification allows the Court to apply the harshest level of scrutiny in reviewing legislation concerning transgender people. This equips the Court to strike down state laws preventing transgender minors from receiving gender-affirming healthcare. Lower courts have deemed the transgender community a quasi-suspect class, applying heightened scrutiny to gender-affirming healthcare regulations. One such regulation, Senate Bill 1, violates the

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[1] *Gender Incongruence and Transgender Health in the ICD*, https://www.who.int/standards/classifications/frequently-asked-questions/gender-incongruence-and-transgender-health-in-the-icd.

[2] Patrick Boyle, *What Is Gender-Affirming Care? Your Questions Answered*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES, https://www.aamc.org/news/what-gender-affirming-care-your-questions-answered.

Equal Protection Clause of the Constitution. This work argues that it is facial discrimination and passes the muster of neither strict scrutiny nor heightened scrutiny. Furthermore, this work urges the Court to consider the effects of the law in its decision, including the potentially harmful impacts on transgender youth and the intrusive, destructive nature of the law for the medical community.

I. Introduction

The past decade has borne witness to a sharp rise in legislation regulating transgender people across the United States. From 2018 to 2022, nineteen states enacted a total of forty-eight laws restricting transgender rights. [3] From 2023 to 2024, twenty-six states passed one-hundred and thirteen laws concerning transgender people.[4] The legislation regulates various aspects surrounding the transgender identity, including sports affiliations, gendered-bathroom usage, and LGBTQ+ education. A significant portion of these laws restrict transgender people from receiving gender-affirming care. In 2023, lawmakers introduced at least 142 bills restricting access to gender-affirming services for transgender people. Eighty percent of these laws restrict access specifically for transgender children under the age of eighteen. [5] As of August 2025, twenty-seven states have banned both surgery and medication for transgender youth.[6] In some of these cases, the legislation contains "grandfather" exceptions, permitting minors actively receiving prescriptions to continue receiving care. Others have "weaning" exceptions, allowing minors receiving prescription medication to receive care for a limited time with the expectation that

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[3] Wilson Y. Lee et al., *State-Level Anti-Transgender Laws Increase Past-Year Suicide Attempts among Transgender and Non-Binary Young People in the USA*, 8 NAT HUM BEHAV 2096 (2024), https://www.nature.com/articles/s41562-024-01979-5.

[4] *2025 Anti-Trans Bills: Trans Legislation Tracker*, https://translegislation.com.

[5] Minami Funakoshi & Disha Raychaudhuri, *The Rise of Anti-Trans Bills in the US*, REUTERS (Aug. 19, 2023), https://www.reuters.com/graphics/USA-HEALTHCARE/TRANS-BILLS/zgvorreyapd/.

[6] Lindsey Dawson & Jennifer Kates, *Policy Tracker: Youth Access to Gender Affirming Care and State Policy Restrictions*, KAISER FAMILY FOUNDATION, https://www.kff.org/lgbtq/gender-affirming-care-policy-tracker/.

they will be tapered off the medication. [7] These states have implemented a variety of enforcement mechanisms to prevent transgender children from accessing this care. In most cases, states have imposed professional or legal penalties on healthcare practitioners providing gender-affirming care to minors. [8] In Florida and Idaho, medical providers who are found to have provided gender-affirming care to transgender youth can be charged with a felony and a loss of their medical license. [9] Many states have prohibited the use of public funds in assisting with or providing this type of care, meaning that Medicaid will not cover these health expenses, and hospitals or clinics receiving government funds cannot provide transgender youth with gender-affirming care. Some states punish those who may aid and abet in providing or promoting gender-affirming care, including counselors, teachers, principals, and school officials. Other states have modified custody laws or definitions of child abuse, calling for investigations and legal penalties for parents who provide gender-affirming care to their children.[10]

These laws will also impact the medical community's ability to assist transgender youth. In 2021, the American Medical Association (AMA) urged governors to oppose state laws prohibiting gender-affirming care for transgender youth, deeming them a harmful intrusion of medical practice: "Decisions about medical care belong within the sanctity of the patient-physician relationship … As with all medical interventions, physicians are guided by their ethical duty to act in the best interest of their patients and must tailor recommendations about specific interventions and the timing of those interventions to each patient's unique circumstances." [11] The healthcare bans undermine the agency of physicians who specialize in providing gender-affirming care treatments. Healthcare providers can

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[7] Movement Advancement Project, *Equality Maps: Bans on Best Practice Medical Care for Transgender Youth* (2024), http://www.mapresearch.org/equality maps/healthcare/youth_medical_care_bans.

[8] Dawson *supra* note 1.

[9] Ch. 2023-90, § 5, 2023 Fla. Laws.

[10] Dawson *supra* note 2.

[11] *AMA to States: Stop Interfering in Health Care of Transgender Children*, AMERICAN MEDICAL ASSOCIATION (Apr. 26, 2021), https://www.ama-assn.org/press-center/ama-press-releases/ama-states-stop-interfering-health-care-transgender-children.

no longer follow the guidelines set forth by the American Academy of Pediatrics, the Endocrine Society, and the World Professional Association for Transgender Health.[12]

Despite warnings from this medical association, legislation banning gender-affirming care for transgender youth has prevailed. In response to the plethora of bans, transgender litigants have challenged the constitutionality of the state laws. Of the 27 state laws banning gender-affirming care for transgender minors, 17 have been challenged in state courts. [13] In some cases, the bans have been permanently or temporarily blocked by state courts.

In the case of *U.S. v. Skrmetti,* litigants sued the state of Tennessee to block Senate Bill 1. This bill bans all medical treatments intended to allow "a minor to identify with, or live as, a purported identity inconsistent with the minor's sex" or to treat "purported discomfort or distress from a discordance between the minor's sex and asserted identity." [14] Lambda Legal, the American Civil Liberties Union, the ACLU of Tennessee, and Akin Gump Strauss Hauer & Feld LLP sued on behalf of Brian and Samantha Williams and their 15-year-old transgender daughter, a Memphis-based medical doctor Dr. Susan Lacy, and two other plaintiff families filing anonymously. [15] This case was first heard in the Tennessee District Court, which granted a preliminary injunction halting the state's enforcement of the law. However, the Sixth Circuit Court of Appeals reversed this decision, arguing that the law "treats similarly situated individuals evenhandedly," and was not in violation of the Equal Protection Clause. [16]

On writ of certiorari to the Court of Appeals, the Supreme Court heard the case in December 2024 and decided in June 2025. The

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[12] Stacy Weiner, *States Are Banning Gender-Affirming Care for Minors. What Does That Mean for Patients and Providers?*, ASSOCIATION OF AMERICAN MEDICAL COLLEGES (Feb. 20, 2024), https://www.aamc.org/news/states-are-banning-gender-affirming-care-minors-what-does-mean-patients-and-providers.

[13] Dawson *supra* note 3.

[14] Tenn. Code § 68-33-103 (2024).

[15] *L.W. v. Skrmetti/U.S. v. Skrmetti*, AMERICAN CIVIL LIBERTIES UNION, https://www.aclu.org/cases/l-w-v-skrmetti.

[16] Steven D. Schwinn, *United States v. Skrmetti*, American Bar Association, (2024). https://www.americanbar.org/groups/public_education/publications/preview_home/us-v skrmetti/.

Court held: Tennessee's law prohibiting certain medical treatments for transgender minors is not subject to heightened scrutiny under the Equal Protection Clause of the Fourteenth Amendment and satisfies rational basis review. [17]

Despite the ruling, leading experts on LGBTQ+ rights and anti-discrimination law, such as Katie Eyer, argue that state bans on gender-affirming healthcare violate the 14th Amendment's Equal Protection Clause. Through the 14th Amendment, the Court has established doctrines securing legal protections for minority groups, minors, and parents. The Equal Protection Clause was intended to ensure equality between groups, and has been applied to deny unequal treatment on the basis of race, gender, and sexual orientation. [18]

This work reviews the evolution of equal protection jurisprudence and examines the development of strict and heightened scrutiny. Next, it will explore the application of suspect or quasi-suspect class status to the transgender identity, review SB 1 under strict scrutiny, and discuss the application of other relevant constitutional law jurisprudence. To conclude, the work will discuss *Skrmetti* and its impact on state court decisions for gender-affirming healthcare bans for minors.

II. Equal Protection

The Fourteenth Amendment, ratified in 1868, regulates a variety of issues, including citizens' rights, State Representatives, apportionment, and public debt. [19] This work focuses on the application of the Equal Protection Clause of the Fourteenth Amendment, which states that, "no State shall … deny to any person within its jurisdiction the equal protection of the laws." [20] Though the law decrees "equal protection" for all, the amendment is limited in scope. To ensure equal protection and prevent certain forms of discrimination, the Court has ruled that all legal classifications must be

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[17] *United States v. Skrmetti*, Oyez, https://www.oyez.org/cases/2024/23-477

[18] Strauder v. West Virginia, 100 U.S. 303 (1879); Frontiero v. Richardson, 411 U.S. 677 (1973); United States v. Windsor, 570 U.S. 744 (2013).

[19] Schwinn *supra* note 1.

[20] U.S. Const. amend. XIV, § 1, cl. 3.

rooted in some sort of rational relationship to a legitimate governmental end. This reasoning can be seen in *Railway Express Agency, Inc. v. New York* (1984), in which a New York City traffic regulation banned vehicles from commercial advertising in public streets. However, vehicles could display advertisements if they related to the business interests of their owner. The regulation was created because the government had an aim to limit distractions to pedestrians and drivers to promote public safety in the streets. The Court reasoned that banning advertisements from vehicles whose advertisements did not relate to the business interests of their owners would lessen the number of distractions in the streets. In this instance, the law prohibited a certain group from performing an action based on an economic classification, yet the ordinance did not violate Equal Protection. This is because regulating the specific group directly supported a government interest. [21]

State legislatures must retain the authority to enact laws that advance legitimate governmental interests. However, the Court has recognized that such interests are less readily assumed when legislation targets particular groups.[22] For this reason, the level of scrutiny applied to statues regulating specific groups depends on the nature of the class being regulated. [23]

The modern framework for evaluating laws that single out certain groups originated in *US v. Carolene Products Co.* (1938). In upholding a federal prohibition on the interstate shipment of filled milk, the Court accepted that economic regulations affecting ordinary commercial transactions are typically justified by a rational basis. Yet Justice Stone's famous Footnote Four cautioned that this deferential assumption should not apply when legislation restricts political processes ordinarily relied upon to repeal "undesirable legislation." Examples of such legislation, which Stone argued require "more exacting judicial scrutiny," include laws regulating voting rights,

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[21] Railway Express Agency, Inc. v. New York, 336 US 106 (1949)
[22] NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (21 ed. 2022).
[23] Alex Reed, *Pro-Business or Anti-Gay? Disguising LGBT Animus as Economic Legislation*, 9 Stan. J. C. R. & C.L. 153 (2013).

religious groups, or racial minorities. [24]

Stone applied this principle to another category of suspect legislation: classifications rooted in prejudice. He explained that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." [25] This reasoning laid the foundation for the tiered scrutiny framework that turns on the group or class affected by the law.

Courts now review equal protection cases using three levels of scrutiny. These levels are, in order of severity, strict scrutiny, heightened (or intermediate) scrutiny, and rational basis review. [26] This section will review the development of strict scrutiny and heightened scrutiny and discuss their applications to the transgender class.

III. Strict Scrutiny and Heightened Scrutiny

Strict scrutiny was initially applied to "discrete and insular" minorities. [27] This designation has been applied to suspect classes, which comprise groups that the courts deem likely to face unequal treatment based on their identity. Historically, courts have designated non-white racial groups as a suspect class. [28] If a law succeeds under the muster of strict scrutiny, it means that the Court has reviewed the law using strict scrutiny and determined that there is no violation of the Equal Protection Clause. For a statute to succeed under strict scrutiny, it must advance a compelling government interest, be necessary to advance that interest, and be the least restrictive, effective means to advance that interest. [29] A compelling government interest could be public safety, as seen in *Railway Express,* or other factors

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[24] United States v. Carolene Products Co., 304 U.S. 144 (1938).
[25] *Id.*
[26] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 699 (5th ed. 2015).
[27] Carolene *supra* note 1.
[28] Loving v. Virginia, 388 U.S. 1 (1967).
[29] R. Randall Kelso, *Clarifying the Four Kinds of 'Exacting Scrutiny' Used in Current Supreme Court Doctrine*, 127 Penn St. L. Rev. 375 (2023).

such as public health and economic welfare. [30]

The Supreme Court has developed the components of strict scrutiny review since the Equal Protection Clause's inception. One of the early cases evaluating if a law violated the Equal Protection Clause was *Strauder v. West Virginia* (1880). In 1879, an all-white jury found Taylor Strauder, a Black man, guilty of murder. At the time, West Virginia had a statute banning Black Americans from serving on a jury. Strauder challenged the constitutionality of this statute. [31] Justice Strong argued that the purpose of the Fourteenth Amendment was to secure Black Americans with the rights white Americans had always enjoyed. In his majority opinion, Justice Strong reasoned:

> That the West Virginia statute…is such a discrimination ought not to be doubted. Nor would it be if the persons excluded by it were white men…The very fact that colored people are singled out and expressly denied by a statute all right to participate in the administration of the law, as jurors, because of their color…is practically a brand upon them affixed by the law, an assertion of their inferiority, and a stimulant to that race prejudice which is an impediment to securing to individuals of the race that equal justice which the law aims to secure to all others. [32]

Strong's reasoning echoes Stone's footnote: the purpose of a law, when regulating a group that cannot protect itself through the traditional political process, should be thoroughly scrutinized. Strong recognized that the purpose of the law was "discrimination because of race or color," which he reasoned was not a legitimate state interest. He notes that had the state regulated jury service based on neutral criteria, such as education, age, or other qualifications, the law might have withstood scrutiny; discrimination based solely on race could not. [33]

Strong's vague scrutiny of the intent and purpose of laws regulating discrete and insular groups began to take shape under the Warren Court. In *Loving v. Virginia*, the Court held that bans on

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[30] Stephen E. Gottlieb, *Compelling Governmental Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 86 B.U. L. REV. 917 (1988).
[31] Strauder *supra* note 1.
[32] *Id.* at 100.
[33] *Id.*

interracial marriage were unconstitutional. [34] The statute could not stand under judicial scrutiny because there was no "legitimate overriding purpose independent of invidious racial discrimination which justifies this classification." This case supported the necessity of a non-discriminatory purpose for laws directed at a racial group and reaffirmed that restricting citizens' rights based on race violated equal protection. [35]

Another case involving discrimination against a Black American upheld *Loving* and identified a compelling state interest. In *Palmore v. Sidoti*, a white mother and father divorced and entered into a custody battle for their child. Initially, the mother won the custody case. After the mother remarried a Black man, the Florida state court awarded custody of the child to the biological father. The court argued it was in "the best interest" of the child, as she would face social stigmatization in an interracial household. The Supreme Court unanimously reversed the ruling. [36] Chief Justice Burger noted that this case was based on race, as the outcome would have been different if the adoptive father had been a white male. Following strict scrutiny, Burger asserted that determining custody based on the best interest of a child was a compelling state interest:

> The State, of course, has a duty of the highest order to protect the interests of minor children, particularly those of tender years. In common with most states, Florida law mandates that custody determinations be made in the best interests of the children involved…The goal of granting custody based on the best interests of the child is indisputably a substantial governmental interest for purposes of the Equal Protection Clause. [37]

However, the Court disagreed with the state's method of advancing this interest. Burger concluded that possible injury brought on by private biases are impermissible considerations to warrant the removal

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[34] Loving v. Virginia, 388 U.S. 1 (1967).
[35] *Id.* at 11-12.
[36] NOAH R. FELDMAN & KATHLEEN M. SULLIVAN, CONSTITUTIONAL LAW (21 ed. 2022).
[37] Palmore *supra* note 1.

of a child from the custody of their mother. [38] He reaffirmed that unequal treatment due to one's race violated the Equal Protection Clause, even in pursuit of protecting a minor.

Though the Equal Protection Clause was initially applied to instances of racial discrimination, it has since evolved to protect other groups. Suspect classes have grown to include nationality and alienage. In *Oyama v. California* (1948), the Supreme Court struck down the California Alien Land Law, which prevented people who were ineligible for U.S. citizenship from selling, buying, or leasing farmland. [39] In this case, a non-citizen, Kajiro Oyamo, purchased land and deeded it to his citizen son, Fred. The state seized the land and assumed that Kajiro was attempting to evade the California Alien Land Law. Applying the reasoning used in *Strauder*, the Court argued that, had Fred's father been a citizen, they would have viewed the land purchase as a gift, rather than a form of evasion. Therefore, the state could not deprive Fred of his property because of a rationale based on citizenship status. Chief Justice Vinson highlighted the tension between state interests and Equal Protection rights:

> This case presents a conflict between the State's right to formulate a policy of landholding within its bounds and the right of American citizens to own land anywhere in the United States. When these two rights clash, the rights of a citizen may not be subordinated merely because of his father's country of origin.[40]

Similarly to *Strauder* and *Palmore*, Vinson reasoned that even if a state action were to further legitimate state interest, the action cannot be rooted in discrimination based on one's suspect class.

Noncitizens were reaffirmed as a suspect class in *Graham v. Richardson* (1971). The Court held that withholding welfare benefits from noncitizens violated the Equal Protection Clause. [41] Justice Blackmun reaffirmed *Oyama*, ruling that "aliens" were a prime example of a discrete and insular minority. Consequently, regulating

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[38] *Id.*
[39] Oyama v. California, 332 U.S. 633 (1948).
[40] *Id.* at 332.
[41] Graham v. Richardson, 403 U.S. 365 (1971).

the group should be subjected to strict scrutiny. [42] Upon review, Blackmun held that denying people welfare based on their non-citizen classification to promote the state's "special public interest" in providing benefits to "citizens over aliens" was an inadequate justification for the Pennsylvania law. [43]

Though the Equal Protection Clause had been developed to protect racial minorities and non-citizens, the courts grew to recognize more groups that faced discrimination at the hands of legislatures. For decades, the Court reviewed laws pertaining to sexual orientation by applying substantive due process principles. Through this reasoning, the Court reviewed LGBTQ+ rights through their relation to the fundamental right to privacy, derived from personal protections stated in the First, Third, Fourth, Fifth, and Ninth Amendments. However, in 1996, the Court reviewed an Equal Protection violation concerning the LGBTQ+ community. During this time, Colorado passed a number of laws banning discrimination based on sexual orientation in employment, education, housing, health and welfare services, and more. In response, Colorado voters adopted "Amendment 2" by a statewide referendum. [44] The amendment to the state constitution precludes ordinances designed to protect the status of lesbian, gay, and bisexual (LGB) people based on their sexual orientation and banned future creation of all such laws. [45] In the case of *Romer v. Evans*, the Colorado Supreme Court and lower trial court chose to review the ordinance using strict scrutiny in protection of the LGB class, finding that Amendment 2 violated equal protection. The Supreme Court applied rational basis review. Justice Kennedy did not discuss his reasoning for selecting this method over strict scrutiny. Rather, he focused on how the statute violated the Equal Protection Clause because it denied a class from accessing judicial functions:

> Amendment 2 goes well beyond merely depriving [LGB people] of special rights. It imposes a broad disability upon those persons alone, forbidding them, but no others, to seek specific legal protection from injuries caused by discrimination

[42] *Id.* at 372, 403.
[43] *Id.* at 372-4.
[44] Romer v. Evans, 517 U.S. 620 (1996)
[45] *Id.*

> in a wide range of public and private transactions…This disqualification of a class of persons from the right to obtain specific protection from the law is unprecedented and is itself a denial of equal protection in the most literal sense. [46]

Justice Kennedy proceeded to apply rational basis review, recognizing two government interests in the creation of this law. Firstly, the state aimed to preserve resources to combat discrimination against other groups. Secondly, the state intended to respect other citizens' "freedom of association," particularly employers or landlords with religious or personal objections to homosexuality. [47] Justice Kennedy argued that the sheer breadth of the law was so far removed from these objectives that they could not be considered an explanation or a justification. In other words, the amendment was not "directed to an identifiable purpose or discrete objective." For Kennedy, this was cause to infer that the law was created out of animosity towards the class it is regulating: LGB people. He re-asserted that status-based classifications not relating to a state interest violate the Equal Protection Clause. [48]

Though the Rehnquist Court applied rational basis review to classification based on sexual orientation, the succeeding Roberts Court recognized LGB people as a class that was more likely to face legal discrimination. As such, the Court designated the LGB identity as a suspect classification, applying intermediate scrutiny rather than strict scrutiny. [49] This classification was granted after the Defense of Marriage Act (DOMA), which Congress passed in 1996. This act amended the federal judicial code to provide that "no State, territory, or possession of the United States or Indian tribe shall be required to give effect to any marriage between persons of the same sex under the laws of any other such jurisdiction or to any right or claim arising from such relationship." Furthermore, the law established the federal definitions of marriage and spouse to describe unions between one man and one woman. [50] In 2012, the Roberts Court reviewed DOMA.

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[46] *Id.* at 621.
[47] Romer *supra* note 1.
[48] *Id.*
[49] Reed *supra* note 1.
[50] Defense of Marriage Act (DOMA) § 3, 1 U.S.C. § 7 (1996).

[51] The law was challenged by Thea Spyer. Thea and Edith Windsor were married in Ontario, Canada. After her wife's death, Thea was denied federal estate tax exemption for surviving spouses, as Edith was not recognized as a spouse under federal law. During Obama's presidency, the Attorney General informed the Speaker of the House that the Department of Justice would cease defense of the constitutionality of DOMA. The Attorney General also notified Congress that "the President has concluded that 'given a number of factors, including a documented history of discrimination, classifications based on sexual orientation should be subject to a heightened standard of scrutiny.'" [52] In this review, Justice Kennedy was critical of the state's purported interest in creating a class-based law. Though the federal government argued the purpose of the law was government efficiency, the Court identified the principal purpose to be identifying the class of married, same-sex couples and making them unequal to heterosexual couples. [53] In effect, DOMA, in denying their equal protection rights, detracts from the dignity and integrity of the suspect class. Furthermore, the act prevents the suspect class from obtaining government healthcare benefits, monetary domestic support benefits, criminal punishments for crimes against immediate family members, and more. [54] The Court asserted that the equal protection guarantee "must at the very least mean that a bare congressional desire to harm a politically unpopular group cannot" justify disparate treatment of that group. The Court further examines the incongruency of constitutional rights afforded to the LGB class at the state and federal level:

> DOMA's principal effect is to identify a subset of state-sanctioned marriages and make them unequal. The principal purpose is to impose inequality, not for other reasons like governmental efficiency. Responsibilities, as well as rights, enhance the dignity and integrity of the person. And DOMA contrives to deprive some couples married under the laws of their State, but not other couples, of both rights and

[51] United States v. Windsor, 570 U.S. 744 (2013)
[52] *Id.*
[53] *Id.*
[54] *Id*.

> responsibilities. By creating two contradictory marriage regimes within the same State, DOMA forces same-sex couples to live as married for the purpose of state law but unmarried for the purpose of federal law, thus diminishing the stability and predictability of basic personal relations the State has found it proper to acknowledge and protect.[55]

In this instance of an LGB rights violation, the Courts protected the supremacy of rights given to the class by the states. Additionally, the Courts applied heightened scrutiny to the Congressional legislation, and determined that a law with the purpose of humiliating and dispensing unequal rights to a suspect group violates the Equal Protection Clause. [56]

IV. Transgender Individuals as a Quasi-Suspect Class

The Court's broadening application of strict and intermediate levels of scrutiny to suspect classes beyond race suggests a potential application to the transgender class. As seen through the development of Equal Protection review, the Supreme Court and lower courts have encountered new classes that may be more likely to face discrimination based on their class. These groups are known as quasi-suspect classes. *Windsor* established criteria for a quasi-suspect class: 1) a shared immutable or distinguishing characteristic; 2) a history of discrimination; and 3) a minority with political powerlessness. [57] When examining the criteria the Supreme Court has developed for suspect and quasi-suspect classes, it is evident that transgender litigants apply.

The first criterion demands the group demonstrate "obvious, immutable, or distinguishing characteristics that define them as a discrete group." [58] Major medical associations and transgender litigants alike have argued that the transgender identity is immutable. The American Medical Association, the American College of Physicians, and 14 additional medical, mental health, and health care

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[55] *Id.*
[56] *Id.*
[57] Katie Eyer, *Transgender Constitutional Law*, 171 U. Pa. L. Rev. 1428 (2022).
[58] Bowen v. Gilliard, 483 U.S. 587 (1987).

organizations submitted *amici curiae* briefs contending that "every person has a gender identity, which cannot be altered voluntarily or necessarily ascertained immediately after birth." [59] Someone's gender identity can be cisgender, meaning that they align with the gender assigned to them at birth, or transgender, meaning their gender does not align with the gender assigned to them at birth. Just as an LGB person cannot choose to be heterosexual, a transgender person cannot choose to be cisgender. As the American Medical Association explains, biological factors, such as prenatal hormone levels and genetic influences, contribute to the transgender identity. Early, adolescent, and adult experiences may also contribute to a transgender identity. [60] Lower courts have weighted *amici curiae* medical briefs from these associations and concluded that transgender people meet the criterion of immutable characteristics. [61] According to *Grimm v. Gloucester County School Board*:

> Transgender people constitute a discrete group with immutable characteristics: Recall that gender identity is formulated for most people at a very early age, and, as our medical amici explain, being transgender is not a choice. Rather, it is as natural and immutable as being cisgender. But unlike being cisgender, being transgender marks the group for different treatment. [62]

Moreover, a Maryland District Court reasons that the transgender class fulfills the "distinguishing characteristics" component of this criterion because as all transgender people have a gender identity that does not align with the gender they were assigned at birth. [63]

Evaluating the second criterion, a variety of social and economic metrics shows the transgender class has experienced a history of discrimination. 70% of transgender employees have reported

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[59] Colt Meier & Julie Harris, Am. Psychol. Ass'n, *Fact Sheet: Gender Diversity and Transgender Identity in Children* 1.
[60] Jason Rafferty, *Gender Identity Development in Children*, AMERICAN ACADEMY OF PEDIATRICS (May 7, 2024), https://www.healthychildren.org/English/ages-stages/gradeschool/Pages/Gender-Identity-and-Gender-Confusion-In-Children.aspx.
[61] Eyer *supra* note 48.
[62] Grimm v. Gloucester County School Board, No. 19-1952 (4th Cir. 2020).
[63] M.A.B. v. Bd. of Educ. of Talbot Cnty., 286 F. Supp. 3d 704, 721 (D. Md. 2018)

experiencing a form of employment discrimination relating to their gender identity. [64] As a class, transgender people are economically disadvantaged. 60% of transgender workers make less than $50,000 a year. [65] In addition to economic instability, transgender individuals are more likely to face housing instability than cisgender individuals. 63% of transgender people are unsheltered. Comparatively, 49% of cisgender people are unsheltered. [66] The transgender class also experiences violence at a higher rate than cisgender people. [67] In many instances, the violence against transgender people is discriminatory, and committed against the class on the basis of their identity. In the United States, the number of transgender people who were murdered nearly doubled between 2017 and 2021. [68] Out of the 932 anti-LGBTQ+ incidents that occurred from May 2024 to May 2025, 52% were specifically targeting transgender people. These instances of violence consisted of 26 injuries and one death. [69]

Given the employment discrimination, economic disadvantage, and identity-based violence experienced by the class, it could be reasonably concluded that transgender individuals have faced substantial discrimination. Lower courts affirm this conclusion. [70] The Fourth Circuit Court in *Grimm* recognized that "there is no doubt that transgender individuals historically have been subjected to discrimination on the basis of their gender identity, including high rates of violence and discrimination in education, employment,

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[64] Brad Sears et al., *Workplace Experiences of Transgender Employees*, UCLA SCHOOL OF LAW (Nov. 2024), https://williamsinstitute.law.ucla.edu/publications/transgender-workplace-discrim/.
[65] *Id.*
[66] *Trans and Gender Non-Conforming Homelessness*, NATIONAL ALLIANCE TO END HOMELESSNESS (July 2020), https://endhomelessness.org/resources/research-and-analysis/trans-and-gender-non-conforming-homelessness/.
[67] Andrew R. Flores et al., *Gender Identity Disparities in Criminal Victimization: National Crime Victimization Survey, 2017–2018*, 111 AM J PUBLIC HEALTH 726 (2021), https://ajph.aphapublications.org/doi/full/10.2105/AJPH.2020.306099.
[68] *Hate Crime Statistics*, FEDERAL BUREAU OF INVESTIGATION (2024), https://www.fbi.gov/how-we-can-help-you/more-fbi-services-and-information/ucr/hate-crime.
[69] *GLAAD ALERT Desk Data Shows Dramatic Rise in Anti-Trans Hate Incidents*, (June 2, 2025), https://glaad.org/glaad-alert-desk-data-shows-dramatic-rise-in-anti-trans-hate-incidents/.
[70] Eyer *supra* note 48.

housing, and healthcare access." [71] Similarly, the U.S. District Court for the Western District of Wisconsin emphasized that "other than certain races," few groups have been "more discriminated against historically or otherwise more deserving of the application of heightened scrutiny when singled out for adverse treatment," than transgender people. [72] In *Whitaker v. Kenosha Unified School District*, the Seventh Circuit Court called attention to the alarming nature of the discrimination faced by transgender youth, citing a report by the National Center for Transgender Equality: 78% of students who identify as transgender or as gender non-conformant, report being harassed while in grades K-12. [73] These same individuals in K-12 also reported an alarming rate of assault, with 35% reporting physical assault and 12% reporting sexual assault. As a result, 15% of transgender and gender non-conformant students surveyed made the decision to drop out. [74] Given these rulings, lower courts have affirmed that the transgender class meets the second criterion designating a quasi-suspect class.

Looking towards the fourth criterion, the transgender class is politically powerless. The Supreme Court has set a standard for determining political powerlessness for minority groups. As discussed previously, Justice Stone's Footnote Four reasons that "discrete and insular minorities" should be protected by strict or heightened scrutiny. Moreover, he describes how groups facing barriers to participating in the political process warrant special protection. [75] Transgender people have recently confronted laws suppressing their participation in the political process. Currently, thirty-five states request or require voters to show their voter ID. [76] This acts as a barrier for transgender individuals who do not have identification that reflects their gender

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[71] Grimm *supra* note 1.
[72] Flack v. Wis. Dep't of Health Servs., 328 F. Supp. 3d 931, 953 (W.D. Wis. 2018).
[73] Jaime M. Grant et al., Injustice at Every Turn: A Report of the National Transgender Discrimination Survey 33 (2011), National Center for Transgender Equality, http://www.transequality.org/sites/default/files/docs/resources/NTDS_Report.pdf.
[74] *Id.*
[75] Carolene *supra* note 2.
[76] *Democracy Maps | Voter Identification Requirements for In-Person Voting*, https://www.mapresearch.org/democracy-maps/in_person_voting.

identity or legal name change. [77] The hurdle is made more significant in light of Trump's Executive Order 14168, which requires that all government-issued ID documents, including passports, visas, and Global entry cards, reflect a person's gender assigned at birth. According to the Williams Institute at the UCLA School of Law:

> There are an estimated 878,300 voting-eligible transgender adults in the U.S. and about 414,000 of them live in 31 states that conduct their elections primarily in person at the polls and also have laws that require or request that voters show some form of ID…Of the[se] eligible trans voters in those 31 states, about 203,700 of them don't have IDs that reflect their gender identities and the names they go by, and 64,800 of them live in states with the strictest voter ID laws, where photo IDs are required with few or no alternatives available. [78] [79]

Legally, gender discrepancies on ID are not valid reasons to deny ballet access. Different makeup, hairstyle, or clothing on a photo ID is also not a valid reason to deny a regular ballot.[80] However, the Brennan Center for Justice describes the lingering effect on transgender people despite this:

> In just the past few years, numerous transgender voters have been harassed or challenged at the polls because their gender expression or name differs from the ID presented to poll workers. This kind of harassment has a chilling effect on all transgender and nonbinary voters and increases the fear of being targeted, outed, or challenged at the polls, which serves

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[77] Jo Yurcaba, *Over 200,000 Trans People Could Face Voting Restrictions Because of State ID Laws*, NBC NEWS (Nov. 1, 2022), https://www.nbcnews.com/nbc-out/out-politics-and-policy/200000-trans-people-face-voting-restrictions-state-id-laws-rcna52853.

[78] Kathryn K. O'Neill, *The Potential Impact of Voter Identification Laws on Transgender Voters in the 2022 General Election*, (2022), https://williamsinstitute.law.ucla.edu/wp-content/uploads/Trans-Voter-ID-Sep-2022.pdf.

[79] Yurcaba *supra* note 1.

[80] *Voting While Trans: Preparing for Voter ID Laws*, ADVOCATES FOR TRANS EQUALITY, https://transequality.org/resources/voting-while-trans-preparing-voter-id-laws.

to further suppress the power of their communities. [81]

Though not inherently directed to the transgender class, voter ID laws disproportionately affect transgender individuals. Similar to voter suppression laws disproportionately affecting the Black community, such as grandfather clauses, poll taxes, and literacy tests, voter ID laws have substantially impacted transgender voter access. [82] This acts as a barrier to the political process, weakening the political power of the quasi-suspect class.

State courts have regularly found that the transgender class is a minority with less political power than cisgender people. [83] In *Evancho v. Pine-Richland School District,* a Pennsylvania District Court held that to fulfill the fourth critereon, the class must be "a minority or politically powerless," ruling that the transgender class fulfilled this because they made up such a small percentage of the American population. [84] Transgender people are undoubtedly a minority in the U.S., with only 0.5% of adults and 1.4% of young people identifying as transgender. [85] Comparatively, a Maryland U.S. District Court had a higher standard for this criterion, focusing on the "politically powerless" aspect. This state court ruled that the group is politically powerless for two key reasons. [86] First, courts have had to block enforcement of policies approved by the federal government or laws passed by state legislatures because they violated the rights of transgender individuals. [87] Second, there is a profound lack of transgender representatives in state legislatures, and no transgender

[81] Stuart Baum, Izabela Tringali & Mikael Morelión, *How Voter ID Laws Threaten Transgender Voters*, BRENNAN CENTER FOR JUSTICE (Nov. 20, 2020), https://www.brennancenter.org/our-work/analysis-opinion/how-voter-id-laws-threaten-transgender-voters.
[82] *Black Americans and the Vote*, NATIONAL ARCHIVES (Oct. 7, 2020), https://www.archives.gov/research/african-americans/vote.
[83] *Eyer* supra note 48.
[84] Evancho v. Pine-Richland School Dist., 237 F. Supp. 3d 267 - Dist. Court, WD Pennsylvania (2017).
[85] Sears *supra* note 1.
[86] M.A.B. *supra* note 1.
[87] Stone v. Trump, 280 F. Supp. 3d 747 , 752 (Nov 21, 2017).

members of the US Congress or the federal judiciary. [88] An Ohio US district court also ruled that "transgender people constitute a minority lacking in political power." [89] According to state courts, the transgender class possesses political powerlessness, fulfilling the third and final criterion.

Lower courts have recognized that the transgender class is immutable, has faced a history of discrimination, and is a minority with political powerlessness. As such, the group should be designated a quasi-suspect class. This is supported by the Maryland U.S. District Court, which ruled that transgender individuals are per se entitled to quasi-suspect class. [90] With a quasi-suspect class status, laws regulating the group should be reviewed with strict or heightened scrutiny.

V. Reviewing SB 1 With Strict Scrutiny

Transgender litigants and the American Civil Liberties Union consider the recent bans on gender-affirming healthcare to be a violation of Equal Protection. In the case of *U.S. v. Skrmetti*, the Supreme Court reviewed Tennessee Senate Bill 1. According to the statute: A healthcare provider shall not perform or offer to perform on a minor, or administer or offer to administer to a minor a medical procedure if the performance or administration of the procedure is for the purpose of : 1) enabling a minor to identify with, or live as, a purported identity inconsistent with the minor's sex; or 2) treating purported discomfort or distress from a discordance between the minor's sex and asserted identity. [91] The bill refers to the following as medical procedures: 1) surgically removing, modifying, altering, or entering into tissues, cavities, or organs of a human being; or 2) prescribing, administering, or dispensing any drug or device to a human being. [92]

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[88] Maggie Astor, *Danica Roem Wins Virginia Race, Breaking a Barrier for Transgender People*, THE NEW YORK TIMES COMPANY, Nov. 7, 2017, https://www.nytimes.com/2017/11/07/us/danica-roem-virginia-transgender.html.
[89] Ray v. McCloud, 507 F. Supp. 3d 925, 937 (S.D. Ohio 2020).
[90] Astor *supra* note 1.
[91] Tenn. Code § 68-33-103 (2024).
[92] *Id.*

However, doctors may perform these medical procedures "to treat a minor's congenital defect, disease, or physical injury." The bill specifies that the term "disease" does not apply to gender incongruence, gender identity disorder, or gender dysphoria. [93] The statute has two state interests: 1) protecting the health and welfare of minors; and 2) protecting the integrity and public respect of the medical profession. [94]

Though there is substantial evidence of the transgender group's suspect class status, the statute can be examined further to determine if discrimination is present within the legislation. For each equal protection case discussed, the Supreme Court evaluated if the statute's purpose was discriminatory. The court determined this by posing the following question: is someone outside of the suspect class given the same rights and privileges? For example, *Strauder* concluded that if white men, rather than black men, were banned from sitting on a jury, it would be undoubtedly discriminatory. Similarly, *Palmore* reasoned that if the adoptive father had been a white man, rather than a black man, the custody of the child would not have been questioned. Furthermore, in the case of *Oyama*, if the man inheriting the land was a citizen, rather than an alien, he would not face legal prejudice. Finally, in *Windsor*, if the married couple had been heterosexual, rather than homosexual, they would have received healthcare benefits, monetary domestic support benefits, and more.

The same reasoning can be applied reviewing SB 1. If the child was cisgender, rather than transgender, could they receive the medical procedures to meet all of their healthcare needs? The answer is yes, cisgender children can receive medical treatments for all of their healthcare needs. As the law specifies, cisgender minors can receive treatments for physical injuries, congenital defects, or diseases. While transgender minors can receive treatments for these same reasons, the quasi-class has additional healthcare needs, such as treating purported discomfort or distress from a discordance between the minor's sex and asserted identity. These additional needs are explicitly denied to them based on their transgender identity. Furthermore, under this law, a

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93 *Id.*
94 *Id.*

cisgender minor may receive a mastectomy for breast cancer, but may not receive the same procedure as gender-affirming healthcare. The only difference in the provision of care is that the purpose is rooted in the transgender identity. Following this reasoning, the Senate bill should be considered discriminatory.

Given the bill's discriminatory nature and lower court consensus on the transgender's suspect class designation, it should be reviewed with strict scrutiny. The state's primary interest in protecting the welfare and health of minors is compelling. Health and welfare have long been compelling government interests, as they are integral to the success and function of the state. However, the measures taken by the Senate bill are not necessary to advance this state interest; in fact, they are harmful and reductive. Senate Bill 2 detracts, rather than advances these governmental interests. As discussed, the AMA argued that the medical procedures banned by this law are medically necessary for transgender youth, and their removal can negatively impact their health and welfare. Thus, the AMA is strongly opposed to Senate Bill 1. Furthermore, the World Health Organization argues that these medical procedures help to improve transgender youths' emotional state. Over 20 U.S. medical groups support accessible gender-affirming care for minors, many of which have authored amicus briefs against the state bans. [95] Many state courts agreed with the arguments made by these medical associations. For example, the U.S. District Court for the Eastern District of Arkansas permanently blocked a similar law prohibiting gender-affirming care to minors because "decades of clinical experience have shown that adolescents with gender dysphoria experience significant positive benefits to their health and well-being from gender-affirming medical care." [96] Similar arguments were seen in Idaho, Missouri, Montana, and Texas. [97]

The state's secondary goal of protecting the integrity and public respect of the medical profession is also a compelling governmental interest. The public respect of the medical profession may be integral to maintaining a state's healthcare system. However,

[95] Weiner *supra* note 1.
[96] Brandt v. Rutledge 677 F. Supp. 3d 877 (E.D. Ark. 2023)
[97] Movement Advancement Project *supra* note 5.

Senate Bill 2 is not necessary to advance this interest. Many doctors specialize in providing gender-affirming healthcare to transgender people. This law disrespects these doctors. Furthermore, it will radically alter the healthcare field. According to the Journal of the American Healthcare Association, "seventy clinics, representing one-fourth of the 271 specializing in gender-affirming care in the 20 states that have enacted restrictions, have closed since the bans began in 2021." [98]

While public respect for the medical profession is compelling, respect for the medical profession must be maintained first and foremost. As discussed, the AMA argued to governors that legislation like Senate Bill 1 is an intrusion into the patient-physician relationship and impedes the ethical duty of doctors to act in their patients' best interest. If doctors are no longer able to perform their ethical duties, public respect for the practice will be lost. The medical practice of providing gender-affirming medical care to transgender youth may cease to exist in states with similar laws. Thus, the legislation fails under strict scrutiny in multiple ways and should be considered a violation of the Equal Protection Clause.

Though the legislation fails under strict scrutiny, further conclusions can be drawn from equal protection jurisprudence. *Palmore* held that states have the "duty of the highest order to protect the interests of minor children, particularly those of tender years." [99] While legal scholars and lower courts have argued that legislation banning gender-affirming care for minors does not protect transgender minors, this Court precedent lends itself to alternative interpretations. The primary state interest is aligned with that of *Palmore*, and a strict scrutiny review could rest on an interpretation of medical literature regarding the effects of gender affirming care for minors.

The Court's interpretation of *Windsor* also has significant applications for SB 1 review. In the *Windsor* opinion, the Court rejected the state interests of the statute and ruled that the true purpose was to impose inequality. The opinion emphasizes the effects of the

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[98] Luca Borah et al., *State Restrictions and Geographic Access to Gender-Affirming Care for Transgender Youth*, 330 JAMA 375 (2023), https://jamanetwork.com/journals/jama/fullarticle/2807578.
[99] Palmore v. Sidoti, 466 U.S. 429 (1984).

law, rather than analyzing the compelling nature of the government interest or the statute's ability to advance the interests. If the same reasoning were applied to SB 1, it could be argued that the true purpose was to deny healthcare to a suspect or quasi-suspect class. Focusing on the effects of the law, the Court should look to the potential of negative physical health and mental health consequences, including self-harm and loss of life. [100]

A potential area that warrants further discussion is the alternative applications of scrutiny to equal protection cases. Heightened scrutiny is also applied in cases of gender-based discrimination. As the transgender identity is considered a gender, transgender discrimination could be examined as an extension of sex discrimination. Under this jurisprudence, the transgender class would be granted heightened scrutiny. As a result, an examination of gender-based discrimination cases may provide additional avenues for constitutional protection for transgender individuals. Due process jurisprudence is another area that could provide substantial constitutional protections for the transgender class. Examining the constitutionality of SB 1 through substantive due process, the law could be found to violate the right to privacy, parental rights, and more.

VI. US v. Skrmetti

In *US v. Skrmetti*, the Supreme Court heard arguments pertaining to the constitutionality of SB 1. Chief Justice Roberts authored the majority opinion, joined by Thomas, Gorsuch, Kavanaugh, Barrett, and Alito in part. Roberts began by reassuring that the Equal Protection Clause "must coexist with the practical necessity that most legislation classifies for one purpose or another, with resulting disadvantage to various groups or persons." [101] He reaffirmed the three tiers of scrutiny and stated the classes he attributed to each. According to Roberts, laws classifying based on race, alienage or national origin warrant strict scrutiny. Laws

[100] Brandt *supra* note 1, at 89.
[101] Skrmetti *supra* note 1.

classifying based on sex are subjected to intermediate scrutiny. Laws that "neither burden a fundamental right nor target a suspect class" are reviewed with rational basis.[102] The Chief Justice made no reference to rulings regarding the same-sex marriage class or the LGBTQ+ class in this area of his discussion.

After his discussion on the levels of scrutiny, Roberts analyzed the class that SB 1 regulates. He argued that the law does not classify on the basis of transgender status, but rather incorporates two classifications: one based on age (allowing certain medical treatments for adults but not minors) and another based on medical use (permitting puberty blockers and hormones for minors to treat certain conditions but not to treat gender dysphoria, gender identity disorder, or gender incongruence)." [103] Roberts reaffirmed that classifications based on age or medical use are subject to rational basis review.

In response to the argument that SB 1 classifies based on sex, Roberts ruled that the law "prohibits healthcare providers from administering puberty blockers or hormones to minors for certain medical uses, regardless of a minor's sex." He disagreed with the notion that the law provided certain healthcare procedures to cisgender minors while withholding them from transgender minors. Instead, Roberts asserted that minors of any gender could receive these healthcare treatments, so long as they were not used to treat gender gender dysphoria, gender identity disorder, or gender incongruence. In response to the argument that SB 1 classifies based on transgender status, Roberts determined that the law divided people into two groups: minors seeking puberty blockers or hormones to treat the excluded diagnoses, and minors seeking these same treatments for other conditions. According to Roberts:

> While the first group includes only transgender individuals, the second encompasses both transgender and nontransgender individuals. Thus, although only transgender individuals seek treatment for gender dysphoria, gender identity disorder, and gender incongruence…there is a "lack of identity" between transgender status and the excluded diagnoses.[104]

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[102] *Id.*
[103] *Id.*
[104] *Id.*

Essentially, Roberts argues that because transgender minors could receive puberty blockers or hormones to treat a non-excluded diagnoses, such as precocious puberty, the law is not discriminatory against transgender minors. Roberts also disagreed with the notion that the law was discriminatory in nature, arguing that bans on gender-affirming healthcare for transgender minors were not "pretexts designed to effect invidious discrimination against transgender individuals." [105]

After determining the classifications that SB 1 was regulating, Justice Roberts applied rational review. For this review, the law must first prove to not burden a fundamental right or target a fundamental class. The Court made no mention of the right to privacy or parental rights. Roberts asserted that "sexual orientation claims have been evaluated in the equal protection context for decades." On the discussion of class, Justice Roberts states that the Court has not previously ruled on transgender people belonging to a protected class. Furthermore, he held that the question of transgender people receiving the designation of suspect or quasi-suspect class designation was irrelevant in the case of SB 1 (as it did not classify based on transgender status). For rational review, the court will uphold the law as long as there is "any reasonably conceivable state of facts that could provide a rational basis for the classification." On this, Chief Justice Roberts reasons that Tennessee determined that administering puberty blockers or hormones to minors to treat gender dysphoria, gender identity disorder, or gender incongruence carries risks, including irreversible sterility, increased risk of disease and illness, and adverse psychological consequences. The legislature found that minors lack the maturity to fully understand these consequences, that many individuals have expressed regret for undergoing such treatments as minors, and that the full effects of such treatments may not yet be known. At the same time, the State noted evidence that discordance between sex and gender can be resolved through less invasive approaches. SB1's age- and diagnosis-based classifications are rationally related to these findings and the State's objective of protecting minors' health and welfare. The Opinion does not determine

[105] *Id.*

the scientific debates concerning the efficacy and safety of gender-affirming care. Justice Roberts argues that the Courts should have a limited reach once an equal protection guarantee is concluded. According to the Chief Justice, the Court's role is not "to judge the wisdom, fairness, or logic" of SB 1. This reasoning reaffirms the limitations of rational basis review, as this application rests on the assumption that the law is not discriminatory.

VII. Conclusion

The transgender class should be considered a quasi-suspect class. This is supported by medical associations, legal scholars, and qualitative and quantitative data illuminating the lived experiences of transgender people. As discussed, the Supreme Court established three criteria for a suspect or quasi-suspect class: 1) a shared "immutable or distinguishing characteristic;" 2) a history of discrimination; and 3) a minority with political powerlessness. The transgender class fulfills each of these criteria. The first criterion is supported by the American Medical Association and recent state court rulings. Both argue that one's gender identity is formed by early life experiences. The class's immutability further supports the idea that transgender people can be regulated, and potentially discriminated against, as a group. The second criterion is supported by data showing discrimination in a variety of sectors, including employment discrimination, economic instability, homelessness, and violence. The Fourth Circuit Court, Seventh Circuit Court, and U.S. District Court for the Western District of Wisconsin ruled that, beyond doubt, the transgender class has been subjected to a history of discrimination. The third and final criterion is supported by population data and the political realities facing the transgender community. U.S. demographics show that the transgender class is made up of less than one percent of the total population. Due to voter ID laws, the transgender community faces a barrier to political participation. As a result, state and federal governments' refusal to legitimize their identity could discourage thousands of transgender individuals from voting. In addition to voter suppression, the federal government and state legislatures have passed or attempted to pass laws violating the class' constitutional rights. Furthermore, there is an

extreme lack of transgender public officials at the state and federal level. These factors characterize the transgender community as politically powerless. It is likely that the political powerlessness of the transgender community is a factor in the constant regulation of this community, as they cannot protect themselves through traditional democratic means.

The Supreme Court did not address the question of the transgender identity belonging to a suspect or quasi-suspect class. This implies that if a law were to specifically classify on the basis of the transgender identity, it may be subjected to heightened scrutiny. *Skrmetti's* ruling was limited in scope, focusing narrowly on Equal Protection claims and Tennessee's ban. The Court determined that there was no violation of the Equal Protection Clause for SB 1. As a result, no state bans will be struck down. The question of the constitutionality of gender-affirming care bans will now be left up to state constitutions, state courts, and governors. Some lower courts have ruled outright that the transgender class is a suspect class per se and examined state statutes with strict scrutiny. As a result, they struck down laws violating Equal Protection for transgender individuals.

The decision may have implications beyond transgender youth. In future, policies regulating gender-affirming care for transgender adults may be subjected to rational review, rather than strict or heightened scrutiny. If a state is able to provide a "reasonably conceivable state of facts" rationally tied to regulating transgender adults, the law will be permissible under the US Constitution. This is especially troubling given President Trump's recent Executive Order asserting that it is impossible to change one's gender identity assigned at birth and implying that the transgender identity does not exist. State legislatures have passed laws regulating transgender people with increasing frequency every year for the past five years, with no indication of abating. Legal scholars must continue to scrutinize the intent of these laws and investigate their practical effects on the transgender community, parents and allies of transgender youth, and healthcare practitioners.

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Technology Transforms Theory: The Decay of The Marketplace of Ideas in the Digital Age

Sanjay Rajesh

I. Introduction

In 2008 and 2024, the Republican Party had a multi-candidate field in their primaries for the United States presidential election. These primaries featured debates with the candidates, and the levels of controversy surrounding the ideas in the two elections could not have been more different. Some issues mentioned in the 2008 debate were corporate spending, FHA loan requirements, tax cuts, and social security reform[1]. In the 2024 debates, ideas were mentioned included ending the Department of Education, sending the military into Mexico to target cartels, and ending birthright citizenship[2]. Over the past two decades, there has been a clear shift in the types of ideas being debated on the top of the political ticket. Polarization has taken over both ends of the political spectrum, and the willingness to discuss alternative perspectives has dramatically diminished[3]. As a society in which the free exchange of ideas is a defining principle of democracy, it is concerning how terrible our execution is. There are clearly hidden failures in the marketplace of ideas, the vision for our First Amendment ideals, that are disrupting societal progress.

This paper lays out three main flaws within the marketplace of ideas and how the digital age enhanced these issues. Section II defines the marketplace of ideas and how it became integrated into the United States legal system. Covering the ideology through the lens of political

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[1] *This Week: The Republican Presidential Candidates Debate* (ABC television broadcast Aug. 4, 2007), https://www.c-span.org/program/campaign-2008/republican-presidential-candidates-debate/179567.

[2] *The Second Republican Presidential Primary Debate* (FOX Business television broadcast Sep. 27, 2023).

[3] Madeline Marino, *Political Ideology and Closed-Mindedness: The Left and Right Have Become More Alike*, NEVADA TODAY: MEDIA AND SOCIETY (May 24, 2022), https://www.unr.edu/nevada-today/news/2022/political-ideology-closed-mindedness.

philosophers like John Milton and John Stuart Mill, the section then explores the three major Supreme Court cases that associated the marketplace of ideas with the First Amendment. Section III investigates the main reason the marketplace is failing, by comparing it to free market economic theory[4]. After criticizing the ideal of rational thought, the section transitions into three specific criticisms with the marketplace: disinformation, echo chambers, and information overloads. Section IV begins its criticism of the marketplace by focusing on disinformation, commenting on the increased accessibility and new technologies that proliferate its growth. After explaining its negligent value to the free exchange of ideas, the paper compares disinformation to counterfeit money in an economic system to explain how it breaks down the chain of ideas.

Section V addresses the natural conflict between echo chambers and the marketplace, before describing the segmentation of the market itself in economic terms. It then explains the dangerous comfort in echo chambers and describes the social psychology involved with them, including group polarization and confirmation bias. Section VI delves into the conflict between limited time and too many decisions, exploring the ideas of time scarcity and shorter attention spans. Section VII moves on from criticism to explaining the necessity of government action as a solution to these issues, arguing that the marketplace of ideas cannot self-correct. For disinformation, it goes through three possible solutions: government cooperation with social media companies, standardized regulations for AI[5], and Section 230 reform. When discussing echo chambers and information overloads, the paper describes possible top-down solutions[6] to these issues such as government sponsored public broadcasting and

[4] Free market economic theory is the exchange of goods through supply and demand without government interference; *Free Market Definition & Impact on the Economy*, INVESTOPEDIA. (last visited Dec. 15, 2024), https://www.investopedia.com/terms/f/freemarket.asp.

[5] When considering AI regulation, the paper is focused on the use of AI in disinformation and falsehoods.

[6] While this paper is focused on government approaches to these problems, those two specific problems often have individual solutions that are focused on mindfulness and improving social media literacy.

removing administrative burdens, including criticisms and further required research in these approaches. Finally, the paper concludes by considering the benefits of Millian philosophy but argues for required reform to save free speech.

II. Defining the Marketplace

Simply put, the marketplace is the free exchange of ideas, unhindered by external forces, as a method for reaching societal progress[7]. A comparison can be made to an economic marketplace, where different vendors sell goods and services. Each good provides value to the overall system, and these goods are exchanged and spread. The higher quality goods are considered more valuable, and therefore rise to the top of the marketplace, while goods that are low quality are cheaper and considered to be of less value. Vendors selling goods try to match and outcompete each other, phasing out low-quality goods and elevating overall societal progress.

The marketplace has been a key element of individualistic political philosophy since the 15th century. When the British parliament, in a move to restrict dissent, passed the Licensing Order of 1643[8] to allow the government to crack down on opposition, it was viewed as an overreach of state authority. John Milton, who vehemently opposed this bill, wrote the *Areopagitica* in response, arguing for the free exchange of ideas as a powerful antidote against falsity: "Let her and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?"[9]. Milton truly believed in the potency that truth brings, the light that appears as a beacon to progress. Any government crackdown would constitute an infringement on the rights of citizens, an approach Thomas Jefferson took when he

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[7] David Schultz, *Marketplace of Ideas*, THE FREE SPEECH CENTER (Jul. 9, 2024), https://firstamendment.mtsu.edu/article/marketplace-of-ideas/.

[8] An Ordinance for the Regulating of Printing, (1642) | ACTS & ORDS. INTERREGNUM (Eng.).

[9] JOHN MILTON & NICOLAS BARKER, AREOPAGITICA: LONDON (Octavo Corp 1998) (1644).

opposed the Alien and Sedition Acts in America[10]. John Stuart Mill, the father of liberal philosophy, took this approach when he wrote his book *On Liberty,* arguing for an expansive interpretation of how unregulated free speech benefits society[11]. Building on the human desire for freedom, Mill's teachings protect the expression of even the falsest ideas– for without falsity, truth cannot become a dogma in society. Radically altering the debate around expression, Mill's approach has grown into the defining trait of American society, establishing debate and discussion as the deterrent to democratic malpractice.

Given the American ideal of the pursuit of freedom, one of our most valuable commodities, it is not surprising that Mill's approach to expression became popular within the American legal system. The philosophy first took root in *Abrams vs United States* (1919)*[12],* in which two Russian immigrants were prosecuted for publishing and distributing pamphlets that denounced American military operations on Russian soil after the overthrow of the Tsarist regime and also called for a workers' strike to prevent the further production of weapons. While the majority sided with the government in finding that the immigrants violated the Espionage Act, Oliver Wendell Holmes published a fiery dissent arguing that the Act violated the First Amendment[13].

> But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas — that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.

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[10] The Alien and Sedition Acts were a set of bills passed by the Federalists to suppress the voices of their opposition, the Democratic-Republicans; Alien & Sedition Acts, S.596, 5th Cong. (1798).

[11] JOHN STUART MILL, ON LIBERTY (Batoche Books, 2001) (1859).

[12] *Abrams v. United States*, 250 U.S 616 (1919)

[13] *See id.* at 630

Holmes' defense of free speech, specifically the "free trade of ideas," draws expressly from Mill's liberalism and vision for societal progress. Competition acts as the test for ideas to pass and for truth to become accepted, and therefore government action must only be applied when said speech poses a clear and present danger. More than a century after the Alien and Sedition Acts, Holmes introduced Millian liberalism to expand the legal interpretation of the First Amendment and reshape America's freedom of speech forever.

The first time the marketplace of ideas was expressly mentioned in the Supreme Court was in *United States vs. Rumely* (1953)[14], in a concurrence written by Justice Douglas and joined by Justice Black. While the case was focused on viewpoint discrimination and Congressional authority in hearings, Douglas focused on arguing that the law that enabled Congress to hold Rumley in contempt was unconstitutional. Drawing on Mill and Holmes, Justice Douglas clearly defines the protections in the First Amendment as applicable to Rumely, as "this publisher bids for the minds of men in the marketplace of ideas"[15]. Despite the slightly troubling implications of comparing human minds to goods that can be bought and sold,[16] Douglas clearly establishes a link between the economic and philosophical ideas of free trade, enshrining the exact wording of the marketplace of ideas into First Amendment case law[17].

The final case that establishes the marketplace was *Brandenburg vs Ohio* (1969)[18], putting the nail in the coffin for unrestricted government interference with freedom of speech. In *Brandenburg,* a member of the Ku Klux Klan hosted a televised rally where they burned a cross and advocated for violence against minority

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[14] *United States vs. Rumely,* 345 U.S. 41 (1953)

[15] John R Vile, *United States vs. Rumely (1953)*, THE FREE SPEECH CENTER (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/united-states-v-rumely/.

[16] (foreshadowing)

[17] One could wonder if without a capitalist economic system based on free trade, the marketplace of ideas would still have emerged, and if so if it would have been the leading ideological philosophy. Given the deep intertwinement between the two, I'd argue that the modern marketplace of ideas would not exist, but rather a variation of it that better reflects the economic and social system of the society in question.

[18] *Brandenburg v. Ohio*, 395 U.S. 444 (1969)

groups. The Supreme Court took on the case and voted unanimously to reverse his conviction. While doing so, they moved past the "clear and present danger" test[19] proposed in *Schneck v. United States* (1919)[20] and tightened the scope of government interference in free speech to be "immediate and likely lawless action"[21]. While not all the Justices agreed with the protections of speech placed by the court,[22] They still enforced stringent requirements for involvement in the marketplace of ideas, protecting Millian liberalism from government interference and intertwining its fate with the First Amendment.

III. The Problem

Despite the marketplace's relevance in modern society, the overall idea seems to be failing. False news is spreading faster than ever, bad ideas are rising to the top of political party platforms, and unfettered access to information on social media does not seem to be helping.[23] So where does the market go wrong? The unfortunate truth is that the marketplace, so closely related with economic theories of free exchange, has the exact same flaw: it requires rational choices. The core requirement for a functioning exchange of ideas is the ability to make the right decision, to be able to determine whether one choice is better or worse than another, and to decide which is most valuable for the society. For too long, the limitations on behavioral economics have been due to the lack of rational choice in human decision-making, and now the same effect plagues the law when it comes to free speech. The current marketplace is a theoretical ideal that breaks down under practical stress. That stress has been exacerbated through the explosive growth of the digital age. Social media should have been

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[19] *Id*.

[20] *Schenck v. United States*, 249 U.S. 47 (1919)

[21] *Brandenburg*, 395 U.S. 444.

[22] Douglas, who originally wrote in the support of the marketplace of ideas in the *Rumley* concurrence, disagreed with this case due to the lack of full support for first amendment rights.

[23] Gizem Ceylan, *How Social Media Rewards Misinformation*, YALE INSIGHTS (Mar. 31, 2023), https://insights.som.yale.edu/insights/how-social-media-rewards-misinformation.

the key to a Millian utopia, where freedom of information and choice has elevated human progress tenfold. Yet the digital revolution has brought in more of an information dystopia, filled with cabals of misinformers and truth deniers, leaving us wondering where it all went wrong.

There are three key failures, amplified by social media,[24] that caused the marketplace of ideas to break down. First, the accessibility of misinformation has gone up, leading to widespread devaluation of ideas and disruptions in the information economy. Secondly, the market has become segmented and locked into echo chambers, spiraling low-quality ideas out of control and preventing high-quality ones from penetrating the chain. Finally, there is an overload of information and decisions for humans to make, and not nearly enough time to achieve rational choices, breaking down the market at its core. This paper will explore these three concepts as reasons for the current failure in the marketplace, followed by attempts to fix them.

IV. Disinformation Manipulation

The first breakdown of the marketplace comes when false information enters the market. Millian philosophy suggests that any ideas, no matter how false they are, must be protected to ensure that truth emerges victorious.[25] Yet this approach only works if truth can be picked out from the lies, or if false information is exposed. When presented as the truth, however, false information becomes harder to expose. Disinformation– the coordinated spread of false information with malicious intent, weaponizes this information to destabilize the market and, in doing so, degrades the most vital element of the exchange: trust.

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[24] This essay primarily focuses on the role social media plays in this breakdown, as most of these flaws in the marketplace were exposed due to the explosive growth of social media.

[25] Christoph Bezemek, *The Epistemic Neutrality of the Marketplace of Ideas: Milton, Mill, Brandeis, and Holmes on Falsehood and Freedom of Speech*, 14 FIRST AMEND. L. REV. 159 (2015), https://scholarship.law.unc.edu/falr/vol14/iss1/4.

The growing accessibility of false information, especially those intended to maliciously manipulate the public, is exacerbated through social media. Before the rise of the digital age, newspapers and television stations were the main source of information, and they were judged on their credibility. A poorly researched article could destroy trust in the paper and ruin profits, and therefore painstaking efforts were taken to adhere to the norms of factual information. Fast forward to the modern day, and social media has taken over as a major source of American news.[26] Social media acts as more of a town square than it does a news source; it is a platform for individuals to voice thoughts and share information. Social media companies are not held liable for false information posted on their platforms,[27] and if a false post begins to gain traction, it boosts a social media company's profit. Therefore, unlike the newspapers, social media companies actively have disincentives to regulate misinformation on their platforms.

In addition, the accessibility of social media has grown alongside technology that makes it easier to present false information in a more believable way.[28] Editing software, A.I. deepfakes, and misleading data have drastically made disinformation more sophisticated. Milton's vision for a grand battle between truth and falsehood, where truth always reigns supreme, becomes muddier when individuals don't know which side to root for. Disinformation can be compared almost to libel, to which Justice Goldberg in *New York Times Co. v. Sullivan (1964)*[29] says, "It may be urged that deliberately

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[26] Social Media and News Fact Sheet, PEW RESEARCH CENTER, (Sept. 17, 2024), https://www.pewresearch.org/journalism/fact-sheet/social-media-and-news-fact-sheet/.

[27] While there is limited legal liability for not limiting the spread of false information, users could try to leave the website and replace it with another platform, like some liberal Americans attempted with a switch to BlueSky from X; Luca Ittimani, *Bluesky Adds 1m New Members as Users Flee X after the US Election*, THE GUARDIAN (Nov. 13, 2024), https://www.theguardian.com/technology/2024/nov/12/us-election-bluesky-users-flee-x-twitter-trump-musk.

[28] Adam Satariano & Paul Mozur, *The People Onscreen Are Fake. The Disinformation Is Real*, N.Y TIMES (Feb. 7, 2023), https://www.nytimes.com/2023/02/07/technology/artificial-intelligence-training-deepfake.html.

[29] *New York Times Co. v. Sullivan,* 376 U.S. 254 (1964)

and maliciously false statements have no conceivable value as free speech."[30] Disinformation fits into the same category: the information spread is false and is intended to cause harm and deliberately trick people. While speech that is not valuable is still protected under the First Amendment, disinformation's negative impact on the marketplace is worth considering when determining whether it should be regulated or not.

To showcase the extent to which disinformation harms the market, one can return to its economic counterpart. Disinformation in the market can be compared to counterfeit money; a valueless substance intended to destabilize the exchange of goods.[31] Looking at figure 1, assume that the blue circles are true ideas, and the red one is disinformation.

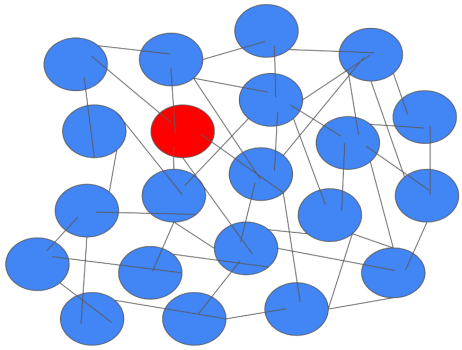


Figure 1:

Disinformation spreads across the market, threatening the exchange as true ideas are replaced with false ones (figure 2).

[30] While the Justice says that one can make this claim, he also does mention that in this specific case, the value of the statement was not as important to the outcome of the case as other factors. Still, this is a key part of the opinion that helps understand what the Court deems to be valuable to the marketplace.

[31] One important distinction should be made between disinformation and counterfeit money. When using counterfeit money, it often isn't the purpose of the counterfeit maker to destabilize the entire market, as it is unlikely that they can print enough money to do that. Instead, the purpose is often to steal a specific good or item for no monetary equivalent. Disinformation, on the other hand, does not intend to steal or take another idea from people. The point of disinformation is to maliciously disrupt the marketplace, to make people buy into the false narrative being pushed. Once people believe this narrative, there is a secondary effect that comes with it (e.g, rallies political support for an issue, scams people into buying a fake product, etc.).

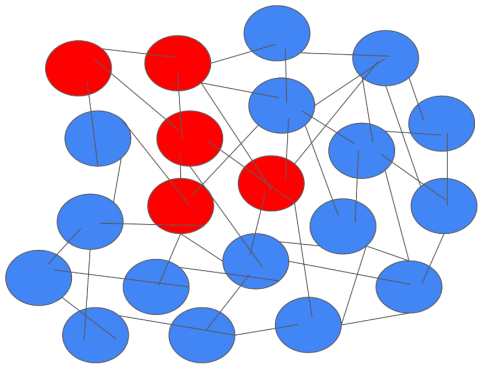


Figure 2[32]:

Then, even if the disinformation is contained, the flow of information stops as trust in the marketplace fails. Therefore, once the disinformation is exposed and trust falls, even information chains between truthful sources break. Trust is eroded, so the lack of faith that truthful information is being exchanged further shuts down the market (figure 3).

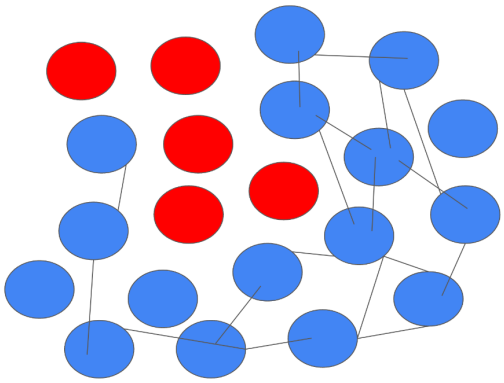


Figure 3:

Disinformation and false information threaten the existence of the exchange of ideas. Lack of trust and unreliable information prevents individuals from making rational decisions, and therefore increases the likelihood that bad ideas rise to the top of the decision-making tree.

[32] In Figure 2, the red misinformation circle spreads and takes over the previously true ideas across the marketplace. Once caught, this causes the link between them to break in Figure 3, and breaks links between previously true ideas (blue circles) that have lost faith in the marketplace.

V. Echo chambers

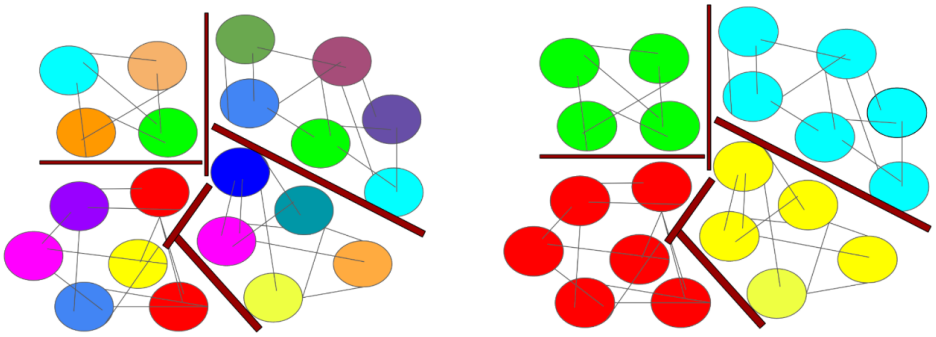
Even when considering only truthful, valuable information, the marketplace of ideas requires individuals to be exposed to holistic information to make rational decisions. Therefore, ideas must be evenly distributed and exposed so individuals can make accurate judgements about them. Yet if only one idea is consistently mentioned to someone, they lose the ability to make an informed decision due to their lack of knowledge. This is the problem with echo chambers. Echo chambers are places where people only interact with ideas that are like their own—reinforcing these ideas and removing alternatives from consideration.

Social media algorithms are designed to create such echo chambers. Companies work to tailor the information their users receive to align with their interests in order to maintain high levels of engagement within their platforms. However, this carries the consequence of algorithms pushing content that can become one-sided, especially when considering political or contentious issues. This creates a positive feedback loop, where individuals become more engaged with a single viewpoint, leading to the algorithm pushing more of that content to improve engagement, continuing the cycle. This method crystallizes the user's prior perspective and diminishes their willingness to accept other ideas as true. This undermines the purpose of the marketplace by removing competition and withholding information from users.

Returning to the economic analogy, echo chambers work like a market that has been segmented overnight[33]. In a market, if walls stop individuals from accessing the entire market—effectively confining them to a single sector—they are forced to exchange goods only with the people around them. As time goes on, these individuals will become exclusively familiar with being sold in their specific sector, even if other valuable ones are being sold in other parts of the market. If vendors in each sector are selling similar products. The lack of

[33] Imagine a physical market built underground, then imagine the ceiling falling in a way that the market becomes segmented by fallen rock, unable to allow people/goods to pass.

diversity in the marketplace will prevent the spread of certain goods that may be valuable to society, but remain unutilized due to knowledge constraints. Social media algorithms operate similarly, from growing in appeal, and hindering progress as the strongest idea does not elevate the whole market (see Figures 4 and 5).



market (aka the algorithm preventing free debate of ideas) prevent the ideas from spreading.

The additional impact of echo chambers that makes them particularly harmful to the marketplace is that they are inherently comfortable. Individuals, once trapped, prefer to be exposed only to ideas they agree with. One example of this is the rise of political migration in which individuals leave their current places of residence to areas where they are surrounded by others who agree with them[34]. By constraining their physical and digital environments to only agreeable information, individuals encourage these echo chambers to crystallize their views and prevent themselves from making decisions in their own best interests.

The psychological effects of echo chambers shift two specific perspectives in an individual's psychology. First, echo chambers boost the false consensus effect. When individuals are only exposed to information that they agree with, they believe that everyone agrees with them. This has the potential to make individuals firm in their opinion and refuse to discuss with those with an alternative perspective

[34] John Burnett, *Americans Are Fleeing to Places Where Political Views Match Their Own*, NPR (Feb. 18, 2022), https://www.npr.org/2022/02/18/1081295373/the-big-sort-americans-move-to-areas-political-alignment.

because they believe it's in the minority[35]. Secondly, echo chambers tend to enhance the group polarization effect, where individuals tend to move towards extreme positions after a group discussion[36]. Surrounded by ideas that are like their own, this tends to make these individuals gain even more radical opinions[37]. As shown in the RNC debates, radicalization and ingrained opinions have become far more common in political discourse, showing the symptoms of the echo chamber's effects on the marketplace of ideas.

VI. Too Many Decisions, Too Little Time

Decisions have shelf lives. They must be made within a certain time frame, and the abundance of decisions to be made means that the individual time spent per choice can be minimal. This phenomenon has only become more pressing as the information individuals have access to has significantly increased since the digital age. When combined with the exploitation of time as a resource and shorter attention spans, the intentional decisions Mill relies on in his vision of the marketplace fails.

Time has become the next battleground for individuals to commercially gather, divide, and exploit. Time scarcity, the concept that time is just as limited as any other resource, has led people to schedule and attempt to optimize every second of their lives. This resource is also being sought after by advertisers who are looking for engagement on their product, social media companies that want users to stay on their platforms, and other individuals who hope to use someone's time for their purposes. These competing demands of the same scarce resource have led to what some define as chronic time pressure, a persistent feeling of "running out of time" that can induce anxiety and emotional distress. The speed of the digital age, with constant information updates and faster computer speeds, constantly

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[35] Matteo Cinelli et al., *The echo chamber effect on social media*, PROC. NATL. ACAD. SCI. U.S.A 118(9) (2021), https://doi.org/10.1073/pnas.2023301118.

[36] *Group Polarization*, APA DICTIONARY OF PSYCHOLOGY, https://dictionary.apa.org/group-polarization (last visited Apr. 19, 2018).

[37] PABLO BARBERÁ, SOCIAL MEDIA AND DEMOCRACY 34-35 (2020).

pushes people forward. These pressures, combined with the emotional challenges that come with chronic time pressure, can impair an individual's judgment when making decisions.

Shorter attention spans have also become a defining effect of the digital age. In 2004, attention spans measured with logging methods were around 150 seconds on average, and in the current day have fallen to 47 seconds[38]. Part of that shift is the exploitation of time by external stimuli, constantly bombarding individuals. The result of shorter attention spans is that advertisers and others must make their content shorter so they can hold their customers' attention. The loop perpetuates itself: consumers shorten their attention spans as products shorten the time needed to grab their notice, leading producers to shorten their products even more to match the lower attention spans. Douglas's comment about the marketplace, being a "bid for the minds of men" comes true in the worst way possible, except rather than convincing consumers with high-quality products, they attempt to auction off as little time as possible, creating an exploitative marketplace of human attention.

When these factors of chronic time pressure and attention spans combine, the marketplace of ideas faces significant challenges in maintaining its ability to facilitate the exchange of information effectively. Intentional decisions are nearly impossible in this environment, with outside factors and internal stressors manipulating individuals' decision-making. The overload of information that is accessible to make these decisions adds more complexity, creating an additional step to every choice. Individuals must make a precursory, meta-decision about what information to consider in their decision-making process before utilizing that information to make the actual choice. Similar to how a computer shuts down in response to an overloaded program, the decision-making process fails to make rational, intentional choices.

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[38] Speaking of Psychology, *Why Our Attention Spans are Shrinking,* APA (Feb. 2023), https://www.apa.org/news/podcasts/speaking-of-psychology/attention-spans.

VII. The Case for Government Regulation

The marketplace of ideas is failing as its weaknesses are exploited by modern technologies. These flaws have long existed in the current system, and have been exacerbated by the digital revolution. Modern law and government policy have not yet caught up to the challenges free speech faces, as shown through the symptoms of a declining marketplace in current political discourse. Immediate action is required to reverse the failures, beginning with recognizing that the marketplace of ideas cannot save itself. Mill's idealism and the American experiment with liberalism require review—specifically one that addressed the practical issues with the marketplace and their root causes. Just as American economic theory is a mix between pure laissez-faire capitalism[39] and a regulated society, free speech must also be regulated in the same way to ensure its longevity. Government action is a necessity to ensure the survival of First Amendment rights[40].

A. Deterring Disinformation

When dealing with disinformation, governments must work with social media companies to regulate the spread of false information online and strengthen accountability in AI. Three possible ways for governments to achieve this goal are through cooperation permitted in *Murthy vs Missouri (2024)*[41], regulation of AI deepfakes, and reform of Section 230.

Murthy was a case where the Biden Administration was sued by two states and five individual social media users who argued that the government was pressuring social media companies to censor their speech. The case centered on COVID-19 misinformation, a direct link to government action surrounding false information on the internet. Justice Barrett, writing for the majority in support of the Biden

[39] Laissez-faire capitalism: a form of capitalism with limited to no government interference.

[40] *Id.*

[41] *Murthy v. Missouri,* 603 U.S.___ (2024)

Administration concluded that these social media platforms "moderated similar content long before any of the Government defendants engaged in the challenged conduct"[42]. This decision relies on the power of social media companies to regulate their users as a shield for the government's informal communication to work on removing false information. By refusing to grant an injunction, the Supreme Court provided a path for the federal government to achieve societal change without directly censoring protected speech. The government must act in the public interest when working with businesses to achieve progress. The purpose of business is to maximize profit, and the government must work with them to mitigate negative externalities associated with their practices.

Another avenue for reform is limiting the use of AI deepfakes in important discourse, like politics. Artificial intelligence is exceptionally difficult to differentiate when it comes to edited images and videos that users can see and hear[43]. Therefore, regulation of these false images, especially when used to spread disinformation during an election, is essential to restore faith in news found online. Multiple states have enacted such regulations during the 2024 elections[44], such as Washington and Texas, but a national effort to counter these falsehoods is necessary. Assessing whether there is significant government interest in regulating this form of speech requires evaluating both the value of regulation and disinformation. Protecting democratic norms and election integrity is a government interest, and as previously addressed with the comparison to libel, there is no clear value that disinformation adds to the marketplace. Therefore, the government can argue there is a compelling interest in regulating this form of speech. In addition, regulatory oversight is not the only

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[42] *Id.*

[43] Dongwon Lee, *The Increased Difficulty of Detecting AI Versus Human-Generated Text*, PENN STATE (May 14, 2024), https://www.psu.edu/news/information-sciences-and-technology/story/qa-increasing-difficulty-detecting-ai-versus-human.

[44] Daniel I. Weiner & Lawrence Nowden*, Regulating AI Deepfakes and Synthetic Media in the Political Arena*, BRENNAN CENTER FOR JUSTICE (Dec. 5, 2023), https://www.brennancenter.org/our-work/research-reports/regulating-ai-deepfakes-and-synthetic-media-political-arena.

regulation the government should utilize to combat AI disinformation. Warning labels on AI-generated content, deceptive or not, would limit the harm done to voter perception. Overall, enhanced security measures governing AI and other editing technologies would vastly reduce the prevalence of falsehood in political discourse.

Finally, reforming Section 230 of the Communications Decency Act would incentivize social media companies to monitor and regulate disinformation. Enacted in 1996 to protect new online platforms, the Act was designed to allow media companies to moderate certain parts of their platforms without having to be held liable for the remaining content posted on their platforms[45]. The business structure of social media companies has changed dramatically since the passage of the bill. These platforms have transformed into highly profit-driven companies, with algorithms built to maximize profitability. At the same time, disinformation continues to spread on social media with limited motivation for these companies to restrict it. Section 230 must be reformed to address this incongruence between the success of the companies and the glaring public interest in minimizing deceptive content. One way to achieve this is to create carve-outs for specific issues in which the government has an interest, such as political disinformation. This would compel these companies to invest resources in preventing this content from proliferating on their websites.

B. Mitigating Echo Chambers

Focusing on mitigating echo chambers is difficult from a top-down approach. Most of the solutions involving echo chambers require individuals to be more aware of their use of social media to avoid finding themselves in one. This is because algorithms are the key to social media companies' business model. Any reform of platform algorithms is unlikely given the secrecy surrounding them, and the

[45] Office of the Attorney General, *Department Of Justice's Review of Section 230 Of the Communications Decency Act of 1996*, DOJ (May 8, 2023), https://www.justice.gov/archives/ag/department-justice-s-review-section-230-communications-decency-act-1996.

government's limited power to regulate companies to that extent. Urging social media companies to make these changes themselves is also improbable, given that the success of these algorithms is a necessity for their survival and any attempt to moderate them would be incompatible with their profit-driven approach.

One possible avenue for countering the effect of echo chambers is to improve the reach of public broadcasting. Public broadcasting is better positioned to provide alternative viewpoints due to the diverse audience it serves. Instead of being perfectly tailored to one specific person, public broadcasting provides broader coverage that presents multiple sides of an issue and doesn't trap an individual in its content. Public broadcasting isn't structured to be for-profit, so maintaining high levels of engagement with its audience is less important than it is to a social media company. Expanding the reach of public broadcasting and strengthening its public contribution would mitigate the effects of echo chambers.

This solution has limitations. First, public broadcasting must become appealing enough that individuals are willing to use it as a news source. Currently, such government-sponsored media exists, yet are far less popular as private social media platforms. Government efforts must focus on promoting and improving the popularity of the service, through stakeholder engagement and listening to public concerns. This also raises a second flaw: a public broadcaster will be associated with the government, and therefore will be limited by current deficits in government trust. Trust in the government will have to correlate with trust in the broadcasting service, and public confidence in the government must improve for a government-sponsored media program to be viable.

C. Making Decisions Easier

When dealing with information overloads, the government focus must be on streamlining their processes to reduce administrative

burdens[46]. Despite the major problems posed by time scarcity on an individual's mental state, adding more time in the day is simply impossible. Therefore, the government should work to deal with the other end of the problem, organizing information in a way that is accessible for individuals to make quick decisions. The administrative burdens associated with government activities, such as filing taxes or applying for food stamps, should have a direct application method that is clear and easy to use, saving time and mental costs. Further research should be done in studying treatments for the mental toll of chronic time pressure and developing solutions to protect against time exploitation in the marketplace.choices.

VIII. Conclusion

The marketplace of ideas has been undermined by the technological advancements made in the twenty-first century, with its flaws exposed through increasing polarization and rigid ideologies in American society. Deluded by disinformation, confined by echo chambers, and constrained by time scarcity, individuals in the marketplace are confronted with obstacles against a fair, free exchange of ideas. Despite the discomfort Mill or Milton would have with government interference, removal and reform of the marketplace is a necessary step to address its structural weaknesses. Whether through clear government involvement or smaller steps to reduce individual burden, intervention is necessary.

While this paper heavily criticizes the flaws in the marketplace, it remains true that Millian philosophy retains merit in its protection of free speech. For the past two centuries, the marketplace of ideas developed protections for speech—a valuable source of expression and a guiding principle in societal progress. Speech is the great equalizer in society, a voice available to every citizen across the nation. Mill was also correct about the value of dialogue, an exchange of ideas so

[46] Administrative burdens: costs associated with interacting with the government, including time and emotional costs.

passionate it can persuade civilizations to adopt new values and push individuals to fight for the freedoms of their neighbors. Speech is sacred in America.

Yet America must also recognize that ideologies must evolve, or they collapse under unquestioned beliefs. The marketplace of ideas recognizes criticism as a valuable part of speech, and therefore criticism of the marketplace itself must not be dismissed. While the ideals and protections it offers merit respect, its failures must be acknowledged for society to self-correct. There may be a time when the pendulum swings too far the opposite way, when protection from government censorship usurps unregulated speech as the primary concern. Until then, however, the marketplace needs a transformation to keep up with the digital age. Otherwise, the effective exchange of ideas will persist in its decline, leaving the marketplace behind as nothing but a tragic, failed theory.

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