

THE PUBLIC'S MICROPHONE: THE LEGAL FOUNDATION OF AMERICAN PROTESTS AND THE EVOLUTION OF SOCIETY'S MANY VOICES

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I. INTRODUCTION

On the evening of August 11, 2017, a group of approximately 250 people gathered around the University of Virginia campus, carrying torches and chanting, “Blood and soil, you will not replace us”, as they marched toward their hallowed statue of General Robert E. Lee.² These people, a congregation of white supremacist and alt-right members under the “Unite the Right” movement, had come to protest the Charlottesville City Council’s decision to remove the statue from the campus and the Council’s endeavor to disassociate Charlottesville from the Confederate South by renaming the space “Emancipation Park”.³ Importantly, despite the group’s public advancement of hate speech, racism, and violence, under America’s extraordinary First Amendment speech protections, the group maintained a right to nonviolently protest publicly, as did the counter protesters who came to make their intolerance of the Unite the Right movement’s extremist views known.⁴ Among the counter protesters was a group known as Antifa, or anti-fascists, who had come to rival the intimidating show of force demonstrated by the Unite the Right movement, effectively priming the already tense and heated protests like a powder keg.⁵ The Charlottesville protests captured national media attention as America watched with bated breath, aware that the police line was far too small a buffer to peacefully diffuse the situation.

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² MICHAEL CAPEK WITH DUCHESS HARRIS, *THE CHARLOTTESVILLE PROTESTS*, 4 (Alyssa Kregelberg, ed., Abdo Publishing, 2019).

³ *Id.* at 6-7.

⁴ *Id.* at 60-61.

⁵ *Id.* at 48-49.

The worst of the violence came the following morning, resulting in the tragic death of Heather Heyer, after a white supremacist maliciously sped his car into a crowd of steadfastly nonviolent counter protesters.⁶ In response to the tragedy, former President Donald Trump stated, “Yes, I think there’s blame on both sides—” a statement largely condemned for its dismissiveness of an act of terror committed by a white supremacist.⁷ However, though President Trump’s reaction as “mourner-in-chief” was phrased insensitively⁸, it is illustrative of the United States governments’ unique hesitation towards viewpoint discrimination—a hesitation that persists even after a tragedy, even in the wake of hate speech brandished by white supremacists.⁹

In 2015, a Pew Research Center poll reported that 40% of millennials think that the government should be able to suppress hate speech toward minority groups, as is characteristic of other democratic countries, whereas only 12% of Americans born between 1928 and 1945 hold this viewpoint.¹⁰ Establishing a legal standard articulating the suppression of any speech invites a host of difficulties, such as determining protected classes and the arbitrariness and potential abuse of enforcement, especially in a country so ideologically divided along partisan lines.¹¹ Whereas nonviolent protests are an invitation and a challenge to streamline adversarial communications as an open discourse on the betterment of society, government censorship is a suppression of communication, and as such would only reinforce the isolation and ideological schisms between suppressed groups and the rest of society.¹² It is unlikely that direct government censorship of hate speech would lead to increased safety, as the resentment felt by the declarant groups would persist. Such censorship would only increase distrust and discrimination among the suppressed groups.¹³

In the aftermath of Charlottesville, it became clear that the most powerful response to hate speech was more speech and more nationwide

⁶ Samuel Perry, *President Trump and Charlottesville: Uncivil Mourning and White Supremacy*, 8 J. of Contemp. Rhetoric 57, 57-58 (2018).

⁷ *Id.* at 65-66.

⁸ *Id.* at 58.

⁹ *Id.* at 58; David Cole, *Why We Must Still Defend Free Speech*, N.Y. Rev. of Books, 2 -3 (2017), <https://www.nybooks.com/articles/2017/09/28/why-we-must-still-defend-free-speech>.

¹⁰ Cole, *supra* note 7, at 2.

¹¹ *Id.* at 3-4.

¹² *Id.* at 4.

¹³ Nadine Strossen, *HATE: Why We Should Resist It with Free Speech, Not Censorship*, 8 (2018).

conversation. When white supremacists rallied in Boston the week after Charlottesville, they were outnumbered by thousands of counter protesters peacefully protesting in condemnation of hate speech.¹⁴ The overwhelming size and peaceful nature of the Boston protest garnered a clear federal response when Steve Bannon, President Trump's chief strategist at the time, and executive chairman of Breitbart News, denounced white supremacists as "losers" and "a collection of clowns".¹⁵ As the 1965 civil rights marches in Selma, Alabama have taught protesters for decades, the line between civil protest and unlawful violence is and historically has been very thin, but that civility is the linchpin for success in every national movement. Violence only serves to distract and exacerbate the ugliness our society desires to improve from and overcome.

In his December 11, 1964, Nobel Peace Prize address, Martin Luther King, Jr. famously declared, "[Nonviolence] seeks to secure moral ends through moral means. ...[I]t is a weapon unique in history, which cuts without wounding and ennoble the man who wields it."¹⁶ Nonviolence is "the method which seeks to implement the just law by appealing to the conscience of the great decent majority who through blindness, fear, pride, and irrationality have allowed their conscious to sleep."¹⁷

This paper is a historical examination of the impact, effectiveness, and evolution of nonviolent protests, beginning with the American Civil Rights Movement in the 1960s and leading into the modern day. This paper highlights the critical significance and modern difficulties of maintaining open channels of communication between citizens and United States federal and state governments. This paper argues that increasing political polarization is strongly correlated to increasing dependency on social media for news and that polarization ultimately stagnates important legislative progress. To demonstrate the detrimental effects of political polarization and ensuing legislative stagnation, this paper discusses the United States' lagging bipartisan response to the current mass shooting epidemic as a case study. This paper is divided into three distinct sections.

The first section begins with a brief history of the foundational success of nonviolent protests in creating social and legislative reform through the Selma March and the quick passage of the Voting Rights Act of 1965. This section continues with a discussion of the pushback against anti-government protests during the Vietnam War through the lens of the United

¹⁴ Cole, *supra* note 7, at 3.

¹⁵ *Id.*

¹⁶ Martin Luther King Jr., Nobel Peace Prize Lecture: The Quest for Peace and Justice, (Dec. 11, 1964).

¹⁷ *Id.*

States Supreme Court's analysis in *U.S. v. O'Brien* and how subsequent cases have rarely allowed government interests to take precedence over First Amendment speech protections. Next is an examination of the extent of free speech under the First Amendment, exemplified by two cases of inflammatory-yet-protected speech, *Brandenburg v. Ohio* and the similar, contemporary ruling of *Snyder v. Phelps*. This section concludes with a look at the ineffectiveness of court-established buffer zones, exemplified by the removal of buffer zones outside abortion clinics after the Supreme Court's decision in *McCullen v. Coakley*.

Section two of this paper examines the role and influence of media coverage of political protests and how media outlets have adapted as technology has evolved. This section begins with the role of mainstream news media outlets and the difference in coverage between nonviolent and violent protests, as well as an analysis of how an eruption of violence dilutes the overall message and power of the protest's message. This section then compares First Amendment speech protections and established news media with the rise of news dependency from social media, explaining how this drastic change in communication has placed both businesses operating social media platforms and individuals in a position of great power curtailing what political information is consumed online. Next is an analysis of ideological echo chambers increasing in size and quantity as a byproduct of social media's individualized censorship and targeted advertising tools. This section then discusses the United States government's attempt to define and limit censorship from state actors as political speech becomes more commonplace online. This section concludes with a discussion of social media's role in contributing to political polarization and communication breakdowns between Democrats and Republicans.

Section three discusses the continuing political polarization since the election of President Donald Trump and how that polarization hinders a bipartisan solution to the unanimously disliked mass shooting epidemic plaguing the United States in recent years. This section begins with an analysis of how Donald Trump's campaign tactics and Presidency have further polarized Democrats and Republicans by fostering an us-versus-them mentality and dismissing political opponents' stances as fake news. This section then discusses government entities' increasing online presence within social media and how courts have attempted to interpret government-run social media forums as extensions of their respective offices, thereby providing protesters a protective bubble to publicly speak in direct opposition to state actors at the heart of their online presence. This section next turns to an example of private finger-pointing journalism, and discusses how even debunked, falsified speech from a cult-of-personality remains preserved in echo chambers, suggesting that fake news' influences spread far beyond

normal news circulation. This section then analyzes the Democratic and conservative stances on gun control in the wake of the mass shooting epidemic and how breakdowns in bipartisan communications have hindered proper plans of action from being forged, despite much of the proffered action not being mutually exclusive. This paper concludes with the determination that the only way to begin countering political polarization and to reach solutions on mutually agreed evils like the mass shooting epidemic is to communicate as allies searching for an optimal solution, rather than as partisan opponents striving to have the final say.

II. CIVIL RIGHTS MOVEMENT TO THE PRESENT: THE DEVELOPMENT OF FREE SPEECH AND ASSEMBLY LAW IN THE CONTEXT OF PEACEFUL POLITICAL PROTESTS

The rights to freedom of speech and freedom of assembly under the First Amendment¹⁸ are the grand equalizers to the David-versus-Goliath battle that protesters bring before lawmakers. State lawmakers originally argued that the First Amendment only applied to free speech protections against the federal government, as the First Amendment refers only to Congress explicitly.¹⁹ However, through passage of the Fourteenth Amendment in 1868,²⁰ Congress extended First Amendment protections against state lawmakers through the Privileges and Immunities Clause.²¹ Protestors in the United States have a legacy of impressive protections when criticizing state and federal governments, even when compared to modern speech laws in other countries. For example, the United Kingdom recently passed the Counter-Terrorism and Border Security Act of 2019, criminalizing speech and pictures raising a “reasonable suspicion” of extreme anti-government or terrorist ideologies.²² Yet the freedom to speak and freedom to peacefully assemble are not unlimited freedoms under the Constitution.

¹⁸ U.S. CONST. amend. I.

¹⁹ Akhil R. Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 *Yale L. J.* 1193, 1198-99 (1992).

²⁰ U.S. CONST. amend. XIV.

²¹ See Douglas G. Smith, *The Privileges and Immunities Clause of Article IV, Section 2: Precursor of Section 1 of the Fourteenth Amendment*, 34 *San Diego L. Rev.* 809, 901-202 (1997).

²² Counter-Terrorism and Border Security Act 2019 c.3, Available at: <http://www.legislation.gov.uk/ukpga/2019/3/contents/enacted/data.htm> (Accessed April 18, 2022); Index on Censorship, *New UK Counter-Terrorism Law Limits Online Freedoms*, European Digital Rights (Feb. 27, 2019), <https://edri.org/new-uk-counter-terrorism-law-limits-online-freedoms/>.

The right to protest peacefully is restricted by social realities including racism and general prejudices, which have historically challenged protesters to remain civil when their Goliath oppressors would not.

A. The Success of Nonviolent Assembly: The Selma March

Protests have always been an emblematic part of United States history, dating back to the country's founding after the American Revolution, but modern protesters largely credit the Civil Rights Movement of the 1960s for their social and legal roots. As such, perhaps the most important protest was the march from Selma to Montgomery, Alabama, in March of 1965, led by Dr. Martin Luther King, Jr. Iconic for an era stained by tyrannical restrictions of African American citizens' rights, the Selma March was intended to raise awareness of the inability of African Americans to change Alabama state law through the normal democratic processes.²³ Alabama at the time relied on the Supreme Court's ruling in *Giles v. Harris*, grandfathering-in white voting registration before January 1, 1903, while requiring those unregistered, who were mostly African American citizens, to satisfy a subjective and often arbitrary citizenship exam given by election officials.²⁴ In April of 1961, African Americans comprised nearly half of the voting-age population of Dallas County, Alabama, but only 156 African Americans were registered to vote out of the 15,000 that resided in the county.²⁵ Without effective participation in the polls, African Americans in Alabama were underequipped to combat the extreme political power gap between themselves and white citizens, and were further deterred by the often violent, and racist backlash of their oppressors.

What made the Selma March successful was the thin line it maneuvered between the permissible exercise of First and Fourteenth Amendment rights and deliberate civil disobedience. The Selma March was coordinated and executed with estimates of the local and national response.²⁶ The protest leaders, including King, expected that a violent response by Alabama state officials toward a peaceful protest would likely further shift national opinion towards favoring the marchers.²⁷ On March 7, 1965, a group of African Americans declared their 50-mile march to Montgomery. In response the Alabama governor, George Wallace, refused to endorse the

²³ Jack Bass, *The Selma March and the Judge Who Made It Happen*, 67 Ala. L. Rev. 537, 537 (2015).

²⁴ *Giles v. Harris*, 189 U.S. 475, 482–84 (1903).

²⁵ David J. Garrow, *Protest at Selma: Martin Luther King, Jr., and the Voting Rights Act of 1965*, 31 (1978).

²⁶ *Id.* at 39.

²⁷ *Id.* at 229.

march, leading to a confrontation at Selma's bridge between protesters and state troopers.²⁸

Unlike previous incidents taking place in the darkness of night and far away from cameras, the Selma March was stopped during daylight hours when troopers attacked the protestors in public with clubs, gas, and sticks.²⁹ The altercation was filmed and displayed on televisions across the nation, confirming the atrocities Selma protesters faced. This resulted in a federal lawsuit brought in Montgomery to prevent state officials from further interfering with the protest.³⁰ The court considered banning the march until a later date, but realizing that the march would likely continue and stir further violence, the federal court issued an order permitting the march.³¹ Accompanied by a federal escort as they marched to Montgomery, King and his protesters demonstrated the immense power of nonviolent, peaceful assembly to combat firmly ingrained prejudices.³² The Selma March had a significant and rapid impact across the nation, leading quickly to the passage of the Voting Rights Act in 1965, which banned many of the gatekeeping tests used to bar African Americans from voting in state elections.³³

The success of the Selma March in bringing about quick legislative reform through nonviolent assembly is one of the most defining moments of the Civil Rights Movement. The principles of the Selma March, outlined in Martin Luther King's 1963 "Letter in Birmingham Cell", became a foundational standard for nonviolent protests that remains largely unchanged to the present day.³⁴ King's famous writing that "injustice anywhere is a threat to justice everywhere," and that individuals have a duty to combat unjust laws while remaining faithful to just laws, is the primary message of many nonviolent protests seeking support from a national audience.³⁵ But what King's "Letter" and the Selma March emphasized most effectively is that "justice too long delayed is justice denied," stressing to moderates and bystanders than social progress is not simply the result of the passage of

²⁸ Burke Marshall, *The Protest Movement and the Law*, 51 Va. L. Rev. 785, 787 (1965).

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 787-88.

³² See Bass, *supra* note 20, at 537-38.

³³ *Id.*; 52 U.S.C. § 10303(a) (2014).

³⁴ Zeke J. Miller, *Why Martin Luther King Jr. 's Lessons about Peaceful Protests Are Still Relevant*, Time Mag. (Jan. 12, 2018, 4:15 PM), <https://time.com/5101740/martin-luther-king-peaceful-protests-lessons/>.

³⁵ See *id.* Letter from Martin Luther King, Jr. to his fellow clergymen (Apr. 16, 1963).

time.³⁶ If protesters do not take direct action as injustice arises, simply waiting with the hope that the democratic process will settle injustice eventually, true justice will undoubtedly fail.³⁷ Yet while active protests get the attention of lawmakers and courts, powerful national interests may ultimately prevail.

B. Government Pushback Against Free Speech: *U.S. v. O'Brien*

The Selma March helped foster a national desire to maintain the power of the popular vote over government suppression, but with the Vietnam War ushering in selective service lotteries, citizens found themselves sharply divided between supporting the war effort or protesting the lottery as an unjust method of fueling an unjust war. Through his “Why Vietnam?” speech and likeminded propaganda, former President Lyndon Johnson attempted to rally Americans into supporting Vietnam War, claiming the War was necessary to preserve peace and freedom throughout the world from threats of communist oppression.³⁸ Despite former President Johnson’s efforts to revive U.S. morale in the war effort, citizen morale remained low as students publicly and continuously held anti-war protests that greatly diminished the public’s opinion of the War.³⁹ Protests with thousands of participants calling for an end to the war were on television screens across the country, with soldiers notably throwing away service medals as a symbolic expression of their opposition.⁴⁰ Media coverage of the Vietnam War became increasingly negative as stories of atrocities overseas reached the American public, causing many draftees to seriously question just what awaited them once they left the United States.⁴¹

³⁶ Letter from Martin Luther King Jr. to his fellow clergymen (Apr. 16, 1963); Michael C. Leff & Ebony A. Utley, *Instrumental and Constitutive Rhetoric in Martin Luther King Jr.’s “Letter From Birmingham Jail,”* 7 *Rhetoric & Pub. Aff.* 37, 38–39 (2004).

³⁷ Ronald J. Krotoszynski, Jr., *CELEBRATING SELMA: THE IMPORTANCE OF CONTEXT IN PUBLIC FORUM ANALYSIS*, 104 *Yale L.J.* 1411, 1412-13, 1435-1436 (1995).

³⁸ Connor Foley, Comment, *An Analysis of American Propaganda in World War II and the Vietnam War*, United States History Commons, In BSU Honors Program Theses and Projects, Item 90, 49-51 (2015), https://vc.bridgew.edu/cgi/viewcontent.cgi?article=1092&context=honors_proj.

³⁹ *Id.* at 51-52.

⁴⁰ *Vietnam War Protests*, HISTORY (Mar. 30, 2020), <https://www.history.com/topics/vietnam-war/vietnam-war-protests>.

⁴¹ Anup Shah, *Media Propaganda and Vietnam*, Global Issues (Oct. 24,

As a symbolic expression of opposition to the Vietnam War, some draftees publicly burned their selective service registration cards, a violation of the Universal Military Training and Service Act of 1948.⁴² Among such protesters was David Paul O'Brien, who burned his registration card on the steps of the South Boston Courthouse and claimed that the statute prohibiting burning draft cards was an unconstitutional abridgement of free speech serving no legitimate purpose.⁴³ The Supreme Court disagreed with O'Brien, claiming that Congress did have substantial legitimate interests in preventing destruction of the draft cards because the cards serve as proof of draft registry, facilitate communication between registrants and local draft boards, and preservation of the cards prevents fraud.⁴⁴

In so holding, the Supreme Court set a new precedent known as the *O'Brien* test, which allows lawmakers to: create restrictions on symbolic expression if the restriction is (1) within the power of the government to make, (2) furthers a substantial government interest, (3) that interest is unrelated to suppression of free speech, and (4) the restriction extends only as far as necessary to fulfill the government interest.⁴⁵

The *O'Brien* test makes explicit that, if the government has a very substantial justification for restricting First Amendment rights outside of a straightforward desire to restrict speech, then the government has the authority to do so.⁴⁶ In his dissent, Justice Douglas raises his concern that allowing mandatory conscriptions, despite Congress never issuing a declaration of war, implies that the federal government can restrict speech with less than a truly compelling national interest.⁴⁷ The question of whether conscription is permissible absent a declaration of war was not presented before the *O'Brien* Court. However, mandatory service was the issue at the heart of *O'Brien*, and similar draft card burners' protests.⁴⁸ Without properly addressing that issue, the scope of what truly comprises a substantial government interest remains ambiguous under the *O'Brien* test.

O'Brien's holding appears at first glance to grant the government

2003), <http://www.globalissues.org/article/402/media-propaganda-and-vietnam#ThemediaLostTheWarForAmerica>.

⁴² U.S. v. O'Brien, 391 U.S. 367, 370 (1968).

⁴³ *Id.*

⁴⁴ *Id.* at 377-79.

⁴⁵ See *id.* at 376-77; Mark R. Arbuckle, *Vanishing First Amendment Protection for Symbolic Expression 35 Years After United States v. O'Brien*, 25 COMM. & L. 1, 2-3 (2003) (citing U.S. v. O'Brien, 391 U.S. at 376-77).

⁴⁶ See Arbuckle, *supra* note 42 at 3.

⁴⁷ U.S. v. O'Brien, 391 U.S. at 389-91 (Douglas, J. dissenting).

⁴⁸ *Id.*

tremendous power to mute government criticism, but time and future cases have demonstrated the government's difficulty to satisfy the *O'Brien* test without an exceptional government interest. For example, in 1989, the Supreme Court heard *Texas v. Johnson*, one of the many controversial cases involving burning the American flag. In protest to several Reagan administration policies, Gregory Johnson burned an American flag in front of the Dallas, Texas city hall, chanting "America, the red, white, and blue, we spit on you" alongside other protestors, leading to his arrest for desecration of a venerated object in violation of a Texas statute.⁴⁹ Applying strict scrutiny, the Supreme Court found that the protester's First Amendment rights outweighed the government's interests in censoring his antipatriotic disdain for America.⁵⁰ However, symbolic expression has occasionally been restricted in more recent years, such as when a Virginia statute outlawing burning crosses with the intent of intimidating others was upheld by the Supreme Court in 2003.⁵¹ The Court's insistence that the cross burning must be intended to intimidate emphasizes the narrowness of its holding, i.e., without clear intent to intimidate and without a particularly egregious context, such as the "history of impending violence" cross burning entails, symbolic, yet inflammatory speech is likely to be protected under the First Amendment.⁵²

C. The Extent of Protected Free Speech in Protests:
Brandenburg v. Ohio

Inflammatory public speech carries with it many of the same First Amendment protections that less provocative protests carry. However, preventing immediate violence has historically been a valid, albeit narrow, exception from First Amendment protections that can satisfy the *O'Brien* test.⁵³ Despite the Selma March's success and national acclaim, the march also sparked a new breed of nonviolent protests with many inimical roots. Social tides began changing rapidly in the 1960s and many private organizations like the Klu Klux Klan, which faced nationwide vilification, countered with the argument that they, too, possess a right to free speech and nonviolent assembly, even if the underlying speech is hateful and a potential instigator of violence.⁵⁴ Just four years after the Selma March, in *Brandenburg v. Ohio*, the Klu Klux Klan challenged the incarceration of one

⁴⁹ *Texas v. Johnson*, 491 U.S. 397, 399–400 (1989).

⁵⁰ *See id.* at 420; *See also* Arbuckle, *supra* note 42, at 11.

⁵¹ *Virginia v. Black*, 538, U.S. 343, 363 (2003).

⁵² *Id.*

⁵³ *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

⁵⁴ *See Id.* at 446-47.

of their rally leaders under Ohio's Criminal Syndicalism statute, which forbade political speech advocating violence against the state as a purported security risk.⁵⁵

Clarence Brandenburg spoke at a Klan rally broadcast on a national network, claiming that the Klan will march to Ohio's Congress and demand retribution for the Caucasian race, ultimately leading to his arrest for advocating violence to achieve political reform.⁵⁶ Despite Brandenburg's inflammatory speech which alluded to possible "revengeance" being taken against the government for "suppress[ing] the white, Caucasian race," the Supreme Court reversed his conviction, emphasizing that only if the speech rallies imminent lawless action, will the speaker be criminally liable.⁵⁷ Brandenburg's rally employed the same tactic as the Selma March of using mass, nonviolent assembly to get lawmakers' attention, albeit the message was the polar opposite of the earlier Selma March.⁵⁸ *Brandenburg's* holding highlights the American value of combatting speech with speech and minimizing content-based restrictions within First Amendment protections, believing that government censorship of speech solely based upon its content has a chilling effect on open public debate.⁵⁹ The implications of *Brandenburg* span all the way to modern-day America, where society continues to question whether First Amendment protections for inflammatory speech are worth upholding, despite vast quantities of empirical evidence linking long-term effects of hate speech and racist propaganda to violent crimes motivated by such prejudices.⁶⁰

Inflammatory rhetoric and hate speech remain commonplace tactics for some marginalized groups' public protests in modern America. In the last ten years, one of the most infamous groups employing hate speech in protests has been the Westboro Baptist Church. The organization claims to have protested over 40,000 times across America largely in condemnation of America's increasing acceptance of homosexuality.⁶¹ In 2011, the Westboro Baptist Church picketed the funeral of a gay soldier in a public place adjacent

⁵⁵ *Id.* at 447.

⁵⁶ *Id.* at 444–47.

⁵⁷ *Id.* at 446–49.

⁵⁸ *Id.* at 446.

⁵⁹ Geoffrey Stone, *Content-Neutral Restrictions*, 54 *Univ. of Chi. L. Rev.* 46, 47–48 (1987).

⁶⁰ Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 *Va. J. L. & Tech.* 5, 20 (2002).

⁶¹ *Westboro Baptist Church*, S. Poverty L. Ctr., <https://www.splcenter.org/fighting-hate/extremist-files/group/westboro-baptist-church>(last accessed Apr. 6, 2019).

to the funeral ceremony, raising the question of whether First Amendment protections for hate speech could bar a private tort claim of intentional infliction of emotional distress.⁶² The Supreme Court reasoned that, despite the hateful nature of the speech, the content of Westboro's speech related to broad issues of public interest, rather than purely private speech targeted only at the deceased, and was therefore entitled to protection under the First Amendment.⁶³ The Court held that even if Westboro's protest contributed nothing to the public good, the speech occurred lawfully, peacefully, and on public property, and therefore must be shielded from tort liability in the interest of promoting public debate.⁶⁴ While protecting the freedom to publicly debate and criticize is a fundamental American value, many agree with Justice Alito in his dissent, wherein he wrote that "our profound national commitment to free and open debate is not a license for the vicious verbal assaults..."⁶⁵ Perhaps with an adequate buffer zone, Westboro protesters could be heard while a soldier's family could bury its son in relative peace, but striking such a balance has proven more difficult than merely drawing a line in the sand.

D. Public Buffer Zones and *McCullen v. Coakley*

It is said that the purpose of debate is to bring forth the greater truths behind the arguments and examine flaws under a microscope. Participants in debates commonly keep a fixed distance from one another—a no-man's-land ensuring that only the opponent's words and intentions reach the other. For protesters, these no-man's-lands are known as buffer zones, fixed distances away from the protest's opponent, such as a government entity or a private clinic, where protections under the First and Fourteenth Amendments end if the zone is crossed.⁶⁶ The existence of buffer zones presents a very difficult and controversial balancing act for courts between citizens' right to publicly protest, content-neutral government interests including maintaining peaceful order, and preserving the rights of bystanders to freely access public spaces.⁶⁷

⁶² *Snyder v. Phelps*, 562 U.S. 443, 448–49 (2011).

⁶³ *Id.* at 457–58.

⁶⁴ *Id.* at 460–61.

⁶⁵ *Id.* at 463 (Alito, J., dissenting).

⁶⁶ Michael S. Leonard, *Supreme Court Invalidates Massachusetts Abortion Clinic 'Buffer Zone'*, 10 No. 4 Westlaw J. Med. Malpractice 1, 1-2 (2014).

⁶⁷ *Id.*; Nate Nasrallah, *Preventing Conflict or Descending an Iron Curtain? Buffer-Zone Laws and Balancing Histories of Disruption with Free Speech*, 66 Case W. Res. L. Rev. 849, 856 (2016); See *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 772(1994).

No buffer zone laws in recent years have been quite as controversial as those surrounding abortion-clinics at the 35-foot marker. In *McCullen v. Coakley*, the Supreme Court struck down a Massachusetts statute which criminalized protesting beyond the 35-foot buffer zone in front of abortion clinics.⁶⁸ The Court held that the Massachusetts government's interests unconstitutionally overreached against abortion-related speech because the buffer zones were not content neutral.⁶⁹ Yet, even the Justices themselves disagreed about the level of discrimination the state law imposed.⁷⁰ As a result, *McCullen* sparked a national debate about whether abortion clinic buffer zones could meet strict scrutiny standards, justifying discrimination as a means to protect women seeking abortions, and whether the removal of these buffer zones would result in greater success for the picketing protesters.⁷¹

The scientific consensus seems to be that the removal of buffer zones from outside abortion clinics causes women seeking abortions greater emotional stress, but generally does not discourage them from carrying out the abortions or regretting the abortion post-operation.⁷² However, abortion protestors have been successful in delaying many abortions, compared to days when protestors are not gathered outside the clinic. Tammi Kromenaker, executive director of the Red River Women's Clinic in North Dakota, reports that, via security cameras, she has seen intimidated women turn away from the clinic and protestors cheer, but often these women subsequently call to reschedule their abortion appointments.⁷³ The most success the protestors have had, Kromenaker reports, is convincing people who likely didn't want an abortion in the first place from carrying out the procedure.⁷⁴ Detering women on the fence from receiving an abortion is indeed a success for the protest. Yet, from Kromenaker's report and the Bixby Center's study, it appears that, regardless of whether protestors stand 35 feet away or are right outside the door, the effectiveness of their protest remains relatively the same.

⁶⁸ *McCullen v. Coakley*, 573 U.S. 464, 478 (2014).

⁶⁹ *Id.*

⁷⁰ *Id.*; *See Id.* at 497-98 (Scalia, J., concurring).

⁷¹ *Id.* at 478; Kate Pickert, *Why Abortion Clinic Protestors May Not Matter*, Time Mag. (June 26, 2014, 4:24 PM), <http://time.com/2928597/abortion-buffer-zone-protestors/>.

⁷² *Id.*; Diana Greene Foster et al., *Effect of abortion protestors on women's emotional response to abortion*, 87 *Contraception* 81, 87 (2013).

⁷³ Pickert, *supra* note 67.

⁷⁴ *Id.*

III. THE EVOLVING ROLE OF THE MEDIA IN NONVIOLENT PROTESTS

A. News Media Outlets

Media coverage functions as a double-edged sword for most protests. Because televised and textual coverage of a protest can spread its message across the nation over an afternoon, media outlets function as the first impression of a protest on most of the nation's citizens. Many protests succeed or fail in large part by determinations of which media outlet covers the protest, who journalists interview, and levels of authority of the interviewees, among other variables.⁷⁵ An unfortunate reality for many protests meaningful in character but limited in resources, is that without a degree of drama to attract media attention, overall news coverage and discussion of the protest will likely be minimal at the national level.⁷⁶ For example, media outlets largely ignored an anti-pornography protest in Minneapolis until some demonstrators ransacked an adult bookstore.⁷⁷ The difficulty most protesters face is balancing the protest's message through peaceful, legitimate means and inciting just enough drama to attract a large audience without allowing that drama to overshadow the protest's message.⁷⁸

In terms of media coverage, the objective of most protesters is to educate the masses of the importance of the protest and what makes the protest worth supporting. Modern protests often require a self-advertising presence on social media to clarify the protest's objectives. Disinterested mass media coverage can hinder the growth of peaceful protests by either glossing over or failing to cover underlying protest objectives. For example, when covering the peaceful 2006 Los Angeles "Day Without Immigrants" demonstrations, no widely publicized articles gave an in-depth explanation of the many immigration issues that birthed the protest, instead merely giving a basic overview of the House and Senate bills fueling the plight of the protesters.⁷⁹

By contrast, riots and rebellions draw in journalists like moths to flame, generating much higher viewership and more real-time updates than most peaceful protests, even if both protests seek to accomplish similar

⁷⁵ Douglas M. McLeod, *News Coverage and Social Protest: How the Media's Protect Paradigm Exacerbates Social Conflict*, 2007 J. Disp. Resol. 185, 186-88, 191 (2007).

⁷⁶ Bart Cammaerts, *The Mediation of Insurrectionary Symbolic Damage: The 2010 U.K. Student Protests*, 18 Int'l J. Press & Pol. 525, 529-31 (2013).

⁷⁷ McLeod, *supra* note 71, at 185.

⁷⁸ *Id.* at 186.

⁷⁹ *Id.* at 190.

objectives.⁸⁰ Higher viewership does not necessarily equal greater protest successfulness however, as negative press surrounding a protest, especially one resorting to violence, threatens to damage or delegitimize the protest at the price of higher publicity.⁸¹ The “Battle for Seattle” protest outside a WTO assembly received national coverage but risked losing its anti-globalization message when activists blocked intersections and smashed windows, forcing police clad in riot gear to launch tear gas to scramble and dismantle the rallied crowds.⁸² The constant updates from news media sources were not focused on the protest’s anti-globalization message, but rather on the mass chaos in downtown Seattle, referring to the protest as a “riot” or a “crime story.”⁸³

If the anti-globalization protests had remained peaceful, it is more probable that any national coverage would have been focused on the anti-globalization debate, rather than the demonstration’s misdeeds.⁸⁴ However, trends in media coverage of recent protests indicate that some protests, such as the anti-racism Charlottesville protest and the Dakota Pipeline protest, are perceived as “confrontational” by the nature of their topic, rather than as public debate.⁸⁵ Coverage of these protests often immediately depicts the protesters as combative, greatly undermining the meaning of the protests and ignoring the debate over resolving systemic problems, focusing instead on officials’ attempts at keeping the peace.⁸⁶ By contrast, despite drawing enormous attendance, gender-related protests such as the Women’s March are rarely covered by media outlets as confrontational or combative.⁸⁷ Moreover, environmental, healthcare, and immigration protests are generally covered as civil public debates.⁸⁸ Therefore, peaceful protests are better poised to maintain media emphasis on the protest’s message, albeit they may receive less coverage overall. Yet, even without the emergence of violence, preconceived bias greatly affects how media outlets cover and convey a protest to a national audience.

Not only has the quantity of major news media outlets rapidly increased as media technology continues to develop, but the amount of coverage of a single event from different perspectives has also increased

⁸⁰ Cammaerts, *supra* note 72, at 529-531.

⁸¹ *Id.* at 531.

⁸² McLeod, *supra* note 71, at 185-86.

⁸³ *Id.* at 186.

⁸⁴ Danielle K. Kilgo & Summer Harlow, *Protests, Media Coverage, and a Hierarchy of Social Struggle*, 24 *Int’l J. of Press/Pol.* 509, 522 (2019).

⁸⁵ *Id.*

⁸⁶ *Id.* at 522-23.

⁸⁷ *Id.* at 521.

⁸⁸ *Id.* at 521-25.

considerably.⁸⁹ Publication over the internet, rather than by newspaper or broadcast, has drastically decreased the cost of producing and distributing information.⁹⁰ With so many news outlets and personal perspectives available instantly via the internet, individuals may easily choose only to consume information from outlets and perspectives confirming their already-held beliefs.⁹¹ Individuals self-filtering news for consumption is no new trend, as having the opportunity to support some news outlets while ignoring others is an integral effect of press freedoms guaranteed in the U.S. Constitution.⁹² What has changed with news outlets' transition to online space is the massively increased quantity of filtered news individuals are likely to see. Media outlets now advertise constantly across Facebook, Twitter, and other private spaces consumers frequent, even giving consumers the ability to advertise for them via the social media hub's "share" technology.⁹³ Instead of waiting for consumers to walk to a newsstand or watch a certain channel for news, media outlets can now exist directly within the social hubs of their consumers.

This change in the relationship between mass media outlets and their consumers contributes greatly to increased ideological polarization between political ideologies, far more than increased information availability has been able to narrow the divide.⁹⁴ Through its marriage with social media, traditional news media outlets have likewise become increasingly more dependent on the health of their online presence, just as their viewers have. Political articles found on social media are more likely to be strongly opinionated and segregated from opposing viewpoints than those found on the same media outlet's official website.⁹⁵ Similarly, political media outlets have greater exposure and traffic from opposing perspectives on their websites than their presence on social media.⁹⁶

This trend indicates that bipartisan information consumers tend to go directly to the opposing position's news source, rather than passively find

⁸⁹ See Richard R. Lau et al., *Effect of Media Environment Diversity and Advertising Tone on Information Search, Selective Exposure, and Affective Polarization*, 39 Pol. Behav. 231, 234-35 (2017).

⁹⁰ Seth Flaxman et al., *Filter Bubbles, Echo Chambers, and Online News Consumption*, 80 Pub. Op. Q. 298, 298 (2016).

⁹¹ *Id.* at 299.

⁹² U.S. Const. amend. 1.

⁹³ Flaxman *supra* note 85, at 298-99.

⁹⁴ *Id.* at 300.

⁹⁵ *Id.* at 317-18.

⁹⁶ *Id.* at 318.

their articles on social media.⁹⁷ Opposing news outlets therefore remain accessible to interested consumers. However, according to a 2016 survey by the Pew Research Center, approximately 62% of adults in the United States consume news primarily from social medial sites, and subsequent trends indicate that the number of people consuming social media news instead of traditional news media is still increasing.⁹⁸ With increased dependency on sensationalized news and rapid news sharing, comes a substantial rise in fake news—news articles with intentionally false information meant to mislead and emotionally deceive readers.⁹⁹ Fake news is not a new problem, but the near-zero cost of creating social media accounts and lack of reprimand for fake news spreaders suggests that news derived from social media has a considerably higher likelihood of containing bias and falsehoods than traditional news outlets.¹⁰⁰ Traditional news outlets have greater concerns over losing credibility and legitimacy, but still tailor their speech to a narrative allied to their respective viewers, imperfectly combatting disinformation with contrasting misinformation or an incomplete picture.¹⁰¹ As dependence on social media platforms for a primary source for news continues to grow, the mere availability of opposing arguments is not sufficient to stop the growing political ideological divides in America.

B. Social Media: The Personal Media Outlet

With the rise of the Internet Age, the exponentially increased speed, methods, and quantity of information readily accessible to individuals has drastically altered the battlefield for protesters. State-sponsored and privatized mass media outlets are no longer the sole providers of local and national news, as citizens through social media efficiently self-advertise and reach thousands of like-minded individuals in an instant.¹⁰² Social media is

⁹⁷ *Id.*

⁹⁸ Amy Mitchell, *Key findings on the traits and habits of the modern news consumer*, Pew Res. Ctr. (July 7, 2016), <https://www.pewresearch.org/fact-tank/2016/07/07/modern-news-consumer/> ; Kai Shu et al., *Fake News Detection on Social Media: A Data Mining Perspective*, 19 ACM SIGKDD Expl. Newsl. 1, 12 (2017).

⁹⁹ *Id.* at 1.

¹⁰⁰ *Id.* at 1, 3.

¹⁰¹ Jana Laura Egelhofer & Sophie Lecheler, *Fake news as a two-dimensional phenomenon: a framework and research agenda*, 43 *Annals of the Int'l Commc'n. Ass'n.* 97, 102-105 (2019).

¹⁰² Rebecca Kay LeFebvre & Crystal Armstrong, *Grievance-based social movement mobilization in the #Ferguson Twitter storm*, 20 *New Media & Soc'y.* 8, 11 (2018).

a readily available, low-cost tool for activists to combat mass media censorship and plays a fundamental role in instilling rapid social change, especially in more authoritarian regions of the world, such as Tunisia during the Arab Spring.¹⁰³ Social media enables protesters to dilute the risk of bad mass media impressions (for example, coverage of a violent protester deviating from an otherwise peaceful assembly) by speaking openly and directly to viewers across the nation the instant an incident occurs, helping to ensure that the protest's narrative continues to hold credence with their national audience.¹⁰⁴

In 2014, after a grand jury decided not to indict Officer Darren Wilson for killing Michael Brown, an unarmed African American teenager, numerous protests and riots broke out across the United States.¹⁰⁵ At the same time, approximately 6 million messages were sent across Twitter under the banner '#Ferguson,' uniting approximately 1.5 million Twitter users to demand a change in police conduct and the criminal justice system.¹⁰⁶ The national outcry led Ferguson's local government to begin changing its policies to help combat "over-policing" minority communities. Ferguson is a town whose population is 70% African American, but staffs only three African American officers on a police force 53 individuals strong.¹⁰⁷ Congress also took notice of the online discussions and response to Ferguson, leading Congress to question the long-running practice of sending surplus military gear to police departments.¹⁰⁸ Though the surplus policies were designed to increase police-readiness for violent confrontations, the policies also exacerbated antagonistic tensions between police and citizens, especially in cities with demographically segregated populations and high minority populations.¹⁰⁹ Were it not for the nonviolent, nationwide criticisms of police and court powers over social media, the Ferguson riots would likely have overshadowed peaceful attempts of demonstrators and critics to bring about change, the silence perhaps even aiding Congress in justifying militarizing police to effectively prevent riots.

¹⁰³ *Role of the Internet and Social Networks in the Arab Uprisings An Alternative to Official Press Censorship*, 21 *Cumminicar* 147, 148 (2013).

¹⁰⁴ See LeFebvre, *supra* note 97, at 11.

¹⁰⁵ *Id.* at 9.

¹⁰⁶ *Id.* at 9, 16, 23.

¹⁰⁷ Patrik Jonsson, *Ferguson Announces Changes to Policing, Courts to 'Improve Trust'*, *Christian Science Monitor* (Sept. 9, 2014) <https://www.csmonitor.com/USA/Justice/2014/0909/Ferguson-announces-changes-to-policing-courts-to-improve-trust>.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

Though social media has become an interwoven asset of free speech, it has also become one of the most powerful tools for speech censorship. Social media hubs like Facebook and Twitter are private enterprises, despite being used and perceived as public forums for free speech by millions of daily users.¹¹⁰ Because these private social media spaces are not government-run, they are not subject to the same strict scrutiny analysis when attempting to restrict free speech.¹¹¹ Facebook's CEO Mark Zuckerberg has reported that Facebook will ban white nationalism and separatism-related content posts on its website.¹¹² There is no *O'Brien*-tested, narrowly tailored reason Facebook must provide to ban hate speech, as Facebook maintains its right as a private entity to moderate content on its forums. In response to queries about limiting free speech, Facebook leaders say that the restrictions' objective is primarily about safety.¹¹³ Contrasting the Supreme Court's holding in *Brandenburg*, that the speech must be linked to *imminent* violence to be restricted, Facebook is instead pointing to the long-term effects of their website being used by hate groups to radicalize individuals and entice them to commit atrocities.¹¹⁴ In creating this ban, Facebook is acknowledging concerns from nations that ban hate speech, such as India, whose citizens make up about 90% of Facebook users outside the U.S.¹¹⁵

Even though Facebook is attempting to disassociate itself from hate speech groups, Facebook has done far less, and indeed profits from, the rampant spreading of fake, targeted, and potentially malicious political advertising.¹¹⁶ In 2018, the U.S. House of Representatives Permanent Select Committee on Intelligence released a dataset indicating that between 2015

¹¹⁰ Benjamin F. Jackson, *ARTICLE: CENSORSHIP AND FREEDOM OF EXPRESSION IN THE AGE OF FACEBOOK*, 44 N.M. L. Rev. 121, 121 (2014).

¹¹¹ *Id.*

¹¹² Sasha Ingber, *Facebook Bans White Nationalism And Separatism Content From Its Platforms*, NPR (Mar. 27, 2019, 4:33 PM), <https://www.npr.org/2019/03/27/707258353/facebook-bans-white-nationalism-and-separatism-content-from-its-platforms>.

¹¹³ Aarti Shahani, *With Facebook Ban On White Extremism, International Norms Apply to U.S.*, NPR (April 5, 2019, 5:15 PM), <https://www.npr.org/2019/04/05/710313380/facebooks-ban-on-white-extremism-comes-amid-international-pressure>.

¹¹⁴ *Id.*

¹¹⁵ *Id.*; India Penal Code § 295A.

¹¹⁶ Filipe N. Ribeiro et al., *On Microtargeting Socially Divisive Ads: A Case Study of Russia-Linked Ad Campaigns on Facebook*, 19 ACM Digit. Libr., and Transparency, 140, 140 (2019).

and 2017, approximately 3,517 political Facebook advertisements had their origins linked to a Russian propaganda group called the Internet Research Agency.¹¹⁷ Many of these advertisements are designed to be delivered to and only visible by the advertisements' target demographics, exploiting viewers' confirmation biases and eluding other demographics more likely to report the advertisements as fake.¹¹⁸ Most of these advertisements are socially-divisive in nature, meaning that they are designed to provoke and inflame viewers, and are reported to have approximately ten times the view count as typical Facebook ads.¹¹⁹ Facebook's allowance of targeted advertisements as a source of revenue is a reminder that, despite being one of the largest vessels for speech in the Internet Age, Facebook is simultaneously a business with its own self-interests and ambitions. With citizens becoming increasingly dependent on Facebook for news, the United States government could foreseeably declare a need to curtail Facebook's allowance of targeted political advertising, arguing that preventing the spread of malicious, fake political advertising is a substantial state interest.

One potential approach to directing Facebook away from incentivizing targeted falsified political advertisements is to create a narrow extension of the Supreme Court's ruling in *New York Times v. Sullivan*. L.B. Sullivan, an elected commissioner in Montgomery, Alabama, sued several supporters of Martin Luther King, Jr. for libel over an advertisement criticizing the local police for their mistreatment of civil rights protesters.¹²⁰ Despite some factual inaccuracies in the advertisement, the Supreme Court unanimously held that public officials cannot recover damages for defamation relating to official conduct unless actual malice, defined as false information spread knowingly or recklessly, is proven.¹²¹ A natural extension of *Sullivan's* holding would allow defamed officials to file injunctions or seek potential money damages against social media businesses, such as Facebook, who recklessly allow their online platforms, search algorithms, and user data to be used for dispensing maliciously false news in exchange for revenue. However, the greatest flaw with this or any other recovery from the spreading of false news, is that it is indeed a reaction—a response to damage already done. Despite any findings or conclusions a court makes in granting relief to the official, if confirmation bias leads individual users to continue believing what the malicious articles purport, the public official gains little from prevailing in court.

¹¹⁷ *Id.* at 140–41.

¹¹⁸ *Id.* at 140.

¹¹⁹ *Id.* at 140–41, 49.

¹²⁰ *New York Times Co. v. Sullivan*, 376 U.S. 254, 256–58 (1964).

¹²¹ *Id.* at 279–80.

Individual users and groups on social media also possess the ability not just to ignore, but to block and delete the speech of others when it is posted on a forum they retain moderator privileges on, such as a personal feed. The freedom of private users to self-regulate censorship is akin to a powerful buffer zone beyond the restrictions of state-made buffer zones. There are no public rights to access and comment on an individual's private social media page, besides what the platform moderator is capable of censoring. These private buffer zones can be used not only to block hate speech and other egregious forms of commenting, but also to block rational criticism. Whereas in the past, avoiding conflicting opinions was more difficult, social media allows us to easily bubble ourselves in layers of consensus and biased information sources. Consequently, political activists have increased difficulty reaching and persuading individuals not already under the activists' banner, especially those in opposition, resulting in the creation of an unprecedented rise of political echo chambers and the breakdown of bipartisan communication.¹²²

C. Political Activism on Social Media and Political Echo Chambers

Social media and political speech are deeply intertwined, with millions of users logging on every day across the country to raise awareness for, or reply to, local and national issues. Former President Trump's presidential campaign and administrative policies unleashed a plethora of controversial issues which Americans were quick to discuss over their preferred forms of social media. Use of social media in the U.S. has exploded in recent years, with usage increasing by approximately 88% since 2006 for U.S. adults between ages 18–29—many of whom were too young to vote in the 2016 election.¹²³ Older demographics have shown rapidly increased social media activity too, ranging from a 78% increase from U.S. adults between ages 30–49 to a 37% increase in usage for those age 65 or older.¹²⁴

According to the Pew Research Center's 2018 report on social media activism, roughly 50% of Americans state that they have engaged in a form of political or social-minded activity via social media in the last year.¹²⁵

¹²² See Christopher A. Bail et al., *Exposure to opposing views on social media can increase political polarization*, 115 PNAS 1, 5-6 (2018).

¹²³ Lee Rainie, *Americans' complicated feelings about social media in an era of privacy concerns*, Pew Rsch. Ctr. (Mar. 27, 2018), <http://www.pewresearch.org/fact-tank/2018/03/27/americans-complicated-feelings-about-social-media-in-an-era-of-privacy-concerns>.

¹²⁴ *Id.*

¹²⁵ Monica Anderson et al., *ACTIVISM IN THE SOCIAL MEDIA AGE*,

Social media has been especially important for aiding racial and ethnic minority users in finding like-minded activists and expressing political ideologies openly, as well as getting elected officials to listen to social protests.¹²⁶ However, despite the communication boom social media offers to political activists, roughly 77% of U.S. adults believe that social media distracts individuals from more important issues, at least to some degree.¹²⁷ African American and Hispanic social media users report more frequently that social media highlights important underrepresented issues, while White users frequently report that social media distracts from more important issues.¹²⁸

The Pew Research Center's report indicates that politically active social media users, and not merely political extremists, push opposing or unrelated activists away, labeling them distractions from worthier causes. Selective exposure and confirmation biases acting as filters on the content an internet user experiences highlights why so many U.S. adults see ideologically distant protests as mere distractions. When an activist is interconnected with thousands of like-minded individuals via social media and is praised for his or her input on a controversial issue, essentially it is as if the activist is centerstage in a filled coliseum, receiving applause from countless attendees. With such reassuring feelings of correctness and authority, confirmation bias dilutes outside issues as distractions from "what's truly important."¹²⁹

1. Echo Chamber Polarization Impacting the Marketplace of Ideas

While social media has become an integral forum for protests to grow peacefully, social media has also negatively impacted protest effectiveness through by-product echo-chambers, where radical ideas find unopposed justification despite flawed logic. Studies indicate that most of an internet user's experiences online are subject to that user's selective exposure and confirmation bias—that is, users are more likely to expose themselves to information that reinforces already established viewpoints.¹³⁰ In other words,

Pew Rsch. Ctr. (July, 11, 2018), <http://www.pewinternet.org/2018/07/11/public-attitudes-toward-political-engagement-on-social-media/>.

¹²⁶ *See Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Elanor Colleoni et al., *Echo Chamber or Public Sphere? Predicting Political Orientation and Measuring Political Homophily in Twitter Using*

studies indicate that individuals tailor their social media feeds to largely conform with their already-established beliefs.¹³¹ Internet echo chambers arise when individuals create homogeneous forums which limit ideological exposure only to what is agreeable within that chamber's worldview, escalating confirmation bias by the absence of opposition.¹³² Unchallenged ideological stagnation dampens the effect of cries for immediate activism to address civil rights issues beyond the scope of the echo chamber's worldview.

Overexposure to like-minded people in echo chambers is often associated with the adoption of more unflinching, extreme political views, starkly contrasting most general media coverage and typical political opinions.¹³³ Political discussion through social media tends to arise over controversial public issues where journalists or other users have brought the topic forward, forming a chain of commentary directly attached to the coverage piece itself, rather than appearing only in spaces reserved as dedicated political forums.¹³⁴ The way individuals respond to political debates through social media has shown to differ between the two primary political parties in America, but both have habits that tend to exacerbate political polarization.

Political polarization, according to Elanor Colleoni's 2014 study, is more pronounced among active followers of official partisan social media accounts than the general public.¹³⁵ Overall however, as social media usage increases, political polarization is becoming more commonplace in the general public.¹³⁶ Based upon their Twitter activity, Democrats are less likely than Republicans to follow official partisan accounts, but Democratic discourse is ten times more likely to appear in Democratic users' general conversations.¹³⁷ By contrast, the level of ideological uniformity among Republican followers of official partisan accounts is considerably higher than respective Democratic followers, but Republicans are less likely to express their ideas about controversial issues in general conversations across online forums.¹³⁸ Whereas Democratic discussion over social media is ten times that of similar Republican discussion, Republicans are more strongly organized and likely to be followers of official partisan accounts, indicating that echo

Big Data, 64 J. Commc'n. 317, 318-19 (2014).

¹³¹ *Id.*

¹³² *Id.* at 319.

¹³³ *Id.*

¹³⁴ *Id.* at 325.

¹³⁵ *Id.* at 328.

¹³⁶ *See Id.* at 328-29.

¹³⁷ *Id.* at 325.

¹³⁸ *Id.* at 325, 328.

chambers form differently between the two parties.¹³⁹ Democratic echo-chambers more easily find ideological confirmation *en masse* by assuming consensus in an overwhelming amount of political discussion online, while Republican echo-chambers emerge as alleged safe-zones for what is deemed radical conservative discourse by the more numerous Democratic users.

In either case, protests, legislation, and social movements are stifled by echo chambers, as encouraging individuals unwilling to acknowledge opposing viewpoints to embrace alternatives is an incredibly difficult challenge. Reluctance to listen, fostered by contempt for opposition, is a key component of the increasing political polarization in America, and without active efforts from both political parties to communicate amicably with one another, America is likely to continue politically polarizing.¹⁴⁰ Such polarization delays and enfeebles America's democratic process, which has vastly increased protesters' and lawmakers' difficulty resolving contemporary issues with a unified, bipartisan plan.

Despite these impediments to bipartisan communication, American jurisprudence fosters a "marketplace of ideas" at the very source of online political discussions across social media platforms, often creating a small buffer zone between echo chambers and the speech of state leaders.¹⁴¹ Influence from John Stuart Mill's theory that truth is best separated from falsehoods when ideas compete free from censorship is apparent from the United States' promotion of "internet freedom" and First Amendment protections against viewpoint discrimination underlying state action.¹⁴² These censorship restrictions preserve a free market of ideas within state actors' presence on social media, exhibiting a readily observable mapping of Mill's theory in government-controlled online spaces. Twitter, for example, publicly displays how many favorites and shares every post and every comment to that post has accrued. Many political leaders in the United States have increasingly been using Twitter and similar platforms as a quick and direct means of speaking out to the American population.¹⁴³ As social media

¹³⁹ *Id.* at 325.

¹⁴⁰ Michael Dimock et al., *Political Polarization in the American Public*, Pew Res. Ctr. (Jun. 12, 2014), <https://www.people-press.org/2014/06/12/political-polarization-in-the-american-public/>.

¹⁴¹ David Schultz, *Marketplace of Ideas*, The First Amend. Encyclopedia, <https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas> (last updated June 2022).

¹⁴² *Id.*; Clay Shirky, *The Political Power of Social Media - Technology, the Public Sphere, and Political Change*, 90 *Foreign Aff.*, 28, 30 (2011).

¹⁴³ Michael Bossetta, *The Digital Architectures of Social Media: Comparing Political Campaigning on Facebook, Twitter, Instagram, and*

continues to become an integral form of state speech, one can see in real time the comparable popularity of state speech, as well as the popularity of its praise and criticisms with minimal censorship.

In the years leading up to the 2016 presidential election of Donald Trump, the United States Supreme Court vocalized the importance of preserving the marketplace of ideas.¹⁴⁴ One notable case is *Reed v. Town of Gilbert*, wherein the Arizona town of Gilbert placed dimensional restrictions on political and religious signs.¹⁴⁵ In ruling that the content-based discrimination of the town's ordinance was unconstitutional, Justice Breyer wrote in his concurrence,

whenever government disfavors one kind of speech, it places that speech at a disadvantage, potentially interfering with the free marketplace of ideas and with an individual's ability to express ideas determining what kind of society that individual wishes to live, help shape that society, and define his place within it.¹⁴⁶

Justice Breyer's concurrence supports the principle that a free market of ideas is a critical asset to a healthy democracy, no matter what medium the speech takes.¹⁴⁷

Reed and similar First Amendment cases permit political criticism and protests to exist where they matter most—as a direct, easily viewable response to official state action directly upon the state actor's official social media account. Without such protections against government censorship, such criticism could only remain published within echo chambers with largely redundant viewership, diminishing the marketplace of ideas. Emulating the marketplace's democratic philosophy that the most popular idea wins the day, social media platforms are designed to prioritize popular speech though publishing that speech as a trending phenomenon, further increasing new incoming praises and criticisms.¹⁴⁸ However, visibility based upon popularity reveals the double-edged nature of the marketplace of ideas in an online political setting. Lengthy, well-documented research often finds

Snapchat in the 2016 U.S. Election, 95 *Journalism & Mass Comm'n.* Q. 471, 472 (2018).

¹⁴⁴ Schultz, *supra* note 136.

¹⁴⁵ *Reed v. Town of Gilbert*, 135 S.Ct. 2218, 2224 (2015).

¹⁴⁶ *Id.* at 2234 (Breyer, J., concurring).

¹⁴⁷ Schultz, *supra* note 136.

¹⁴⁸ Sitaram Asur et al., *Trends in Social Media: Persistence and Decay*, 5 *Fifth Int'l AAAI Conf. on Weblogs and Soc. Media* 434, 434 (2011).

itself less viewed than quick, satirical anecdotes from cults of personality.¹⁴⁹

The near-ubiquity of sensationalized, biased news, coupled with rising trends of viewers avoiding criticism, reveals that there is great difficulty discerning truth from dramatic-yet-popular propaganda, and that it is more difficult than previously assumed for legitimate news to prevail over falsified news.¹⁵⁰ Overall, political advertising across digital platforms rose from 1.7% of ad spending in the 2012 election cycle to a 14.4% share in 2016 for both local and national elections.¹⁵¹ Increased distrust of opposing Democratic and Republican news sources became a hallmark of the 2016 presidential race and the Trump Presidency, exacerbating political tensions between the parties.¹⁵²

IV. THE TRUMP-ERA

A. Success in Maintaining First Amendment Protections Across Social Media

Former President Donald Trump, even before being inaugurated, has been the focal point of one of the largest battles over truth in United States history. Former President Trump on Twitter and during press conferences personally rejected many news sources painting his administration in a less than stellar light as an attempt by Democrats to diminish his accomplishments.¹⁵³ Trump's crusade against sources of alleged fake news strikes many as a political witch hunt, as Trump attempted to vilify his political opponents, most notably presidential candidate Hillary Clinton.¹⁵⁴

¹⁴⁹ See Jeff Grabmeier, *Not Just Funny: Satirical News has Serious Political Effects*, ScienceDaily (Jan. 23, 2017), <https://www.sciencedaily.com/releases/2017/01/170123115741.htm>.

¹⁵⁰ See Lili Levi, *Real Fake News and Fake Fake News*, 16 First. Amend. L. Rev. 232, 233-37 (2017); Philip M. Napoli, *What If More Speech Is No Longer the Solution: First Amendment Theory Meets Fake News and the Filter Bubble*, 70 Fed. Commc'n. L.J. 55, 59 (2018).

¹⁵¹ Michael Bossetta, *The Digital Architectures of Social Media: Comparing Political Campaigning on Facebook, Twitter, Instagram, and Snapchat in the 2016 U.S. Election*, 95 Journalism & Mass Commc'n. Q. 471, 472 (2018).

¹⁵² John Gramlich, *Q&A: How Pew Research Center evaluated Americans' trust in 30 news sources*, Pew Rsch. Ctr. (Jan. 24, 2020), <https://pewrsr.ch.208F7Tp>.

¹⁵³ David Jackson, *Trump blames Democrats for wave of claims*, USA TODAY (Int'l Ed.), Dec. 14, 2017, at 3A.

¹⁵⁴ Heidi M. Przybyla, *Clinton, Trump swap accusations of putting country in danger*, USA TODAY (US Ed.), Sept. 20, 2016, at 2.

Trump's campaign rallies were infamously more evocative against Clinton than focused on the structure of his future policies, with Trump himself leading chants of "Lock her up!" even long after securing the presidency.¹⁵⁵ Trump's rallies enticed right-leaning media to repeatedly portray Clinton as a criminal due to her leaked emails, purposely disregarding Clinton's multiple exonerations in 2015 and 2016.¹⁵⁶

Despite Trump's fake news accusations not always being justified and often being hypocritical, Trump shed light on America's inability to learn from past incidents where misinformation and propaganda effectively spread falsehoods as evidentiary truths.¹⁵⁷ But while awareness of potential fake news is enlightening, Trump's demagogical approach to lime-lighting fake news fostered an us-versus-them mentality hindering bipartisan communication.¹⁵⁸ Declaring information fake news because it is adversarial to the declarant's worldview encourages the opposite party to do much the same. As *Time Magazine* reports, the only thing Republicans and Democrats seem to agree on these days is that the other party is brainwashed.¹⁵⁹

1. Government Speech in Online Spaces: The Knight Cases and Implications

Prior to Donald Trump's time in office, courts had largely left questions of government use of social media unanswered.¹⁶⁰ Government presence on social media became much more controversial when former President Trump's personal Twitter account became closely associated with official state action, especially when the former president made executive announcements such as his administration's ban on transgender people

¹⁵⁵ Emily R. Anderson, *The narrative that wasn't: what passes for discourse in the age of Trump*, *Media, Culture & Soc'y* 1,9 (2019).

¹⁵⁶ *Id.* at 6.

¹⁵⁷ Anya Schiffrin, *DISINFORMATION AND DEMOCRACY: THE INTERNET TRANSFORMED PROTEST BUT DID NOT IMPROVE DEMOCRACY*, 71 *J. Int'l Aff.* 117, 117 (2017).

¹⁵⁸ Paul Elliott Johnson, *The Art of Masculine Victimhood: Donald Trump's Demagoguery*, 40 *Women's Stud. in Comm'n.* 229, 231-232 (2017).

¹⁵⁹ Charlotte Alter et al., *Pro-Trump, Anti-Trump Protesters Agree: The Other Side as Brainwashed*, *FORTUNE*, (July 18, 2016, 8:04 PM), <https://fortune.com/2016/07/18/pro-trump-anti-trump-protesters-agree-the-other-side-has-been-brainwashed/>.

¹⁶⁰ Samantha Briggs, *The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine*, 52 *Colum. J.L. & Soc. Probs.* 1, 1, 6-7 (2018).

participating in U.S. military service.¹⁶¹ Despite the then-sitting president speaking in his official capacity, the online space his speech occupied originated as a private account in the domain of a private corporation.¹⁶² This leaves courts with the difficult question of whether blocking another Twitter user from seeing or interacting with the president's speech simply by using banning tools available to every Twitter user an unconstitutional violation of that user's First Amendment rights to political participation in the public forum.¹⁶³ At first glance, it appeared clear that the president, while overtly acting in his official capacity, engaged in unlawful viewpoint discrimination when blocking critical political speech on his Twitter page.¹⁶⁴ In *Knight First Amendment Institute v. Trump*, the New York Southern District Court determined that, while the president does have the right to ignore criticism, he does not have the right to outright block users on social media.¹⁶⁵ Blocking prevents users from seeing and replying to official government messages, and is thus a violation of those users' First Amendment rights to speak and be heard free of government censorship.¹⁶⁶ *Knight's* holding was affirmed 3-0 by the United States Court of Appeals, Second Circuit.¹⁶⁷

However, in *Biden v. Knight First Amendment Institute At Columbia University*, the United States Supreme Court vacated the previous *Knight* judgment and remanded the case to the Second Circuit with instructions to dismiss the case as moot.¹⁶⁸ In his concurrence, Justice Thomas addresses the difficulty of determining what is truly a state-controlled, public forum within the purview of a state agent's social media presence, evidenced by Twitter's ultimate authority and decision to permanently remove the then-president's Twitter account for violations of Twitter's terms of service.¹⁶⁹ "Any control Mr. Trump exercised over the account greatly paled in comparison to Twitter's authority, dictated in its terms of service to remove the account 'at any time for any or no reason'" Justice Thomas writes.¹⁷⁰

¹⁶¹ *Id.* at 3-4.

¹⁶² *Id.* at 29.

¹⁶³ *Id.* at 5-6.

¹⁶⁴ *Id.* at 12-13.

¹⁶⁵ *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 302 F.Supp.3d 541, 575-77 (2018).

¹⁶⁶ *Id.*

¹⁶⁷ *Knight First Amend. Inst. at Colum. Univ. v. Trump*, 928 F.3d 226 (3rd Cir. 2019).

¹⁶⁸ *Biden v. Knight First Amend. Inst. at Colum. Univ.*, 141 S.Ct. 1220 (Mem), 209 L.Ed.2d 519 (2021).

¹⁶⁹ *Id.* at 1222.

¹⁷⁰ *Id.*

The unilateral authority of social media providers to ban is seldom invoked against government authorities, yet that unilateral authority hangs over every user, President or otherwise. Justice Thomas notes that “when a platform’s unilateral control is reduced, a government official’s account begins to better resemble a government-controlled space.”¹⁷¹ Multiple avenues exist that could make that reduction in unilateral authority a reality in the future. The legislature could enact a public accommodation doctrine creating restrictions on removing government accounts or digital platform regulations, like those binding common carriers, such as telephone companies, to service the general public.¹⁷² In addition to possible legislative action, circumstantial doctrines could enable courts to prohibit unilateral speech bans in digital spaces, such as if the ban was the result of coercion from another government entity.¹⁷³

However, Congress has yet to pass any such public accommodation doctrine, and the *Knight* Court failed to identify any existing regulation that limited Twitter’s authority to ban former President Trump’s Twitter due to it being a government-controlled space.¹⁷⁴ As Justice Thomas concludes “[I]f the aim is to ensure that speech is not smothered, then the more glaring concern must perforce be the dominant digital platforms themselves...the extent to which that power matters for purposes of the First Amendment and the extent to which that power could lawfully be modified raises interesting and important questions.”¹⁷⁵ Justice Thomas’s discussion of social media giants’ unilateral authority over digital spaces appears likely to influence court and legislative deliberations on the matter in the coming years, but only time will tell if those regulations will keep pace with the ever-evolving digital landscape.

It is important to remember that, while the *Biden* Court calls into question the public nature of the place, the content of the speech, i.e. the then-president speaking in his official capacity, was never disputed. Additionally, the *Biden* Court does *not* hold that government spaces in social media cannot be public forums with First Amendment protections. Instead, Justice Thomas’s concurrence explains that there are additional elements that need to be addressed, namely the unilateral power of social media providers, but that the case at issue is nonetheless moot.

How much weight courts should give to this element has not yet been determined. Allowing government entities to ban protesters’ speech based on

¹⁷¹ *Id.* at 1225.

¹⁷² *Id.* at 1223, 1226.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 1225-226.

¹⁷⁵ *Id.* at 1227.

viewpoint discrimination without a narrowly tailored and significant prevailing government interest would greatly strip protesters of one of the quickest, most publicly viewed, and most easily accessible methods of directly interacting with government entities on social media.¹⁷⁶ Speech through social media platforms is a staple form of instant communication in today's world. Allowing government officials to delete speech adverse to their state action without a prevailing interest, and merely on the premise that the government's social media presence is technically private, removes a key avenue for constructive criticism and encourages elected leaders to ignore such criticism, potentially leading to government-run echo chambers.

Knight's holding may have been vacated and dismissed as moot, but other courts of appeals have reached similar holdings that have not been overturned. In *Davison v. Randall*, the Fourth Circuit Court of Appeals held that a state agent's Facebook page constituted a public forum, and the state agent engaged in unconstitutional viewpoint discrimination when banning Davison for expressing disapproval for the funding and management of local public schools.¹⁷⁷ Unlike in *Knight*, the claim that Facebook is a private website, and thus not a public forum, was raised. The Fourth Circuit notes that "the Supreme Court and lower courts have held that private property, whether tangible or intangible, constituted a public forum when, for example, the government retained substantial control over the property under regulation or by contract."¹⁷⁸ Social media user-agreements are contracts between the user (private individual, president, or otherwise) and the social media provider articulating the terms of service and grounds for service termination.

The Fourth Circuit held that the Facebook page was "clothed in the trappings of [the state agent's] public office," and that the state agent exercised "complete control" over the Facebook page.¹⁷⁹ Combined with Justice Thomas's concurrence in *Biden*, the missing element for future cases appears to be, put simply: How much weight should be attributed to the ultimate authority of the social media provider's ability to interfere with government spaces? In situations like *Davison*, the answer appears to be minimal weight relative to the overt viewpoint discrimination and suppression of speech on important matters of public concern on a webpage inviting public commentary. In addition to the Fourth Circuit, the Fifth Circuit of Appeals held that a Facebook page run by the Hunt County

¹⁷⁶ See *Knight First Amend. Inst. at Colum. Univ.*, 302 F. Supp. 3d at 557-58; U.S. Const. amend. I.

¹⁷⁷ *Davidson v. Randall*, 912 F.3d 666, 688 (4th Cir. 2019).

¹⁷⁸ *Id.* at 683.

¹⁷⁹ *Id.* at 683-84.

Sheriff's Office which expressly stated that it is "not a public forum" is in fact a public forum because it is a space maintained by public officials inviting public commentary, and thus the officials maintaining the page are prohibited from banning commentary based upon viewpoint discrimination.¹⁸⁰

These appellate court holdings suggest that, despite social media forums technically being private entities, if the accounts are held by public officials and used to discuss or announce official policies, those forums should be treated as public forums. While the appellate courts do not analyze the social media provider's apparent unilateral authority when defining government-maintained online spaces as public forums, they do thoroughly analyze what facets of the online spaces the government entities *do* control. Even with the proverbial sword of Damocles hanging overhead, viewpoint discrimination by state authorities acting in official capacities remains a more immediate, apparent threat to lawfully protesting citizens. If the courts overturn these decisions, ruling instead that government-run online spaces remain private due to the unilateral authority of the private provider, protesters will lose a quick, inexpensive-yet-effective communication medium with a national audience on matters of important public concern. Such a ruling runs contrary to the litany of First Amendment cases protecting against viewpoint discrimination, and merely on the ambiguous premise that a social media provider could intervene, if it wanted to.

As further studies emerge correlating frequent online hate speech to imminent violence, exceptions to these holdings could emerge where the threat of speech encouraging violence could prevail over the protections of the First Amendment. However, the Court's analysis in *Brandenburg v. Ohio* demonstrates how difficult the correlation between hate speech and *imminent* violence is to establish. Without an abundantly clear tie between the two, the government would merely be attempting to censor the speech for the purpose of censoring free speech, something the *U.S. v. O'Brien* holding prohibits.

2. *Infowars and Sandy Hook Commentary*

While cases restricting government activity online have vast roots and precedent arising from decades of First Amendment litigation prior to the Internet Age, speech-related suits against private actors online are a relatively novel concept in need of guidance from the courts.¹⁸¹ Communication

¹⁸⁰ *Robinson v. Hunt County, Texas*, 921 F. 3d 440, 447-50 (5th Cir. 2019).

¹⁸¹ Manav Tanneeru, *Can the law keep up with technology?*, CNN (Nov. 17, 2009, 10:08 AM), <http://www.cnn.com/2009/TECH/11/17/law.technology/index.html>.

technology and speech in modern times are outpacing the law.¹⁸² Defamation cases arising from mass broadcasts by private individuals, for example, are still in the process of setting boundary lines for protected speech, questioning if such a boundary should even be set.¹⁸³ One highly discussed and ongoing conflict of this type is the series of lawsuits brought by the parents of the victims of the Sandy Hook Elementary shooting in 2012 against Alex Jones and his business, Infowars, LLC. The victims' parents brought several lawsuits against Mr. Jones and Infowars for intentional infliction of emotional distress ("IIED") and defamation in response to multiple broadcasts wherein Mr. Jones called the Sandy Hook shooting a hoax "as phony as a three-dollar bill" and attempted to disprove its occurrence.¹⁸⁴

Mr. Jones's speech never identifies the victims or their parents by name, raising the question of whether a plaintiff can bring an IIED or defamation claim without being individually identified by the defaming statements.¹⁸⁵ Mr. Jones made the statements about Sandy Hook's shooting knowing that his accusations are false, but asserts that the statements are "rhetorical hyperbole" and therefore are not "of and concerning the plaintiff" to an extent actionable.¹⁸⁶ However, the Texas Appellate Court determined that the parents of the Sandy Hook victims are a very limited class of potential plaintiffs and readily identifiable from Mr. Jones's statements, resulting in a denial of Mr. Jones's Motion to Dismiss.¹⁸⁷

In November of 2021, the Connecticut Superior Court ruled that Mr. Jones defaulted by refusing to relinquish documents per the Court's order regarding whether Mr. Jones's companies profited from publishing the false claims at the center of the Sandy Hook defamation lawsuits.¹⁸⁸ In 2022, the

¹⁸² *Id.*

¹⁸³ See Crystal Revilla, *As Social Media Continues to Evolve, Online Defamation Laws Remain Stagnant*, FIU L. Rev. (Apr.17, 2017), <https://law.fiu.edu/2017/04/17/social-media-continues-evolve-online-defamation-laws-remain-stagnant/>.

¹⁸⁴ *Jones v. Lewis*, No. 03-19-00423, 2019 WL 5090500, at *1, *7 (Tex. Ct. App. Oct. 11, 2019).

¹⁸⁵ *Id.* at *3.

¹⁸⁶ *Id.*; Associated Press, *Alex Jones to pay \$100,000 in Sandy Hook case, judge rules*, NBC NEWS (Dec. 31, 2019, 1:14 PM), <https://www.nbcnews.com/news/us-news/alex-jones-pay-100-000-sandy-hook-case-judge-rules-n1109096>.

¹⁸⁷ *Jones*, 2019 WL 5090500, at *4.

¹⁸⁸ *Connecticut judge finds Jones liable in lawsuit over school shooting denial*, Reuters (November 15, 2021, 7:30 PM), <https://www.reuters.com/world/us/conspiracy-theorist-jones-found-guilty->

families of the Sandy Hook victims promptly rejected a settlement offer from Mr. Jones and the Connecticut Superior Court found Mr. Jones in contempt of court until he complies with court orders to appear for a deposition.¹⁸⁹ The victims' families continue to pursue defamation lawsuits against Mr. Jones following the dismissal of a Chapter 11 bankruptcy filed by Mr. Jones's holding companies amid allegations that the bankruptcy was filed as a "sinister" attempt to shield Mr. Jones's assets from the defamation lawsuits.¹⁹⁰ Additionally, the father of one of the Sandy Hook victims previously won a separate defamation lawsuit against authors of a book claiming that the shooting never occurred.¹⁹¹ Yet despite these victories, naysayers continue to harass the families of the victims, illustrating the stagnation, durability, and longevity ideological echo chambers can foster.¹⁹² The actionability of these claims raise important questions for future litigation of how limited a class of unidentified plaintiffs must be and to what extent the defaming speech's medium and view count plays a role.

The infamy of Mr. Jones's case is largely the product of what his business, Infowars, LLC, and their respective broadcasts purport to be: a hub for United States and world news tailored for politically conservative ideologies. Articles appearing on the main page of Infowars's website are styled to be aggressively accusatory and inflammatory, demonizing political opponents and naysayers.¹⁹³ Despite Infowars's general infamy and Alex Jones testifying that some of the stories he broadcasts are false, Infowars continues to have an avid, national following in the United States, albeit with a gradual decline in popularity.¹⁹⁴ Infowars and Mr. Jones are an extreme

by-default-us-school-shooting-defamation-2021-11-15/.

¹⁸⁹ Barbara Goldberg, *Alex Jones found in contempt of court in Sandy Hook lawsuit*, Reuters (March 30, 2022, 4:43 PM), <https://www.reuters.com/world/us/lawyers-infowars-host-sandy-hook-school-shooting-families-head-back-court-2022-03-30/>.

¹⁹⁰ Maria Chutchian, *Alex Jones' InfoWars agrees to dismiss bankruptcy*, Reuters (June 2, 2022, 6:17 PM) <https://www.reuters.com/legal/litigation/alex-jones-infowars-agrees-dismiss-bankruptcy-2022-06-02/>.

¹⁹¹ Pat Eaton-Robb, *Newton parents score a win in growing fight against hoaxers*, PBS NEWS HOUR (June 18, 2019, 9:56 AM), <https://www.pbs.org/newshour/nation/newtown-parents-score-a-win-in-growing-fight-against-hoaxers>.

¹⁹² *Id.*

¹⁹³ INFOWARS, <https://www.infowars.com/> (last visited Jan. 18, 2020).

¹⁹⁴

similarweb, *infowars.com*, <https://www.similarweb.com/website/infowars.co>

case of the power of biased journalism and fake news, but they are not an uncommon example of the extent biased or falsified news influences viewers unwilling to seek second opinions from differing sources.¹⁹⁵ Infowar's finger-pointing journalism and its zealous following mark an important example of the influence private media sources have when leading discussions and the great difficulty of overcoming political polarization on highly sensitive political issues in the United States.¹⁹⁶ The polarizing nature of sensationalist journalism and analogous us-versus-them political strategies severely deteriorate efforts for the nation to come together to solve even mutually-agreed crises, notably the mass shooting epidemic that has surged in recent years.

B. Gun-Control Protests: Contemporary Hurdles of Political Polarization

Numerous protests have arisen since Donald Trump took office in 2016, but few have been as nationally captivating and divisive as the protests surrounding the sale and possession of firearms during the recent surge of mass shootings. Mass shootings, defined as shootings where four or more people excluding the shooter are killed¹⁹⁷, continue to be a growing epidemic in the United States because the federal government continues in its reluctance to secure a bipartisan solution to the problem.¹⁹⁸ In only 18 years, the 21st century has more reported mass shooting casualties than the entire 20th century.¹⁹⁹ The total number of mass shootings increased by 41%, from a total of 417 mass shootings in 2019 to another 592 mass shootings through

m (last visited Jan. 18, 2020).

¹⁹⁵ See Joshua DeLung et al., *Proximity and Framing in News Media: Effects on Credibility, Bias, Recall, and Reader Intentions*, 2 *Journalism and Mass Comm'n.* 748, 749-50 (2012).

¹⁹⁶ *Id.*

¹⁹⁷ Adam Lankford, *Public Mass Shooters and Firearms: A Cross-National Study of 171 Countries*, 31 *Violence and Victims*, 1,5 (2016).

¹⁹⁸ Aaron Smith, *Eight Years After Sandy Hook, Mass Shootings Are Up, But Federal Gun Control Remains the Same*, *Forbes* (Dec. 11, 2020, 7:01 AM), <https://www.forbes.com/sites/aaronsmith/2020/12/11/eight-years-after-sandy-hook-mass-shootings-are-up-but-federal-gun-control-remains-the-same/?sh=1e83889a5a34>.; Springer, *Rapid rise in mass school shootings in the United States, study shows: Researchers call for action to address worrying increase in the number of mass school shootings in past two decades*, *ScienceDaily* (Apr. 19, 2018), <https://www.sciencedaily.com/releases/2018/04/180419131025.htm>.

¹⁹⁹ *Id.*

December 8, 2020.²⁰⁰ Firearm protests, both for and against the restriction of private firearm possession, have been commonplace throughout much of America's history.²⁰¹ However, in 2018, the victims of the Parkland, Florida, mass shooting brought the topic of gun violence center stage before a national audience with a clear and cohesive voice that persuaded federal and state lawmakers to more avidly consider stricter gun-control legislation previously deemed off the table.²⁰²

The victims of the Parkland shooting were able to gain greater media attention, both over social media and through large news outlets, than similar protests arising in the aftermath of mass shootings due to a combination of factors surrounding the incident. The Parkland victims were old enough to attend rallies and testify at the time of the mass shooting. The victims recorded video and audio of the shooting and posted it to social media, leading to greater and speedier national attention than previous gun control protests, including those in response to the Las Vegas shooting in 2017, the Sandy Hook shooting in 2012, and the Columbine shooting in 1999, respectively.²⁰³ Much like the Selma March activists in 1965, the Parkland shooting protesters poised themselves as bipartisan advocates against an urgent national crisis, resulting in some success increasing restrictions in the sale of firearms and firearm accessories at the state level. Some noteworthy resulting state legislation included state-wide bans on bump stocks and expanded criminal background checks before firearm sales in certain states.²⁰⁴ Restricting the rights of firearms is a long-debated issue, but both political parties wholeheartedly agree that a reduction in the number of mass shootings benefits everyone.

Despite bipartisan consensus that something must be done to curb the

²⁰⁰ *Id.*

²⁰¹ See RJ Reinhart, *One in Three Americans Have Felt Urge to Protest*, GALLUP (Aug. 24, 2018), <https://news.gallup.com/poll/241634/one-three-americans-felt-urge-protest.aspx>.

²⁰² Alan Gomez, *The Parkland survivors started a movement when they took on gun violence. Here's how it happened.*, USA TODAY (Feb. 22, 2018, 4:33 PM), <https://www.usatoday.com/story/news/nation/2018/02/22/parkland-survivors-started-movement-when-they-took-gun-violence-heres-how-happened/361297002/>.

²⁰³ *Id.*

²⁰⁴ Matt Vasilogambros, *After Parkland, States Pass 50 New Gun-Control Laws*, PEW (Aug. 2, 2018), <https://www.pewtrusts.org/en/research-and-analysis/blogs/stateline/2018/08/02/after-parkland-states-pass-50-new-gun-control-laws>

number of mass shootings, Parkland shooting protesters have not yet been able to persuade Congress to pass new federal restrictions on firearm sales.²⁰⁵ Compared to the quick passage of the Voting Rights Act of 1965 in response to the Selma March, which passed under a Democrat-dominated Congress and Presidency, there was higher political division within 2018's Republican-dominated Congress and Presidency that prevented bipartisan steps towards a solution.²⁰⁶ Hesitant of infringing or altering Second Amendment rights, Republican members of Congress have instead responded with policies aimed at better law enforcement and teacher training to diffuse crises before they cause casualties.²⁰⁷ Democratic members of Congress, by contrast, are pushing for new restrictions on firearms, including "red flag" laws which would allow court petitions for removal of firearms from individuals perceived as dangerous.²⁰⁸ While there is some moderate bipartisan agreement on passing red flag laws in the wake of mass shootings, these bills continue to run into an uncompromising blockade once they reach the Senate.²⁰⁹ Likewise, Democratic senators have been unwilling to compromise on their proposals for new gun safety legislation and have put intense pressure on dissenting Republican senators.²¹⁰ As an unfortunate result of the communication breakdown among elected officials, hardly any gun safety-related legislation aimed to curb mass shootings has had a decent

²⁰⁵ Smith, *supra* note 177.

²⁰⁶ Cynthia R. Farina, *Congressional Polarization: Terminal Constitutional Dysfunction?*, 115 Colum. L. Rev. 1689, 1728-29, 1734-35 (2015); *See Congress Profiles: 89th Congress (1965-1967)*, Hist. Art & Archives, U.S. House of Representatives, <https://history.house.gov/Congressional-Overview/Profiles/89th/> (last visited Apr. 14, 2019).

²⁰⁷ Andrew Ujifusa, *Federal Response to Fla. Shooting Starts to Take Shape*, Educ. Wk., (Mar. 20, 2018), <https://www.edweek.org/leadership/federal-response-to-fla-shooting-starts-to-take-shape/2018/03>.

²⁰⁸ *Id.*; Sheryl Gay Stolberg, 'Red Flag' Gun Control Bills Pick Up Momentum With G.O.P. in Congress, N.Y. Times (Aug. 6, 2019), <https://www.nytimes.com/2019/08/06/us/politics/congress-gun-control.html>.

²⁰⁹ *Id.*

²¹⁰ Sheryl Gay Stolberg, *After String of Mass Shootings, Democrats Begin New Push for Gun Control*, N.Y. Times (Mar. 11, 2021), <https://www.nytimes.com/2019/09/10/us/politics/democrats-gun-control.html>.

chance of even making it to the Senate floor in the years since the Sandy Hook mass shooting, while the epidemic continues to worsen.²¹¹

This adversarial debate on whether mass shootings are better reduced by increasing training and security or by tighter gun control laws impedes the progress of both theories, preventing either from fully addressing the issue. These proposed solutions are not mutually exclusive, but unwavering partisan loyalty hinders Congress from moving forward with propositions made by either party.²¹² Communication stagnation is exacerbated by Congressional echo chambers, impeding America's progress toward a solution to its mass shooting epidemic.

Because many members of Congress favor less-restricted gun rights and because of the lobbying power of the National Rifle Association, increased federal monitoring of guns is a difficult position for gun-control advocates, as are major alterations to statutory and Constitutional firearm freedoms a vast number of citizens peacefully exercise.²¹³ Despite exponentially increasing numbers of school shootings, CNN reports from multiple surveys taken in recent years that only approximately 50% of surveyed Americans support stricter gun control, regardless of age.²¹⁴ The lack of a definite public majority may be explained in large part by the geographic location of the Americans surveyed. In densely populated urban areas such as New York where firearms have fewer immediate legal uses, more residents are likely to support stricter gun control, rather than in rural areas of the country such as West Virginia, where guns are more widely considered multifaceted tools for hunting and sport.²¹⁵ The right to own a firearm is a right and responsibility deeply intertwined with America's perspective on freedom, second only to the individual's right to believe and speak his or her mind freely. The firearm conversation led by both protestors and Congress has been greatly strained by increasing political polarization,

²¹¹ *Id.*; See Smith *supra* note 177.

²¹² Alex Casendino, *Missing the Mark: How the Intense Partisan Divide over Gun Control Impedes Solutions*, Berkeley Pol. Rev. (Nov. 29, 2017), <https://bpr.berkeley.edu/2017/11/29/missing-the-mark-how-the-intense-partisan-divide-over-gun-control-impedes-solutions>.

²¹³ Jeffrey A. Marlin, *The National Guard, the National Board for the Promotion of Rifle Practice, and the National Rifle Association: Public Institutions and the Rise of a Lobby for Private Gun Ownership*, Dissertation, Georgia State University, 19-23 (2013).

²¹⁴ *Id.*

²¹⁵ Kim Parker et al., *America's Complex Relationship With Guns*, Pew Resch. (June 22, 2017), <https://www.pewresearch.org/social-trends/2017/06/22/americas-complex-relationship-with-guns/>.

but it remains a necessary conversation so long as the threat posed by sudden mass shootings looms and rises across the country.

The Selma March had several strengths that contemporary gun control protests lack, further highlighting what holds up a federal and more unanimous social response to mass shootings. Both protests have strong, lobbied opposition from empowered organizations, but the Selma March was granted federal protection, utilizing the firmly established Constitutional right to peacefully assemble. Gun control protests, on the other hand, seek revision of firearm statutes and potentially the Constitution itself from an administration, legislature, and large number of the population opposed to revision. Fostering national sympathy, Selma's success largely rested on the ground that the atrocities African Americans were being subject to were not only shocking and tragic, but importantly, the oppression could clearly be perceived as an oppression of American freedom itself with an empathetic solution—let the people vote and coexist as the Constitution guarantees they can. Causation for the Selma marchers' suffering was abundantly clear to the millions of Americans tuning in from home.

In contrast, pro-gun rights activists aptly reply that stricter gun control does not necessarily equal fewer mass shootings, citing to the Parkland, Florida shooting where the shooter was a 19-year-old with no criminal record who purchased the guns used legally.²¹⁶ Mass shootings appearing commonly in news cycles can desensitize individuals into thinking they're mere by-products occurring randomly beyond reasonable social or governmental control, though the Parkland victims were able to mitigate desensitization with audio and video recordings from the shooting posted to social media.²¹⁷ Media coverage and social media responses to gun rights legislation have been very two-faced, with some demanding gun rights be reduced to promote safety while others view gun restrictions as an erosion of the Second Amendment.²¹⁸

Contemporary Trump-era gun control protests have only experienced minimal success at the federal level.²¹⁹ The ongoing partisan shifts will likely create only modest statutory alterations without effective correlations between the gun restrictions proposed and a reduction in mass shootings.²²⁰

²¹⁶ Walsh, *supra* note 192.

²¹⁷ Gomez, *supra* note 181.

²¹⁸ Anna Pohoryles, *The Problem With U.S. Media Coverage of the Gun Control Debate*, *odyssey* (Oct. 19, 2015), <https://www.theodysseyonline.com/problem-media-coverage-gun-control-debate-united-states>.

²¹⁹ Smith, *supra* note 177.

²²⁰ Stolberg, *supra* note 205.

The right of private individuals to freely bear arms is not a right many are willing to regress for merely a chance at reducing mass shootings, especially when such restrictions may disarm potential victims but not mass shooters. However, by continuing to exercise their rights to protest mass shootings beyond the initial front-page news cycles, gun control protesters, like the Parkland protestors, prevent solutions to the mass shooting epidemic from stagnating, inviting evolving legislation for a rapidly evolving society. Keeping a protest alive is as simple (or as difficult) as keeping it relevant in contemporary conversation, and through social media the nation continues to keep the gun-control debate perpetually centerstage. Few Americans are surprised that mass shootings have reportedly been on the rise in the 21st century, and the only remaining question for many, even between those starkly ideologically divided, is how we can effectively stem the tide, as these tragic shootings are a blight upon all Americans across all party lines.

V. CONCLUSION

Protests, when occurring under the protections of the First and Fourteenth Amendments, are powerful forms of speech able to not only create dramatic scenes and lists of demands, but also to invite intellectual challenge and bipartisan solutions to long-standing problems. America should work towards encouraging, rather than dismissing the sharing of ideas, even controversial and potentially inflammatory ideas. Keeping the marketplace of ideas open not only enables ideological opponents to forge well-tempered and thoroughly scrutinized opinions, but also enfeebles hate speech by dragging it into the open, forcing it to compete against more rational ideologies, popping the bubble of the echo chamber the hate speech's source. A lack of protest is a disadvantage for both governments, always seeking to improve themselves, and those who living under its unchallenged principles.

The courageous protestors participating in the Selma march, through nonviolent opposition to oppressive segregationist laws, were able to convince Congress to pass the Voting Rights Act of 1965 just a few months after the demonstration, enabling many voters in Alabama to better combat generations of segregationist politics with their votes. Many nonviolent gatherings thereafter tested the boundaries of free speech, finding their propositions thoroughly considered by state officials, unless, rarely, a compelling state interest prevailed over the speech. There are consequences to such immense protections, most infamously the Constitution's protections for hate speech, leading officials to experiment with buffer zones and other means of maintaining peace during controversial demonstrations. As First Amendment rights continue to evolve alongside technology and current events, one wonders if America will always be protective of inflammatory speech in nonviolent protests as further sociological studies continue to

strongly correlate the long-term effects of inflammatory speech with violent activity.

Media activity has always been crucial to the success of protests, but the era of social media has radically altered media relationships with consumers. Internet interconnectedness has reduced individuals' reliance on large news outlets for national news, helping to reduce the information monopoly large news outlets maintained in previous eras. However, social media trends indicate that, despite the availability of so much information from a plethora of unaffiliated sources, the information individuals typically choose to consume is largely tailored to that individual's preconceived biases. Individuals and social media operators alike possess incredible censorship power, far exceeding the state and federal censorship powers, allowing individuals not just to ignore, but to outright delete the speech of others if it appears in online spaces they control. The number of echo chambers, communication hubs with zero tolerance for opposition, has greatly increased, widening ideological divides on numerous issues, and has already become a prominent force within America politics. This phenomenon illustrates both the lack of protections free speech has in private online spaces and the need for opposing parties to continue communicating effectively instead of blocking one another's speech, lest they become further ideologically polarized.

Former President Donald Trump, as a former government figure much in favor of his own private free speech rights, became the bridge between private online rights and government censorship in the *Knight* litigation. The appellate courts' holdings in *Davison and Robinson* demonstrate that even though government entities in fact have identical faculties to private users for blocking and restricting speech across their social media accounts, blocking said speech would constitute a First Amendment violation without a prevailing government interest. Thus, as these appellate court holdings stand, free speech protections for nonviolent protests of government entities posted on their social media accounts mirror more traditional protections of in-person nonviolent protests.

Currently, America is faced with an immense increase in mass shootings occurring across the country, leading to countless national protests, passage of state but not federal legislation, and increased ideological and media polarization over Second Amendment gun rights. Unlike the Selma March, which protested segregation and an unconstitutional restriction of free speech, rather than combatting the constitutional right to bear arms, there is no easy or immediate bipartisan process to solve the mass shooting crisis. Gun rights have always been a polarizing topic, especially between urban and rural demographics, but without having that bipartisan conversation on how to proceed, the problems surrounding mass shootings will perpetuate and

worsen. Protests from the Parkland victims and others have given much needed impetus to the mass shooting debate and have kept the debate relevant in ever-shifting news cycles, but it is up to the rest of the nation, lawmakers and private individuals alike, to respond and help create a well-tempered solution. Gun-control movements need to vigorously, but civilly, voice opposition to pro-gun advocates, rather than outright ignore, denounce, or delete their speech from online forums, and vice versa. If the conversation continues long enough it will progress into a potential solution to the mass shooting epidemic, but that can only happen if we find the courage to allow each other's voices to be heard and reach past our ever-widening buffer zones into a habitable middle ground.

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