The Governor's Council for Judicial Appointments

State of Tennessee

Application for Nomination to Judicial Office

Name: Jeffrey Omar Usman

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INTRODUCTION

The State of Tennessee Executive Order No. 54 (May 19, 2016) hereby charges the Governor's Council for Judicial Appointments with assisting the Governor and the people of Tennessee in finding and appointing the best and most qualified candidates for judicial offices in this State. Please consider the Council's responsibility in answering the questions in this application. For example, when a question asks you to "describe" certain things, please provide a description that contains relevant information about the subject of the question, and, especially, that contains detailed information that demonstrates that you are qualified for the judicial office you seek. In order to properly evaluate your application, the Council needs information about the range of your experience, the depth and breadth of your legal knowledge, and your personal traits such as integrity, fairness, and work habits.

This document is available in Microsoft Word format from the Administrative Office of the Courts (telephone 800.448.7970 or 615.741.2687; website www.tncourts.gov). The Council requests that applicants obtain the Microsoft Word form and respond directly on the form using the boxes provided below each question. (The boxes will expand as you type in the document.) Please read the separate instruction sheet prior to completing this document. Please submit your original, hard copy (unbound), completed application (*with ink signature*) and any attachments to the Administrative Office of the Courts. In addition, submit a digital copy with your electronic or scanned signature. The digital copy may be submitted on a storage device such as a flash drive that is included with your hard-copy application, or the digital copy may be submitted via email to ceesha.lofton@tncourts.gov. See section 2(g) of the application instructions for additional information related to hand-delivery of application packages due to COVID-19 health and safety measures

THIS APPLICATION IS OPEN TO PUBLIC INSPECTION AFTER YOU SUBMIT IT.

PROFESSIONAL BACKGROUND AND WORK EXPERIENCE

1. State your present employment.

Law Professor at the Belmont University College of Law

2. State the year you were licensed to practice law in Tennessee and give your Tennessee Board of Professional Responsibility number.

2004 – BPR # 023068

3. List all states in which you have been licensed to practice law and include your bar number or identifying number for each state of admission. Indicate the date of licensure and whether the license is currently active. If not active, explain.

Tennessee (BPR # 023068). My date of licensure is November 20, 2004. My license is currently active.

4. Have you ever been denied admission to, suspended or placed on inactive status by the Bar of any state? If so, explain. (This applies even if the denial was temporary).

No

5. List your professional or business employment/experience since the completion of your legal education. Also include here a description of any occupation, business, or profession other than the practice of law in which you have ever been engaged (excluding military service, which is covered by a separate question).

Belmont University College of Law (Assistant Professor of Law January 2012 to June 2017; Associate Professor of Law with tenure June 2017 to present)

Career Law Clerk to Justice William C. Koch, Jr., Tennessee Supreme Court (January 2007 to January 2012)

Assistant Attorney General (Tax Division), Office of the Tennessee Attorney General and Reporter (June 2006 to January 2007)

Law Clerk to Judge Mary Beck Briscoe, United States Court of Appeals for the Tenth Circuit (September 2004 to August 2005)

Law Clerk to Judge W. Harold Albritton, United States District Court for the Middle District of Alabama (August 2003 to August 2004)

6. If you have not been employed continuously since completion of your legal education, describe what you did during periods of unemployment in excess of six months.

From September 2005 through June 2006, I attended Harvard Law School to obtain my LL.M. degree.

7. Describe the nature of your present law practice, listing the major areas of law in which you practice and the percentage each constitutes of your total practice.

I am law professor at the Belmont University College of Law. Currently 100% of my courses are focused on teaching various aspects of constitutional law. I teach the core constitutional law courses at Belmont Law, which include *Constitutional Law I: Structures and Powers* and *Constitutional Law II: Individual Rights*. Additionally, I teach *Criminal Constitutional Law*, which is primarily focused on search and seizure, self-incrimination, and right to counsel. I also teach *First Amendment* and *State Constitutional Law*. With regard to the latter, I use examples and illustrations from the Tennessee Constitution and caselaw about the Tennessee Constitution in most class sessions.

I also serve as the faculty advisor for the Belmont Law Review. The law review publishes two issues each year containing works of scholarship produced by attorneys, judges, and law professors. For the law review, I assist students with the development of their notes, works of scholarship that they are creating, and with conducting the annual symposium which gathers leading legal academics and practitioners to discuss a particular aspect of law each year.

I also chair the law school's faculty development committee which is responsible for assisting faculty members in advancing in terms of their teaching, service, and scholarship.

8. Describe generally your experience (over your entire time as a licensed attorney) in trial courts, appellate courts, administrative bodies, legislative or regulatory bodies, other forums, and/or transactional matters. In making your description, include information about the types of matters in which you have represented clients (e.g., information about whether you have handled criminal matters, civil matters, transactional matters, regulatory matters, etc.) and your own personal involvement and activities in the matters where you have been involved. In responding to this question, please be guided by the fact that in order to properly evaluate your application, the Council needs information about your range of experience, your own personal work and work habits, and your work background, as your legal experience is a very important component of the evaluation required of the Council. Please provide detailed information that will allow the Council to evaluate your qualification for the judicial office for which you have applied. The failure to provide detailed information, especially in this question, will hamper the evaluation of your application.

From August 2003 until August 2004, I served as a law clerk to the Honorable W. Harold Albritton of the United States District Court for the Middle District of Alabama. For Judge Albritton, the majority of work that I performed involved legal research and writing for draft

opinions in response to motions to dismiss and for summary judgment. I reviewed the filings and drafted a preliminary memorandum opinion and order for the Judge's consideration. I also aided Judge Albritton with research and drafting in connection with motions to compel arbitration, motions in limine, jury instructions, complex objections during trial proceedings, motions to remand to state court, motions to enforce settlement agreements, findings of fact and conclusions of law following bench trials, and sentencing hearings.

The federal law that I had to grasp as a law clerk for Judge Albritton included, among other areas, the Equal Credit Opportunity Act, the Fair Credit Reporting Act, the Fair Housing Act, the Family Medical Leave Act, the Federal Arbitration Act, federal court jurisdictional issues, federal criminal laws related to controlled substances, Title VII, and a variety of bankruptcy related provisions. Through diversity jurisdiction and other routes, I also had to grasp, among other areas of Alabama law, breach of contract, continuing trespass, easements, fraud, negligence, non-compete agreements, state right to work laws, and tortious interference with business relations.

From September 2004 to August 2005, I served as a law clerk for the Honorable Mary Beck Briscoe of the United State Court of Appeals for the Tenth Circuit. For cases that were straightforward with an obvious resolution, I would read the briefing and prepare a preliminary draft opinion. For all oral argument cases or otherwise complex cases, I would read the briefing, further research the arguments presented, and produce a detailed memorandum analyzing the relative strengths and weaknesses of the arguments advanced by the parties. The memorandum would offer a recommended decision in each case. If Judge Briscoe was assigned the case for which I had prepared a memorandum, I would prepare a preliminary draft opinion for the Judge's consideration.

The federal law that I had to grasp as a law clerk for Judge Briscoe, included among other areas, the Age Discrimination in Employment Act, the Armed Career Criminal Act, drug laws, gun laws, federal habeas claims, criminal law on tribal lands, criminal law within national parks, immigration laws, federal rules of evidence, sentencing laws, the First Amendment to the United States Constitution, the Fourth Amendment to the United States Constitution, Title VII, and 42 U.S.C. Section 1983. The state law that I had to grasp included a variety of business torts, contracts, defamation, gaming, property disputes, negligence, and tort law from the various states comprising the Tenth Circuit: Oklahoma, Kansas, New Mexico, Colorado, Wyoming, and Utah.

From June 2006 to January 2007, I served as an Assistant Attorney General for the Tax Division of the Office of the Tennessee Attorney General and Reporter. In this role, my primary client was the Tennessee Department of Revenue. I was able to successfully reach settlements with a number of taxpayers. The highest dollar figure case that I was able to resolve through settlement involved approximately 100,000 dollars. I was also drafted as a second chair trial counsel in an interesting sales and use tax case involving ADT Security Services (the case eventually resulted in a published appellate opinion in *ADT Sec. Services, Inc. v. Johnson*, 329 S.W.3d 769 (Tenn. Ct. App. 2009)), which involved approximately a million dollars in taxes and interest payments due to the State. I also represented the state regulatory boards and did some work on behalf of the Tennessee Department of Safety. With regard to the former, I was able to work with counsel from the Department of Commerce and Insurance to avoid a number of potential problems for

the regulatory boards. In the latter role, through seeking to understand the concerns of both my client and opposing counsel, I was able to devise a solution to resolve a persistent problem the Department of Safety had been experiencing with attorneys in connection with subpoenas to the satisfaction of both the Department and the bar. The final project that I was tackling when I left the office was an appeal in *Value Motor Inc. v. Farr* (2008 WL 238423) related to the repossession tax credit, which ultimately proved to be successful. I also helped draft Tennessee Attorney General and Reporter opinions on a variety of issues including the Municipal Court Clerks' Commission on Litigation Taxes for Cases Heard Under Concurrent General Sessions Jurisdiction, Private College Security Guards and Proprietary Security Organizations, and the State Tax Relief Program and Exemption from Storm Water User Fees.

From January 2007 to January 2012, I served as the career clerk for the Honorable William C. Koch, Jr. of the Tennessee Court of Appeals and the Tennessee Supreme Court. For Judge/Justice Koch, I prepared preliminary draft opinions for his consideration. I was also responsible for reviewing opinions circulated by other Justices and noting any observations for Justice Koch's consideration. Additionally, I drafted for the judges on the Special Workers Compensation Appeals Panel a number of detailed memorandums on cases before them. I also worked with staff attorneys as part of small team tasked with making recommendations in connection with complex death penalty related matters. Furthermore, I was tasked with drafting memorandums for the full court on a number of substantive and procedural issues such as whether to order briefing on certain matters.

The law that I had to grasp as a law clerk for Judge/Justice Koch included, among other areas, arbitration, board of professional responsibility matters, capital criminal cases, the church autonomy doctrine, contracts, discovery disputes, divorce, double jeopardy (state and federal constitution), the duty to act, the False Claims Act, the First Amendment to the United States Constitution, state habeas, the harmless error doctrine, joint and several liability, justiciability, legal malpractice, mandatory joinder under the Rules of Criminal Procedure, medical malpractice, negligence, property and zoning disputes, punitive damages, recission, retrospective laws, rules of evidence, the right of self-representation, search and seizure, summary judgment, taxing power, the Tennessee Securities Act of 1980, termination of parental rights, vicarious liability, visitation, wills, workers compensation law, and writs of error coram nobis.

Since January of 2012, I have been a law professor at the Belmont University College of Law. I am primarily a professor of constitutional law. Through my scholarship, I endeavor to explore complex areas of federal and state constitutional law. I have published multiple articles, conducted numerous CLEs, and am currently in the process with a co-author of creating a state constitutional law treatise for Lexis/Matthew Bender. In addition to such scholarly engagement, I have also provided assistance to attorneys preparing for argument before the Tennessee and United States Supreme Court by serving as a judge for moots in their argument preparation.

9. Also separately describe any matters of special note in trial courts, appellate courts, and administrative bodies.

See response to question 8.

10. If you have served as a mediator, an arbitrator or a judicial officer, describe your experience (including dates and details of the position, the courts or agencies involved, whether elected or appointed, and a description of your duties). Include here detailed description(s) of any noteworthy cases over which you presided or which you heard as a judge, mediator or arbitrator. Please state, as to each case: (1) the date or period of the proceedings; (2) the name of the court or agency; (3) a summary of the substance of each case; and (4) a statement of the significance of the case.

Not Applicable

11. Describe generally any experience you have serving in a fiduciary capacity, such as guardian ad litem, conservator, or trustee other than as a lawyer representing clients.

Not Applicable

12. Describe any other legal experience, not stated above, that you would like to bring to the attention of the Council.

I am currently serving as the Reporter for Tennessee's Advisory Commission on the Rules of Practice and Procedure.

13. List all prior occasions on which you have submitted an application for judgeship to the Governor's Council for Judicial Appointments or any predecessor or similar commission or body. Include the specific position applied for, the date of the meeting at which the body considered your application, and whether or not the body submitted your name to the Governor as a nominee.

Not Applicable

EDUCATION

14. List each college, law school, and other graduate school that you have attended, including dates of attendance, degree awarded, major, any form of recognition or other aspects of your education you believe are relevant, and your reason for leaving each school if no degree was awarded.

Harvard Law School – attended September 2005 to June 2006 – degree awarded LL.M.

Vanderbilt University Law School – attended August 2000 to May 2003 – degree awarded J.D. – graduated *Order of the Coif*, awarded the Legal Aid Society Public Interest Award, the Grace Wilson Sims Prize for Student Writing, Best Oralist Awards (Intramural Moot Court & Jessup International Law Moot Court Competitions), selected as the Managing Associate Justice of Vanderbilt Moot Court Board

Georgetown University – attended August 1996 to May 2000 – degree awarded A.B (double major History & Psychology) – graduated *magna cum laude* and *Phi Beta Kappa*

PERSONAL INFORMATION

15. State your age and date of birth.

43 years – [redacted] 1978

16. How long have you lived continuously in the State of Tennessee?

Since June 2006 – 15 years

17. How long have you lived continuously in the county where you are now living?

Since June 2006 – 15 years

18. State the county in which you are registered to vote.

Davidson County

19. Describe your military service, if applicable, including branch of service, dates of active duty, rank at separation, and decorations, honors, or achievements. Please also state whether you received an honorable discharge and, if not, describe why not.

Not Applicable

20. Have you ever pled guilty or been convicted or placed on diversion for violation of any law, regulation or ordinance other than minor traffic offenses? If so, state the approximate date, charge and disposition of the case.

No

21. To your knowledge, are you now under federal, state or local investigation for possible violation of a criminal statute or disciplinary rule? If so, give details.

No

22. Please identify the number of formal complaints you have responded to that were filed against you with any supervisory authority, including but not limited to a court, a board of professional responsibility, or a board of judicial conduct, alleging any breach of ethics or unprofessional conduct by you. Please provide any relevant details on any such complaint if the complaint was not dismissed by the court or board receiving the complaint.

None

23. Has a tax lien or other collection procedure been instituted against you by federal, state, or local authorities or creditors within the last five (5) years? If so, give details.

HOA fees – As soon as my wife and I became aware of the outstanding balance that was owed we immediately paid the full amount. The matter was then non-suited.

24. Have you ever filed bankruptcy (including personally or as part of any partnership, LLC, corporation, or other business organization)?

No

25. Have you ever been a party in any legal proceedings (including divorces, domestic proceedings, and other types of proceedings)? If so, give details including the date, court and docket number and disposition. Provide a brief description of the case. This question does not seek, and you may exclude from your response, any matter where you were involved only as a nominal party, such as if you were the trustee under a deed of trust in a foreclosure proceeding.

See response to question 23. Davidson County General Sessions Docket # 20GC7316.

26. List all organizations other than professional associations to which you have belonged

within the last five (5) years, including civic, charitable, religious, educational, social and fraternal organizations. Give the titles and dates of any offices that you have held in such organizations.

Friends of Illuminate Academy

Illuminate Academy Parents Group

St. Henry Catholic Church

St. Lawrence Catholic Church

27. Have you ever belonged to any organization, association, club or society that limits its membership to those of any particular race, religion, or gender? Do not include in your answer those organizations specifically formed for a religious purpose, such as churches or synagogues.

a. If so, list such organizations and describe the basis of the membership limitation.

b. If it is not your intention to resign from such organization(s) and withdraw from any participation in their activities should you be nominated and selected for the position for which you are applying, state your reasons.

None

ACHIEVEMENTS

28. List all bar associations and professional societies of which you have been a member within the last ten years, including dates. Give the titles and dates of any offices that you have held in such groups. List memberships and responsibilities on any committee of professional associations that you consider significant.

American Bar Association (August 2021 to present)

Belmont University College of Law Inn of Court (Fall 2014 to Spring 2019)

Federalist Society (off and on from Spring 2001 to present)

Southeastern Association of Law Schools (Inclusiveness Committee 2019 to present; Scholarly Research Committee 2019 to present)

Tennessee Bar Association (off and on from 2012 to present) – Member of the Access to Justice Committee (2012-2017); Access to Justice Committee Law School Subcommittee Member (2012-2017)

29. List honors, prizes, awards or other forms of recognition which you have received since your graduation from law school that are directly related to professional accomplishments.

Belmont University Chaney Distinguished Professor Award Finalist (2016)

Belmont University College of Law Best Professor Award (2012, 2013, 2018, 2019)

Tennessee Bar Association Leadership Law Class Selection (2015)

Tennessee Supreme Court Attorney for Justice (2016, 2017, 2018, 2019, 2020, 2021)

30. List the citations of any legal articles or books you have published.

The Twenty-First Century Death Penalty and Paths Forward, 37 MISS. C. L. REV. 80 (2019) (invited symposium contribution)

Presidential Authority & the Federal Death Penalty, 68 AM. U. L. REV. F. 39 (2019) (invited response)

State Legislatures and Solving the Eighth Amendment Ratchet Puzzle, 20 U. PA. J. CONST. L. 677 (2018)

Law Schools, Bar Passage, and Under and Over-Performing Expectations, 36 QUINNIPIAC L. REV. 183 (2018) (co-authored work with Professor Jeff Kinsler)

Defamation and the Government Employee: Redefining Who Constitutes a Public Official, 47 LOY. U. CHI. L.J. 247 (2015)

Finding the Lost Involuntary Public Figure, 2014 UTAH L. REV. 951 (2014)

Constitutional Constraints on Retroactive Civil Legislation: The Hollow Promises of the Federal Constitution and Unrealized Potential of State Constitutions, 14 NEV. L.J. 63 (2013)

Capital Punishment, Cultural Competency, and Litigating Intellectual Disability, 42 U. MEM. L. REV. 855 (2012)

Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions, 73 ALB. L. REV. 1459 (2010)

The Game is Afoot: Constitutionalizing the Right to Hunt and Fish in the Tennessee Constitution, 77 TENN. L. REV. 57 (2009)

Ancient and Modern Character Evidence: How Character Evidence Was Used in Ancient Athenian Trials, Its Uses in the United States, and What This Means for How These Democratic Societies' Understand the Role of Jurors, 33 OKLA. CITY U. L. REV. 1 (2008)

Defining Religion: The Struggle to Define Religion Under the First Amendment and the Contributions and Insights of Other Disciplines of Study, Including Theology, Psychology, Sociology, and the Arts, 83 N.D. L. REV. 123 (2007)

Non-Justiciable Directive Principles: A Constitutional Design Defect, 15 MICH. ST. J. INT'L L. 643 (2007)

The Evolution of Iranian Islamism from the Revolution Through the Contemporary Reformers, 35 VAND. J. TRANSNAT'L L. 1679 (2002)

Forthcoming works include a *State Constitutional Law* treatise with co-author Professor Charles

"Rocky" Rhodes for Lexis/Matthew Bender Treatise Series and law review articles *State Constitutions and the Right of Self-Representation* and *The Two Axes of Designated Public Forums*.

31. List law school courses, CLE seminars, or other law related courses for which credit is given that you have taught within the last five (5) years.

Law School Courses:

Constitutional Law;

Constitutional Law I: Powers and Structures;

Constitutional Law II: Individual Rights;

Criminal Law Journal;

Criminal Constitutional Law;

Criminal Procedure;

First Amendment;

Independent Study Supervisor;

Law Review;

Mass Media Law;

State Constitutional Law

CLE Courses:

Alumni Career and Professional Development Panel Discussion (panel moderator);

Constitutional Structuring and Historical Evolution of Federal Judicial Nominations;

Emerging Issues in Criminal Constitutional Law;

Hamilton the Attorney: *Rutgers v. Waddington*;

Immigration Attorney Practitioner Panel (panel moderator);

Legal Scholarship Mechanics and Contributing to the Profession;

Modern Legal History Series: Student Speech Rights (moderator);

Perspectives on Title IX from a General Counsel's Office (panel moderator);

Plea Negotiation (panel moderator);

Prosecuting and Defending Campus Assaults: Practitioners' Perspectives (panel moderator);

Sections 3 and 5 of the 14th Amendment;

Social Media and the First Amendment;

State Legislatures and Solving the Eighth Amendment Ratchet Puzzle;

Statistical Analysis and Bar Passage Rates;

Struggles over State vs. Local Authority in an Era of Criminal Justice Reform;

Tennessee Supreme Court 2018 The Year (So Far) in Review;

Title IX from a Coordinator's Perspective (panel moderator);

The Twenty-First Century Death Penalty and Paths Forward;

United States Supreme Court & Tennessee Supreme Court Criminal Law Review;

Voting Rights in Tennessee (panel moderator)

32. List any public office you have held or for which you have been candidate or applicant. Include the date, the position, and whether the position was elective or appointive.

Not Applicable

33. Have you ever been a registered lobbyist? If yes, please describe your service fully.

No

34. Attach to this application at least two examples of legal articles, books, briefs, or other legal writings that reflect your personal work. Indicate the degree to which each example reflects your own personal effort.

I have attached two legal articles to this application. I am sole author of these articles. They were published in law reviews. Accordingly, the citations and attributions were verified by student editors and the works were proofread by the student editors prior to publication. Beyond this excellent editorial assistance, the works reflect my personal efforts.

ESSAYS/PERSONAL STATEMENTS

35. What are your reasons for seeking this position? ***(150 words or less)***

I believe I could add to the composition of the Tennessee Supreme Court and thereby be of service to the people of the State of Tennessee.

Appellate courts in general, and collaborative appeals courts like the Tennessee Supreme Court

especially, draw strength from members offering different vantage points. Cases arrive at the Tennessee Supreme Court because they are difficult and challenging. The task of the judges is fundamentally one of learning and then teaching.

I had the privilege of serving as a career law clerk to the Honorable William C. Koch, Jr., a person I believe to be among the finest judges to have served on the Court, and I have spent my career since as an academic concentrating on constitutional law. I believe these experiences position me well to offer an academic perspective to the Court and to aid the Court in its role of learning and teaching.

36. State any achievements or activities in which you have been involved that demonstrate your commitment to equal justice under the law; include here a discussion of your pro bono service throughout your time as a licensed attorney. ***(150 words or less)***

My engagement began as a law student. Among other projects, I assisted long-time public interest attorney Russ Overby on cases in which individuals were cutoff from welfare benefits in violation of state and federal law (for example clients cutoff for missing a meeting due to hospitalization with a serious illness). My engagement continued as an attorney. Among other activities, I have advised parents of children with special needs regarding the IDEA and early intervention services and been involved in community outreach educating people on their constitutional rights. I have also helped facilitate student pro bono opportunities by assisting students in founding the Belmont Legal Aid Society and serving as advisor for many years, helping organize several Tennessee law student pro bono summits, and helping students partner with pro bono community organizations. I have been recognized by the Tennessee Supreme Court as an Attorney for Justice each year from 2016-2021.

37. Describe the judgeship you seek (i.e. geographic area, types of cases, number of judges, etc. and explain how your selection would impact the court. ***(150 words or less)***

I am seeking appointment to the Tennessee Supreme Court. Article VI of the Tennessee Constitution provides that the Court will "consist of five Judges." The Tennessee Supreme Court has civil and criminal appeals from throughout the State of Tennessee.

Tennesseans are fortunate to have an extremely dedicated and high-quality Supreme Court. An appellate court gains its strength from the diverse skills and perspectives of its members.

I believe that judging is better when done as pursuit of discovery, finding the law, rather than an exercise of will. The task for a generalist appellate court is learning something in order to then teach it to others. That is what I have spent the last ten years doing as law professor. I am a teacher of lawyers whether in my classroom or in an article or CLE. I believe adding a professor to the court adds something of value.

38. Describe your participation in community services or organizations, and what community involvement you intend to have if you are appointed judge? ***(250 words or less)***

My wife and I have been blessed with two wonderful children. One of our children, our son, is a remarkable thirteen-year-old young man who is autistic and non-verbal. Our love for him and the amazing people we have met whose lives intersect with the autism spectrum has engaged us in various ways with the autism community in Nashville. We were previously involved with the Brown Center for Autism and have become supporters of the wonderful and amazing people at Illuminate Academy who are making a difference for so many children and families of those on the autism spectrum. We have helped in variety of ways including as financial benefactors behind the launch of Friends of Illuminate Academy, a 501(c)(3). We have been involved in numerous small and some larger ways (emotional, legal, and financial) in support of autism community families in Middle Tennessee. My wife and I are currently at the building block stage of working to create a program to provide assistance for families who seek to create a conservatorship as their children with special needs reach adulthood.

As a judge I would view it as both a duty and privilege to engage in community outreach. I am especially interested in becoming involved with civics educational efforts by the judiciary. I would love to work with teachers and lawyers across the state to enhance children's civics education in order to give the next generation a foundational understanding of our state and federal constitutions.

39. Describe life experiences, personal involvements, or talents that you have that you feel will be of assistance to the Council in evaluating and understanding your candidacy for this judicial position. ***(250 words or less)***

My remarkable parents and my Catholic faith shaped me as a person. The three judges for whom I clerked helped turn that person into a professional. I discuss a lesson learned from each judge below.

Judge Albritton – Respect Others

Judge Albritton treats every person with whom he interacts with kindness and respect, recognizing each person's inherent dignity. Every person that interacts with the court should be treated by the judges with the kindness and respect that Judge Albritton exudes. My coworkers speak of my kindness. My teaching evaluations reflect that my students feel they are treated with the utmost respect. Both are extremely important to me.

Judge Briscoe – Do Not Unnecessarily Delay

Judge Briscoe emphasized with her clerks that parties in the real world were awaiting the resolution of the cases before the court. She wanted us to never forget that delay can have adverse consequences whether for the operation of a business or the liberty of an individual. Delay that was unnecessary was not to occur. I will not forget that lesson, and I believe in it.

Justice Koch – Write with Clarity and Depth

Justice Koch taught his clerks that an appellate judge should write with clarity and depth. The task is to take complex legal issues and provide busy lawyers with the depth and clarity of analysis that helps guide the attorney when advising or advocating for a client. I will never forget that lesson. It forms the core for my sense of good judicial opinion writing.

40. Will you uphold the law even if you disagree with the substance of the law (e.g., statute or rule) at issue? Give an example from your experience as a licensed attorney that supports your response to this question. ***(250 words or less)***

I was first asked a version of this question more than two decades ago in a clerkship interview with Judge Albritton. He asked if I could draft an opinion contrary to a strongly held personal belief. I told him I could and promised I would. I said the place for my beliefs is not in writing for a court but the quiet of the ballot box.

I believed that then, and I believe that now. A person who is driven to change the law to reflect their beliefs should run for city council or the state legislature but should not be a judge. To paraphrase Justice Hugo Black, such a person is not truly a judge but instead a politician in judicial garb.

In the seven years I worked for courts, I put aside my beliefs in favor of rigorous adherence to the law. In researching and writing opinion drafts, I consistently put forward the best understanding of the law rather than one shaded by own beliefs.

My approach to the classroom is similar. I teach my students the variances between conservative and progressive jurists in terms of differing approaches to constitutional interpretation. The goal is for the students to learn how to advocate before whatever judge is before them and to begin to develop their own sense of the right way to interpret the constitution. In teaching interpretive approaches, I strive for them to have no idea what my views are, keeping my thumb off the scales.

REFERENCES

41. List five (5) persons, and their current positions and contact information, who would recommend you for the judicial position for which you are applying. Please list at least two persons who are not lawyers. Please note that the Council or someone on its behalf may contact these persons regarding your application.

A. Professor Don Cochran, Belmont University College of Law,
B. Susan Dulin, Assistant to the Dean, Nashville School of Law,
C. Dean Alberto Gonzales, Belmont University College of Law,
D. Lisa Giffen, Executive Administrative Specialist at University of South Florida,
E. President and Dean William C. Koch, Jr., Nashville School of Law,

AFFIRMATION CONCERNING APPLICATION

Read, and if you agree to the provisions, sign the following:

I have read the foregoing questions and have answered them in good faith and as completely as my records and recollections permit. I hereby agree to be considered for nomination to the Governor for the office of Judge of the [Court] Supreme Court of Tennessee, and if appointed by the Governor and confirmed, if applicable, under Article VI, Section 3 of the Tennessee Constitution, agree to serve that office. In the event any changes occur between the time this application is filed and the public hearing, I hereby agree to file an amended application with the Administrative Office of the Courts for distribution to the Council members.

I understand that the information provided in this application shall be open to public inspection upon filing with the Administrative Office of the Courts and that the Council may publicize the names of persons who apply for nomination and the names of those persons the Council nominates to the Governor for the judicial vacancy in question.

Dated: November 19, 2021.

Jeffrey Usman

Signature

When completed, return this application to Ceesha Lofton, Administrative Office of the Courts, 511 Union Street, Suite 600, Nashville, TN 37219.

THE GOVERNOR'S COUNCIL FOR JUDICIAL APPOINTMENTS
ADMINISTRATIVE OFFICE OF THE COURTS

511 UNION STREET, SUITE 600
NASHVILLE CITY CENTER
NASHVILLE, TN 37219

TENNESSEE BOARD OF PROFESSIONAL RESPONSIBILITY
TENNESSEE BOARD OF JUDICIAL CONDUCT
AND OTHER LICENSING BOARDS

WAIVER OF CONFIDENTIALITY

I hereby waive the privilege of confidentiality with respect to any information that concerns me, including public discipline, private discipline, deferred discipline agreements, diversions, dismissed complaints and any complaints erased by law, and is known to, recorded with, on file with the Board of Professional Responsibility of the Supreme Court of Tennessee, the Tennessee Board of Judicial Conduct (previously known as the Court of the Judiciary) and any other licensing board, whether within or outside the State of Tennessee, from which I have been issued a license that is currently active, inactive or other status. I hereby authorize a representative of the Governor's Council for Judicial Appointments to request and receive any such information and distribute it to the membership of the Governor's Council for Judicial Appointments and to the Office of the Governor.

Jeffrey Usman
Type or Print Name

[signature]
Signature

11/19/21
Date

023068
BPR #

Please identify other licensing boards that have issued you a license, including the state issuing the license and the license number.

Defamation and the Government Employee: Redefining Who Constitutes a Public Official

*Jeffrey Omar Usman**

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INTRODUCTION

With its decision in *New York Times Co. v. Sullivan*, the United States Supreme Court created critical free speech protections by imposing upon public officials a requirement to demonstrate actual

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malice in order to recover for defamatory comments related to their official conduct.[1] However, in doing so, the Court declined to indicate which government employees constituted public officials to whom these restrictions would apply.[2] In subsequent cases, most notably *Rosenblatt v. Baer* (1966)[3] and *Hutchinson v. Proxmire* (1979),[4] the Supreme Court defined public officials in a manner suggesting exclusion of lower-level government employees.[5] As a consequence, the speech-protective actual malice standard does not apply to a citizen's comments about the actions of lower-level government employees in their official capacity.

This Article argues for reconsideration of this approach, asserting that speech about the action and inaction of lower-level government employees in their official capacity should be protected under the First Amendment. Defining public officials in a manner that excludes lower-level government employees is inconsistent with the Court's rationale in *New York Times Co. v. Sullivan*. Furthermore, even assuming that exclusion of lower-level government employees was ever proper, such exclusion is no longer tenable for four reasons. One, a dramatic transformation in understanding of the actual operation of the administrative state, which occurred after *Rosenblatt* and *Hutchinson*, has evinced the important role that lower-level government employees play in policy-making, governance, and public perception thereof. Two, social and technological changes have substantially effaced the justifications for states being able to protect lower-level government employees from scrutiny. Three, jurisprudential changes in how courts apply part of the defamation framework have undermined a critical conceptual basis for distinguishing lower-level government employees from their higher-level counterparts. Four, the failure to protect speech about the official conduct of lower-level government employees creates

1. *See* 376 U.S. 254, 279–80 (1964); *see also, e.g.*, Walker v. Associated Press, 417 P.2d 486, 489 (Colo. 1966) ("In the *New York Times Company* case the Supreme Court of the United States rather severely limited the right of public officials to recover for libelous newspaper articles by holding that the constitutional safeguards regarding freedom of speech and press require that a public official in a libel action against a critic of his official conduct must show actual malice on the part of such critic before the public official can make any recovery . . . ." (emphasis omitted)).

2. *Sullivan*, 376 U.S. at 283 n.23; *see also* Andrew L. Turscak, Jr., Note, *School Principals and* New York Times*: Ohio's Narrow Reading of Who Is a Public Official or Public Figure*, 48 CLEV. ST. L. REV. 169, 172 (2000) ("Although *New York Times* established the rule that a public official must prove actual malice in order to recover for a defamatory falsehood, the Court did not define who is a 'public official,' or even issue rough parameters for determination.").

3. 383 U.S. 75 (1966).

4. 443 U.S. 111 (1979).

5. *See infra* Part III.A (describing the inconsistencies with the rationale of *New York Times Co. v. Sullivan*).

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significant and troubling dissonance in the Supreme Court's First Amendment jurisprudence.

To understand these issues, it is helpful to begin with the *New York Times Co. v. Sullivan* case, which was "about as easy to resolve as a landmark decision could be."[6] Responding to a civil rights movement fundraising advertisement that criticized the Montgomery Police Department in the pages of the *New York Times*,[7] Montgomery County Commissioner L.B. Sullivan[8] and the Alabama political establishment[9] seized upon minor factual errors therein[10] as part of a brazenly

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6. John C.P. Goldberg, *Judging Reputation: Realism and Common Law in Justice White's Defamation Jurisprudence*, 74 U. COLO. L. REV. 1471, 1478 (2003).

7. On March 29, 1960, the *New York Times* published a page-length editorial advertisement entitled *Heed Their Rising Voices*, which had been created by civil rights leaders A. Philip Randolph and Bayard Rustin. KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 331 (5th ed. 2007); LUCAS A. POWE, JR., THE WARREN COURT AND AMERICAN POLITICS 304 (2000). The advertisement, which listed eighty prominent endorsers, was an appeal to raise money to assist Dr. Martin Luther King, Jr. with legal fees incurred in the civil rights struggle. *Heed Their Rising Voices*, N.Y. TIMES, Mar. 29, 1960, at 25; POWE, *supra*, at 304–05. The advertisement included minor factual errors regarding the conduct of Montgomery police officers. SUSAN DUDLEY GOLD, *NEW YORK TIMES CO. V. SULLIVAN*: FREEDOM OF THE PRESS OR LIBEL? 19 (2007).

8. L.B. Sullivan was one of three elected County Commissioners for Montgomery County, Alabama. ANTHONY LEWIS, MAKE NO LAW: THE *SULLIVAN* CASE AND THE FIRST AMENDMENT 256 (1991). In his position as Commissioner of Public Affairs, he supervised the Montgomery Police Department. *Id.*

9. The Alabama political establishment was extremely displeased with the press coverage of civil rights-related matters within the State. *See* GOLD, *supra* note 7, at 22–24 (describing the actions taken by various Montgomery officials in response to the advertisement). Alabama's Attorney General saw an opportunity and advised state public officials to file multi-million dollar lawsuits against the New York Times Company. LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 82 (1991).

> 10. Sullivan objected to assertions in the third and sixth paragraphs of the advertisement. LEWIS, *supra* note 8, at 12. In Montgomery, Alabama, after students sang "My Country, 'Tis of Thee" on the State Capitol steps, their leaders were expelled from school, and truck-loads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was pad-locked in an attempt to starve them into submission . . . . Again and again the Southern violators have answered Dr. King's peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for "speeding," "loitering" and similar "offenses." And now they have charged him with "perjury" . . . under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize [African] Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of

aggressive use of defamation litigation as a tool in support of white supremacy.[11] Having fashioned a defamation suit into a weapon, the Alabama political establishment struck at their political adversaries in the press[12] and the civil rights movement.[13] Sullivan's suit and the substantial monetary judgments awarded by a Montgomery County jury exposed in a dramatic fashion the potential dangers posed to democratic self-governance by defamation suits brought by government officials.[14]

> the total struggle for freedom in the South.

Heed Their Rising Voices, *supra* note 7, at 25. The errors in the advertisement included the following:

> [T]he campus dining hall had not been padlocked on any occasion, the police had a significant presence near the campus but did not "ring" the campus and had not been called to the campus in response to the demonstration at the capitol steps, the students had sung a different song, and the police had arrested Dr. King four not seven times.

Jeffrey Omar Usman, *Finding the Lost Involuntary Public Figure*, 2014 UTAH L. REV. 951, 957–58 (2014) (footnotes omitted).

11. *See* Brief for Petitioners at 29, Abernathy v. Sullivan, 376 U.S. 254 (1963) (No. 40), 1963 WL 105893, at *29 (explaining that the actions were brought to silence critics of Alabama's enforced segregation policy).

12. GOLD, *supra* note 7, at 22–24; KERMIT L. HALL & JOHN J. PATRICK, THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA 143 (2006); LEWIS, *supra* note 8, at 12; JIM NEWTON, JUSTICE FOR ALL: EARL WARREN AND THE NATION HE MADE 429 (2006).

13. Garrett Epps, *The Other* Sullivan *Case*, 1 N.Y.U. J. L. & LIBERTY 783, 784–86 (2005). Without contradiction, the ministers testified they had not authorized use of their names as endorsers or even seen the advertisement prior to its application; nevertheless, the jury still imposed substantial verdicts against them. LEWIS, *supra* note 8, at 12. The ministers had only discovered their names were listed on the advertisement upon Sullivan's filing of suit against them. KERMIT L. HALL & MELVIN I. UROFSKY, *NEW YORK TIMES V. SULLIVAN*: CIVIL RIGHTS, LIBEL LAW, AND THE FREE PRESS 15–18 (2011). Sullivan and the Alabama judiciary proved to be particularly vindictive towards the four ministers in enforcing the judgment including seizing and levying their property without following standard procedures in awaiting resolution of the case on appeal. Epps, *supra*, at 785; HALL & UROFSKY, *supra*, at 88; ALFRED H. KNIGHT, THE LIFE OF THE LAW: THE PEOPLE AND CASES THAT HAVE SHAPED OUR SOCIETY, FROM KING ALFRED TO RODNEY KING 228 (1996).

14. *See* Alex Kozinski, *The Bulwark Brennan Built*, COLUM. JOURNALISM REV., Nov./Dec. 1991, at 85 ("If successful, the lawsuits would effectively ring down the curtain on conditions of blacks in the South, for every story and every advertisement commenting on those conditions would expose the media sources to liability. Worse, if L.B. Sullivan—a small-town official from the heart of Dixie—could intimidate *The New York Times*, the media in this country would become as effective as a toothless guard dog."); *see also* NORMAN L. ROSENBERG, PROTECTING THE BEST MEN: AN INTERPRETIVE HISTORY OF THE LAW OF LIBEL 236 (1986) (indicating that the libel suits "seemed about to inhibit political discussion even more seriously than had the infamous Sedition Act of 1798"). Sullivan's success in litigation before a Montgomery County jury shone a path for southern officials to bring the northern press to heel. In the eighteen months that immediately followed the verdict, southern political officials filed defamation actions seeking more than three hundred million dollars in damages related to news coverage of the civil rights movement. KNIGHT, *supra* note 13, at 229. The targets of the lawsuits were those reporters who were covering civil rights issues in the South. JAMES L. AUCOIN, THE EVOLUTION OF AMERICAN INVESTIGATIVE JOURNALISM 68 (2005). While *New York Times Co. v. Sullivan* was pending

While in retrospect the unconstitutionality of Alabama's strict liability approach to defamation suits involving pubic officials is clear,[15] that conclusion was far from obvious based upon then existent precedent.[16] Drawing upon precedent, the Alabama Supreme Court noted that Sullivan's suit involved libelous portions of the advertisement and that "[t]he First Amendment of the U.S. Constitution does not protect libelous publications."[17] At the time, this was a perfectly orthodox conclusion. The United States Supreme Court in a number of previous decisions had classified libelous speech as low-value speech that stood outside the ambit of the protections afforded by the First Amendment.[18] No lesser authority than William Blackstone in his influential *Commentaries*[19] had blessed the view that libel was not

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before the Supreme Court, the New York Times Company "pulled its reporters out of Alabama, achieving precisely what the state had hoped—an end to national attention to its racial policies, at least in the pages of the Times." NEWTON, *supra* note 12, at 429. That the defamation lawsuits were curtailing reporting by the press on the civil rights movement in the South was far from a hidden consequence of the litigation. KNIGHT, *supra* note 13, at 228–29. A headline in the *Montgomery Advertiser* rejoiced "State Finds Formidable Club to Swing at Out-of-State Press." *Id.* The *Alabama Journal* observed that as a result of the verdict its northern press counterparts might "re-survey . . . their habit of permitting anything detrimental to the south and its people to appear in their columns." DOUGLAS M. FRALEIGH & JOSEPH S. TUMAN, FREEDOM OF EXPRESSION IN THE MARKETPLACE OF IDEAS 172 (2011) (citing LEWIS, *supra* note 8, at 34).

15. Goldberg, *supra* note 6, at 1478.

16. KNIGHT, *supra* note 13, at 229–30. Confident of his chances of prevailing before the Supreme Court, Sullivan's lawyer M. Roland Nachman, Jr. observed that "[t]he only way the Court could decide against me was to change one hundred years or more of libel law." POWE, supra note 7, at 307.

17. N.Y. Times Co. v. Sullivan, 144 So. 2d 25, 40 (Ala. 1962).

18. *See, e.g.*, Chaplinsky v. New Hampshire, 315 U.S. 568, 571–72 (1942). Therein, the Supreme Court indicated that

> [t]here are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

Id. at 571–72 (footnote omitted).

19. "Blackstone's Commentaries served as a conduit through which English jurisprudential developments influenced the Framers and thus affected the development of the Constitution. . . . Blackstone's *Commentaries* had such a profound influence on the Framers' generation that it 'was often used by practitioners as a shortcut to the law.'" Michael D. Pepson & John N. Sharifi, *Two Wrongs Don't Make a Right: Federal Death Eligibility Determinations and Judicial Trifurcations*, 43 AKRON L. REV. 1, 28–29 (2010) (quoting Randolph N. Jonakait, *The Origins of the Confrontation Clause: An Alternative History*, 27 RUTGERS L.J. 77, 79 (1995)).

protected as free speech: "[W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated."[20]

The advertisement being libelous proved not to be controlling; quite to the contrary, the Court glided past the crux of Sullivan's argument, finding that "libel can claim no talismanic immunity from constitutional limitations."[21] Distinguishing precedents, which had seemingly suggested a contrary conclusion, the Supreme Court noted these cases had not involved application of libel suits "to impose sanctions upon expression critical of the official conduct of public officials."[22] Rejecting Sullivan's contention that libelous speech stands outside the bounds of First Amendment protection, the Court instead concluded that defamation actions must be "measured by standards that satisfy the First Amendment."[23]

In assessing Alabama's defamation tort law under those standards, neither the availability of truth as a defense nor the presence of false information in the advertisement proved sufficient to render the verdict sustainable.[24] The Supreme Court expressed concern that requiring government critics to guarantee the truth of all their statements under the looming threat of a libel judgment would dampen the vigor and limit the variety of public debate.[25] In order to protect public discourse about the conduct of public officials, the Court determined that the existence of an error, even an error resulting from negligence, should not be a sufficient basis to recover tort damages.[26] The Court recognized that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive.'"[27]

To maintain the necessary breathing space, the Supreme Court ruled that a public official cannot recover damages for a defamatory falsehood relating to his or her official conduct without proof that the statement

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20. 4 WILLIAM BLACKSTONE, COMMENTARIES 151 (Univ. Chi. Press 1979) (1765–1769) (emphasis omitted).

21. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964).

22. *Id.* at 268.

23. *Id.* at 269.

24. *Id.* at 267–69.

25. *Id.* at 270–71, 279.

26. *Id.* at 268–69.

27. *Id.* at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

was made with "actual malice."[28] Clarifying what was necessary to meet the actual malice standard, the Court indicated that claimants need to show the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[29] As for the foundational questions of who qualifies as a "public official" and what constitutes speech "relating to his [or her] official conduct," the Supreme Court determined no further exploration was warranted in the *New York Times Co. v. Sullivan* case given the facts thereof:

> We have no occasion here to determine how far down into the lower ranks of government employees the "public official" designation would extend for purposes of this rule, or otherwise to specify categories of persons who would or would not be included. Nor need we here determine the boundaries of the "official conduct" concept. It is enough for the present case that respondent's position as an elected city commissioner clearly made him a public official, and that the allegations in the advertisement concerned what was allegedly his official conduct as Commissioner in charge of the Police Department.[30]

But, "there's the rub,"[31] for though *New York Times Co. v. Sullivan*

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28. *Id.* at 279–80.

29. *Id.*

30. *Id.* at 283 n.23 (citation omitted).

31. "To die, to sleep; To sleep: perchance to dream: ay, there's the rub." WILLIAM SHAKESPEARE, HAMLET act 3, sc. 1.

> These latter words, then, are the point where the self-induced deconstruction of Hamlet's death wish is complete and where he is forced to "pause" and redirect his thought. If this is so, then one may legitimately ask what significance is attached to the expression "there's the rub," which marks the reversal. English speakers of today are likely to respond to the expression as a whole, since it is familiar, almost proverbial, perhaps a mere verbal gesture recognizing some difficulty, or perhaps an intensified variant of "that is the question" at the beginning of the soliloquy. This is how the in dictionaries of current English usage the pertinent sense of the noun *rub* (apart from the more usual meaning "the act of rubbing") is explained, mostly with reference to the idiomatic *there's the rub* itself; for example:
>
> > *There's / here's the rub*] used when saying that a particular problem is the reason why a situation is so difficult.
> >
> > The rub [sing.] (*dated or rhet.*) a problem or difficult: . . . there's / there lies the rub.
>
> But then the familiarity of the phrase may well be due to its occurrence in the most famous monologue of the most famous play of the most famous [British] dramatist. Shakespeare may, indeed, have coined it—the *OED*, at any rate, has no earlier attestations of the phrase. If so, he would have made use of a meaning of *rub* common in his own time but obsolete today. In early modern English, *rub* was a bowling term, denoting "an obstacle or impediment by which a bowl is hindered in, or diverted from, its proper course." It also had a more general meaning, no doubt transferred from the bowling context, signifying any kind of "impediment or difficult" of either a physical

proved to be an "easy case," it sowed "the problem of how to decide subsequent cases, in which all signs are not pointing toward one resolution."[32] Though the issue was avoidable in *New York Times Co. v. Sullivan*, a challenging and recurring question that has plagued courts since is which government employees qualify as public officials for the purpose of applying the actual malice test.[33]

Having declined to explore the parameters of this issue in *New York Times Co. v. Sullivan*, the Supreme Court two years later in *Rosenblatt v. Baer*[34] offered some guidance.[35] The Court indicated the public official designation applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[36] The Court added that "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."[37] Addressing the suggestion that this test might convert the "night watchman accused of

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> or mental nature . . . . In the Shakespeare canon itself, *rub* in those senses occurs about ten times, though it is not always easy to determine whether, and to what extent, the bowling association is present or whether a more general meaning predominates—in other words, whether *rub* is a fresh or faded metaphor. It will be noticed, however, that in Shakespeare a *rub* is usually something that obstructs a path, in which case the bowling association seems natural—as in *Henry V* ("We doubt not now / But every rub is smoothed our way") or in *King John* ("the breath of what I mean to speak / Shall blow each dust, each straw, each little rub"). Or else it may obstruct, in a more abstract sense, the course of fortune . . . . Surely Shakespeare is aware of both meanings—the concrete one applied to bowling *and* the transferred one, since he plays with them in the garden scene of *Richard II*; when the lady-in-waiting, attempting to cheer up the melancholy queen, suggests: "Madam, we'll play at bowls," the answer is: "Twill make me think the world is full of rubs / and that my fortune runs against the bias."

Werner Habicht, *Translating Hamlet's Thoughts Process*, *in* SHAKESPEARE WITHOUT BOUNDARIES: ESSAYS IN HONOR OF DIETER MEHL 267, 268–69 (Christa Jansohn et al. eds., 2011) (footnotes and citations omitted). The expression is used here in both the classical and modern sense. In the classical sense, the Supreme Court's definition of a public official has proven to obstruct and impede the fulfillment of the rationale of the *New York Times Co. v. Sullivan* decision. In the modern sense, the determination of who constitutes a public official has been a recurring and difficult question for courts.

32. Goldberg, *supra* note 6, at 1478.

33. 3 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH § 23:3.75, at 23–57 (2015).

34. 383 U.S. 75 (1966).

35. *See The Supreme Court, 1965 Term*, 80 HARV. L. REV. 123, 197 (1966–1967) (characterizing the *Rosenblatt* Court's description of a public official as "a modest contribution to the development of the definition").

36. *Rosenblatt*, 383 U.S. at 85.

37. *Id.* at 86 n.13.

stealing state secrets" into a public official, the Court rejected this contention.[38] In doing so, the Court observed the actual malice standard would not be applied "merely because a statement defamatory of some person in government employ catches the public's interest; that conclusion would virtually disregard society's interest in protecting reputation."[39] In other words, a "low[er]-level government employee does not become a public official simply because a news story about him attracts public attention; he must be a public official by virtue of his position or potential influence over governmental policy."[40]

Summarizing the Supreme Court's jurisprudence as of 1979 on the question of who qualifies as a public official, Chief Justice Warren Burger observed in *Hutchinson v. Proxmire* that while the Supreme Court "has not provided precise boundaries for the category of 'public official'; it cannot be thought to include all public employees."[41] With this limit declared, the Supreme Court has left the heavy lifting of defining who qualifies as a public official to the lower courts.[42] In the nearly five decades since *Rosenblatt*, scholarly attention has been more focused on defamation issues connected with public figures than public officials,[43] and the Supreme Court has largely left this aspect of the doctrine untended.[44]

In this void, irreconcilable conflicts have arisen among the lower courts.[45] "These varied interpretations, 'blur[ring] the taxonomy to the point where it loses all shape and meaning,' run the gamut from extremely broad to relatively narrow; many bear no resemblance to one another, and some bear little resemblance to the *Rosenblatt* test itself."[46] These divergent understandings can be organized around two strong

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38. *Id.*

39. *Id.*

40. LYRISSA BARNETT LIDSKY & R. GEORGE WRIGHT, FREEDOM OF THE PRESS: A REFERENCE GUIDE TO THE UNITED STATES CONSTITUTION 76 (2004).

41. Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

42. *See* Brian Markovitz, Note, *Public School Teachers As Plaintiffs in Defamation Suits: Do They Deserve Actual Malice?*, 88 GEO. L.J. 1953, 1962 (2000) (explaining that the *Rosenblatt* court refused to draw precise lines as to what type of government employees constitute public officials).

43. Richard E. Johnson, *No More Teachers' Dirty Looks—Now They Sue: An Analysis of Plaintiff Status Determinations in Defamation Actions by Public Educators*, 17 FLA. ST. U. L. REV. 761, 762 (1990).

44. *See id.* at 764 ("The 1966 Rosenblatt decision was the last time the Court offered any meaningful clarification of who could be classified as a public official.").

45. David Finkelson, Note, *The Status/Conduct Continuum: Injecting Rhyme and Reason into Contemporary Public Official Defamation Doctrine*, 84 VA. L. REV. 871, 884–85 (1998).

46. *Id.* (citation omitted).

poles: a narrow and an expansive definition of the term public official. This division often manifests through the prism of whether the court emphasizes *Rosenblatt*'s above-the-line description of a public official or the description set forth in footnote thirteen[47]—what defamation scholar David Elder has termed the "two-part alternative test for 'public official.'"[48] The above-the-line language declares the public official designation applies "at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs."[49] The below-the-line language in footnote thirteen provides, in part, that "[t]he employee's position must be one which would invite public scrutiny and discussion of the person holding it, entirely apart from the scrutiny and discussion occasioned by the particular charges in controversy."[50] The narrow view suggests the public official designation should be limited to *Rosenblatt*'s "at the very least" category of high-level policy-making officials.[51] The broad conception embraces within the scope of public officialdom positions that are of importance to the public in general.[52] Both approaches

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47. Finkelson, *supra* note 45, at 885; Kate M. Adams, Comment, *(Re)defining Public Officials and Public Figures: A Washington State Primer*, 23 SEATTLE U. L. REV. 1155, 1166–68 (2000).

48. David Elder, *Defamation, Public Officialdom and the* Rosenblatt v. Baer *Criteria—A Proposal for Revivification: Two Decades After* New York Times Co. v. Sullivan, 33 BUFF. L. REV. 579, 679 (1984).

49. Rosenblatt v. Baer, 383 U.S. 75, 85 (1966).

50. *Id.* at 86 n.13.

51. *See, e.g.*, Kassel v. Gannett Co., 875 F.2d 935, 939 (1st Cir. 1989) (conceiving of public officials as "[p]olicymakers, upper-level administrators, and supervisors"); Smith v. Russell, 456 So. 2d 462, 464 (Fla. 1984) (viewing of a public official as a "highly visible representative of government authority who has power over citizens and broad discretion in the exercise of that power"); Ellerbee v. Mills, 422 S.E.2d 539, 540 (Ga. 1992) (excluding public school principals from the category of public officials because they do not govern and are not at a sufficiently high level of policymaking); E. Canton Educ. Ass'n v. McIntosh, 709 N.E.2d 468, 475 (Ohio 1999) (declining to apply the actual malice standard to a principal because he did not assume a role of special prominence in society or governance); Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32, 37 (Va. 1987) (concluding that the actual malice standard was inapplicable to a government employee who was not a policymaker).

52. *See, e.g.*, Kahn v. Bower, 284 Cal. Rptr. 244, 251 (Cal. Ct. App. 1991) (indicating that even in the absence of policymaking authority that the exercise of power and public visibility can render a government employee a public official); Ryan v. Dionne, 248 A.2d 583, 585 (Conn. Super. Ct. 1968) (concluding that a government employee qualified as a public official because of performing important governmental functions in the public interest); Hodges v. Okla. Journal Publ'g Co., 617 P.2d 191, 194 (Okla. 1980) (finding a government contractor to be a public official because of the appearance of substantial responsibility for government affairs); Press, Inc. v. Verran, 569 S.W.2d 435, 441 (Tenn. 1978) (stating that the designation as a public official "does not necessarily apply only to high public position. Any position of employment that carries with it duties and responsibilities affecting the lives, liberty, money or property of a citizen or that

concede that not all government employees qualify as public officials.

This Article embraces neither the narrow nor broad conceptualization of a public official but instead suggests revisiting the *Rosenblatt* formulation and the one clear limitation set forth by *Hutchinson* that whatever the scope of public officialdom may be "it cannot be thought to include all public employees."[53] Though not all speech about government employees should be deemed to be related to their official capacity, all government employees should be considered public officials, and speech related to their official conduct should be safeguarded by the actual malice standard. To explain and support this contention, this Article in Part II delineates the Supreme Court's constitutional framework for categorizing plaintiffs in defamation cases. In Parts III and IV of the Article, the three principal arguments for not applying the actual malice standard to lower-level government employees and why those arguments are ultimately unavailing are explored. More precisely, Part III of the Article addresses the contention that speech about lower-level government employees is unimportant to democratic self-governance. In responding to this argument, Part III seeks to demonstrate that speech about the actions of lower-level government employees who are acting in their official capacity is political speech that is critical to democratic self-governance. The Article in Part IV sets forth the opposing argument that the actual malice standard should not be applied to lower-level government employees because of their lack of access to media for purposes of self-help and because they have not voluntarily submitted to such scrutiny. These rationales for not protecting speech relating to the official conduct of lower-level government employees arise from the Supreme Court's 1974 decision in *Gertz v. Robert Welch, Inc*.[54] Part IV delves into the manner in which four decades of societal and technological change since *Gertz* have significantly diminished the persuasiveness of the lack of access to media rationale. Part IV also examines how the jurisprudential transformation in the concept of voluntariness in the years after *Gertz* has rendered the voluntariness rationale unavailing as

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may enhance or disrupt his enjoyment of life, his peace and tranquility, or that of his family, is a public office within the meaning of the constitutional privilege"); HBO v. Harrison, 983 S.W.2d 31, 36–39 (Tex. App. 1998) (applying the public official designation to an individual who exercised governmental power); Palmer v. Bennington Sch. Dist., 615 A.2d 498, 502–03 (Vt. 1992) (determining that a principal is a public official because of the responsibility and control over governmental functions).

53. *Rosenblatt*, 383 U.S. at 86 n.13; Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979).

54. 418 U.S. 323 (1974).

a basis for not applying the actual malice standard to lower-level government employees. The Article in Part V explores the First Amendment jurisprudential dissonance created by failure to afford greater protection to speech about the official conduct of lower-level government employees. Ultimately, the Article seeks to explain, in contradistinction with *Rosenblatt* and *Hutchison*, why all government employees should be deemed public officials, and why speech related to their actions within their official capacity should be protected by the actual malice standard.

II. The Supreme Court's Framework for Categorizing Plaintiffs in Defamation Suits

The Supreme Court has structured a constitutional framework for defamation litigation designed to address the inherent tension between states' interest in redressing reputational injuries arising from defamation and the constitutional safeguards necessary for fostering a vigorous and robust discussion of governmental conduct.[55] While theoretically the balance could be struck through case-by-case determinations, the Court recognized the impracticability and substantive undesirability of such an approach.[56] Instead, the Supreme Court balanced the competing interests by creating categorical groupings, assigning different types of defamation plaintiffs to different categories, and establishing rules for each of those categories.

Plaintiffs in defamation cases are classified into one of five categories: (1) public officials, (2) all-purpose public figures, (3) limited-purpose public figures, (4) involuntary public figures, and (5) private individuals.[57] For the heightened protections of the actual malice test to apply to a public official, the allegedly defamatory speech must be related to his or her official conduct.[58] As for the second

55. *Id.* at 342.

56. *Id.* at 343.

57. Usman, *supra* note 10, at 972; *see* Wilson v. Daily Gazette Co., 588 S.E.2d 197, 214 & n.7 (W. Va. 2003) (noting that plaintiffs can be categorized as public officials, private individuals, and three types of public figures: all-purpose public figures, limited-purpose public figures, and involuntary public figures); JAMES G. SAMMATARO, FILM AND MULTIMEDIA AND THE LAW § 5:20 (West 2015) (stating individuals can be classified as private individuals, public officials, all-purpose public figures, limited-purpose public figures, and involuntary limited-purpose public figures).

58. *See* SMOLLA, *supra* note 33, § 23:3.75, at 23–57 (noting that one of the important factors in determining public official status is the extent to which the allegedly defamatory article seeks to hold the plaintiff "accountable" for their public official duties). In *Garrison v. Louisiana*, 379 U.S. 64, 77 (1964), the Supreme Court expressly concluded that the heightened actual malice

category, all-purpose public figures are persons who "occupy positions of such persuasive power and influence that they are deemed public figures for all purposes."[59] This category, which applies to a relatively small number of persons,[60] is comprised of individuals with significant fame and notoriety, i.e., "household names."[61] If the plaintiff in a defamation suit is an all-purpose public figure, the constitutional protection of the actual malice standard applies to the plaintiff[62] for "all purposes and in all contexts."[63]

The third category, limited-purpose public figures, includes people who have "thrust themselves to the forefront of particular public controversies" or "the vortex of [a] public issue" "in order to influence the resolution of the issues involved" and in doing so "have assumed roles of especial prominence in the affairs of society."[64] Such persons are public figures in connection with matters upon which they have

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standard reached beyond official conduct to fitness for office, including considerations of private character, when considering candidates for public office. The Court stated:

> The *New York Times* rule is not rendered inapplicable merely because an official's private reputation, as well as his public reputation, is harmed. The public-official rule protects the paramount public interest in a free flow of information to the people concerning public officials, their servants. To this end, anything which might touch on an official's fitness for office is relevant. Few personal attributes are more germane to fitness for office than dishonesty, malfeasance, or improper motivation, even though these characteristics may also affect the official's private character.

Id. Utilizing even starker language, the Supreme Court observed in *Monitor Patriot Co. v. Roy*, 401 U.S. 265 (1971), that

> [g]iven the realities of our political life, it is by no means easy to see what statements about a candidate might be altogether without relevance to his fitness for the office he seeks. The clash of reputations is the staple of election campaigns, and damage to reputation is, of course, the essence of libel.

Id. at 275.

59. *Gertz*, 418 U.S. at 345.

60. Waldbaum v. Fairchild Publ'ns, Inc., 627 F.2d 1287, 1296 (D.C. Cir. 1980) ("Few people, of course, attain the general notoriety that would make them public figures for all purposes."); Patrick H. Hunt, *Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims*, 73 LA. L. REV. 559, 573 (2013) ("[F]ew people are truly 'all-purpose' public figures."); *see also* Dennise Mulvihill, Comment, Irving v. Penguin*: Historians on Trial and the Determination of Truth Under English Libel Law*, 11 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 217, 247 (20002001) (noting that if the case had been brought under U.S. libel law, the plaintiff would be determined a public figure and therefore be required to prove actual malice).

61. 1A ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 4:8, at 4-22 (3d ed. 2010); *see* Susan M. Gilles, *From Baseball Parks to the Public Arena: Assumption of the Risk in Tort Law and Constitutional Libel Law*, 75 TEMP. L. REV. 231, 251 n.118 (2002) (explaining the focus of an all-purpose public figure is whether or not the person has achieved "national prominence").

62. 1 RODNEY A. SMOLLA, LAW OF DEFAMATION § 3:23, at 3-36 (2d ed. 2010).

63. *Gertz*, 418 U.S. at 351.

64. *Id.* at 345, 352.

assumed such a role, "but in all other aspects of their lives they remain private figures."[65] Accordingly, they are public figures and subject to application of the actual malice standard "for a limited range of issues."[66] The fourth category, the involuntary public figure category, applies in limited circumstances to persons who are "drawn into a particular public controversy" and "become a public figure through no purposeful action of [their] own."[67] For the actual malice standard to be applied to the plaintiff in either category three, the limited-public figure category, or category four, the involuntary public figure category, the speech must address a matter of public concern.[68] Finally, persons who are not public officials, all-purpose public figures, limited-purpose public figures, or involuntary public figures are categorized as private individuals. Significantly for purposes of the discussion herein, plaintiffs who are lower-level government employees in defamation actions are assigned to the private individual category, even if the speech is addressed to their actions as a government employee.[69] The Supreme Court has ruled that states are prohibited from setting strict liability standards in defamation suits but otherwise enabled states to set their own standards, providing significantly less protection for speakers on speech regarding private individuals even where the speech addresses a matter of public concern.[70]

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65. RODNEY A. SMOLLA, RIGHTS AND LIABILITIES IN MEDIA CONTENT: INTERNET, BROADCAST, AND PRINT § 6:38, at 6-316 (2d ed. 2010).

66. *Gertz*, 418 U.S. at 351.

67. *Id.* at 345, 351.

68. *See* SMOLLA, *supra* note 62, § 3:23, at 3-36 (noting that if the allegedly defamatory comment is not a matter of public concern, the plaintiff may essentially "revert" to private figure status).

69. *See generally* Rosenblatt v. Baer, 383 U.S. 75, 86 n.13 (1966) (excluding application of the actual malice standard to a night watchman accused of stealing state secrets); Hutchinson v. Proxmire, 443 U.S. 111, 119 n.8 (1979) (indicating that not all government employees will qualify as public officials).

70. *Gertz*, 418 U.S. at 346–48 & n.10. Commentators addressing the Supreme Court's decision in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985), have argued that if the defamatory statements regarding a private person are not addressed to a matter of public concern, then strict liability could apply:

> The United States Supreme Court, in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, held that when a private person who is neither a public official nor a public figure sues for defamation arising from publication of matters that are *not* of public concern, she need not prove actual damages as required in the private person, public concern cases. Thus the common law rule of presumed damages can be applied by the states to cases in this category if the states are so minded.
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> Several decisions have said or assumed that the *Dun & Bradstreet* case means that *all* of the common law rules remain intact, not merely the damages rule. That would mean that in the private person case where the issue is not of public concern, the

III. COMMENTING ON LOWER-LEVEL GOVERNMENT EMPLOYEES AND PROTECTING POLITICAL SPEECH

One of the principal arguments[71] advanced for assigning lower-level government employees to the private individual category, even where the speech addresses their actions as a government employee, is that speech about the actions of such employees is immaterial to democratic self-governance: "the public interest in the activities of most civil servants is slight."[72] Alternatively, some scholars have rejected such a total exclusion approach, conceding that some lower-level government employees may constitute public officials, and have instead presented a nuanced approach to distinguish those who are public officials from those who are not.[73] The total exclusion understanding meshes well with a narrow definition for the term public official while the nuanced approach more closely ties in with a broader definition of a public official.[74] Both approaches are problematic, however, for at least three reasons. One, the exclusion of speech regarding lower-level government employees from the ambit of the actual malice constitutional safeguard is inconsistent with the rationale of *New York Times Co. v. Sullivan*. Two, even well-considered nuanced approaches for distinguishing those lower-level government employees who are public officials from those who are not ultimately prove untenable. Three, and most importantly, speech about lower-level government employees is political speech that is critical to democratic self-governance.

> states would also be free to presume falsehood as well as damages, and possibly even to presume that the defendant was at fault; courts could go back to the old common law of prima facie strict liability in this class of cases. If the rules develop along these lines, courts in private person cases will be required to determine what counts as an issue of public concern.

3 DAN B. DOBBS ET AL., THE LAW OF TORTS § 557 (2d ed. 2011 & Supp. 2014) (citations omitted).

71. The First Circuit Court of Appeals has conceived of delineation between public officials and lower-level government employees who should instead be treated as private individuals as standing upon a three-legged stool. Mandel v. Bos. Phx., Inc., 456 F.3d 198, 204 (1st Cir. 2006). The three legs of the stool (importance of the position, access to media, and voluntary submission to scrutiny) are also the three arguments advanced for not imposing the actual malice standard upon lower-level government employees.

72. *The Supreme Court, 1965 Term*, *supra* note 35, at 197.

73. *See generally* Marc A. Franklin, *Constitutional Libel Law: The Role of Content*, 34 UCLA L. REV. 1657, 1677–79 (1987) (setting forth his approach for determining whether a governmental employee is a public official for purposes of defamation suits).

74. *See supra* Part I (discussing the narrow and broad definitions employed by courts to define the term public official).

A. Inconsistency with the Rationale of New York Times Co. v. Sullivan

The categorical exclusion of speech relating to the official conduct of lower-level government employees from the protections afforded under the actual malice test is inconsistent with the Supreme Court's rationale in *New York Times Co. v. Sullivan*. A politically oriented theory of the First Amendment undergirds the constitutional protections set forth in *New York Times Co. v. Sullivan*.[75] The Supreme Court recognized therein that:

> "[I]t is a prized American privilege to speak one's mind, although not always with perfect good taste, on all public institutions, and this opportunity is to be afforded for "vigorous advocacy" no less than "abstract discussion."
>
> The First Amendment, said Judge Learned Hand, "presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection. To many this is, and always will be, folly; but we have staked upon it our all." Mr. Justice Brandeis, in his concurring opinion in *Whitney v. California*, gave the principle its classic formulation:
>
>> Those who won our independence believed that public discussion is a political duty; and that this should be a fundamental principle of the American government. They recognized the risks to which all human institutions are subject. But they knew . . . that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies; and that the fitting remedy for evil counsels is good ones. Believing in the power of reason as applied through public discussion, they eschewed silence coerced by law . . . .
>
> Thus we consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.[76]

This understanding fits smoothly with the Supreme Court's consistent recognition that within the pantheon of free speech, the most protected variety is political speech.[77] Safeguarding political speech is the core

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75. Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 918 (1984).

76. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–70 (1964) (citations omitted).

77. CASS R. SUNSTEIN, THE PARTIAL CONSTITUTION 232–42 (1993) (articulating a hierarchical understanding of First Amendment protections with political speech at the highest level); Valerie M. Fogleman & James Etienne Viator, *The Critical Technologies Approach: Controlling Scientific Communication for the National Security*, 4 BYU J. PUB. L. 293, 355 (1990) ("Many modern commentators recognize that Supreme Court jurisprudence has regarded

purpose, the primary raison d'être, of the First Amendment.[78] Such speech stands at the "'highest rung of the heirarchy [sic] of First Amendment values' and is entitled to special protection."[79] Simply stated, "[t]he maintenance of the opportunity for free political discussion to the end that government may be responsive to the will of the people and that changes may be obtained by lawful means, an opportunity essential to the security of the Republic, is a fundamental principle of our constitutional system."[80]

By protecting speech related to the official conduct of public officials, the Supreme Court viewed its adoption of the actual malice standard in *New York Times Co. v. Sullivan* as honoring the core self-governance purpose of the First Amendment.[81] Such protections are deduced from principles of self-government, which require the electorate to be able to gain sufficient knowledge to fulfill its responsibilities in a representative republic.[82] These safeguards are also critically tied to being able to voice grievances about government and seek redress through nonviolent means.[83] Because the citizenry plays a critical role in democratic self-governance and because of what is needed to be able to play this role, "speech concerning public affairs . . . is the essence of self-government."[84] In the absence of the information and debate derived from and fostered by such speech, "citizens cannot play their assigned roles in choosing and instructing their

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political speech as the most protected category of discourse.").

78. *See* Boos v. Barry, 485 U.S. 312, 318 (1988) (noting that public picketing is considered classically political speech, and as such, possible restrictions are scrutinized carefully).

79. Connick v. Myers, 461 U.S. 138, 145 (1983) (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886, 913 (1982)).

80. Stromberg v. California, 283 U.S. 359, 369 (1931).

81. *See generally, e.g.*, Ashutosh Bhagwat, *Associational Speech*, 120 YALE L.J. 978, 1024 (2011) (noting the "core self-governance goals of the First Amendment"); Lyrissa Barnett Lidsky, *Nobody's Fools: The Rational Audience as First Amendment Ideal*, 2010 U. ILL. L. REV. 799, 839 ("It is generally agreed that a core purpose of the First Amendment is to foster the ideal of democratic self-governance.").

82. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 26–27 (1948) ("The principle of the freedom of speech springs from the necessities of the program of self-government. . . . It is a deduction from the basic American agreement that public issues shall be decided by universal suffrage."); Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255 (characterizing freedom of speech as a right focused on self-governance by allowing the electorate to become informed).

83. *See* Whitney v. California, 274 U.S. 357, 376–78 (1927) (Brandeis, J., concurring), *overruled in part by* Brandenburg v. Ohio, 395 U.S. 444 (1969) (setting forth a view of freedom of speech as relieving opposition pressure and allowing for reform).

84. Garrison v. Louisiana, 379 U.S. 64, 74–75 (1964).

representatives and in participating in the formation of public policy."[85] Whatever disagreements Supreme Court Justices have had over the last century with regard to the exact applications of the First Amendment, there has been a long-standing consensus among Justices across the ideological continuum that the constitutional guarantee protecting freedom of speech safeguards discussions of governmental action and inaction.[86]

The critical question that emerges next, when considering who qualifies as a public official, is whether speech about lower-level government officials falls within the ambit of speech related to self-governance. When subjected to measured analysis, the argument that there is not a public interest in commenting on lower-level government officials proves to be inconsistent with the core constitutional purposes of *New York Times Co. v. Sullivan*. Simply stated, "the first amendment theory expounded in *New York Times* was much broader than the limited privilege which it produced" in *Rosenblatt*.[87] The *Rosenblatt* definition has generated confusion among the lower courts precisely because the protections afforded by *New York Times Co. v. Sullivan* "seem[] to go well beyond the limited class of government employees" conceived of as public officials in *Rosenblatt*.[88] The inconsistency between the restrictive definition of public officials in *Rosenblatt* and the more expansive speech protecting purposes of *New York Times Co. v. Sullivan*, not only created confusion but spawned active resistance among many lower courts to the narrow *Rosenblatt* conception of a public official.[89]

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85. Lidsky, *supra* note 81, at 810.

86. Mills v. Alabama, 384 U.S. 214, 218–19 (1966) ("Whatever differences may exist about interpretations of the First Amendment, there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs. This of course includes discussions of candidates, structures and forms of government, the manner in which government is operated or should be operated, and all such matters relating to political processes."); Margaret Tarkington, *A First Amendment Theory for Protecting Attorney Speech*, 45 U.C. DAVIS L. REV. 27, 60 (2011) ("[T]he Court carefully protects political speech, considering it at the 'core' of the First Amendment.").

87. Joel D. Eaton, *The American Law of Defamation Through* Gertz v. Robert Welch, Inc. *and Beyond: An Analytical Primer*, 61 VA. L. REV. 1349, 1376 (1975).

88. Comment, *Defamation of the Public Official*, 61 Nw. U. L. Rev. 614, 616 (1966).

89. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 867 (2d ed. 1988) (stating approvingly that lower courts have tended to disregard the highly restrictive understanding of public official suggested by the Court in *Rosenblatt* and *Hutchinson*). *See generally* Eaton, supra note 87, at 1376 (remarking that the lower courts either failed to comprehend the *Rosenblatt* formulation or disregarded it).

B. Nuanced Approaches Fail to Adequately Cover the Spectrum of Self-Governance

Responding to such concerns, venerable mass media scholar Marc Franklin offered a thoughtful, nuanced approach to drawing a line between categorical exclusion that no lower-level government employee could constitute a public official and the position taken in this Article that all lower-level government employees are public officials.[90] Professor Franklin began his analysis by inquiring

> [b]ut how far into government does the [self-governance] rationale go? Surely speech about less obvious parts of government or about lower level employees is not always unimportant. On the other hand, although citizens should be encouraged to discuss every aspect of their government, statements about the efficiency of the highway department's snow removal or of the teaching prowess of an elementary school teacher seem to fall far from the paradigm, especially in a self-governing society that relies heavily on a representative structure.
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> A first cut for purposes of defining "self-governance" for libel purposes—after including discussion of electoral matters—might well track a distinction between charges of a conscious abuse of power or of criminality on the one hand and most charges of negligence or ineptness on the other. Some ineptness, however, may have important implications for functions most citizens consider central to the role of government—matters of public health and safety. If, following a major air disaster, a speaker blames the carelessness of a small group of government air traffic controllers, that statement would seem entitled to the higher tier of protection because of its close connection to the government's role in public safety. The first cut, then, may be that speech related to self-governance involves charges of abuse of power, of criminality, or of carelessness or oversight that affects public health or safety.
>
> This dual line of focusing on abuse by government personnel and on the government's role in public health and safety is likely to capture the mass of what most people think of as involving the essence of self-governance.[91]

Professor Franklin's reasoned analysis is a vast improvement over a categorical rejection of the premise that speech regarding a lower-level government employee cannot constitute speech related to self-

90. *See* Franklin, *supra* note 73, at 1677–79 (setting forth his approach for determining whether a governmental employee is a public official for purposes of defamation suits).

91. *Id.* at 1677–78.

governance. However, his approach fails to fully capture the expansive scope of matters of governance that may be of concern to citizens or the importance of lower-level government officials to the functioning of local, state, and federal governments in the United States.

One of Professor Franklin's examples, exclusion of discussion of "the teaching prowess of an elementary school teacher," provides a helpful illustration of the manner in which even his more expansive understanding of who qualifies as public official is still too narrow.[92] While protecting public school teachers from defamatory comments by not defining them as public officials certainly has appeal,[93] the contrary view has the better of the argument. The United States Supreme Court observed in *Brown v. Board of Education* that "education is perhaps the most important function of state and local governments."[94] Elementary and secondary education provides the "foundation of good citizenship . . . [and awakens] the child to cultural values, in preparing [her] for later professional training, and in helping [her] to adjust normally to [her] environment."[95] Voters consistently agree, identifying education as an important political issue.[96] Education is an

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92. *Id.* at 1678. *See generally, e.g.*, Franklin v. Lodge 1108, Benevolent & Protective Order of Elks, 159 Cal. Rptr. 131, 136–37 (Cal. Ct. App. 1979) (concluding that teachers are not public officials); Richmond Newspapers, Inc. v. Lipscomb, 362 S.E.2d 32, 35–37 (Va. 1987) (finding that a teacher is a private person and not a public official).

93. *See, e.g.*, Eugene C. Bjorklun, *Are Teachers Public Officials for Defamation Purposes?* 2 WEST'S EDUC. L.Q. 527, 534–35 (1993) (advancing the position that teachers are confronted by overwhelming challenges in terms of criticism of them in the performance of their jobs such that the actual malice standard should not be applied); Markovitz, *supra* note 42, at 1964–81 (explaining why public school teachers should not be categorized as public officials); Kristian D. Whitten, *The Economics of Actual Malice: A Proposal for Legislative Change to the Rule of* New York Times v. Sullivan, 32 CUMB. L. REV. 519, 568 (2002) (expressing concern that with "applying the public official/public figure label to . . . public school teachers, the 'actual malice' rule prevents many people in public service, who may not have ready access to the media to defend themselves, from having any meaningful remedy when they are defamed in the media").

94. 347 U.S. 483, 493 (1954).

95. *Id.*

96. *See, e.g.*, DAVID T. CONLEY, WHO GOVERNS OUR SCHOOLS?: CHANGING ROLES AND RESPONSIBILITIES 8 (2003) (observing that education policy has emerged as a central political issue in many states); CHRISTOPHER A. SIMON, TO RUN A SCHOOL: ADMINISTRATIVE ORGANIZATION AND LEARNING 52 (2001) (addressing the political role of education); THE GALLUP POLL: PUBLIC OPINION 2004, at 431 (Alec Gallup & Frank Newport eds., 2006) (reflecting findings demonstrating the importance of education as an issue to voters); Tim Conlan & Paul Posner, *A Solution for All Seasons: The Politics of Tax Reduction in the Bush Administration*, *in* BUILDING COALITIONS, MAKING POLICY: THE POLITICS OF THE CLINTON, BUSH & OBAMA PRESIDENCIES 182, 185 (Martin A. Levin et al. eds., 2012) (noting that education was in polling identified by voters as among the most important issues); Luis Ricardo Fraga & Ann Frost, *Democratic Institutions, Public Engagement, and Latinos in American Public Schools*, *in* PUBLIC ENGAGEMENT FOR PUBLIC EDUCATION: JOINING FORCES TO REVITALIZE

important political issue not only to parents of school-aged children,[97] but also for businesses[98] and the military,[99] among many others.[100] The value assigned by the electorate to the government's role in education is reflected through its enshrinement in all fifty state constitutions.[101]

In the debate over education, teacher quality (or the teaching prowess of the teacher as Professor Franklin describes it) has moved center-stage: "Teacher quality is not just an important issue in addressing the many challenges facing the nation's schools: It is *the* issue."[102] The

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DEMOCRACY AND EQUALIZE SCHOOLS 117, 123–24 (Marion Orr & John Rogers eds., 2011) (noting the importance placed on education by voters).

97. *See, e.g.*, BENJAMIN LEVIN, REFORMING EDUCATION: FROM ORIGINS TO OUTCOMES 121 (2001) (addressing the active political involvement of parents with school-aged children in education issues); Mark R. Warren, *Community Organizing for Education Reform*, *in* PUBLIC ENGAGEMENT FOR PUBLIC EDUCATION: JOINING FORCES TO REVITALIZE DEMOCRACY AND EQUALIZE SCHOOLS 139*,* 141 (Marion Orr & John Rogers eds., 2011) ("Studies consistently show that parents of all racial and class backgrounds care deeply about their children's education . . . .").

98. *See, e.g.*, ARCHIE B. CARROLL ET AL., CORPORATE RESPONSIBILITY: THE AMERICAN EXPERIENCE 328 (Kenneth E. Goodpaster et al. eds., 2012) (addressing the importance of the quality of education system for employers); THOMAS E. CRONIN & ROBERT D. LOEVY, COLORADO POLITICS AND POLICY: GOVERNING A PURPLE STATE 334 (2012) (discussing the involvement of business in the politics of education policy in Colorado); U.S. CHAMBER OF COMMERCE, EDUCATION REFORM PLAYBOOK: A BUSINESS LEADER'S GUIDE 2–35 (2012), http://www.uschamberfoundation.org/sites/default/files/publication/edu/Education_Reform_Playbook.pdf (setting forth the education reform position of the U.S. Chamber of Commerce and recommended approaches for obtaining education reform for members thereof); C. Kent McGuire, *Meeting the Challenges of Urban Communities: Funding School Districts*, *in* POLICY, LEADERSHIP, AND STUDENT ACHIEVEMENT: IMPLICATIONS FOR URBAN COMMUNITIES 3, 14 (C. Kent McGuire & Vivian W. Ikpa eds., 2008) (reflecting upon the involvement of business in political struggles over education policy).

99. *See, e.g.*, PAUL L. KIMMELMAN, THE SCHOOL LEADERSHIP TRIANGLE: FROM COMPLIANCE TO INNOVATION 21 (2010) (noting the importance of a quality education system for the effective functioning of the military); ROBERT E. WISE, RAISING THE GRADE: HOW HIGH SCHOOL REFORM CAN SAVE OUR YOUTH AND OUR NATION 12–13 (2008) (discussing the connection between the quality of education and a qualified military).

100. *See* LEVIN, *supra* note 97, at 121 (discussing the active political involvement of teachers in education politics); PAUL E. PETERSON ET AL., TEACHERS VERSUS THE PUBLIC: WHAT AMERICANS THINK ABOUT THEIR SCHOOLS AND HOW TO FIX THEM 35 (2014) (addressing how public school issues impact homeowners without children); James G. Cibulka, *The NEA and School Choice*, *in* CONFLICTING MISSIONS?: TEACHERS UNIONS AND EDUCATIONAL REFORM 150, 151 (Tom Loveless ed., 2000) (noting the importance of education reform to labor unions beyond the teachers union).

101. *See generally* Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1461, 1465–69 & n.43 (2010) (addressing education clauses in state constitutions).

102. Sam Minner, *Our Own Worst Enemy*, EDUC. WEEK (May 30, 2011), http://www.edweek.org/ew/articles/2001/05/30/38minner.h20.html. *See* LESLIE S. KAPLAN & WILLIAM A. OWINGS, TEACHER QUALITY, TEACHING QUALITY, AND SCHOOL IMPROVEMENT 1–2 (2002) (addressing the place of teacher quality in the debate over education reform).

National Commission on Excellence in Education report *A Nation at Risk: The Imperative for Educational Reform* raised troubling concerns about the state of education in the United States and found serious deficiencies in teaching to be a root cause.[103] A series of subsequent studies have shown that the quality of teachers and their teaching prowess are among the most important factors in shaping students' learning.[104] In a study assessing the impact of quality variances among teachers, Professor Eric Hanushek found that over the course of a year, students in classrooms with top teachers will exceed what is generally deemed as one year worth of educational development, advancing by a grade level and a half.[105] Alternatively, students in classrooms with the worst teachers will advance by only half a grade level over the course of a year.[106] Thus, according to Professor Hanushek's study, the development gap between good and bad teachers per year is one full year of educational development.[107] California Superior Court Judge Rolf M. Treu found in a June 2014 decision that

> a grossly ineffective teacher costs students $1.4 million in lifetime earnings per classroom [per year and that] . . . students in [Los Angeles Unified School District] who are taught by a teacher in the bottom 5% of competence lose 9.54 months of learning in a single year compared to students with average teachers.[108]

Professor Hanushek's analysis on improving American education suggests that by ending the "dance of the lemons"[109] and "de-selecting,"

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103. *See* Michael L. Yell, *A Nation at Risk*, *in* 2 ENCYCLOPEDIA OF EDUCATIONAL REFORM AND DISSENT 649, 649–51 (Thomas C. Hunt et al. eds., 2010) (summarizing the findings and recommendations of the 1983 National Commission on Excellence in Education's *A Nation at Risk* report).

104. Richard M. Ingersoll, *Power, Accountability, and the Teacher Quality Problem*, *in* ASSESSING TEACHER QUALITY: UNDERSTANDING TEACHER EFFECTS ON INSTRUCTION AND ACHIEVEMENT 97, 97 (Sean Kelly ed., 2011).

105. Eric Hanushek, *The Difference is Great Teachers*, *in* WAITING FOR "SUPERMAN": HOW WE CAN SAVE AMERICA'S FAILING PUBLIC SCHOOLS 81, 84 (Karl Weber ed., 2010).

106. *Id.*

107. *Id.*

108. Vergara v. California, No. BC484642, 2014 WL 2598719, at *8 (Cal. Super. Ct. June 10, 2014) (tentative decision).

109. One commentator notes:

> The "lemons" are dysfunctional teachers, and this dance pairs them with new principals in different schools. Some of the transfers are voluntary, attempts by teachers to escape impending remediation or possible dismissal. In many cases, principals trade lemons with colleagues, hoping to get slightly more competent or less angry teachers in exchange for their difficult ones. . . . The dance of the lemons merely sends one principal's problem to another administrator.

ELAINE K. MCEWAN, HOW TO DEAL WITH TEACHERS WHO ARE ANGRY, TROUBLED,

that is firing instead of transferring the worst eight percent of teachers and replacing them with teachers who are on par with the quality of today's average teacher, the United States would catch Finland for the top spot in the world education rankings.[110] Even when factoring in the increased costs needed to attract and retain higher-quality teachers, scholars have found an incredibly significant economic benefit is produced from replacing bad teachers with average teachers.[111]

Researchers Raj Chetty, John N. Friedman, and Jonah E. Rockoff found "that children exposed to even a single highly effective teacher during primary school are significantly more likely to go to college, attend better colleges, earn higher incomes, have higher savings rates, live in higher income neighborhoods, and (among females) are less likely to become teenage mothers."[112] In other words, "[t]he current evidence suggests that great teachers not only raise student learning in areas captured on standardized tests but also develop students' human capital in broader and deeper dimensions that have a lifelong payoff."[113]

Even assuming for purposes of argument that the consistent findings of studies and common sense are wrong and that teacher quality does not impact educational outcomes, parents would still have other justifiable reasons for being concerned with teacher quality. Teachers help to shape students' attitudes towards government and citizenship as well as social perceptions and values;[114] teachers even influence students' sense of self-efficacy.[115] Parents consistently indicate that they are particularly concerned about the manner in which teachers impact their children's happiness, safety, socialization, and values.[116]

EXHAUSTED, OR JUST PLAIN CONFUSED 120 (2005).

110. Eric A. Hanushek, *The Economic Value of Higher Teacher Quality*, 30 ECON. EDUC. REV. 466, 474–75 (2011).

111. BARBARA BRUNS & JAVIER LUQUE, GREAT TEACHERS: HOW TO RAISE STUDENT LEARNING IN LATIN AMERICA AND THE CARIBBEAN 231–32 (2015).

112. *Id.* at 69. *See generally* Raj Cheety et al., *Measuring the Impacts of Teachers II: Teacher Value-Added and Student Outcomes in Adulthood*, 104 AM. ECON. REV. 2633 (2014) (addressing the long-term impact of higher-quality teachers).

113. BRUNS & LUQUE, *supra* note 111, at 70–71.

114. Ambach v. Norwick, 441 U.S. 68, 79 (1979). *See generally* ROBERTA BERNS, CHILD, FAMILY, SCHOOL, COMMUNITY: SOCIALIZATION AND SUPPORT 241 (2015) (addressing the socializing impact of education); MICHELE FOSTER, BLACK TEACHERS ON TEACHING 102 (1998) ("Teachers work with young minds, and if they are molding these young minds for the future, then they can't avoid teaching values.").

115. JOY ELISE HARRIS, THE IMPACT OF GENDER SOCIALIZATION ON WOMEN'S LEARNED TECHNOLOGICAL HELPLESSNESS AND ITS ANDRAGOGICAL IMPLICATIONS 51 (2008).

116. *See* R.P. CHAMBERLIN ET AL., FAILING TEACHERS? 184–85 (2005) (noting that a parent's view of what makes a good teacher often addresses qualities other than academic

As observed by the United States Supreme Court, "[i]n shaping the students' experience to achieve educational goals, teachers by necessity have wide discretion over the way the course material is communicated to students . . . . No amount of standardization of teaching materials or lesson plans can eliminate the personal qualities a teacher brings to bear in achieving these goals."[117] Quite reasonably, the Oklahoma Supreme Court[118] and Illinois Court of Appeals[119] found that "public school teachers . . . and the conduct of such teachers . . . and their policies, are of as much concern to the community as are other 'public officials.'" In an article that offers a strong defense of the application of the actual malice standard to public school teachers, Richard Johnson explains that most parents have a greater interest in the actions of a public school teacher than a variety of high-level government officials:

> Most parents take an acute interest in the "qualifications and performance" of any stranger who has . . . power over their children for six or seven hours per day. This interest is likely to exist even for people who are mostly indifferent to or ignorant of the "qualifications and performance" of senators, governors, and the secretary of agriculture—all of whom are unquestionably public officials.[120]

Contrary to Professor Franklin's understanding, speech criticizing the prowess of a public school teacher is not a distant outpost of political speech, but instead it is a critical part of democratic self-governance in terms of seeking redress and contributing to the conversation on broader political issues. While the termination of public school teachers for poor performance is relatively rare, parental complaints tend to be part of what leads to a public school teacher being terminated.[121] Even if a

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performance like the happiness and safety of their children); JOAN DEAN, MANAGING THE PRIMARY SCHOOL 100 (2002) (addressing parental expectations of what makes for a good school); CHRISTOPHER GABRIELI & WARREN GOLDSTEIN, TIME TO LEARN: HOW A NEW SCHOOL SCHEDULE IS MAKING SMARTER KIDS, HAPPIER PARENTS, AND SAFER NEIGHBORHOODS 261 (2008) (indicating that parents place considerable emphasis on the safety of their children at educational institutions); GENE E. HALL ET AL., INTRODUCTION TO TEACHING: MAKING A DIFFERENCE IN STUDENT LEARNING 209 (2013) ("[P]robably nothing concerns parents more than the moral values, or ethics, the teachers of their children demonstrate. Parental concern over the moral values of individual teachers as well as those expressed by schools has given rise to an increased interest in homeschooling and school vouchers."); ROSEMARY C. SALOMONE, VISIONS OF SCHOOLING: CONSCIENCE, COMMUNITY, AND COMMON EDUCATION 62 (2008) (noting that the "debate over education and parental values has now become a major political issue").

117. *Ambach*, 441 U.S. at 78.

118. Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1103 (Okla. 1978).

119. Basarich v. Rodeghero, 321 N.E.2d 739, 742 (Ill. App. Ct. 1974).

120. Johnson, *supra* note 43, at 791.

121. KENNETH D. PETERSON, TEACHER EVALUATION: A COMPREHENSIVE GUIDE TO NEW

teacher is not terminated, complaints and criticisms of teachers from parents are significant contributing factors in poor-performing teachers voluntarily leaving the profession of their own accord or under the suggestive guidance of administrators.[122] Teachers also may self-correct behavior in response to critiques from parents,[123] and principals may exercise closer supervision in response thereto.[124] Parental complaints can lead to additional teacher training to address identified problems and shortcomings[125] and circumscribing of teachers' leeway in terms of curricular selections in their classrooms.[126] Criticism of a public school teacher's teaching prowess can also contribute to the marketplace of ideas with regard to public perception on an impressive variety of broader political issues including, among others, teacher compensation,[127] vouchers,[128] education standardization (as examples No Child Left Behind and the Common Core),[129] home schooling,[130]

DIRECTIONS AND PRACTICES 306 (2d ed. 2000); Diana Pullin, *Judging Teachers: The Law of Teacher Dismissal*, *in* TEACHER ASSESSMENT AND THE QUEST FOR TEACHER QUALITY 309 (Mary Kennedy ed., 2010).

122. RICHARD P. MCADAMS, EXPLORING THE MYTHS AND THE REALITIES OF TODAY'S SCHOOLS: A CANDID REVIEW OF THE CHALLENGES EDUCATORS FACE 33–34 (2010).

123. CAROL GESTWICKI, HOME, SCHOOL, AND COMMUNITY RELATIONS 421 (9th ed. 2014); FELICIA MARIA VAUGHN COLEMAN, QUALITY IN EDUCATION: PERSPECTIVES REGARDING BALDRIGE-BASED PRACTICES AND INSTRUCTIONAL LEADERSHIP IN MIDDLE SCHOOLS 100 (2008).

124. WILLIAM B. RIBAS, TEACHER EVALUATION THAT WORKS!!: THE EDUCATIONAL, LEGAL, PUBLIC RELATIONS (POLITICAL) & SOCIAL-EMOTIONAL (E.L.P.S.) STANDARDS & PROCESSES OF EFFECTIVE SUPERVISION & EVALUATION 179 (2005).

125. Bill Utterback, *Parent Complaint Leads to Special Needs Training in PA District*, TEACHHUB, http://www.teachhub.com/parent-complaint-leads-special-needs-training-pa-district (last visited Oct. 7, 2015).

126. PAMELA HUNT STEINLE, IN COLD FEAR: THE *CATCHER IN THE RYE* CENSORSHIP CONTROVERSIES AND POSTWAR AMERICAN CHARACTER 96 (2000); Charlotte Garden, *Teaching for America: Unions and Academic Freedom*, 43 U. TOL. L. REV. 563, 573–79 (2012). *See generally* Eric A. DeGroff, *Parental Rights and Public School Curricula: Revisiting* Mozert *After 20 Years*, 38 J.L. & EDUC. 83 (2009) (reflecting on the evolving relationship between parents' right to direct the education of their children and the state's role in inculcating common values in public schools).

127. WINSTON APPLE, EDUTOPIA: A MANIFESTO FOR THE REFORM OF PUBLIC EDUCATION 94 (2003); JAMES HARVEY, THE SUPERINTENDENT'S FIELDBOOK: A GUIDE FOR LEADERS OF LEARNING 279 (2013); JANET MCKENZIE, CHANGING EDUCATION: A SOCIOLOGY OF EDUCATION SINCE 1944, at 131 (2014); Allan E. Parker, *Public Education: Is It Education Under State Constitutions, in* MAKING GOVERNMENT WORK: A CONSERVATIVE AGENDA FOR THE STATES 51 (Tex Lezar ed., 1994).

128. MARLOW EDIGER, PHILOSOPHY AND CURRICULUM 102–03 (2003); ARNOLD S. KLING, UNCHECKED AND UNBALANCED: HOW THE DISCREPANCY BETWEEN KNOWLEDGE AND POWER CAUSED THE FINANCIAL CRISIS AND THREATENS DEMOCRACY 96 (2010).

129. KELLY GALLAGHER, READICIDE: HOW SCHOOLS ARE KILLING READING AND WHAT YOU CAN DO ABOUT IT 12 (2009); W. James Popham, *All About Accountability / "Teaching to*

America's declining math and science predominance,[131] sexual morality of and the prevention of sexually transmitted diseases among young people,[132] racial discrimination,[133] etc. Simply stated, through the political process, important changes have already occurred "in schooling . . . because of ongoing efforts by parents."[134]

Nor is this self-governance role limited to education; Professor Franklin's second exemplar for clear exclusion from public officialdom, the efficiency of the highway department's snow removal efforts, while not attracting the attention education does, also proves ultimately to not warrant categorical exclusion.[135] Though seemingly innocuous in nature, snow removal has proven to be a political issue of discussion, debate, and vote determination to a much greater extent than one might initially expect. Local politics is often focused on issues like snow removal[136] with the electorate concerned about efficient performance of

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the Test": An Expression to Eliminate, 62 EDUC. LEADERSHIP 82, 82–83 (2004).

130. LINDA DOBSON, THE FIRST YEAR OF HOMESCHOOLING YOUR CHILD: YOUR COMPLETE GUIDE TO GETTING OFF TO THE RIGHT START 203 (2009); RACHEL GATHERCOLE, THE WELL-ADJUSTED CHILD: THE SOCIAL BENEFITS OF HOMESCHOOLING 77 (2007); HALL ET AL., *supra* note 116, at 209.

131. WILLIAM J. BENNETT, THE DE-VALUING OF AMERICA: THE FIGHT FOR OUR CULTURE AND OUR CHILDREN 43 (1994); CHARLES T. STEWART, THE DECLINE OF LEARNING IN AMERICA 163 (2008). *See generally* VINCE M. BERTRAM, ONE NATION UNDER TAUGHT: SOLVING AMERICA'S SCIENCE, TECHNOLOGY, ENGINEERING & MATH CRISIS (2014) (describing the challenge American students face in competing globally in science, technology, engineering, and math fields, and suggesting reforms to remedy the problem).

132. SIMON BLAKE, SEX AND RELATIONSHIPS EDUCATION: A STEP-BY-STEP GUIDE FOR TEACHERS 48 (2013); Susan C. Schena, *Legal Organization Addresses Sex Ed* '*Controversy*' *At Acalanes H.S.*, LAMORINDA PATCH (Dec. 8, 2014), http://patch.com/california/lamorinda/legal-organization-addresses-sex-ed-controversy-acalanes-hs-0; Todd Starnes, *Graphic Sex Ed Class Under Fire*, FOX NEWS (June 22, 2010), http://www.foxnews.com/us/2010/06/22/graphic-sex-ed-class/.

133. *See, e.g.*, Dennis Carlson et al., *Risky Business: Teaching about the Confederate Flag Controversy in a South Carolina High School*, in BEYOND SILENCED VOICES: CLASS, RACE, AND GENDER IN UNITED STATES SCHOOLS (Lois Weis & Michelle Fine eds., rev. ed. 2005) (addressing the importance of teaching well when addressing issues related to race, racial identity, and racial discrimination); *see* SHARON RUSH, HUCK FINN'S "HIDDEN" LESSONS: TEACHING AND LEARNING ACROSS THE COLOR LINE 140–41 (2006) (reflecting upon how quality teachers making well-reasoned pedagogical educational decisions related to subjects touching upon race impacts students and the broader society); *see also* Taylor Gordon, *MS Teacher Directs Racist Comment to Black Middle Schoolers: I'll* '*Send Your Colored Selves To the Office*', ATLANTA BLACKSTAR (Nov. 4, 2014), http://atlantablackstar.com/2014/11/04/insensitive-teacher-black-middle-schoolers-ill-send-colored-selves-office/ (addressing the impact of teachers' racism in education).

134. LEVIN, *supra* note 97, at 121.

135. Franklin, *supra* note 73, at 1677–78.

136. KAREN KIRST-ASHMAN & GRAFTON HULL, JR., GENERALIST PRACTICE WITH ORGANIZATIONS AND COMMUNITIES 293 (4th ed. 2008).

this type of governmental services.[137] Mayors have experienced political difficulties and even election defeats as a result of poor snow removal.[138] Snow removal has at times even become intertwined with federal politics in terms of disaster relief declaration status.[139] Snow removal appears as a political issue with surprising regularity globally; even Hezbollah, which has been classified as a terrorist organization,[140] opted to adjust its approach to snow removal in the Bekaa Valley as part of expanding its electoral appeal in Lebanese elections.[141]

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137. DAVID L. MARTIN, RUNNING CITY HALL: MUNICIPAL ADMINISTRATION IN AMERICA 178 (1990); JOE WILLIAMS, CHEATING OUR KIDS: HOW POLITICS AND GREED RUIN EDUCATION 161 (2005).

138. *See, e.g.*, BETH BOOSALIS DAVIS, MAYOR HELEN BOOSALIS: MY MOTHER'S LIFE IN POLITICS 229 (2008) (reflecting upon snow removal politics in mayoral politics in Lincoln, Nebraska); *see* PAUL M. GREEN, *Michael A. Bilandic: The Last of the Machine of the Regulars*, *in* THE MAYORS: THE CHICAGO POLITICAL TRADITION 164–67 (4th ed. 2013) (addressing the downfall of Chicago Mayor Bilandic as result of the failure of the City to properly remove snow during February of 1979); NORMAN KRUMHOLZ, MAKING EQUITY PLANNING WORK: LEADERSHIP IN THE PUBLIC SECTOR 38–39 (2011) (reflecting upon snow removal politics in Cleveland, Ohio); ANTHONY M. TOWNSEND, SMART CITIES: BIG DATA, CIVIC HACKERS, AND THE QUEST FOR A NEW UTOPIA 208 (2013) (addressing Chicago snow removal politics in 2000s); Richard Weir et al., *Patience Wears Thin As Snow Piles Grow Deeper*, BOS. HERALD (Feb. 10, 2015), http://www.bostonherald.com/news_opinion/local_coverage/2015/02/patience_wears_thin_as_snow_piles_grow_deeper (discussing residents frustrations with the action of government in addressing snow removal); *see also* GLENN SPARKS, MEDIA EFFECTS RESEARCH: A BASIC OVERVIEW 214 (2012).

> One of my favorite parts of the local newspaper in the wintertime is the coverage of the aftermath of a big snowstorm. Consider how the media might frame such news coverage. In the wake of a huge snowfall, the news could concentrate on winter recreation and that fun that children in the area have playing with snowballs and sledding down steep hills. On the other hand, the media could focus on how slowly snow removal is progressing and attempt to track down local government officials to comment on the problem. Depending on which way the story of the snowstorm is framed, consumers may have different thoughts as a result of reading the news. Traditionally, this effect might be described in the standard agenda-setting terminology: 'The media don't tell us what to think, they tell us what to think about.' But a closer inspection of what goes on here suggests that there is more to it. By framing the story in terms of poor snow removal instead of recreational activities, the media are doing more than just telling us what to think about. In a very real way, they are telling us what to think by focusing attention on one particular angle of the story instead of another one.

Id.

139. Lee Leonard, *Rhodes' Second Eight Years, 1975-1983*, *in* OHIO POLITICS 123 (Alexander P. Lamis ed., 1994).

140. Parvez Ahmed, *Terror in the Name of Islam—Unholy War, Not Jihad*, 39 CASE W. RES. J. INT'L L. 759, 773 (2007).

141. Keely M. Fahoum, *Deprivation, Occupation, and Social Change: Hamas and Hezbollah's Evolution from Bombs to Ballot Boxes*, *in* TERRORISM AND HOMELAND SECURITY: PERSPECTIVES, THOUGHTS, AND OPINIONS 213 (Dale L. June ed., 2010).

In his book *Politics and Pasta*, colorful six-term former Providence, Rhode Island mayor Vincent Buddy Cianci, Jr.,[142] one of America's longest-serving, big-city mayors,[143] observes that "[t]hey don't teach the fine art of snow removal at [Harvard University's] Kennedy School of Government."[144] Nevertheless, noting that the manner in which snow removal is handled is an important political issue for local politicians, Mayor Cianci offers his own primer.[145] Therein, Cianci reflects upon the importance of having every employee, from the frontline worker through the city government department heads and the mayor, well organized with a clear plan that is properly and quickly implemented.[146] Cianci is not the only local politician to realize the importance of snow removal to his or her constituents.[147] Despite Mayor Cianci's surmising to the contrary, snow removal as a matter of public policy and politics has not entirely escaped the attention of the academy. As an example, Professor Donald S. Kettl, currently a Professor at the University of Maryland School of Public Policy and formerly Dean thereof,[148] in his text *Politics of the Administrative Process*, presents public administration students with a case study and questions directed towards addressing the political and policy

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142. Mayor Cianci was elected by the residents of Providence, Rhode Island to six terms as mayor from 1975 to 1984 and then again from 1991 through 2001. MICHAEL Z. HACKMAN & CRAIG E. JOHNSON, LEADERSHIP: A COMMUNICATION PERSPECTIVE (6th ed. 2013). Cianci helped to revitalize the city during his terms in office. Thomas J. Vicino, *Urban Governance*, *in* CITIES OF NORTH AMERICA: CONTEMPORARY CHALLENGES IN U.S. AND CANADIAN CITIES 189 (2013). He stepped down from his position as mayor in 1984 after he pled guilty to the assault of a man who was having a relationship with his estranged wife and was sentenced to five years of probation. ROBERT W. SPEEL, CHANGING PATTERNS OF VOTING IN THE NORTHERN UNITED STATES: ELECTORAL REALIGNMENT, 1952–1996, at 95 n.1 (2010). His second stint as mayor also ended in a conviction, specifically for violating the Racketeer Influenced and Corrupt Organizations Act ("RICO"). FRANCIS J. LEAZES & MARK T. MOTTE, PROVIDENCE, THE RENAISSANCE CITY 49 (2004); MIKE STANTON, THE PRINCE OF PROVIDENCE: THE RISE AND FALL OF BUDDY CIANCI, AMERICA'S MOST NOTORIOUS MAYOR 369–82 (2004).

143. Vicino, *supra* note 142, at 189.

144. VINCENT "BUDDY" CIANCI, JR. & DAVID FISHER, POLITICS AND PASTA: HOW I PROSECUTED MOBSTERS, REBUILT A DYING CITY, DINED WITH SINATRA, SPENT FIVE YEARS IN A FEDERALLY FUNDED GATED COMMUNITY, AND LIVED TO TELL THE TALE 96 (2011).

145. *See id.* at 96–103 (discussing Cianci's advice on snow removal).

146. *Id.*

147. *See, e.g.*, DAVIS, *supra* note 138, at 229 (reflecting upon snow removal politics in mayoral politics in Lincoln, Nebraska); JESSICA TROUNSTINE, POLITICAL MONOPOLIES IN AMERICAN CITIES: THE RISE AND FALL OF BOSSES AND REFORMERS 157 (2009) (discussing elected officials appreciation of the politics of snow removal).

148. DONALD KETTL, https://www.publicpolicy.umd.edu/faculty/donald-kettl (last visited Sept. 7, 2015).

complications presented by snow removal.[149]

Snow removal political fallout can result from, among other complications, poor budgeting[150] or implementation,[151] snow removal priorities that are discordant from those of the electorate, including playing racial[152] and class politics,[153] aiding political patrons and punishing political opponents,[154] and being overly or not sufficiently solicitous of environmental impact[155] or alternative transportation (for

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149. DONALD F. KETTL, POLITICS OF THE ADMINISTRATIVE PROCESS 19–20 (6th ed. 2014).

150. GEORGE M. GUESS & PAUL G. FARNHAM, CASES IN PUBLIC POLICY ANALYSIS 159–60 (2011); Bryan T. Morytko, *Snow Removal, Fees Cause Budget Woes*, HARTFORD COURANT, Mar. 14, 1996, at B4; *Cleveland's Botched Snow Removal: Editorial Board Roundtable*, CLEVELAND.COM (Feb. 12, 2015), http://www.cleveland.com/opinion/index.ssf/2015/02/clevelands_botched_snow_remova.html; *see also* Christopher Keating, *Luke Bronin: Plow Hartford's Streets Better*, HARTFORD COURANT (Feb. 10, 2015, 2:13 PM), http://www.courant.com/politics/capitol-watch/hc-luke-bronin-plow-hartfords-streets-better-20150210-story.html. In campaigning for mayor of Hartford, mayoral candidate, Luke Bronin, has argued:

> It is stunning to me that the Mayor only budgeted for three storms, and that admission explains why Hartford's plowing and snow removal has been worse than any other city or town around us. Sure, we've gotten a lot of snow this year, but we've gotten a lot of snow each of the last few years. To budget for only three storms is irresponsible. Under-budgeting is a gimmick that the people of Hartford and Hartford's businesses have to pay for in a different way—in the form of impassible sidewalks, one-lane streets, traffic jams, and dangerous road conditions.

Id.

151. ANTHONY M. TOWNSEND, SMART CITIES: BIG DATA, CIVIC HACKERS, AND THE QUEST FOR A NEW UTOPIA (2013); Green, *supra* note 138, at 164–66; Sewell Chan, *Remembering a Snowstorm That Paralyzed the City*, N.Y. TIMES (Feb. 10, 2009), http://cityroom.blogs.nytimes.com/2009/02/10/remembering-a-snowstorm-that-paralyzed-the-city/?_r=0; *Cleveland's Botched Snow Removal*, *supra* note 150.

152. Green, *supra* note 138, at 164–66; Edward Thompson III, *Race and the 1983 Chicago Election*, CRISIS, Oct. 1983, at 14–15.

153. DAVID F. REMINGTON, ASHBEL P. FITCH: CHAMPION OF OLD NEW YORK 187 (2011); Chan, *supra* note 150; James Nye, *De Blasio Has Left New York City on Its A**! Al Roker Leads Criticism of New Mayor's 'Class War' Snow Failures*, DAILY MAIL (Jan. 22, 2014), http://www.dailymail.co.uk/news/article-2543959/Hes-trying-New-Yorks-Mayor-Blasio-accused-waging-class-war-Upper-East-Side-snow-plows-fail-clear-roads-city-grinds-halt-officials-admit-unprepared-storm.html; *see* Fran Spielman, *Streets and Sanitation Chief Pleads for Patience on Side-Street Snow Removal*, CHI. SUN-TIMES (Feb. 2, 2015), http://chicago.suntimes.com/chicago-politics/7/71/338890/streets-sanitation-commissioner-pleads-patience-side-street-snow-removal (highlighting a mayoral candidate campaigning against Rahm Emanuel based upon alleged inequities between rich and poor neighborhoods in terms of snow removal).

154. TOWNSEND, *supra* note 151; Spielman, *supra* note 153.

155. Beth Quimby, *Snow removal: Maine Towns Want More Power over Those Piles*, PORTLAND PRESS HERALD (Feb. 9, 2011), http://www.pressherald.com/2011/02/09/towns-seek-pile-powers_2011-02-09/; Michael Walsh, *Snow Where to Go: Boston-Area Town Dumps Excess White Stuff in Harbor*, YAHOO NEWS (Feb. 10, 2015), http://news.yahoo.com/boston-might-dump-excess-snow-from-record-setting-winter-in-harbor-171544664.html.

example, bike lanes).[156] Snow removal politics can also arise in a number of other forms. For example, private Residential Community Associations ("RCAs") have successfully, but not without political controversy, lobbied in some jurisdictions for the ability to conduct their own snow removal in return for property tax refunds.[157] This produces a recurring divide between the speed with which snow is removed from RCAs and the speed of removal from residential areas served by public snow removal.[158] Alternatively, some local governments, having acquired the necessary equipment, are able to defer costs or raise revenues by selling their city's snow removal services to neighbors.[159] In other locales snow removal has been at the center of public funds being lost through graft and corruption.[160]

Professor Franklin is likely correct that voters would be better served by directing their attention to issues of public health rather than snow removal; however, drawing distinctions that prioritize protection for speech about preferred political issues over less preferred political issues is antithetical to the First Amendment. Reflecting on the core purposes of the First Amendment, the Supreme Court observed that "[p]remised on mistrust of governmental power, the First Amendment stands against attempts to disfavor certain subjects."[161] Even outside of

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156. Steven Vance, *City Explains Gap in Snow Removal From Protected Bike Lanes This Week*, STREETSBLOG CHI. (Dec. 12, 2013), http://chi.streetsblog.org/2013/12/12/city-explains-gap-in-snow-removal-from-protected-bike-lanes-this-week/.

157. MARGARET KOHN, BRAVE NEW NEIGHBORHOODS: THE PRIVATIZATION OF PUBLIC Space 90–91 (2004); Daniel A. Bell, *Civil Society vs. Civic Nature*, *in* FREEDOM OF ASSOCIATION 245 (Amy Gutmann ed., 1998). New Jersey by statute requires local governments to reimburse RCAs for providing their own snow removal. Daniel A. Bell, *Residential Community Associations: Community or Disunity?*, *in* THE ESSENTIAL COMMUNITARIAN READER 167, 175 (Amitai Etzioni ed., 1998).

158. ROBERT JAY DILGER, NEIGHBORHOOD POLITICS: RESIDENTIAL COMMUNITY ASSOCIATIONS IN AMERICAN GOVERNANCE 31 (1992).

159. BETH WALTER HONADLE ET AL., FISCAL HEALTH FOR LOCAL GOVERNMENTS 234 (2003).

160. *See* PAUL GRONDAHL, MAYOR ERASTUS CORNING: ALBANY ICON, ALBANY ENIGMA 504 (2007) (recounting how the city's poor snow removal was tied to political corruption); HENRY H. KLEIN, BANKRUPTING A GREAT CITY: THE STORY OF NEW YORK 42–43 (1915) (addressing snow removal corruption in New York City); THOMAS J. O'GORMAN & LISA MONTANARELLI, STRANGE BUT TRUE CHICAGO: TALES OF THE WINDY CITY 184 (2005) (discussing the 1979 conviction of Salvatore Mucerino, owner of a Chicago snow removal firm, for snow removal fraud); FRANK S. ROBINSON, MACHINE POLITICS: A STUDY OF ALBANY'S O'CONNELLS 150 (1977) (discussing snow removal corruption in Albany, New York); Kevin Flynn, *"Plow Now Anyhow, Buried City Hired Tainted Contractors*," NEWSDAY, Feb. 28, 1994, at 7 (discussing the Giuliani administration's snow removal contracts made with corrupt contractors in New York City).

161. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 340 (2010).

the category of political speech, the Court in addressing commercial speech has noted while "[s]ome of the ideas and information [presented in the commercial marketplace] are vital, some [are] of slight worth. But the general rule is that the speaker and the audience, not the government, assess the value of the information presented."[162] The efficacy of snow removal may not be an extremely important issue, but nevertheless, as was recently observed by urban policy reporter Emily Badger, "snow is political"[163] and thus discussion of the efficacy of snow removal efforts is political speech.

The ultimate problem with Professor Franklin's approach, and other similar attempts at providing a nuanced understanding of what governmental officials address matters of such significance as to warrant public attention is that the voters ultimately get to decide what issues are important to them. For good or ill, voters have decided that the teaching prowess of elementary school teachers and the efficacy of governmental efforts at snow removal are important. A foundational premise of representative democracy is that a single voter can identify an issue as a matter of concern and try to effectuate change.[164] The voters, or even a single voter, are free to decide if any governmental action or inaction is of importance or at least to advocate that it should be of importance to the community.[165]

C. Lower-Level Government Employees and Democratic Governance

The above discussion points towards commentary upon an elementary school teacher's teaching prowess constituting speech related to democratic self-governance. Mayor Cianci's discussion of snow removal invites the same conclusion with regard to frontline snow removal workers. To understand why discussion of the action and inaction of lower-level government employees in their official capacity is critical to democratic self-governance, it is helpful to appreciate the dramatic transformation in the understanding of the functioning of the

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162. Edenfield v. Fane, 507 U.S. 761, 767 (1993).

163. Emily Badger, *The End of Political Snow Plowing*, WASH. POST (Jan. 6, 2015), http://www.washingtonpost.com/blogs/wonkblog/wp/2015/01/06/the-end-of-political-snow-plowing.

164. *See, e.g.*, LEE C. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 7–11 (1986) (setting forth an understanding of free speech as protective of the right of the extreme or individual believer to advocate a position that ultimately is not better for achieving truth in a marketplace of ideas, but instead better for providing tolerance for the dissenting voice); STEVEN H. SHIFFRIN, THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE 86–109 (1990) (addressing the importance of individualism and dissent within the protections of free speech).

165. BOLLINGER, *supra* note 164, at 7–11; SHIFFRIN, *supra* note 164, at 86–109.

administrative state that has occurred over that last three decades. In essence, the working conceptual understanding of the administrative state that would have been predominant when *Rosenblatt* and *Hutchison* were decided has been fundamentally transformed by further research and analysis.[166]

Max Weber provided the then-leading model for understanding the modern administrative bureaucratic state.[167] Weber's administrative state converted law into impersonal formal actions taken through a controllable hierarchical structure composed of an unbroken chain running from the lawmaker through an accountable bureaucracy that rendered a rationally calculable, correct application of formal law made at a higher level rather than decision making at a lower one.[168] Weber's administration of law subdued human affairs to the application of law with certain and determinable correct applications thereof.[169] Weber rejected "government by bureaucrats" and the concept of political decision makers in bureaucracy.[170] Thus, Weber

> emphasized control from top to bottom in the form of monocratic hierarchy, that is, a system of control in which policy is set at the top and carried out through a series of offices, with each manager and worker reporting to one superior and held to account by that person. The bureaucratic system is based on a set of rules and regulations flowing from public law; the system of control is rational and legal.

166. *See infra* III.C (developing the argument that speech about lower-level government employees is political speech critical to democratic self-governance).

167. *See, e.g.*, CRITICAL STUDIES IN ORGANIZATION AND BUREAUCRACY 1 (Frank Fischer & Carmen Sirianni eds., rev. ed. 1994) (observing that Weber's theory of bureaucracy was likely the most widely known and was highly influential in shaping the future understanding of bureaucracy); A. MICHAEL DOUGHERTY, PSYCHOLOGICAL CONSULTATION AND COLLABORATION IN SCHOOL AND COMMUNITY SETTINGS 157 (6th ed. 2013) (indicating that Weber's model of bureaucracy is considered the classical model of bureaucracy); BARUN KUMAR SHAU, UNWRITTEN FLAWS OF INDIAN BUREAUCRACY 77 (2004) (noting the influence of Weber's bureaucratic model); Carl K.Y. Shaw, *Hegel's Theory of Modern Bureaucracy*, 86 AM. POL. SCI. REV. 381, 381 (1992) ("Weber's ideal type of bureaucracy . . . has had a pervasive influence in the development of the sociological tradition.").

168. Christoph Reichard, *The Study of Public Management in Germany: Poorly Institutionalized and Fragmented*, *in* THE STUDY OF PUBLIC MANAGEMENT IN EUROPE AND THE US: A COMPARATIVE ANALYSIS OF NATIONAL DISTINCTIVENESS 50–51 (Walter Kickert ed., 2008).

169. Ogunrotifa Ayodeji Bayo, *Democratic Deficit: The Dark Side of Weberian Bureaucracy in Nigeria*, 3 INT'L J. SOC. SCI. & EDUC. 541, 545 (2013).

170. BERTRAND BADIE & PIERRE BIRNBAUM, THE SOCIOLOGY OF STATE 24 (Arthur Goldhammer trans., 1983); *see also* Wolfgang J. Mommsen, *German Artists, Writers and Intellectuals and the Meaning of War, 1914–1918*, *in* STATE, SOCIETY AND MOBILIZATION IN EUROPE DURING THE FIRST WORLD WAR 31–32 (John Horne ed., 2002) (noting Weber's view that decision making by bureaucrats leads to irresponsible governance).

> The role of the bureaucrat is strictly subordinate to the political superior.[171]

The classic Weberian understanding of the administrative state presupposes the individual discretion of lower-level government employees is immaterial to the implementation of law, playing no part.[172]

Critics offered descriptive and normative challenges, claiming a disconnect between Weber's description and the real world operation of modern bureaucracies and also the undesirability of the inflexible Weberian top-down hierarchical bureaucracy.[173] Scholars found that Weber's model did not necessarily mesh with real world experience.[174] Instead of simply implementing top-down commands, lower-level government employees "pursue interests and express feelings from the bottom up that can constrain, facilitate, or transform formal organizational systems into complex congeries marked by informal cultures and shadow structures."[175] Professor Norton Long observed "[n]ot only does political power flow in from the sides of [a bureaucratic] organization . . . ; it also flows up the organization to the center from the constituent parts."[176] Even information dominance, which had long been viewed as the domain of the higher rather than the lower-level government employee, was turned on its head through realization that lower-level bureaucrats "often possess information not independently available to their political superiors."[177] The lower-level bureaucrat has a simultaneity of information, possessing both information internal to the bureaucracy and information from the client who is external to the government entity.[178] An information asymmetry

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171. James P. Pfiffner, *Traditional Public Administration versus The New Public Management: Accountability versus Efficiency*, *in* INSTITUTIONENBILDUNG IN REGIERUNG UND VERWALTUNG: FESTSCHRIFT FUR KLAUS KONIG 443, 443–44 (A. Benz et al. eds., 2004), http://pfiffner.gmu.edu/files/pdfs/Book_Chapters/NewPublicMgt.doc.pdf.

172. Arre Zuurmond, *Bureaucratic Bias and Access to Public Services*, *in* THE STATE OF ACCESS: SUCCESS AND FAILURES OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES 164 (Jorrit De Jong & Gowher Rivzi eds., 2009).

173. *See generally* Pfiffner, *supra* note 171 (demonstrating that Weber's classical model has been challenged by the "new public management" model of bureaucracy).

174. JOS C.N. RAADSCHELDERS, GOVERNMENT: A PUBLIC ADMINISTRATION PERSPECTIVE 325 (2003) (noting "the reality of their functioning differed from the idealtypical (Weber)").

175. Shannon Portillo & Danielle S. Rudes, *Construction of Justice at the Street Level*, 10 ANN. REV. L. & SOC. SCI. 321, 322 (2014).

176. Norton E. Long, *Power and Administration*, 9 PUB. ADMIN. REV 257, 258 (1949).

177. CHARLES GOODSELL, THE CASE FOR BUREAUCRACY: A PUBLIC ADMINISTRATION POLEMIC 128 (4th ed. 2004).

178. RICHARD W. SCHWESTER, HANDBOOK OF CRITICAL INCIDENT ANALYSIS 221 (2014).

emerges therefrom that "gives [bureaucrats] the ability to outmaneuver their principals and pursue their own objectives."[179]

The most important breaking point in the movement away from Weber's previously dominant understanding arrived with Professor Michael Lipsky's seminal 1980 book *Street-Level Bureaucracy: Dilemmas of the Individual in Public Services*,[180] which was published nearly fifteen years after the Supreme Court's decision in *Rosenblatt*.[181] Simply stated, Professor Lipsky's work, and those who joined in exploring the impact of lower-level government employees, "change[d] a field" and "altered . . . thinking about American bureaucracy."[182]

Professor Lipsky not only added greatly to the descriptive challenge to Weber's model but also struck at it normatively.[183] His work proved to be groundbreaking and influential in the study of bureaucratic implementation, shifting the focus from top-down policy makers to bottom-up implementers, who proved in the real world to be policy makers in their own right.[184] This change in focus has been crucial to developing the modern understanding of the administrative state.[185] It has also sparked a number of realizations that are central to appreciating the role of lower-level government employees in democratic self-governance.

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179. GOODSELL, *supra* note 177, at 125.

180. MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY: DILEMMAS OF THE INDIVIDUAL IN PUBLIC SERVICES (1980).

181. MICHAEL HILL & PETER HUPE, IMPLEMENTING PUBLIC POLICY: AN INTRODUCTION TO THE STUDY OF OPERATIONAL GOVERNANCE 53 (3d ed. 2014); Steven Maynard-Moody & Shannon Portillo, *Street Level Bureaucratic Theory*, *in* THE OXFORD HANDBOOK OF AMERICAN BUREAUCRACY 252 (Robert F. Durant ed., 2010); EVERT VEDUNG, PUBLIC POLICY AND PROGRAM EVALUATION 235 (1997).

182. Maynard-Moody & Portillo, *supra* note 181, at 252.

183. *See, e.g.*, GREG MCELLIGOTT, BEYOND SERVICE: STATE WORKERS, PUBLIC POLICY, AND THE PROSPECTS FOR DEMOCRATIC ADMINISTRATION 20 (2001) (stating that Lipsky's theory has the effect of "'standing the study of policy implementation on its head,' extend[ing] the critique of Max Weber far enough to assert a direct causal link between the actions of lower-level public servants and the policy output of the state"); HILL & HUPE, *supra* note 181, at 53–56 (noting that Lipsky's theory offers a challenge both descriptively and normatively to the top-down hierarchical model of the administrative state); Catherine Trundle, *Compassion and Interaction in Charity Practices*, *in* DIFFERENTIATING DEVELOPMENT: BEYOND AN ANTHROPOLOGY OF CRITIQUE 218 (Soumhya Venkatesan & Thomas Yarrow eds., 2012) (casting Lipsky in opposition to the top-down model of Weber).

184. HILL & HUPE, *supra* note 181, at 50–52; LARS TUMMERS, POLICY ALIENATION AND THE POWER OF PROFESSIONALS: CONFRONTING NEW POLICIES 42 (2013); VEDUNG, *supra* note 181, at 235; Maynard-Moody & Portillo, *supra* note 181, at 252.

185. HILL & HUPE, *supra* note 181, at 50–52; VEDUNG, *supra* note 181, at 235; Maynard-Moody & Portillo, *supra* note 181, at 252.

When citizens interact with government it is overwhelmingly through lower-level government employees rather than higher-level policy-making officials.[186] Lower-level government officials present the face of the government, personifying the authority of the government and its manner of operation.[187] As was well observed by Professor Charles Goodsell: "[T]he principal function of public administration, the implementation of law and policy, puts bureaucracy in the position of representing the sovereign majesty of the state to citizens in concrete, everyday terms. To them, the state *is* bureaucracy."[188] The implementation of law through the modern administrative state occurs at the end of a long line from lawmaker to lower-level government employee that traverses along the route of various relationships and interactions.[189] The implementation ultimately emerges through the interaction of a citizen with a lower-level government employee.[190] It is actions of the lower-level government employee at the end of that chain that "actually constitute the services 'delivered' by government."[191]

Lower-level government employees exercise decision-making and policy-making judgments that are neither anticipated by nor welcomed under a strict Weberian administrative structure.[192] Through their interactions with the public, lower-level government employees "actually make policy choices rather than simply implement the decisions of elected officials."[193] As observed by Professor Lipsky, "[p]olicy implementation in the end comes down to the people who actually implement it."[194] Referring to these lower-level government employees as "street-level bureaucrats," Professor Lipsky explains that

> [t]he ways in which street-level bureaucrats deliver benefits and sanctions structure and delimit people's lives and opportunities.

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186. TUMMERS, *supra* note 184, at 42.

187. ZACHARY W. OBERFIELD, BECOMING BUREAUCRATS: SOCIALIZATION AT THE FRONT LINES OF GOVERNMENT SERVICE 16–17 (2014).

188. GOODSELL, *supra* note 177, at 125.

189. SARAH L. HARTZELL, MANAGING WELFARE STIGMA FROM THE OTHER SIDE OF THE DESK: A LOOK AT RURAL TANF CASEWORKERS 30 (2007); Marcia K. Meyers & Nara Dillon, *Institutional Paradoxes: Why Welfare Workers Cannot Reform Welfare*, *in* PUBLIC MANAGEMENT REFORM AND INNOVATION: RESEARCH, THEORY, AND APPLICATION 232 (H. George Frederickson & Jocelyn Johnston eds., 1999).

190. HARTZELL, *supra* note 189, at 30; Meyers & Dillon, *supra* note 189, at 232.

191. LIPSKY, *supra* note 180, at 3.

192. BADIE & BIRNBAUM, *supra* note 170, at 24; Mommsen, *supra* note 170, at 31–32.

193. ROBERT B. DENHARDT ET AL., MANAGING HUMAN BEHAVIOR IN PUBLIC AND NONPROFIT ORGANIZATIONS 152 (3d ed. 2013).

194. MARTHA R. BURT, STRATEGIES FOR IMPROVING HOMELESS PEOPLE'S ACCESS TO MAINSTREAM BENEFITS AND SERVICES 7 (2010).

> These ways orient and provide the social (and political) contexts in which people act. Thus every extension of service benefits is accompanied by an extension of state influence and control. As providers of public benefits and keepers of public order, street-level bureaucrats are the focus of political controversy. They are constantly torn by the demands of service recipients to improve effectiveness and responsiveness and by the demands of citizen groups to improve the efficacy and efficiency of government services. . . .
>
> Street-level bureaucrats dominate political controversies over public services for two general reasons. First, debates about the proper scope and focus of governmental services are essentially debates over the scope and function of these public employees. Second, street-level bureaucrats have considerable impacts on peoples' lives. The impact may be of several kinds. They socialize citizens to expectations of government services and a place in the political community. They determine the eligibility of citizens for government benefits and sanctions. They oversee the treatment (the service) citizens receive in these programs.[195]

Nor is this impact limited to lower-level government employees who interact with the public. In a 2010 report to the President and Congress, the United States Merit Systems Protection Board concluded that first-level supervisors form a critical nexus between higher-level management and frontline employees.[196] The Board determined that how these supervisors perform their duties is vital to ensuring that congressional and executive policy determinations are actually implemented.[197] Accordingly, "modern public officials have much more individual decision-making discretion than predicted by Weber."[198] Civil servants "should not be seen as cogs in the machine,"

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195. LIPSKY, *supra* 180, at 4; *see also* JOEL F. HANDLER, LAW AND THE SEARCH FOR COMMUNITY 4–5 (1990).

> Despite the masses of legislation, rules, regulations, and administrative orders, most large, complex administrative systems are shot through with discretion, from the top policy-makers down to the line staff—the inspectors, social workers, intake officers, police, teachers, health personnel, even the clerks. How they interpret the rules, how they listen to the explanations, how they help the citizen or remain indifferent all affect the substance and quality of the encounter, an encounter made increasingly important because of our widespread dependence on the modern state.

Id.

196. U.S. MERIT SYS. PROT. BD., A CALL TO ACTION: IMPROVING FIRST-LEVEL SUPERVISION OF FEDERAL EMPLOYEES, at i (Annie Marrelli ed., 2010).

197. *Id.*

198. CHRISTOPH DEMMKE & TIMO MOILANEN, EFFECTIVENESS OF PUBLIC-SERVICE ETHICS AND GOOD GOVERNANCE IN CENTRAL ADMINISTRATION OF THE EU-27: EVALUATING REFORM OUTCOMES IN THE CONTEXT OF THE FINANCIAL CRISIS 7 (2012).

but instead, to understand the administrative state, one has to grasp the "individual, value-laden, emotional, pluralistic, and . . . unpredictable" nature of governance that arises from implementers as decision makers.[199] The consequences of this are enormous because "[t]hrough administrative discretion, bureaucrats [even lower-level government employees] participate in the governing process of our society."[200]

Many of the policy decisions of these lower-level government employees arise through informal rules and practices.[201] That the policy decisions of these government employees are often informal makes them no less critical, however, in terms of the implementation of law.[202] These informal decisions are in essence policy decisions that carry, whether with the knowledge or not of higher-ups,[203] the force of the state and the law thereof.[204] Whereas the nature of personal interactions between citizens and government bureaucrats are immaterial under Weberian theory in terms of actual implementation, the impact upon citizens in the real world is significant.[205] The nature of the interaction between the civil servant and the citizen at the point of implementation can have both positive effects in terms of improving policy implementation through flexible application at the street level,[206] or negative, for example, with the denial of benefits to which a citizen is otherwise entitled.[207] With either approach, "the actions of front-line workers have substantial and sometimes unexpected consequences for the *actual* direction and outcome of . . . programs [resulting in] . . . street-level bureaucrats . . . not implementing the policies that the 'state' intended to be delivered."[208] Through the mediating of citizen's needs

199. *Id.*

200. JOHN A. ROHR, ETHICS FOR BUREAUCRATS: AN ESSAY ON LAW AND VALUES 48 (2d ed. 1989).

201. Evelyn Z. Brodkin, *Accountability in Street-Level Organizations*, 31 INT'L J. PUB. ADMIN. 317, 318, 329–30 (2008).

202. U.S. DEP'T OF HOUS. & URBAN DEV., OFFICE OF POLICY DEV. & RESEARCH, STRATEGIES FOR IMPROVING HOMELESS PEOPLE'S ACCESS TO MAINSTREAM BENEFITS AND SERVICES 7–8 (2010).

203. Brodkin, *supra* note 201, at 318, 329–30.

204. TODD DONOVAN ET AL., STATE AND LOCAL POLITICS 289 (2014).

205. DAVID A. WILLIAMSON, JOB SATISFACTION IN SOCIAL SERVICES 12–13 (1996).

206. *See* Trundle, *supra* note 183, at 218 (observing that lower-level bureaucrats can "transform policies of 'indifference' through practice and develop their own systems and sets of rules against such top-down pressures towards disinterest" (citation omitted)).

207. Arre Zuurmond, *Bureaucratic Bias and Access to Public Services*, *in* THE STATE OF ACCESS: SUCCESS AND FAILURE OF DEMOCRACIES TO CREATE EQUAL OPPORTUNITIES 164 (Jorrit De Jong & Gowher Rizvi eds., 2008).

208. NORMA M. RICCUCCI, HOW MANAGEMENT MATTERS: STREET-LEVEL BUREAUCRATS

within a prism of the implementer's own biases and views, administrative rules and available resources, and interaction with higher-ranking officials, the street-level bureaucrat provides bottom-up leadership in the administrative state.[209] Thus, as opposed to the smooth hierarchical flow of the Weberian model, a more contemporary understanding of the administrative state instead posits that

> [b]ureaucracies are checked but not chained. They are responsive to external political control but not politically supine. They react not merely to static instructions but to changed circumstances. They not only implement policy but shape and advocate it . . . . [T]hey draw from . . . [the] lifeblood of power to advance ideas they think are right.[210]

While frustrating and undesirable from a Weberian point of view, from a Hegelian perspective, none of this should be particularly surprising. For Georg Wilhelm Friedrich Hegel,[211] a bureaucracy "mediates between the universal (laws or council decisions) and the particular (application to specific cases)."[212] Bureaucracy provides an "integrating force as it links the civil society and the state . . . . In Hegelian analysis bureaucracy takes its meaning from the opposition between the particular interest of the civil society and the general interest of the state."[213] In its performance of this role, unlike Weber, who maintained a strict separation between politics for the lawmakers

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AND WELFARE REFORM 5, 75 (2005).

209. R.A.W. Rhodes, *Public Administration*, *in* THE OXFORD HANDBOOK OF POLITICAL LEADERSHIP 101, 107–08 (R. A.W. Rhodes & Paul T. Hart eds., 2014).

210. GOODSELL, *supra* note 177, at 128.

211. Hegel's dialectic can be described as follows:

> Hegel's dialectic consists of a three-step process: thesis-anti-thesis-synthesis. The process starts with a current situation of common wisdom, called the thesis. The situation usually has a strong disadvantage, such as an unexplainable phenomenon in a theory, or needs of people not being met. This at one moment leads to people adopting the opposite belief, approach, or situation. This reaction is called antithesis. It solves the previous disadvantage, but brings new disadvantages as well. We are now in the stage of a dilemma: Both thesis and antithesis present dominant disadvantages. So far, this is nothing new, as yin and yang provided the same insight. But where with yin and yang the pendulum keeps swinging between opposites, Hegel offers a way out. He introduces the idea of synthesis, where over time the two opposites will fuse, or reconcile, creating the best of both worlds. And then, . . . the synthesis becomes the new thesis, what is believed to be true, to be eventually challenged by an antithesis once again.

FRANK BUYTENDIJK, DEALING WITH DILEMMAS: WHERE BUSINESS ANALYTICS FALL SHORT 11 (2010).

212. A.F. McGovern, *The Young Marx on the State*, *in* 1 KARL MARX'S ECONOMICS: CRITICAL ASSESSMENTS 177, 177 (1987).

213. S. P. NAIDU, PUBLIC ADMINISTRATION: CONCEPTS AND THEORIES 90 (5th ed. 2004).

and bureaucratic administration, Hegel did not descriptively or normatively separate the two.[214] Hegel instead focused his attention on seeking effective governance upon the emergence, hiring, and retention of highly qualified civil servants and appropriate control over these bureaucrats,[215] rather than excluding them from decision making.[216] The division between Hegel and Weber is, at least in part, attributable to Hegel's legitimization of state power through an abstract notion of a universal common good while Weber grounded legitimacy in formal legality.[217] In achieving this universal common good, Hegel took Immanuel Kant's notion of the individual politician with his or her "pure practical reason," and instead distributed that discernment through the political community with properly educated and trained civil servants of the society mediating the application of the law to the individual case, giving the sense of the society.[218] "For Hegel, bureaucratic administration, carried out by a cadre of independent and disinterested civil servants, is the essence of the rational state."[219] Unlike Weber's administrative state machine, "Hegel's theory of the state reminded civil servants to give their best for the sake of the state as the true representative of both reason and a quasi-religious commitment to the unselfish fulfillments of duty."[220] Hegel's theory for grounding such a role in civil servants "was based on the idea that the state was

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214. Fritz Sager & Christian Rosser, *Weber, Wilson, and Hegel: Theories of Modern Bereaucracy*, 69 PUB. ADMIN. REV. 1136, 1143 (2009).

215. *See, e.g.*, Prabhat Kumar Datta, *Karl Marx*, *in* ADMINISTRATIVE THINKERS 279 (D. Ravindra Prasad et al. eds., 1991) (addressing checks on the bureaucracy); *see* JERRY Z. MULLER, THE MIND AND THE MARKET: CAPITALISM IN WESTERN THOUGHT 164 (2003) (explaining Hegel's views regarding the education and training of bureaucrats).

216. *See* Wolfgang Seibel, *Beyond Bureaucracy-Public Administration as Political Integrator and Non-Weberian Thought in Germany*, 70 PUB. ADMIN. REV. 719, 721 (2010) (noting that Hegel embraced a role for bureaucrats beyond mere conduits for higher-level authorities).

217. *Id.*

218. G. A. Kelly, *Hegel's America*, 2 PHIL. & PUB. AFF. 3, 33 (1972).

> Hegel's 'universal class', bureaucracy, is the only group whose roles in the state and civil society are said to coincide. Yet bureaucracy itself arises out of the separation of the two spheres. . . . The state is said to mediate the contradictions of civil society. The civil servant, educated in 'thought and ethical conduct' as well as the in the mechanics of administration, forgoes his own subjective interest and finds satisfaction in the dutiful discharge of his public functions. The bureaucracy is prevented by the combined pressures of the sovereign and the . . . [civil society] from 'acquiring the isolated position of an aristocracy and using its education and skill as means to an arbitrary tyranny.'

MICHAEL EVANS, KARL MARX 111 (1975).

219. EDWARD ROYCE, CLASSICAL SOCIAL THEORY AND MODERN SOCIETY: MARX, DURKHEIM, WEBER 210 (2015).

220. Seibel, *supra* note 216, at 721.

embedded in civil society and, indeed, was the prime representative of the ethical substance of the people as citizens."[221]

One does not need to embrace Hegel's justification for the discretion of civil servants to appreciate the critical role that bureaucrats, even lower-level government employees, play in the implementation of law and the conduct of government. As noted by Professors Goodsell and Lipsky, to members of the electorate, such employees are the personification of the government, its laws, and its services.[222] Thus, "the citizen's impression of government may be significantly influenced by interaction with civil servants at the very lowest level of their organizations."[223] Even if one were to only accredit the position that the public perceives lower-level government officials as the embodiment of the government, that would alone be sufficient cause to warrant assigning a role to discussion of the acts of such employees in their official capacity as part of democratic self-governance. The fact that lower-level government employees exercise real power removes any reasonable doubt as to whether the ability to discuss the action and inaction of such employees in their official capacity is integral to democratic self-governance.

"The core of the First Amendment . . . is the freedom to say whatever one thinks about the government . . . [and] its conduct . . . ."[224] Devoid of speech about lower-level government employees, this is a voice without words. The failure to safeguard speech about lower-level government employees threatens to "hobble effective criticism of government."[225] Accordingly, as part of political speech and democratic self-governance, discussion of the conduct of lower-level government employees in their official capacity belongs upon the highest rung of protection under the First Amendment.

IV. THE *GERTZ* COURT'S RATIONALES ARE NO LONGER AVAILING WHEN

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221. *Id.*

222. *See* LIPSKY, *supra* note 191, at 4 (noting that street-level bureaucrats who implement policies are the focus of what constitutes government for citizens); *see also* GOODSELL, *supra* note 177, at 125 ("The principal function of public administration, the implementation of law and policy, puts bureaucracy in the position of representing the sovereign majesty of the state to citizens in concrete, everyday terms. To them, the state *is* bureaucracy.").

223. B. GUY PETERS, COMPARING PUBLIC BUREAUCRACIES: PROBLEMS OF THEORY AND METHOD 112 (1988).

224. Ronald A. Cass, *Weighing Constitutional Anchors:* New York Times Co. v. Sullivan *and the Misdirection of First Amendment Doctrine*, 12 FIRST AMEND. L. REV. 399, 400 (2014).

225. WILLIAM K. JONES, INSULT TO INJURY: LIBEL, SLANDER, AND INVASIONS OF PRIVACY 43 (2003).

APPLIED TO A GOVERNMENT EMPLOYEE

That speech about lower-level government officials is political speech, seemingly warranting such protection, does not, however, end the inquiry into whether the actual malice standard should be applied to lower-level government officials. The two remaining arguments in favor of not requiring lower-level government employees to surmount the actual malice test both arise from the United States Supreme Court's 1974 decision in *Gertz v. Welch*.[226] The *Gertz* Court concluded that the actual malice test should not be applied to private individuals even if the speech was upon a matter of public concern because of their (1) lack of access to media for purposes of self-help, and (2) lack of voluntariness in exposing themselves to public scrutiny.[227] Applying the *Gertz* Court's reasoning to lower-level government employees, there is a strong argument to be made that lower-level government employees are more akin to private individuals than high-level government officials or public figures in these two critical respects. This argument is not without appeal.[228] However, four decades of technological change in access to media, an erosion of the privacy of ordinary persons, and jurisprudential changes in how courts understand voluntariness in the context of defamation have all combined to undermine the force of these rationales. Ultimately, the two *Gertz* factors no longer provide sufficient support to justify failing to protect speech about the action and inaction of lower-level government employees in their official capacity, especially given the heightened protection that should be afforded to such speech given its role in democratic self-governance.

To fully understand the contrary position, it is helpful to start with the United States Supreme Court's 1971 decision in *Rosenbloom v. Metromedia, Inc.*,[229] which has proven to date to be the high-water mark for protecting speakers against defamation suits.[230] In *Rosenbloom*, the Supreme Court, or at least a plurality thereof, extended application of the actual malice test to otherwise private individuals so

226. Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974).

227. *Id.* at 344.

228. *See* Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 52 (1971) (finding that even if a news broadcast defames a private citizen, it is not libel unless the plaintiff can demonstrate malicious intent).

229. 403 U.S. 29 (1971), *abrogated by Gertz*, 418 U.S. at 333–39.

230. *See, e.g.*, Michael A. Albert & Robert L. Bocchino Jr., *Trade Libel: Theory and Practice Under the Common Law, The Lanham Act, and the First Amendment*, 89 TRADEMARK REP. 826, 832 (1999) ("The high water mark of First Amendment protection came in *Rosenbloom v. Metromedia, Inc*.").

long as the content of the speech related to a matter of public concern.[231] Writing for the plurality, Justice Brennan reasoned that "[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not 'voluntarily' choose to become involved."[232] Brennan asserted that "[t]he public's primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant's prior anonymity or notoriety."[233] Adopting this approach, at least in the view of the plurality, honored "the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous."[234]

Just three years later, the Supreme Court in *Gertz* concluded that the *Rosenbloom* plurality had gone too far.[235] The *Gertz* Court viewed the *Rosenbloom* plurality's balancing of the competing interests of persons injured by defamation and protection of speech as having been overly protective of the media and insufficiently so of private individuals.[236] *Gertz* offered a correction to the perceived excesses of *Rosenbloom*.[237] The *Gertz* Court redirected the focus in determining the applicable standard back to the status of the plaintiff.[238] For private individuals, those persons who are neither public officials nor all-purpose public figures ("household names"), the Supreme Court narrowed the circumstances wherein the actual malice standard applies.[239] In doing so, the Court created greater protection for the defamation suit plaintiff and less protection for the defamation suit defendant, the speaker.[240]

231. *See Rosenbloom*, 403 U.S. at 43–48 (discussing protection of speech on matters of public concern under the First Amendment).

232. *Id.* at 43.

233. *Id.*

234. *Id.* at 43–44.

235. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974) (discussing how *Rosenbloom*'s plurality test impedes the States' ability to enforce a legal remedy for private individuals injured by defamatory remarks).

236. *Id.*

237. *Id.*

238. *See* Joseph H. King, Jr., *Deus ex Machina and the Unfulfilled Promise of* New York Times v. Sullivan*: Applying the Times for All Seasons*, 95 KY. L.J. 649, 663–65 (2006–2007) (addressing the shift in focus from the content of the speech to the identity of the subject of the speech).

239. *Id.* at 664–65.

240. *Id.* at 664.

The actual malice standard only applies to an otherwise private person if the speech is both about a matter of public concern and the plaintiff has voluntarily thrust herself into a public controversy or, in some rare circumstances, where the plaintiff has been drawn into a public controversy.[241] Otherwise, the constitutional safeguard of the actual malice standard is inapplicable to private individuals.[242]

The *Gertz* Court's rationale for distinguishing between private individuals and public figures, and in doing so rejecting the *Rosenbloom* plurality's approach, stands upon two pillars: (1) lack of access to media for self-help and (2) voluntary assumption of the risk.[243] The first rationale for the distinction between private individuals and public figures is that public figures have greater access to media as a means of self-help for addressing defamatory statements.[244] The *Gertz* Court reasoned that

> [t]he first remedy of any victim of defamation is self-help—using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation. Public officials and public figures usually enjoy significantly greater access to the channels of effective communication and hence have a more realistic opportunity to counteract false statements then [sic] private individuals normally enjoy. Private individuals are therefore more vulnerable to injury, and the state interest in protecting them is correspondingly greater.[245]

The second rationale for distinguishing private individuals from public figures is that the latter have voluntarily thrust themselves into matters of public controversy, thereby assuming the risk of adverse comment.[246] This second rationale "is heavily grounded in cultural and moral equity" attached to a sense that those who seek to influence matters of public concern should accept that "if you can't stand the heat of the fire, stay out of the kitchen."[247]

Contextualizing lower-level public employees within the broader scope of *Gertz*'s analysis, which distinguishes public figures from private persons, venerable defamation scholar Professor David Elder

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241. *Id.* at 664–65.

242. *Id.*

243. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 344–45 (1974) (discussing the differences between private individuals and public figures in regard to defamation).

244. *Id.* at 344.

245. *Id.*

246. SMOLLA, *supra* note 65, § 6:40, at 6-336.

247. *Id.* at 6-354.

has argued that imposition of the actual malice standard to lower-level public employees is antithetical to the general reasoning behind the *Gertz* framework.[248] He notes that "[l]ow-ranking or 'garden variety' public employees do not in any realistic sense assume the risk of enhanced press scrutiny and they generally have little access to the media for rebuttal on a 'regular and continuing' or other basis."[249] Simply stated, most lower-level government employees "have no more access to the press than private individuals, and none have assumed the risk of media exploitation by taking low-level positions."[250] As noted above, this argument is not without appeal or force. However, four decades of technology and social changes in access to media, the general erosion of the privacy of ordinary persons, and jurisprudential changes in how courts understand voluntariness in context of defamation have undermined the force of these rationales.

A. Dramatically Increased Access to Media

The rapid pace of societal and technological change in the four decades since the United States Supreme Court decided *Gertz* in 1974 has been dizzying.[251] Thomas Friedman, reflecting on technological changes since the publication of his book *The World is Flat*, observed that "Facebook didn't exist for most people, 'Twitter' was still a sound, the 'cloud' was something in the sky, '3G' was a parking space, 'applications' were what you sent to college, and 'Skype' was a typo."[252] Friedman wrote *The World is Flat* in 2005;[253] *Gertz* was decided in 1974. The technological revolution that would reshape the world was still in its infancy in 1974. Computers were for large corporations and the government, not ordinary people.[254] A majority of

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248. DAVID ELDER, DEFAMATION: A LAWYER'S GUIDE § 5:1, Westlaw (database updated July 2015).

249. *Id.*; *see also* Whitten, *supra* note 93, at 568 (noting that lower-level government employees "may not have ready access to the media to defend themselves").

250. Finkelson, *supra* note 45, at 888.

251. *See* BRUCE A. SHUMAN, ISSUES FOR LIBRARIES AND INFORMATION SCIENCE IN THE INTERNET AGE, at x (2001) ("The rise of the Internet is one of the most astonishing developments of this or any other century, compared by some writers in importance to the capture of fire and to Gutenberg's printing press . . . .").

252. THOMAS L. FRIEDMAN & MICHAEL MANDELBAUM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK 59 (2011).

253. THOMAS L. FRIEDMAN, THE WORLD IS FLAT: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY (2005).

254. *See, e.g*, JUNE JAMRICH PARSONS & DAN OJA, NEW PERSPECTIVES ON COMPUTER CONCEPTS 6 (2014) (observing that computers originally were enormous and expensive devices used by large corporations and the government but not ordinary people); *see also* JANNA

households in the United States did not have a computer for more than a quarter of century after *Gertz* was decided.[255] In 1974, the Internet was the exclusive preserve of the military and scientists; it was unknown to the general public.[256] Widespread usage of the Internet by non-techies was still two decades away,[257] as were the first blogs, which were essentially online diaries.[258] Widespread blogging did not appear for another twenty-five years after *Gertz* was decided.[259]

The Supreme Court of the mid-1970s saw a world in which there were only a few media options limited to local newspapers, commercial radio stations, the big-three television networks, and national newsmagazines.[260] Because of both the limited number of available media platforms and the narrowness of control thereof, popular participation in the media was nonexistent.[261] Simply stated, these were

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QUITNEY ANDERSON, IMAGINING THE INTERNET: PERSONALITIES, PREDICTIONS, PERSPECTIVES 39–42 (2005) (noting that computers were extremely expensive, most were so large they could fill an entire room, and many organizations "shared" time on a single computer).

255. *See* LYNN G. GREF, THE RISE AND FALL OF AMERICAN TECHNOLOGY 110 (2010) (discussing the history of the Personal Computer ("PC")); *see also* Kenneth R. Wilson et al., *Social Stratification and the Digital Divide*, *in* HANDBOOK OF PUBLIC INFORMATION SYSTEMS 173, 175 (G. David Garson ed., 2005) (addressing the impact and history of the Internet).

256. *See* MARY LOU ROBERTS & DEBRA ZAHAY, INTERNET MARKETING: INTEGRATING ONLINE & OFFLINE STRATEGIES 3–4 (3d ed. 2013) (discussing the history of the Internet).

257. MARK F. DOBECK & EUEL ELLIOTT, MONEY 188 (2007); ANASTASIA GOODSTEIN, TOTALLY WIRED: WHAT TEENS AND TWEENS ARE REALLY DOING ONLINE 56 (2007); *see also* Pamela Samuelson & Hal R. Varian, *The "New Economy" and Information Technology Policy*, *in* AMERICAN ECONOMIC POLICY IN THE 1990S, at 361, 365–66 (Jeffrey A. Frankel & Peter R. Orszag eds., 2002) (noting that the first Internet interface for non-techies was not developed until 1991).

258. ROB BROWN, PUBLIC RELATIONS AND THE SOCIAL WEB: HOW TO USE SOCIAL MEDIA AND WEB 2.0 IN COMMUNICATIONS 26 (2009). Brown notes,

> The first bloggers were . . . online diarists, who would keep a running account of their lives. These blogs began well before the term was coined and the authors referred to themselves usually as diarists or online journalists. Perhaps the first of these and therefore the original blogger was Justin Hall, who began blogging in 1994.

Id.

259. *See id.* (explaining how public participation in blogging began to significantly increase in 1999 with the arrival of Blogger, which Google purchased four years later).

260. DAVID CROTEAU & WILLIAM HOYNES, THE BUSINESS OF MEDIA: CORPORATE MEDIA AND THE PUBLIC INTEREST 111 (2d ed. 2006); *see, e.g.*, RICHARD CAMPBELL ET AL., MEDIA & CULTURE: AN INTRODUCTION TO MASS COMMUNICATION G-8 (8th ed. 2012) (describing the mid-1950s through the late-1970s as the network era for the dominance of the big three television networks: ABC, CBS, and NBC); Kevin Drum, *A Blogger Says: Save The MSM!*, MOTHER JONES, http://www.motherjones.com/politics/2007/03/blogger-says-save-msm (last visited Oct. 8, 2015) (stating that in the early- to mid-1970s "most people still had pretty limited access to news . . . one or two newspapers, three TV networks, and a few national newsmagazines").

261. *See* Nico Carpentier et al., *Waves of Media Democratization: A Brief History of Contemporary Participatory Practices in the Media Sphere*, 19 CONVERGENCE 287, 291 (2013)

"modes of communication that ordinary citizens generally could not tap into," in seeking to exercise self-help in responding to defamatory comments.[262]

The cumulative effect of the advances in technology and social media have provided access for ordinary people to communicate broadly through media in a manner that would have been unthinkable to the members of the Supreme Court in 1974. There has been a

> wave of media democratization . . . with the popularization of the Internet, especially Web 2.0 . . . . In contrast to [earlier] participation through the Internet . . . [more recent] participation in the Internet focuses on the opportunities provided to non-media professionals to (co-)produce media content themselves and to (co-)organize the structures that allow for this media production.[263]

The core of Web 2.0, which dates its birth to around 2000, is technological services including "blogs, wikis, podcasts, Really Simple Syndication (RSS) feeds etc., which facilitate a more socially connected Web where everyone is able to add to and edit the information space."[264] With computer coding knowledge no longer necessary to produce and distribute content, the nontechnophile person can utilize sophisticated communication technology relatively easily through user-friendly interfaces.[265]

Among rich and poor, young and old, and persons of diverse racial and ethnic backgrounds, this technological revolution has taken hold.[266] Social media is increasingly becoming a "key source [of] news and information,"[267] and an important forum for discourse on public issues.[268] For Americans under the age of fifty, the Internet serves as their main source for news, and even when Americans of all age groups are considered, the Internet remains well ahead of newspaper and radio

(discussing the history of media post-World War II).

262. David Lat & Zach Shemtob, *Public Figurehood in the Digital Age*, 9 J. ON TELECOMM. & HIGH TECH. L. 403, 410 (2011).

263. Carpentier et al., *supra* note 261, at 292.

264. PAUL ANDERSON, WEB 2.0 AND BEYOND: PRINCIPLES AND TECHNOLOGIES 1 (2012).

265. *See* Sharon Meraz, *The Many Faced "You" of Social Media*, *in* JOURNALISM AND CITIZENSHIP: NEW AGENDAS IN COMMUNICATION 123 (Zizi Papacharissi ed., 2009) (summarizing the shifts in blogging and internet practices).

266. *See generally* Maeve Duggan et al., *Social Media Update 2014*, PEW RES. CTR. (Jan. 9, 2015), http://www.pewinternet.org/2015/01/09/social-media-update-2014/ (demonstrating technology's powerful effect across economic, racial, and generational lines).

267. Alan B. Albarran, *Preface to* THE SOCIAL MEDIA INDUSTRIES, at xviii, xix (Alan B. Albarran ed., 2013).

268. Lyrissa Lidsky, *Public Forum 2.0*, 91 B.U. L. REV. 1975, 2003–04 (2011).

and second only to television as their source of news.[269] Seeking to survive the onslaught of social media, traditional media is adapting to integrate reader participation.[270] For example, newspapers and magazines open up their articles for comment from members of the public[271] and create forums for citizen journalism.[272]

While it remains difficult to grasp the full scope of the societal change that has been driven by technology, it can be safely stated that "the ability for self-help has spread to the masses."[273] Unlike their counterparts in 1974, "ordinary people can now publish their thoughts on Twitter . . . attack those in power on Blogger . . . and report on events excluded from other mainstream media by sending their own news stories and photos to citizen journalism sites like Demotix."[274] Via the Internet, ordinary people have "the opportunity to share their experiences (good and bad), air their views and opinions, and vent their frustrations."[275] Ordinary citizens "can now leverage their Web-based social networks for creating knowledge and meaning outside elite cueing, which is transforming how information is created, interpreted, and diffused in the Internet age."[276]

Persons who would have been excluded from mass communication in 1974 can now access vast potential audiences[277] at an extremely low

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269. *Number of Americans Who Read Print Newspapers Continues Decline*, PEW RES. CTR. (Oct. 11, 2012), http://www.pewresearch.org/daily-number/number-of-americans-who-read-print-newspapers-continues-decline/.

270. *See* Dina A. Ibrahim, *Broadcasting and Cable Networks*, *in* 1 ENCYCLOPEDIA OF SOCIAL NETWORKS 88, 90–91 (George A. Barnett ed., 2011) (addressing the challenge posed to traditional media by social media and how traditional media is responding).

271. *See* Paul Grabowicz, Tutorial: The Transition to Digital Journalism, BERKELEY: ADVANCED MEDIA INST. (2014), http://multimedia.journalism.berkeley.edu/tutorials/digital-transform (last visited Sept. 7, 2015) ("One of the most basic ways that a news organization can engage people is to provide a way for them to comment on and discuss news stories on the website and postings to staff weblogs.").

272. *See, e.g.*, *Citizen Journalism*, MEDIASHIFT, http://mediashift.org/social-media/citizen-journalism (last visited Sept. 7, 2015) (providing a forum for citizen journalism).

273. Jeff Kosseff, *Private or Public? Eliminating the* Gertz *Defamation Test*, 2011 U. ILL. J.L. TECH. & POL'Y 249, 266.

274. KEN BROWNE, AN INTRODUCTION TO SOCIOLOGY 324 (4th ed. 2011).

275. TERRY NICKLIN, CAMBRIDGE MARKETING HANDBOOK: STAKEHOLDER 58 (2013).

276. MERAZ, *supra* note 265, at 123.

277. *See* BROWNE, *supra* note 274, at 324 (addressing the communication possibilities offered for ordinary persons through technology and sociological impacts thereof); Michelle Sherman, *The Anatomy of a Trial with Social Media and the Internet*, 14 J. INTERNET L. 8, 8 (2011) ("Social media is connection. It is communication, a rather unlimited form of it with people speaking to a large audience."); Aaron Perzanowski, Comment, *Relative Access to Corrective Speech: A New Test for Requiring Actual Malice*, 94 CALIF. L. REV. 833, 835 (2006) ("The average citizen—previously confined to the one-to-one methods of distributing information—

cost[278] through leveraging technology. Media studies scholars Professors Andrea Press and Bruce Williams have observed that "new media . . . challenges elites . . . by providing communication channels for ordinary citizens to directly produce and access information about political, social, and economic life."[279] Technological changes greatly empower the ordinary person through increasing democratization of the means of media production and the manner by which consumers obtain information.[280] New-media bloggers are now even holding traditional institutional news media accountable for errors.[281]

The new reality of ordinary people being able to reach large audiences at low costs using technology has not gone entirely unnoticed by the courts. The Delaware Supreme Court concluded that ordinary

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enjoys a potential global audience on the internet.").

278. *See* Geoffrey W.G. Leane, *Deliberative Democracy and the Internet: New Possibilities for Legitimising Law Through Public Discourse?*, 23 CAN. J.L. & JURIS. 373, 379–80 (2010) (addressing the low costs of mass communication through the Internet); Stephen C. Jacques, Comment, Reno v. ACLU*: Insulating the Internet, the First Amendment, and the Marketplace of Ideas*, 46 AM. U. L. REV. 1945, 1989 (1997) ("The Internet . . . breaks down . . . barriers, offering an egalitarian form of communication where the cost is little or nothing and an opinion is instantaneously distributed worldwide."). In the *Gertz* era, media distribution required enormous capital expenditure and investment; as an illustration, printing and distributing newspapers required significant operational expenditures including printing presses, delivery trucks and delivery persons, reporters, editors, assistants, etc. *See* SHANNON E. MARTIN & KATHLEEN A. HANSEN, NEWSPAPERS OF RECORD IN A DIGITAL AGE: FROM HOT TYPE TO HOT LINK 44 (1998) (addressing the costs of newspaper publication).

279. ANDREA L. PRESS & BRUCE A. WILLIAMS, THE NEW MEDIA ENVIRONMENT: AN INTRODUCTION 20 (2010); *see also* Dan Gillmor, *Bloggers Breaking Ground in Communication*, 11 EJOURNAL USA: EMERGING MEDIA 24, 24 (2006) ("Software technology that allows writers to easily post their own essays on the World Wide Web has challenged the traditional role of media organizations as gatekeepers to a mass audience. At a steadily increasing pace over the last several years, ordinary citizens have made themselves into reporters and commentators on the social scene. They have made a remarkably rapid ascent onto their own platform in the realm of social and political debate."). Hugh Hewitt, a conservative political commentator, has argued that "[t]he power of elites to determine what [is] news via a tightly controlled dissemination system [has been] shattered. The ability and authority to distribute text are now truly democratized." HUGH HEWITT, BLOG: UNDERSTANDING THE INFORMATION REFORMATION THAT'S CHANGING YOUR WORLD 70–71 (2005); *cf.* David Gauntlett, *Creativity and Digital Innovation*, *in* DIGITAL WORLD: CONNECTIVITY, CREATIVITY AND RIGHTS 77, 80 (Gillian Youngs ed., 2013) (addressing the shift in perception of media as wholly separate and above the masses with the empowerment of the ordinary person to reach mass audiences through technology).

280. DAVID TAYLOR & DAVID MILES, FUSION: THE NEW WAY OF MARKETING 11 (2011); *cf.* CARNE ROSS, THE LEADERLESS REVOLUTION: HOW ORDINARY PEOPLE WILL TAKE POWER AND CHANGE POLITICS IN THE TWENTY-FIRST CENTURY, at xvii (2011) ("[I]n an increasingly interconnected system, such as the world emerging in the twenty-first century, the action of one individual or a small group can affect the whole system very rapidly.").

281. S. Robert Lichter, *The Media*, *in* UNDERSTANDING AMERICA: THE ANATOMY OF AN EXCEPTIONAL NATION 181, 215 (Peter H. Schuck & James Q. Wilson eds., 2008).

persons now have access to

> a very powerful form of extrajudicial relief. The Internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The [person] can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an anonymous defendant's allegedly defamatory statements made on an internet blog or in a chat room.[282]

Similarly, the Supreme Court of Georgia adopted a broad interpretation of an online speech statutory protection provision in accordance with a public policy of encouraging "defamation victims to seek self-help, their first remedy, by 'using available opportunities to contradict the lie or correct the error and thereby to minimize its adverse impact on reputation.'"[283] In adopting this statutory interpretation, the Georgia Supreme Court indicated that it was "strik[ing] a balance in favor of uninhibited, robust, and wide-open debate in an age of communications when anyone, anywhere in the world, with access to the Internet can address a worldwide audience of readers in cyberspace."[284]

Congress has also deemed self-help to constitute an appropriate remedy in the Internet era. In the Communications Decency Act of 1996 ("CDA") Congress expressly noted its finding that "[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity."[285] Congress also declared that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation."[286] Through the CDA, Congress sought "to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the

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282. Doe v. Cahill, 884 A.2d 451, 464 (Del. 2005).

283. Mathis v. Cannon, 573 S.E.2d 376, 385 (Ga. 2002) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 344 (1974)).

284. *Id.* at 386 (citations omitted).

285. 47 U.S.C. § 230(a)(3) (2012).

286. *Id.* § 230(a)(4).

vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation."[287] In pursuit of these ends, Congress provided under the CDA that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[288] The practical result of this limitation is to leave available the remedy of online self-help, which is a remedy Congress considered to be adequate.[289]

Extralegal private market solutions are also available through online reputation management tools. For example, companies like Reputation.com, also known as Reputation Defender, serve their clients by helping individuals and companies to manage their online appearance.[290] Reputation Defender and its counterparts can monitor online commentary, boost positive comments in search engine ranking returns while lowering negative comments, and scrub negative comments by having them removed.[291] Utilizing online reputation management tools offers certain advantages in comparison with defamation suits including eliminating the defamatory statements and not drawing additional attention to the defamatory material.[292]

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287. *Id.* § 230(b)(1), (2).

288. *Id.* § 230(c)(1).

289. *See* Ellyn M. Angelotti, *Twibel Law: What Defamation and its Remedies Look Like in the Age of Twitter*, 13 J. HIGH TECH. L. 430, 485 (2013) ("One purpose of the CDA is to promote self-help on the internet . . . ."); Allison E. Horton, Note, *Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet*, 43 VAL. U. L. REV. 1265, 1305–06 (2009) ("[T]he CDA's purpose is to promote self-help on the Internet and prevent the potential chilling effect that regulation may have on Internet speech.").

290. *Combat Negative Search Results with Reputation Defender*, REPUTATION.COM, http://www.reputation.com/reputationdefender (last visited Sept. 7, 2015).

291. *See* Lyrissa Barnett Lidsky, *Anonymity in Cyberspace: What Can We Learn from John Doe?*, 50 B.C. L. REV. 1373, 1390 (2009) (explaining how reputation defender can address defamatory online speech). *See generally* Angelotti, *supra* note 289, at 495 (describing some of the means by which such companies accomplish their objectives on behalf of their clients).

292. *See* Lidsky, *supra* note 291, at 1390. Professor Jacqueline Lipton has also noted that

> [t]hese services provide a number of advantages over legal solutions to online abuses, including the fact that several of them now have many years of experience with reputation management and have established solid working relationships with websites that host harmful communications. The use of private commercial services does not raise the specter of a First Amendment challenge. . . . [M]any laws directed at curtailing online speech may raise First Amendment concerns and may be open to constitutional challenge. Reputation management services also avoid many of the practical problems associated with litigation including jurisdictional challenges and difficulties identifying a defendant in the first place. A commercial service does not need to identify or locate a potential defendant in order to engage in astroturfing or search engine optimization. Resort to a reputation management service also avoids

While the Supreme Court has not addressed the impact of technological tools on First Amendment jurisprudence in the context of defamation specifically, the availability of self-help technology to accomplish ends that might otherwise be arrived at only through legally imposed restrictions on speech has been of significant impact in the Court's analysis of other free speech issues. For example, the Court explained that "the mere possibility that user-based Internet screening software would 'soon be widely available' was relevant to our rejection of an overbroad restriction of indecent cyberspeech."[293] In seeking to invalidate restrictions imposed under the CDA, the challengers focused on the availability of self-help technological remedies in asserting a reduced need for governmentally imposed speech restrictions.[294] As Professor Ann Bartow observed, that was precisely where the Justices turned in analyzing the constitutionality of the decency restrictions imposed by Congress, noting

> [a] remedy was available for parents who did not want their children exposed to pornography or "indecency" on the Internet. They could purchase filtering software (a.k.a. "censorware") and subscribe to related content filtering services to keep undesired words and images away from their computers. In this way they could accomplish with their private purchasing power what the government would not do for them in terms of providing tools to regulate the information that was accessible to their children.[295]

Writing in a time period when Internet usage was at a stage of comparative infancy, approximately two decades ago, the United States Supreme Court observed that "[t]hrough the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer."[296] The empowerment of ordinary citizens has

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> drawing public attention to the damaging content. Harmful content can simply be unobtrusively de-prioritized in search engine results.

Jacqueline D. Lipton, *Combating Cyber-Victimization*, 26 BERKELEY TECH. L.J. 1103, 1147 (2011) (citations omitted).

293. United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 814 (2000) (quoting Reno v. ACLU, 521 U.S. 844, 876–77 (1997)).

294. *See generally* Tom W. Bell, *Pornography, Privacy, and Digital Self Help*, 19 J. MARSHALL J. COMPUTER & INFO. L. 133, 138–42 (2000) (describing how self-help remedies have made certain governmental restrictions upon speech that may be indecent or harmful to minors unnecessary and unconstitutional).

295. Ann Bartow, *Internet Defamation as Profit Center: The Monetization of Online Harassment*, 32 HARV. J.L. & GENDER 383, 422 (2009) (citations omitted).

296. *Reno*, 521 U.S. at 870.

grown exponentially in the last two decades, fundamentally undermining the *Gertz* Court's notion that private persons do not have meaningful access to channels of communication for redressing attacks on their reputations. In 2015, a lower-level government employee has access to means of communication for purposes of self-help that far exceed what would have been available to high-level public officials in 1974.

B. Private Individuals Are Less Private Than They Were in 1974

Underlying the Court's defamation jurisprudence is a view that states have a greater interest in protecting private persons who are not normally in the public domain from scrutiny than persons who are regularly in the public sphere. Private persons are not as isolated from the public sphere as they would have been in 1974. In his plurality opinion in *Rosenbloom*, and subsequently in his dissenting opinion in *Gertz*, Justice Brennan observed that "[v]oluntarily or not, we are all 'public' men to some degree."[297] In the 1970s, Justice Brennan did not find agreement from a sufficient number of his colleagues to form a majority around this conclusion. David Lat, founder of the website Above the Law, and Professor Zach Shemtob have argued that "Justice Brennan's words ring even more true in the digital age."[298]

Private individuals are undisputedly less private in 2015 than they were in 1974. And for that, as Cassius proclaims to Brutus in William Shakespeare's Julius Caesar, "[t]he fault, dear Brutus, is not in our stars. But in ourselves."[299] Judge Alex Kozinski has consistently argued privacy is being killed by the ordinary person and his or her love affair with technology:[300]

> It started with the supermarket loyalty programs. They seemed innocuous enough—you just scribble down your name, number and address in exchange for a plastic card and a discount on Oreos. . . .
>
> Letting stores track our purchases may not appear to be permitting an intensely personal revelation but, as the saying goes, you are what you eat, and we inevitably reveal more than we thought. Have diapers

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297. Rosenbloom v. Metromedia, Inc., 403 U.S. 29, 48 (1971), *abrogated by* Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974); *Gertz*, 418 U.S. at 364.

298. Lat & Shemtob, *supra* note 262, at 413.

299. WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2.

300. *See, e.g.*, Alex Kozinski & Eric S. Nguyen, *Has Technology Killed the Fourth Amendment?*, 2011–2012 CATO SUP. CT. REV. 15, 15–30 (exploring how technology and people's love affair therewith have eroded privacy); Alex Kozinski & Stephanie Grace, *Pulling Plug on Privacy: How Technology Helped Make the 4th Amendment Obsolete*, FREE REPUBLIC (June 22, 2011), http://www.freerepublic.com/focus/f-chat/2738236/posts (same).

> in your cart? You probably have a baby. Tofu? Probably a vegetarian. A case of Muscatel a week? An alcoholic (with poor taste, at that). The cards also track the "where" and "when" of our shopping expeditions. Making a late-night run to a convenience store near your ex-girlfriend's house? Buying posters and markers the day before a political rally? If you swiped your card, all that information is now public. . . .
>
> . . . .
>
> These cards were just the beginning. Fast Track passes quickly followed—with their lure of a shorter commute for a little privacy. Then came eBay and Amazon, which save us from retyping our billing and shipping information, if only we create an account. Before long, convenience became paramount, and electronic tracking became the norm. Nowadays, Google not only collects data on what websites we visit but uses its satellites to take pictures of our homes.[301]

The digitization of government records has also moved much of what was formerly buried in dusty government records offices to something that it is easily accessible online.[302] For instance, a nosy neighbor can discover almost instantaneously how much someone paid for his or her home on Zillow.[303] With only a little more work, that same nosy neighbor can find arrest records, professional licenses, property liens, trademarks, patents, driver's license information, and bankruptcy history, among other things.[304]

Social media collapses the private sphere even further. In 2008, the editors of *Webster's New World Dictionary* chose "overshare," which they defined as "to divulge excessive personal information," as their word of the year.[305] Simply stated, people tend to overshare on social media.[306] Professor Bruce Boyden has observed that "[t]oo many

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301. Kozinski & Grace, *supra* note 300.

302. HERMAN T. TAVANI, ETHICS AND TECHNOLOGY: ETHICAL ISSUES IN AN AGE OF INFORMATION AND COMMUNICATION TECHNOLOGY 138 (2004).

303. David Carlson, *How Zillow Fueled My Real Estate Obsession*, YOUNG ADULT MONEY (Oct. 15, 2012), http://www.youngadultmoney.com/2012/10/15/how-zillow-fueled-my-real-estate-obsession ("Much to the shock of some people that the price they paid for their home is on public record, Zillow aggregates this public record data and makes it easy to see what a home was sold for in the past.").

304. *How to Find Free Public Records Online*, ABOUT.COM, http://websearch.about.com/od/governmentpubliclegal (last visited Sept. 7, 2015).

305. *Word of the Year 2008: Overshare*, WEBSTER'S NEW WORLD DICTIONARY (Dec. 1, 2008, 6:31 AM), https://wordoftheyear.wordpress.com/2008/12/01/2008-word-of-the-year-overshare.

306. *See* Jennifer Rowsell, *My Life on Facebook: Assessing the Art of Online Social Networking*, *in* ASSESSING NEW LITERACIES: PERSPECTIVES FROM THE CLASSROOM 95, 97–98 (Anne Burke & Roberta F. Hammett eds., 2009) (observing the tendency people have to

people, confronted with the ability to share information with others via social networks, readily avail themselves of that opportunity, causing personal information to be shared from Facebook or Twitter accounts with little care as to its relevance or privacy."[307] Through social media, people increasingly document almost every aspect of their lives.[308] Neuroscientists have helped to explain this oversharing phenomenon, suggesting that disclosure itself, especially personal self-disclosure, functions as an intrinsic reward, stimulating regions of the brain associated with pleasure.[309] Communications and media studies scholars have also offered insight into oversharing, having found that computer-mediated communication eliminates social and biological cues that would normally signal restraint and instead make the Internet not "feel public to its users," thereby fostering less-restricted communication.[310] The problem is at such epidemic levels that a cottage industry of writers has emerged to caution against oversharing[311] and offer advice on where to draw the line.[312]

Nevertheless, oversharing has arguably become the new normal with the non-oversharer as the outlier.[313] Facebook CEO Mark Zuckerberg argues that openly sharing is the new social norm.[314] It is difficult to

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overshare online).

307. Bruce E. Boyden, *Oversharing: Facebook Discovery and the Unbearable Sameness of Internet Law*, 65 ARK. L. REV. 39, 39 (2012).

308. *Id.* at 40.

309. *See* Diana I. Tamir & Jason P. Mitchell, *Disclosing Information about the Self is Intrinsically Rewarding*, 109 PRO. NAT'L ACAD. SCI. U.S. AM. 8038, 8038 (2012) (explaining neuroscience research and findings with regard to the oversharing online).

310. Malin Sveningsson Elm et al., *Question 3: How Do Various Notions of Privacy Influence Decisions in Qualitative Internet Research?*, *in* INTERNET INQUIRY: CONVERSATIONS ABOUT METHOD 69, 77 (Annette N. Markham & Nancy K. Baym eds., 2009) (emphasis omitted).

311. *See, e.g.*, Andy O'Donnell, *The Dangers of Facebook Oversharing*, ABOUT.COM http://netsecurity.about.com/od/securityadvisorie1/a/The-Dangers-Of-Facebook-Oversharing.htm (last visited Sept. 7, 2015) (cautioning against oversharing); Robert Siciliano, *Oversharing on Social Media Common Amongst 50+*, MCAFEE BLOG CENT. (Oct. 23, 2013), https://blogs.mcafee.com/consumer/50plus-tech-savvy-but-still-at-risk (same).

312. *See, e.g.*, Amy Guth, *Social Media and Oversharing: How to Check Yourself Before You Wreck Yourself*, CHI. TRIB. (Jan. 31, 2013), http://articles.chicagotribune.com/2013-01-31/features/ct-tribu-social-media-oversharing-20130131_1_social-media-tweet-or-post-online-boundaries (addressing how to draw lines to avoid oversharing); Mary Dell Harrington & Lisa Endlich Heffernan, *Oversharing: Why Do We Do It and How Do We Stop?*, HUFFINGTON POST (Dec. 4, 2013, 1:07 PM), http://www.huffingtonpost.com/grown-and-flown/oversharing why-do-we-do-it-and-how-do-we-stop_b_4378997.html (same).

313. *See* Natalie J. Ferrall, Comment, *Concerted Activity and Social Media: Why Facebook is Nothing Like the Proverbial Water Cooler*, 40 PEPP. L. REV. 1001, 1026–27 (2013) (addressing increased social expectations of oversharing online).

314. Bobbie Johnson, *Privacy No Longer a Social Norm, Says Facebook Founder*, GUARDIAN

argue with the conclusion that there has been a radical redefinition of social norms at least insofar as people "are freely giving up some of their privacy to strangers, as they willingly friend strangers and post information and images they would never have shared so publicly before."[315] In selecting "overshare" as their word of the year, *Webster's* editors were quite conscious of this duality:

> It's also a word that is rather slip-slippery, chameleon-like. Some people use it disparagingly; they don't like oversharing. Others think oversharing is good and that one must give full disclosure of one's inner life. Sometimes there is a generational shift in the way people look at this practice and therefore view the word.[316]

Even if an individual is cautious about sharing information online, a friend, a parent, an acquaintance, a neighbor, or any other person with whom one interacts with may be far less hesitant about sharing or oversharing what formerly would have been private information about another person.[317] And in this new era of social media, "friend" is a far more expansive concept and less-known commodity, a problem only magnified by the unfathomable expansion online of the concept of a "friend of a friend."[318]

Even among the most active and adept users of technology, there is little understanding of what is being made publicly available through users' online activities.[319] Such lack of knowledge, or at least full appreciation thereof, can result in even classically private information such as what one is reading becoming exposed through Internet connectivity programs via Facebook's social reader.[320]

(Jan. 10, 2010, 10:58 PM), http://www.theguardian.com/technology/2010/jan/11/facebook-privacy.

315. Laurie Thomas Lee, *Privacy and Social Media*, *in* THE SOCIAL MEDIA INDUSTRIES 146, 150 (Alan B. Albarran ed., 2013).

316. *Word of the Year 2008: Overshare*, *supra* note 305.

317. FREDERICK S. LANE, AMERICA PRIVACY: THE 400-YEAR HISTORY OF OUR MOST CONTESTED RIGHT 255–61 (2009).

318. *See generally* DOUGLAS JACOBSON & JOSEPH IDZIOREK, COMPUTER SECURITY LITERACY: STAYING SAFE IN A DIGITAL WORLD 214–17 (2012) (discussing the concept of "friend" in the digital world as it relates to varying levels of access to private information).

319. *See* JOHN PALFREY & URS GASSER, BORN DIGITAL: UNDERSTANDING THE FIRST GENERATION OF DIGITAL NATIVES 66–68 (2008) (noting people's lack of full appreciation of just how tracked and observed they are through social media and online tools).

320. Margot Kaminski, *Reading Over Your Shoulder: Social Readers and Privacy Law*, WAKE FOREST L. REV. ONLINE (2012), http://wakeforestlawreview.com/2012/03/reading-over-your-shoulder-social-readers-and-privacy-law/. "Websites are adopting techniques to glean information about visitors to their sites, in real time, and then deliver different versions of the Web to different people." Jennifer Valentino-DeVries et al., *Websites Vary Prices, Deals Based on Users' Information*, WALL ST. J. (Dec. 24, 2012), http://www.wsj.com/articles/SB1000142412

Aggregation of massive amounts of data about formerly private individuals and data mining tools for exploring that information pose an even greater threat to privacy.[321] "[W]ith the advent of more powerful data mining techniques, the aggregation of seemingly innocuous personal data across a range of social media makes it fairly straightforward to put together a disturbingly detailed profile of the data's originator."[322] The access to information through aggregation and data mining is fundamentally undermining what was formerly the private sphere.[323] Given these technological realities, Sun Microsystems CEO Scott McNealy indelicately declared: "You have zero privacy. Get over it."[324] At the very least, technology and people's use of that technology has resulted in private individuals in 2015 being significantly less private than they were in 1974.

C. Reduction in the Demands of Voluntariness

In addition to the lack of access to media and resulting inability to

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7887323777204578189391813881534. Websites' prices and text displays vary to respond to the customer's IP address, search history, and means of accessing the site. *Id.*

321. LORI ANDREWS, I KNOW WHO YOU ARE AND I SAW WHAT YOU DID: SOCIAL NETWORKS AND THE DEATH OF PRIVACY 118–19 (2012); Craig Blakeley & Jeff Matsuura, *Welcome to the World of Information Aggregation*, LEGAL SOLUTIONS BLOG (Feb. 13, 2012), http://blog.legalsolutions.thomsonreuters.com/law-and-techology/welcome-to-the-world-of-information-aggregation/; Andre Oboler et al., *The Danger of Big Data: Social Media As Computational Social Science*, FIRST MONDAY (July 2, 2012), http://firstmonday.org/ojs/index.php/fm/article/view/3993/3269.

322. Lynne Y. Williams, *Who is the 'Virtual' You and Do You Know Who is Watching You?*, *in* SOCIAL MEDIA FOR ACADEMICS: A PRACTICAL GUIDE 175, 177–78 (Diane Rasmussen Neal ed., 2012).

323. *See* Saby Ghoshray, *The Emerging Reality of Social Media: Erosion of Individual Privacy Through Cyber-Vetting and Law's Inability to Catch Up*, 12 J. MARSHALL REV. INTELL. PROP. L. 551, 556–65 (2013) (discussing a diminished fundamental right when an employer searches through an applicant's cyber life). Reflecting upon the new realities for privacy presented by technology and social media, a New York state court observed:

> [W]hen Plaintiff created her Facebook and MySpace accounts, she consented to the fact that her personal information would be shared with others, notwithstanding her privacy settings. Indeed, that is the very nature and purpose of these social networking sites else they would cease to exist. Since Plaintiff knew that her information may become publicly available, she cannot now claim that she had a reasonable expectation of privacy. As recently set forth by commentators regarding privacy and social networking sites, given the millions of users, "[i]n this environment, privacy is no longer grounded in reasonable expectations, but rather in some theoretical protocol better known as wishful thinking."

Romano v. Steelcase Inc., 907 N.Y.S.2d 650, 657 (N.Y. Sup. Ct. 2010) (citation omitted).

324. Deborah Radcliff, *A Cry for Privacy: As E-Commerce Grows, Businesses Must Avoid Intruding on the Lives of Customers—Or Risk Losing Them*, COMPUTERWORLD, May 17, 1999, at 46.

exercise self-help rationale, the *Gertz* Court also explained the distinguishing of private individuals from public figures upon the basis that public figures have voluntarily submitted to scrutiny.[325] The *Gertz* Court envisioned public figures as persons "thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved" and in doing so "assum[ing] roles of especial prominence in the affairs of society."[326] Such a person "voluntarily injects himself . . . into a particular public controversy."[327]

However, "[w]hat is and is not voluntary is by no means self-evident."[328] And what is declared by courts to be voluntary looks increasingly less limited to persons thrusting themselves into matters of public controversies in order to influence the resolution thereof. Professor Rodney Smolla's explanation of the application of public figure status to athletes is revealing and insightful on this point:

> Professional athletes voluntarily enter the "arena," quite literally the "sports arena," and issues germane to their performance or fitness, including issues relating to mental and physical health, but also to their character and position in society as role models, justify treating professional athletes as public figures and also justifies a reasonably broad understanding of the range of issues concerning the professional athlete's life that falls within the perimeter of that public figure status.[329]

Professional athletes have entered an arena that attracts public attention, but professional athletes have not "thrust" themselves to "the forefront of particular public controversies in order to influence the resolution of the issues involved."[330] Instead, the finding of voluntariness for athletes derives from entering a profession that "command[s] the attention of sports fans."[331] With this transition in understanding of what constitutes voluntariness, even the court's voice shifts from active to passive. For example, in determining whether a

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325. *See* W. Wat Hopkins, *The Involuntary Public Figure: Not So Dead After All*, 21 CARDOZO ARTS & ENT. L.J. 1, 19 (2003) ("[V]oluntariness seemed to be the key element in determining whether a libel plaintiff is a public figure."). Questions have been raised, however, about the soundness of the voluntariness rationale. *See, e.g.*, David A. Anderson, *Is Libel Law Worth Reforming?*, 140 U. PA. L. REV. 487, 527–30 (1991) (challenging underlying presumptions about the voluntariness rationale).

326. Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974).

327. *Id.* at 351.

328. Schiavone Constr. Co. v. Time, Inc., 619 F. Supp. 684, 703 (D.N.J. 1985).

329. SMOLLA, *supra* note 65, § 6:40, at 6-361.

330. *Gertz*, 418 U.S. at 345.

331. Chuy v. Phila. Eagles Football Club, 595 F.2d 1265, 1280 (3d Cir. 1979).

plaintiff, a professional football player, was a public figure, the Third Circuit Court of Appeals concluded, "Chuy *had been thrust* into public prominence."[332]

The concept of voluntariness even extends to individuals who scrupulously endeavor to maintain their anonymity and privacy, and to avoid the public sphere. While noting that the Mafioso figure in the case before it "yearns for [the] shadow," the Fifth Circuit Court of Appeals, nevertheless, found him to be a public figure because, by being a Mafioso, he "voluntarily engaged in a course that was bound to invite attention and comment."[333] The Third Circuit Court of Appeals embraced the same understanding, concluding that "[w]hen an individual undertakes a course of conduct that invites attention, even though such attention is neither sought nor desired, he may be deemed a public figure."[334] In other words and remarkably, "'[v]oluntariness,' for purposes of public figure status, could be involuntary."[335] The underlying analysis of this less-demanding form of voluntariness emphasizes "'run[ning] the risks' and 'rais[ing] the chances' of becoming a news item."[336] When implementing such an approach, as noted by the Third Circuit Court of Appeals, "courts have classified some people as limited purpose public figures because of their status, position or associations."[337] Redefining voluntariness in such a manner makes the voluntariness rationale for distinguishing public from private persons readily susceptible to the criticism that "[t]he premise that public figures have voluntarily accepted the risk of defamation, or that it goes with the territory, is nothing more than a handy fiction."[338]

Changes in technology and media make utilizing this form of analysis, which lowers the bar for voluntariness, especially problematic. Professor Gerald Ashdown has observed,

> [i]n our highly mobile, visible, and interactive society, the risk of attracting the attention of the press is as apparent as it is unpredictable. Becoming involved in any number of events, whether voluntarily or involuntarily, e.g., from an accident, natural disaster to a winning

332. *Id.* (emphasis added).

333. Rosanova v. Playboy Enters., 580 F.2d 859, 861 (5th Cir. 1978) (quoting Rosanova v. Playboy Enters., 411 F. Supp. 440, 445 (S.D. Ga. 1976)).

334. McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985).

335. Hopkins, *supra* note 325, at 24 n.157.

336. King, *supra* note 238, at 692 (alterations in original) (quoting Clyburn v. News World Commc'ns, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990)).

337. Marcone v. Penthouse Int'l Magazine for Men, 754 F.2d 1072, 1083 (3d Cir. 1985).

338. King, *supra* note 238, at 698.

lottery ticket (i.e., good luck or bad), makes us vulnerable to media exposure.[339]

Accordingly, voluntariness is no longer confined to individuals who thrust themselves into the vortex of a public controversy to try to influence the resolution of the matter in controversy.[340] Instead,

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339. Gerald G. Ashdown, *Journalism Police*, 89 MARQ. L. REV. 739, 757 (2006).

340. The U.S. Courts of Appeals have repeatedly found voluntariness to be satisfied even in circumstances in which the subject of the speech did not attempt to intervene or address any matter of public controversy. *See, e.g.*, McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985) (finding that an architect who worked on public building projects was a public figure though he did not "intend to attract attention by his actions"); *Marcone*, 754 F.2d at 1083 (labeling a plaintiff who purchased marijuana as part of a drug smuggling ring a limited public figure); Chuy v. Phila. Eagles Football Club, 595 F.2d 1265, 1280 (3d Cir. 1979) (determining that a starting player for an NFL football team was thrust into public prominence and was a public figure); Rosanova v. Playboy Enters., 580 F.2d 859, 861 (5th Cir. 1978) (noting that Rosanova voluntarily engaged in organized crime, which was "bound to invite attention and comment"); *see also, e.g.*, Lohrenz v. Donnelly, 350 F.3d 1272, 1274 (D.C. Cir. 2003) ("Because Lohrenz's evidence shows that she chose the F-14 combat jet while well aware of the public controversy over women in combat roles, her challenge to the ruling that she was a voluntary limited-purpose public figure once the Navy assigned her to the F-14 combat aircraft rings hollow: she chose combat training in the F-14 and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came with the territory. Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she 'suited up' as an F-14 combat pilot."); *Clyburn*, 903 F.2d at 33 ("Clyburn's acts *before* any controversy arose put him at its center. His consulting firm had numerous contracts with the District government, he had many social contacts with administration officials, and Medina, at least as one may judge from attendance at her funeral, also enjoyed such ties. Clyburn also spent the night of Medina's collapse in her company. One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy. Clyburn engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy. This conduct, together with his false statements at the controversy's outset, disable him from claiming the protections of a purely 'private' person."); Dombey v. Phx. Newspapers, Inc., 724 P.2d 562, 570–71 (Ariz. 1986) ("Dombey sought, received, accepted and struggled to keep appointments as the designated insurance agent of record for a large county and administrator of deferred compensation programs for its employees. While he was not employed by and received no direct benefits from the public body, he did receive significant and valuable benefits because of his position. He did more than compile and transmit research results or publish arcana in obscure learned journals; he made recommendations resulting in substantial expenditures from the public fisc for health and life insurance programs and of private funds obtained by payroll deductions from public employees for the deferred compensation program. By assuming the position that he held, Dombey invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention. This is not to say that every provider of goods and services to the government becomes a public figure. We believe that no bright line can be drawn. A person who sells legal pads to the judicial department may legitimately expect to retain almost complete anonymity. Those responsible for providing rockets for the space program may not legitimately enjoy the same expectations. Dombey is at neither pole, but we believe that by assuming the positions of agent of record and administrator for the

voluntariness can be satisfied by a less demanding showing that plaintiffs willingly engaged in activity that foreseeably put them at risk of public attention.

Lower-level government officials have entered precisely such an arena. The primary charge of the press in the United States is to serve as a government watchdog so as to provide "transparency of government actions, thus contributing to government accountability and discouraging corruption."[341] The press stands in the stead of the public as its eyes and ears so as to be able to inform the public about the actions of the government.[342] In doing so, Professor C. Edwin Baker has observed that the press serves as a deterrent upon governmental misconduct.[343] With regard to lower-level government employees, the media plays an important role in exposing bureaucratic incompetence, dereliction, ineptitude, and scandal.[344] Professor Mordecai Lee has found that reporters often utilize their reporting as a conduit for complaining about bureaucracy.[345] Consequently, Professor Goodsell notes that bureaucrats must be wary of the press, which is a watchdog of the bureaucracy.[346] Given that two of the primary roles of the press in the United States are "serving the public as a watchdog over the government and as a critic of the government's actions"[347] and that those actions are taken through the administrative bureaucratic state,

deferred compensation plans, he surrendered any legitimate expectation of anonymity with regard to the manner in which he performed in his positions, his relationship with executives of the governmental agencies and the other matters with which the articles were concerned. . . . Whatever requirement there might be to 'thrust' oneself into a public controversy was satisfied by his voluntary participation in activity calculated to lead to public scrutiny." (citations omitted)).

341. Emily Berman, *Democratizing the Media*, 35 FLA. ST. U. L. REV. 817, 824 (2008).

342. *See* James Carey, *"A Republic If You Can Keep It": Liberty and Public Life in the Age of Glasnost* (1991), *reprinted in* JAMES CAREY: A CRITICAL READER 207, 218 (Eve Stryker Munson & Catherine A. Warren eds., 1997) (noting that the press serves the public as the eyes, ears, guardians, and protectors of the public's right to know).

343. *See* C. EDWIN BAKER, MEDIA, MARKETS, AND DEMOCRACY 133 (2001) (noting that the most important function of the press is its exposure of government corruption or incompetence, serving as the watchdog for the public).

344. DAVID L. PALETZ ET AL., 21ST CENTURY AMERICAN GOVERNMENT AND POLITICS § 16.4, at 775 (2012).

345. MORDECAI LEE, GOVERNMENT PUBLIC RELATIONS: A READER 92 (Mordecai Lee ed., 2007). *See generally* MORDECAI LEE, MEDIA AND BUREAUCRACY IN THE UNITED STATES, *in* ENCYCLOPEDIA OF PUBLIC ADMINISTRATION AND PUBLIC POLICY (Evan M. Berman ed., 2d ed. 2008) (addressing the media's reporting upon bureaucracy).

346. *See* GOODSELL, *supra* note 177, at 61 (detailing the number of "watchdogs" that serve as external reviewers of bureaucracies, such as auditors, legislative committees, budget offices, investigative bodies, program evaluation units, and, appropriately, the press).

347. Jennifer Elrod, *Protecting Journalists from Compelled Disclosure: A Proposal for A Federal Statute*, 7 N.Y.U. J. LEGIS. & PUB. POL'Y 115, 123 (2004).

media attention of government employees is hardly unforeseeable. Additionally, the public's role in democratic self-governance suggests that an expectation by a governmental employee of not being subject to public attention in the performance of one's official conduct is misplaced. Simply stated, the government employee has entered an arena that attracts and should attract public attention.

V. FIRST AMENDMENT DISSONANCE

Nevertheless, the Supreme Court has failed to protect speech about the action and inaction of lower-level government employees in their official capacity. This failure creates a discordant break in First Amendment jurisprudence in at least three critical respects. One, the Supreme Court's failure to safeguard speech about lower-level government employees devalues self-governance related speech in comparison to nonpolitical speech such as speech about literature and science. Two, the Supreme Court's failure to apply the actual malice standard is inconsistent with its rejection of balancing of the costs and benefits of protected speech—political speech about lower-level government employees constituting protected speech that should not be subjected to such balancing. Three, failing to provide greater protection for speakers addressing the conduct of lower-level government employees from defamation suits is inconsistent with the Supreme Court's handling of suits in other areas of tort law, such as intentional infliction of emotional distress claims.

As for the first fissure, Professor Frederick Schauer in his insightful article *Public Figures* questions the reasonableness of parity in treatment of public figures and public officials through application of the actual malice standard to both.[348] In his concurring opinion in *Curtis Publishing Co. v. Butts*, Chief Justice Warren articulated the Supreme Court's reason for extending the actual malice constitutional safeguard to include speech related to public figures where the speech is upon a matter of public concern:

> To me, differentiation between "public figures" and "public officials" and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930's and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between

348. *See generally* Schauer, *supra* note 75.

> the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions. While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.[349]

Chief Justice Warren's portrait of the public figure, which provided the foundation for the *Gertz* Court's embrace and structuring of the public-figure category,[350] is plainly the image of "a nominally private person [who] exercises as much, if not more, influence on the determination of public policy issues as do many public officials."[351] In that sense, the public figure doctrine "is heavily grounded in the public policy of facilitating free social discourse—those who voluntarily seek to influence events and issues may appropriately be forced to accept as part of the bargain a greater risk of defamation."[352] However, Professor Schauer has astutely observed that the Court's archetype of the public figure as a political actor engaged in influencing and directing political affairs "is only a part, and perhaps only comparatively small part, of the domain of public figures. The universe of public figures includes many people whose involvement in or influence on public policy matters is either attenuated or nonexistent."[353]

While conceding that parity between non-policy-making public

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349. Curtis Publ'g Co. v. Butts, 388 U.S. 130, 163–64 (1967) (Warren, C.J., concurring).

350. *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (quoting from Chief Justice Warren's description of a public figure in explaining the difference in treatment of private individuals and public figures with regard to defamation suits); *see also* Schauer, *supra* note 75, at 914 (questioning the reasonableness of equal treatment of public figures and public officials through application of the actual malice standard to both).

351. Schauer, *supra* note 75, at 916.

352. SMOLLA, *supra* note 62, § 2:35.50, at 2-64.35.

353. Schauer, *supra* note 348, at 917.

figures (as examples, fiction authors and painters) and politicos may be justified based upon other aspects of the First Amendment, Professor Schauer observes that "[s]uch an argument . . . can be found neither in *New York Times* nor in an extension of *New York Times* premised on the inevitable or predominant involvement of some public figures in the same types of decisions made by public officials."[354] The parity problem is even worse when considered in relation to lower-level government officials. Despite being integral components of the modern administrative state, and comments regarding their official conduct being critical to democratic self-governance, lower-level government employees are not actually in parity with non-policy-making public figures in defamation suits. Instead, a lower-level government official has less constitutional constraint in seeking damages through a defamation suit than a fiction writer or painter. While not disputing that non-political speech is, and should be, protected under the First Amendment,[355] political speech is, at least in theory, to have the greatest degree of First Amendment protection.[356] Failure to afford

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354. *Id.* at 919.

355. The Supreme Court has recognized that "guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government." Time, Inc. v. Hill, 385 U.S. 374, 388 (1967). Protected speech could also, for example, be related to economic, religious, or cultural matters. *See* NAACP v. Alabama, 357 U.S. 449, 460 (1958) ("It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech. Of course, it is immaterial whether the beliefs sought to be advanced by associations pertain to political, economic, religious or cultural matters, and state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny." (citations omitted)). First Amendment protections embrace a "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969). In fact, in recent years the nonpolitical entertainment-related speech issues that have been before the Supreme Court have been so pronounced in terms of their "sheer volume, [that] . . . media entertainment speech seems to be subtly changing the cultural backdrop of the First Amendment, relegating political speech to a subordinate level within the general cultural awareness," though the actual importance of political speech is undiminished. Patrick M. Garry, *The First Amendment and Non-Political Speech: Exploring a Constitutional Model That Focuses on the Existence of Alternative Channels of Communication*, 72 MO. L. REV. 477, 478 (2007).

356. The Supreme Court and scholars have repeatedly noted the special protection afforded for political speech. Boos v. Barry, 485 U.S. 312, 318 (1988); Connick v. Myers, 461 U.S. 138, 145 (1983); *see also* Aaron Johnson, *Interning Dissent: The Law of Large Political Events*, 9 DUKE J. CONST. L. & PUB. POL'Y 87, 87–88 (2013) (asserting that it is "fair to say that once a federal court determines that a restriction is content-based, the restriction will fall"); Amy J. Sepinwall, Citizens United *and the Ineluctable Question of Corporate Citizenship*, 44 CONN. L. REV. 575, 607 (2012) (declaring that political speech receives the greatest protection in First Amendment jurisprudence because it "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people").

protection for speech about lower-level government employees acting in their official capacity is inconsistent with that understanding.

As for the second fissure, balancing of the value of protected speech, in *Stevens v. United States*, the Court considered the government's argument "that a claim of categorical exclusion should be considered under a simple balancing test: 'Whether a given category of speech enjoys First Amendment protection depends upon a categorical balancing of the value of the speech against its societal costs.'"[357] In an eight to one decision, the Court rejected this contention in unambiguous terms:

> As a free-floating test for First Amendment coverage, that sentence is startling and dangerous. The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.[358]

This approach to First Amendment interpretation has led to the protection of speech that threatens potentially far greater harm than defamation.[359] A dissonance in First Amendment jurisprudence exists if courts are generally disabled from weighing the relative cost-benefit of protected speech but are free to do so when a citizen is commenting on the government, which in theory should enjoy the highest protection, if a lower-level government employee is involved.

As for the third fissure, the failure to protect speech relating to the conduct of lower-level government employees in their official capacity is also inconsistent with the Court's approach to addressing the intersection of the First Amendment with other areas of tort law, such as the tort of intentional infliction of emotional distress. In his dissenting opinion in *Snyder v. Phelps*,[360] Justice Alito found the distinction between the status of the plaintiff in an intentional infliction of emotional distress case—a public figure versus a private individual—to

357. United States v. Stevens, 559 U.S. 460, 470 (2010).

358. *Id.*

359. *See generally id.* (permitting crush videos of animals); Ashcroft v. Free Speech Coal., 535 U.S. 234 (2002) (permitting images and videos of virtual young children); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (protecting the burning of crosses); Brandenburg v. Ohio, 395 U.S. 43 (1977) (protecting racial invective-laden white supremacist rallies); Nat'l Socialist Party of Am. v. Vill. of Skokie, 432 U.S. 43 (1977) (protecting American Nazi marches through the town with the highest percentage of Holocaust survivors).

360. 131 S. Ct. 1207 (2011).

be of critical importance in considering the First Amendment protection to be afforded.[361] In *Hustler Magazine, Inc. v. Falwell*, the Supreme Court had protected the speaker (Hustler Magazine) against a tort suit for its intentional infliction of emotional distress upon Reverend Jerry Falwell through a parody it published suggesting Falwell's first sexual experience had been with his mother in an outhouse.[362] Justice Alito noted that Falwell was a public figure and Matthew Snyder, the subject of the Westboro Baptist Church's invective in *Snyder v. Phelps*, was not.[363] Justice Alito observed that the Court in *Hustler Magazine, Inc. v. Falwell* did "not suggest that its holding would also apply in a case involving a private figure" and yet that is precisely what the Court did in *Snyder v. Phelps*.[364]

In another eight to one decision, the United States Supreme Court upheld the right of the members of the Westboro Baptist Church to picket, displaying their horrifyingly offensive and painful signs,[365] at the funeral of United States Marine Lance Corporal Matthew Snyder without being subject to a tort suit for intentional infliction of emotional distress.[366] The members of the Westboro Baptist Church were protected in doing so by the First Amendment because their speech was upon a matter of public concern and addressed not only to the Snyder family but also the broader public.[367] The speech of the members of the Westboro Baptist Church was addressed to a matter of public concern given that the church members were advancing their view that tolerance of homosexuality is leading to the destruction of the United States.[368] Reiterating the same core principles that animated *New York Times Co. v. Sullivan*, the Supreme Court noted in *Snyder v. Phelps* that

> [s]peech on matters of public concern is at the heart of the First Amendment's protection. The First Amendment reflects a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open. That is because speech

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361. *Id.* at 1222 (Alito, J., dissenting).

362. Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 47–57 (1988).

363. *Snyder*, 131 S. Ct. at 1222 (Alito, J., dissenting).

364. *Id.* at 1228.

365. *See generally* EDWIN J. DELATTRE, CHARACTER AND COPS: ETHICS IN POLICING 520 (2011) (discussing the Westboro Baptist Church and the signs it uses in picketing events); PAUL FROESE & CHRISTOPHER BADER, AMERICA'S FOUR GODS: WHAT WE SAY ABOUT GOD—AND WHAT THAT SAYS ABOUT US 78–80 (2010) (addressing the Westboro Baptist Church's understanding of God and how its infamous signs connect with the Church's religious views).

366. *Snyder*, 131 S. Ct. at 1219 (majority opinion).

367. *Id.* at 1216–17.

368. *Id.*

> concerning public affairs is more than self-expression; it is the essence of self-government. Accordingly, speech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.[369]

Because speech that causes no offense or injury needs no protection, for the majority "the point of all speech protection . . . is to shield [precisely] those choices of content that in someone's eyes are misguided, or even hurtful."[370]

The Supreme Court's disabling of the use of the tort of intentional infliction of emotional distress where the speech is upon a matter of public concern and directed towards the public creates a division between intentional infliction of emotional distress jurisprudence and defamation jurisprudence. It does so through the majority gliding past the concerns voiced by Justice Alito regarding the differentiation between private individuals and public figures. Whatever portents the Court's decision in *Snyder v. Phelps* has with regard to the private individual category in defamation, and there are potentially sensible grounds for distinguishing, it creates a stark division with the Court's approach to lower-level government employees. The Court currently fails to protect speakers whose speech addresses the conduct of lower-level government employees taken in their official capacity if it causes injury to the reputation of government employees but does protect speakers who cause severe emotional distress to purely private individuals so long as the speech is on a matter of public concern. Protection of the latter may certainly be a price of freedom of speech, but again, the Court's approach results in providing less protection for speech addressing the action or inaction of the government, which should be the most jealously protected form of speech.

CONCLUSION

"It is axiomatic that the freedom of speech is vitally important to our democratic society and that being able to criticize the government is at the core of this freedom."[371] The Supreme Court recognized in *New York Times Co. v. Sullivan* that "erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression

369. *Id.* at 1215.

370. *Id.* at 1219 (quoting Hurley v. Irish–Am. Gay, Lesbian and Bisexual Grp. of Bos., 515 U.S. 557, 574 (1995)).

371. Ilya Shapiro and Sophie Cole, *Government Can't Silence Speech Criticizing Its Actions, Even If That Speech Is 'Commercial,'* CATO INST. (Dec. 28, 2012), http://www.cato.org/blog/government-cant-silence-speech-criticizing-its-actions-even-speech-commercial.

are to have the 'breathing space' that they 'need . . . to survive.'"[372] To maintain the necessary breathing room for protecting public debate, the Supreme Court ruled a public official cannot recover damages for a defamatory falsehood relating to his or her official conduct without proof that the statement was made with "actual malice."[373] Clarifying what was necessary to meet the actual malice standard, the Court indicated that claimants needed to show the statement was made "with knowledge that it was false or with reckless disregard of whether it was false or not."[374]

To a great extent, lower-level government employees are the government, both in terms of implementation of law through formation of street-level policy and public perception. There is, however, no magical quality that makes erroneous statements less likely to occur because the speaker is addressing the action or inaction of lower-level government employees in their official capacity rather than higher-level employees. And yet speech addressing the conduct of lower-level government employees in their official capacity receives no greater constitutional protection than speech about a private individual.

There are reasons, and not illegitimate ones, for declining to impose a substantial barrier upon lower-level government employees in recovering in defamation claims, but, like sand slipping through an hourglass, none of these reasons can ultimately hold against the force of gravity imposed by the First Amendment. In a modern administrative state, speech related to the actions of lower-level government employees in their official capacity is an essential component of political speech and critical to democratic self-governance. The government functions through its appendages and the public has the right, or should have the right under the First Amendment, to address the actions of those appendages. While lower-level government officials certainly have less access to media than some of their higher-level counterparts, though likely not all, they can exercise self-help by accessing media in ways and to an extent that far exceeds what would have been available to most high-level public officials when *Gertz* was decided in 1974. First Amendment pressures have also resulted in a jurisprudential transformation of what is considered voluntarily inviting scrutiny. This expansion of voluntariness is broad enough to include

372. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).

373. *Id.* at 279–80.

374. *Id.* at 280.

persons as varied as artists, authors, football players, scientists, and surfers; it should also include lower-level government officials.

The development of intricate constitutional doctrines can sometimes obscure the answer to constitutional questions rather than clarifying. Courts have struggled with the question of who qualifies as a public official, dividing over narrow and broad conceptions. The analysis in these cases has, however, obscured the more important point. The First Amendment protects above anything else the right of a citizen to criticize his or her government and to seek redress and change through peaceful means. Lower-level government employees are critical to the implementation of government and are perceived by citizens as the embodiment of government. If a citizen wishes to criticize the action or inaction of these governmental actors either to seek correction from a supervisor or voice concern in the marketplace of ideas, the Constitution protects such speech and recognizes the inevitability of misstatement and error. In the absence of actual malice, the First Amendment safeguards a citizen critiquing the actions of a government official whether high or low.

GOOD ENOUGH FOR GOVERNMENT WORK: THE INTERPRETATION OF POSITIVE CONSTITUTIONAL RIGHTS IN STATE CONSTITUTIONS

*Jeffrey Omar Usman**

INTRODUCTION

The United States Supreme Court ruled in *DeShaney*[1] and reaffirmed in *Castle Rock*[2] that absent conditions of confinement, the Due Process Clause imposes no affirmative obligations upon government to protect an individual's life, liberty, or property.[3] These decisions reflect the Court's broader understanding of the United States Constitution as a guarantor of negative rights but devoid of assurance of positive rights.[4] While controversial and subject to considerable criticism,[5] these decisions were not particularly surprising. To the contrary, *DeShaney* and *Castle Rock* provide a logical capstone to a series of earlier decisions from the Burger Court.

Whereas the Warren Court had inched ever closer towards constitutionalizing certain positive social and economic

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[1] DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 191 (1989).

[2] Town of Castle Rock, Colo. v. Gonzales, 545 U.S. 748, 768 (2005).

[3] Douglas W. Kmiec, *Young Mr. Rehnquist's Theory of Moral Rights—Mostly Observed*, 58 STAN. L. REV. 1827, 1853 (2006).

[4] *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 551–53 (2006); William E. Forbath, *The Politics of Race, Rights, and Needs—and the Perils of a Democratic Victory in Post-Welfare America: Some Reflections on the Work of Felicia Kornbluh*, 20 YALE J.L. & FEMINISM 195, 195 (2008); Valorie K. Vojdik, *Conceptualizing Intimate Violence and Gender Equality: A Comparative Approach*, 31 FORDHAM INT'L L.J. 487, 499–500 (2008).

[5] *See, e.g.*, Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272–73 (1990); Michael J. Gerhardt, *The Ripple Effects of Slaughter-House: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 409–50 (1990); Aviam Soifer, *Moral Ambition, Formalism, and the "Free World" of DeShaney*, 57 GEO. WASH. L. REV. 1513, 1514 (1989).

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constitutional rights, the Burger Court firmly applied the brakes and reversed course.[6] For example, in rejecting a constitutional challenge brought by recipients of welfare funds, the Burger Court concluded in *Dandridge*, almost two decades before *DeShaney*, that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court."[7] The Court added that "the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients."[8] The Burger Court also declined to find a constitutional right to a public education,[9] shelter,[10] or abortion funding for indigent women.[11] Thus, when

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[6] CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER 149, 153–54 (2004).

> By 1970, it was not at all clear that the Court would not eventually recognize a set of social and economic rights. In retrospect, the crucial event was the election of President Nixon in 1968, and his four appointments to the Court: Warren Burger in 1969, Harry Blackmun in 1970, and Lewis Powell and William Rehnquist in 1972. These appointees proved decisive to a series of extraordinary decisions, issued in rapid succession, limiting the reach of Warren Court decisions, and eventually making clear that social and economic rights do not have constitutional status outside of certain restricted domains. During the period from 1970 to 1973, the Court cut off the emerging development.

Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 21 (2005) [hereinafter Sunstein, *American Constitution*].

[7] Dandrige v. Williams, 397 U.S. 471, 487 (1970).

[8] *Id.*

[9] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29–39 (1973).

[10] Lindsey v. Normet, 405 U.S. 56, 63–74 (1972).

[11] Harris v. McRae, 448 U.S. 297, 316–18 (1980). The Court opined in *Harris* that

> [a]lthough the liberty protected by the Due Process Clause affords protection against unwarranted government interference with freedom of choice in the context of certain personal decisions, it does not confer an entitlement to such funds as may be necessary to realize all the advantages of that freedom. To hold otherwise would mark a drastic change in our understanding of the Constitution. It cannot be that because government may not prohibit the use of contraceptives or prevent parents from sending their child to a private school, government, therefore, has an affirmative constitutional obligation to ensure that all persons have the financial resources to obtain contraceptives or send their children to private schools. To translate the limitation on governmental power implicit in the Due Process Clause into an affirmative funding obligation would require Congress to subsidize the medically necessary abortion of an indigent woman even if Congress had not enacted a Medicaid program to subsidize other medically necessary services. Nothing in the Due Process Clause supports such an extraordinary result. Whether freedom of choice that is constitutionally protected warrants federal subsidization is a question for Congress to answer, not a matter of constitutional entitlement.

Id. at 317–18 (citations omitted). The Court has not interpreted the Constitution so as to create an "affirmative obligation upon the state to provide the necessary conditions in which citizens can freely exercise abortion rights. Instead, the Court informs us that the state will only be prohibited from acting in ways that deny citizens the right to avoid reproduction through the use of contraception and abortion . . . ." April L. Cherry, *The Detention, Confinement, and Incarceration of Pregnant Women for the Benefit of Fetal Health*, 16 COLUM.

Electronic copy available at: http://ssrn.com/abstract=1588886

Judge Richard Posner stated that the United States Constitution "is a charter of negative rather than positive liberties,"[12] he was not so much inciting revolution as marking the path of prior Supreme Court precedent as it marched towards *DeShaney* and *Castle Rock*.

Like the constitutions of many countries, especially those adopted after 1945, state constitutions have charted a different course.[13] Unlike their federal counterpart, state constitutions unambiguously confer positive constitutional rights.[14] "[S]tate constitutions not only provide . . . negative rights, but also often include *positive* mandates for rights protection or government action."[15] Or, "[p]ut another way, state constitutional language mandates that states use their plenary authority in specific ways to achieve explicit and highly self-conscious policy goals."[16] Thus, while *DeShaney* and *Castle Rock* either harshly excluded or prudently liberated, depending upon one's view, federal courts from the work of interpreting positive constitutional rights, their state court brethren have neither been so limited nor relieved. Instead, state courts must confront the challenge posed by positive rights. In addressing such rights, the interpretive approaches adopted by state courts have reflected a rich diversity. But it cannot be ignored that many state courts have struggled mightily with the task.

This article focuses upon a species of state constitutional rights to which there are no federal counterparts, positive constitutional rights, and the interpretation thereof by state courts. The goal is both descriptive and normative. The article first defines what constitutes a positive constitutional right and then highlights examples in state constitutions. The article next addresses differences between interpreting state constitutions and the Federal Constitution and between interpreting positive and negative rights in state constitutions. The article then describes the various approaches state courts have taken to interpreting affirmative

J. GENDER & L. 147, 186 (2007).

[12] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

[13] MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS 169 (1999); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 526–27 (1992).

[14] Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 18 (1993) [hereinafter Hershkoff, *State Constitutions*]; Robert F. Williams, *Rights*, in 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 7, 10 (G. Alan Tarr & Robert F. Williams eds., 2006) [hereinafter Williams, *Rights*].

[15] Williams, *Rights*, *supra* note 14, at 10. "The federal Constitution is often said to contain only negative rights . . . . On the other hand, state constitutions, in addition to negative rights, also contain a number of positive rights." *Id.* at 25.

[16] Hershkoff, *State Constitutions*, *supra* note 14, at 18.

constitutional rights. Ultimately, the argument is advanced that there are five primary types of affirmative rights provisions in state constitutions, each of which requires a distinct interpretive approach.

I. WHAT ARE POSITIVE CONSTITUTIONAL RIGHTS?

The difference "between positive and negative rights is an intuitive one."[17] Positive rights derive their meaning through contrast with negative rights; the space between these two concepts gives meaning to the respective terms.[18] Whereas affirmative or positive rights are essentially "private entitlements *to* protection by the state," negative rights are "protections *against* the aggressive state."[19] A constitutional right is affirmative where "it imposes on government some obligation to bestir itself, to act, in a manner conducive to the fulfillment of certain interests of persons."[20] In contrast, "negative rights entail freedom *from* government action. To enforce a negative right, a citizen merely insists that the government not act so as to impinge her freedom."[21] Positive constitutional rights suggest "a form of affirmative obligation on the part of the government to provide something to people. By contrast, a 'negative' right indicates that the government may not do something to people, or deny them certain freedoms."[22] The underlying historical rationale between positive and negative rights has been well stated by Judge Posner: "The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."[23]

Negative and positive rights, however, are best understood as

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[17] Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 864 (2001).

[18] *See generally* Gary Peller, *The Metaphysics of American Law*, 73 CAL. L. REV. 1151, 1164 n.13 (1985) ("This conception of differentiation, starting from the premise that no specific expression has meaning by itself, but instead derives significance in a *relational* contrast with others . . . .").

[19] CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 222 (2001).

[20] Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893, 1893 (2001).

[21] Jenna MacNaughton, Comment, *Positive Rights in Constitutional Law: No Need to Graft, Best Not to Prune*, 3 U. PA. J. CONST. L. 750, 750 n.2 (2001) (citing Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2272 (1990)). Alternatively, to enforce a positive right, a citizen "compel[s] the government to take action to provide certain services." *Id.*

[22] Williams, *Rights*, *supra* note 14, at 25; *see also* Cross, *supra* note 17, at 864 (noting that "[o]ne category is a right to be free *from* government, while the other is a right to command government action").

[23] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

ends of a continuum rather than wholly separate dichotomous concepts. The distinction between positive and negative rights is not perfectly pure either in terms of absolute separations based upon imposition of financial costs on the government or between governmental action and inaction. "[T]he difference between negative and positive rights is not that one of them has budgetary implications and the other does not. Negative rights, too, cost money."[24] For example, "in order to give substance" to private property protections, expenditures on police, courts, and a legal system are necessary.[25] Even classic negative rights such as freedom of speech, guarantees against unreasonable searches and seizures, protections against compelled self-incrimination, and the right to a jury trial, as a practical matter, impose financial costs upon the state.[26] Whether police officers become necessary for protecting a controversial group speaking in a public park or more costly criminal investigative methods are required because of limitations imposed by the Fourth, Fifth, or Sixth Amendments, there is an attendant financial cost.[27] The imposition of expense is even more immediately apparent with the constitutional obligation to provide indigent defendants with representation for purposes of defending against criminal prosecutions.[28] Nevertheless, there appears to be a practical distinction in terms of "the *size* of the budget consequences . . . . Protecting [negative] constitutional rights is [relatively] cheap, though not free. Protecting social welfare rights is expensive."[29]

Similarly, "[t]he distinction between state action and inaction does not entirely help to draw a clear line. Several 'negative' rights may also imply state action."[30] Professor David Sklansky has

[24] Carlos Closa, *Ran Hirschl, Towards Juristocracy: The Origins and Consequences of the New Constitutionalism*, 4 INT'L J. CONST. L. 581, 585 (2006) (book review).

[25] *See* Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT'L L. & POL'Y 1233, 1236 (1995).

[26] *See* Ellen Wiles, *Aspirational Principles or Enforceable Rights? The Future for Socio-Economic Rights in National Law*, 22 AM. U. INT'L L. REV. 35, 46–47 (2006); Susan H. Bitensky, *Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 576–79 (1992).

[27] Williams, *Rights*, *supra* note 14, at 25.

[28] John C.P. Goldberg, *The Constitutional Status of Tort Law: Due Process and the Right to a Law For the Redress of Wrongs*, 115 YALE L.J. 524, 593 (2005).

[29] Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1896 (2004); *see also* Randall Peerenboom, *Assessing Human Rights in China: Why the Double Standard?*, 38 CORNELL INT'L L.J. 71, 153 (2005) (describing the amount of resources and necessary requirements that contribute to the costs of protecting positive rights).

[30] Horacio Javier Etchichury, *Argentina: Social Rights, Thorny Country: Judicial Review of Economic Policies Sponsored by the IFIs*, 22 AM. U. INT'L L. REV. 101, 106 (2006).

termed such provisions "quasi-affirmative rights" as they require governmental action to realistically meet constitutional requirements.[31] For example, the government must act to provide assistance of counsel for indigent criminal defendants under the Sixth Amendment.

While the distance between positive and negative rights may be only a matter of degrees on a continuum, the difference between the light and dark shades of gray here is significant. The "distinction helpfully underscores the fact that the realization of [positive rights] generally requires more elaborate measures and longer-term planning on the part of the state."[32] Differentiation between positive and negative rights in terms of action versus restraint and levels of expenditures is neither incoherent nor inconsistent in apprehending these rights.[33]

For some the lack of a pure separation based on expenditures or action versus inaction proves to be too much to accept that a genuine difference exists between positive and negative rights.[34] Even if one does not accept the above discussed division as a meaningful basis of distinction, there is a second basis that may, nevertheless, prove meaningful. Economic rights, so-called second generation rights such as health care, housing, education, etc., are the equivalent of positive rights, while negative rights include classic political freedoms, so-called first generations rights such as freedom of speech and religion.[35] For those who do not accept the utility of the positive and negative rights division, the task of this article will be better understood as addressing second-generation rights in state constitutions.

II. WHAT POSITIVE CONSTITUTIONAL RIGHTS EXIST IN STATE CONSTITUTIONS?

Positive rights in state constitutions are a multifarious sort,

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[31] David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1230 (2002).

[32] Angel R. Oquendo, *The Solitude of Latin America: The Struggle for Rights South of the Border*, 43 TEX. INT'L L.J. 185, 193 (2008).

[33] *See* Sklansky, *supra* note 31, at 1230.

[34] *See, e.g.*, Wiles, *supra* note 26, at 45–48.

[35] Burns H. Weston, *Human Rights and Nation-Building in Cross-Cultural Settings*, 60 ME. L. REV. 317, 335 (2008); Jennifer Prah Ruger, *Toward a Theory of a Right to Health: Capability and Incompletely Theorized Agreements*, 18 YALE J.L. & HUMAN. 273, 282 (2006); Oona A. Hathaway, *The Cost of Commitment*, 55 STAN. L. REV. 1821, 1840 n.62 (2003); Ran Hirschl, *Israel's 'Constitutional Revolution': The Legal Interpretation of Entrenched Civil Liberties in an Emerging Neo-Liberal Economic Order*, 46 AM. J. COMP. L. 427, 444–45 (1998).

protecting a wide variety of interests. There are relatively unique provisions such as the Idaho Legislature's constitutional duty to act to prevent the spread of livestock diseases,[36] the North Carolina General Assembly's duty to care for orphans,[37] and the Wyoming Legislature's duty to encourage virtue and temperance.[38] There are also provisions that appear in numerous state constitutions such as victims' rights measures[39] and open courts guarantees.[40] A limited cross-section of common affirmative rights are discussed in more detail herein including state constitutional provisions relating to education, assistance for indigent persons and physically or mentally challenged persons, as well as state constitutional provisions relating to healthcare and the environment.

A. Education Clauses in State Constitutions

The United States Supreme Court has declared that "education is perhaps the most important function of state and local governments."[41] The electorate generally concurs with this assessment.[42] Not surprisingly, every state constitution contains a clause expressly addressing education.[43]

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[36] IDAHO CONST. art. XVI.

[37] N.C. CONST. art. XI, §4.

[38] WYO. CONST. art. VII, §20.

[39] *See generally* Lynne Henderson, *Revisiting Victim's Rights*, 1999 UTAH L. REV. 383, 385 (1999) (discussing constitutional rights for victims of crime and the potentially negative implications of adopting a federal victim's rights amendment).

[40] *See generally* William C. Koch, Jr., *Reopening Tennessee's Open Courts Clause: A Historical Reconsideration of Article I, Section 17 of the Tennessee Constitution*, 27 U. MEM. L. REV. 333, 340–42 (1997) (discussing the ways by which the open courts provision of the Tennessee Constitution could be rehabilitated and restored as a jurisprudential tool).

[41] Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954).

[42] *See, e.g.*, Geoffrey Klimas, *Financial Effects of Disasters*, 26 ANN. REV. BANKING & FIN. L. 200, 205 (2007) (explaining how Florida voters indicated that education was the most important voting issue in 2006); Scott E. Sundby, *The Death Penalty's Future: Charting the Crosscurrents of Declining Death Sentences and the McVeigh Factor*, 84 Tex. L. Rev. 1929, 1967 (2006) (noting that Virginians identified education as the most important issue in the 2005 governor's election); Eugene C. Bricklemyer, Jr. et al., *Preservation of Coastal Spaces: A Dialogue on Oregon's Experience with Integrated Land Use Management*, 9 OCEAN & COASTAL L.J. 239, 268 (2004) (noting a statewide survey that reported education as an identified topic of importance for voters); *see also* IssuesPA, New IssuesPA/Pew Poll Shows Pennsylvanians Aren't Satisfied with State's Direction, http://www.issuespa.net/articles/16118 (last visited May 21, 2010) (discussing how education is a key issue to Pennsylvanians).

[43] William E. Thro, *Thorough and Efficient Systems of Education*, *in* 2 ENCYCLOPEDIA OF EDUCATION LAW 106 (Charles J. Russo ed., 2008); BENJAMIN MICHAEL SUPERFINE, THE COURTS AND STANDARDS-BASED EDUCATION REFORM 7 (2008); ARTHUR J. TOWNLEY, SCHOOL LAW: A CALIFORNIA PERSPECTIVE 9 (2001); Jeffrey S. Sutton, San Antonio Independent School District v. Rodriguez *and its Aftermath*, 94 VA. L. REV. 1963, 1973–74 (2008); Karla A. Turekian, Comment, *Traversing the Minefields of Education Reform: The Legality of Charter Schools*, 29 CONN. L. REV. 1365, 1369 (1997). It is periodically asserted in scholarly

These clauses have an impressive lineage. Of the original twelve state constitutions adopted during the Revolutionary War,[44] five contained education clauses. The North Carolina Constitution of 1776 provided "[t]hat a school or schools shall be established by the Legislature, for the convenient instruction of youth, with such salaries to the masters, paid by the public, as may enable them to instruct at low prices; and all useful learning shall be duly encouraged, and promoted, in one or more universities."[45] The Georgia, Pennsylvania, and Vermont Constitutions included similar provisions.[46] Massachusetts's Constitution offered a more intricate rendering:

> Wisdom and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of

publications that the Mississippi Constitution is the sole exception in that it does not contain an education clause. *See, e.g.*, Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 392 n.157 (2008) (stating that the Mississippi Constitution is without a positive education clause); William E. Thro, *The Third Wave: The Impact of the Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219, 229 (1990) (stating that every state constitution, with the exception of Mississippi's, has an education provision). That view is incorrect. Article 8 of the Mississippi Constitution is addressed entirely to education, and article 8, section 201 of the Mississippi Constitution expressly provides that "[t]he Legislature shall, by general law, provide for the establishment, maintenance and support of free public schools upon such conditions and limitations as the Legislature may prescribe." MISS. CONST. art. VIII, § 201; *see also* 7 JEFFREY JACKSON & MARY MILLER, ENCYCLOPEDIA OF MISSISSIPPI LAW § 65:3 (2009) (explaining that in 1987 the Constitution was amended to provide for a mandatory system of free public education).

[44] During the American Revolutionary War, twelve former colonies adopted state constitutions. Thomas Y. Davies, *What Did the Framers Know, and When Did They Know It? Fictional Originalism in* Crawford v. Washington, 71 BROOK. L. REV. 105, 154 n.157 (2005). Of these twelve, eight states adopted constitutions in 1776 (Delaware, Maryland, New Hampshire, New Jersey, North Carolina, Pennsylvania, South Carolina, and Virginia), three in 1777 (Georgia, New York, and Vermont), and one in 1780 (Massachusetts). HENRY W. FARNAM, CHAPTERS IN THE HISTORY OF SOCIAL LEGISLATION IN THE UNITED STATES TO 1860 120 (Clive Day ed., The Lawbook Exchange, Ltd. 2000) (1938).

[45] N.C. CONST. of 1776, art. XLI.

[46] GA. CONST. of 1777, art. LIV ("Schools shall be erected in each county, and supported at the general expense of the State, as the legislature shall hereafter point out."). PA. CONST. of 1776, § 44 ("A school or schools shall be established in each county by the legislature, for the convenient instruction of youth, with such salaries to the masters paid by the public, as may enable them to instruct youth at low prices: And all useful learning shall be duly encouraged and promoted in one or more universities."). VT. CONST. of 1777, ch.II, § XL ("A school or schools shall be established in each town, by the legislature, for the convenient instruction of youth, with such salaries to the masters, paid by each town; making proper use of school lands in each town, thereby to enable them to instruct youth at low prices. One grammar school in each county, and one university in this State, ought to be established by direction of the General Assembly.").

> education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools, and grammar-schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, and good humor, and all social affections and generous sentiments, among the people.[47]

From this foundation, state constitutional education provisions have moved through four stages of historical development.[48] The initial phase, from approximately 1776 through 1834, was marked by uncertainty as to constitutionalizing such rights with slightly less than half of state constitutions (eleven out of twenty-four) including such provisions as of 1834.[49] These early provisions either reflected the soaring language of the Massachusetts Constitution or the simpler clauses of the Georgia, North Carolina, Pennsylvania, and Vermont Constitutions.[50] State constitutions of the era provided few specifics as to the administration, operation, or method of funding schools.[51]

During the second stage of development, ranging from 1835 to 1912, two significant shifts occurred. One, a right to education was adopted in almost every state. As early as 1868, thirty-six of thirty-seven state constitutions guaranteed a public education.[52] Two, education clauses became much "more detailed and bureaucratic,"[53] with state constitutions addressing issues such as school

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[47] MASS. CONST. of 1780, ch. V, § 2.

[48] Paul L. Tractenberg, *Education*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 241, 242–249 (G. Alan Tarr & Robert F. Williams eds., 2006).

[49] *Id.* at 243.

[50] *Id.* at 243–44.

[51] *Id.* at 244.

[52] Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions when the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 108 (2008).

[53] DAVID TYACK ET AL., LAW AND THE SHAPING OF PUBLIC EDUCATION, 1785–1954 55 (1987).

administration, boards of education and superintendents of schools, state school funds, school taxes, teacher credentialing, and age ranges for students.[54]

While the second stage reflected significant "concentrated constitutional activity," during the third stage, from approximately 1913 to 1954, state constitutional activity slipped into a lull.[55] Few modifications were made to existing provisions and few new provisions were enacted.[56] It was the quiet before the storm.

The fourth stage, which began in 1954 with the Supreme Court's decision in *Brown v. Board of Education* and which continues through the present, has been dominated by an explosion in litigation and a myriad of constitutional amendments with the ground still shaking from *Brown*'s aftershocks. While education related litigation was not unknown prior to *Brown*, the Supreme Court's watershed decision generated a substantial increase therein.[57] Initially, this litigation was focused upon desegregation. The desegregation effort proved to be extraordinarily prolonged[58] in large part due to active resistance[59] but also as a result of judicial trepidation about inflaming an even more vitriolic reaction through

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[54] Tractenberg, *supra* note 48, at 245.

[55] *Id.* at 245, 247.

[56] *Id.* at 247.

[57] Michael Heise, *Litigated Learning, Law's Limits, and Urban School Reform Challenges*, 85 N.C. L. REV. 1419, 1438–39 (2007).

[58] In *Brown II*, the remedial decision tied with the original *Brown* decision, the Court instructed district courts "to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit to public schools on a racially nondiscriminatory basis with all deliberate speed the parties to these cases." Brown v. Bd. of Educ. *(Brown II)*, 349 U.S. 294, 301 (1955); *see generally* Jim Chen, *Poetic Justice*, 28 CARDOZO L. REV. 581, 582–83 (2006) (exploring in detail the phrase "all deliberate speed"). The pace of adherence proved to be so slow and resistance so intense as to warrant the Supreme Court's statement nine years after *Brown II* that "[t]he time for mere 'deliberate speed' has run out, and that phrase can no longer justify denying these Prince Edward County school children their constitutional rights to an education equal to that afforded by the public schools in the other parts of Virginia." Griffin v. County Sch. Bd., 377 U.S. 218, 234 (1964). The Court reiterated the same point four years later. Green v. County Sch. Bd., 391 U.S. 430, 438 (1968). In 1969, failures to properly integrate schools were still such, fourteen years after *Brown II*, that Justice Black wrote:

> Federal courts have . . . struggled with the phrase "all deliberate speed." Unfortunately this struggle has not eliminated dual school systems, and I am of the opinion that so long as that phrase is a relevant factor they will never be eliminated. 'All deliberate speed' has turned out to be only a soft euphemism for delay.

Alexander v. Holmes County Bd. of Educ., 396 U.S. 1218, 1219 (1969) (writing as a Circuit Justice).

[59] Rebecca E. Zietlow, *To Secure These Rights: Congress, Courts and the 1964 Civil Rights Act*, 57 RUTGERS L. REV. 945, 995 (2005); Doug Rendleman, Brown II's *"All Deliberate Speed" at Fifty: A Golden Anniversary or A Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1587–88 (2004).

speedier desegregation efforts.[60]

Although desegregation proved to be a slow moving process, school related litigation began to shift focus in the late 1960s to issues of funding equality between school districts.[61] Initially, this litigation was pursued under the Equal Protection Clause of the United States Constitution.[62] But this front was largely foreclosed by the *San Antonio Independent School District v. Rodriguez* decision,[63] in which the United States Supreme Court determined that even substantial funding disparities do not violate the Equal Protection Clause.[64]

Following in the wake of this decision, school related litigation shifted to state constitutional provisions.[65] Litigation theories predominantly focused on funding disparities between districts and the adequacy of educational funding.[66] The underlying litigation strategy was coupled with pursuit of constitutional amendments addressing issues of school quality, funding, and safety.[67] Having begun as concise basic provisions in the Revolutionary War era, state education clauses have become extraordinarily intricate provisions of governance that are often the subject of litigation.

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[60] Jim Chen, *With All Deliberate Speed:* Brown II *and Desegregation's Children*, 24 LAW & INEQ. 1, 3 (2006); Paul Gewirtz, *Remedies and Resistance*, 92 YALE L.J. 585, 623–28 (1983).

[61] RAMONA L. PAETZOLD & STEVEN L. WILLBORN, THE STATISTICS OF DISCRIMINATION § 9:7 (1994).

[62] Kimberly A. Yuracko, *Education Off the Grid: Constitutional Constraints on Homeschooling*, 96 CAL. L. REV. 123, 136–37 n.62 (2008); Benjamin Michael Superfine, *Using the Courts to Influence the Implementation of No Child Left Behind*, 28 CARDOZO L. REV. 779, 824 (2006).

[63] San Antonio Indep. Sch. Dist. V. Rodriguez, 411 U.S. 1, 51 (1973).

[64] *See* Shavar D. Jeffries, *The Structural Inadequacy of Public Schools for Stigmatized Minorities: The Need for Institutional Remedies*, 34 HASTINGS CONST. L.Q. 1, 9 (2006); Aaron Jay Saiger, *The Last Wave: The Rise of the Contingent School District*, 84 N.C. L. REV. 857, 858 (2006); *see also* PAETZOLD & WILLBORN, *supra* note 61, at § 9:7; Joseph O. Oluwole & Preston C. Green, III, *Charter Schools Under the NCLB: Choice and Equal Educational Opportunity*, 22 ST. JOHN'S J. LEGAL COMMENT., 165, 173 (2007).

[65] PAETZOLD & WILLBORN, *supra* note 61, at § 9:7; Joseph O. Oluwole & Preston C. Green, III, *No Child Left Behind Act, Race, and Parents Involved*, 5 HASTINGS RACE & POVERTY L.J. 271, 291, 293 (2008) [hereinafter Oluwole & Green, *No Child Left Behind*]; William S. Koski, *Achieving "Adequacy" in the Classroom*, 27 B.C. THIRD WORLD L.J. 13, 20–21 (2007).

[66] *See, e.g.*, Oluwole & Green, *No Child Left Behind, supra* note 65, at 291, 293; Koski, *supra* note 65, at 20–21; Joseph P. Viteritti, *The Inadequacy of Adequacy Guarantees: A Historical Commentary on State Constitutional Provisions that are the Basis for School Finance Litigation*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 58, 62–63 (2007); Sonja Ralston Elder, Note, *Standing Up to Legislative Bullies: Separation of Powers, State Courts, and Education Rights*, 57 DUKE L.J. 755, 756 (2007).

[67] Tractenberg, *supra* note 48, at 247–48.

B. Assistance for Indigent Persons

While other affirmative rights lack the same historical pedigree as education provisions, affirmative rights beyond education are not entirely a recent creation. To the contrary, in 1868, nine out of thirty-seven state constitutions, or just less than a quarter thereof, contained non-education affirmative rights provisions.[68]

While the Federal Constitution does not reference assistance to the poor,[69] numerous state constitutions expressly address the State's relationship with impoverished residents.[70] The origins of such rights in state constitutions can be traced to reconstruction constitutional conventions in the south called in the wake of the Civil War.[71] Indiana traces its constitutional provision for welfare for the poor back even further to the Indiana Constitution of 1816 and its imposition of a duty to provide asylums for the poor, a practice that began during the 1790s in Indiana's territorial days.[72] Today, the state constitutions of at least fifteen states expressly address poverty including Alabama, California, Hawaii, Indiana, Kansas, Louisiana, Missouri, Mississippi, Montana, New Mexico,

[68] Calabresi & Agudo, *supra* note 52, at 111.

[69] There has been considerable debate over whether the United States Constitution does or should protect the basic welfare of its poorest citizens with Professor Frank Michelman offering a forceful argument in favor of such a constitutional duty. *See, e.g.*, Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 659 (1979); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice,* 121 U. PA. L. REV. 962, 962–1019 (1973); Frank I. Michelman, *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 7–59 (1969); *see also* William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1826 (2001) (stating that "[n]o one has thought and written more deeply and imaginatively about constitutional welfare rights than Frank Michelman, and no one has approached the problem from as many fruitful perspectives"). The arguments for recognition of such rights have not persuaded the federal courts. Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 205 (2008). These arguments appear to many in the context of today's legal culture to be "off the wall." J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1733 (1997).

[70] Liu, *supra* note 69, at 205 n.4; Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 868–69 (2008).

[71] JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 204 (2009).

[72] IND. CONST. of 1818, art. IX, § 4 (providing that "[i]t shall be the duty of the general assembly, as soon as circumstances will permit, . . . to provide one or more farms to be an asylum for those persons, who by reason of . . . other misfortunes, may have a claim upon the aid and beneficience of society, on such principles that such persons may therein find employment and every reasonable comfort, and lose by their usefulness the degrading sense of dependence"); BOARD OF STATE CHARITIES OF INDIANA, THE INDIANA BULLETIN No. 112 (1918) (providing an informative look at Indiana's asylums for the poor); *see also* William P. Quigley, *The Quicksands of the Poor Law: Poor Relief Legislation in a Growing Nation, 1790–1820*, 18 N. ILL. U. L. REV. 1, 25–26 (1997) (discussing Indiana's initial constitution and its consideration of the needs of the poor).

New York, North Carolina, Oklahoma, West Virginia, Texas, and Wyoming. These provisions can be divided into three categories: (1) authorization to provide for the poor, (2) creation of a governmental entity to aid the poor, and (3) imposition of a duty upon the state to provide for the poor.

With regard to the authorization category,[73] there are two subcategories thereof, broad authorizations to act and narrowly focused provisions. Article XII, section 8 of the Louisiana Constitution is representative of the former; it provides that "[t]he legislature may establish a system of economic and social welfare [and] unemployment compensation . . . ."[74] The California, Hawaii, Montana, and New Mexico Constitutions include similar provisions.[75] Alternatively, the Indiana and Mississippi Constitutions are more specific, authorizing the creation of farms as asylums for the poor.[76] With three separate provisions addressing impoverished residents, the Texas Constitution has both general provisions and a more specific provision directed towards the creation of county poor-houses.[77]

Missouri and West Virginia's Constitutions fall into the second category requiring the creation of a governmental position with responsibility for addressing poverty but giving little direction as to what obligations are imposed upon this governmental actor. West Virginia's Constitution provides for the appointment of county "Overseers of the Poor."[78] The Missouri Constitution provides for creating a Department of Social Services with the director thereof being "charged with promoting . . . social services to the citizens of

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[73] As will be further discussed later in this article, these authorization provisions in state constitutions do not truly create affirmative rights; however, because they are often discussed in the literature as positive rights, they are set forth in this article subject to further discussion regarding their failure to create any rights. *See infra* Part V.A.

[74] LA. CONST. art. XII, § 8.

[75] CAL. CONST. art. XVI, § 11; HAW. CONST. art. IX, § 3; MONT. CONST. art. XII, § 3, cl. 3; N.M. CONST. art. IX, § 14. Montana previously had a mandatory provision (requiring that "the legislature *shall* provide") as opposed to a provision that merely authorized the legislature to provide assistance for those in need of aid. Katherine Barrett Wiik, *Justice for America's Homeless Children: Cultivating a Child's Right to Shelter in the United States*, 35 WM. MITCHELL L. REV. 875, 931 n.282 (2009). The Montana Constitution was amended in 1988 to alter this provision so as to merely authorize rather than require the legislature to act. *Id.*

[76] IND. CONST. art. IX, § 3; MISS. CONST. art. XIV, § 262. Indiana's Constitution of 1851 as originally adopted replaced the mandatory language of the Indiana Constitution of 1816 with the authorization language of "county boards shall have power to" provide for farms as asylums for the misfortunate, which was in turn amended in 1984 to provide that "counties may" provide for farms as asylums for the misfortunate. IND. CONST. of 1816, art. IX, § 3.

[77] TEX. CONST. art. III, § 51-a; art. IX, § 14; art. XI, § 2.

[78] W. VA. CONST. art. IX, § 2.

the state as provided by law."[79]

There are six state constitutions that go further, imposing an express affirmative obligation upon the state to act to aid the poor.[80] For example, the Alabama Constitution provides that "[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."[81] Similar provisions appear in the Kansas, New York, North Carolina, Oklahoma, and Wyoming Constitutions.[82]

C. Physically or Mentally Challenged Persons

In comparison to poverty related provisions, state constitutional provisions addressing the state's relationship with physically or mentally challenged residents, considered textually, are more likely to impose mandatory affirmative obligations upon the state. For example, the constitution of Idaho requires that institutions "shall be established and supported by the state in such manner as may be prescribed by law" "for the benefit of the insane, blind, deaf and dumb."[83] Virtually identical provisions appear in the constitutions of Arizona, Colorado, and Nevada.[84] The Washington Constitution adds a specific reference requiring aid to developmentally disabled persons, but focuses its attention, in general, more narrowly on disabled children as opposed to adults.[85] The constitution of Arkansas leaves even less room for uncertainty, declaring "[i]t shall be the duty of the General Assembly to provide by law for the

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[79] MO. CONST. art. IV, § 37.

[80] William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 553–54 & n.99 (1998).

[81] ALA. CONST. art. IV, § 88.

[82] KAN. CONST. art. VII, § 4 ("The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of . . . other misfortune, may have claims upon the aid of society. . . . [Provided, however, t]he state may participate financially in such aid and supervise and control the administration thereof."); N.Y. CONST. art. XVII, § 1 ("The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."); N.C. CONST. art. XI, § 4 ("Beneficent provision for the poor . . . is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare."); OKLA. CONST. art. XVII, § 3 ("The several counties of the State shall provide, as may be prescribed by law, for those inhabitants who, by reason of . . . misfortune, may have claims upon the sympathy and aid of the county."); WYO. CONST. art. VII, § 18 ("Such charitable . . . as the claims of humanity and the public good may require, shall be established and supported by the state in such manner as the legislature may prescribe.").

[83] IDAHO CONST. art. X, § 1.

[84] ARIZ. CONST. art. XXII, § 15; COLO. CONST. art. VIII, § 1; NEV. CONST. art. XIII, § 1.

[85] WASH. CONST. art. XIII, § 1.

support of institutions for the education of the deaf and dumb, and of the blind."[86] The constitutions of Indiana, Michigan, North Carolina, and Ohio contain similar provisions.[87] The Mississippi Constitution imposes a duty to provide for the treatment and care for the mentally ill while merely authorizing assistance for others.[88] The constitutions of Hawaii, Massachusetts, Montana, and New York all expressly authorize but do not require assistance to certain categories of physically or mentally challenged persons.[89]

D. Public Health and Healthcare

At least twelve state constitutions address either the state's role with regard to public health in general or healthcare for the poor specifically. The Alaska Constitution declares that "[t]he legislature shall provide for the promotion and protection of public health."[90] The constitutions of Hawaii, Michigan, New York, South Carolina, and Wyoming also set forth a similarly broad, but undefined duty to provide for the protection and promotion of the public health.[91] The Hawaii, Georgia, Mississippi, and Texas Constitutions expressly authorize the state to assist the needy in obtaining healthcare.[92] Missouri's Constitution creates a Department of Social Services and charges the director thereof with "promoting improved health."[93] The Alabama Constitution authorizes the state to "acquire, build, establish, own, operate and maintain hospitals . . . and other health facilities" and to appropriate funds for this purpose,[94] while the Louisiana Constitution authorizes the establishment of a public health system.[95]

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[86] ARK. CONST. art. XIX, § 19.

[87] IND. CONST. art. IX, § 1; MICH. CONST. art VIII, § 8; N.C. CONST. art. 11, § 4; OHIO CONST. art. VII, § 1.

[88] MISS. CONST. art IV, § 86; MISS. CONST. art. XIV, § 262.

[89] HAW. CONST. art. IX, § 2; MASS. CONST. art. XVIII, § 3; MONT. CONST. art XII, § 3; N.Y. Const. art. XVII, § 4.

[90] ALASKA CONST. art. VII, § 4.

[91] HAW. CONST. art. IX, § 1; MICH. CONST. art. IV, § 51; N.Y. CONST. art. XVII, § 3; S.C. CONST. art. VII, § 1; WYO. CONST. art. VII, § 20.

[92] HAW. CONST. art. IX, § 3; GA. CONST. art. III, § 9, ¶ 6(i); MISS. CONST. art. IV, § 86; TEX. CONST. art. III, § 51-a.

[93] MO. CONST. art. IV, § 37.

[94] ALA. CONST. art. IV, § 93.12.

[95] LA. CONST. art. XII, § 8.

E. Environmental Rights

Turning from economic and healthcare rights to environmental rights, the confluence of a burgeoning environmental movement and state constitutional reform efforts "led to the passage of a number of state constitutional amendments designed to provide protection for the environment."[96] The "content of these provisions varies considerably, from provisions that are only potentially 'environmental' to others that are clearly 'green.'"[97] There are four broad categories of environmental rights in state constitutions: (1) authorizations of environmental legislation; (2) broad policy statements with no express imposition of a duty upon the legislature to act thereupon; (3) broad policy statements imposing a duty upon the state to safeguard the environment; and (4) narrowly focused environmental provisions imposing a duty upon the state as to some particular area of environmental responsibility.

The authorization provisions are remarkably diverse. The Georgia Constitution, which generically authorizes environmental legislation, is the broadest.[98] Other states' provisions tend to be more narrowly focused. For example, the Oregon and Washington Constitutions authorize governmental loans to private entities for environmental purposes.[99] Oregon addresses forest rehabilitation and reforestation and the creation or improvement of pollution control facilities,[100] while Washington directs funds to improving existing structures to reduce energy and water waste.[101] The Kansas, Nevada, New Hampshire, North Dakota, Ohio, Tennessee, and Wisconsin Constitutions also authorize the state to act for a specified environmental purpose.[102]

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[96] JACQUELINE P. HAND & JAMES C. SMITH, NEIGHBORING PROPERTY OWNERS 269 (1988).

[97] John C. Tucker, *Constitutional Codification of an Environmental Ethic*, 52 FLA. L. REV. 299, 307 (2000).

[98] GA. CONST. art. III, § 6, ¶ 2(a)(1).

[99] OR. CONST. arts. XI-E, XI-H; WASH. CONST. art. VIII, § 10.

[100] OR. CONST. arts. XI-E, XI-H.

[101] WASH. CONST. art. VIII, § 10.

[102] KAN. CONST. art. XI, § 9 (authorizing governmental involvement in the development and conservation of water resources); NEV. CONST. art. X, § 1 (allowing the legislature to create property tax exemptions for property used for energy conservation purposes or for developing alternatives to fossil fuels); N.H. CONST. pt. 2, art. 5 (permitting the creation of special taxes on wood and timber for purposes of financing forest conservation); N.D. CONST. art. X, § 22 (authorizing a trust fund for energy conservation programs); OHIO CONST. art. II, § 36 (allowing for state involvement in the conservation of water-related resources and the regulation of mining); TENN. CONST. art. XI, § 13 (authorizing the General Assembly to protect and preserve fish and game); WIS. CONST. art. VIII, § 10 (authorizing expending funds to preserve and develop forests).

Some state constitutional provisions instead set forth broad statements of policy. For example, in addition to authorizing environmental legislation, the Virginia Constitution declares the State's environmental policy:

> To the end that the people have clean air, pure water, and the use and enjoyment for recreation of adequate public lands, waters, and other natural resources, it shall be the policy of the Commonwealth to conserve, develop, and utilize its natural resources, its public lands, and its historical sites and buildings. Further, it shall be the Commonwealth's policy to protect its atmosphere, lands, and waters from pollution, impairment, or destruction, for the benefit, enjoyment, and general welfare of the people of the Commonwealth.[103]

The Alabama and North Carolina Constitutions contain similar provisions setting forth the state's environmental policy without expressly imposing a duty to act to further that policy.[104]

At least thirteen state constitutions go further by imposing a duty upon the state to safeguard the environment. For example, the Pennsylvania Constitution provides:

> The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic, and esthetic values of the environment. Pennsylvania's public natural resources are the common property of all the people including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.[105]

Similar provisions appear in the state constitutions of Alaska, Florida, Hawaii, Louisiana, Massachusetts, Michigan, New Mexico, New York, Rhode Island, and Texas.[106] The Illinois Constitution reaches even further, expressly providing that environmental rights are held individually and are enforceable against governmental and private actors:[107] "Each person has the right to a healthful

[103] VA. CONST. art. XI, § 1; *see also* VA. CONST. art. XI, § 2 (setting forth the ways by which the state may further its environmental policies).

[104] ALA. CONST. art VI, § 219.07; N.C. CONST. art. XIV, § 5.

[105] PA. CONST. art. I, § 27.

[106] ALASKA CONST. art. VIII, §§ 1, 2; FLA. CONST. art. II, § 7; HAW. CONST. art. XI, § 9; LA. CONST. art. IX, § 1; MASS. CONST. art. XCVII; MICH. CONST. art. IV, § 52; N.M. CONST. art. XX, § 21; N.Y. CONST. art. XIV, § 4; R.I. CONST. art. I, § 17; TEX. CONST. art. XVI, § 59.

[107] The imposition of a constitutional limitation or duty upon private actors is rare; "[o]rdinarily, constitutional limitations do not apply to private actors." Ira C. Lupu & Robert Tuttle, *Sites of Redemption: A Wide-Angle Look at Government Vouchers and Sectarian*

environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law."[108] The Montana Constitution contains a similar guarantee.[109]

A number of states have amended their constitutions to include mandatory environmental provisions that are narrowly focused. For example, the Ohio Constitution directs the state to finance or assist in financing capital improvements for projects that enhance the use and enjoyment of natural resources by individuals.[110] Utah's Constitution requires the legislature to prevent the destruction of forests on state lands,[111] and the Wyoming Constitution requires protection of the state's water resources.[112] Arkansas's Constitution creates a Game and Fish Commission, which is charged with responsibility for wildlife conservation and imposes an excise tax with funds to be used for environmental enhancement with percentages allocated to the Game and Fish Commission, Department of Parks and Tourism, Department of Heritage, and the Keep Arkansas Beautiful Fund.[113] These are a few examples of many similar provisions.[114]

Service Providers, 18 J.L. & POL. 539, 573 (2002). States rarely impose constitutional limitations upon private actors with the exceptions largely limited to "weakening or dispensing with the state action requirement in cases where individuals sought access to private property, like shopping malls, for expressive purposes." Kevin Cole, *Federal and State "State Action": The Undercritical Embrace of a Hypercriticized Doctrine*, 24 GA. L. REV. 327, 330 (1990). But in comparison with the federal constitution, which with the exception of the Thirteenth Amendment prohibition on slavery or involuntary servitude does not address private conduct, Steven J. Cleveland, *The NYSE as State Actor?: Rational Actors, Behavioral Insights & Joint Investigations*, 55 AM. U. L. REV. 1, 2 n.1 (2005), state constitutions are more likely to constitutionally limit citizens of the state though such restrictions still remain the exception rather than the rule.

[108] ILL. CONST. art. XI, § 2.

[109] MONT. CONST. art. IX, § 1.

[110] OHIO CONST. art. VIII, § 2l.

[111] UTAH CONST. art. XVIII, § 1.

[112] WYO. CONST. art. I, § 31.

[113] ARK. CONST. amends. XXXV, LXXV.

[114] Maine's Constitution provides that state park land, public lots, and any other real estate held by the state for conservation and recreational purposes may not be reduced or its use altered except by a two-third super-majority vote of the members of the Maine Senate and House of Representatives and that any proceeds from such a sale must be reinvested for the same purposes. ME. CONST. art. IX, § 23. Nebraska's Constitution prohibits alienating natural resources on state lands but allows for leasing and development thereof. NEB. CONST. art. III, § 20; *see also* IOWA CONST. art. VII, § 9 (providing that all revenue derived from license fees and all funds received for hunting, fishing, and trapping shall be used exclusively for activities related to those purposes); W. VA. CONST. art. VI, § 55 (requiring that all funds derived from the sale of all permits and licenses to hunt, trap, and fish "be expended solely for the conservation, restoration, management, educational benefit, recreational use and

III. WHAT IS DIFFERENT ABOUT INTERPRETING STATE CONSTITUTIONAL AFFIRMATIVE RIGHTS PROVISIONS?

Having explored a sampling of the positive rights enshrined in state constitutions, we now turn to the interpretation thereof by state courts. An underlying premise of this article is that there is something different about the task of interpreting affirmative rights in state constitutions than interpreting constitutional rights under the United States Constitution. This premise is built upon two components. One, interpreting state constitutions whether focusing on a negative or positive right presents a different task than interpreting the United States Constitution. Two, in addressing state constitutions, there are differences in interpreting positive and negative rights.

A. Interpreting State Constitutions is a Different Task Than Interpreting the Federal Constitution

"[S]tate constitutions are not simply miniature versions of the United States Constitution."[115] State constitutions "differ from their federal counterpart in crucial respects that affect how a jurist, public official, or citizen should interpret them."[116] Variances exist "in their origin, function, and form."[117] Five major differences are discussed herein: (1) state constitutions exist against a backdrop of residual plenary authority; (2) interpretation of original intent or original meaning of state constitutions varies from the federal approach; (3) state constitutions differ in their function and form; (4) there is less development of argument and fewer scholarly materials available for state judges; and (5) state courts confront federalism concerns from a different vantage point than the federal courts.

1. Limited Enumerated Powers/Residual Plenary Authority

The federal government is a government of limited enumerated powers set forth in the United States Constitution.[118] States, in

scientific study of the state's fish and wildlife").

[115] G. Alan Tarr, *State Constitutional Interpretation*, 8 TEX. REV. L. & POL. 357, 357 (2004).

[116] *Id.*

[117] Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U. L. REV. 189, 191 (2002) [hereinafter Williams, *Brennan Lecture*].

[118] Alexandra B. Klass, *Tort Experiments in the Laboratories of Democracy*, 50 WM. &

contrast, retain broad residual plenary authority.[119] Accordingly, whereas the federal government can only act where constitutionally authorized to do so, state governments are generally free to act in any manner not prohibited by the United States Constitution or their state constitution.[120] This variance can impact how state courts interpret state constitutions and federal courts the United States Constitution.[121]

A number of state courts have delved into this divide. In 1865, the Kentucky Supreme Court explained the consequences for judicial review as follows:

> [A]s Congress derives its power from grants by the people of pre-existent State sovereignties, an enlightened inquirer into the constitutionality of any of its acts, looks only for a delegation of power by the Federal Constitution; for that Constitution expressly declares that all power not delegated by it, is reserved to the States or to the people. In this class of cases, therefore, he who asserts the power holds the affirmative, and, unless he "maintains it," the controverted act should not be enforced by law by the judiciary. On the contrary, the party affirming that a legislative act of a State is prohibited by the State Constitution, must prove it, and, unless the proof is clear, the contested act must be admitted to be law. The distinctive difference between the two classes of cases is, that, in the former, the power must be shown to have been delegated; but, in the latter, it must appear to have been prohibited.[122]

The Colorado Supreme Court in 1884 linked more deferential review of state than federal legislation with the state legislature's plenary authority and Congress's limited authority.[123] The court stated:

> There would be greater force in the arguments employed to demonstrate the invalidity of the law of 1881, if the state constitution, like the national constitution, was a grant of

MARY L. REV. 1501, 1543–44 (2009); Gideon Kanner, Kelo v. New London: *Bad Law, Bad Policy, and Bad Judgment*, 38 URB. LAW. 201, 216 (2006).

[119] Klass, *supra* note 118, at 1543–44.

[120] Christian G. Fritz, *The American Constitutional Tradition Revisited: Preliminary Observations on State Constitution-Making in the Nineteenth-Century West*, 25 RUTGERS L.J. 945, 965 (1994).

[121] *See* Nicole Stelle Garnett, *"No Taking Without a Touching?" Questions From an Armchair Originalist*, 45 SAN DIEGO L. REV. 761, 776 (2008).

[122] Griswold v. Hepburn, 63 Ky. 20, 24 (1865).

[123] Alexander v. People, 7 Colo. 155, 160 (1884).

> enumerated powers. In such case we would look into the constitution to see if the grant was broad enough to authorize the legislature to declare what vote should be necessary to remove a county seat. But the legislature being invested with complete power for all the purposes of civil government, and the state constitution being merely a limitation upon that power, we look into it, not to see if the enactment in question is authorized, but only to see if it is prohibited.
>
> Another rule is, that when the validity of an act of the legislature is assailed for a supposed conflict with the constitution, the legal presumption is in favor of the statute; and before the court will be warranted in declaring it void, a clear conflict with the constitution must be shown to exist.[124]

This rationale is not a relic of nineteenth-century state court judicial decision-making. To the contrary, the Missouri Supreme Court in 1994 reasoned that "[u]nlike the Congress of the United States, which has only that power delegated by the United States Constitution, the legislative power of Missouri's General Assembly . . . is plenary, unless . . . it is limited by some other provision of the constitution. Any constitutional limitation, therefore, must be strictly construed in favor of the power of the General Assembly."[125] The California and Rhode Island Supreme Court have also recently associated the state's plenary authority with a more deferential review of legislation under their respective state constitutions.[126] Professor Robert A. Schapiro has observed "the continuation of deferential review in the states evinces an ongoing commitment to a theory of plenary state governmental power."[127]

2. Whose Original Intent or Original Meaning to Whom?

From the approval of a constitutional convention through the drafting of a new constitution to its ratification, the United States Constitution was generated by representatives of the people rather

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[124] *Id.*

[125] Bd. of Educ. of St. Louis v. City of St. Louis, 879 S.W.2d 530, 532–33 (Mo. 1994) (citations omitted).

[126] Pac. Legal Found. v. Brown, 624 P.2d 1215, 1221 (Cal. 1981) (quoting Methodist Hosp. of Sacramento v. Saylor, 488 P.2d 161, 164–65 (1971)); *In re* Richard A., 946 A.2d 204, 211 (R.I. 2008); City of Pawtucket v. Sundlun, 662 A.2d 40, 44–45 (R.I. 1995).

[127] Robert A. Schapiro, *Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law*, 85 CORNELL L. REV. 656, 695 (2000).

than the people directly.[128] Under Article V, constitutional amendments are also controlled by representatives of the people rather than the people directly. All but one constitutional amendment to the United States Constitution was approved through ratification by state legislatures, with the sole exception having been approved via state conventions.[129] Professor Akhil Amar has noted that the framers considered the use of ratifying conventions for adoption of the Federal Constitution to be superior to ratification by the ordinary state legislatures because "the convention *was* in theory the virtual embodiment of the People of that state."[130]

While it may have been the virtual embodiment of the people, the ratification of the United States Constitution reflected a commitment to representative democracy whereas in the states the

[128] In February 1787, the Articles of Confederation Congress called for a convention of delegates from the thirteen states that were charged with revising the Articles of Confederation. Gregory E. Maggs, *A Concise Guide to the Records of the State Ratifying Conventions as a Source of the Original Meaning of the U.S. Constitution*, 2009 U. ILL. L. REV. 457, 466 (2009). The delegates were selected by the legislatures of the several states. McCullough v. Maryland, 17 U.S. 316, 403 (1819). Debating the Constitution in Philadelphia during the blistering hot summer of 1787, the framers opted to bypass the state legislatures in seeking ratification of their replacement for the Articles of Confederation government in favor of state constitutional conventions. Article VII of their proposed Constitution provided that "[t]he Ratification of the Conventions of nine States, shall be sufficient for the Establishment of this Constitution between the States so ratifying the same." Maggs, *supra*, at 458; *see generally* RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS (2006) (discussing the Constitutional Convention and ratification of the Bill of Rights).

[129] Peter H. Huang, *Lawsuit Abandonment Options in Possibly Frivolous Litigation Games*, 23 REV. LITIG. 47, 83 (2004); Maimon Schwarzschild, *Popular Initiatives and American Federalism, or, Putting Direct Democracy in Its Place*, 13 J. CONTEMP. LEGAL ISSUES 531, 542 n.16 (2004).

[130] Akhil Reed Amar, *Of Sovereignty and Federalism*, 96 YALE L.J. 1425, 1459 (1987). Professor Amar explained the rationale for this conclusion as follows:

> Why was it sensible for Americans to transubstantiate a convention into the virtual embodiment of the People? After all, as with an ordinary legislative assembly, a convention assembly may improve the ultimate quality of public deliberation, but only by excluding most citizens, thereby raising fiduciary/agency problems. An answer based on organization theory/incentive analysis might focus on how a ratification convention is structured differently from an ordinary legislature in ways that enhance monitoring and improve public accountability. First, the People select convention delegates in a special election. Second, delegates are generally convened to consider a single issue (ratification). Third and related, the basic choice set is binary (yes-no), reducing agenda manipulation problems and decreasing the monitoring problems that exist in an ordinary legislature with virtually infinite possibilities of side deals and vote trading. Fourth, conventions immediately disband and disperse among the People, reducing the problem of legislators entrenching themselves and developing their own institutional perspectives. Finally, a convention enhances a sense of public-spiritedness and individual moral responsibility among both voters and delegates.

Id. at 1459 n.147.

ratification and amendment of constitutions, and often even the proposal of constitutional provisions through the initiative process, is driven by direct democracy. This distinction is not without impact. More than a century ago, Justice Thomas Cooley explained that "as the constitution does not derive its force from the convention which framed, but from the people who ratified it, the intent to be arrived at is that of the people."[131] In accordance therewith, a number of state supreme courts have indicated their interpretation of state constitutional provisions is directed towards attempting to ascertain, or at least includes, the intent of the electorate in approving the constitutional amendment. For example, the Florida Supreme Court has indicated that "[o]ur goal in construing a constitutional provision is to ascertain and effectuate the intent of the framers and voters."[132] The Indiana Supreme Court also looks to ascertain the "common understanding" of the drafters and the voters who ratified the constitutional provision.[133] The Missouri Supreme Court has indicated that "[a] constitutional provision is interpreted according to the intent of the voters who adopted it."[134] New Hampshire's Supreme Court has stated "[i]n interpreting an article in our constitution, we will give the words the same meaning that they must have had to the electorate on the date the vote was cast."[135] Oregon's Supreme Court has also declared that "[i]n interpreting voter-initiated constitutional provisions, our goal is to discern the intent of the voters."[136]

While originalism is certainly not the only approach to interpreting the United States Constitution, few non-originalists would argue original meaning or intent is entirely irrelevant; rather, the argument between originalists and non-originalists focuses on the propriety of utilizing additional considerations in

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[131] THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION, *in* CONSTITUTIONAL LIMITATIONS 66 (Special ed., 1987).

[132] Lawnwood Med. Ctr., Inc. v. Seeger, 990 So.2d 503, 510 (Fla. 2008) (citing Carribean Conservation Corp. v. Fla. Fish & Wildlife Comm'n, 838 So.2d. 492, 501 (Fla. 2003)).

[133] Bonner *ex rel.* Bonner v. Daniels, 907 N.E.2d 516, 519 (Ind. 2009) (quoting Collins v. Day, 644 N.E.2d 72, 75–76 (Ind. 1994)).

[134] Conservation Fed'n of Mo. v. Hanson, 994 S.W.2d 27, 30 (Mo. 1999) (quoting Savannah R-III Sch. Dist. v. Pub. Sch. Ret. Sys. of Mo., 950 S.W.2d 854, 859 (Mo. 1997)).

[135] Claremont Sch. Dist. v. Governor, 635 A.2d 1375, 1377 (N.H. 1993) (quoting Grinnell v. State, 435 A.2d 523, 525 (1981)).

[136] Li v. State, 110 P.3d 91, 97 (Or. 2005) (citing Flavorland Foods v. Wash. County Assessor, 54 P.3d 582 (2002)).

constitutional interpretation.[137] Under the various theories of federal originalism, "originalists may focus on framers' intent, ratifiers' intent, the dominant understanding of framers and ratifiers combined, or the public meaning of the text."[138] None of these strands, however, fully reconcile with originalist state constitutional interpretation.

Justice Hugo Black, "the original originalist on the modern Supreme Court"[139] and arguably its most successful proponent, utilized originalism as a clarion call for jurisprudential reformation in returning to first principles, in his view the intentions of the founders and framers of the United States Constitution and its subsequent amendments.[140] For Justice Black, "the actual subjective intention of [the] Founders was dispositive" in constitutional interpretation.[141]

Another prominent originalist, Judge Robert Bork[142] appeared at one point to embrace a similar view though focusing more specifically on those who ratified the Constitution.[143] For Judge Bork, "[t]here is no other source of legitimacy . . . if we are to have judicial review [than] to root that law in the intentions of the founders."[144] In his view, constitutional interpretation through originalism was an endeavor in "finding the intent of the founders at a required level of generality and then requiring consistent application."[145]

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[137] Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1, 74 (2009).

[138] *Id.* at 5.

[139] Bruce Ackerman, *The Living Constitution*, 120 HARV. L. REV. 1737, 1799 (2006); *see also* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 2 (1980).

[140] David A. Strauss, *Why Conservatives Shouldn't Be Originalists*, 31 HARV. J.L. & PUB. POL'Y 969, 975 (2008); *see also* Harper v. Va. Bd. of Elections, 383 U.S. 663, 677–80 & n.7 (1966) (Black, J., dissenting); Griswold v. Connecticut, 381 U.S. 479, 519--20 (1965) (Black, J., dissenting); Engel v. Vitale, 370 U.S. 421, 429–33 (1962); Reid v. Covert, 354 U.S. 1, 5–10 (1957) (plurality opinion); Adamson v California, 332 U.S. 46, 70–81 (1947) (Black, J., dissenting); Ackerman, *supra* note 139, at 1799.

[141] John J. Gibbons, *Intentionalism, History, and Legitimacy*, 140 U. PA. L. REV. 613, 630 (1991); *The Adamson Case: A Study in Constitutional Technique*, 58 YALE L.J. 268, 273 (1949); *see also* ROGER K. NEWMAN, HUGO BLACK: A BIOGRAPHY 360 (1994) (explaining how Black interpreted the Constitution by looking to the framers' intentions).

[142] *See generally* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1079 (2009) (discussing Bork's disapproval of constitutional interpretation that is inconsistent with the context it was ratified in).

[143] "It is the ratifiers, not the Philadelphia convention, who are the law givers, I might point out." Robert H. Bork, *The Fifth Annual Judicial Conference of the United States of Appeals for the Federal Circuit*, 119 F.R.D. 45, 68 (West 1988).

[144] *Id.*

[145] Paul Lermack, *The Constitution Is the Social Contract so It Must Be a Contract . . . Right? A Critique of Originalism as Interpretive Method*, 33 WM. MITCHELL L. REV. 1403, 1409 (2007).

In a transition that is dated to a 1986 speech by then Judge Antonin Scalia, a paradigm shift was born with Scalia's assertion that originalists should "change the label from the Doctrine of Original Intent to the Doctrine of Original Meaning."[146] More than a labeling change was on the horizon, as the soon to be Justice Scalia was moving originalism away from the subjective intention of the founders towards the original meaning of the text to a reasonable person[147] with Judge Bork also moving to adopt this view.[148] This form of originalism is identified not with seeking the framers' intent but instead a "public understanding" of their words:[149] "The search for original understanding is for the meaning that a reasonable person in the relevant setting would have assigned the language."[150]

But as noted by Professor Richard S. Kay,

> [t]he search for the understanding of the competent English speaker of 1787–1789 bears all the risks associated with the process of positing the behavior of the "reasonable person" in numerous common law doctrines. The perfect objectivity of that fictional character must be compromised the moment we inject him or her into a real factual context. We need to endow the reasonable person with some particular characteristics of time, place, and status. In defining our reasonable eighteenth-century speaker of English, we must make some choices as to education, region, vocation and the information he or she possessed concerning the costs and risks of any particular rule. . . . These choices may make a difference in the resulting interpretation. There is no a priori way to decide just where to stop our elaboration. . . .
>
> [I]n the literature of public meaning originalism, we find a range of descriptions of that hypothetical speaker or reader.

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[146] Gary Lawson & Guy Seidman, *Originalism as a Legal Enterprise*, 23 CONST. COMMENT. 47, 48 & n.10 (2006) (quoting Antonin Scalia, Speech Before the Attorney General's Conference on Economic Liberties (June 14, 1986), *in* OFFICE OF LEGAL POLICY, ORIGINAL MEANING: A SOURCEBOOK 106 (U.S. Dept. of Justice 1987)).

[147] *Id.* at 48.

[148] ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 144 (1990) [hereinafter BORK, TEMPTING OF AMERICA].

[149] Stephen B. Presser, *Judicial Ideology and the Survival of the Rule of Law: A Field Guide to the Current Political War Over the Judiciary*, 39 LOY. U. CHI. L.J. 427, 431 (2008); *see also* DOUGLAS H. GINSBURG, AEI LEGAL CTR. FOR THE PUB. INTEREST, ORIGINAL PUBLIC MEANING OF THE CONSTITUTION: OUT OF EXILE? 21 (2008), *available at* http://www.aei.org/docLib/20090218-gauerlecturepublication.pdf.

[150] Stephen F. Williams, *Restoring Context, Distorting Text: Legislative History and the Problem of Age*, 66 GEO. WASH. L. REV. 1366, 1368 (1998).

> [Judge] Robert Bork simply points to "the public of that time." Justice Scalia adds a minor qualification when he writes of "intelligent and informed people of the time." [Professor] Randy Barnett calls for adherence to "the objective meaning that would be understood by a reasonable person in the relevant community of discourse." [Professor] Gary Lawson initially posited "the ordinary meanings that the Constitution's words, read in linguistic, structural and historical context, had at the time of the document's origin." More recently, he and [Professor] Guy Seidman have provided a far more elaborate description of the hypothetical person whose understanding should control the Constitution's meaning: "This person is highly intelligent and educated and capable of making and recognizing subtle connections and inferences. This person is committed to the enterprise of reason, which can provide a common framework for discussion and argumentation. This person is familiar with the peculiar language and conceptual structure of the law."[151]

The approach of many originalists, accordingly, leaves little space between the original meaning as understood by the ratifiers and the concept of original public meaning itself.[152]

While Judge Bork's formulation of original meaning analysis, "the public at the time," comes extremely close to the state formulation of original intent, there still exist differences with Judge Bork's approach between state constitution and Federal Constitution originalism. While Judge Bork would look to convention debates, public discussion, newspaper articles, and dictionaries,[153] something that state courts would do as well,[154] he would also consider more technical readings derived from

[151] Richard S. Kay, *Original Intention and Public Meaning in Constitutional Interpretation*, 103 NW. U. L. REV. 703, 721–22 (2009).

[152] Douglas G. Smith, *Does the Constitution Embody a "Presumption of Liberty"?*, 2005 U. ILL. L. REV. 319, 325-26 (2005); Volokh, *supra* note 142, at 1058 n.9; *see also* Kay, *supra* note 151, at 723 (asserting that "[r]educing the reasonable person to the reasonably well-informed ratifier with all the relevant evidence in hand more or less collapses the difference between intended and public meaning").

[153] BORK, TEMPTING OF AMERICA, *supra* note 148, at 143–44.

[154] For example, "[o]ften state courts will examine . . . evidence of the voters' intent derived from official ballot pamphlets and other materials presented to voters prior to the referendum," including official addresses to the people from constitutional conventions. Williams, *Brennan Lecture*, *supra* note 117, at 196. Also, state courts have relied upon newspaper accounts to provide insight into what voters would have been informed of as to the purpose and effect of a state constitutional provision. *Id.* at 197.

> the works of imminent scholars and commentators, known to be influential on the thinking of the political elite from which the framers and adopters of the Constitution and Bill of Rights were drawn. As a minimum, the list of scholars and commentators should include Blackstone, Coke, Grotius, Pufendorf, Burlamaqui, Vattel, Locke, and Otis . . . .[155]

State courts' emphasis on direct democracy ratification has resulted in a more pronounced focus upon deriving intent through a simplified plain meaning understanding of the language and avoidance of technical readings of state constitutional provisions so much so that courts have eschewed application of certain canons of construction that would be applied by federal courts.[156] Justice Cooley offered the following explanation for such an approach:

> it is not to be supposed they [(the electorate)] have looked for any dark or abstruse meaning in the words employed, but rather that they have accepted them in the sense most obvious to the common understanding, and ratified the instrument in the belief that was the sense designed to be conveyed.[157]

Justice Cooley added that "[n]arrow and technical reasoning is misplaced when it is brought to bear upon an instrument framed by the people themselves, for themselves, and designed as a chart upon which every man, learned and unlearned, may be able to trace the leading principles of government."[158] Simply stated, even at their closest point, state constitutional originalism and federal constitutional originalism never fully reconcile. The answer to the question of original meaning to whom or intent of whom is often different for federal courts than for state courts, and not surprisingly, so is the accompanying approach to understanding original intent or meaning.

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[155] J. D. Droddy, *Originalist Justification and the Methodology of Unenumerated Rights*, 1999 L. REV. MICH. ST. U. DET. C.L. 809, 854 (1999).

[156] *See, e.g.*, Ariz. Minority Coal. for Fair Redistricting v. Ariz. Indep. Redistricting Comm'n, 121 P.3d 843, 858 (Ariz. Ct. App. 2005); Davidson v. Sandstrom, 83 P.3d 648, 654 (Colo. 2004); Am. Axle & Mfg., Inc. v. City of Hamtramck, 604 N.W.2d 330, 335 (Mich. 2000); Vreeland v. Byrne, 370 A.2d 825, 830 (N.J. 1977); Kuhn v. Curran, 61 N.E.2d 513, 517–18 (N.Y. 1945); Victoria Guilfoyle, Note, *Constitutional Law—Education—State-Wide School Voucher Program Declared Unconstitutional Under the "Uniformity" Provision of Florida's Education Article*, Bush v. Holmes, 919 So.2d 392 (Fla. 2006), 38 RUTGERS L.J. 1329, 1347 n.114 (2007).

[157] COOLEY, *supra* note 131, at 81.

[158] *Id.* at 73–74.

3. Function and Form: Extensive Policy Enshrining Instruments with Multiple Amendment Epochs

Another major difference between state constitutions and the Federal Constitution appears in their function and form. The "length and detail of many state constitutions and the regularity with which state constitutions are revised, amended, and even redrafted" varies significantly from their federal counterpart.[159] The United States Constitution is approximately 6,700 words and has been amended twenty-seven times.[160] In contrast, the Alabama Constitution of 1901, the state's sixth constitution,[161] is more than 350,000 words and has been amended more than 800 times.[162] While Alabama's Constitution is an extreme example,[163] all state constitutions are longer, and most substantially so, than the United States Constitution.[164]

Whereas the Federal Constitution establishes the framework of the government and secures certain basic rights, state constitutions "have been generally drafted upon a different principle and have often become, in effect, extensive codes of laws."[165] This extensiveness results from addressing numerous topics unmentioned in the Federal Constitution,[166] and doing so in a manner that is seemingly more statutory in nature.[167] As a result, state constitutions "seem to call for more judicial interpretation and intervention on a variety of obligations placed on state

[159] John Fabian Witt, *The Long History of State Constitutions and American Tort Law*, 36 RUTGERS L.J. 1159, 1163–64 (2005).

[160] DAVID R. BERMAN, STATE AND LOCAL POLITICS 77 (9th ed. 1999).

[161] Eduardo M. Peñalver, *Restoring the Right Constitution?*, 116 YALE L.J. 732, 760 n.97 (2007).

[162] John Dinan, *Accounting for Success and Failure of Southern State Constitutional Reform*, *1978–2008*, 3 CHARLESTON L. REV. 483, 489 (2009).

[163] Alabama's Constitution is the world's longest written constitution. D J Brand, *Constitutional Reform—The South African Experience*, 33 CUMB. L. REV. 1, 1 (2002).

[164] Christopher W. Hammons, *State Constitutional Reform: Is It Necessary?*, 64 ALB. L. REV. 1327, 1328–29 (2001).

[165] RACHEL KANE ET AL., 16 OHIO JUR. 3d CONSTITUTIONAL LAW § 4 (2001).

[166] Paul H. Anderson & Julie A. Oseid, *A Decision Tree Takes Root in the Land of 10,000 Lakes: Minnesota's Approach to Protecting Individual Rights Under Both the United States and Minnesota Constitutions*, 70 ALB. L. REV. 865, 873 (2007); Robert F. Williams, *State Constitutional Law Processes*, 24 WM. & MARY L. REV. 169, 178 (1983).

[167] Anderson & Oseid, *supra* note 166, at 873; *see also* JOHN NORTON POMEROY, AN INTRODUCTION TO THE CONSTITUTIONAL LAW OF THE UNITED STATES 14 (4th ed., Houghton, Osgood & Co. 1879); Kathleen M. Sullivan, *Constitutionalizing Women's Equality*, 90 CAL. L. REV. 735, 747 (2002); Robert Brauneis, *The First Constitutional Tort: The Remedial Revolution in Nineteenth-Century State Just Compensation Law*, 52 VAND. L. REV. 57, 121 n.276 (1999).

government."[168] Their "pronounced specificity . . . does not inhibit, but rather facilitates, responsible constitutional decisionmaking by state courts," while arguably providing for greater perceived legitimacy in deciding a constitutional claim based upon the highly detailed language of state constitutions rather than the more generalized language of the Federal Constitution.[169] State constitutions' sheer verbosity requires a high degree of textual analysis and an extremely close textual inspection.[170] As noted by Professor William Swindler, "[b]ecause state constitutions are all too detailed and explicit, there is a built-in orientation toward strict construction."[171]

State constitutions function "not only as a framework for governing but also as an instrument of governance."[172] Unlike their federal counterpart, state constitutions "are rich sources of substantive provisions" that "reflect public policy" in a wide variety of areas.[173] Many of these provisions have been designed by successive waves of state constitutional populists, who believe that government is "unaccountable and beholden to special interests" and that it is "important to limit [the government's] power by constitutionalizing policy choices and circumscribing officials' freedom of action."[174] That policy limitation also applies to the judiciary with the electorate having grown increasingly suspicious that judges are asserting their own policymaking preferences into judicial decisions, and accordingly, on a state level have taken action to limit the decisional capacities and policy pursuits available to courts.[175]

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[168] Michael E. Solimine, *Recalibrating Justiciability in Ohio Courts*, 51 CLEV. ST. L. REV. 531, 553 (2004); *see also* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1169 (1999) [hereinafter Hershkoff, *Positive Rights*].

[169] James D. Heiple & Kraig James Powell, *Presumed Innocent: The Legitimacy of Independent State Constitutional Interpretation*, 61 ALB. L. REV. 1507, 1515–16 (1998).

[170] Williams, *Brennan Lecture*, *supra* note 117, at 214.

[171] William F. Swindler, *State Constitutions for the 20th Century*, 50 NEB. L. REV. 577, 593 (1971).

[172] G. Alan Tarr & Robert F. Williams, *Western State Constitutions in the American Constitutional Tradition*, 28 N.M. L. REV. 191, 193 (1998).

[173] Lermack, *supra* note 145, at 1431–32.

[174] G. Alan Tarr, *Models and Fashions in State Constitutionalism*, 1998 WIS. L. REV. 729, 742 (1998) [hereinafter Tarr, *Models*].

[175] *See* G. ALAN TARR, UNDERSTANDING STATE CONSTITUTIONS 168 (1998) [hereinafter TARR, UNDERSTANDING]; Williams, *Rights*, *supra* note 14, at 8–9; Patience Drake Roggensack, *To Begin a Conversation on Judicial Independence*, 91 MARQ. L. REV. 535, 541 (2007); *see generally* Douglas S. Reed, *Popular Constitutionalism: Toward A Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871, 872–74 (1999) (discussing the evolution in state constitutional law known as the "new judicial federalism").

"[W]hile the Federal Constitution 'embodies a political theory and a coherent constitutional design,' state constitutions often have been frequently amended or otherwise changed, which process can often dilute or obscure a founding philosophy."[176] As Professor G. Alan Tarr has noted, "[f]or state judges, the penetration of the state constitution by successive political movements makes the task of producing coherence even more difficult than it has been [in] seeking coherence in the federal Constitution."[177] Thus, "an interpreter cannot always look to the whole to illuminate the meaning of its various parts;" consequently, state constitutions are tied "much closer to 'clause bound' interpretation."[178]

Additionally, the relative ease with which most state constitutions can be amended helps influence the exercise of judicial review. Arguments can be made that a less aggressive form of judicial review is warranted given that judicial modernizing is not as necessary where the electorate may more easily amend the constitution to meet modern demands; or a more aggressive form of review is warranted, given that there is less need for judicial restraint because decisions by the court can be more easily reversed by the electorate.[179]

4. Lack of Development

In interpreting state constitutions, state court judges are confronted by certain limitations that are either not applicable to judges interpreting the Federal Constitution or which are at least comparatively less problematic. While complaints about the quality of briefing are common,[180] lawyers have been particularly deficient in addressing state constitutions, often failing to raise state constitutional arguments even though doing so is warranted, or only briefly mentioning the state constitution without developing an argument.[181] Many lawyers suffer from tunnel vision in

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[176] Anderson & Oseid, *supra* note 166, at 873.

[177] TARR, UNDERSTANDING, *supra* note 175, at 194.

[178] *Id.*

[179] *See, e.g.*, L. Harold Levinson, *Interpreting State Constitutions by Resort to the Record*, 6 FLA. ST. U. L. REV. 567, 568 (1978) (noting that "[s]tate constitutions are easier to amend and may therefore provide less justification for flexible interpretation"); Reed, *supra* note 175, at 874–75.

[180] Chad M. Oldfather, *Remedying Judicial Inactivism: Opinions as Informational Regulation*, 58 FLA. L. REV. 743, 798–99 (2006).

[181] *See* Hans A. Linde, *State Constitutions are Not Common Law: Comments on Gardner's* Failed Discourse, 24 RUTGERS L.J. 927, 933 (1993) [hereinafter Linde, *State Constitutions*]; Shirley S. Abrahamson, *Criminal Law and State Constitutions: The Emergence of State*

approaching constitutional questions, thinking only about the Federal Constitution; they are either entirely not aware of state constitutional provisions or do not understand the differences in state constitutional interpretation.[182] Attorneys are not the only ones who can suffer from this tunnel vision; to the contrary, it also can afflict state court judges and their law clerks.[183]

While recent years have witnessed a significant increase in academic scholarship related to state constitutions, there is still considerably less scholarly commentary available to assist lawyers, judges, and law clerks on state constitutional law issues. Additionally, while research into the history of various aspects of the United States Constitution has been extraordinarily impressive, there are serious concerns about whether the existing historical materials in many states are adequate for constitutional analysis.[184] Simply stated, the bar and academy have been of less assistance in helping state judges understand state constitutions.

5. Federalism from a State Vantage Point

It has been asserted that "[s]tate courts, interpreting their own state constitutions" have "no federalism concerns."[185] This is an overstatement. Federalism concerns are instead viewed from a different vantage point than the federalism concerns confronting federal judges.

The foundation of the state court's ability to independently review its state constitution and the preservation of the state supreme court's role as the principle expositor thereupon derives from federalism.[186] Beyond that foundation, Professor James Gardner

Constitutional Law, 63 TEX. L. REV. 1141, 1161–63 (1985).

[182] Michael F.J. Piecuch, *State Constitutional Law in the Land of Steady Habits: Chief Justice Ellen A. Peters and the Connecticut Supreme Court*, 60 ALB. L. REV. 1757, 1764–65 (1997); Nathan Sabourin, Comment, *We're from Vermont and We Do What We Want: A "Re"-Examination of the Criminal Jurisprudence of the Vermont Supreme Court*, 71 ALB. L. REV. 1163, 1166 (2008); *see also* Hershkoff, *Positive Rights*, *supra* note 168, at 1194–95; Linde, *State Constitutions*, *supra* note 181, at 933; Hans A. Linde, *First Things First: Rediscovering the States' Bills of Rights*, 9 U. BALT. L. REV. 379, 392–93 (1980).

[183] State v. Jewett, 500 A.2d 233, 235 (Vt. 1985) (quoting Charles G. Douglas III, *State Judicial Activism—The New Role for State Bills of Rights*, 12 SUFFOLK U. L. REV. 1123, 1147 (1978)); *see also* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 11–12 (1995).

[184] *See* Anderson & Oseid, *supra* note 166, at 873–74.

[185] Robert F. Williams, *State Constitutional Methodology in Search and Seizure Cases*, 77 MISS. L.J. 225, 234 (2007).

[186] *See* Thomas M. Hardiman, *New Judicial Federalism and the Pennsylvania Experience: Reflections on the* Edmunds *Decision*, 47 DUQ. L. REV. 503, 505 (2009).

has offered an intriguing theory asserting that "the identification and enforcement of state constitutional rights can serve as a mechanism by which state governments can resist and, to a degree, counteract abusive exercises of national power."[187] In Professor Gardner's view, state constitutions can and should be "weapons of state resistance to national tyranny in a federal system of divided power."[188]

Professor Gardner has offered an additional interesting insight into the implications of interpreting sub-national constitutions within a system of federalism:

> If a constitution reflects the identity of the polity that creates it, the identity of a state polity in a federal system is yoked in a significant way to the national identity, and thus cannot differ greatly from it. But this seepage of identity from state to nation and from nation to state is in considerable tension with the premise of constitutional positivism holding that the authors of a constitution have a political identity that is determinate. In the American system of federalism, it is difficult to tell where national identity ends and state identity begins. Again, then, the more realistic position is to conceive of state constitutions as the joint product of the state and national polities.[189]

The consequences of the aforementioned principle for interpretation of state constitutions is significant in numerous respects but appears most prominently in adherence to, or at least extreme deference to, federal interpretation of state constitutional provisions that are similar to federal provisions. In a broader sense, the impact extends to the constitutional values of a given state being strongly imbued with national identity and understanding.[190] As noted by then New Hampshire Supreme Court Justice Souter, state courts must perform a delicate balance, "[i]f we place too much reliance on federal precedent we will render the State rules a mere row of shadows; if we place too little, we will render State practice

[187] James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 GEO. L.J 1003, 1004 (2003).

[188] *Id.*

[189] James Gardner, *Whose Constitution Is It?: Why Federalism and Constitutional Positivism Don't Mix*, 46 WM. & MARY L. REV. 1245, 1258 (2005) [hereinafter Gardner, *Whose Constitution?*].

[190] *See id.* at 1270–71 (stating that the meaning of the state constitutions is determined not just from state materials, but also by the history, values, and experiences on the national level as well).

incoherent."[191]

B. Interpreting Positive Rights Is Different Than Interpreting Negative Rights

Whereas the first distinct element of interpreting positive state constitutional rights is the variance between interpretation of federal and state constitutions in general, the second component is a divide between interpreting positive and negative rights in state constitutions themselves. Three of the primary differences between the interpretation of affirmative and negative rights are discussed herein: (1) the absence of federal precedent on which to rely; (2) the greater enforcement complexities that arise for state courts in addressing positive rights; and (3) the greater relevance of transnational jurisprudence and experiences.

1. Absence of Federal Precedent Interpreting Positive Rights

With the dynamic constitutional change brought about by the Warren Court, state constitutionalism became an afterthought, relegated at best to a secondary consideration, when not entirely forgotten.[192] All of the oxygen of constitutionalism was sucked out of the state constitutions and breathed into the Federal Constitution. Reflecting upon the impact on state constitutional law, Justice Brennan wrote "I suppose it was only natural that when during the 1960's our rights and liberties were in the process of becoming increasingly federalized, state courts saw no reason to consider what protections, if any, were secured by state constitutions."[193] With a judicial reformation underway in the federal courts, "it was easy for state courts . . . to fall into the drowsy habit of looking no further than federal constitutional law."[194]

The Warren Court had lead a jurisprudential revolution, but in

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[191] State v. Bradberry, 522 A.2d 1380, 1389 (N.H. 1986) (Souter, J., concurring).

[192] *See* Judith S. Kaye, *Dual Constitutionalism in Practice and Principle*, 61 ST. JOHN'S L. REV. 399, 404–05 (1987); Antony B. Klapper, Comment, *Finding a Right in State Constitutions for Community Treatment of the Mentally Ill*, 142 U. PA. L. REV. 739, 787–88 (1993).

[193] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 495 (1977).

[194] A. E. Dick Howard, *State Courts and Constitutional Rights in the Day of the Burger Court*, 62 VA. L. REV. 873, 878 (1976); *see also* Charles G. Douglas, III, *Federalism and State Constitutions*, 13 VT. L. REV. 127, 133 (1988) (asserting that "[s]tate judges started to parrot federal cases and law clerks researched them to the exclusion of state charters").

his 1968 Presidential campaign, Richard Nixon would stake much of his candidacy on the contention that this revolution was reflective of judicial activism run amuck that needed to be curtailed, particularly emphasizing a desire to respond to the Warren Court's criminal procedure jurisprudence by appointing "law and order" judges.[195] With Nixon's election and opportunity to appoint four justices to the United States Supreme Court, the Burger Court would, in fact, shift the Court's movement from the path of the Warren Court.[196] In a 1977 *Harvard Law Review* article, Justice Brennan enlisted state judiciaries in a counterattack against the conservative course change of the Burger Court.[197]

Justice Brennan's appeal became immersed in politics largely because it appeared to constitute a naked political end-run around the conservative course change of the United States Supreme Court.[198] Regardless of the political debate surrounding Justice Brennan's article, he was undoubtedly correct that state courts are the supreme arbiter of the meaning of the rights guaranteed under their state constitutions, and he undoubtedly helped to breathe new energy into addressing state constitutional rights.[199]

Largely dormant during the Warren Court years, state constitutionalism has re-emerged under the moniker of judicial federalism, though its practice by state courts is intermittent and inconsistent.[200] If the original sin of judicial federalism is Justice Brennan's politicized end-run around the Burger court, the debate over the application of state constitutionalism has not escaped this taint. The primary focus in discussing judicial federalism remains

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[195] Carl T. Bogus, *Genuine Tort Reform*, 13 ROGER WILLIAMS U. L. REV. 1, 2 (2008); Cornell W. Clayton & J. Mitchell Pickerill, *The Politics of Criminal Justice: How the New Right Regime Shaped the Rehnquist Court's Criminal Justice Jurisprudence*, 94 GEO. L.J. 1385, 1396–97 (2006); *see also* Tracey Maclin, *The Bush Administration's Terrorist Surveillance Program and the Fourth Amendment's Warrant Requirement: Lessons from Justice Powell and the* Keith *Case*, 41 U.C. DAVIS L. REV. 1259, 1277 (2008).

[196] Sunstein, *American Constitution*, *supra* note 6, at 22.

[197] Brennan, *supra* note 193, at 500–04.

[198] *See generally* Cornell W. Clayton, *Toward a Theory of the Washington Constitution*, 37 GONZ. L. REV. 41, 49 (2001/02) (discussing the beginning of judicial federalism as being a "strategic political" measure and the criticism leveled at courts that followed suit); Paul W. Kahn, *Two Communities: Professional and Political*, 24 RUTGERS L.J. 957, 968 (1993) (citing Earl M. Maltz, *False Prophet-Justice Brennan and the Theory of State Constitutional Law*, 15 HASTINGS CONST. L.Q. 429 (1988)).

[199] TARR, UNDERSTANDING, *supra* note 175, at 169; Williams, *Rights*, *supra* note 14, at 8; Daniel B. Rodriguez, *State Constitutional Theory and Its Prospects*, 28 N.M. L. REV. 271, 288–302 (1998); Robert K. Fitzpatrick, Note, *Neither Icarus nor Ostrich: State Constitutions as an Independent Source of Individual Rights*, 79 N.Y.U. L. REV. 1833, 1841–45 (2004).

[200] *See generally* Justin Long, *Intermittent State Constitutionalism*, 34 PEPP. L. REV. 41, 72–87 (2006) (examining the inconsistent role and application of state constitutionalism).

on the propriety of divergent interpretations of state constitutional provisions that correspond with federal constitutional rights.

Despite Justice Brennan's appeal, like Charles Schultz's *Peanuts* character Linus holding onto his blue blanket, state courts have become quite accustomed to the security of federal constitutional precedent. When given the opportunity to strike out in a different direction, state courts instead, generally, engage in a lock-step analysis with the federal courts.[201] Professor G. Alan Tarr has argued that "too many states continue to rely automatically on federal law when confronted with rights issues. . . . [T]oo many frame their analysis in federal doctrinal categories, making state constitutional law merely a poor relation, stuck with ill-fitting hand-me-downs."[202] While disagreeing with Professor Tarr on the advisability of such an approach, Professor Schapiro concurs that "federal law has continued to provide the presumptive starting point for state constitutional analysis, and in interpreting state constitutions, courts generally adhere to federal doctrine."[203] The concepts and reasoning of constitutional analysis are dominated by discussions and decisions under the Federal Constitution, which form an extraordinarily strong undertow pulling upon state courts.[204] As a result of reliance on federal constitutional precedent, state courts "are out of practice speaking under their state constitutions."[205]

A lively debate has arisen over the propriety of state courts adopting a lockstep approach to interpreting state constitutional provisions. Advocates of state court adherence to federal precedent (1) question whether states are really distinct political communities with divergent identities, (2) assert the importance of national values to constitutional interpretation, (3) note that many state provisions are modeled on the Federal Constitution, (4) suggest reliance preserves judicial resources by allowing state courts to tap into a huge volume of decisions addressing the requirements of the Federal Constitution, (5) caution that reliance avoids varying

[201] Michael E. Solimine, *Supreme Court Monitoring of State Courts in the Twenty-First Century*, 35 IND. L. REV. 335, 338 (2002).

[202] TARR, UNDERSTANDING, *supra* note 175, at 208.

[203] Robert A. Schapiro, *Contingency and Universalism in State Separation of Powers Discourse*, 4 ROGER WILLIAMS U. L. REV. 79, 82 (1998) [hereinafter Schapiro, *Contingency*].

[204] *See* John Devlin, Louisiana Associated General Contractors: *A Case Study in the Failure of a State Equality Guarantee to Further the Transformative Vision of Civil Rights*, 63 LA. L. REV. 887, 909 (2003); Schapiro, *Contingency*, *supra* note 203, at 82–87.

[205] Jason Mazzone, *The Bill of Rights in the Early State Courts*, 92 MINN. L. REV. 1, 79 (2007).

mandates that could be confusing for state officials, and (6) claim that reliance fosters judicial restraint.[206]

These critiques of judicial federalism, however, simply have no resonance when it comes to the interpretation of rights that have no federal counterpart. "If the right is guaranteed only by the state constitution, there is no issue as to the relative weight of a nonexistent federal right."[207] The constitutional analysis conducted by the federal courts "may yield no guidance to state courts asked to interpret . . . the substantive meaning of positive rights."[208] Unmoored from federal precedent, rather than embroiled in the quandaries surrounding deviation from the federal interpretation of similar provisions, state courts instead have an opportunity to realize "[t]he full potential of state constitutionalism [by] giving effect to distinct rights embodied in the state constitutions."[209] As noted by Indiana Chief Justice Randall T. Shephard, "[w]hile the scholar is free to ask whether state constitutions should even be considered as constitutions at all, the state court judge is stuck in the more intractable position of having to decide what to do when two interested parties assert that their state constitution means either this or that."[210] The interpretation of positive constitutional rights in state constitutions is a significantly different enterprise than interpreting negative rights under state constitutions if for no other reason than state courts do not have the smothering security blanket of federal precedent on which to hold tightly. As both a practical and theoretical matter, it is difficult to overstate the importance of the absence of a corresponding federal provision in distinguishing the interpretation of affirmative state constitutional rights from their negative rights counterparts.

2. Complexities of Judicial Enforcement of Affirmative Rights

As a result of their imposition of affirmative obligations upon

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[206] *See, e.g.*, Gardner, *Whose Constitution?*, *supra* note 189, at 1246; Schapiro, *Contingency*, *supra* note 203, at 82–87.

[207] Anderson & Oseid, *supra* note 166, at 873.

[208] Martha F. Davis, *The Spirit of Our Times: State Constitutions and International Human Rights*, 30 N.Y.U. REV. L. & SOC. CHANGE 359, 360 (2006); *see also* Leah J. Tulin, Note, *Can International Human Rights Law Countenance Federal Funding of Abstinence-Only Education?*, 95 GEO. L.J. 1979, 2014 (2007).

[209] Michael D. Blanchard, *The New Judicial Federalism: Deference Masquerading as Discourse and The Tyranny of the Locality in State Judicial Review of Education Finance*, 60 U. PITT. L. REV. 231, 239 (1998).

[210] Randall T. Shepard, *The Renaissance in State Constitutional Law: There are a Few Dangers, But What's the Alternative*, 61 ALB. L. REV. 1529, 1531 n.8 (1998).

governmental actors, state constitutions "differ from federal civil rights guarantees, in kind as well as in text."[211] Positive as compared with negatives rights "can require very different approaches, particularly from the standpoint of judicial enforcement, to rights protection."[212] In considering positive constitutional rights, an "attitude of negativism pervades the entire American judiciary. They believe that courts are not very good at enforcing positive rights . . . ."[213] Former Connecticut Supreme Court Justice Professor Ellen A. Peters has offered an explanation of the difficulty courts confront:

> [S]tate courts have a dual assignment. They must not only define the scope of the affirmative state constitutional obligation at stake, but they must also determine whether the state has fulfilled its constitutional duty. Defining the constitutional right is the quintessential judicial obligation, but at least initially, elected officials, rather than judges, can better determine the precise contours of the appropriate policy response. [214]

Separation of powers concerns rise to the forefront when the judiciary confronts affirmative rights based constitutional challenges. "Whereas the enforcement of negative rights only demands that a court invalidate legislation or prevent governmental action, positive rights enforcement requires a court to obligate the legislature to act, thus entering into the arena traditionally reserved for the political branches."[215] Judicial decision-making regarding affirmative rights immerses courts more deeply within the affairs of the executive and legislative branches.[216] While there are exceptions, the tendency of foreign judiciaries whose national constitutions contain affirmative rights provisions has been to avoid aggressive enforcement of such rights out of concern about distorting budgets, interfering in policy-making, and exceeding separation of powers limitations.[217] State judiciaries' discomfort with enforcing substantive affirmative rights

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[211] Ellen A. Peters, *Getting Away from the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1558 (1997).

[212] Williams, *Rights*, *supra* note 14, at 10.

[213] Scott T. Johnson, *The Influence of International Human Rights Law on State Courts and State Constitutions*, 90 AM. SOC'Y INT'L L. PROC. 259, 269 (1996).

[214] Peters, *supra* note 211, at 1558.

[215] Pascal, *supra* note 70, at 864.

[216] Williams, *Brennan Lecture*, *supra* note 117, at 192.

[217] Lisa Forman, *Justice and Justiciability: Advancing Solidarity and Justice Through South Africans' Right to Health Jurisprudence*, 27 MED. & L. 661, 665–66 (2008).

has been similarly evident.[218]

3. Global Precedent

While federal precedent is enormously influential with state courts regarding negative rights but largely inapplicable in addressing positive rights provisions, transnational jurisprudence inversely has a greater potential to be influential in regard to positive constitutional rights. "Because state constitutions are not coextensive with the Federal Constitution and many include positive rights that can be found in human rights and foreign law, there may be greater opportunities for the comparative use of such sources to interpret state constitutional provisions."[219] While there are certain areas of law where the influence of foreign courts is likely to be minimal, given the well-established nature of jurisprudence on the subject within a jurisdiction, there are other "emerging issues" where "there is much room for fruitful transnational inquiry."[220] When state courts address positive rights, the jurisprudence of foreign courts "can provide insight into how other courts have made positive rights justiciable."[221] With similar positive rights provisions appearing in foreign constitutions, though wholesale transplantation would be problematic, "international sources can help state courts develop their jurisprudence by providing empirical examples of how rights are enforced in other countries."[222]

IV. HOW ARE STATE COURTS INTERPRETING POSITIVE RIGHTS PROVISIONS?

While some positive rights provisions have been rarely or never litigated before state appellate courts, others have been the focus of repeated constitutional challenge. The most marked quality of state court interpretation of affirmative rights provisions is the diversity of approaches. For example, courts in different states interpret virtually identical state education clauses, some borrowed directly

[218] Pascal, *supra* note 70, at 900.

[219] Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 FORDHAM L. REV. 459, 476 (2008).

[220] Margaret H. Marshall, *"Wise Parents Do Not Hesitate to Learn From Their Children": Interpreting State Constitutions in an Age of Global Jurisprudence*, 79 N.Y.U. L. REV. 1633, 1643 (2004).

[221] Soohoo & Stolz, *supra* note 219, at 477.

[222] *Id.*; *see also* Hershkoff, *Positive Rights*, *supra* note 168, at 1141–43.

from sister states, in diametrically opposite fashions.[223] Strangely, there even appears to be an inverse relationship between the degree of enforcement by state courts and the seeming strength, when considered textually, of the constitutional provision at issue.[224] Considered more broadly, positive rights have been found to be political questions, non-self-executing provisions, or to require strict scrutiny. They have been found to impose mandatory duties upon the state but to allow the legislature full autonomy, or at least extraordinarily broad deference, in defining the scope of these duties. Courts have also utilized enforcement mechanisms characterized by democratic experimentalism and judicial management. Finally, a number of the affirmative rights provisions have not been interpreted because litigants have failed to advance litigation predicated upon them before state courts.

A. Affirmative Constitutional Rights as Political Questions

Constitutional provisions generally, and most especially affirmative constitutional rights, may ultimately end up not being enforced by the courts as a result of non-justiciability under the political question doctrine.[225] Application of this doctrine reflects a judicial determination that the "subject matter is inappropriate for judicial consideration."[226] Unlike a variety of other restrictions on judicial review that may be overcome by seeking judicial consideration under different factual circumstances "a holding of nonjusticiability is absolute in its foreclosure of judicial scrutiny" of an issue.[227]

The political question doctrine primarily arises from the operation of separation of powers concerns.[228] In *Baker v. Carr*, the United States Supreme Court identified six strains of political questions:

> [(1)] textually demonstrable constitutional commitment of the issue to a coordinate political department; [(2)] lack of judicially discoverable and manageable standards for resolving it; [(3)] the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial

[223] Tractenberg, *supra* note 48, at 261–64.
[224] *Id.* at 264.
[225] John L. Horwich, *Montana's Constitutional Environmental Quality Provisions: Self-Execution or Self- Delusion?*, 57 MONT. L. REV. 323, 349 (1996).
[226] RONALD D. ROTUNDA & JOHN E. NOWAK, 1 TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 2.16, at 430 (4th ed. 2007).
[227] *Id.* at 431–32.
[228] Baker v. Carr, 369 U.S. 186, 210 (1962).

> discretion; [(4)] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; [(5)] an unusual need for unquestioning adherence to a political decision already made; [and (6)] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.[229]

Following in the wake of the *Baker v. Carr* decision, the National Municipal League in its Model State Constitution advised against including positive rights on the theory that such rights would not be enforceable under the political question doctrine.[230] The National Municipal League's advice "stemmed from the belief that 'judicially manageable standards' could not be derived from positive guarantees, which rendered these guarantees non-justiciable."[231] These concerns have proven prescient. In the education context, a number of state courts have treated challenges based upon affirmative constitutional rights as non-justiciable political questions.[232]

For example, the Nebraska Supreme Court applied the political question doctrine as a basis for not addressing the question of whether the funding provided to the state's public schools was constitutionally adequate.[233] Having considered the experiences of other states' supreme courts that had attempted to address the constitutional adequacy of education in their respective states, the court concluded that judicial abstention was the better course. The Nebraska Supreme Court stated, "[t]he landscape is littered with courts that have been bogged down in the legal quicksand of continuous litigation and challenges to their states' school funding systems. Unlike those courts, we refuse to wade into that Stygian swamp."[234]

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[229] *Id.* at 217.

[230] NATIONAL MUNICIPAL LEAGUE, MODEL STATE CONSTITUTION 27–28 (6th ed. 1963).

[231] Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1058 n.8 (1993).

[232] *See generally* Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42 COLUM. J.L. & SOC. PROBS. 545 (2009) (investigating why state courts have resurrected the political question doctrine in educational adequacy claims).

[233] Neb. Coalition for Educ. Equity and Adequacy v. Heineman, 731 N.W.2d 164, 164 (Neb. 2007).

[234] *Id.* at 183; *see also* Michelle L. Sitorius, Note, Nebraska Coalition for Educational Equity & Adequacy v. Heineman, 273 NEB. 531, 731 N.W.2D 164 (2007)—*The Political Question Doctrine: A Thin Black Line Between Judicial Deference and Judicial Review*, 87

The Illinois Supreme Court also concluded that deciding what constitutes a constitutionally adequate education is a political question for the voters and their representatives, not the courts.

> What constitutes a "high quality" education,[235] and how it may best be provided, cannot be ascertained by any judicially discoverable or manageable standards. The constitution provides no principled basis for a judicial definition of high quality. It would be a transparent conceit to suggest that whatever standards of quality courts might develop would actually be derived from the constitution in any meaningful sense. Nor is education a subject within the judiciary's field of expertise, such that a judicial role in giving content to the education guarantee might be warranted. Rather, the question of educational quality is inherently one of policy involving philosophical and practical considerations that call for the exercise of legislative and administrative discretion.[236]

The court expressed concern that

> To hold that the question of educational quality is subject to judicial determination would largely deprive the members of the general public of a voice in a matter which is close to the hearts of all individuals in Illinois. Judicial determination of the type of education children should receive and how it can best be provided would depend on the opinions of whatever expert witnesses the litigants might call to testify and whatever other evidence they might choose to present. Members of the general public, however, would be obliged to listen in respectful silence. We certainly do not mean to trivialize the views of educators, school administrators and others who have studied the problems which public schools confront. But nonexperts—students, parents, employers and

NEB. L. REV. 793, 819 n.210 (2009) ("The Stygian swamp is a reference to Greek mythology and the Stygios—a 'wild and awful place' according to Plato—that feeds the River Styx, which surrounds Hades." (quoting PLATO, PHAEDO 183 (Reginald Hackforth trans., Cambridge University Press 1st ed. 1955))).

[235] The Illinois Constitution provides that:

> A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. The State has the primary responsibility for financing the system of public education.

ILL. CONST., art. 10, § 1.

[236] Comm. for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1191 (Ill. 1996).

> others—also have important views and experiences to contribute which are not easily reckoned through formal judicial factfinding. In contrast, an open and robust public debate is the lifeblood of the political process in our system of representative democracy. Solutions to problems of educational quality should emerge from a spirited dialogue between the people of the State and their elected representatives.[237]

A number of other states including Florida, Oklahoma, Pennsylvania, and Rhode Island have also dismissed challenges to the adequacy of the public education system by concluding that the issue is non-justiciable.[238] Similarly, the North Carolina Supreme Court found the issue of whether pre-kindergarten programs are constitutionally required to constitute a political question.[239]

B. Non-Self-Executing Provisions

Whether considered to be a sub-category of the political question doctrine[240] or a separate but related doctrine,[241] a number of states courts also have declined to enforce positive rights based upon the conclusion that such provisions are not self-executing. In his highly influential treatise on state constitutional law, Justice Cooley described the divide between self-executing constitutional provisions and those that are not as follows:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.[242]

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[237] *Id.*

[238] Okla. Educ. Ass'n v. State *ex rel.* Okla. Legislature, 158 P.3d 1058, 1066 (Okla. 2007); Marrero *ex rel.* Tabalas v. Commonwealth, 739 A.2d 110, 113 (Pa. 1999); City of Pawtucket v. Sundlun, 662 A.2d 40, 58–59 (R.I. 1995).

[239] Hoke County Bd. of Educ. v. State, 599 S.E.2d 365, 391 (N.C. 2004).

[240] Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 260 (Mont. 2005) (stating that "[b]oth the United States Supreme Court and [the Montana Supreme] Court recognize that non-self-executing clauses of constitutions are non-justiciable political questions"); Jared S. Pettinato, *Executing the Political Question Doctrine*, 33 N. KY. L. REV. 61, 62–63 (2006).

[241] FRANK P. GRAD & ROBERT F. WILLIAMS, 2 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY, DRAFTING STATE CONSTITUTIONS, REVISIONS, AND AMENDMENTS 95 (2006); José L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333, 335 (1993).

[242] COOLEY, *supra* note 131, at 121.

A non-self-executing provision offers "general principles" that "may need more specific legislation to make it operative."[243] In other words, enforcement of non-self-executing provisions, which are more common in state constitutions than the federal constitution,[244] requires further legislative enactments to provide a basis for judicial review.[245]

State constitutional environmental rights provisions are often deemed unenforceable as non-self-executing provisions.[246] A number of state constitutions include policy statements indicating adherence to environmental protection but do not provide any greater specificity.[247] Addressing such provisions, "state courts have concluded that [they] are not self-executing and do not require either state or private parties to take any particular actions."[248]

For example, in a case concerning a component of Virginia's environmental protection constitutional provision, which also provides for preservation of historical sites, the Virginia Supreme Court explained its determination that the entire article was non-self-executing as follows:

> Article XI, § 1, contains no declaration of self-execution, it is not in the Bill of Rights, it is not declaratory of common law, and it lays down no rules by means of which the principles it posits may be given the force of law. . . . [I]ts language invites crucial questions of both substance and procedure. Is the policy of conserving historical sites absolute? If not, what facts or circumstances justify an exception? Does the policy apply only to the State and to state-owned sites, or does it extend to private developers and to privately-owned sites? Who has standing to enforce the policy? Is the Governor of the Commonwealth an essential party-defendant? Is the remedy solely administrative, solely judicial, or a mixture of the two? If the remedy is judicial,

[243] Davis v. Burke, 179 U.S. 399, 403 (1900).

[244] Rob Natelson, *Montana Constitution Project Unveiled at UM: Documents 'May Change Way We Think' About Intent*, 33 MONT. LAW. 14, 15 n.7 (2008).

[245] Robert J. Klee, *What's Good for School Finance Should Be Good for Environmental Justice: Addressing Disparate Environmental Impacts Using State Courts and Constitutions*, 30 COLUM. J. ENVTL. L. 135, 175 (2005); James "Beau" Eccles, *Down to the Bare Walls*, 66 TEX. B.J. 952, 955 & n.6 (2003); Natelson, *supra* note 244, at 15 n.7.

[246] JACQUELINE P. HAND & JAMES CHARLES SMITH, NEIGHBORING PROPERTY OWNERS § 9:19 n.211 (1988 & Supp. 2009).

[247] Barton H. Thompson, Jr., *Constitutionalizing the Environment: The History and Future of Montana's Environmental Provisions*, 64 MONT. L. REV. 157, 158–59 (2003) [hereinafter Thompson, *Constitutionalizing*].

[248] *Id.* at 161.

which court has jurisdiction over the subject matter and over the parties?[249]

Similarly, the Florida Supreme Court concluded that a water pollution amendment would constitute a political question because "too many policy determinations remain unanswered [such as the various] rights and responsibilities, the purposes intended to be accomplished, and the means by which the purposes may be accomplished."[250] The court added that the amendment raised too many questions including "what constitutes 'water pollution'; how will one be adjudged a polluter; how will the cost of pollution abatement be assessed; and by whom might such a claim be asserted."[251] Many state constitutional environmental provisions have suffered the same fate and have been left unenforced.[252]

State court determinations that affirmative rights provisions are non-self-executing are not limited, however, to environmental rights provisions. For example, the Michigan Court of Appeals applied the doctrine to a claim that state health insurance is required for the otherwise uninsured. Michigan's Constitution provides that "[t]he public health and general welfare of the people of the state are hereby declared to be matters of primary public concern. The legislature shall pass suitable laws for the protection and promotion of the public health."[253] The Michigan Court of Appeals found that this "provision is not self-executing; it requires legislative action."[254]

C. Recognition of a Duty, but with Extraordinary or Complete Deference to the Legislature

Courts have frequently adopted an interpretive approach recognizing the mandatory duty imposed on the legislature by the Constitution, but deferring absolutely or almost completely to the legislature as to the scope of the right afforded by the state constitution.[255] The Alabama Supreme Court's response to

[249] Robb v. Shockoe Slip Found., 324 S.E.2d 674, 676–77 (Va. 1985); *see also* City of Corpus Christi v. City of Pleasanton, 276 S.W.2d 798, 803 (Tex. 1955) (reaching the same conclusion for a Texas constitutional provision).

[250] Advisory Op. to the Gov'r, 706 So. 2d 278, 281 (Fla. 1997).

[251] *Id.*

[252] Fernandez, *supra* note 241, at 334.

[253] MICH. CONST. art, IV, § 51.

[254] Mich. Universal Health Care Action Network v. State, No. 261400, 2005 WL 3116595, at *2 (Mich. Ct. App. Nov. 22, 2005).

[255] Louis Henkin, *Economic Rights Under the United States Constitution*, 32 COLUM. J. TRANSNAT'L L. 97, 124–25 (1994); Pascal, *supra* note 70, at 874–76; Wiik, *supra* note 75, at 928–29.

challenges based upon Alabama Constitution Article IV, Section 88, which provides that "[i]t shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor,"[256] is emblematic of the sense of some state courts that they are incapable of responding to potential constitutional failures with regard to affirmative rights. The court noted that this section "makes it the duty of the legislature to require the several counties to make adequate provision for the maintenance of the poor. Appellee points to the fact that this is a mandatory duty. But of course there is no way to force the legislature to perform that duty . . . ."[257]

Even where state courts have not so starkly declared a sense of incapacity to remedy constitutional failures, many state courts have, nevertheless, with regard to the scope of affirmative rights, rendered these issues de facto purely political matters. For example, the Kansas Constitution imposes a duty upon county governments to provide for the poor: "The respective counties of the state shall provide, as may be prescribed by law, for those inhabitants who, by reason of age, infirmity or other misfortune, may have claims upon the aid of society."[258] The Kansas Supreme Court has repeatedly interpreted this provision as imposing a duty to act to aid the poor. For example, the court stated that while the Kansas Constitution

> gives utterance to the universal voice of sympathy, it does much more; it gives voice to a universally recognized state duty, to be discharged in the interest of the public welfare . . . . Since the pauper is both indigent and incapable of self-help, and since no one else is charged with the duty of keeping him, the state must . . . take care of him.[259]

Having noted that statutory provisions "make it the duty of the overseer to care for the poor and to see that they are given relief, and [make it] the duty of the board of county commissioners to raise money and pay for such care and relief," the Kansas Supreme Court has declared that the state constitution "enjoins this care and commands that counties of the state shall provide for the poor and those who have claims upon the sympathy and aid of society."[260] But as noted by the court itself, "[t]he real issue is the depth, and

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[256] ALA. CONST. art. IV, § 88.
[257] Atkins v. Curtis, 66 So. 2d 455, 458 (Ala.1953).
[258] KAN. CONST. art. VII, § 4.
[259] Beck v. Bd. of Comm'rs of Shawnee County, 182 P. 397, 400 (Kan. 1919).
[260] Caton v. Bd. of Comm'rs of Osborne County, 205 P. 341, 343 (Kan. 1922).

breadth, of that duty."[261] In answering this question, the court has declined to give any contour to the scope of that duty and instead deferred entirely to the legislature.[262]

In adopting this approach, the Kansas Supreme Court drew upon the jurisprudence of the New York state courts in addressing Article XVII, § 1 of the New York Constitution. The New York Court of Appeals has explained that

> This provision was adopted in 1938, in the aftermath of the great depression, and was intended to serve two functions: First, it was felt to be necessary to sustain from constitutional attack the social welfare programs first created by the State during that period; and, second, it was intended as an expression of the existence of a positive duty upon the State to aid the needy.[263]

New York has, in fact, instituted a welfare program for the needy. Three categories of cases have been raised in challenging aspects of the program: (1) challenges involving persons who argue they fall within the statutory definition of needy but have, nevertheless, been denied benefits; (2) challenges involving individuals who do not fall within the statutory definition of needy but who assert that they should be included because they are similarly situated with persons who are receiving benefits; and (3) challenges arguing the legislature is failing to provide sufficient benefits or benefits of the appropriate type.[264]

As to the first type of claim, New York courts have taken the view that "the legislature has no authority to depart from a definition of needy that the political process has itself generated. The court applies in these cases a bright-line approach, without any balancing, thus vigorously enforcing standards that presumably come with the aura of democratic accountability."[265] Enforcement of these claims has extended beyond remedying errant benefit denials to eliminating procedural hurdles that may create difficulties for otherwise entitled claimants to receive benefits. For example, the New York Court of Appeals determined that although a particular administrative requirement served a valid cost-cutting objective, it could not be implemented because the objective could not be

[261] Bullock v. Whiteman, 865 P.2d 197, 202 (Kan.1993).
[262] *Id.* at 202–03.
[263] Tucker v. Toia, 371 N.E.2d 449, 451 (N.Y. 1977) (citation omitted).
[264] Helen Hershkoff, *Rights and Freedoms Under the State Constitution: A New Deal for Welfare Rights*, 13 TOURO L. REV. 631, 636–39 (1997) [hereinafter Hershkoff, *Rights*].
[265] *Id.* at 637–38.

"achieved by methods which ignore the realities of the needy's plight and the State's affirmative obligation to aid all its needy."[266]

In addressing suits from the second category of plaintiffs, those asserting a functional equality with those who qualify for benefits, the courts have been extremely deferential to the legislature's line-drawing of who is needy and who is not. The courts have, in general, presumed a plenary legislative authority "to define the standards that construct the statutory category of needy and that limit membership in the group of needy persons eligible for assistance. In the cases so far, the court will rarely accept a substantive challenge to the underinclusiveness of the state's classification."[267] Accordingly, if "the statutory border is plausibly cast in economic terms, [then] the court is typically satisfied that the legislature has complied with [the Constitution's] mandate and it does not scrutinize the actual reasonableness of the law."[268]

As for the third category of plaintiffs, those asserting that the benefits afforded are inadequate, the court has given the legislature complete autonomy to determine adequacy. The New York Court of Appeals has determined that "the Legislature is vested with discretion to determine the amount of aid."[269] The court has indicated that the New York "Constitution provides the Legislature with discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term 'needy.'"[270] Although the courts have viewed the issue as being justiciable and analyzed claims upon the merits with regard to questions pressing the adequacy of the benefits provided, "in practice the legislature is afforded discretion that is final and beyond review."[271]

D. Democratic Experimentalism

Some state courts have taken a more active role in defining the scope of affirmative rights and done so in a manner somewhat in accord with new governance democratic experimentalism theories. New governance models seek to move away from "a top-down, hierarchical rule-based system where failures to adhere are

[266] *Tucker*, 371 N.E.2d at 452.
[267] Hershkoff, *Rights*, *supra* note 264, at 638–39.
[268] *Id.* at 639.
[269] Bernstein v. Toia, 373 N.E.2d 238, 244 (N.Y. 1977).
[270] *Tucker*, 371 N.E.2d at 452.
[271] Hershkoff, *Rights*, *supra* note 264, at 639; *see also* Raquel Aldana, *On Rights, Federal Citizenship, and the "Alien"*, 46 WASHBURN L.J. 263, 301–02 (2007).

sanctioned, or unregulated market-based approaches," and replace such approaches with "a more participatory and collaborative model of regulation in which multiple stakeholders, including, depending on the context, government, civil society, business and nonprofit organizations, collaborate to achieve a common purpose."[272]

Professors Michael C. Dorf and Charles F. Sabel have advanced an approach to constitutional interpretation based upon new governance models. They suggest that

> Judicial review by experimentalist courts . . . becomes a review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect they actually accord those reasons: a review, that is, of whether the protagonists have themselves been sufficiently attentive to the legal factors that constrain the framing of alternatives and the process of choosing among them. Constitutional review in particular becomes a jurisprudence of impermissible arguments and obligatory considerations—the former forbidding the actors to pursue ends found to be unconstitutional; the latter enjoining them to give particular attention to their choice of means when constitutional values appear to be at risk.[273]

To facilitate experimentation and improvement, multiple governmental units pursue policy goals on parallel tracks with each unit generating data on its progress. This data generation empowers greater participation by an informed citizenry in assessing the utility of governmental services and the imposition of best practice requirements by the judiciary as benchmarks with rights become increasing rigorously pursued.[274]

The Texas Supreme Court's approach to education clause issues has reflected to some degree Professors Dorf and Sabel's democratic experimentalism approach to constitutional interpretation.[275] Article VII, Section 1 of the Texas Constitution provides that "[a] general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools." Interpreting this provision, the Texas Supreme Court

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[272] Klein, *supra* note 43, at 394.

[273] Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 389–90 (1998) (emphasis omitted).

[274] Klein, *supra* note 43, at 394.

[275] *Id.* at 397–402.

stated the following:

> This duty is not committed unconditionally to the legislature's discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make "suitable" provision for an "efficient" system for the "essential" purpose of a "general diffusion of knowledge." While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature's actions.[276]

The court added that "[i]f the system is not 'efficient' or not 'suitable,' the legislature has not discharged its constitutional duty and it is our duty to say so."[277] The court defined some of the constitutional parameters of the constitutionally mandated public education, but declined to instruct the legislature as to specifics or mechanisms for achievement.[278] The court, however, rejected a series of legislative plans for remedying the constitutional violation before approving a legislatively created approach that coupled finance changes with a system that set standards and provided for continuing on-going monitoring and publicly available information.[279]

Similarly, the Kentucky Supreme Court and the Massachusetts Supreme Judicial Court opted to set forth goals for the legislature to strive to achieve.[280] To provide an efficient system of education under the Kentucky Constitution, the Kentucky Supreme Court concluded that the legislature "must have as its goal to provide each and every child" with seven capacities that the court considered to be minimum requirements.[281] While finding that the state's

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[276] Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989).

[277] *Id.* (emphasis omitted).

[278] *Id.* at 399.

[279] Klein, *supra* note 43, at 400.

[280] Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 212 (Ky. 1989); McDuffy v. Sec'y of Executive Office of Educ., 615 N.E.2d 516, 554 (Mass. 1993).

[281] *Rose*, 790 S.W.2d at 212. Those capacities include

> (i) sufficient oral and written communication skills to enable students to function in a complex and rapidly changing civilization; (ii) sufficient knowledge of economic, social, and political systems to enable the student to make informed choices; (iii) sufficient understanding of governmental processes to enable the student to understand the issues that affect his or her community, state, and nation; (iv) sufficient self-knowledge and knowledge of his or her mental and physical wellness; (v) sufficient grounding in the arts to enable each student to appreciate his or her cultural and historical heritage; (vi) sufficient training or preparation for advanced training in either academic or vocational fields so as to enable each child to choose and pursue life work intelligently; and (vii) sufficient levels of academic or vocational skills to enable public school students to

education system needed to be fundamentally reformed, the court left to the general assembly's discretion the question of how best to reform the state's education system so long as it acted reasonably to pursue the goals specified by the court or even higher goals.[282] The Massachusetts Supreme Judicial Court followed the same approach, adopting the same goals. In doing so, the court declared "[a]s has been done by the courts of some of our sister States, we shall articulate broad guidelines and assume that the Commonwealth will fulfill its duty to remedy the constitutional violations that we have identified."[283]

E. Strict Scrutiny

Whereas education clause challenges have achieved considerable litigation success for those challenging the adequacy of state education systems, for the most part "constitutional guarantees of environmental rights have generally not been taken very seriously by courts . . . . Such statements are often viewed by judges and commentators alike as voicing aspirations rather than creating substantive law."[284] The Montana Supreme Court's approach to Article II, Section 3 of its state constitution stands as a counterexample. The constitutional provision provides as follows:

> All persons are born free and have certain inalienable rights. They include the right to a clean and healthful environment and the rights of pursuing life's basic necessities, enjoying and defending their lives and liberties, acquiring, possessing and protecting property, and seeking their safety, health and happiness in all lawful ways. In enjoying these rights, all persons recognize corresponding responsibilities.[285]

Addressing this provision, the Montana Supreme Court held

> [T]he right to a clean and healthful environment is a fundamental right . . . and . . . any statute or rule which implicates that right must be strictly scrutinized and can only survive scrutiny if the State establishes a compelling state interest and that its action is closely tailored to

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> compete favorably with their counterparts in surrounding states, in academics or in the job market.

Id.

[282] *Id.*

[283] *McDuffy*, 615 N.E.2d at 554.

[284] Bryan P. Wilson, Comment, *State Constitutional Environmental Rights and Judicial Activism: Is the Big Sky Falling?*, 53 EMORY L.J. 627, 628 (2004).

[285] MONT. CONST. art. II, § 3.

> effectuate that interest and is the least onerous path that can be taken to achieve the State's objective.[286]

Article IX, Section 1 adds the following to the foundation laid by Article II, Section 3:

> (1) The state and each person shall maintain and improve a clean and healthful environment in Montana for present and future generations.
>
> (2) The legislature shall provide for the administration and enforcement of this duty.
>
> (3) The legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.[287]

Concluding the latter provision is interrelated with Article II, Section 3, the court determined that it would also "apply strict scrutiny to state or private action which implicates either constitutional provision."[288] Under these standards, the Montana Supreme Court invalidated a statute creating an exception to the state's environmental protections laws and found a contract between private parties to be void as an illegal contract because of its deleterious environmental consequences.[289]

The Montana Supreme Court is not the only state court to have interpreted an affirmative rights provision as requiring the application of strict scrutiny. In addressing a one year expulsion of a student for bringing a firearm onto school property, the West Virginia Supreme Court concluded that strict scrutiny was required.[290] The court determined that "any denial of the right to an education cannot withstand strict scrutiny unless the State can demonstrate some compelling State interest to justify that denial."[291] The court reasoned that "[i]mplicit within the constitutional guarantee of 'a thorough and efficient system of free schools' is the need for a safe and secure school environment. Without a safe and secure environment, a school is unable to fulfill its basic purpose of providing an education."[292] Nevertheless, the

[286] Mont. Envtl. Info. Ctr. v. Dep't of Envtl. Quality, 988 P.2d 1236, 1246 (1999).
[287] MONT. CONST., art. IX, § 1.
[288] *Id.*
[289] *Id.* at 1249; Cape-France Enters. v. Estate of Peed, 29 P.3d 1011, 1017.
[290] Phillip Leon M. v. Greenbrier County Bd. of Educ., 484 S.E.2d 909, 914 (W.Va. 1996).
[291] *Id.*
[292] *Id.*

court determined that "by refusing to provide any form of alternative education, [the government] has failed to tailor narrowly the measures needed to provide a safe and secure school environment."[293] Ultimately, the court concluded that "the 'thorough and efficient' clause of Article XII, Section 1 of the West Virginia Constitution, requires the creation of an alternative program for pupils suspended or expelled from their regular educational program for a continuous period of one year."[294]

F. Judicial Management

While strict scrutiny imposes an arduous burden on the political branches, "[n]o example of the active judicial participation . . . is perhaps more notorious than the [nearly four]-decade saga surrounding school finance litigation in New Jersey. This litigation has been described by even those who are partial towards the court's involvement as a 'war.'"[295] Two series of cases, *Robinson v. Cahill* and *Abbott v. Burke*, which have been addressed by the New Jersey appellate courts dozens of times over the last four decades have been vehicles for application of a judicial management approach to state constitutional affirmative rights.[296] In *Robinson*, the New Jersey Supreme Court, while advancing the constitutional importance of equal opportunity in education, rejected the state's equal protection clause as the basis for greater funding for poor schools and instead embraced the education clauses of the state constitution.[297] The *Abbott* litigation, which arose after *Robinson*, "reflects the court's simultaneous contraction and expansion of its role in the dialogue that had consumed many New Jersey lawmakers and citizens. *Abbott* significantly expanded the judicial scope, but targeted the court's effort at fewer and more discrete school districts."[298] Instead of focusing on influencing school policy for all children in New Jersey, the court turned its attention to improving educational opportunities for students in the most disadvantaged schools.[299] These districts have become known as

[293] *Id.*
[294] *Id.*
[295] Michael Heise, *Preliminary Thoughts on the Virtues of Passive Dialogue*, 34 AKRON L. REV. 73, 99 (2000).
[296] *See id.* at 99–100.
[297] *Id.*
[298] *Id.* at 101.
[299] *Id.*

"*Abbott* districts."[300]

With regard to the operation of schools in "*Abbott* districts," the New Jersey courts have assumed "the role of 'education policymaker.'"[301] For example, pursuant to the state constitution, the New Jersey Supreme Court has ordered the implementation of full-day kindergarten programs as well as half-day programs for three and four year-olds.[302] For these programs, the court has required particular certifications for pre-school teachers and specified class-sizes.[303] The court has also ordered the use of supplemental assistance programs with accompanying software and instructional materials.[304] The court has also placed a heavy emphasis on literacy and mathematics in early education.[305] The court has ordered construction of new facilities and provided time-lines for completion thereof[306] and has mandated technology and college preparatory programs at the high school level.[307] Simply stated, "the New Jersey Supreme Court [is] heavily involved in overseeing the administration of the state's public school system."[308]

G. Unlitigated Provisions

While many affirmative rights provisions have been litigated in state courts, others have been completely ignored. Litigants often fail to advance their rights under state constitutions thereby failing to place these provisions before state judiciaries.[309] For example,

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[300] John B. Wefing, *Chief Justice Richard J. Hughes and His Contributions to the Judiciary of New Jersey*, 36 SETON HALL L. REV. 1257, 1270–71 (2006).

[301] Alexandra Greif, Note, *Politics, Practicalities, and Priorities: New Jersey's Experience Implementing the* Abbott V *Mandate*, 22 YALE L. & POL'Y REV. 615, 624 (2004).

[302] Amanda R. Broun & Wendy D. Puriefoy, *Public Engagement in School Reform: Building Public Responsibility for Public Education*, 4 STAN. J. CIV. RTS. & CIV. LIBERTIES 217, 233 (2008); Joy Chia & Sarah A. Seo, *Battle of the Branches: The Separation of Powers Doctrine in State Education Funding Suits*, 41 COLUM. J.L. & SOC. PROBS. 125, 135 (2007).

[303] Allison Harper, Note, *Building on Traditional Lawyering by Organizing Parent Power: An Emerging Dimension of Early Childhood Advocacy*, 14 GEO. J. ON POVERTY L. & POL'Y 339, 355 (2007).

[304] Martha Minow, *After* Brown*: What Would Martin Luther King Say?*, 12 LEWIS & CLARK L. REV. 599, 633 n.179 (2008).

[305] *Id.*

[306] Daria E. Neal, *Healthy Schools: A Major Front in the Fight for Environmental Justice*, 38 ENVTL. L. 473, 482 (2009); Broun & Puriefoy, *supra* note 302, at 236 n.81.

[307] Eli Savit, Note, *Can Courts Repair the Crumbling Foundation of Good Citizenship? An Examination of Potential Legal Challenges to Social Studies Cutbacks in Public Schools*, 107 MICH. L. REV. 1269, 1274 n.31 (2007).

[308] Chia & Seo, *supra* note 302, at 136.

[309] *See* Victor E. Schwartz et al., *The Supreme Court's Common Law Approach to Excessive Punitive Damage Awards: A Guide for the Development of State Law*, 60 S.C. L. REV. 881, 908 (2009); Sheldon H. Nahmod, *State Constitutional Torts:* Deshaney, *Reverse-Federalism and*

"the vast majority of states that have constitutional provisions directly addressing the care of individuals with mental disabilities or mental illnesses have not been the site of state-law-based right-to-treatment litigation."[310] Likewise, fewer than half of the state constitutional provisions relating to health-care have been litigated in state appellate courts.[311] As a result, these issues are simply not addressed by the courts.[312] It has been suggested that "[a] generation of overreliance by law professors, judges, and attorneys on the federal doctrines that grew out of the Warren [Court decisions] left state constitutional law in a condition of near atrophy in [most] states."[313] While judicial federalism has brought new life, especially with regard to state constitutional criminal law provisions, many affirmative rights have yet to be enlivened through litigation.

V. HOW SHOULD AFFIRMATIVE RIGHTS IN STATE CONSTITUTIONS BE INTERPRETED?

When interpreting affirmative rights provisions, state courts find themselves navigating between Scylla and Charybdis.[314] On one side, constitutional violations are left unredressed, resulting in devastating harms to individuals and communities as well as the constitution; on the other side, aggressive enforcement of affirmative rights may result in usurpation of the authority of political branches, improper limitations on the electorate's

Community, 26 RUTGERS L.J. 949, 958 (1995).

[310] Katie Eyer, *Litigating for Treatment: The Use of State Laws and Constitutions in Obtaining Treatment Rights for Individuals with Mental Illness*, 28 N.Y.U. REV. L. & SOC. CHANGE 1, 13 n.84 (2003); *see also* Michael L. Perlin, *State Constitutions and Statutes as Sources of Rights for the Mentally Disabled: The Last Frontier?*, 20 LOY. L.A. L. REV. 1249, 1264–65 (1987); Alan Meisel, *The Rights of the Mentally Ill Under State Constitutions*, 45 LAW & CONTEMP. PROBS. 7, 9 (1982).

[311] *See* Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1, 40–41 (forthcoming 2010), *available at* http://ssrn.com/abstract =1421504.

[312] *See* Shane R. Heskin, Comment, *Florida's State Constitutional Adjudication: A Significant Shift as Three New Members Take Seats on the State's Highest Court?*, 62 ALB. L. REV. 1547, 1554 (1999).

[313] JENNIFER FRIESEN, 1 STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS CLAIMS AND DEFENSES § 1.01 n.11, at 1–4 (4th ed. 2006).

[314] [T]hese are the two sea monsters from Homer's Odyssey. Scylla and Charybdis dwelled on opposite sides of a narrow strait so that sailors attempting to avoid Charybdis would fall prey to Scylla and vice versa. The monsters symbolize a state where one is between two dangers and moving away from one will cause you to be in danger of the other.

Damien Geradin et al., *The Complements Problem Within Standard Setting: Assessing the Evidence on Royalty Stacking*, 14 B.U. J. SCI. & TECH. L. 144, 176 n.125 (2008).

governing capacity, a reduction in administrative flexibility, and a diminishment in the judiciary's prestige. State constitutional affirmative rights provisions can be classified in a variety of ways. Herein, the provisions are divided into five categories based upon the general approach that should be applied in addressing these measures: (1) provisions which have been identified in scholarly discourse as positive rights provisions but which in reality merely authorize the state to take action; (2) non-justiciable positive rights provisions; (3) non-self-executing rights; (4) highly specific enforceable provisions; and (5) abstract enforceable provisions. The interpretation of the first four are relatively uncomplicated to address; the latter is considerably more complex.

A. Mere Authorizations to Act

A number of scholarly commentators have equated provisions that are little more than express authorizations for a state government to act with the imposition of an affirmative right.[315] While such provisions are not inconsequential, they do not create affirmative rights. They can provide a basis for governmental action, allowing action that might otherwise be prohibited under the state constitution. They can also be a source of inspiration to act. But to equate provisions that constitutionally authorize the state to act with imposition of a constitutional duty to act is misplaced. These provisions simply do not obligate the government to act. Courts should find these provisions relevant where related governmental action is challenged but should not consider these provisions as imposing affirmative obligations upon the state.

B. Non-Justiciable Directive Principles

"American state constitutions have not generally utilized the approach of including judicially unenforceable . . . directive principles as constitutional provisions."[316] Such provisions are more

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[315] *See, e.g.*, Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 447 & n.265 (2008); Kelly Thompson Cochran, Comment, *Beyond School Financing: Defining the Constitutional Right to an Adequate Education*, 78 N.C. L. REV. 399, 431 n.161 (2000); Joseph R. Grodin, *Rediscovering the State Constitutional Right to Happiness and Safety*, 25 HASTINGS CONST. L.Q. 1, 29 & n.165 (1997); Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy,"* 44 HASTINGS L.J. 79, 97–98 (1992).

[316] G. Alan Tarr & Robert F. Williams, *Foreword: Getting from Here to There: Twenty-First Century Mechanisms and Opportunities in State Constitutional Reform*, 36 RUTGERS L.J. 1075, 1119 (2005).

common internationally both in national and sub-national constitutions.[317] While such provisions are relatively rare in the United States, some state constitution drafters have offered their own variation on the directive principles concept, perhaps best exemplified internationally by India's Constitution. The Indian Constitution constitutionalizes directive principles of state policy, an incredibly expansive array of economic and social rights and Gandhian principles.[318] The Indian Constitution expressly forbids the courts from enforcing these principles; rather, responsibility for their effectuation is the exclusive province of the political branches.[319]

Such provisions are not unknown in state constitutions. For example, the Alabama Constitution declares that "[i]t is the policy of the state of Alabama to foster and promote the education of its citizens in a manner and extent consistent with its available resources, and the willingness and ability of the individual student."[320] This principle, however, is sharply limited because the constitution also expressly provides that "nothing in this Constitution shall be construed as creating or recognizing any right to education or training at public expense."[321] Alabama's Constitution originally included a more traditional right to education requiring the legislature to "'establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof.'"[322] But this provision was subsequently amended to prevent judicial enforcement.[323] In

[317] Eric C. Christiansen, *Using Constitutional Adjudication to Remedy Socio-economic Injustice: Comparative Lesson from South Africa*, 13 UCLA J. INT'L L. & FOREIGN AFF. 369, 375 (2008); Tarr & Williams, *supra* note 316, at 1119–20.

[318] INDIA CONST. part IV; *see* Paras Diwan, *Three Decades of Constitutional Development: Keynote Paper*, *in* 1 DIRECTIVE PRINCIPLES JURISPRUDENCE 27–35 (Paras Diwan & Virenda Kumar eds., 1982); NALIN KUMAR, JUDICIARY ON GOALS OF GOVERNANCE: DIRECTIVE PRINCIPLES OF STATE POLICY 11–12 (2005).

[319] INDIA CONST. part IV, art. 37 ("The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.").

[320] ALA. CONST. art. XIV, § 256.

[321] *Id.*

[322] ALA. CONST. art. XIV, § 256 Code Commissioner's Notes.

[323] *Id.* In a 2004 statewide referendum, the voters of Alabama narrowly disapproved amendments that would have, among other measures, removed this limiting language with amendment opponents specifically raising concerns that "removing that language will lead to the constitutional construction of an enforceable right to education in Alabama by 'activist' judges"; that "based on the existence of an enforceable right to education, and in light of existing inequities, judges will order extensive changes in the public school system and increases in school funding"; and that "such changes and increases will result—either directly

addressing suits challenging educational adequacy, the Alabama Supreme Court properly found that the "duty to fund Alabama's public schools is a duty that . . . the people of this State have rested squarely upon the shoulders of the Legislature, it is the Legislature, not the courts, from which any further redress should be sought."[324]

While constitutionalizing non-justiciable principles is often a poor constitutional design choice,[325] if a court ignored this limitation and rendered the provision judicially enforceable, it would be grievously abusing its power. When a state court addresses a constitutional challenge predicated on a provision that expressly permits no judicial enforcement or declares that it creates no enforceable right, the court should follow the model of the Alabama Supreme Court in *Ex parte James* and bow-out.

C. Non-Self-Executing Policy Provisions

A number of state constitutional provisions establish a policy but do not impose any particular duty upon the legislature to act. In the context of environmental litigation, "[c]ourts have uniformly held that such [v]alue [d]eclarations do not require anyone, including the government, to take any particular actions. In constitutional terminology, [v]alue [d]eclarations are not 'self-executing,' but instead rely on legislative or administrative implementation."[326]

In addressing a case implicating the political question doctrine under the Federal Constitution, Justice Souter presented a useful analogue for state courts in addressing the outer-boundaries of such judicial abstention. In his concurring opinion in *Nixon v. United States*, in which the Court determined that the question of whether the Senate's actions were sufficient to constitute having tried President Nixon before impeaching him qualified as a political question, Justice Souter conceded that judicial silence would

or indirectly—in higher state taxes." Pratik A. Shah, *The Hypothetical Impact of Alabama's Failed Amendment 2 on Public School Funding*, 56 ALA. L. REV. 863, 866 (2005).

[324] *Ex parte* James, 836 So.2d 813, 815 (Ala. 2002).

[325] *See generally* Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect*, 15 MICH. ST. J. INT'L L. 643, 645 (2007) ("[T]his inclusion of non-justiciable directive principles in a constitution threatens to undermine the distinctiveness and purposes of a constitution [or constitutional law] in a constitutional representative democracy. . . . [W]hile non-justiciable directive principles can be constitutional law . . . they should not be.").

[326] Barton H. Thompson, Jr., *The Environment and Natural Resources*, *in* 3 STATE CONSTITUTIONS FOR THE TWENTY-FIRST CENTURY: THE AGENDA OF STATE CONSTITUTIONAL REFORM 312–13 (G. Alan Tarr & Robert F. Williams eds., 2006).

normally be warranted on such an issue and was warranted in this case. Justice Souter indicated, however, that there is an outer-boundary beyond which the actions of the political branches may be so extreme as to exceed their authority and the impact of their actions so grievous as to warrant judicial action.[327]

In a similar vein, Montana Supreme Court Justice James Nelson has raised serious and legitimate concerns about the outer-boundaries of judicial abstention with regard to non-self-executing provisions in state constitutions. Justice Nelson noted that "[w]hen, in adopting their constitution, the people provided that a provision shall be implemented by the legislature, it cannot be gainsaid that the people had the right to expect, and do expect that branch of government to, in good faith, carry out its constitutionally imposed obligation to legislate."[328] By their very nature, "non-self-executing constitutional mandates are . . . enacted with the expectation that the legislature will act to implement the directive."[329] The legislature's failure "to act upon a non-self-executing constitutional directive, which defeats or restricts the purpose of that mandate, is just as unacceptable as legislation which defeats or restricts the purpose of a self-executing right."[330] Accordingly, "a justiciable claim must, at some point, arise if the legislature fails or refuses to fulfill its obligation."[331] While a state court should not create a positive right out of whole-cloth in addressing a challenge raised pursuant to a non-self-executing provision,[332] a court should not wholly abandon the field. If a legislature fails to act to effectuate a non-self-executing provision, Justice Nelson's observations point towards the judiciary cautiously endeavoring to encourage legislative action.

D. Highly Specific Detailed Affirmative Rights Provisions

Standing on the opposite end of the spectrum from abstract non-self-executing policy statements are highly detailed state constitutional provisions. While the use of highly specific detailed provisions in a constitution causes certain difficulties, not the least of which is that the constitution may not have the flexibility

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[327] Nixon v. United States, 506 U.S. 224, 253–54 (1993) (Souter, J., concurring).

[328] Columbia Falls Elementary Sch. Dist. No. 6 v. State, 109 P.3d 257, 265 (Mont. 2005) (Nelson, J., concurring).

[329] *Id.*

[330] *Id.* at 266.

[331] *Id.* at 265.

[332] Pettinato, *supra* note 240.

necessary to change with shifting societal needs, the greater specificity of many state constitutional provisions eases the task of interpretation.[333] Many recent highly specific affirmative rights provisions, such as mandatory minimum levels of increased funding for public education from kindergarten through grade twelve[334] and constitutional provisions authorizing lotteries with funds specifically allocated,[335] have been introduced, in part, with the goal of inviting the check of judicial enforcement upon legislative or executive discretion. The courts should not disappoint these expectations; to the contrary, the electorate should be given the benefit of their constitutional bargain.[336] While there are certainly disadvantages to highly detailed specific provisions, one of them should not be judicial abdication. Rigorous enforcement of highly specific affirmative rights provisions is warranted.

E. Abstract Affirmative Rights Provisions

The most difficult quandary in approaching state constitutional rights is the interpretation of affirmative provisions that are not specific and detailed but which impose an affirmative duty upon the state to confer some benefit that imposes a significant cost upon the state, has extensive administrative requirements, and affects large numbers of persons. A significant number of affirmative rights provisions in state constitutions fall within this category.

1. Rejection of the Political Question Doctrine

A number of state courts have responded to challenges based upon abstract positive rights provisions by finding such challenges

[333] Hershkoff, *Positive Rights*, *supra* note 168, at 1156; *see generally* Barton H. Thompson, Jr., *Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance*, 27 RUTGERS L.J. 863, 916 (1996); Michael G. Colantuono, *The Revision of American State Constitutions: Legislative Power, Popular Sovereignty, and Constitutional Change*, 75 CAL. L. REV. 1473, 1510 (1987) (discussing possible negative ramifications of constitutional flexibility resulting in highly specific state constitutions); Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 197 (1984) [hereinafter Linde, *E Pluribus*].

[334] *See, e.g.*, COLO. CONST. art IX, § 17; *see generally* DALE A. OESTERLE & RICHARD B. COLLINS, THE COLORADO STATE CONSTITUTION: A REFERENCE GUIDE 220–22 (2002) (discussing article IX, § 17 of the Colorado Constitution); Richard B. Collins, *The Colorado Constitution in the New Century*, 78 U. COLO. L. REV. 1265, 1304 (2007); Norman H. Wright, *Important Developments in State and Local Tax: Colorado*, 6 ST. & LOC. TAX LAW. 175, 175 (2001).

[335] *See, e.g.*, OHIO CONST. art. XV, § 6.

[336] *See* Heiple & Powell, *supra* note 169, at 1515–16.

to be non-justiciable under the political question doctrine. This approach constitutes an improper abdication of the court's constitutional role.

As applied by the federal courts, the political question doctrine has been subject to considerable criticism. Its application seems inconsistent with tripartite government composed of an executive, legislature, and judiciary, in which each checks the others.[337] Utilization of the political question doctrine is also unnecessary to give effect to judicial restraint.[338] To employ the political question doctrine for the purpose of facilitating judicial restraint is to conflate "deference with abdication."[339] Furthermore, as for concerns about the absence of judicially manageable standards, abdication on such a basis seems suspect. When "one examines the litany of case law either interpreting the broad language of the due process or equal protection clauses or establishing standards on which to invoke the first amendment right of free speech, one must suspect the disingenuousness of the 'absence-of-standards' rationale."[340]

Furthermore, it has been argued that the political question doctrine is entirely inapplicable to state courts.[341] While this argument reaches too far, it unearths an important truth. Justiciability restrictions on the state level are less than those limiting federal courts. State common law courts quite properly "hear an array of questions that would be nonjusticiable under federal law."[342] That is, state courts, as common law courts of general jurisdiction, frequently, and of long-standing tradition, adjudicate matters that would be non-justiciable in federal courts.[343] State courts often do not share the same constitutional limitations of the case and controversy requirements as their federal counterparts. They have fewer limitations related to standing, for

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[337] James R. May, *Climate Change, Constitutional Consignment, and the Political Question Doctrine*, 85 DENV. U. L. REV. 919, 954 (2008).

[338] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 131–32 (2d ed. 2002).

[339] *Id.* at 132.

[340] Martin H. Redish, *Judicial Review and the "Political Question"*, 79 NW. U. L. REV. 1031, 1046 (1985).

[341] Linde, *E Pluribus*, *supra* note 333, at 189–90; Hans A. Linde, *Judges, Critics, and the Realist Tradition*, 82 YALE L.J. 227, 248 (1972) [hereinafter Linde, *Judges*].

[342] Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1863–64 (2001) [hereinafter Hershkoff, *State Courts*].

[343] *See id.* at 1863–64; Linde, *Judges*, *supra* note 341, at 248; James W. Doggett, Note, *"Trickle Down" Constitutional Interpretation: Should Federal Limits on Legislative Conferral of Standing Be Imported into State Constitutional Law?*, 108 COLUM. L. REV. 839, 839 (2008).

example taxpayer suits are regularly permitted, and many are empowered to give advisory opinions.[344] It is a symptom of over-incorporation of federal constitutional norms to simply transport the federal political question doctrine into state courts without changes being made to tailor the doctrine to its more limited role in the state court context.

Even if the political question doctrine were treated in a one size fits all approach, applicable in the same manner to state and federal courts, it is not apparent that state courts are correctly applying the doctrine in finding that affirmative rights provisions are non-justiciable. As has been noted by Professor Mark Tushnet, "not much" lies within the non-justiciable realm of the political question doctrine and outside the bounds of ordinary judicial interpretation.[345] Addressing the doctrine's application outside the realm of foreign affairs, Professor Rebecca Brown has noted that "[i]f the plaintiff has a real stake and articulates a real injury, the Court tends to adjudicate the case, even in the face of arguments that the case should be dismissed as a nonjusticiable political question."[346] Plaintiffs seeking vindication of their right to education, welfare, or disability benefits, etc. have a real stake and suffer a real injury by the denial thereof.

Interpreting positive rights does not inherently press the courts into the narrow domain of cases that constitute non-justiciable political questions. To the contrary, positive rights, like their negative rights counterparts, invite judicial interpretation. "[T]he explicit textual commitment of some state constitutions" to guaranteeing affirmative rights "actively engages the state court in the elaboration of substantive norms and also legitimates this interpretive process."[347] Simply stated, "constitutional language requires interpretation and implementation, including language in

[344] *See* Jim Rossi, *The Puzzle of State Constitutions*, 54 BUFF. L. REV. 211, 233 (2006); *see also* Hershkoff, *State Courts, supra* note 342, at 1861–66; James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 808–10 (1992); Varu Chilakamarri, Comment, *Taxpayer Standing: A Step Toward Animal-Centric Litigation*, 10 ANIMAL L. 251, 254–55, 259–64 (2004); Note, *Taxpayer Suits*, 82 HARV. L. REV. 224, 227 (1968).

[345] Mark Tushnet, *Law and Prudence in the Law of Justiciability: The Transformation and Disappearance of the Political Question Doctrine*, 80 N.C. L. REV. 1203, 1208–09 (2002); *see also* David J. Bederman, *Deference or Deception: Treaty Rights as Political Questions*, 70 U. COLO. L. REV. 1439, 1441 (1999); Nat Stern, *The Political Question Doctrine in State Courts*, 35 S.C. L. REV. 405, 406 (1984) ("[T]he political question doctrine appears to have nearly fallen into desuetude . . . .").

[346] Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States, 1993 SUP. CT. REV. 125, 147 (1993).

[347] Hershkoff, *Positive Rights*, *supra* note 168, at 1169.

state constitutions that creates an affirmative right."[348] The overwhelming majority of state courts addressing affirmative rights have concluded that such challenges are justiciable.[349] As noted by the Wyoming Supreme Court, such challenges are "no more a political question than any other challenge to the constitutionality of statutes."[350] To treat positive rights provisions as inherently nonjusticiable, as matters purely of politics despite their constitutionalization, is to effectively read these provisions out of state constitutions or at least to eliminate the role of a tripartite system of checks and balances with regard to these constitutional rights.[351] In other words, "the complexity of distinguishing between spheres of power" that arise when interpreting affirmative rights state constitutional provisions "is not an appropriate grounds for conceding authority altogether."[352] Affirmative state constitutional rights "may not simply be remitted to politics."[353]

2. Deference with Limits

While these provisions cannot be ignored, interpreting affirmative rights provisions does generate substantial difficulties for state courts. Whereas negative rights are "directly susceptible to judicial enforcement,"[354] the interpretation of positive rights can "create deep problems of implementation, scope and enforcement."[355] Declaring that a constitutional affirmative right exists beyond what the legislature has afforded can result in resistance from the political branches[356] or taxpayers, involve the judiciary deeply in the political process, lead to "troubled, ineffective implementation," and ossify the government's ability to respond with flexibility in trading-

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[348] James E. Ryan, *A Constitutional Right to Preschool?*, 94 CAL. L. REV. 49, 85 (2006).

[349] *Id.*

[350] Washakie County Sch. Dist. No. One v. Herschler, 606 P.2d 310, 318 (Wyo. 1980).

[351] Aaron Jay Saiger, *School Choice and States' Duty to Support "Public" Schools*, 48 B.C. L. REV 909, 966 (2007) [hereinafter Saiger, *School Choice*].

[352] Blanchard, *supra* note 209, at 268. *But see* Bess J. DuRant, *The Political Question Doctrine: A Doctrine for Long-Term Change in Our Public Schools*, 59 S.C. L. REV. 531, 540 (2008).

[353] Hershkoff, *Positive Rights*, *supra* note 168, at 1156.

[354] Closa, *supra* note 24, at 585; *see also* Cass R. Sunstein, *The Negative Constitution: Transition in Latin America*, *in* TRANSITION TO DEMOCRACY IN LATIN AMERICA: THE ROLE OF THE JUDICIARY 367 (Irwin P Stotzky ed., 1993).

[355] Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93, 115 (2009) [hereinafter Saiger, *Local Government*].

[356] *See generally* Michael A. Rebell, *Poverty, "Meaningful" Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467, 1528 (2007) (noting that some states have actively resisted court orders with regard to education).

off between various categories of public expenditure and between higher and lower public expenditures and rates of taxation.[357] Although the task may be difficult, the ground unsteady, and the dangers quite real, that does not free state courts from their obligation to say what the law is, and to serve as a check upon the political branches where they fail to adhere to the obligations imposed by the state constitution.

The familiar tools of federal constitutional interpretation are applicable to the interpretation of positive rights in state constitutions, thus one could find considerations in state court decisions interpreting positive rights of "text, structure, history, precedent, purposes, framers' intentions, values of the polity, and all the other tools and conventions familiar from our well-developed tradition of federal constitutional interpretation."[358] But, as discussed above, not all of these conventions of federal constitutional interpretation function in the same manner or play the same role in understanding state constitutions in general or in interpreting affirmative rights specifically.

This article has previously addressed some of the differences in interpreting positive rights in state constitutions, for example interpreting against a backdrop of residual plenary authority, less assistance from the bar and academy, an absence of federal precedent, greater enforcement difficulties, and a heightened role for international precedent, viewing original intent through the electorate's understanding of a constitutional amendment and federalism concerns from a different vantage point, and performing an extremely close textual inspection with a clause bound rather than structural interpretive focus. Simply stated, interpreting positive state constitutional rights is not the same methodological or jurisprudential task as interpreting negative rights provisions under the Federal Constitution.

As noted above, "[t]he men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them."[359] Constitutionalization of positive rights flips this paradigm on its head. The primary constitutional purpose of constitutionalizing a positive constitutional right is to safeguard against the danger of legislative

[357] Saiger, *Local Government, supra* note 355, at 115–16.
[358] *See* JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 2 (2005).
[359] Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983).

indifference.[360] Such provisions articulate a substantive constitutional commitment and are "designed to make permanent a basic policy choice that the legislature is mandated to achieve."[361] The obligation imposed by the state constitution upon the state is to "use its power to effectuate a policy goal that is constitutionally fixed."[362]

The role of judicial review when interpreting a positive rights provision is, as it is generally in addressing the constitutionality of statutory schemes, "to keep legislative power within the bounds of law," but in doing so, where the constitutional right is a positive one, the court "must constrain [the legislature's] discretion so that it achieves the affirmative constitutional mandate."[363] The existence of a positive constitutional right "should . . . be understood as constraining the legislature's otherwise unfettered discretion to choose from among competing policy alternatives."[364] Although the right is likely only defined in general terms, "it creates 'an environment of constraint, of . . . ideals to be fulfilled' that cabins the legislature's discretion to choose only those means that will actually carry out, or at least help to carry out, the constitutional end."[365] The legislature retains the ability to

> choose the means to carry out a constitutional goal, but it cannot claim to meet its constitutional duty if the means chosen evade, undermine, or fail to carry out the prescribed end. The relevant question is thus consequential in focus—asking whether the legislature's approach furthers or effectuates the constitutional right at issue.[366]

A rational basis review is not adequate to address challenges arising under positive rights provisions, for such an approach ignores the question of whether the legislature has satisfied the constitutionally mandated objective, or is at least making efforts that can be expected to achieve its constitutional duty.[367] Positive rights enforcement demands that the government act to achieve certain minimum goals and requires the courts to assess whether a

[360] Hershkoff, *Rights*, *supra* note 264, at 640.

[361] *Id.* at 641.

[362] Helen Hershkoff, *Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1415 (1999) [hereinafter Hershkoff, *Welfare Devolution*].

[363] Hershkoff, *Rights*, *supra* note 264, at 641.

[364] Hershkoff, *Welfare Devolution*, *supra* note 362, at 1414.

[365] *Id.* at 1415 (quoting PHILLIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 11 (1980)).

[366] *Id.* at 1414.

[367] Hershkoff, *Positive Rights*, *supra* note 168, at 1136, 1138.

legislative or administrative scheme is, in fact, sufficiently progressing towards meeting these constitutional obligations.[368] Rationality review is insufficient because it would not obligate the state to "justify its legislative enactments as the appropriate means to satisfy the aspirations of the state constitution."[369] The question for reviewing courts is not whether the statutory scheme improperly burdens or interferes with a constitutional right; rather, the court must assess "'[h]ow does this policy further a constitutional right?'"[370] While the courts should be focused on actual results, they should be wary of over-reaching to impose their preferred approach or judicially determined best practices.[371] The court should, in general, defer to sensible supportable legislative approaches and be especially conscious of deferring to normative legislative judgments in allocating and directing resources in providing the right.[372]

A more rigorous review than federal rational basis analysis, however, raises well-founded concerns about removing issues and questions from the realm of self-government, and in doing so, eliminating citizen participation.[373] A judiciary led "quest for justice" into the realm of positive rights that reaches beyond a sturdy constitutional foundation causes harmful consequences by threatening to "debase and impoverish republican government."[374]

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[368] *Id.*

[369] Robert Doughten, *Filling Everyone's Bowl: A Call to Affirm a Positive Right to Minimum Welfare Guarantees and Shelter in State Constitutions to Satisfy International Standards of Human Decency*, 39 GONZ. L. REV. 421, 437 (2003).

[370] Hershkoff, *Positive Rights*, *supra* note 168, at 1184.

[371] *See* Saiger, *School Choice*, *supra* note 351, at 966–68.

[372] *See id.* The trade-offs can be extraordinarily complex in the context of addressing affirmative rights provisions. For example, in the environmental context, Professor Ruhl has noted the following:

> correct environmental policy is not as clear-cut as, say, our convictions that free speech is vital and slavery is evil. The latter are not characterized by large gray areas or competing social values. But environmental policy, like economic policy, education policy, welfare policy, and most of social policy in general, is defined by hard choices and complicated, multidimensional problems. The reason the Environmental Protection Agency has over ten thousand pages of rules is because that's how many it takes to tackle the problem. To think that environmental policy can be summed up in two sentences thus seems naïve, if not ludicrous.

J. B. Ruhl, *The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don't Measure Up*, 74 NOTRE DAME L. REV. 245, 281 (1999).

[373] Andrew C. Spiropoulos, *Just Not Who We Are: A Critique of Common Law Constitutionalism*, 54 VILL. L. REV. 181, 230 (2009).

[374] Michael W. McConnell, *A Moral Realist Defense of Constitutional Democracy*, 64 CHI.-KENT L. REV. 89, 108 (1988). "As constitutionalization based on substantive values becomes more pervasive, the less it is likely to command widespread support. Over-constitutionalization forces some in the polity to become subordinate to the values and conceptions of the good of others and thus threatens to de-legitimize the *Verfassungsstaat* ['state rule through the constitution']." Michel Rosenfeld, *The Rule of Law and the Legitimacy*

While critics of the judicial enforcement of positive rights suggest that in addressing challenges based upon positive rights the courts are intruding into the role of the legislature, this argument will be misplaced so long as courts limit themselves to a judicially restrained interpretation of the constitution.[375] A court that exercises restraint is simply performing its traditional and vital role of serving as a check upon the political branches in assuring adherence to the state constitution.[376] Courts overstep their "bounds no more when defining the parameters of required legislative action than when defining prohibitions on legislative behavior."[377]

Moreover, there arguably is less reason for concern about state judges' interpreting vague and ambiguous state constitutional provisions than federal court judges construing vague and ambiguous provisions of the federal constitution.[378] Three of the primary objections to such interpretation by federal judges are (1) lack of accountability of the judges to the electorate, (2) the difficulty of overcoming the federal courts' imposed restrictions due to arduous requirements for constitutional amendment under Article V of the United States Constitution, and (3) where a state law is affected, the decision reflects the views of a small number of judges removed from the state, its government, and electorate.[379] These objections do not carry the same weight in state courts where the judges are often elected, state constitutions are more easily amended, and judges are well-versed in the legal culture of the state.[380]

Furthermore, we should expect that state judiciaries will need to play a more active role than their federal brethren in serving as a counter-majoritarian check. As noted by James Madison, the threat

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of Constitutional Democracy, 74 S. CAL. L. REV. 1307, 1329 (2001). As a result,

> over-constitutionalization gives rise to a very similar problem to that produced by strict Kantian autonomy. In the latter case, legitimate law is bound to alienate one from one's own interests as the right must remain above all interests; in the former, one always risks alienation from one's own interests to the extent that the constitution enshrines conflicting interests.

Id. Specifically, "[i]n a pluralist polity, this means a sizeable portion of the citizenry will remain significantly alienated from the dictates emanating from the prevailing substantively grounded legal-constitutional regime." *Id.* at 1329–30.

[375] *See* Doughten, *supra* note 369, at 433.

[376] *Id.*

[377] Feldman, *supra* note 231, at 1061.

[378] Posting of Eugene Volokh to The Volokh Conspiracy, http://www.volokh.com/posts/1210969007.shtml (May 16, 2008, 16:16 EST).

[379] *Id.*

[380] *Id.*

of the tyranny of the majority is heightened in smaller polities.[381] In Federalist number 10, Madison wrote:

> The smaller the society, the fewer probably will be the distinct parties and interests composing it; the fewer the distinct parties and interests, the more frequently will a majority be found of the same party; and the smaller the number of individuals composing a majority, and the smaller the compass within which they are placed, the more easily will they concert and execute their plans of oppression.[382]

In accord therewith, "[t]he greater potential for parochialism within state government . . . logically implicates a stronger role for the judiciary as guardian of minority interests and individual rights."[383]

Additionally, research suggests that courts have performed better than critics would suggest in crafting remedial orders.[384] Judicial deliberations are often characterized by a different focus than legislative decision-making, being predominantly "'rational-analytic'" while legislative decision-making is predominately a "mutual adjustment" process.[385] Courts have generated orders predicated upon evidence presented by competing experts and have remained more nimble than expected to address changing circumstances by retaining jurisdiction.[386]

Having extolled the judiciary's participation in enforcing positive rights, let us begin to build in some necessary restraint. One of the primary reasons for concern about the judiciary taking an extremely active policy-making partnership role with regard to the enforcement of affirmative constitutional rights is that courts in doing so stray into the realm of the legislature's most important power and exceed one of the most critical limitations upon their own actions. In explaining why the judiciary could be entrusted with the power of judicial review, Alexander Hamilton noted in Federalist No. 78 that "[t]he judiciary . . . has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither force nor will, but merely

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[381] Blanchard, *supra* note 209, at 260.
[382] *Id.*
[383] *Id.*
[384] Rebell, *supra* note 356, at 1532.
[385] *Id.* at 1531–32.
[386] *Id.* at 1532.

judgment."[387] Through enforcement of affirmative rights provisions, the judiciary begins to reach into the legislature's purse and distribute significant funds from the state's treasury.

But "enforcement of a positive right need not result in judicial tyranny. As long as the remedy initially allows the legislature to fashion the curative legislation, the imposition of a remedy is [arguably] even less intrusive than where a negative rights violation is involved."[388] This conclusion follows because the legislature when addressing a negative right prohibits the legislature's action entirely; however, when approaching a positive right, the court need only set the legislative process back in motion and allow the legislature to operate with broad discretion in fulfilling the constitutional rights, bounded only by certain limited parameters.[389]

Judicial review involving positive rights "does not necessarily involve the determination of a particular level of resources to be spent by the state or the exact way they are to be spent."[390] To the contrary, "a judgment can simply consist of pointing out where a violation has occurred, and instructing that it should be remedied in whichever way the public authority deems most appropriate, or simply that an appropriate inquiry should be instigated."[391] Such an approach is both prudent and proper. "It makes judicial as well as political sense and comports with the values represented by the doctrine of separation of powers for courts to enlist the creative talents of the legislative and executive branches of government."[392] If courts afford "space and time within which to respond, political actors are more able than judges to identify remedial social strategies and social programs that will be politically acceptable and that will enforce the judicial mandate for the long term."[393] The judiciary is the branch least suited for setting policy as to affirmative rights and managing the accompanying state and local budgets.[394] Legislatures are able to more broadly reflect the competing interests involved in an issue as they embody a

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[387] THE FEDERALIST NO. 78 (Alexander Hamilton).

[388] Feldman, *supra* note 231, at 1061.

[389] *Id.*

[390] Wiles, *supra* note 26, at 47.

[391] *Id.*

[392] Peters, *supra* note 211, at 1559.

[393] *Id.*

[394] Edward C. Mosca, *The Original Understanding of the New Hampshire Constitution's Education Clause*, 6 PIERCE L. REV. 209, 242 (2007) (describing courts' interference in education policy and budgets as undesirable).

multitude of competing perspectives.[395]

The nature of positive rights lends itself to such an approach. While "in the case of negative rights the court merely establishes what the state may not do. When it comes to certain social goals, . . . these can be achieved in a variety of ways."[396] Where

> there is a prohibition on destroying or adversely affecting something, then every act which represents or brings about destruction or an adverse effect is prohibited. By contrast, if there is a command to protect or support something, then not every act which represents or brings about protection or support is required.[397]

For example, addressing a constitutional right to housing, a state appropriately could create incentives for market actors to build affordable housing, provide rent supports for tenants, or construct public housing facilities.[398] The government, the addressee of the constitutional obligation to act, "has . . . discretion as to which method [it] will choose to satisfy the command."[399] It is critical for courts to recognize that "judicial enforcement of positive rights is limited by the greater discretion accorded the political branches in determining the specific act to be performed."[400] Thus, "[c]ourts appropriately have a more limited role in the enforcement of rights-based redistributive policies than other institutions whose raison d'être is, precisely, to make the decisions as to which is the best way to achieve a desired end."[401]

It has been asserted by some that state courts should take an aggressive and active role, assuming a full policy-making partnership with the legislature in ensuring enjoyment of affirmative state constitutional rights. Differences between the state and federal judiciaries and between state constitutions and the Federal Constitution are referenced in support of this position. State judges stand in dramatically different circumstances than their federal counterparts because they are often elected and are

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[395] *Id.*

[396] Closa, *supra* note 24, at 585.

[397] ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 308 (Julian Rivers trans., Oxford University Press 2002) (citation omitted); *see also* Mattias Kumm, *Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice*, 2 INT'L J. CONST. L. 574, 586 (2004) (reviewing ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS (2002)).

[398] Closa, *supra* note 24, at 585.

[399] ALEXY, *supra* note 397, at 308 (emphasis omitted); *see also* Kumm, *supra* note 397, at 586.

[400] Kumm, *supra* note 397, at 586.

[401] Closa, *supra* note 24, at 585.

thus less subject to concerns about democratic legitimacy, are more closely linked with the state community, and exercise law-making authority as common law jurists.[402] Additionally, state constitutions can be more easily amended than the Federal Constitution, therefore what is perceived to be an errant interpretation can be more easily corrected.[403] But "to the extent that we accept judges because of their democratic credentials, we undermine the affirmative case that is made in favor of judicial review as a distinctively valuable form of political decisionmaking."[404] Furthermore, "legislative supremacy pose[s] an additional problem for those who would assign extra decisional discretion to elective judiciaries. Even when elected at regular intervals, courts will never be as democratic as the legislature, nor will they possess its institutional competence, deliberative structure, or proactive capabilities."[405]

On a more fundamental level, encouraging the judiciary to mandate judicially determined best practices or aggressively utilize constitutional provisions to achieve social justice beyond the minimum requirements of the constitution would usurp the authority of the electorate to, through their representatives, determine the best means to achieve a constitutionalized policy goal and to determine how much of a benefit beyond the constitutionally-required minimum they wish to confer. Judges, no matter how selected, are not representatives; to the contrary, as has been noted by Justice Scalia, judges do not represent the people but instead represent the law.[406] Justice Ginsburg joins her colleague in this conclusion, observing that judges

> are not political actors. They do not sit as representatives of particular persons, communities, or parties; they serve no faction or constituency. . . . Even when they develop common law or give concrete meaning to constitutional text, judges act only in the context of individual cases, the outcome of

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[402] *See, e.g.*, Hershkoff, *State Courts, supra* note 343, at 1885–90; Pascal, *supra* note 70, at 870; Wiik, *supra* note 75, at 929–31.

[403] *See, e.g.*, Hershkoff, *State Courts, supra* note 342, at 1885–87; Pascal, *supra* note 70, at 870–71 (noting that state constitutions can act as "enabling documents" to aid state judges in addressing social issues, specifically welfare benefits); Wiik, *supra* note 75, at 929–33.

[404] Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1394 (2006).

[405] David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 327 (2008) (emphasis omitted).

[406] Chisom v. Roemer, 501 U.S. 380, 410–11 (1991) (Scalia, J., dissenting).

which cannot depend on the will of the public.[407]

In order to maintain the necessary breathing room for a thriving representative democracy and for separation of powers to be preserved, we should be wary of inviting state judges into a full policy-making role on the basis that they are more democratic than their federal brethren. Ultimately, state court adjudication of positive rights is preferably directed towards "jumpstart[ing]"[408] and spurring legislative action rather than becoming a full-partner in defining best practices as to education, welfare, healthcare, the environment, etc., or stretching positive rights provisions to achieve judicially imposed social justice aims beyond what the constitution requires.

This view is supported through the experience of courts internationally. Such courts have "tend[ed] to interpret affirmative rights in a manner that shifts the determination as to . . . how these rights will be provided to the legislative process."[409] For example, courts in Venezuela and South Africa have found greater, more lasting effect and success through identifying a positive right, providing some limited contour thereto, and directing the legislature to respond.[410] Instead of exercising a classic judicial supremacy command-and-control approach, these courts have found greater effectiveness through "maintaining a constitutional dialogue between the judiciary and legislature."[411] Such an approach has proven to be "an important means of achieving the right balance between judicial intervention and legislative and executive direction of policy."[412] In fact, "[c]ontinental [European] lawyers call such rights 'programmatic' to emphasize that they are not directly enforceable individual rights, but await implementation through legislative or executive action, and through budgetary appropriations."[413] Recognizing the realities of governance and the principles underlying the separation of powers, it is without doubt that the vindication of affirmative rights will "require[] the

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[407] Republican Party of Minn. v. White, 536 U.S. 765, 806 (2002) (Ginsburg, J., dissenting).

[408] *See* Hershkoff, *State Courts*, *supra* note 342, at 1922.

[409] Christopher T. Ruder, Comment, *Individual Economic Rights Under the New Russian Constitution: A Practical Framework for Competitive Capitalism or Mere Theoretical Exercise?*, 39 ST. LOUIS U. L.J. 1429, 1443 (1995).

[410] Wiles, *supra* note 26, at 47–48.

[411] *Id.* at 48.

[412] *Id.*

[413] Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 528 (1992).

participation of the legislative branch to a significant degree."[414] In other words, "[t]he democratically-elected legislature is the branch best able to formulate policy and to determine the allocation of public monies."[415] By "deferring to political decisionmaking for the negotiation and prescription of a remedial implementation plan" courts may better elicit cooperation and defuse resistance.[416] In the context of addressing affirmative rights, judicial management is simply not an attractive or advisable option, so long as an alternative exists.[417] Judicial management simply fails to adequately recognize the constitutional discretion of the legislature as to the means by which to achieve a certain positive right and the fairly broad scope, but not unlimited discretion or meaningless constraint, of what might be reasonably thought to satisfy many affirmative rights.[418]

But the question remains of how a court should address a recalcitrant legislature that fails to employ any, or any reasonable, means to achieve the constitutional mandate at issue. "Although courts may ultimately have to intervene quite decisively, they [should] generally do so only after the government fails to devise a satisfactory solution on its own."[419] Where a legislature fails to respond to judicial encouragement, if a state constitution is to maintain its integrity, then, for affirmative rights provisions, including those for adequate food, clothing, shelter, medical care, old age pensions, etc., compliance must be directed.[420]

These guarantees cannot be allowed to be mere pious statements.[421] Were courts to permit otherwise, the resulting loss to a constitution's standing as the supreme law, its primacy, would be of considerable concern as this is a core function of a constitution. "Primacy is . . . an indispensable element of constitutionalism. Where it is missing, the constitution cannot carry out the task for which it was invented."[422] Its fundamental task is to serve as the

[414] Feldman, *supra* note 231, at 1061.

[415] *Id.*

[416] Peters, *supra* note 211, at 1559.

[417] *See* Saiger, *School Choice*, *supra* note 351, at 966–67.

[418] *See* Doughten, *supra* note 369, at 433.

[419] William J. Nardini, *Passive Activism and the Limits of Judicial Self-Restraint: Lessons for America from the Italian Constitutional Court*, 30 SETON HALL L. REV. 1, 55 (1999); Blanchard, *supra* note 209, at 268–69.

[420] *See* Frank P. Grad, *The State Bill of Rights*, *in* CON-CON: ISSUES FOR THE ILLINOIS CONSTITUTIONAL CONVENTION 30, 55–56 (Samuel K. Grove and Victoria Ranney eds., 1970).

[421] *See id.* at 56–57.

[422] Dieter Grimm, *The Constitution In the Process of Denationalization*, *in* 12 CONSTELLATIONS: AN INT'L J. OF CRITICAL & DEMOCRATIC THEORY 446, 452 (2005).

supreme law that binds and limits the state.[423]

The "distinction, between a government with limited and unlimited powers, is [abolished], if [those] limits do not confine the [persons] on whom they are [imposed]."[424] "The [constitution] is either a [superior], paramount law, unchangeable by ordinary means, or it is on a level with ordinary [legislative] acts, and like other acts, is alterable when the [legislature shall please] to alter it."[425] There is no compromise between the two. In considering these possibilities "[i]f the former part of the alternative be true, then a [legislative] act contrary to the [constitution] is not law: if the latter part be true, then written [constitutions] are [absurd] attempts, on the part of the people, to limit a power, in its own nature illimitable."[426] The framers of "written [constitutions] contemplate them as forming the fundamental and paramount law."[427] The supremacy function of a constitution is subverted where the constitution affords the "[legislature] a practical and real omnipotence, with the [same] breath which [professes] to [restrict] their powers within narrow limits."[428] Under such an errant understanding, a constitution "is [prescribing] limits, and declaring that [those] limits may be [passed] at [pleasure]."[429]

In addition to the violation itself, the consequences of not adhering to the constitution include undermining the rule of law, reducing the status of the constitution in the public's eyes, and setting a dangerous precedent for future governmental violations. Because a constitution "continues to retain the positivistic force of law . . . , if the rule of law is to be valued, the directives of the [c]onstitution must be obeyed, unless and until modified in the manner prescribed . . . or until the system is openly rejected in favor of some new governing structure."[430] In failing to honor constitutional provisions, even difficult ones to enforce such affirmative rights, the public's respect for the constitution is diminished, for "guaranteeing these rights without the prospect of enforcement would result in degrading the efficacy of rights in the

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[423] *Id.*
[424] Marbury v. Madison, 5 U.S. 137, 176–77 (1803).
[425] *Id.* at 177.
[426] *Id.*
[427] *Id.*
[428] *Id.* at 178.
[429] *Id.*
[430] Martin H. Redish, *Political Consensus, Constitutional Formulae, and the Rationale for Judicial Review*, 88 MICH. L. REV. 1340, 1353 (1990).

public consciousness."[431] As Madison noted, allowing violation of a constitution helps to endanger constitutional rights because "once the 'parchment barrier' [is] violated, the government . . . set[s] the precedent for ignoring the Constitution."[432] Simply stated, "it is hardly desirable to have a system in which many constitutional rights are ignored."[433]

Although a court should seek to engage the legislature in remedying a constitutional deficiency, where the court does need to take a more active role due to legislative recalcitrance, there exist practical means of crafting remedial measures that may reduce interference. For example, the court has available remedies that do not require legislatures to adopt wholly novel programs; rather, the court may instead require an expansion or extension of existing programs.[434] Similarly, although the federal constitution does not provide guidance in the interpretation of positive rights, that does not mean that federal law is irrelevant. In interpreting positive rights provisions, state courts should consider national statutory and administrative law.[435] Federal law may establish a floor beneath which state rights to education, environmental protection, welfare, healthcare, etc., cannot fall and may even provide a ceiling preventing the imposition of higher standards, through preempting stricter state controls.[436] Where an interpretation of a state constitutional affirmative right would create a conflict with overriding federal law, the best course of action for the court is to pretermit the state constitutional issue with the case being controlled by the federal law, rather than embracing an unnecessary conflict. In other words, while state courts should not waiver from their duty to confront the legislature where necessary to do so, the court should still seek to limit conflict where doing so is consistent with vindicating the constitutional right at issue or at

[431] James Thuo Gathii, *Retelling Good Governance Narratives on Africa's Economic and Political Predicaments: Continuities and Discontinuities in Legal Outcomes Between Markets and States*, 45 VILL. L. REV. 971, 1027 (2000).

[432] Paul Finkelman, *Intentionalism, the Founders, and Constitutional Interpretation*, 75 TEX. L. REV. 435, 476 (1996) (quoting Letter from James Madison to Thomas Jefferson (Oct. 17, 1788), *in* 11 THE PAPERS OF JAMES MADISON 297 (Charles F. Hobson & Robert A. Rutland eds., 1977)); *see also* Jeffrey Usman, *Non-Justiciable Directive Principles: A Constitutional Design Defect*, 15 MICH. ST. J. INT'L L. 643, 694 (2007)).

[433] Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 443 (2002) (quoting Cass R. Sunstein, *Against Positive Rights, in* WESTERN RIGHTS?: POST-COMMUNIST APPLICATION 225, 228 (András Sajó ed., 1996)); *see also* Usman, *supra* note 432, at 694.

[434] *See* Ryan, *supra* note 348, at 86.

[435] Thompson, *Constitutionalizing*, *supra* note 247, at 173–74.

[436] *Id.*

least immaterial thereto.

VI. CONCLUSION

As interpreted by the United States Supreme Court, the federal constitution protects negative but not positive rights. State constitutions undeniably have charted a different course, constitutionalizing a wide variety of positive rights. For example, state constitutions enshrine rights to a public education, and require the state to act to care for the poor and the disabled and to safeguard the public health and the environment. The interpretation of affirmative rights in state constitutions differs from experiences in interpreting federal constitutional rights both because interpreting state constitutions is a different enterprise than interpreting the federal constitution and because there are differences in interpreting affirmative and negative rights within state constitutions themselves. State courts have utilized a wide variety of approaches to interpret affirmative rights provisions, running the gamut from treating these measures as pure political questions to taking-on an extensive and extremely involved policy-making role in shaping the scope and directing the effectuation of these rights.

Provisions that have been identified as positive rights in scholarly discourse can be grouped into five primary categories in order to offer guidance as to the respective applicable interpretive approach: (1) provisions which merely authorize the state to take action; (2) non-justiciable positive rights provisions; (3) non-self-executing rights; (4) highly specific enforceable provisions; and (5) abstract enforceable provisions. The first four are relatively uncomplicated; the latter is considerably more complex.

As for the latter category, the judiciary's constitutional role requires judges to interpret and enforce affirmative rights provisions. Although the enforcement of such provisions is fraught with difficulties for the judicial branch, positive rights are not simply de jure or de facto political questions but instead enforceable constitutional rights that impose a duty upon the government to act to achieve a particular policy objective. The political branches, however, are significantly better suited to meet the goals constitutionalized as affirmative rights in a manner that will not only be palatable to the political branches themselves but also to the electorate. Separation of powers concerns also warrant deference to the legislature, provided its actions are truly adequately and

sensibly directed towards the achievement of these constitutionalized ends. That does not mean that any asserted or judicially discovered rational basis for adopting the approach utilized by the legislature will be adequate to justify the legislature's approach or that the court should simply ignore the state's failure to achieve its constitutionally mandated objectives. While the court must identify a constitutional failing where it arises, it should leave the initial task of crafting a remedy to the legislature. Only where the political branches are recalcitrant and refuse to adhere to the mandate of the constitution should courts embrace a conflict with the political branches in order to vindicate the constitution. In considering what the constitution requires, the courts should be particularly cautious so as not to over-constitutionalize. The reach of affirmative rights provisions is so expansive (education, welfare, the environment, etc.) that the dangers to representative government from the court pursuing social justice, as opposed to requiring adherence to the minimum standards required by the constitution, are heightened. It would be well-worthwhile for a court confronting what it believes to be a constitutional violation in failing to make the constitutionally necessary efforts to achieve an affirmative right to keep firmly in mind Professor Charles Black's rephrasing of the question before them: "When we are faced with these difficulties of 'how much,' it is often helpful to step back and think small, and to ask not, 'What is the whole extent of what we are bound to do?' but rather, 'What is the clearest thing we ought to do first?'"[437]

[437] Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1114 (1986).