Reimagining First Amendment Remedies

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ABSTRACT: Since the Warren Court's landmark First Amendment decisions of the 1960s, the Supreme Court has aggressively deployed the Free Speech Clause to provide broad substantive protections for expressive freedoms. These rules, in theory, should effectively safeguard the marketplace of political ideas and facilitate both speaker and audience autonomy. No matter how broadly fashioned, however, a constitutional rule is only as strong as the remedies available to enforce it—and far too often, First Amendment remedies are either woefully weak or effectively nonexistent. When a would-be First Amendment plaintiff cannot obtain a meaningful remedy for a proven constitutional violation, the substantive rule will not effectively safeguard expressive activities against government censorship.

In several important areas of First Amendment law, available remedies are inadequate. Government employees who want to blow the whistle on unlawful, or even patently unconstitutional, government conduct must risk discharge and face obstacles in securing future employment. So too, pretextual arrests of journalists engaged in newsgathering activities significantly chill such activity going forward—yet no effective remedy currently exists for this kind of targeted government effort to suppress reporting on matters of public concern. Finally, local zoning ordinances often silence disfavored would-be

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speakers based on the content of their message through highly selective signage bans—thereby preventing the intended audience from receiving messages they would like to see.

The Supreme Court and all courts must fashion and enforce effective First Amendment remedies. This Article argues that the Supreme Court's entire theory of First Amendment remedies requires both reimagining and reinvigoration. Existing law only imperfectly redresses harms to a would-be speaker and often fails to remedy harms to the audience at all. The interest of We the People in hearing, seeing, or reading a message needs to be an important part of the remedial analysis—but today just isn't. When the government censors speech, it harms not only the would-be speaker, but also the would-be audience. This Article recalibrates the relationship between harm and remedy via a theoretical framework: (1) enduring equity; (2) bounded discretion; (3) proportional relief; (4) correlative function; and (5) tangible remedies. First Amendment remedies law must redress effectively both personal and collective expressive injuries. This Article proposes pathways and equitable remedies that will safeguard First Amendment rights comprehensively and effectively—thereby facilitating the process of democratic deliberation.

INTRODUCTION: THE CENTRALITY OF MEANINGFUL REMEDIES TO SECURING AND SAFEGUARDING EXPRESSIVE FREEDOMS[1]

Current First Amendment remedies fail to empower would-be speakers to propagate their messages. They discount the ability of a potential audience to see, hear, or read a would-be speaker's message. As such, they ineffectively counter the chilling effect of government suppression of speech and insufficiently deter future censorial government behavior. The Supreme Court, as well as the lower federal and state courts, have felled entire forests writing about the *substance* of First Amendment law (primarily under the Free Speech Clause).[2] Unfortunately, however, they have paid far too little attention to theorizing and implementing effective *remedies* for proven constitutional violations that significantly burden the ability to exercise expressive freedoms.[3]

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1. This Article uses the phrase "expressive freedom" to capture "various, and differentiable, forms of . . . speech, press, assembly, and petition." *See* Ronald J. Krotoszynski, Jr., *Common Law Constitutionalism and the Protean First Amendment*, 25 U. PA. J. CONST. L. 1, 2 n.2 (2023).

2. U.S. CONST. amend. I (providing, in relevant part, "Congress shall make no law . . . abridging the freedom of speech"); *see* Harry Kalven, Jr., *The* New York Times *Case: A Note on "The Central Meaning of the First Amendment,"* 1964 SUP. CT. REV. 191, 204–10 (arguing that the "central meaning" of the First Amendment involves rejection of the notion that government may silence and punish criticism of its actions and positing that the First Amendment, properly read and applied, precludes the doctrine of seditious libel).

3. *See, e.g.*, Barr v. Am. Ass'n of Pol. Consultants, Inc. (*AAPC*), 140 S. Ct. 2335, 2347–48, 2356 (2020) (holding that although the American Association of Political Consultants ("AAPC") had a meritorious First Amendment claim related to an unconstitutional content-based government speech regulation, the AAPC nevertheless was not entitled to engage in the speech activity that led it to initiate First Amendment litigation). Discrete remedial gaps have garnered discrete but vital academic commentary. *See, e.g.*, Charlotte Garden, *Ministerial Employees and Discrimination Without Remedy*, 97 IND. L.J. 1007, 1021–24 (2022) (seeking to rectify the remedial gap created by the Supreme Court's ministerial exemption for religious employers in

If the Supreme Court is serious about the centrality of the First Amendment to the project of democratic self-government,[4] it needs to do a better job of crafting remedies that effectively facilitate the exercise of cherished First Amendment rights. It is well past time to reimagine First Amendment remedies. Remedies that leave a prevailing First Amendment plaintiff unable to speak must be rejected in favor of remedies that empower speakers and audiences alike. The point is more than merely abstract given the critical relationship between the process of democratic self-government and the freedom of speech.

Simply put, First Amendment rights are fundamental to democracy and rest at the very center of American democratic values. As Professor Richard Epstein states the point, "the First Amendment, with its protection of freedom of speech and the press, is one of the bulwarks of our current constitutional order."[5] And, making a very similar observation, Professor Cass Sunstein posits that "a well-functioning system of free expression" constitutes an essential condition for achieving "the central constitutional goal of creating a deliberative democracy."[6] Thus, he argues "that the free speech principle should be read in light of the commitment to democratic deliberation," meaning that "a central point of the free speech principle is to carry out that commitment."[7]

Professor Ash Bhagwat argues that the project of democratic self-

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discrimination cases and proposing mandatory disclosures and government-created employment opportunities for workers discharged by religiously identified employers); Benjamin Plener Cover, *The First Amendment Right to a Remedy*, 50 U.C. DAVIS L. REV. 1741, 1744–47, 1799–803 (2017) (arguing that the federal courts should ensure effective and efficacious remedies for proven Petition Clause violations involving legal wrongs but not requests for public policy reforms).

4. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("Speech is an essential mechanism of democracy, for it is the means to hold officials accountable to the people. The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." (citation omitted)).

5. Richard A. Epstein, *A Common Law for the First Amendment*, 41 HARV. J.L. & PUB. POL'Y 1, 1 (2018).

6. CASS R. SUNSTEIN, DEMOCRACY AND THE PROBLEM OF FREE SPEECH 18 (1993); *see* Gerald G. Ashdown, *Whither the Press: The Fourth Estate and the Journalism of Blame*, 3 WM. & MARY BILL RTS. J. 681, 681–82 (1994) [hereinafter *Whither the Press*] (asserting the direct correlation between free press and the flourishing of the project of democratic self-government); Gerald G. Ashdown, Gertz *and* Firestone*: A Study in Constitutional Policy-Making*, 61 MINN. L. REV. 645, 654 (1977) ("Freedom of speech and press protect the transfer of information to and from every member of our society and shape society itself. Without the free exchange of ideas and information, neither participatory democracy nor our culture could survive." (footnote omitted)); Gerald G. Ashdown, *Media Reporting and Privacy Claims—Decline in Constitutional Protection for the Press*, 66 KY. L.J. 759, 760, 798–99 (1978) (cautioning against permitting Prosser's privacy torts to serve as a basis for unconstrained liability against media defendants because "[t]o the extent that defamation or privacy judgments are readily available against the media, self-restraint and the consequent reduction of information flowing to the public will result," producing a "subtle, though powerful, restrictive impact" that "impose[s] a direct chilling effect on the press" thereby "limit[ing] the system of freedom of expression" and positing that "[t]his restraint will have the effect of screening out much information of unquestioned accuracy, some of which may be useful to survival in a complex society and, consequently, sociopolitically important").

7. CASS SUNSTEIN, REPUBLIC.COM 153 (2001).

government, and the process of democratic deliberation it facilitates, lie at the heart, or center, of the First Amendment's jurisprudential universe.[8] He explains that the "First Amendment was intended to give citizens—ordinary people—the tools to engage in political debate, to organize themselves in associations, to assemble for a variety of purposes including consulting together regarding the issues of the day, and to call for action from elected officials through formal petitions."[9] In sum, the First Amendment exists to empower each and every citizen to participate actively and meaningfully in the process of democratic deliberation.

Government censorship of the marketplace of political ideas obviously frustrates attainment of these objectives and thereby greatly distorts the process of democratic deliberation. At a minimum, then, the First Amendment must shield speakers from government censorship based on antipathy to a would-be speaker's identity, views, or message.[10] Federal (and state)[11] courts should consider more seriously these general principles when conceptualizing and implementing remedies in First Amendment cases—but to date have not done so.[12]

We propose a new theoretical and doctrinal remedies framework for First Amendment violations. At the heart of our approach is a relatively simple question that judges considering how to remedy proven First Amendment violations should ask and answer: Does the proposed remedy facilitate the ability of the would-be speaker to say their piece and, simultaneously, empower We the People with the ability to see, hear, or read the would-be speaker's message? If a proposed remedy leaves a successful First Amendment plaintiff silenced, it should be junked in favor of a remedy that facilitates the exercise of expressive freedoms. Unfortunately, in several critically important

8. ASHUTOSH BHAGWAT, OUR DEMOCRATIC FIRST AMENDMENT 1–10, 160–62 (2020).

9. *Id.* at 161–62.

10. RONALD J. KROTOSZYNSKI, JR., THE DISAPPEARING FIRST AMENDMENT xvii (2019) ("[T]he First Amendment should certainly stand as a bulwark against ham-fisted government efforts to suppress particular speakers, ideas, or ideologies . . . .").

11. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977) ("[S]tate courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law.").

12. *See, e.g.*, Barr v. Am. Ass'n of Pol. Consultants, Inc. (*AAPC*), 140 S. Ct. 2335, 2343–46 (2020) (failing to provide a remedy that permitted the plaintiffs' clients to speak despite holding that the federal government had adopted a constitutionally impermissible content-based restriction of speech that favored some speakers while silencing others); GEFT Outdoor, L.L.C. v. City of Westfield, 39 F.4th 821, 826 (7th Cir. 2022) (observing that GEFT's claim that a signage ordinance "conferring unbridled discretion on [a] [b]oard" of zoning appeals raised serious First Amendment concerns but declining to address these concerns on the merits despite such a scheme potentially "call[ing] into question the validity of the ordinance's regulations").

areas of First Amendment law, currently available remedies flunk both prongs of this test.[13]

A substantive right shorn of an effective remedy is little better than having no right at all. As Chief Justice John Marshall famously observed in *Marbury v. Madison*, "[t]he government of the United States has been emphatically termed a government of laws, and not of men," but "will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right."[14] Consistent with this approach, First Amendment rights are only as secure as the remedies available to protect them when the government oversteps the mark and unconstitutionally censors speech.

Today, all too often a plaintiff will prevail on the legal merits in First Amendment litigation but be left no better off after "winning" the case. To provide a salient, recent example, in *Barr v. American Ass'n of Political Consultants*, the American Association of Political Consultants ("AAPC") successfully challenged a federal law[15] that permitted debt collectors seeking to enforce government-owned debt to robocall those whose payments were in arrears.[16] At the same time, federal law strictly prohibited the placement of calls by those seeking to propagate core political speech through robocalls.[17]

The AAPC was probably quite indifferent to whether government debt collectors could use robocalls—beyond wanting a fully equal ability for candidates seeking elected public offices to speak using this low-cost means of mass communication. The Supreme Court ruled in the AAPC's favor but invalidated the exemption for robocalls related to government debt collection efforts rather than expanding that exemption to include political speech.[18] Thus, the AAPC "won" its case but gained nothing; it remained unable to speak because the majority's remedy zeroed out this First Amendment interest. Such an outcome obviously failed to advance core First Amendment values and reflects a profound—and quite troubling—lack of remedial imagination.

Going forward, a prudent lawyer advising a client like the AAPC about whether to mount a First Amendment challenge to a facially content-based (and arguably viewpoint-based)[19] government speech restriction will have to

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13. *See infra* Section 1.B.

14. Marbury v. Madison, 5 U.S. (1 Cranch) 137, 163 (1803).

15. Telephone Consumer Protection Act of 1991, 47 U.S.C. § 227(b)(1) (2018).

16. *AAPC*, 140 S. Ct. at 2343–46.

17. 47 U.S.C. § 227(b)(1)(A)(iii) (generally prohibiting robocalls without the recipient's express prior agreement for receipt, but categorically excluding robocalls "made solely to collect a debt owed to or guaranteed by the United States" from this proscription).

18. *AAPC*, 140 S. Ct. at 2347–48, 2356.

19. R.A.V. v. City of St. Paul, 505 U.S. 377, 391–92 (1992) (observing that a St. Paul ordinance prohibiting only certain fighting words "[i]n its practical operation . . . goes even beyond mere content discrimination, to actual viewpoint discrimination" because it targets specific messages of a particular kind for proscription while permitting related messages taking a different side). The *AAPC* statute permitted debt collectors to use robocalls but not those advocating student loan debt relief; this is arguably viewpoint-based as well as content-based. *See*

advise her client that even if they win the First Amendment argument, prevailing on the merits will not necessarily mean that the client will actually get to speak. In fact, in *AAPC*, Justice Neil Gorsuch, joined by Justice Clarence Thomas, noted the deep irony of winning a free speech case but remaining silenced—and would have given the AAPC a meaningful remedy (namely, a remedy that permitted their clients, candidates seeking election to public office, to speak via robocalls).[20]

Justice Gorsuch properly observes that "[w]ith a First Amendment violation proven, the question turns to remedy."[21] In this instance, "[b]ecause the challenged robocall ban unconstitutionally infringes on [the AAPC's] speech, I would hold that the plaintiffs are entitled to an injunction preventing its enforcement against them."[22] In other words, basic First Amendment values require a remedy that actually empowers the AAPC to speak and audiences to hear the AAPC's messages. Yet, the *AAPC* majority saw things differently and delivered the First Amendment plaintiffs an entirely pyrrhic victory—their clients were just as silenced by the ban on robocalls as before (a ban that Congress obviously no longer believed to be necessary given the 2015 amendment permitting at least some favored would-be speakers to use automated robocalls to reach their preferred audience).[23]

To be sure, in many First Amendment cases, the remedy enables the winning plaintiff to do what it seeks: namely, to speak.[24] But shouldn't that be

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AAPC, 140 S. Ct. at 2252 ("Enacted in 2015, the government-debt exception added an unconstitutional discriminatory exception to the robocall restriction," by favoring one side, namely callers seeking to collect government debts, over the other, namely those who might use robocalls to advocate nonpayment of government debt, such as federal student loans). For a relevant critique of the Supreme Court's per se rule of invalidity for content- and viewpoint-based speech regulations, see Elena Kagan, *The Changing Faces of First Amendment Neutrality:* R.A.V. v St. Paul, Rust v Sullivan*, and the Problem of Content-Based Underinclusion*, 1992 SUP. CT. REV. 29, 35–38, 69–71. Now Justice, then Professor, Kagan observes that "[w]e can all agree that a law applies in a viewpoint discriminatory manner when it takes one side of a public debate," and, moreover, "[w]e should also all be able to agree that one way of taking sides is by handicapping a single contestant—and further, that one way of handicapping a contestant is by denying her a particular means of communication (such as fighting words)." *Id.* at 70.

20. *See AAPC*, 140 S. Ct. at 2365–66 (Gorsuch, J., concurring in part and dissenting in part).

21. *Id.* at 2365.

22. *Id.*

23. Bipartisan Budget Act of 2015, Pub. L. No. 114-75, § 301(a)(1)(A), 129 Stat. 584, 588 (amending the Telephone Consumer Protection Act of 1991 to create an exception for robocalls "made solely to collect a debt owed to or guaranteed by the United States" thereby undercutting the government's claim that all robocalls are inherently and intrinsically destructive of privacy in the home); *see also AAPC*, 140 S. Ct. at 2345 ("In other words, Congress carved out a new government-debt exception to the general robocall restriction.").

24. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 171–72, 174 (2015) (opining that "[b]ecause the Town's Sign Code imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny, 'which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest,'" additionally finding that the town could not meet this burden, and, accordingly, holding that a local church was free to post temporary directional signs for its Sunday services (quoting Ariz.

the rule for *all* remedies in First Amendment free speech cases where the plaintiff prevails? The reality is far from it. In fact, in a wide swath of First Amendment cases, as in *AAPC*, the victories are merely symbolic (if not completely pyrrhic). In the absence of a remedy that permits a would-be speaker to say their piece, the most demanding legal test will not prevent the government from engaging in broad-based forms of censorship. Unfortunately, however, in the aftermath of important substantive free speech landmark decisions, such as *Brandenburg v. Ohio* and *New York Times Co. v. Sullivan*, First Amendment remedies have failed to keep pace with the scope of (mostly) expanding substantive rights.[25]

This Article will proceed in three main parts. Part I will show how First Amendment remedies, at least during the Warren Court era, better facilitated the ability of speakers and audiences to interact with each other. We do not claim that during the First Amendment remedies law of the Warren Court was perfect—it was far from it. Our more limited claim is that, under the Warren Court, First Amendment remedies were generally *better* at facilitating the exercise of First Amendment rights. Part I will also demonstrate, using three concrete examples involving government employee whistleblowers, journalists engaged in newsgathering activity, and bans on outdoor billboard advertising, that times have changed. Simply put, under the Roberts and Rehnquist Courts, First Amendment remedies have failed to advance core First Amendment values associated with both speaker and audience autonomy and free, open, and transparent information flows.

Part II will develop and expound general remedial principles that should serve to frame how federal and state courts go about fashioning First

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Free Enter. Club's Freedom Club PAC v. Bennett, 564 U.S. 721, 734 (2011))); United States v. Alvarez, 567 U.S. 709, 729–30 (2012) ("Though few might find respondent's statements anything but contemptible, his right to make those statements is protected by the Constitution's guarantee of freedom of speech and expression. The Stolen Valor Act infringes upon speech protected by the First Amendment."). It also bears noting that some plaintiffs sometimes seek the ability *not* to speak and succeed in obtaining a remedy that permits them to avoid engaging in compelled speech. *See, e.g.*, 303 Creative L.L.C. v. Elenis, 143 S. Ct. 2298, 2321 (2023) (holding that Colorado could not require a web designer to create a page she did not want to create because "the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong").

25. *See* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (per curiam) (holding that "the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270, 279–80 (1964) (observing, despite press criticism of public officials often being "unpleasantly sharp," that our "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open" requires limits on tort recoveries for defamation and holding that "[t]he constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not").

Amendment remedies. The centrality of free speech to democratic self-government should affect the scope and strength of remedies law—just as it has required significant modifications to the generally applicable law of tort.[26] More specifically, an effective First Amendment remedial framework must consider not only a would-be speaker's abstract autonomy interest in speaking, but also the interest of We the People in open and transparent information flows. Part III then revisits examples of First Amendment areas with particularly ineffective remedies, applies the normative framework, and proposes reforms to the remedial orders in such cases that would facilitate the exercise of expressive freedoms by successful plaintiffs (which would concurrently advance interests of potential audiences as well). This Article concludes with a theory of reimagined, recalibrated remedies to foster protection of proven First Amendment rights of the individual speaker as well as safeguard interests of the collective audience.

A constitutional imperative exists for remedies that enable a would-be speaker to exercise their First Amendment rights; effective First Amendment remedies should, at a minimum, empower both speakers and audiences to engage with each other. Affirmative relief[27] should validate not only the

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26. *See, e.g.*, Snyder v. Phelps, 562 U.S. 443, 457–61 (2011); Hustler Mag., Inc. v. Falwell, 485 U.S. 46, 53–54 (1988); Gertz v. Robert Welch, Inc., 418 U.S. 323, 349–50 (1974). Indeed, the Supreme Court's *Sullivan* line of cases not only required significant modifications to the common law of torts, but also to the process of appellate court review of trial court decisions imposing civil liability on losing media entity defendants. *See Sullivan*, 376 U.S. at 270, 279–80 (restricting the ability of state tort law to impose damages on media defendants in cases with public official plaintiffs in order to ensure that public debate in the United States will be "uninhibited, robust, and wide-open"); RONALD J. KROTOSZYNSKI, JR., CHRISTINA E. WELLS, LYRISSA BARNETT LIDSKY & CAROLINE MALA CORBIN, THE FIRST AMENDMENT: CASES AND THEORY 463–67 (3d ed. 2017) (setting forth, in some detail, the First Amendment rules in the *Sullivan* line that limit the scope of state defamation law). These jurisprudential innovations were not merely necessary, but essential, to realizing the First Amendment's full potential as a means of facilitating the process of democratic deliberation. *See* Kalven, *supra* note 2, at 209 (arguing that the ability to freely and fairly criticize the government lies at the heart of any defensible theory of the freedom of speech in a democracy and positing that "[t]he central meaning of the Amendment is that seditious libel cannot be made the subject of government sanction" either directly via the criminal law or indirectly via the law of tort). Under the *Sullivan* line of cases, plaintiff must prove the media defendant's liability by "clear and convincing" evidence (rather than mere preponderance) and, on appeal, the appellate court has a constitutional duty to independently analyze whether the plaintiff has satisfied this demanding evidentiary burden (rather than overruling fact findings only if "clearly erroneous"). *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 773, 777–78 (1986); Bose Corp. v. Consumers Union of U.S., Inc., 466 U.S. 485, 499, 505–11, 514 (1984). The Supreme Court, lower federal, and state courts, have simply failed to approach the fashioning of effective remedies—and general remedial principles—with the same brio as they have approached refashioning the common law of torts and the process of adjudicating tort claims that seriously implicate First Amendment values.

27. Henry P. Monaghan, *First Amendment "Due Process,"* 83 HARV. L. REV. 518, 547–48 (1970) (observing that "while the authorities are uncertain and not decisive here, they support the view that in some instances the Constitution can be read to require the existence of an affirmative remedy" and arguing that "[t]he first amendment would seem a proper source for the implication of affirmative remedies" and that the government "should be required to provide remedies which

autonomy interest of a winning plaintiff in speaking, but also secure the benefit of the plaintiff's speech activity for the public (thereby advancing the project of democratic deliberation).[28] To safeguard effectively cherished First Amendment values, an adequate constitutional remedy should enable the plaintiff to speak and an audience to see, hear, or read the speaker's message.

Major First Amendment decisions that award hollow victories to First Amendment plaintiffs—decisions such as *AAPC*—send, at best, mixed signals to potential litigants with clearly meritorious First Amendment claims. After all, what is the point of challenging unconstitutional government censorship schemes if prevailing on the merits leaves you no better off than before? The Supreme Court's failure to take seriously the centrality of First Amendment remedies to securing expressive freedom leaves these rights at serious risk.[29] Federal courts need to reimagine, reinvigorate, and, in some material respects, restore First Amendment remedies—thereby rendering them as strong as the substantive constitutional rights that they aim to protect. The governing remedial framework in First Amendment cases must protect not only would-be speakers but also potential audiences. In sum, First Amendment harms include individual and collective speech-related injuries; remedies law in this area must take account of this fact and effectively redress both kinds of harm.

I. RIGHTS WITHOUT REMEDIES AND THE CONTEMPORARY FIRST AMENDMENT: FREE SPEECH PARADIGMS

This Part first considers how the Supreme Court and lower federal courts once paid more attention to remedial efficacy in First Amendment cases. It then proceeds to show how today remedial efficacy appears to be little more than an afterthought in the pages of the U.S. Reports. The Roberts Court, as well as the Rehnquist and Burger Courts, devoted insufficient time and attention to crafting effective remedies for First Amendment violations. It was not always so. During the Warren Court era, the federal courts generally paid at least some attention to remedial decrees that tangibly enabled the exercise of expressive freedoms. Unfortunately, this trend stalled out during the Burger Court and has faded away almost completely today. Under the Roberts

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are adequate to rectify the situation").

28. Citizens United v. FEC, 558 U.S. 310, 339–41 (2010) (observing that "[t]he First Amendment protects speech and speaker, and the ideas that flow from each" such that "it is inherent in the nature of the political process that voters must be free to obtain information from diverse sources in order to determine how to cast their votes"); *see* KROTOSZYNSKI, *supra* note 10, at 16–21, 215–26 (arguing that federal and state courts should interpret and apply the First Amendment to facilitate the project of democratic self-government and use the First Amendment to require government to assist rather than impede speech related to democratic self-government). For a provocative exploration of labor union litigation advancing community and social welfare, as closely related public goods, see Charlotte Garden, *Union Made: Labor's Litigation for Social Change*, 88 TUL. L. REV. 193, 249–55 (2013).

29. *See* Epstein, *supra* note 5, at 19 ("But you can stare at the constitutional text as long as you want, and you will discover not a word in it that explicitly addresses these remedial issues.").

Court, it is not at all uncommon for a First Amendment plaintiff to establish a constitutional violation—but not obtain a remedy that permits the proposed speech activity to go forward.

In our view, *Williams v. Wallace*, the "Selma March" case, arguably provides one of the best examples of an efficacious First Amendment remedy.[30] Judge Frank M. Johnson, Jr., issued a remarkable remedial order in this First Amendment litigation—an order that fully and completely facilitated the plaintiffs' ability to speak and We the People's ability to receive, consider, and respond to the plaintiffs' speech activity.[31] Indeed, a direct, causal relationship exists between the Selma March and enactment of the Voting Rights Act of 1965.[32] Judge Johnson's remedial order—steeped in the tradition of using equity to create and implement efficacious relief in circumstances where traditional legal remedies, such as monetary damages, won't get the job done—provides an exemplar of federal courts better crafting remedies to fully and fairly vindicate First Amendment rights.

A. THE WARREN COURT'S EXAMPLE DURING CIVIL RIGHTS ERA: FASHIONING EFFECTIVE REMEDIES FOR FIRST AMENDMENT VIOLATIONS

The Warren Court did not do a perfect job of fashioning meaningful remedial orders in First Amendment cases—but it clearly did a better job than the contemporary Supreme Court on this front. We believe that remedial efficacy in First Amendment cases requires careful attention to two foundational questions: (1) Does the proposed remedy facilitate the ability of a would-be

30. Williams v. Wallace, 240 F. Supp. 100, 106–09 (M.D. Ala. 1965) (finding that massive constitutional violations in Alabama involving the right to vote justified an extraordinarily broad remedial order that permitted a multiday march, of over fifty miles, using the principal U.S. highway in the region). Based on the evidence presented at trial showing enormous, intentional, and ongoing violations of the Fourteenth and Fifteenth Amendments in Alabama, Judge Johnson concluded that "plaintiffs' proposed plan of march from Selma to Montgomery, Alabama, for its intended purposes, is clearly a reasonable exercise of a right guaranteed by the Constitution of the United States provided the march commences not earlier than March 19, 1965, and not later than March 22, 1965." *Id.* at 109.

31. *Id.* at 107–09.

32. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 445 (codified as amended at 52 U.S.C. § 10101); Off. of the House Historian, Off. of Art and Archives & Off. of the Clerk, *Bridging History: Selma and the Voting Rights Act of 1965*, HIST., ART & ARCHIVES, U.S. HOUSE OF REPRESENTATIVES (Dec. 11, 2014), https://history.house.gov/Exhibitions-and-Publications/Civil-Rights/VRA-Documentary [https://perma.cc/B4BA-3PSR]; Jason Mazzone & Stephen Rushin, *From Selma to Ferguson: The Voting Rights Act as a Blueprint for Police Reform*, 105 CALIF. L. REV. 263, 287 (2017) ("Within the Johnson administration, all doubts about the need for a stronger federal voting law gave way with the violence that accompanied the Selma to Montgomery civil rights march on 'Bloody Sunday' . . . . The march was the catalyst for the VRA's passage in August of 1965."); *cf.* MELISSA FAY GREENE, PRAYING FOR SHEETROCK: A WORK OF NONFICTION 175–76, 210–20, 226–31, 256–57 (1991) (providing a complex, historical account of the Civil Rights Movement through the vantage point of a rural coastal county in Georgia where, even by the 1970s, major federal civil rights litigation had not made a discernible difference in securing meaningful equality of the races).

speaker to say their piece; and (2) does the remedy take adequate account of the public's interest in having access to the would-be speaker's message? First Amendment violations harm both the autonomy interest of a silenced speaker and the potential audience's interest in receiving the information that the speaker would like to share with the general community.

The Warren Court and, during its early years, the Burger Court as well, considered the interests of both speakers and audiences. It did so in several contexts and in so doing created important First Amendment rules that help to protect free and open communication within the marketplace of political ideas. To provide one example, in cases involving access to public property for speech activity, the Warren Court generally began with a strong presumption that a speaker had a right to use public property for speech activity and the government had a duty to justify refusing access to public property for expressive activities.[33] Under this analytical approach, the campus of a public school could serve as the location for a protest of the Vietnam War.[34] And a government employee had a right to publish a highly critical "letter to the editor" in the local newspaper, which contained some materially factual errors, that attacked his employer's advocacy of a bond issue.[35] Moreover, a journalist could contest government efforts to use her sources as a means of criminal investigation[36]—and the government had an obligation to permit a journalist to possess and use the tools of her trade when taking a public tour of a county jail.[37]

In all these examples, the Warren Court, as well as the early Burger Court, adopted a remedial posture that focused on the ability of the would-be speaker to communicate a message—and to do so at a time, and in a place, of the speaker's choosing. In this respect, the remedies analysis considered the speaker's interest in communicating with a particular audience. To be sure, the interest of the audience in receiving the speaker's message did not feature prominently in the doctrinal analysis. Nevertheless, in all four lines of precedent (access to public property for speech activity; the speech rights of

33. *See, e.g.*, Brown v. Louisiana, 383 U.S. 131, 138–39 (1966) (holding that civil rights protestors could use a segregated public library, during regular operating hours, as the location for targeted protest of the exclusion of Black patrons from the library).

34. *See, e.g.*, Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

35. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 564–66 (1968) (discussing the highly critical op-ed that Pickering published in the local newspaper and the school board's subsequent discharge of Pickering from employment because of it).

36. *See, e.g.*, Branzburg v. Hayes, 408 U.S. 665, 707–08 (1972) ("[A]s we have earlier indicated, news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification." (footnote omitted)).

37. Houchins v. KQED, Inc., 438 U.S. 1, 16–18 (1978) (Stewart, J., concurring) (opining that journalists must be permitted to bring the tools of their trade while taking a public tour of county jail even though members of the public might be prohibited from bringing recording devices into county jail).

students while attending a public high school or middle school; the ability of government employees to express themselves about matters of public concern; newsgathering activities by journalists), the remedies provided effectively protected the ability of an audience to receive the speaker's message. It is unfortunate that this interest went largely unstated in the opinions themselves—which tend to emphasize exclusively the autonomy interest of a would-be speaker and pay little to no attention to the interest of potential listeners, viewers, or readers.

Consider first *Brown v. Louisiana*, a case in which five civil rights protestors, affiliated with the Congress for Racial Equality ("CORE"), staged a silent protest in the Audubon Regional Library, in Clinton, Louisiana.[38] They were denied service because the local government operated the library on a racially segregated basis.[39] After being denied service, the protestors refused to leave; they were arrested, tried, and convicted of causing a breach of the peace (despite the absence of any altercation or disturbance in the public library).[40]

Writing for the majority, Justice Abe Fortas reversed the breach of peace convictions on the theory that the silent protest enjoyed First Amendment protection.[41] He explained that "the circumstances here were such that no claim can be made that use of the library by others was disturbed by the demonstration."[42] He noted that "[w]ere it otherwise, a factor not present in this case would have to be considered."[43] On the facts, however, "there was no disturbance of others, no disruption of library activities, and no violation of any library regulations."[44] Rather, the local government had to make its property available for the CORE members' protest activity, and the government could not criminally punish "those engaged in lawful, constitutionally protected exercise of their fundamental rights."[45]

Brown's remedy effectively created a free speech easement to a public library for protest activity associated with the Civil Rights Movement. To be sure, the Supreme Court's order simply reversed the state criminal convictions for breach of the peace—but the implication of the Court's reasoning was that the CORE protestors had a right to be where they were and to do what they did. Going forward, segregated public spaces, such as a public library, that might not generally be available for protest activity as a general matter *would be* available for those seeking reform of racially segregated public institutions. The majority could have held that the library

38. *Brown*, 383 U.S. at 135–37.
39. *See id.* at 136–37.
40. *Id.* at 137–39.
41. *See id.* at 142–43.
42. *Id.* at 142.
43. *Id.*
44. *Id.*
45. *See id.* at 143.

did not exist, and was not maintained, as a locus for protest activity; it instead considered whether the use of the government property, on the facts presented, imposed any meaningful burden on the government with respect to the property's more regular uses.[46] Because the protest did not affect the library's use for its more traditional purposes, the government had to tolerate its use for a civil rights protest.

Tinker v. Des Moines Independent Community School District involved public middle and high school students donning black armbands to protest the ongoing Vietnam War.[47] Local school officials in Des Moines, Iowa, fearing disruption associated with this antiwar protest on school grounds, suspended the students and prohibited them from returning to campus while wearing the black armbands.[48] Writing for the majority, Justice Fortas explained that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[49] Thus, the *Tinker* Court begins the analysis not by asking if the government had a right to ban protest on public school campuses, but rather with a ringing endorsement of the idea that public school authorities lack the discretionary authority to prohibit the exercise of First Amendment rights by students or teachers while on campus.

To be sure, school officials have a legitimate, and constitutional, interest in avoiding disruption to a school's educational mission. Local public-school officials may ban student (and, for that matter, teacher and staff) speech activity while on campus—but only if student speech activity presents a serious risk of "substantial disruption" or "material interference" with the school's educational mission.[50] Justice Fortas observes that:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.[51]

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46. *See* Steven G. Gey, *Reopening the Public Forum—From Sidewalks to Cyberspace*, 58 OHIO ST. L.J. 1535, 1542–55 (1998) (discussing the Supreme Court's presumption, during the Warren Court, of access to public property for speech activity and the subsequent erosion, and rejection, of this speech-favoring presumption by the Burger and Rehnquist Courts). Professor Gey argues that the government should be permitted to deny access to public property for speech activity "only if the speech would otherwise significantly interfere with the government's ability to carry out its legitimate duties." *Id.* at 1634.

47. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969).

48. *See id.* at 508.

49. *Id.* at 506.

50. *Id.* at 509, 514.

51. *Id.* at 509.

Thus, unless the school officials can make a persuasive showing that student speech activity on campus will cause substantial disruption to its educational functions, the school district must tolerate the speech activity.

This outcome reflects the principle that "[i]n our system, state-operated schools may not be enclaves of totalitarianism" and, accordingly, "[s]chool officials do not possess absolute authority over their students."[52] Moreover, "[f]reedom of expression would not truly exist if the right could be exercised only in an area that a benevolent government has provided as a safe haven for crackpots."[53]

The remedial approach in *Tinker*, as in *Brown*, involves federal courts issuing remedial decrees that force government to make public property available for speech—even if the property at issue, a public library, in *Brown*, and local public schools, in *Tinker*, does not constitute a traditional venue for expressive activity and even if the local government would prefer to close its property to expressive activity. The Supreme Court's remedial approach seeks to force government to facilitate speech—rather than casting a blind eye on government efforts to impede or censor speech activity on what is, after all, the government's property.

Pickering v. Board of Education, another Warren Court precedent, follows this general pattern and adopts a remedy that requires government to facilitate speech—whether it wishes to do so or not. In *Pickering*, the Supreme Court extended First Amendment protection to government employees who speak out about matters of public concern.[54] Marvin L. Pickering, an Illinois public school teacher, opposed a local bond issue and published a critical letter to the editor in the local newspaper.[55] Pickering's employer then fired him for publishing the critical letter.[56] The Supreme Court, for the first time, held that government employees who speak out about matters of public concern cannot generally be fired—even if their speech is critical of their employer, contains good-faith mistakes of fact, and arguably impedes the government employer's ability to attain its institutional goals and objectives.[57]

Writing for the majority, Justice Thurgood Marshall explained that:

> What we do have before us is a case in which a teacher has made erroneous public statements upon issues then currently the subject of public attention, which are critical of his ultimate employer but which are neither shown nor can be presumed to have in any way either impeded the teacher's proper performance of his daily duties

52. *Id.* at 511.
53. *Id.* at 513.
54. Pickering v. Bd. of Educ., 391 U.S. 563, 574 (1968).
55. *Id.* at 565–67.
56. *Id.* at 566–67.
57. *See id.* at 570–74.

> in the classroom or to have interfered with the regular operation of the schools generally.[58]

Because Pickering's speech concerned a matter of public concern and did not affect his ability to perform his workplace duties, the First Amendment prohibited the school district from retaliating against Pickering: "In these circumstances we conclude that the interest of the school administration in limiting teachers' opportunities to contribute to public debate is not significantly greater than its interest in limiting a similar contribution by any member of the general public."[59] The Court remanded the case with directions that Pickering's employer should reinstate him to his former job.[60]

Pickering thus deployed equitable injunctive relief to force a government employer to reinstate an employee who was publicly highly critical of its operations.[61] The Supreme Court could have simply required the school board to pay monetary damages, including back pay or front pay. It is also hard not to believe that Pickering's presence would occasion *some* disruption in the government workplace. However, a remedial scheme that did not include reinstatement to his former position would have left the door open to a significant chilling effect that would undoubtedly have deterred government employees from speaking out about matters of public concern. Reinstatement, as a remedy, was essential to creating necessary breathing space for government employees to speak their version of truth to power. The First Amendment plaintiffs in *Brown*, *Tinker*, and *Pickering* did not win empty or hollow victories in federal court; they won the right to enter the marketplace of ideas without the government either silencing them directly or punishing them for speaking after the fact. A remedial focus on facilitating speech and communication, so that resulting political debate will "be uninhibited, robust, and wide-open,"[62] appropriately safeguards and advances First Amendment values. Moreover, these remedial orders facilitated the process of democratic deliberation and the use of regular elections as a means of securing government accountability.

Judge Frank M. Johnson, Jr.'s remedial order, and the reasoning in support of it, in *Williams v. Wallace*, the Selma March case, reflect a remedial

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58. *Id.* at 572–73 (footnote omitted).

59. *Id.* at 573.

60. *See id.* at 574–75.

61. *See id.*; *see also* JOHN E. SANCHEZ & ROBERT D. KLAUSNER, STATE AND LOCAL GOVERNMENT EMPLOYMENT LIABILITY § 14:17, Westlaw STLOCEMP (database updated Oct. 2023) (discussing two versions of public policy grounds against wrongful discharge: whistleblowing statutes and antiretaliation legislation); 22 AM. JUR. PROOF OF FACTS 3D *Termination or Demotion of a Public Employee in Retaliation for Speaking Out as a Violation of Right of Free Speech* 203 (1993), Westlaw (database updated Feb. 2024) (noting that a public employer may not generally discharge an employee who speaks out about a matter of public concern unless the employer can show that the employee's continued presence in the workplace would cause substantial disruption with particular attention to government employee whistleblowing speech).

62. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

approach that carefully aligns First Amendment substantive rights with muscular, effective remedies. After the Southern Christian Leadership Conference ("SCLC") plaintiffs, including Rev. Dr. Martin Luther King, Jr., showed that there was a statewide and systematic program of mass disenfranchisement of Black voters in Alabama,[63] Johnson issued a broad injunctive order that made U.S. Highway 80—the main road in that part of the world—available for a large scale civil rights protest march that would traverse fifty-two[64] miles over a five day period.[65] Moreover, Johnson strictly enjoined Governor George C. Wallace, state public safety officials, and local law enforcement officers from harassing, threatening, or impeding the SCLC protestors.[66] Johnson's injunctive relief is broad, creative, and draws deeply on principles of equity to fashion a remedy that facilitated critically important expressive activity.[67]

Judge Johnson found that "[t]he acts and conduct of these defendants, together with the members of their respective enforcement agencies, as outlined above, have not been directed toward enforcing any valid law of the State of Alabama or furthering any legitimate policy of the State of Alabama."[68] Instead, the state government's actions "have been for the purpose and have had the effect of preventing and discouraging Negro citizens from exercising their rights of citizenship, particularly the right to register to vote and the right to demonstrate peaceably for the purpose of protesting discriminatory practices in this area."[69] Judge Johnson accepted,

> that the plan as proposed and as allowed reaches, under the particular circumstances of this case, to the outer limits of what is constitutionally allowed. [Still], the wrongs and injustices inflicted upon these plaintiffs and the members of their class (part of which have been herein documented) have clearly exceeded—and continue to exceed—the outer limits of what is constitutionally permissible.[70]

Moreover, considering the gravity of the constitutional offenses, "it seems basic to our constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs

63. Williams v. Wallace, 240 F. Supp. 100, 103–06 (M.D. Ala. 1965); *see also id.* at 112–20 (providing shocking statistics that clearly established that many Alabama counties systematically refused to allow Black citizens to register and vote).

64. Ronald J. Krotoszynski, Jr., *Celebrating Selma: The Importance of Context in Public Forum Analysis*, 104 YALE L.J. 1411, 1413 (1995).

65. *Williams*, 240 F. Supp. at 105–09.

66. *Id.* at 110.

67. Jack Bass, *The Selma March and the Judge Who Made It Happen*, 67 ALA. L. REV. 537, 552–54 (2015).

68. *Williams*, 240 F. Supp. at 105.

69. *Id.*

70. *Id.* at 108.

that are being protested and petitioned against."[71] Johnson found that "[i]n this case, the wrongs are enormous."[72] He then held "[t]he extent of the right to demonstrate against these wrongs should be determined accordingly."[73]

To be sure, Judge Johnson's remedial order was strikingly bold—but it bears all the indicia of an equitable remedy that carefully calibrates the strength of the remedial frame to the rights being safeguarded. He explained that the scope of his remedial order reflected, in part, the fact that "the usual, basic and constitutionally-provided means of protesting in our American way—voting—have been deprived."[74] Given the gravity of constitutional harms proven in open court, the "plaintiffs' proposed plan of march from Selma to Montgomery, Alabama, for its intended purposes, is clearly a reasonable exercise of a right guaranteed by the Constitution of the United States."[75]

The importance of the Selma March cannot be overstated. Perhaps most important, the march had a direct and essential causal relationship to the subsequent enactment of the Voting Rights Act of 1965 ("VRA"). The Selma March served as the catalyst for Congress enacting fundamental reforms that secured equal suffrage without regard to race in the United States.[76] Historians quite properly attribute passage of the VRA to the national attention, and outrage, that the Selma March brought to the systematic and grotesque disenfranchisement of Black voters in the Deep South.[77] Thus, Judge Johnson's bold and creative remedial vision, coupled with the SCLC's leadership, and the bravery of over twenty-five thousand marchers, together helped to end Jim Crow–era laws and practices that systematically disenfranchised literally millions of U.S. citizens for generations.

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71. *Id.* at 106.

72. *Id.*

73. *Id.*

74. *Id.* at 108.

75. *Id.* at 109.

76. *See* Krotoszynski, *supra* note 64, at 1412 ("By focusing national attention on the disenfranchisement of Southern blacks, it prompted Congress to pass one of the most sweeping civil rights laws in history: the Voting Rights Act of 1965."). On the collaborative relationship between labor unions and people of color to advance mutual interests including voting rights, see Charlotte Garden & Nancy Leong, *"So Closely Intertwined": Labor and Racial Solidarity*, 81 GEO. WASH. L. REV. 1135, 1136–37, 1205 (2013) ("King soon concluded that he could not abandon the strikers, however, not least because he considered their campaign to be a microcosm of his own Poor People's Campaign—failure in the former could increase the likelihood of failure in the latter. Moreover, the strike had become 'a broad human rights confrontation in which almost every aspect of Negro life in Memphis [was] . . . at issue.'" (alteration in original) (footnote omitted) (quoting Paul Valentine, *The Memphis Strife: Rights Confrontation*, WASH. POST, Mar. 31, 1968, at A1)).

77. *See* DAVID J. GARROW, PROTEST AT SELMA: MARTIN LUTHER KING, JR., AND THE VOTING RIGHTS ACT OF 1965, at 133–78 (2d prtg. 1978); *see also* JACK BASS, TAMING THE STORM: THE LIFE AND TIMES OF JUDGE FRANK M. JOHNSON, JR., AND THE SOUTH'S FIGHT OVER CIVIL RIGHTS 254–55 (1993) (noting the causal connection between the Selma March and subsequent enactment of the Voting Rights Act of 1965).

B. Three Salient Examples of How Contemporary First Amendment Remedies Routinely Fail to Adequately Protect Expressive Freedoms

Three vignettes demonstrate how times have changed since the days of the Warren Court. Moreover, they establish the acute need for a better normative remedies framework to make First Amendment litigation challenging unconstitutional government censorship a game worth the candle for most potential plaintiffs. Systematically failing to provide meaningful remedies to prevailing First Amendment plaintiffs creates a significant chilling effect that deters such litigation going forward. Winning a judicial declaration that the government's behavior was unlawful is not why most First Amendment litigants bring lawsuits in federal court.[78] Instead, they initiate litigation in the hope that, if they prevail on the merits, they will enjoy the ability to speak and engage their intended audience.

We believe that federal court remedial orders are woefully inadequate in three highly visible, quite important First Amendment areas: (1) government employee whistleblowers in circumstances where a government employer, in possession of after-acquired evidence—commonly discovered during First Amendment–related litigation—provides an independent basis for firing a whistleblowing government employee; (2) journalists arrested, often pretextually, while engaged in legitimate newsgathering activities; and (3) content-based local zoning schemes that create prior restraints against speaking. In each of these important areas, many plaintiffs who prevail on the merits find that they still lack the ability to speak or to exercise other expressive freedoms.

1. Unemployed Government Employee Whistleblowers

The essence of government whistleblowing involves a government employee disclosing to the public, typically through the mass media, embarrassing, but truthful, information about wrongdoing or misconduct within the agency for which they work. Not uncommonly, information about government misconduct would not see the light of day in the absence of a whistleblowing government employee; unless a whistleblower comes forward, the voters will not be able to hold government accountable for its misconduct or malfeasance.[79] Frequently, the government employer subsequently fires

78. *But cf.* Steffel v. Thompson, 415 U.S. 452, 456 (1974) (seeking solely declaratory relief, but discarding the request for an injunction); Samuel L. Bray, *The Myth of the Mild Declaratory Judgment*, 63 DUKE L.J. 1091, 1096–98, 1102 (2014) (exploring *Steffel*); Brief for Ams. for Prosperity Found. as Amicus Curiae Supporting Petitioners at 2, Uzuegbunam v. Preczewski, 141 S. Ct. 792 (2021) (No. 19-968), 2020 WL 1373167, at *2 (emphasizing the importance of the narrow question presented "because First Amendment cases frequently seek an injunction and declaratory judgment with little or no compensatory damages").

79. *See* Ronald J. Krotoszynski, Jr., *Whistleblowing Speech and the First Amendment*, 93 IND. L.J. 267, 302 (2018) ("In many circumstances, relevant information about government misconduct will be known only by government employees. Accordingly, if government employees do not

the whistleblower.[80] Under the Supreme Court's doctrinal rules for after-acquired evidence, however, the discovery of information that would justify discharge of the whistleblowing employee cuts off reinstatement and front pay remedies for the plaintiff.[81] The Kafkaesque irony is that the government employer uses evidence that it only discovered incident to the First Amendment litigation to justify its decision to fire the whistleblowing government employee. This approach grossly under-protects whistleblowing government employees and severely chills would-be whistleblowers from stepping forward. It seems self-evident that "[a] rational government employee will not disseminate information about wrongdoing within her department or agency if a not improbable consequence will be the loss of her employment."[82]

An effective remedy for government whistleblowers would permit the whistleblowing government employee to obtain reinstatement without a material risk of further retaliation down the line. To what extent could the federal courts meaningfully ensure that a government whistleblower enjoys professional and financial protection against retaliation? At a minimum, the government should not be able to benefit from its bad behavior through the fortuity of after-acquired evidence that never would have seen the light of day absent the government's retaliatory behavior toward a whistleblowing government employee. An equitable remedy that includes reinstatement should be generally available to prevailing whistleblowing plaintiffs (although perhaps not automatically). Courts, when fashioning remedies in these circumstances, should be able to balance the employer's bad behavior, any bad intent or unclean hands on the part of the whistleblower, and the public interest.[83]

A larger, and no less significant, problem arises from the exclusively bilateral remedies analysis that the federal courts have adopted and deployed to date in this context. The *Pickering/Connick* doctrine, with the *Nashville Banner* rule involving the use of after-acquired evidence to cut off prospective remedial assistance (such as reinstatement), frames the remedial question solely in *binary* terms. Courts consider the interests of the government employee on one hand and the interests of the government employer on the other. What is missing here? The public's interest is in the information that

speak, the information simply will not come to the attention of the electorate, and government accountability to the people will be impeded as a result.").

80. *See id.* at 290 (noting that "the *Pickering/Connick* doctrine permits employers to use potentially pretextual claims of possible workplace disruption as a basis for firing government employees who speak out on matters of public concern"). *See generally* Bland v. Roberts, 730 F.3d 368 (4th Cir. 2013) (firing employees for expressing political support for a rival candidate); Meek v. County of Riverside, 183 F.3d 962 (9th Cir. 1999) (firing subordinate judicial employee). For additional collected cases, see SANCHEZ & KLAUSNER, *supra* note 61, § 14:17.

81. McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 361–62 (1995).

82. Krotoszynski, *supra* note 79, at 274.

83. *See infra* notes 228–38 and accompanying text.

whistleblowers provide and the press then reports—thereby enabling voters to cast better-informed ballots on election day.

Simply put, contemporary First Amendment remedies law entirely ignores the public interest when addressing the social effects of government efforts to retaliate against government employees who blow the whistle. Is it really the case that We the People do not possess *any* judicially cognizable First Amendment interest in the information that whistleblowing government employees make available? First Amendment law is not devoid of collective concerns given the vagueness[84] and overbreadth[85] doctrines where the targeted individual may assert challenges to a regulation's deficiencies as would be experienced by the broader population not before the court.[86] How and when does a collective interest enter the remedial picture?[87] At present, unfortunately, the collective interest in access to information that whistleblowers provide the

84. *See, e.g.*, Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972) (describing the troublesome nature of vague laws and opining that "[u]ncertain meanings inevitably lead citizens to '"steer far wider of the unlawful zone" . . . than if the boundaries of the forbidden areas were clearly marked'" (first quoting Baggett v. Bullitt, 377 U.S. 360, 372 (1964); then quoting Speiser v. Randall, 357 U.S. 513, 526 (1958))); United States v. Williams, 553 U.S. 285, 304–05 (2008); Holder v. Humanitarian L. Project, 561 U.S. 1, 18–20 (2010); Smith v. Goguen, 415 U.S. 566, 572–73 (1974).

85. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 119 (2003) ("Many persons, rather than undertake the considerable burden (and sometimes risk) of vindicating their rights through case-by-case litigation, will choose simply to abstain from protected speech . . . harming not only themselves but society as a whole, which is deprived of an uninhibited marketplace of ideas. Overbreadth adjudication, by suspending *all* enforcement of an overinclusive law, reduces these social costs caused by the withholding of protected speech." (citation omitted)).

86. KROTOSZYNSKI ET AL., *supra* note 26, at 22 ("Laws can violate the Constitution not simply because they suppress speech based on content but because they proscribe too much speech or do not give fair notice as to what they attempt to regulate."). The "[o]verbreadth doctrine allows a person whose speech could permissibly be regulated to challenge a law as overly broad because the law might chill the speech of third-party non-litigant speakers." *Id.* Anti-SLAPP statutes, albeit legislative solutions, operate with a collective frame in mind. *Understanding Anti-SLAPP Laws*, REPS. COMM. FOR FREEDOM OF THE PRESS, https://www.rcfp.org/resources/anti-slapp-laws [https://perma.cc/TMH4-EC5H] ("Short for strategic lawsuits against public participation, SLAPPs have become an all-too-common tool for intimidating and silencing criticism through expensive, baseless legal proceedings. Anti-SLAPP laws are meant to provide a remedy to SLAPP suits. . . . Under most anti-SLAPP statutes, the person sued makes a motion to strike the case because it involves speech on a matter of public concern." (emphasis omitted)).

87. In other arenas, such as punitive damages jurisprudence, the Supreme Court has drifted away from collective frames. *See, e.g.*, Philip Morris USA v. Williams *ex rel.* Estate of Williams, 549 U.S. 346, 356–57 (2007) ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572–73 (1996) (condemning extraterritorial punishment and explaining that "Alabama does not have the power . . . to punish BMW for conduct that was lawful where it occurred and that had no impact on Alabama or its residents"). Notwithstanding the merit of the Court's jurisprudential shifts on punitive damages, this Article asserts that remedies that punish raise distinct concerns not present for remedies that protect collective interests. *Cf.* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351–52 (2003) (reconceptualizing punitive damages to recognize a new category of damage, compensatory societal damages).

electorate is utterly absent from the remedial calculus. This state of affairs must change.

2. Suppressed Journalist Newsgathering and Reporting

Journalists arrested and released without charge, while they are engaged in newsgathering activity antecedent to reporting on matters of public concern,[88] present a second salient example of systematic remedial failure. Local law enforcement officers thwart their speech activity via this tactic—and the tactic is commonplace today.[89] Judicial remedies are necessary to make such journalists whole. Existing pathways to relief are deficient.[90] Here it may be more than the remedy that is lacking. It may also include the lack of a meaningful federal court path for seeking relief.

However, a journalist's First Amendment injuries constitute only one side of the coin (albeit an important one). We the People lose out on reporting

88. *E.g.*, Tyler Valeska, *A Press Clause Right to Cover Protests*, 65 WASH. U. J.L. & POL'Y 151, 154–55 (2021) (noting an "unprecedented" spike in arrests of journalists at protests during the Black Lives Matter movement (quoting Martin G. Reynolds, Carlos Martinez de la Serna & Glenda Wrenn, *Covering Unrest: When Journalists of Color Become the Target*, UNIV. S. CAL. ANNENBERG CTR. FOR HEALTH JOURNALISM (June 10, 2020, 9:30 AM), https://centerforhealthjournalism.org/our-work/webinars/covering-unrest-when-journalists-color-become-target [https://perma.cc/G662-QY9X])).

89. *See, e.g.*, Peter Jacobs, Comment, *Protests, the Press, and First Amendment Rights Before and After the "Floyd Caselaw,"* 24 U. PA. J. CONST. L. 591, 591–92 (2022) (recounting the arrests of several reporters arrested while covering protests); Jenny Maynard, Comment, *Stop the Presses: Police Can Arrest Journalists on Their Own Whims with the Protection of Their Broad Probable Cause Defense to Retaliatory Arrest Claims*, 11 WAKE FOREST J.L. & POL'Y 757, 758–59 (2021); Angela Rulffes, *The First Amendment in Times of Crisis: An Analysis of Free Press Issues in Ferguson, Missouri*, 68 SYRACUSE L. REV. 607, 610–13 (2018).

90. An existing remedy for an arrested journalist is a damages action for false arrest either in state court or in federal court under 42 U.S.C. § 1983, though the viability of such routes is increasingly narrow. 15 AM. JUR. TRIALS 555 *Police Misconduct Litigation–Plaintiff's Remedies* § 2, Westlaw (database updated Feb. 2024) (noting that the federal remedy provided by the U.S. Supreme Court for police misconduct in *Monroe v. Pape*, 365 U.S. 167 (1961), is not "widely invoked . . . probably because of a lack of information among lawyers on how to bring and win such suits, and because of the fear of retaliatory action against complainants who bring suits alleging police misconduct"). The other problem with using false arrest as a potential means for journalists to seek a meaningful remedy involves the reflexive judicial deference that judges, state and federal alike, tend to afford to police officers' subjective, real-time decisions in the context of boisterous, disruptive, and sometimes even violent mass protest activity in public spaces and places. A police officer who is attempting to restore public order in a chaotic and perhaps even dangerous situation, who is at the same time also targeting pesky journalists covering the protest and arrests, will almost certainly not simply admit to engaging in the latter activity while undertaking the former (constitutionally permissible) activity. Third, an after-the-fact action for damages for false arrest will not restore or replace the lost newsgathering and reporting; the remedy is misaligned with the harm and does not take the public interest in the reporting into account at all. Fourth, and finally, the news cycle will have long moved on by the time a trial occurs and the appellate process runs its course—the remedy comes too late. In sum, this vehicle provides a (very) poor avenue for seeking relief that is targeted to the disruption of the flow of information related to matters of public concern.

about matters of public concern when police officers harass and intimidate journalists—thereby impeding or preventing their ability to disseminate the news and information necessary to facilitate the process of democratic deliberation.[91] As Alexander Meiklejohn explained with such great eloquence, "[w]hen a free man is voting, it is not enough that the truth [be] known by someone else, by some scholar or administrator or legislator."[92] Instead, "[t]he voters must have it, all of them."[93]

If, as Meiklejohn posits, "[t]he primary purpose of the First Amendment is, then, that all the citizens shall, so far as possible, understand the issues which bear upon [the] common life,"[94] then the critically important role of the press cannot be gainsaid. The information that the press makes available to the electorate is essential to the operation of democratic self-government and so the critical importance of journalists' work in both gathering and then reporting the news should be obvious to all. Accordingly, government efforts to impede or prevent newsgathering inflict serious constitutional harm not only on the individual journalists subjected to pretextual harassment and arrest, but on the body politic as well. Remedies law needs to take some account of these collective, public harms in addition to the personal harms that journalists suffer when police try to impede or prevent newsgathering and reporting.

The problem is real and ongoing. For example, police officers in Phoenix, Arizona, detained and handcuffed Dion Rabouin, a Wall Street Journal reporter, who was talking to customers outside a branch of Chase Bank.[95] Mr. Rabouin was arrested, cuffed, and placed in a police vehicle after Chase Bank employees noticed him speaking with customers outside a Phoenix, Arizona, local branch.[96] Despite repeatedly identifying himself as a reporter engaged in newsgathering activity, the police "officer did not appear to care," and a bystander who was video recording the arrest with his cell phone "was also threatened with arrest."[97] After fifteen minutes, the police officer released Mr. Rabouin from custody and he was "allowed to walk free."[98] Although Chase Bank apologized to Mr. Rabouin, the Phoenix municipal police department has not even taken that small (and largely meaningless) step.[99]

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91. *See* ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 88–89 (1948).

92. *Id.* at 88.

93. *Id.*

94. *Id.* at 88–89.

95. Oliver Darcy, *A Wall Street Journal Reporter Was Handcuffed by Police While Standing Outside a Chase Bank. The Newspaper Is Demanding Answers*, CNN: BUS. (Jan. 6, 2023, 8:05 AM), https://www.cnn.com/2023/01/06/media/wsj-reporter-chase-arrest/index.html [https://perma.cc/9H8C-LT5C].

96. *Id.*

97. *Id.*

98. *Id.*

99. *See id.*

In the classic scenario, police make arrests using perfectly constitutional general statutes—such as breach of peace, unlawful assembly, failure to observe a lawful police order, and obstructing traffic.[100] The police arrest protesters, and journalists get swept into the mass arrest and carted off to the local jail.[101] But, thereafter, the government releases the journalists without any charges being prosecuted.[102] Professor Christina Wells explains that "law enforcement officials thwart protests by engaging in online surveillance to gather information about the protestors, using it to facilitate pretextual arrests, and participating in coercive information gathering through individual interrogations of protestors."[103] Most immediately relevant, she emphasizes that "many journalists covering protests have been harassed or arrested" and "arrests of journalists are likely to chill protest activity *or at the very least manipulate the public's access to protestors' messages*."[104]

Without an active and ongoing criminal proceeding, no easy or obvious venue exists for contesting the arrests. And courts seem to loath second-guessing the good faith of police officers in making such (pretextual) arrests in the first place.[105] Another example involves journalists placed on no-fly lists without sufficient justification,[106] but with the harsh consequence that they

100. Christina E. Wells, *Protest, Policing, and the Petition Clause: A Review of Ronald Krotoszynski's* Reclaiming the Petition Clause, 66 ALA. L. REV. 1159, 1164–67 (2015); *see* Victoria Cavaliere, *Charges Dismissed in Last Cases from Occupy Wall Street March*, REUTERS (Oct. 8, 2013, 4:50 PM), https://www.reuters.com/article/us-usa-occupy-cases/charges-dismissed-in-last-cases-from-occupy-wall-street-march-idUSBRE99713H20131008 [https://perma.cc/9Y2K-H29X] (discussing arrests of journalists covering Occupy Wall Street protests); John Nichols, *The Constitutional Crisis in Ferguson, Missouri*, NATION (Aug. 14, 2014), www.thenation.com/blog/181145/policy-overreaction-has-become-constitutional-crisis-fergusonmissouri [https://perma.cc/92EC-JSEZ] (discussing systematic harassment of protestors and journalists attempting to cover and report on civil rights protests in Ferguson, Missouri, following the police officer's fatal shooting of Michael Brown on August 14, 2014); *see also* John Eligon, *No Charges for Ferguson Officer Who Killed Michael Brown, New Prosecutor Says*, N.Y. TIMES (July 30, 2020), https://www.nytimes.com/2020/07/30/us/michael-brown-darren-wilson-ferguson.html (on file with the *Iowa Law Review*) (identifying the police officer who fatally shot Michael Brown as Darren Wilson).

101. Wells, *supra* note 100, at 1166.

102. *Id.* at 1166–67.

103. *Id.* at 1166.

104. *Id.* at 1166–67 (emphasis added); *see* KROTOSZYNSKI, *supra* note 10, at 175 ("To the extent that the First Amendment's core purpose relates to facilitating the process of democratic self-government, First Amendment protection of newsgathering activity is no less integral to a healthy and dynamic marketplace of political ideas than the longstanding rules against the government adopting content- or viewpoint-based speech regulations.").

105. In a recent Supreme Court case involving a man who was arrested for allegedly disrupting a Florida town council meeting, the Court noted that the uniqueness of the facts coupled with the core First Amendment values at issue supported a narrow ruling that the arrested man did not need to prove the absence of probable cause to pursue his claim for retaliatory arrest. Lozman v. City of Riviera Beach, 138 S. Ct. 1945, 1949, 1954–55 (2018). The Justices avoided the larger, and quite difficult, issue of police using pretextual arrests to silence would-be speakers committed to speaking their version of truth to power.

106. Jeffrey Kahn, Travel as a Right of the Second Freshness: How Terrorist Watchlists Erode

are thwarted from capturing important, timely news stories involving matters of public concern.[107] Such deficiencies raise serious concerns about potential speech harms suffered by journalists that may go unremedied and undeterred. In our view, "[t]he First Amendment should preclude government efforts to suppress the gathering and dissemination of the information voters need to make wise electoral choices."[108]

Unfortunately, the contemporary Supreme Court has shown little interest—at all—in deploying the First Amendment's Free Speech or Free Press Clauses to facilitate either newsgathering activity or reporting. As Professors RonNell Andersen Jones and Sonja R. West, two of the nation's leading Press Clause scholars, explain, "[t]he United States Supreme Court has also grown less interested in press protections [over time]."[109] They note, quite correctly, that "[i]n the last decade, the Court has issued no major opinions articulating press freedoms and has likewise denied certiorari on several hotly contested press issues."[110] Thus, the problems associated with First Amendment protection of newsgathering and news reporting are hardly limited to the lack of remedies for pretextual arrests. They extend more broadly to encompass the Supreme Court's failure to use the Press Clause to convey targeted constitutional protection on activities antecedent to reporting but essential to getting the story right.[111]

The Executive Director of the Reporters Committee for Freedom of the Press, Bruce Brown, has observed that there have been an "alarming number of incidents" in recent years "where police have detained, arrested, or assaulted journalists who were doing their jobs."[112] The U.S. Press Freedom Tracker reports that, from 2020 to 2022, law enforcement officers have arrested over two hundred journalists in the United States.[113] Targeted police harassment of professional journalists is the new normal in the United States—

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the Meaning of Rights 12 (June 9, 2022) (unpublished manuscript) (on file with author).

107. Ryan Devereaux, *Journalists, Lawyers, and Activists Working on the Border Face Coordinated Harassment from U.S. and Mexican Authorities*, INTERCEPT (Feb. 8, 2019, 11:42 AM), https://theintercept.com/2019/02/08/us-mexico-border-journalists-harassment [https://perma.cc/8F4E-HJCW].

108. KROTOSZYNSKI, *supra* note 10, at 175; *see* MEIKLEJOHN, *supra* note 91, at 25 (positing that "[t]he welfare of the community requires that those who decide issues shall understand them" and, thus requires that voters "must know what are voting about" and enjoy free and unfettered access to "all facts and interests relevant to the problem").

109. RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 579 (2017).

110. *Id.* (footnote omitted).

111. *See* Ashutosh Bhagwat, *Producing Speech*, 56 WM. & MARY L. REV. 1029, 1035–36, 1078–80 (2015) (arguing that the federal courts should deploy the Press Clause to protect the right to gather information necessary to reporting because "unlike speech production, information gathering often has no connection to speech at all"). Professor Bhagwat advocates using the Press Clause as a source of protection for "penumbral" activities essential to the dissemination of news and information to the public. *See id.* at 1056–58.

112. Darcy, *supra* note 95.

113. *Id.*

but to date, the federal courts have failed to offer any meaningful remedies for a tsunami of pretextual arrests of the sort that Wall Street Journal reporter Dion Rabouin experienced in Phoenix. Indeed, it veritably boggles the mind, in terms of remedial logic, that Mr. Rabouin cannot even secure a public apology from the Phoenix police department for its pretextual and baseless arrest. In the absence of any meaningful remedies for preventing the press from engaging in newsgathering activities, police harassment of journalists will continue unabated, and We the People will lack access to news and information essential to holding the government accountable through our ballots.

3. Banned Billboards in Ebbing, Missouri (and Elsewhere)

For the final paradigm, adequate remedies do not presently exist when the government prevents a would-be speaker, such as one who wishes to use outdoor billboards to propagate messages, from speaking despite a successful constitutional attack on the applicable local ordinances restricting the construction and use of outdoor billboards. In many instances, local zoning regulations suffer from serious constitutional defects—notably including the use of content-based regulations that make the legality of a particular sign contingent on the message that it propagates.[114]

If a plaintiff has sufficient time and resources, they can prove constitutional infirmities in federal court. In the local zoning context, plaintiffs are frequently successful in winning substantive claims such as the city or county has enacted unconstitutional, content-based schemes of signage regulation or maintains a constitutionally deficient zoning variance procedure.[115] But to what end? In the absence of a remedy that permits the would-be speaker to erect a sign and propagate messages on it, the First Amendment victory rings entirely hollow. A typical remedial order will void the unconstitutional regulations and procedures. The prevailing plaintiff can also seek and obtain an award of court costs and attorney fees.[116] But the prevailing First Amendment plaintiff will quite often remain unable to speak.

In the absence of an affirmative injunctive order requiring the city or county government to permit the successful First Amendment litigant to erect and operate an outdoor billboard, and to propagate messages via the billboard, the successful plaintiff is really not any better off than before "winning" the First Amendment case in federal court. When a federal district court simply severs and voids offending content-based provisions of a comprehensive zoning ordinance, while leaving bans on outdoor billboards in place, it levels speech down by abolishing exemptions from signage

114. *See, e.g.*, Reed v. Town of Gilbert, 576 U.S. 155, 159–61 (2015).

115. *See, e.g.*, Thomas v. Schroer, 127 F. Supp. 3d 864, 878 (W.D. Tenn. 2015); Int'l Outdoor, Inc. v. City of Troy, 974 F.3d 690, 709 (6th Cir. 2020); Park Outdoor Advert. of N.Y., Inc. v. Town of Onondaga, 708 F. Supp. 2d 241, 248 (N.D.N.Y. 2010).

116. The Civil Rights Attorney's Fees Award Act of 1976, 42 U.S.C. § 1988(b).

requirements that favored signs conveying government-favored messages. However, remedial orders of this stripe leave the would-be speaker essentially empty-handed: Those who would use the billboard to speak remain silenced.

Worse still, the invalidation of constitutionally problematic variance procedures would seem to *reward the government* for its bad behavior. When a federal court voids a variance procedure (for example, because it fails to constrain the discretion of a board of zoning appeals ("BZA") sufficiently), it makes it impossible for a would-be speaker even to seek a variance for a nonconforming outdoor sign unless and until the local government enacts a constitutionally compliant variance procedure. This is actually perverse: It means that the prevailing First Amendment plaintiff is arguably left *worse off* after winning their First Amendment case than it was before initiating the litigation. In the absence of some sort of deadline in the district court's remedial order for enacting constitutionally compliant variance procedures, nothing would prevent a city or county government that dislikes outdoor billboards (or the messages that would appear on them) from taking its sweet time in adopting revised rules for seeking sign-related variances.

Accordingly, even though the would-be speaker succeeds in its challenge, the victory is pyrrhic. The offending ordinance provisions are no more, but the would-be speaker remains silenced. Instead, the victorious would-be speaker must simply sit back and await new regulations while being prevented from speaking. What's more, severing unconstitutional provisions without affording affirmative injunctive relief can actually produce the perverse result of causing new and additional constitutional harms.

For example, if a variance procedure lacks sufficient safeguards to cabin a BZA's discretion in granting or denying a variance for a nonconforming outdoor sign, it empowers the BZA to choose as it pleases free speech winners (by granting a variance) and free speech losers (by denying a variance). That said, voiding the variance procedure with respect to applications for variances related to outdoor signs leaves the would-be speaker with no procedural avenue for seeking approval of a nonconforming land use related to an outdoor sign. Thus, the local government, despite losing the First Amendment case, remains free to refuse even considering a sign-related variance until it adopts new, constitutionally adequate variance procedures.

This creates, at least arguably, issues arising under the rubric of equal protection (non-signage-related variance requests can be filed and considered whereas signage-related variance requests cannot), procedural due process (a property right associated with the land where the sign would be erected is burdened significantly but no procedure exists for seeking to reduce or remove that burden), and perhaps the Takings Clause (a land use regulation plainly diminishes the value of land when it limits the uses to which a parcel may be put).

As Rev. Dr. Martin Luther King, Jr., so eloquently observed in his iconic *Letter from a Birmingham Jail*, "justice too long delayed is justice denied."[117] Voiding unconstitutional zoning ordinances that ban speech activity on private property should be met with robust remedial orders that permit a would-be speaker to communicate a message without waiting for an indefinite period for a local government to cure constitutional defects in its comprehensive zoning plan. Moreover, these orders should consider not only the monetary losses that an outdoor billboard company suffers, which could be made whole with traditional legal remedies, such as money damages, but also the collective harm the local government's unconstitutional behavior causes to speakers who would use the billboard to communicate messages and the audience that wishes to receive and consider them.

A remedial order limited to money damages, court costs, and attorney fees disregards entirely the lost speech opportunities caused by the government's unconstitutional zoning policies. A simple hypothetical will make this point crystal clear. If a government enacts an unconstitutional ban on operating or maintaining a newspaper printing press within the city limits, the body politic suffers obvious and cognizable harm along with the owner of the (silenced) local newspaper. Current remedies law, however, takes account of the latter harm (and does so, at best, imperfectly) and simply disregards the former harm.

II. RETHINKING AND RENORMALIZING THE RELATIONSHIP BETWEEN REMEDIES AND EXPRESSIVE FREEDOMS

Traditionally, remedies in First Amendment cases have focused on the would-be speaker. This is fine so far as it goes. But a First Amendment violation actually involves harms beyond the speaker because free speech benefits not just the speaker but also the audience.[118] A remedy framed solely in terms of a would-be speaker's personal autonomy interest in speaking entirely ignores an important social harm associated with government censorship—the loss of the information to the would-be audience. As Justice Anthony Kennedy explained in *Citizens United v. FEC*, "[t]he First Amendment confirms the freedom to think for ourselves."[119] Moreover, "[w]hen Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear,

117. MARTIN LUTHER KING, JR., LETTER FROM BIRMINGHAM CITY JAIL 5 (Am. Friends Serv. Comm. ed., 1963) (commonly known as the "Letter from a Birmingham Jail").

118. *See* Citizens United v. FEC, 558 U.S. 310, 341 (2010) ("The Government may not . . . deprive the public of the right and privilege to determine for itself what speech and speakers are worthy of consideration. The First Amendment protects speech and speaker, and the ideas that flow from each.").

119. *Id.* at 356.

it uses censorship to control thought."[120] These observations quite properly emphasize audience autonomy as a central First Amendment value.[121]

First Amendment remedies should, of course, take account of the personal autonomy interest that a citizen has in speaking, publishing, or broadcasting. But this is only one side of the free speech coin. We the People suffer a cognizable harm as well when the government squelches speech and the information needed for the body politic to hold the government accountable through the electoral process is unavailable to voters. This Part, in conjunction with Part III, seeks to rethink how best to secure meaningful personal relief as well as ways to theorize and address collective redress.

A. ENHANCED REMEDIAL VISION: ACHIEVING EFFECTIVE, MEANINGFUL INDIVIDUAL RELIEF

Effective remediation of First Amendment violations requires enhanced alignment of the remedy to the right.[122] This alignment dictates remedy expansion instead of contraction to the point of evaporation. When a plaintiff has proven a First Amendment violation, why default to a remedy that puts a thumb on the scale of the continued suppression of speech and expression? Instead, the remedy should calibrate to the encroached right—as was the case with Judge Johnson's *Williams* order. The remedy must enable more, rather than less, speech. Otherwise, what was the point of going through the time and trouble of litigating the constitutionality of the law? What's more, absent an efficacious remedy, the government will not be deterred (at all) from inflicting future First Amendment harms.

This approach does not mean that courts should not tailor remedies or use caution before issuing bold relief. Instead, what this alignment frame means is that courts should not void a statute in one breath but then leave a plaintiff with anemic, totally useless relief in the next. To use Judge Johnson's formulation of the relevant remedial principle, "it seems basic to our

120. *Id.*

121. *See* MARTIN H. REDISH, THE ADVERSARY FIRST AMENDMENT: FREE EXPRESSION AND THE FOUNDATIONS OF AMERICAN DEMOCRACY 72–75 (2013) (arguing that "the First Amendment must encompass *both* the listener autonomy that Meiklejohn would protect *and* the speaker autonomy that Post would protect," positing that "[t]he adversary theory of free expression, on the other hand, protects and even values the promotion of self-interest," and suggesting that self-interested speech is no less efficacious in driving forward the process of collective deliberation necessary to animate the ongoing process of democratic self-government).

122. A separate but related problem is the inconsistency of remedial doctrines when enforcing constitutional rights. This Article focuses on the acute problem of anemic remedies. For a thoughtful in-depth examination of remedial inconsistency, see generally Katherine Mims Crocker, *Constitutional Rights, Remedies, and Transsubstantivity*, 110 VA. L. REV. (forthcoming 2024), which offers detailed examples, robust criticism, and thoughtful recommendations for transsubstantive treatment of constitutional remedies. *See also* Caprice Roberts, *Towards an Improved Judiciary—Decisionmaking Consistency on Constitutional Remedies*, JOTWELL (May 16, 2023), https://lex.jotwell.com/towards-an-improved-judiciary-decisionmaking-consistency-on-constitutional-remedies [https://perma.cc/29MR-ZZJY] (reviewing Crocker, *supra*).

constitutional principles that the extent of the right to assemble, demonstrate and march peaceably along the highways and streets in an orderly manner should be commensurate with the enormity of the wrongs that are being protested and petitioned against."[123] A remedy for a constitutional violation proven in open court should meaningfully and effectively redress the constitutional wrong—nothing more and nothing less.

Of course, remedies in First Amendment cases are not uniformly deficient. Examples certainly exist where courts apply broad remedial tools rather than narrow ones. The conscientious objector cases,[124] for example, used a remedial logic that expanded, rather than contracted, First Amendment rights. In *United States v. Seeger*, the Supreme Court rewrote a provision of the Universal Military Training and Service Act[125] to expand eligibility for conscientious objector status to include persons who objected to personal participation in armed conflicts but whose beliefs were rooted in secular humanism rather than traditional religious beliefs.[126]

Section 456(j) of Title 50 authorized an exemption from conscription into the "armed forces of the United States [for a person] who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[127] In turn, the provision defined "religious training and belief" as "an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."[128] This definition excluded persons who had a moral or ethical objection to personal participation in military combat—only those like Quakers, with an objection rooted in a traditional religious tradition,[129] would qualify for conscientious objector status under the letter of Section 456(j).

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123. Williams v. Wallace, 240 F. Supp. 100, 106 (M.D. Ala. 1965).

124. *See, e.g.*, Welsh v. United States, 398 U.S. 333, 335 (1970); United States v. Seeger, 380 U.S. 163, 164–65 (1965).

125. Military Selective Service Act § 456(j), ch. 625, 62 Stat. 604, 612–13 (1948) (codified as amended at 50 U.S.C. § 3806(j)).

126. *Seeger*, 380 U.S. at 184–88.

127. § 456(j), 62 Stat. at 612.

128. *Id.* at 613.

129. MULFORD Q. SIBLEY & PHILIP E. JACOB, CONSCRIPTION OF CONSCIENCE: THE AMERICAN STATE AND THE CONSCIENTIOUS OBJECTOR, 1940-1947, at 18–36 (Robert E. Cushman ed., 1952); Ronald J. Krotoszynski, Jr., *If Judges Were Angels: Religious Equality, Free Exercise, and the (Underappreciated) Merits of* Smith, 102 NW. U. L. REV. 1189, 1227, 1255–56 (2008) (observing that "many religious groups, such as the Quakers, have a history of refusing to participate in wars prosecuted by the U.S. federal government" and discussing Congress's consideration, but ultimate rejection, of a conscientious objector clause in the First Amendment); *see also* Alan E. Brownstein, *Harmonizing the Heavenly and Earthly Spheres: The Fragmentation and Synthesis of Religion, Equality, and Speech in the Constitution*, 51 OHIO ST. L.J. 89, 166–67 (1990) ("Given the centrality of nonviolence to the religious beliefs of many pacifist sects and the long history of political acceptance of religiously based exemptions from conscription, a strong case may be made on balance that these exemptions should be sustained against establishment clause challenge."

Daniel A. Seeger refused to characterize his objections to military service in terms of belief in a "Supreme Being."[130] Instead, citing "Plato, Aristotle, and Spinonza," Seeger explained that his objection was rooted in "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed" and "without belief in God, except in the remotest sense."[131] Based on his express disavowal of a belief in a Supreme Being, he was indicted, tried, and convicted for refusing to submit to induction into the armed forces.[132] The U.S. Court of Appeals for the Second Circuit reversed Seeger's conviction on equal protection grounds, and the Supreme Court agreed to hear the federal government's appeal.[133]

Because Section 456(j) plainly favored some kinds of religious beliefs over others and also denied conscientious objector status to people who held strong moral or ethical beliefs not tied to traditional religious beliefs, the statute arguably violated both the Establishment Clause and the Equal Protection Clause. The simplest solution to this problem would have been to follow the approach in *AAPC* and simply void the exemption for everyone—including traditional religious believers, such as Quakers, who object to personal participation in all wars. This is not how the Supreme Court resolved the clear constitutional problems that Section 456(j) created by conveying conscientious objector status so selectively.

Writing for a unanimous bench, Justice Tom Clark explained that the "Supreme Being" language actually did not mean what it so clearly said. Rather than excluding nontraditional religions and deeply held secular moral and ethical beliefs, Congress "was merely clarifying the meaning of religious training and belief so as to embrace all religions and to exclude essentially political, sociological, or philosophical views."[134] Under this creative interpretation of the statute's language, "the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption."[135]

By rewriting the statute and ignoring its plain words, the Supreme Court was able to avoid having to decide whether, as written, Section 456(j) violated either the Establishment Clause or the equal protection principle of the Fifth Amendment's Due Process Clause.[136] Justice Clark explained that the

(footnote omitted)).

130. *Seeger*, 380 U.S. at 167.

131. *Id.* at 166 (quoting Transcript of Rec. at 69–70, 73, *Seeger*, 380 U.S. 163 (No. 50)).

132. *Id.* at 166–67.

133. *Id.* at 167.

134. *Id.* at 165.

135. *Id.* at 165–66.

136. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) ("The Fifth Amendment, which is applicable in the District of Columbia, does not contain an equal protection clause as does the Fourteenth Amendment which applies only to the states. But the concepts of equal protection

Supreme Court's creative reading of the statute's language "avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets."[137] Under the revised and expanded test for eligibility, "[w]e think it clear that the beliefs which prompted [Seeger's] objection occupy the same place in his life as the belief in a traditional deity holds in the lives of his friends, the Quakers."[138]

Elliott Ashton Welsh II sought conscientious objector status based on beliefs related to his "reading in the fields of history and sociology."[139] On the form used to seek conscientious objector status, "Welsh struck the word 'religious' entirely"—thereby flatly refuting any claim that his objection related a religious belief.[140] The Selective Service authorities, as well as the U.S. Court of Appeals for the Ninth Circuit, took Welsh at his word and denied him conscientious objector status.[141] The Supreme Court reversed the Ninth Circuit's ruling, instead performing further surgery on Section 456(j).[142]

Writing for the plurality, Justice Hugo L. Black explained that

> [i]f an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual 'a place parallel to that filled by . . . God' in traditionally religious persons.[143]

Moreover, such an ethical or moral commitment is sufficient to qualify under Section 456(j): "Because his beliefs function as a religion in his life, such an individual is as much entitled to a 'religious' conscientious objector exemption under [Section 456(j)] as is someone who derives his conscientious opposition to war from traditional religious convictions."[144] In other words, the statute "exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them

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and due process, both stemming from our American ideal of fairness, are not mutually exclusive.").

137. *Seeger*, 380 U.S. at 176.

138. *Id.* at 187.

139. Welsh v. United States, 404 F.2d 1078, 1090 (9th Cir. 1968) (Hamley, J., dissenting), *rev'd*, 398 U.S. 333 (1970).

140. Welsh v. United States, 398 U.S. 333, 341 (1970).

141. *Welsh*, 404 F.2d at 1082 ("He denied that his objection to war was premised on religious belief. The Appeal Board was entitled to take him at his word, as he failed to meet the statutory standard, and to deny his request to be so classified.").

142. *See Welsh*, 398 U.S. at 342–44.

143. *Id.* at 340 (alteration in original) (quoting *Seeger*, 380 U.S. at 176).

144. *Id.*

no rest or peace if they allowed themselves to become a part of an instrument of war."[145]

Justice John Marshall Harlan provided a fifth vote in support of the plurality's proposed resolution of the case—but unlike Justice Black, Harlan believed that the Supreme Court had to engage the constitutional questions directly because the statute could not bear the meaning that the plurality ascribed to it.[146] He observed that "[t]oday the prevailing opinion makes explicit its total elimination of the statutorily required religious content for a conscientious objector exemption."[147] He believed that the doctrine of avoiding constitutional questions, via a saving construction, could not be stretched to meet the facts of this case.[148] Justice Harlan concluded that "having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other" because such a line is "[in]compatible with the Establishment Clause of the First Amendment."[149] To pass constitutional muster, "the exemption . . . must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source."[150]

On these facts, Justice Harlan explained that the Supreme Court had to make a critical remedial choice:

> Where a statute is defective because of underinclusion there exist two remedial alternatives: a court may either declare it a nullity and order that its benefits not extend to the class that the legislature intended to benefit, *or it may extend the coverage of the statute to include those who are aggrieved by exclusion.*[151]

Rejecting the *AAPC* Court's embrace of the former approach, Justice Harlan instead concluded that expanding the scope of Section 456(j) constituted the better approach. Accordingly, he was "prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patchwork of judicial making that cures the defect of underinclusion in [Section 456(j)]."[152]

The Supreme Court, after finding a violation of the Establishment Clause in *Welsh* and *Seeger*, could have followed the remedial logic of the *AAPC* Court and simply voided the constitutionally problematic conscientious objector

145. *Id.* at 344.

146. *Id.* at 344–45, 356–62 (Harlan, J., concurring).

147. *Id.* at 345.

148. *Id.* at 354 ("When the plain thrust of a legislative enactment can only be circumvented by distortion to avert an inevitable constitutional collision, it is only by exalting form over substance that one can justify this veering off the path that has been plainly marked by the statute.").

149. *Id.* at 356.

150. *Id.* at 358.

151. *Id.* at 361 (emphasis added).

152. *Id.* at 366–67.

exemption. This approach, denying Quakers an exemption from the draft because Congress intentionally excluded New Age and less theistically grounded secular moral and ethical objections to personal participation in war, would have leveled First Amendment rights down—for everyone. This is not, however, how the Warren Court approached the remedial question. Had the Supreme Court instead adopted an anemic remedial frame (as the lower and state courts have done in the zoning cases involving signage bans), then the remedy would have been to void the exemption and thereby put Quakers at risk of incarceration.

In our view, *Welsh* and *Seeger* provide a strong remedial template for the expansion of First Amendment remedies—remedies that actually align with the underlying expressive freedoms at stake and the serious consequences associated with the problematic "leveling down" approach frequently deployed in shaping remedial orders in First Amendment cases. All too often, however, in First Amendment cases, like *AAPC*, the federal courts will abolish an exemption from an otherwise general speech ban rather than expand it—leaving no one able to speak.[153] Fortunately, these remedial deficiencies can be cured by defaulting to a speech-protective frame rather than a speech-indifferent posture. In short, remedies in First Amendment cases should reflect the normative point of view that more speech, not less speech, better secures core First Amendment values.

In addition, First Amendment remedies should take fully and fairly into account collective harms that government censorship inflicts on the body politic. To be sure, we do not seek to minimize either the importance or the relevance of the individual autonomy interests of whistleblowing government employees, journalists engaged in newsgathering and news reporting, or companies that disseminate messages to the public via outdoor billboard advertising; an appropriate remedial frame should factor their autonomy interests into the remedial equation. That said, the contemporary federal courts have done a miserable job of even recognizing and acknowledging the collective social harms of government censorship of speech in these three areas. Remedial orders fail to address the public's injuries because federal judges appear to be either obtuse or willfully blind to them. This must change if remedies in First Amendment cases are to vindicate reliably and effectively *all the harms* associated with government efforts to censor speech. The next Section details how to improve remedial vision to redress harms to the collective.

B. ENHANCED REMEDIAL VISION: SEEING AND REMEDIATING COLLECTIVE HARMS

Judge Frank M. Johnson, Jr., in another case, *United States v. Paradise*, 480 U.S. 149 (1987),[154] crafted an equitable order with a collective frame. The

153. Barr v. Am. Ass'n of Pol. Consultants, Inc. (*AAPC*), 140 S. Ct. 2335, 2347–48, 2356 (2020).

154. The *Paradise* litigation generated several published decisions, including Judge Johnson's

order required the Alabama state troopers to hire one Black trooper for every other open position, and for any one of the "top four" positions within the agency, until the agency's overall work force reached a target of twenty-five percent Black troopers.[155] This type of relief was essential to eradicate egregious long-term racial discrimination perpetuated by the Alabama state government agency.[156]

Here, the harm was a collective one—a work force that reflected decades of de jure segregation and one that would have continued to look mostly white, if not all white, absent targeted hiring goals that conferred a benefit on the group suffering discrimination rather than the individuals who had applied to the state troopers and been rejected because of their race. The remedy was collective in two ways: (1) it benefited the harmed group, Black Alabamians, rather than only those who had directly and personally suffered racial discrimination; and (2) it benefitted everyone in Alabama by rendering the state troopers visibly racially integrated and inclusive (a racially diverse and inclusive police force obviously will be more effective than a racially segregated one). Thus, the equitable remedy in *Paradise* factored both individual and collective interests into the remedial equation. A remedy limited solely to those who had applied, perhaps decades earlier, for employment in the agency would not have effectively addressed the constitutional harm of an all-white state trooper force as an artifact of the agency's prior policy of categorically refusing to hire Black applicants (save for janitorial positions).

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initial remedial order imposing a duty on the Alabama state troopers to engage in affirmative action hiring to address and redress the agency's racially imbalanced workforce and, unfortunately, several subsequent remedial orders, over the span of a *decade*, reaffirming and restating that remedial order. NAACP v. Allen, 340 F. Supp. 703, 705–06 (M.D. Ala. 1972) (requiring one-to-one hiring until twenty-five percent of the state trooper force was Black); *see* Paradise v. Prescott, 585 F. Supp. 72, 74 (M.D. Ala. 1983) ("The time has now arrived for the department to take affirmative and substantial steps to open the upper ranks to black troopers."); *id.* at 75 (ordering certain requirements such as the advancement of Black troopers, if qualified, to fifty percent of promotions to corporal); Paradise v. Shoemaker, 470 F. Supp. 439, 441 (M.D. Ala. 1979) ("Seven years have passed since this case was first before the Court, and defendants have yet to achieve full compliance with the Court's order. That they wish to free themselves from the stigma of non-compliance in the name of 'clarification' is understandable but not excusable.").

155. *Shoemaker*, 470 F. Supp. at 442 ("One continuing effect of that discrimination is that, as of November 1, 1978, out of 232 state troopers at the rank of corporal or above, *there is still not one black*. The quota fashioned by the Court provides an impetus to promote blacks into those positions."). As Judge Johnson explained in applying the remedy to officer positions, "[t]o focus only on the entry-level positions would be to ignore that past discrimination by the Department was pervasive, that its effects persist, and that they are manifest." *Id.* Judge Myron Thompson, in *Prescott*, required that promotions within the officer ranks prefer Black candidates until the upper echelons of the agency included at least twenty-five percent Black state troopers. *Prescott*, 585 F. Supp. at 74–75; *see also* BASS, *supra* note 77, at 377–79 (discussing the overall twenty-five percent requirement and the requirement that officer positions also be filled with no less than twenty-five percent Black state troopers using an every-other-hire metric). *See generally* United States v. Paradise, 480 U.S. 149, 156–61 (discussing the top ranks hiring requirement).

156. Paradise v. Prescott, 767 F.2d 1514, 1532–33 (11th Cir. 1985).

The Supreme Court affirmed Johnson's approach by a 5–4 vote,[157] over the vociferous, spirited dissent of Justice O'Connor, who was joined by Chief Justice Rehnquist and Justice Scalia.[158] Justice O'Connor believed that the remedial order was not sufficiently narrowly tailored.[159] In her view, "[g]iven the singular *in terrorem* purpose of the District Court order, it cannot survive strict scrutiny" because "some combination of penalties could have been designed that would have compelled compliance with the consent decrees."[160]

It bears noting that in a latter affirmative action opinion, *City of Richmond v. J.A. Croson Co.*, Justice Scalia made explicit his view that only a remedy limited to those who directly suffered racial discrimination, rather than benefiting a minority group as such, can be reconciled with the imperatives of the Equal Protection Clause.[161] He reiterated this view in *Adarand Constructors, Inc. v. Pena*, observing that "[i]ndividuals who have been wronged by unlawful racial discrimination should be made whole; but under our Constitution there can be no such thing as either a creditor or a debtor race" because "[t]hat concept is alien to the Constitution's focus upon the individual."[162] Even so, to this day, the remedial approach in *Paradise* remains good law, and an equitable remedy may take into account both individual and collective injuries.

In sum, working within the Equal Protection Clause space, the *Paradise* plurality opted to embrace the need for constitutional remedies that reach and redress collective harms in addition to individual ones.[163] Courts need to bring

157. *Paradise*, 480 U.S. at 153, 186.

158. *See id.* at 196 (O'Connor, J., dissenting).

159. *See id.* at 199–201. Justice White agreed with much of Justice O'Connor's dissent but wrote separately to assert "that the District Court exceeded its equitable powers in devising a remedy in this case." *Id.* at 196 (White, J., dissenting).

160. *Id.* at 199–200 (O'Connor, J., dissenting).

161. City of Richmond v. J.A. Croson Co., 488 U.S. 469, 526 (1989) (Scalia, J., concurring) (opining that "a State may 'undo the effects of past discrimination' in the sense of giving the identified victim of state discrimination that which it wrongfully denied him—for example, giving to a previously rejected black applicant the job that, by reason of discrimination, had been awarded to a white applicant, even if this means terminating the latter's employment" because "[i]n such a context, the white jobholder is not being selected for disadvantageous treatment because of his race, but because he was wrongfully awarded a job to which another is entitled," which, in Justice Scalia's view, "is worlds apart from the system here, in which those to be disadvantaged are identified solely by race").

162. Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part).

163. Justice John Paul Stevens provided the critical fifth vote in favor of affirming the district court's remedial order, explaining that "the record discloses an egregious violation of the Equal Protection Clause" and "[i]t follows, therefore, that the District Court had broad and flexible authority to remedy the wrongs resulting from this violation." *Paradise*, 480 U.S. at 190 (Stevens, J., concurring). In his view, "[a] party who has been found guilty of repeated and persistent violations of the law bears the burden of demonstrating that the chancellor's efforts to fashion effective relief exceed the bounds of 'reasonableness,'"—a burden that, in Justice Stevens's view, Alabama clearly failed to meet. *See id.* at 193–95.

this same remedial logic to bear in the context of First Amendment remedies as well.

What makes *Paradise* particularly compelling is that the trial court considered and redressed the collective harms of the equal protection violation and fashioned a remedy that addressed them effectively. The remedy included the individual interests in not being subjected to race-based discrimination by Alabama, but it also fully encompassed the societal or community-wide harms that the segregation policy visited on the entire community.

Alabama's policy—for decades—to exclude Black applicants obviously inflicted a direct harm on applicants rejected because they were Black. And these applicants, in remedial terms, could be made whole with an award of damages and, if they still desired employment with the agency, injunctive relief that would require their onboarding with the state troopers. The remedial lens should certainly focus on those most directly affected by the unconstitutional state policy. Yet, the harm inflicted plainly went beyond just those who applied for jobs only to be rejected for racially discriminatory reasons. Many potential Black applicants likely did not bother to apply—because they assumed (correctly) that doing so would be entirely futile. Black citizens suffered a harm as well because they were, as a *group*, categorically excluded from employment opportunities with this government agency. However, the *entire community* suffered a serious harm in that the legitimacy of the agency suffered a significant (and quite justified) hit with the body politic because of its racially segregated status.

A remedial focus on only those directly denied employment, after applying, would be grossly insufficient to address the collective harms that this policy visited on the community. Constitutional rights are by their nature *collective* rights—We the People established our governing institutions subject to some very important rules of the road (including a mandate not to engage in racial discrimination, after enactment of the Fourteenth Amendment). The *Paradise* remedy fully and fairly took these collective social harms into account by literally requiring the agency to be remade to look as it would have looked but for the unconstitutional state action.

If we transpose this kind of remedial reasoning to the First Amendment context, a federal court has a duty to consider not only the frustrated would-be speaker, but also the audience that has been deprived of the speech. This would renormalize First Amendment remedies along the lines of *Paradise* in the context of equal protection principles. A First Amendment remedy that does not permit the speaker to engage the potential audience fails to remediate the collective harms that government censorship visits on the community.

Returning to our three paradigms, a government worker who does not speak, because remedies for whistleblowers are too weak, denies the public critically important information essential to holding government accountable via elections. A journalist who does not cover a protest, because police officers in the community involved have a bad reputation for brutalizing journalists,

deprives the community of the opportunity to hear, consider, and respond to the message of the protesters. And a billboard advertising company, waiting indefinitely for a city or county to enact constitutionally compliant signage regulations, cannot display messages about issues of the day or candidates for public office to passersby. We do not seek to minimize the speech interests of government employees, journalists, or advertising companies; instead, we simply point out that censoring these would-be speakers also censors the entire community. Remedies law needs to take account of this reality—it, at present, simply does not.

III. A THEORETICAL FRAMEWORK FOR FIRST AMENDMENT REMEDIES

To reverse the diminishing realization of rights, the focus must turn to remedies. This Part explores key frames to foster robust speech rights for would-be speakers in the public forum. It builds on that foundation to offer a theoretical remedial frame to ensure that federal courts foster substantive First Amendment rights by validating and vindicating proven constitutional claims with meaningful tangible relief. In sum, an ideal remedial solution would facilitate, not chill, speech.

We seek not only to create a richer, fuller, and more nuanced normative account of the centrality of remedies to First Amendment jurisprudence, but also to offer some targeted, highly specific practical proposals that could be operationalized through relatively modest doctrinal changes. Simply put, reforms will be necessary if remedial orders in First Amendment cases, going forward, are to reflect the central importance of expressive freedoms to the process of democratic deliberation.[164]

In addition to the equity suggestions that follow, this Article proposes and considers other analogies that involve legislative efforts including a False Claims Act[165] model that would create an incentive for private attorneys general who would receive a bounty for pursuing valid claims of speech and press infringement. Alternatively, treble damages may be worthy of consideration for instances where the remedy conundrum is particularly acute such as the pretextual arrest of journalists. For treble damages to work, however, a plaintiff may need to prove a modicum of monetary damages before seeking further statutory or equitable relief.[166] The ideal remedy would restore the information flow, but given the time-sensitive nature of the news cycle, such equitable remedies may be unworkable. Accordingly, with respect

164. MEIKLEJOHN, *supra* note 91, at 26–27 (arguing that "[t]he principle of the freedom of speech springs from the necessities of the program of self-government" and constitutes "a deduction from the basic American agreement that public issues shall be decided by universal suffrage").

165. 31 U.S.C. §§ 3729–3733.

166. *See, e.g.*, Copyright Act of 1976, 17 U.S.C. § 504(c) (authorizing the recovery of statutory damages in lieu of actual damages, at plaintiff's election). *See generally* Feltner v. Columbia Pictures Television, Inc., 523 U.S. 340, 347–55 (1998) (holding that the Seventh Amendment grants a federal constitutional right to a jury trial exists for statutory damages for copyright violations).

to the press and newsgathering activities, we will differentiate harm to journalists and the harm to the public. With respect to zoning, harm to the public is obvious and arguably compelling—after all, if no billboard exists within a community, then by implication the residents cannot see and consider a message displayed on it. We assert there should be a cognizable harm to speakers that cannot use a highly effective means of communicating at a low cost.[167] For that cognizable harm, remedies should flow.

A. FOUNDATIONAL FRAMES FOR FREE SPEECH RIGHTS AND REMEDIES

Four components are essential to fully protecting freedom of speech: (1) government facilitation; (2) judicial discretion; (3) individual empowerment; and (4) public benefit. The government must empower free expression by doing more than simply not suppressing speech. A First Amendment remedy should facilitate the exercise of expressive freedom and thereby advance the process of democratic deliberation. In turn, the federal courts have a vital role to play in designing remedies that honor both in letter and spirit the centrality of speech to democratic self-government. And, as explained previously, government facilitation of speech must advance not only the rights of would-be speakers but also those of the potential audience.

Courts must play a role, when necessary, in directing affirmative government support to expressive activity, thereby ensuring that prevailing free speech plaintiffs can actually reach their intended audiences. The current Supreme Court's approach fails to take adequately into account the government's affirmative First Amendment duties. Categorial rules that diminish rather than enhance free speech are the norm today—would-be speakers without the financial resources necessary to propagate a message effectively are particularly disadvantaged under the current approach.[168]

Instead of adopting a remedial approach that frustrates speech, the federal courts should embrace a remedial approach that facilitates speech. As it happens, the Supreme Court and its lower federal courts once embraced precisely this approach.[169] Both the Supreme Court and the lower federal courts must embrace discretion in First Amendment cases in general and with

167. The movie, THREE BILLBOARDS OUTSIDE EBBING, MISSOURI (Fox Searchlight Pictures 2017), offers a prism to glean the potential power of billboards on viewers and targeted government actors. Based on a true-life rape and murder of a teenage daughter, this film portrays a grieving, frustrated mother (played by Frances McDormand) who rents three disused billboards near her home and posts on them: "Raped While Dying," "And Still No Arrests," and "How Come, Chief Willoughby?" *Id.* The billboards stir controversy and action, while the mother refuses to yield. *Id.* In Section I.B.3, this Article discusses in some detail concerns from speech harms that go well beyond lost profits for outdoor billboard advertising companies when local government seek to censor such billboards.

168. KROTOSZYNSKI, *supra* note 10, at 17 (explaining and lamenting the Rehnquist and Roberts Courts' abandonment of balancing tests in favor of categorial tests that deemphasize judicial discretion at the expense of free speech rights in certain contexts).

169. *See id.* at 16–17 (detailing the Warren Court and Burger Court eras).

respect to remedial orders more specifically. Otherwise, the deployment of weak, ineffectual remedies will facilitate, rather than prevent, ongoing government efforts to distort the marketplace of political ideas. The answer lies in equitable discretion. Equitable discretion is essential to reimaging First Amendment remedies to take adequate account of both speaker *and* audience interests. This jurisprudential shift requires reconceptualizing federal court and governmental roles in facilitating the exercise of speech rights.

Simply put, a constitutionally adequate remedy must protect the underlying right. Where rights are fundamental and traditional legal remedies arguably inadequate, equity can save the day. It is axiomatic that equitable remedies should provide a plaintiff with their substantive entitlement.[170] Legal damages, even at their best, approximate and substitute a financial reward for the harm caused.[171] Accordingly, legal damages often pale in comparison to equitable relief that directly facilitates constitutionally protected conduct like speech.

Government censorship, in our view, imposes an incommensurable harm that cannot be made right solely with an award of money damages. If a citizen cannot speak her version of truth to power during an election campaign, an after-the-fact award of monetary compensation does not, and cannot, alter an adverse electoral result. The aphorism "a day late and a dollar short" applies in this context with full force.

Stymied expression frustrates the central purpose of the First Amendment (particularly in the electoral context). In short, delayed speech, in a wide variety of contexts, including but not limited to elections for public office, constitutes free speech denied. The chilling effect plus the utter lack of an effective monetary remedy to compensate for the lost speech opportunity demonstrate the acute nature of the remedial problem. It is quintessential irreparable harm warranting the deployment of equitable remedies. Legal remedies, including money damages, to compensate for losses are entirely inadequate because free speech harms are incommensurable and impossible to quantify.

For example, how does a federal district court quantify the damage associated with the election of a George Santos because those seeking to blow the whistle on his myriad lies and misrepresentations[172] were silenced by the prospect of civil or criminal liability? The continued occurrence of such

170. DOUG RENDLEMAN & CAPRICE L. ROBERTS, REMEDIES: CASES AND MATERIALS 287 (9th ed. 2018).

171. *Id.* at 19–20; DAN B. DOBBS & CAPRICE L. ROBERTS, LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION § 3.1 (3d ed. 2018).

172. Press Release, U.S. Att'ys Off., E. Dist. of N.Y., Congressman George Santos Charged with Fraud, Money Laundering, Theft of Public Funds, and False Statements (May 10, 2023), https://www.justice.gov/usao-edny/pr/congressman-george-santos-charged-fraud-money-laundering-theft-public-funds-and-false [https://perma.cc/9A5Q-S9T9] (summarizing and attaching the indictment against Representative George Santos).

injuries causes an exponential problem and greatly diminishes the value of the underlying substantive fundamental right.[173] The overarching goal of reframing rights and remedies necessitates an exploration of five key factors: (1) enduring equity; (2) bounded discretion; (3) proportional relief; (4) correlative function; and (5) tangible remedies.

1. Enduring Equity[174]

Equity exists within its own tradition and modern scope. This reality should help foster a deeper appreciation for how vital equity is in the context of First Amendment remedies. The need for equity is acute when a proven constitutional right is met with inadequate or nonexistent relief. Federal courts should exercise greater equitable discretion in First Amendment cases. Taking this step constitutes a natural, and essential, judicial response to the inadequacy of traditional legal remedies (including money damages). At minimum, federal courts should not fear breaking out their equitable toolkits and using those tools to fashion efficacious, speech-enhancing remedies.

Equity endures because it must. In the arena of remedies, equity serves a continuing critical role. There are wrongs that cannot be righted by purely legal remedies. Further, for certain wrongs, legal remedies are unprovable. Such wrongs may cause significant, ongoing harm that cause irreparable injury if left unabated. The study of equity is key, including historic equity[175] through the modern revival of equity and the Supreme Court's new equity.[176]

Historic equity is misunderstood, forgotten, and ignored.[177] Despite the procedural merger of law and equity, equitable doctrines, principles, defenses,

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173. As discussed in Section I.B.3, an emblematic example of this problem is a billboard owner that successfully voids an unconstitutional ordinance, but fails to garner an immediate, equitable remedy. How can the billboard owner continue to use, lease, and sell prime billboard space if the very messages intended for those spaces never make the light of day—or at a minimum, encounter severe, indeterminate delays? If the owner of such billboards leases them regularly, a path to some compensatory relief may exist. At best, compensatory damages would approximate partial recovery of harms incurred given reputational and other intangible losses that any monetary award would not capture. Compensatory damages, even if provable, likely would be too little and too late. Rather, the nature of the harm increases exponentially as violations continue and the wrong languishes without relief. The failure of the speech to reach its audience shows the elusive nature of the right without the assistance of equity to cure the erosion. This inadequacy is exacerbated by the time-sensitive nature of much of the speech—some of which is core political speech. Without an equitable remedy like an injunction to ensure visibility of the expression, the would-be speaker will see little reason to pay for the billboard's use. The market will respond because the essential function of the leased space is thwarted by the lack of a meaningful remedy that responds to the core harm that is intangible.

174. *See* Samuel L. Bray, *The System of Equitable Remedies*, 63 UCLA L. REV. 530, 589–93 (2016) (explaining why a system of equity—equitable remedies—has and must survive).

175. *See* Owen W. Gallogly, *Equity's Constitutional Source*, 132 YALE L.J. 1213, 1231–56 (2023) (detailing the historical development of equity).

176. Samuel L. Bray, *The Supreme Court and the New Equity*, 68 VAND. L. REV. 997, 1044 (2015).

177. *See* RENDLEMAN & ROBERTS, *supra* note 170, at 287–515 (explaining the challenges of properly understanding and applying equity in the modern era).

and remedies remain essential. Equity retains salience because purely legal remedies cannot always vindicate vested legal (constitutional) rights.

Modern equity brings equity's soil, including limitations and requirements.[178] It also includes a more coherent set of principles and precedent with an increasing pattern of demonstrated reasoning. Some of the increased explication is due to Supreme Court edicts[179] and can be a helpful way to restore equity while countering its whimsical reputation ("equity, darling!"). At the same time, equity should not be overly rigid; judges should always take into account relevant factors and guidelines when crafting their remedial orders in First Amendment cases.[180] Equity also commonly requires judges to balance conflicting and competing factors using a sliding scale;[181] this, of necessity, means that equity involves the exercise of principled judicial discretion (as with Judge Johnson's equitable remedial orders in both *Williams* and *Paradise*). Modern applications of equity should include the creative

178. Taggart v. Lorenzen, 139 S. Ct. 1795, 1801 (2019) ("The bankruptcy statutes, however, do not grant courts unlimited authority to hold creditors in civil contempt. Instead, as part of the 'old soil' they bring with them, the bankruptcy statutes incorporate the traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction.").

179. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (pronouncing that plaintiff, who sought a permanent injunction in a patent case, must meet the generally applicable "four-factor test" for injunctive relief: "(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction"). Scholars have criticized *eBay*'s interpretation of the precise, lockstep nature of injunction analysis. *See, e.g.*, Mark P. Gergen, John M. Golden & Henry E. Smith, *The Supreme Court's Accidental Revolution? The Test for Permanent Injunctions*, 112 COLUM. L. REV. 203, 205 (2012) (lamenting *eBay*'s unintended upheaval of historic equitable and justifiable considerations); Doug Rendleman, *The Trial Judge's Equitable Discretion Following* eBay v. MercExchange, 27 REV. LITIG. 63, 73, 76–77, 80 (2007) (lambasting the Supreme Court's misconstruction of equity's injunction analysis).

180. For example, a court may need to consider judicial administrability of injunctive relief, even though a strict four-factor analysis under *eBay* may not contain that issue.

181. Certain federal circuits have recognized the continued need to use sliding scale tests in the injunction space. *See, e.g.*, O Centro Espirita Beneficiente Uniao Do Vegetal v. Ashcroft, 389 F.3d 973, 1002 (10th Cir. 2004) (en banc), *aff'd without addressing the preliminary injunction standard sub nom.*, Gonzales v. O Centro Espirita Beneficiente Uniao Do Vegetal, 546 U.S. 418 (2006); Citigroup Glob. Mkts., Inc. v. VCG Special Opportunities Master Fund Ltd., 598 F.3d 30, 38 (2d Cir. 2010); *see also* DOBBS & ROBERTS, *supra* note 171, § 2.11(2) (explaining that some but not all courts have interpreted *eBay* to permit continued flexibility in the evaluation of injunction standards and presumptions); Pamela Samuelson, *Withholding Injunctions in Copyright Cases: Impacts of* eBay, 63 WM. & MARY L. REV. 773, 814 (2022) (observing that "*eBay* has reinforced judicial discretion to withhold injunctions in appropriate cases"). For an example of a case in which the judge felt compelled to track *eBay*'s analysis, see Salinger v. Colting, 607 F.3d 68, 74–75 (2d Cir. 2010), which reviewed a preliminary injunction for copyright infringement. *See also* Matthew Sag & Pamela Samuelson, *Discovering* eBay*'s Impact on Copyright Injunctions Through Empirical Evidence*, 64 WM. & MARY L. REV. 1447, 1451, 1469 (2023) ("In the initial four years after the *eBay* decision, our data show that courts cited *eBay* in copyright injunction cases much more frequently than the [Jiarui] Liu study reported," as "rarely cited" in the same period).

ability to fashion proper relief where appropriate—while following precedent and enunciating sincere reasons for the court's remedial orders.[182]

The Supreme Court's most famous use of equity to fashion effective constitutional remedies arguably occurred in the school desegregation decisions in the *Brown v. Board of Education* line of cases.[183] The Justices famously punted the most pressing—and most difficult—remedial questions away in *Brown I*. Instead of directly taking the bull by the horns, and addressing how trial court judges in the Deep South were to go about enforcing *Brown*, the Supreme Court, after reargument, issued a vague mandate for the lower federal "[c]ourts to take such proceedings and enter such orders and decrees consistent with this opinion as are necessary and proper to admit [students] to public schools on a racially nondiscriminatory basis with *all deliberate speed*."[184]

A decade came and went—yet public schools across the nation, in the North and South alike, remained organized and operated on a de jure racially discriminatory basis.[185] In 1968, the Supreme Court reversed its remedial course and broadly repudiated *Brown II*'s toothless "all deliberate speed" remedial approach.[186] Instead, as Justice William J. Brennan, Jr., explained, "[t]he burden on a school board today is to come forward with a plan that

182. *See* Ronald J. Krotoszynski, Jr., *On the Importance of Being Earnest: Contrasting the Dangers of Makeweights with the Virtues of Judicial Candor in Constitutional Adjudication*, 74 ALA. L. REV. 243, 247–53 (2022) (discussing in some detail the problems that arise when judges offer insincere reasons in support of their legal conclusions, notably including placing at risk the popular legitimacy of the Article III courts).

183. Brown v. Bd. of Educ. (*Brown I*), 347 U.S. 483, 495 (1954) (holding that "in the field of public education the doctrine of 'separate but equal' has no place" and, accordingly "[s]eparate educational facilities are inherently unequal"). Unfortunately, having decided the equal protection merits question, the *Brown I* majority punted away the question of an appropriate remedy. *See id.* ("Because these are class actions, because of the wide applicability of this decision, and because of the great variety of local conditions, the formulation of decrees in these cases presents problems of considerable complexity. On reargument, the consideration of appropriate relief was necessarily subordinated to the primary question—the constitutionality of segregation in public education.").

184. Brown v. Bd. of Educ. (*Brown II*), 349 U.S. 294, 301 (1955) (emphasis added); *see also* Doug Rendleman, Brown II*'s "All Deliberate Speed" at Fifty: A Golden Anniversary or a Mid-Life Crisis for the Constitutional Injunction as a School Desegregation Remedy?*, 41 SAN DIEGO L. REV. 1575, 1582 (2004) ("The desegregation lawsuit's substantive 'proceedings only gradually merge' into the plaintiffs' practical reality in an injunction." (quoting FRANZ KAFKA, THE TRIAL 264 (Willa Muir, Edwin Muir & E.M. Butler trans., 1957))).

185. *See* Rendleman, *supra* note 184, at 1588 (explaining that after *Brown II*, "not much had actually happened in the practical world of K–12, primary and secondary, education in the South").

186. Green v. Cnty. Sch. Bd., 391 U.S. 430, 439 (1968) (quoting *Brown II*, 349 U.S. at 301). On historic and modern equitable injunctions that operate collectively, see Suzette M. Malveaux, *Class Actions, Civil Rights, and the National Injunction*, 131 HARV. L. REV. F. 56, 57 (2017); Portia Pedro, *Toward Establishing a Pre-Extinction Definition of "Nationwide Injunctions,"* 91 U. COLO. L. REV. 847, 870 (2020); and Mila Sohoni, *The Lost History of the "Universal" Injunction*, 133 HARV. L. REV. 920, 993 (2020).

promises realistically to work, and promises realistically to work *now*."[187] Three years later, in *Swann v. Charlotte-Mecklenburg Board of Education*, the Supreme Court issued a broad mandate to the lower courts to fashion effective remedial orders that would end the operation of racially segregated public schools.[188] Such orders could include redrawing school district attendance lines, reassigning teachers, administrators, and staff, and interdistrict busing orders.[189]

This broad, bold, and aggressive deployment of equitable principles was necessary. Chief Justice Warren E. Burger explained that because "words are poor instruments to convey the sense of basic fairness inherent in equity" and efficacious remedies were essential if "[s]ubstance, not semantics, must govern,"[190] the lower federal courts had an obligation to fashion effective, and if necessary, highly creative, remedial orders to end the operation of public schools on a racially segregated basis root and branch. No good reason exists that can justify having remedies for First Amendment violations stand as the remote, distant cousins of remedies for proven Equal Protection Clause violations. Accordingly, the school-desegregation cases provide an entirely suitable road map for reforming how the federal courts approach fashioning First Amendment remedies.

The scope of the remedial power in the *Brown* line even encompassed imposing taxes in excess of state law to raise the funds necessary to fund remedial desegregation efforts.[191] In federalism terms, having a federal trial court order a local or state government to impose taxes in excess of limits imposed by state law (perhaps even the state constitution) is remarkable—at least at one level of analysis. On a second, more careful, look, it's clear that waiting for defendant public school districts to implement fully and fairly prohibitory remedial decrees would be akin to *Waiting for Godot*. Because of this fact, district judges had to reach deep into their toolkits to find and implement efficacious equitable remedies.

To be sure, the Supreme Court's ultimate rejection of interdistrict remedial orders, in *Milliken v. Bradley*,[192] greatly undermined judicial efforts to make the nation's public schools look like they would have looked in the absence of official de jure forms of segregation. Yet, despite the arguable failure of *Brown* to achieve its larger remedial objectives, the federal judiciary's use of equity to fashion effective equal protection remedies cannot be gainsaid. This same approach is not any less essential to vindicating First Amendment rights than it was to securing Equal Protection Clause rights in

187. *Green*, 391 U.S. at 439.

188. Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971) ("Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

189. *Id.* at 28–31.

190. *Id.* at 31.

191. Missouri v. Jenkins, 495 U.S. 33, 51–52 (1990).

192. Milliken v. Bradley, 418 U.S. 717, 752–53 (1974).

the context of public school desegregation efforts.

2. Bounded Discretion

Bounded equity is the path forward. The Supreme Court should not shirk from its discretionary role in reviewing First Amendment challenges. Balancing and discretion should be revived for federal courts to evaluate winners and losers. In fact, discretion rests at the very heart of efficacious equitable remedies that secure fundamental rights (like the freedom of speech). Indeed, because freedom of speech is an essential condition for the operation of a deliberative democracy,[193] the federal courts should exercise equitable remedial power to provide mandatory relief[194] that forces recalcitrant governmental entities to facilitate the exercise of expressive freedoms.

A judge has limited discretion to choose between legal and equitable remedies. Where an equitable remedy is warranted, however, the judge possesses significant discretion to shape equitable relief. The judge has authority and flexibility to craft an equitable remedy such as detailing relevant instructions in an injunctive order or setting the amount of feet necessary for an effective buffer zone.[195] Regarding preliminary and permanent injunctive relief analysis, the Supreme Court has endorsed the public interest as a necessary factor, which mandates that judges consider third-party effects.[196] In the First Amendment context, a defendant's violation of First Amendment rights typically constitutes irreparable injury,[197] warranting an injunction that permits the plaintiff's expression, which thereby benefits the public's interest in receiving speech and engaging in the collective deliberation that will shape public policy going forward. When possible, a First Amendment plaintiff may seek a class injunction to expand the plaintiff group and, thus, the direct beneficiaries of an injunction.[198] Notwithstanding important debates about conflicting national injunctions and the scope of equitable relief, injunctions can and do routinely affect nonparties.[199]

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193. *See* MEIKLEJOHN, *supra* note 91, at 24–27, 89–91.

194. Mandatory injunctions are affirmative orders to act; prohibitive injunctions are negative orders not to act. DOBBS & ROBERTS, *supra* note 171, § 2.9(1). Courts have the equitable power to do either, both, or neither. *Id.*

195. DOBBS & ROBERTS, *supra* note 171, §§ 2.1, 2.4 (explaining the scope of discretion in judicial tailoring of equitable remedies).

196. eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006); Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20 (2008).

197. *See, e.g.*, Elrod v. Burns, 427 U.S. 347, 373 (1976) (affirming the appellate court's determination of irreparable injury based on defendant's encroachment of First Amendment freedoms).

198. FED. R. CIV. P. 23(b)(2).

199. Doug Rendleman, *Preserving the Nationwide National Government Injunction to Stop Illegal Executive Branch Activity*, 91 U. COLO. L. REV. 887, 950–59 (2020) (exploring how injunctions regularly benefit nonparties in addition to the plaintiff including a private plaintiff's injunction against a smelly cattle feedlot that benefits all downwinders from the lot and a public law busing injunction that affects white children who are bused to another school).

To be sure, modern equity is bounded;[200] discretion is not without limits.[201] Equity has precedents, principles, and doctrines of flexibility and restraint. Discretion to grant, to deny, and to shape equitable remedies all involve the exercise of bounded judicial discretion. Equitable limits flow from precedent, doctrines of restraint, and enunciated reasoning subject to appellate review, and, at the end of the day, public critique.

3. Proportional Relief

In First Amendment litigation, the right at stake is fundamental to the individual, to the public, and to our experiment in democratic self-government.[202] Reviving the Supreme Court's earlier jurisprudence, which tended to rely on open-ended balancing tests, would go far toward restoring the healthy, but fraught, exercise of judicial discretion that is the lifeblood of equitable remedial practice. The Supreme Court also should look to seminal cases of bold, but necessary, discretion including proportional relief. This includes arguably controversial civil rights decisions that feature the broad use of equitable relief. This deployment of judicial discretion was essential—despite arguably opening the door to accusations of judges playing First Amendment favorites.[203]

If the trial judge deems that the scope of injunctive relief is unwarranted, then it is not proportional. The requested relief may exceed the ongoing harm; it may overcorrect in the judge's estimation. Still, unless legal remedies truly suffice, incremental approaches should receive consideration. For example, incremental equity may include an alteration of default thinking. Consider the billboard scenario where the plaintiff shows the unconstitutionality of governing ordinances. Where the judge denies any equitable relief, the speech is held in suspension despite a plaintiff's successful showing of the unconstitutional nature of the government's regulatory scheme. Why should the law's presumption be that the speech cannot flow unless and until the appropriate government entity puts in place a replacement ordinance, survives another constitutional challenge, and, hopefully, at some point in the indefinite future affirmatively countenances the placement of the would-be speech onto the proposed billboard?

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200. RENDLEMAN & ROBERTS, *supra* note 170, at 423 ("A modern federal equity judge does not have the limitless discretion of a medieval Lord Chancellor to grant or withhold a remedy. . . . Modern equity has rules and standards, just like law. . . . And although the ratio of rules to standards is lower in equity than in law, in cases where the plaintiff has an established entitlement to an equitable remedy the judge cannot refuse the remedy because it offends his personal sense of justice." (alteration in original) (quoting *In re* Grand Jury Proc. Empanelled, 894 F.2d 881, 887 (7th Cir. 1989))).

201. *Id.*

202. MEIKLEJOHN, *supra* note 91, at 89–91.

203. KROTOSZYNSKI, *supra* note 10, at 3, 6–9, 17–19 (exploring and endorsing U.S. District Court Judge Frank M. Johnson, Jr.'s creative and expansive remedial order that facilitated the Selma March).

Instead of naively hoping for the best and relying on tried-and-true legal remedies like money damages and strictly prohibitory injunctive relief, once a plaintiff succeeds in securing judicial invalidation of a constitutionally problematic speech regulation, the presumption should shift in favor of permitting the speech activity blocked by the government's unconstitutional policies. Otherwise, the present-day effects of an unconstitutional prior restraint will linger indefinitely. Repeated, and sometimes pretextual, efforts by government actors to stymie speech activity that they dislike further exacerbates the scope and scale of the remedial problem. Simply put, equity should not abide this imbalance. If the government has unclean hands, it should have an obligation to do more than simply stop enforcing a regulatory scheme that violates the First Amendment.

Ceasing to enforce an unconstitutional regulatory scheme that stifles and suppresses the exercise of expressive freedoms is, of course, important—and it constitutes an essential, or *necessary*, part of an adequate constitutional remedy. But it's not *sufficient* because it leaves the plaintiff's speech no better protected than before the federal court issued its remedial decree. As in the desegregation context, it should not be acceptable for the government simply to stop violating the Constitution and Bill of Rights; instead, it should be required to undo the ongoing harmful effects of its bad (unconstitutional) behavior.

Moreover, equity should require that the government not benefit, directly or indirectly, from its prior bad (again, unconstitutional) behavior. Yet, inadequate remedies in the First Amendment context, meaning remedies that leave a victorious First Amendment plaintiff unable to speak, can and do have the perverse effect of encouraging governments to regulate first and assess the constitutional validity of speech regulations later—or never.

Consider an analogy from another constitutional right, the Second Amendment, as interpreted by the Supreme Court. In *New York State Rifle & Pistol Ass'n, Inc. v. Bruen*, the Supreme Court struck New York's additional requirement of showing some additional special need before citizens could obtain a license to carry handguns publicly for self-defense.[204] Petitioners sued for declaratory and injunctive relief; they alleged violation of their Second and Fourteenth Amendment rights by the state's refusal of their unrestricted-license applications due to the failure to show a unique need for self-defense.[205] Regardless of one's view of the merits or the constitutional interpretive method,[206] once the Supreme Court declared the New York law unconstitutional, the question of fashioning an appropriate remedy was front and center.

Once stricken, under the majority's remedial logic, the petitioners were free to carry handguns publicly for self-defense. Of course, New York is also

204. N.Y. State Rifle & Pistol Ass'n, Inc. v. Bruen, 142 S. Ct. 2111, 2122 (2022).

205. *Id.* at 2125.

206. *See, e.g.*, Albert W. Alschuler, *Twilight-Zone Originalism: The Peculiar Reasoning and Unfortunate Consequences of* New York State Pistol & Rifle Association v. Bruen, 32 WM. & MARY BILL RTS. J. 1, 6 (2023) ("A reader might reasonably be puzzled about what *Bruen* held.").

free to impose new regulations that would restore legal limits on carrying firearms in public. Once the Supreme Court's mandate issued, however, under the majority's remedial order, anyone and everyone can walk about Times Square with a handgun. Under *Bruen*, it was possible to exercise Second Amendment rights unless and until the New York state legislature enacts a new, constitutionally adequate public carry law. In the meantime, the exercise of the Second Amendment rights will flow and any redoubled efforts by the state to craft constitutional restrictions will not "prevent[] law-abiding citizens with ordinary self-defense needs from exercising their right to keep and bear arms."[207] If "[t]he constitutional right to bear arms in public for self-defense is not 'a second-class right, subject to an entirely different body of rules than the other Bill of Rights guarantees,'"[208] the invalidity of the restriction necessitated a right to *immediately* exercise the constitutional right.

Free speech constitutes a cornerstone of our democratic practices; surely it is no less compelling, or important, a constitutional right as gun ownership for self-defense. Given the fundamental nature of the right and the dangers of persistent suppression of speech, equity supports ordering government to tolerate speech activity unless and until a local government successfully enacts a constitutionally valid zoning ordinance. The burden of inaction must not fall on silenced speakers. Yet, today, anemic remedial orders in First Amendment cases challenging constitutionally defective zoning plans precisely create this outcome.

A judge may have objections to even an incremental approach that shifts presumptions. Again, the shift is *from* blocking the speech until the government passes an ordinance that can survive constitutional scrutiny *to* permitting the speech in that interim period. Accordingly, where municipalities are dragging their heels, why not allow the speech to flow? At minimum, a judge should equitably order the government actors to expedite any legislative or regulatory process so that the would-be speech with its intended billboard parameters receive constitutional consideration for time, place, and manner particulars. Then, that process would be reviewable, though with much discretion on the government's side given the law's distaste for perceived "pig[s] in the parlor."[209]

In this speech conundrum where the court denies all equitable relief, the pig is neither in the parlor nor the barn. It is utterly suppressed, and this result cannot be reconciled with the Supreme Court's repeated invocation of the central importance of the First Amendment to democratic self-government.[210]

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207. *Bruen*, 142 S. Ct. at 2156.

208. *Id.* at 2121 (quoting McDonald v. City of Chicago, 561 U.S. 742, 780 (2010)).

209. Village of Euclid v. Ambler Realty Co., 272 U.S. 365, 388 (1926) ("A nuisance may be merely a right thing in the wrong place, like a pig in the parlor instead of the barnyard. If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control.").

210. Citizens United v. FEC, 558 U.S. 310, 340 (2010) ("Premised on mistrust of governmental

The Justices have acknowledged the autonomy interests of both speakers and audiences when framing the *substantive* scope of First Amendment rights.[211] However, they have failed to carry this animating theory forward into the Supreme Court's remedial jurisprudence.

4. Correlative Function

Free speech remedies must address both the harm to the individual and to the audience. This conception is correlative. When one wishes to engage in speech, that speech will almost always have important consequences for listeners—both good and bad. Words have weight.[212] As Chief Justice John G. Roberts, Jr., has explained, "[s]peech is powerful" and "can stir people to action, move them to tears of both joy and sorrow, and . . . inflict great pain."[213] Accordingly, one should speak with listeners in mind. When the government censors speech, banning it from the marketplace of ideas, the audience's First Amendment interest in would-be speech is not as an incidental beneficiary; it is a *shared interest* in the equitable outcome of the speech's destination.

In modern cases, the Supreme Court has increasingly closed the public forum to free speech. Ever narrowing access to public property for speech activity has tilted the playing field in favor of speakers with the assets and property to speak without relying on government assistance of any kind (including access to public property) to do so.[214] The result is analogous to an appropriation model in property law where those with the most resources may siphon figurative public space—now pushed to alternative private space for certain, asset-rich speakers and simultaneously limiting who gets to hear the message.

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power, the First Amendment stands against attempts to disfavor certain subjects or viewpoints."); Snyder v. Phelps, 562 U.S. 443, 461 (2011) ("As a Nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle public debate."); Cohen v. California, 403 U.S. 15, 26 (1971) (opining that "we cannot indulge the facile assumption that one can forbid particular words without also running a substantial risk of suppressing ideas in the process," warning that "governments might soon seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views," and concluding that "[w]e have been able, as noted above, to discern little social benefit that might result from running the risk of opening the door to such grave results"); W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943) ("If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.").

211. *Citizens United*, 558 U.S. at 339–41.

212. *See generally* KEEGAN LESTER, PERFECT DIRT: AND OTHER THINGS I'VE GOTTEN WRONG (2021) (exploring meaning of words over time); KEEGAN LESTER, THIS SHOULDN'T BE BEAUTIFUL BUT IT WAS & IT WAS ALL I HAD SO I DREW IT (2017) (exploring the import and challenge of language).

213. *Snyder*, 562 U.S. at 460–61.

214. KROTOSZYNSKI, *supra* note 10, at 1–26.

In an ideal world, the government would facilitate access to public property for speech activity without the necessity of a federal court's remedial order. Alas, we do not live in an ideal world. Too many remedial orders seem to place undue weight on the possibility of a would-be speaker's ability to propagate a message somewhere else via another modality of speech (such as posts on social media).[215] More speakers with varied messages must reach broader audiences. To ensure that the marketplace of political ideas remains meaningfully open to any and all citizens, federal court intervention, including broad, creative equitable relief, of the sort exemplified in Judge Johnson's remedial order in *Williams v. Wallace*, will be essential.[216]

5. Tangible Remedies

The import of equity is often lost on the modern mind. Even the law of remedies remains practically misunderstood and woefully undertheorized. Yet remedies law asks: What will the law do for the winning plaintiff? Equity provides some of remedies law's most tangible remedies. It has the power to order a defendant to act or not act, to disgorge wrongful profits, or to hold property in trust for another. It is creative, dynamic, and seeks to craft meaningful relief when traditional legal remedies fall short of the mark.

Injunctions, as well as other equitable remedies, build the public interest into factor tests for relief.[217] It is a relevant factor, and "not . . . disserv[ing]" the public interest is a required factor.[218] Under Supreme Court precedent, failure to meet it or to show that the claimed irreparable harm outweighs the public interest will result in a court declining to issue injunctive relief.[219] Notably, another option that remains possible in many jurisdictions is for federal courts to use sliding scale tests that allow a lesser showing of one factor (likelihood of success on the merits) if the prevailing plaintiff has made a greater showing with respect to another factor (e.g., irreparable harm). To be sure, some jurisdictions continue to have less and more exacting injunction standards depending on the type of injunction sought—meaning the nature of the right that the plaintiff seeks to protect. Although the Supreme Court does permit categorical absolutes for injunctions, the weakening of certain factors should apply to injunctions in certain First Amendment contexts to ensure protection of profound threats to expressive freedom (both generally and with particular force where expressive activity possesses a clear nexus with the process of democratic deliberation).

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215. *But cf.* Brown v. Louisiana, 383 U.S. 131, 141–43 (1966) (holding that civil rights protestors possessed a First Amendment right to stage a silence protest in a racially segregated public library).

216. *See* Williams v. Wallace, 240 F. Supp. 100, 109–11 (M.D. Ala. 1965).

217. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006).

218. *Id.*

219. Winter v. Nat. Res. Def. Council, Inc., 555 U.S. 7, 20–24 (2008) (finding plaintiff failed to establish that its irreparable harm outweighed the government's public interest).

Injunctive authority applies to private[220] and public defendants. Constitutional rights should warrant attention, protection, and oversight from judges.[221] Relief can even extend to a structural injunction that outlines how a government entity must address proven constitutional deficiencies.[222] In some institutional reform litigation, structural injunctions have essentially placed constitutionally deficient state institutions, such as prisons and mental hospitals, into receivership with ongoing federal court supervision of their day-to-day operations.[223] This form of relief is not without critics,[224] but can be

220. For a provocative exploration on the limits of equitable remedies in private law's gap between what one already has and what the law owes, see generally Larissa Katz, *Equitable Remedies: Protecting "What We Have Coming to Us,"* 96 NOTRE DAME L. REV. 1115 (2021).

221. *See* RENDLEMAN & ROBERTS, *supra* note 170, at 422–24.

222. Professor Owen Fiss coined the term "structural injunction" to describe when injunctions involve ongoing federal oversight of public institutions because the government defendant has defaulted on the performance of mandatory constitutional or statutory duties; these affirmative injunctions often specify specific institutional reforms, include details on how those reforms will be effectuated, and encompass timetables for making forward progress. OWEN M. FISS, THE CIVIL RIGHTS INJUNCTION 9–11 (1978); *see* Doug Rendleman, *The Civil Rights Injunction*, 47 U. CHI. L. REV. 199, 200–01, (1979) (reviewing FISS, *supra*) (observing that "[n]aming the structural injunction and articulating some of its general characteristics are Fiss's major contributions to our continuing effort to understand equity" and explaining that "[j]udges use structural injunctions to reorganize existing governmental institutions, such as schools, mental hospitals, and prisons, because they find that the ways the authorities operate the institutions violate the Constitution"). Judge Frank M. Johnson, Jr., faced with an intransigent, arguably defiant, Alabama state government, issued injunctive orders that largely and deeply disregarded traditional negative remedial formats by authorizing ongoing federal court supervision of the day-to-day operation of the state institutions, including prisons and mental hospitals. *See infra* note 223 (providing case examples where Judge Johnson, Jr., issued structural injunctions); *see also* FISS, *supra*, at 90 (commending Judge Johnson's efforts to craft effective and efficacious remedial orders and observing that "[i]t was not reasonable to expect the judges to be heroes, but the truth of the matter is that many lived up to these unreasonable expectations" during the Civil Rights era). He took a similar approach when crafting remedial decrees to achieve the desegregation of public schools and other state institutions operated on a racially segregated basis. *See* BASS, *supra* note 77, at 262–73 (discussing Judge Johnson's decisions desegregating the public schools, colleges, and universities). These affirmative "structural injunctions" effectively placed many of Alabama's public institutions into federal court supervised receivership.

223. *See, e.g.*, Pugh v. Locke, 406 F. Supp. 318, 328–29 (M.D. Ala. 1976) (placing Alabama's state prisons into ongoing federal court supervision because of the state's failure to fully and fairly implement more traditional prohibitory injunctive relief); Wyatt v. Stickney, 344 F. Supp. 373, 376–79 (M.D. Ala. 1972) (placing Alabama's state mental hospitals under ongoing federal court supervision because state officials failed to fully and fairly implement more traditional prohibitory injunctive relief).

224. The most vocal and sustained critic of structural injunctions was Justice Antonin Scalia. *See, e.g.*, Brown v. Plata, 563 U.S. 493, 550–59 (2011) (Scalia, J., dissenting) (5–4 decision) (voicing intense criticism of structural injunctions and the Court's particular injunction at issue under the Prison Litigation Reform Act and describing the order as "what is perhaps the most radical injunction issued by a court in our Nation's history: an order requiring California to release the staggering number of 46,000 convicted criminals"); *id.* at 555 ("Structural injunctions depart from that historical practice, turning judges into long-term administrators of complex social institutions such as schools, prisons, and police departments."); Int'l Union, United Mine

the last effective resort for curing egregious wrongs. Civil rights progress required structural injunctions to secure constitutional rights to claimants because state governments, like Alabama's, simply ignored more traditional prohibitory remedial court orders.

To be sure, any great power holds the potential risk of abuse. Recent Supreme Court decisions allowing the government to restrict access to public property for speech activity[225] as if it were the Boeing Corporation or McDonald's demonstrate with convincing clarity that bold, striking reforms

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Workers of Am. v. Bagwell, 512 U.S. 821, 842–44 (1994) (Scalia, J., concurring) (joining the Court's opinion holding that the seriousness of contempt fines warranted criminal process rather than civil process). In Justice Scalia's concurrence, he expressed concerns regarding the evolving and expanding nature of injunctive orders and the rising complexity for contempt hearings, and calibration of proper procedure as between civil and criminal protections:

> Contemporary courts have abandoned these earlier limitations upon the scope of their mandatory and injunctive decrees. They routinely issue complex decrees which involve them in extended disputes and place them in continuing supervisory roles over parties and institutions. . . . [T]hey have lost some of the distinctive features that made enforcement through civil process acceptable. It is not that the times, or our perceptions of fairness, have changed . . . but rather that the modern judicial order is in its relevant essentials not the same device that in former times could always be enforced by civil contempt. So adjustments will have to be made. We will have to decide at some point which modern injunctions sufficiently resemble their historical namesakes to warrant the same extraordinary means of enforcement. We need not draw that line in the present case, and so I am content to join the opinion of the Court.

Id. (citation omitted).

225. *See, e.g.*, Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 681–83 (1992) (holding that government property cannot constitute a "public forum" presumptively available for speech activity unless the property has been used for speech activity since the ratification of the First Amendment, in 1791—even though airports, train stations, and public transit facilities, such as subways, simply did not exist in 1791, so we cannot really know whether the Framers would have deemed such property suitable for speech activities); United States v. Kokinda, 497 U.S. 720, 736–37 (1990) (holding that the sidewalks around a local U.S. Post Office building do not constitute a public forum—despite being, for all intents and purposes, a sidewalk like any other—because the government may selectively ban speech activity from its property if the property has not been used since time immemorial for speech activity); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 806 (1985) (holding that a federal government program that permitted nonprofit organizations to solicit donations from federal employees during working hours did not constitute a public forum and, accordingly, could be selectively closed to certain nonprofit organizations without violating the First Amendment's Free Speech Clause). Taking their cues from the Supreme Court, recent U.S. courts of appeals decisions, sometimes authored by ostensibly "progressive" lower federal court judges, are no less problematic and reflect, incorporate, and advance this same trend. *See, e.g.*, Hodge v. Talkin, 799 F.3d 1145, 1159 (D.C. Cir. 2015) (holding that a large public park adjacent to the Supreme Court's building, in Washington, D.C., constitutes the Justices' private "front porch," rather than a public forum and therefore may be selectively closed to expressive activity); Oberwetter v. Hilliard, 639 F.3d 545, 552 (D.C. Cir. 2011) (holding that the Jefferson Memorial, in Washington, D.C., which would appear to any reasonable observer to constitute a public park space, actually is *not* a traditional public forum and, accordingly, concluding that the federal government may close it to speech activity, including the "silent expressive dancing" that Mary Brooke Oberwetter wished to perform, without violating the First Amendment).

in remedies law are unlikely to be forthcoming any time soon. The prospects for more interstitial reform are considerably better, however, and could be adopted to improve the efficacy of remedies in targeted areas of First Amendment law. Although structural injunctions are possible in this arena, long-term extensive judicial oversight over federal and state executive functions would not be desirable nor is it among our aims;[226] we are not advocating for revolutionary change even if it might be possible.[227] Rather, a modern structural injunction would be within the outer limits of principled discretion: As one of us previously noted, "[j]urists expect remedies in such litigation to change over time, to be flexible, and to involve a measure of negotiation and mediation."[228] We advocate the kind of judicial creativity and commitment to securing constitutional rights that led judges to turn to the structural injunction as a remedial tool in the first place.

B. REMEDIAL FRAMEWORK APPLIED TO CORE PARADIGMS

Returning to the three areas in need of remedial reform, namely

226. *See generally* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 39–71 (2d ed. 2008) (exploring and explaining how the federal courts were never able to fully deliver on *Brown v. Board of Education*'s promise of meaningfully racially integrated public schools on a nation-wide basis and positing that that the institutional limitations of the Article III courts, especially in contrast to Congress's ability to craft finely detailed civil rights statutes that provide comprehensive remedial structures that include both administrative enforcement through federal agencies and private rights of action, made a project of this sort, which requires judges to undertake active day-to-day monitoring of a vast educational bureaucracy, unlikely to succeed). Professor Rosenberg's acerbic and iconic critique of the *Brown* line of desegregation cases should give a thoughtful person pause about the limits of federal district court judges' abilities to implement successfully remedial decrees seeking to effect systemic and long-term institutional structural reforms. *See* NEIL K. KOMESAR, IMPERFECT ALTERNATIVES: CHOOSING INSTITUTIONS IN LAW, ECONOMICS, AND PUBLIC POLICY 48–49 (1994) (arguing that the executive, legislative, and judicial branches possess different institutional strengths and weaknesses and, accordingly, are better able to perform some governmental duties than others).

227. Of course, Congress can impose limits on structural injunctions including heightened pleading and review standards as it has done in the Prison Litigation Reform Act. *See* 18 U.S.C. § 3626(a)(1)(A) ("Prospective relief in any civil action with respect to prison conditions shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs. The court shall not grant or approve any prospective relief unless the court finds that such relief is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right. The court shall give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief.").

228. DOBBS & ROBERTS, *supra* note 171, § 7.4(2); Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1284, 1298–302 (1976). Models also exist from the settlement context where, for example, the government assumes an obligation to report to a court-appointed oversight board. DOBBS & ROBERTS, *supra* note 171, § 1.4. Consent decrees, of course, involve government agreement to the terms. *Id.* Injunctions, although via adjudicative wins by plaintiff, may also incorporate more detailed compliance with accountability and supervision to independent supervisors or install a receivership where necessary. *Id.*

remedies for government whistleblowers,[229] journalists engaged in newsgathering activity, and those seeking to display outdoor signs to the public to communicate both commercial and noncommercial messages, equitable remedies have a real and meaningful capacity to secure expressive freedom in all three areas of First Amendment jurisprudence. Commercial billboards regularly publish noncommercial speech, including core political speech. To the extent commercial speech garners a low-value speech label and a billboard is limited to purely commercial speech, the scope of the appropriate remedy should be narrower. In such an example, the harm to the public is more limited, and the remedy should reflect the limited nature of the intrusion.[230] Where the billboard includes political speech conveying election-related information to voters, for example, the judge should draw the equitable remedy to fit the broader infringement. Equity, deployed with care and forethought, and with an eye to context, can serve as a source of highly efficacious First Amendment remedies, thereby empowering both individuals and We the People.

For example, governmental whistleblowers need affirmative reinstatement relief. Reinstatement rests inside the arsenal of equitable remedies,[231] but federal courts should not be afraid to provide effective relief beyond simple reinstatement. The order must include other parameters that ensure the government restores both the tangible and intangible aspects of employment. If this requires new titles or training, the court should order it. Such affirmative programs can be part of injunctive relief, and federal courts have done so in other contexts including employment discrimination cases.[232]

Of course, in certain instances, a judge should use discretion to deny an equitable order. For example, the remedial analysis would clearly tip against equity—and the use of equity to support a broad remedial decree that

229. Krotoszynski, *supra* note 79, at 270–75, 291–302 (discussing shortfalls of federal statutory remedies for whistleblowers notably including the nonapplicability of these statutory protections for blowing the whistle on government misconduct if the whistleblower goes to the press rather than reports the misconduct through "proper" internal channels, as well as the problem of government employers failing to implement statutory protections in good faith when whistleblowing government employees manage to successfully invoke these laws).

230. Most newspaper advertising is commercial speech, but the *Sullivan* advertisement was about civil rights violations. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 260–61 (1964). The underlying advertisement recounted civil rights protests in Montgomery, Alabama, praised Dr. King's leadership, and rebuked several southern state government officials for violating the rights of Black Americans. *Id.* app. A prior restraint involving newspaper advertising would certainly affect commercial speech, but it would also affect a nontrivial amount of noncommercial speech.

231. *See, e.g.*, Thurston v. Box Elder County., 892 P.2d 1034, 1039–42 (Utah 1995); Allen v. Autauga Cnty. Bd. of Educ., 685 F.2d 1302, 1305–06 (11th Cir. 1982); *see also* RENDLEMAN & ROBERTS, *supra* note 170, at 964–69 (excerpting and exploring reinstatement cases). *But cf.* Traxler v. Multnomah County, 596 F.3d 1007, 1012 (9th Cir. 2010) (opining that reinstatement is the preferred remedy for violation of a federal statute, though the remedy is not automatic).

232. *See, e.g.*, EEOC v. Massey Yardley Chrysler Plymouth, Inc., 117 F.3d 1244, 1253–54 (11th Cir. 1997) (reversing a district court's denial of the EEOC's request for training and other injunctive acts where the discriminatorily fired employee refused reinstatement).

includes reinstatement—where the prior government employee engaged in pretextual whistleblowing with a nefarious intent, or the after-acquired evidence reveals to the government employer that the whistleblower's continued presence in the workplace endangers the public health, safety, or the rights of other workers. In such scenarios, judges should balance the equities to determine whether to order or decline reinstatement as part of a comprehensive remedial order. Both First Amendment[233] and remedies jurisprudence[234] call for such balancing, and judges possess the discretion to deny reinstatement when warranted.

Even when reinstatement is appropriate, it may not always be preferable or possible. Suppose a nurse in a government hospital blows the whistle on a practice of reusing needles (despite the obvious, catastrophic health risks associated with such a practice). It is difficult to imagine reinstatement working optimally in such a case. A judge might consider a flexible equitable solution such as transferring the whistleblower to another affiliated hospital with comparable rights and benefits. The nurse, however, may not be able to relocate, or a comparable substitute might not exist. Alternatively, injunctive methods could be used that include reassigning others within the department to create a functional work environment; again, though, such maneuvers may not be possible. At the end of the day, whistleblowers who provide the general public with information critical to using elections as a means of securing government accountability need better, more comprehensive, and more meaningful remedial options than they enjoy at present and equity could provide those options.

A *qui tam*[235] model, such as the False Claims Act,[236] could serve as the basis for actual injury based on speech harms, including intangible harms.[237] Such a cause of action could also create a means of vindicating community interests

233. *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 565–68 (1968).

234. *See, e.g.*, eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006) (rejecting categorical grants or denials of injunctions and emphasizing consideration of factors including the balance of hardships and the public interest).

235. In Latin, *qui tam* literally means "[w]ho . . . as well," which refers to English lawsuits brought by a litigant on behalf of the King. *See* J. Randy Beck, *The False Claims Act and the English Eradication of* Qui Tam *Legislation*, 78 N.C. L. REV. 539, 551 (2000) (alteration in original) (quoting *Qui tam action*, BLACK'S LAW DICTIONARY (6th ed. 1990)) (exploring the connection between Blackstone's Commentaries and *qui tam* legislation through which one sues on behalf of both oneself and the King).

236. 31 U.S.C. §§ 3729–3733. The existing False Claims Act already provides a bounty for bringing certain suits to protect, for example, the government from being defrauded. Insufficient avenues exist to pursue litigation when the whistleblower has gone to the press, to protect broader nonmonetary harms to collective free speech and expression interests, and to provide adequate remedies for personal and collective intangible harms (harms that civil rights statutes commonly address).

237. *But cf.* TransUnion L.L.C. v. Ramirez, 141 S. Ct. 2190, 2217–18 (2021) (Thomas, J., dissenting) (blocking consideration of remediation for broader harms if those harms did not exist during the time of the founding generation).

by providing an avenue to sue on behalf of collective harms.[238] Moreover, the ability of a government agency to join the suit, and various remedies such as statutory damages and attorney fees, would make such a cause of action a plausible remedial template. For any federal legislative solution, however, Congress must use very clear, explicit statutory language regarding the precise injuries, or harms, covered. The Supreme Court typically will construe statutes of this sort narrowly to *exclude* relief for any harms not expressly enumerated.[239] Remedies should include both injunctive and monetary remedies as well as detailing that monetary remedies may cover pecuniary (tangible) and nonpecuniary (intangible) harms. Further, any legislative reform effort should specify that a whistleblower can assert claims on behalf of nonlitigants (namely, the collective or We the People) and obtain relief for such harms.

The journalist-newsgathering context is complex and arguably the most difficult scenario in which to fashion an effective remedy. The path into court needs to be clear and reliable, but at present, neither condition holds true. Indeed, no obvious procedural vehicle exists for obtaining federal court review of pretextual journalist arrests—ideally a vehicle that would prevent government officers from frustrating newsgathering activity and thereby impeding reportage of matters of public concern. Describing the problem is considerably easier to do than designing an effective remedial tool. Nevertheless, the path forward is clear: Federal courts should use equitable discretion to tailor effective relief when warranted.

Of course, a viable cause of action must exist. But that means that the legal system needs a bit of latitude (and possibly legislative help) on the requirements for establishing actual injury and consideration of any relevant governmental immunities. Intricate and sweeping remedies exist in the civil rights space that could be models here. Such examples include police department remedial orders that address excessive force and racial

238. *See* Trevor W. Morrison, *Private Attorneys General and the First Amendment*, 103 MICH. L. REV. 589, 590 (2005) ("[A] plaintiff who sues to vindicate public interests . . . [where] remedies sought . . . tend to be correspondingly broad: rather than seeking redress for discrete injuries, private attorneys general typically request injunctive or other equitable relief aimed at altering the practices of large institutions.").

239. *See, e.g.*, AMG Cap. Mgmt., L.L.C. v. Fed. Trade Comm'n, 141 S. Ct. 1341, 1351 (2021) (rejecting well-established Federal Trade Commission enforcement authority to pursue disgorgement of profits as restitution ancillary to equitable injunctive power and narrowly interpreting the word "injunction"); Romag Fasteners, Inc. v. Fossil, Inc., 140 S. Ct. 1492, 1495–97 (2020) (interpreting narrowly court power to grant remedies despite relevant statutory language authorizing remedies "subject to the principles of equity" (quoting 15 U.S.C. § 1117(a))); Fed. Aviation Admin. v. Cooper, 566 U.S. 284, 302 (2012) (construing federal Privacy Act's allowance for "actual damages" to mean only pecuniary harm but not nonpecuniary harms like emotional distress). For a provocative discussion of the Supreme Court's recent jurisprudence including the Court's virtual erasure of the remedial equitable provisions of the Lanham Act in *Romag*, see Mark A. Lemley, *The Imperial Supreme Court*, 136 HARV. L. REV. F. 97, 105 n.47 (2022).

discrimination with elaborate, robust injunctive commands.[240] Remedies of this sort flow only *after* a plaintiff proves a material and ongoing substantive constitutional violation and overcomes all relevant immunity shields (including absolute immunity, when applicable, and qualified immunity).

When addressing this problem, one should keep in mind that despite journalists' speech and press rights being violated, and chilled going forward to boot, the police typically will release pretextually arrested journalists without any meaningful opportunity to challenge their treatment by the government.[241] To be clear, journalists should not be prosecuted on bogus charges solely to provide a procedural mechanism for challenging their arrest. In the absence of any process, however, a real loss of First Amendment activity will foreseeably result—with both journalists and the body politic suffering significant speech-related harms. The legal system must find a way to remedy these First Amendment harms; once again, equity points the way.

Even bolder, more creative judicially fashioned equitable remedies might not be adequate. Instead, new legislation aimed at combating the harassment of journalists engaged in newsgathering activity might be needed. Of course, incumbent politicians are not always eager for the press to investigate and report on their misconduct and malfeasance. Thus, a serious political economy problem exists with successfully seeking an effective legislative solution and will not be easy to overcome.

The question of unconstitutional zoning schemes, in the outdoor billboard context, presents an arguably easier case because of the property

240. *See* Margo Schlanger, *Civil Rights Injunctions over Time: A Case Study of Jail and Prison Court Orders*, 81 N.Y.U. L. REV. 550, 626 (2006) (demonstrating, in a longitudinal study, that detailed injunctions played a pivotal role in correctional administration after the strictures brought by the 1996 Prison Litigation Reform Act); *see also* Jason Mazzone & Stephen Rushin, *State Attorneys General as Agents of Police Reform*, 69 DUKE L.J. 999, 1050 (2020) (stating that state attorneys general ought to be able to seek "equitable relief in federal court against police departments in their jurisdiction to remedy and prevent violations of constitutional rights"). *But cf.* John Harrison, Ex Parte Young, 60 STAN. L. REV. 989, 1009 (2008) ("An injunction against collection, which was permissible, was to be contrasted with specific performance, which was not: 'Appellant in this case merely seeks the cessation of appellee's allegedly unconstitutional conduct and does not request affirmative action by the State.'" (quoting Ga. R.R. & Banking Co. v. Redwine, 342 U.S. 299, 304 n.15 (1952))). Professor Harrison demonstrates special concerns that arise when federal courts entertain equitable injunctions against state actors. *Ex parte Young* authorizes prospective relief like injunctions against state officers engaging in ongoing unconstitutional behavior thereby stripped of the state's sovereign immunity shield under the Eleventh Amendment. *Ex parte* Young, 209 U.S. 123, 155–56 (1908). But, to Harrison, the prospective relief is not as broad as presumed; rather, it endorses antisuit injunctions and establishes support for negative—rather than positive—forms of relief. *See* Harrison, *supra*, at 1002. Cessation is a negative example; whereas specific performance is a positive one (because it usually orders defendant to take specific action). *Id.* at 1019.

241. The arrest of a *Wall Street Journal* reporter newsgathering at a Chase Branch in Phoenix follows this all-too-predictable pattern. *See supra* notes 95–98 and accompanying text; *see also* Darcy, *supra* note 95 (describing the arrest of Dion Rabouin by a Phoenix, Arizona, police officer and subsequent release without being charged with any criminal violations).

ownership interest of the would-be speaker. This interest provides a legal basis for challenging constitutionally problematic zoning rules and procedures. Governmental restrictions on outdoor billboards are often patently unconstitutional as content-based regulations. Even where plaintiffs are successful in making this case, however, the inadequacy of remedial orders all too often results in a pyrrhic victory. The government effectively delays speech indefinitely by causing the would-be speaker to await revised regulations without any judicially mandated timeframe for the local government to act. Accordingly, despite notching a "W" in the win column against the government, the plaintiff's speech will not see the light of day. Such suppression is troublesome as a prior restraint. Speech interminably delayed is speech denied.

Providing a meaningful remedy in this context would not mean that a billboard company could erect a sign anywhere, or any time, if doing so would advance its business interests. Moreover, plaintiffs with clearly meritless claims obviously should not prevail. Zoning rules may constitutionally regulate outdoor signage, but such regulation cannot be used pretextually to favor particular speakers, content, or viewpoints. That said, when the would-be speaker has taken all the necessary steps to comply with often blatantly unconstitutional strictures and spent the time, energy, and treasure required to establish in open court the unconstitutionality of a local zoning scheme (often repeatedly), equity should support a remedial order that favors the intended speech over the unconstitutional barrier. The presumption in favor of facilitating speech could be rebuttable upon certain good-faith demonstrations by the affected governmental entities. Even so, however, a preference in favor of more free speech is especially vital when the holding pattern is indefinite and cyclical (and arguably even pretextual).

In this context, a creative solution would do more than expedite timelines for another round of revised regulations and likely litigation. Equity supports an affirmative remedy that authorizes at least the temporary posting of the speech. If nothing else, such a shift in remedial presumptions would incentivize the local government officials to act with more haste, greater care, and with an eye toward firmer constitutional grounding. An equitable remedy should guarantee a presumption toward getting unconstitutionally delayed speech up in lights (so to speak), at least until the government acts with reasonable dispatch, and in good faith, to rectify the original constitutional defects.

Moreover, a temporary judicial order permitting the erection of an outdoor sign should become permanent if a local government fails to comply in good faith, and within a reasonable time, in curing the constitutional defects in its comprehensive zoning plan. The marketplace of ideas would benefit from more speech and the ability of the audience to enjoy access to various speakers' messages while the local government seeks to put its regulatory house in order. Core First Amendment values, including speaker autonomy, audience autonomy, and democratic deliberation, would be significantly and materially advanced by developing and then deploying

remedies that facilitate speech over enforced silence.

The owner or operator of a billboard advertising company is in most material respects akin to a bookstore—such enterprises serve as conduits for the speech of others and put would-be speakers and audiences together. Even so, efforts to eradicate commercial bookstores from within a city's municipal boundaries would plainly raise serious First Amendment issues.[242] So too would regulating the wares that a bookstore may offer to its customers.[243] The exact same constitutional logic should apply, with full force,[244] to billboard companies seeking to erect outdoor signs and provide an inexpensive channel for the communication of commercial and noncommercial messages to passersby. These entities are speech facilitators for would-be speakers and audiences alike. Remedial decrees in signage zoning cases need to take this reality into account—but, at least to date, have not done so.

CONCLUSION: FIRST AMENDMENT RIGHTS WITHOUT EFFECTIVE REMEDIES UNDERMINE DEMOCRATIC DELIBERATION AND THE PROJECT OF DEMOCRATIC SELF-GOVERNMENT

First Amendment remedies simply do not align with the Supreme Court's soaring rhetoric about the central importance of the First Amendment to the process of democratic deliberation. If expressive freedoms, including speech, assembly, association, petition, and a free press are indeed critical to facilitating participatory democracy in the United States,[245] then the remedies available to successful First Amendment plaintiffs should reflect the central importance of these fundamental rights. A meaningful commitment to ensuring that public debate in the United States remains "uninhibited, robust, and wide-open"[246] requires remedies that work.

As a normative matter, remedies in First Amendment cases should seek to facilitate not only a would-be speaker's interest in disseminating a message, but also We the People's interest in enjoying access to the speaker's message. The Supreme Court's current approach to remediating First Amendment violations gives insufficient weight to a speaker's interest in saying their piece

242. *See* FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 224 (1990).

243. *See* Butler v. Michigan, 352 U.S. 380, 383–84 (1957).

244. Monaghan, *supra* note 27, at 551 ("[F]irst amendment due process cases have shown that first amendment rights are fragile and can be destroyed by insensitive procedures; in order to completely fulfill the promise of those cases, courts must thoroughly evaluate every aspect of the procedural system which protects those rights.").

245. *Whither the Press*, *supra* note 6, at 684–85 (arguing for the essential nature of a free press in a functioning democracy and positing that an unmuzzled press will reliably advance the public's right to receive information enabling citizens to participate on a well-informed basis in the process of democratic deliberation). *See generally* Barry Sullivan, *FOIA and the First Amendment: Representative Democracy and the People's Elusive "Right to Know,"* 72 MD. L. REV. 1 (2012) (exploring the scope and importance of the citizen's elusive right to know about its government in a representative democracy).

246. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

and largely, if not completely, ignores the collective harms that government efforts to squelch speech activity impose on the body politic. If the federal and state courts take fully and fairly into account the potential audience's interest in access to speech, First Amendment remedies would more reliably enable speech rather than simply declare invalid government regulations that favor some speech or speakers over others.

In remedial terms, equity and the application of equitable principles would provide a suitable doctrinal vehicle for reimagining, reframing, and enhancing First Amendment remedies to facilitate more speech by a wider array of speakers. More specifically, government employee whistleblowers should enjoy remedies that reduce the potential personal and professional cost of blowing the whistle on government misconduct—notably including a presumption of reinstatement to government employment and protection against pretextual, adverse employment-related actions going forward. Journalists need an effective means of challenging targeted police harassment—including ham-fisted efforts to impede or block entirely newsgathering activities essential to fair and accurate reporting of matters of public concern. Those seeking to create modalities for the dissemination of speech to the public—who establish that a local government is playing favorites through content-based zoning rules, or variance procedures that vest unbridled discretion with a BZA—should be able to secure robust and effective remedial orders that permit them to speak while a local government gets its zoning house in better order.

If First Amendment plaintiffs in these and other areas find that prevailing in federal court on their constitutional claims will result in merely a symbolic (hollow) victory, they will cease bringing First Amendment actions challenging unconstitutional government speech regulations. And, as such litigation falls off, the chilling effect of government efforts to silence whistleblowing employees, impede the free press, and selectively silence speech via content-based signage bans and standardless variance procedures will grow and flourish unchecked.

The Supreme Court tells us that "[t]he First Amendment protects speech and speaker, and the ideas that flow from each."[247] Today, unfortunately, this statement constitutes a theoretical, or perhaps aspirational, constitutional commitment on the Supreme Court's part. Given the weak-kneed remedies available to many First Amendment plaintiffs, this statement does not reflect our lived reality. Simply put, effective remedies, routinely deployed, that empower speakers and audiences to engage in the ongoing process of democratic deliberation are essential to operationalizing the First Amendment as a reliable shield against government efforts to censor speech—and thereby as an effective means for protecting both speech and speakers.

247. Citizens United v. FEC, 558 U.S. 310, 341 (2010).