

# SPEECH COURTS IN EQUITY

Enrique Armijo\*

*ABSTRACT: In their Article Reimagining First Amendment Remedies, Professors Ronald Krotoszynski and Caprice Roberts demonstrate that courts' current approaches to remedies in First Amendment cases often fail to fully address the harms to both speakers and listeners that unlawful speech-suppressive actions by governments can cause. They argue that to fulfill the First Amendment's guarantee, courts should design remedies that not only restore the speaker's rights to the place they were prior to the government's constitutional violation but also address the collective harm to the audience that has been deprived of valuable speech.*

*This Response evaluates Professors Krotoszynski and Roberts' argument and its implications for First Amendment jurisprudence. It examines whether a more listener-focused remedial approach could have improved the outcomes in the cases discussed in the Article, such as Barr v. AAPC. It also identifies potential conflicts between speaker and listener interests that might arise in crafting equitable relief that the Article neglects to fully consider. It concludes that while Professor Krotoszynski and Roberts' proposals offer valuable insights, balancing the relevant interests in the manner the Article proposes might present additional challenges, such as inadvertent favoring of specific viewpoints and undermining broader constitutional and nonconstitutional principles that the substantive law of the First Amendment currently recognizes.*

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\* Professor of Law, Elon University School of Law; Faculty Affiliate, Yale Law School Information Society Project and UNC-Chapel Hill Center for Information, Technology and Public Life; Research Fellow, George Washington University Institute for Data, Democracy, and Public Life. Thanks to the *Iowa Law Review* for asking me to write this Response, and to Cameron Samek for outstanding research assistance.

## INTRODUCTION

It was nine Supreme Court terms after *New York Times Co. v. Sullivan*, and Justice Byron White was having second thoughts. Justice White had signed on to Justice William Brennan's unanimous 1964 opinion, which held that the First Amendment required public officials in defamation cases to demonstrate by clear and convincing evidence that false statements about them were made with actual malice.<sup>1</sup> But in 1974's *Gertz v. Robert Welch, Inc.*,<sup>2</sup> in which the Court extended *Sullivan*'s revisions of the common law to defamation cases involving public figures, Justice White dissented, and deemed the Court's constitutionalization of state common law in the name of the First Amendment to be "an ill-considered exercise of the power entrusted to this Court."<sup>3</sup> Justice White believed that the Court's creativity with respect to reimagining the state common law of defamation was better expended not on the degree of fault public figures should have to show or on plaintiffs' burden of proof with respect to the same, but rather on the remedies they should be eligible to receive from their defamers.<sup>4</sup>

To Justice White, the irony of *Sullivan* and its progeny was that they made it effectively unattainable for defamation plaintiffs to receive the remedy that they most desired and were most entitled to, given the interest the tort had protected for the pre-*Sullivan* centuries of common law—an official determination of falsity.<sup>5</sup> Under the Court's newly constitutionalized law of defamation, Justice White wrote in his dissent of *Gertz*, "it will be exceedingly difficult, perhaps impossible," for a defamation plaintiff "to vindicate his reputation interest by securing a judgment for nominal damages, the practical effect of such a judgment being a judicial declaration that the publication was indeed false."<sup>6</sup>

In a later post-*Sullivan* and *Gertz* defamation case, 1985's *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*,<sup>7</sup> Justice White expounded on the principle that cabining the monetary remedies available to defamed individuals, rather than limiting the liability of those who defamed them via changes to the substantive common law, was a preferable route to vindicate both the First Amendment and reputational interests that are often in conflict in defamation cases.<sup>8</sup> To Justice White, adhering to the preexisting common law standards of fault but limiting damages would permit defamed parties to

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1. See generally *New York Times Co. v. Sullivan*, 376 U.S. 254, 283 (1964).

2. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342-43 (1974).

3. *Id.* at 370 (White, J., dissenting).

4. See *id.* at 371-73.

5. See *id.* at 375-80, 393.

6. *Id.* at 376.

7. *Dun & Bradstreet, Inc. v. Greenmoss Builders*, 472 U.S. 749, 771 (1985) (White, J., concurring in judgment).

8. *Id.*

pursue the relief they are most likely to want, namely the clearing of their name through a judicial declaration of defamatory falsity:

[I]nstead of escalating the [defamation] plaintiff's burden of proof to an almost impossible level, we could have achieved our stated goal [of ensuring discussion about public issues, per *Sullivan*, be robust, uninhibited, and wide-open]<sup>9</sup> by limiting the recoverable damages to a level that would not unduly threaten the press. . . . [In such a circumstance,] the defamed public official, upon proving falsity, could at least have had a judgment to that effect. His reputation would then be vindicated; and to the extent possible, the misinformation circulated would have been countered.<sup>10</sup>

Limiting libel plaintiffs to actual damages, argued Justice White, would provide an achievable and practical remedy for the defamed party who "sought no damages but only to clear his name."<sup>11</sup> And on the First Amendment side of the ledger, it would also fulfill *Sullivan*'s goal of "protect[ing] the press from the chilling danger of numerous large damages awards," while at the same time ensuring defamers would "hav[e] to pay for the actual damages caused to those they defame."<sup>12</sup>

In their Article, *Reimagining First Amendment Remedies*,<sup>13</sup> Professors Ronald Krotoszynski and Caprice Roberts take up Justice White's project of looking to the law of remedies as an alternative path to vindicate the interests of the parties in First Amendment cases. Their project is broader than Justice White's in one sense and narrower in another. Briefly stated, they argue is that with respect to remedy, wins for speakers are not always a win for the First Amendment, or at least for the values the Amendment intends to promote and preserve. The unstated implication, however, is that when a different, nonconstitutional interest in a First Amendment case, it should give way to interests that relate to the freedom of speech.<sup>14</sup>

Part I of this Response summarizes the Article's primary argument. Part II examines the recently decided *Barr v. American Ass'n of Political Consultants, Inc.* ("AAPC"),<sup>15</sup> a decision which Professors Krotoszynski and Roberts argue exemplifies the Supreme Court's cramped approach to remedies in First Amendment cases, which lower court cases have followed.<sup>16</sup> But a close look at AAPC reveals that its result is mostly the product not of an insufficient imagining law of remedies, but rather an affirmation of the substantive formal

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9. *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

10. *Dun & Bradstreet, Inc.*, 472 U.S. 749 at 771.

11. *Id.*

12. *Id.* at 771-72.

13. Ronald J. Krotoszynski & Caprice L. Roberts, *Reimagining First Amendment Remedies*, 109 IOWA L. REV. 911, 938-39 (2024).

14. *See id.* at 914-18.

15. *See Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 610 (2020).

16. Krotoszynski & Roberts, *supra* note 13, at 916-18.

equality principle underlying content discrimination doctrine. *AAPC* also demonstrates that the problem and the rule the Article proposes to solve them may be a product of the kinds of free speech-related cases that Professors Krotoszynski and Roberts choose to value, and not of any defect or failure of imagination by First Amendment courts exercising their equitable discretion.

## I. REMEDIES FOR LISTENERS

The Article's core claim is that courts' equitable powers to craft remedies in First Amendment cases present an opportunity to consider free speech interests in ways that substantive free speech law might not be adequately equipped to do.<sup>17</sup> Professors Krotoszynski and Roberts argue that as a principal matter, "a First Amendment violation actually involves harms beyond the speaker because free speech benefits not just the speaker but also the audience."<sup>18</sup> Even in cases where the speaker wins, the actual relief courts provide in some of those cases fails to return the speaker to the place they were before the rights violation. This decision has the effect of continuing the speech harm to the speaker that the government's unconstitutional act has caused, but more importantly for the Article's purposes, it ignores the collective harm that a less-than-complete speaker victory causes.<sup>19</sup>

For example, a billboard operator whose request for billboard space has been denied might well demonstrate successfully that the city's ordinance that was the basis for the denial is content-based. But in the absence of an express and immediate equitable order by the reviewing court to the city to grant the successful challenger's request, even after losing the First Amendment case, the city has several options, many of which will extend the effect of its unconstitutional proscription on the speaker's speech. The city can drag its feet to curing its ordinance of the constitutional defect. It can also replace the defective ordinance with a new law that does not distinguish based on content but would bar the winning plaintiff's billboard on a content-neutral basis.<sup>20</sup> All the while, not only is the speaker still deprived of the ability to disseminate her message, but viewers are also deprived of the benefit of seeing it.<sup>21</sup> In short, even a declaratory judgment that the law or government action is unconstitutional is not enough to adequately cure the constitutional harm. The speaker walks away from court with a mandate (and a remand, if she lost below) in her favor, but still has no access to a billboard, which was the

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17. Krotoszynski & Roberts, *supra* note 13, at 938.

18. *Id.*

19. *See id.* at 944.

20. *See* Krotoszynski & Roberts, *supra* note 13, at 936–37. For more on the situation where a plaintiff successfully challenging an ordinance as content-based can often wind up with a pyrrhic victory when the town adopts a replacement ordinance that is content-neutral but has the effect of banning the plaintiff's proposed sign as well as many others, see generally Enrique Armijo, Reed v. Town of Gilbert: *Relax, Everybody*, 58 B.C. L. REV. 65 (2017).

21. Krotoszynski & Roberts, *supra* note 13, at 936–38.

constitutional wrong the First Amendment claim was brought to cure in the first place.

A similar result occurs when a federal government has unconstitutionally fired a whistleblower for their protected speech but is not ordered the reinstatement of employment by the reviewing court.<sup>22</sup> Other whistleblowers who know their firings might not be undone because the government employer can rely on after-acquired evidence to cleanse their dismissal of its unconstitutionality may be less likely to speak out, thus depriving the public of important information.<sup>23</sup> Journalists who are collecting information for possible dissemination to the public in an environment where newsgatherers are being harassed or arrested by police are forced into the same bad choice; the last journalist who was so treated may have had their rights to record or collect vindicated in court, or even be released from custody or other potential criminal liability prior to having to sue. But the cost of that victory was arrest, which other journalists might not be willing to pay. The result of that conduct is thus a retreat from First Amendment-protected activity and less information for the public, even where the government's constitutional violations are clear.<sup>24</sup>

Accordingly, Professors Krotoszynski and Roberts write, it is often the case that even where a court finds a constitutional violation, access to the speaker's message can remain diminished because of a failure to take a broader view of speech interests into account at the remedial stage of a First Amendment case.<sup>25</sup> These kinds of remedies particularly frustrate listener-based values, because listeners are deprived of speech they would have accessed in the absence of the violation—speech that could be to their self-governance-related benefit. “[A] federal court has a duty,” the authors write, “to consider not only the frustrated would-be speaker, but also the audience that has been deprived of the speech. . . . 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.”<sup>26</sup>

## II. *AAPC* AND THE UNWILLING LISTENER

In providing an example of a remedy in a First Amendment case that demonstrates courts' taking insufficient theoretical account of collective harms, Professors Krotoszynski and Roberts point to the Court's 2020 *AAPC* decision.<sup>27</sup> But *AAPC* is a curious choice of case to demonstrate a remedy that inadequately takes collective harms into account. And that is true in part

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22. See *id.* at 929–32.

23. See *id.* at 930–32.

24. See *id.* at 932–36.

25. *Id.* at 931–32, 936.

26. *Id.* at 947.

27. *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 610 (2020).

because it involves one of the only types of speakers that nearly every listener of that speech would strongly prefer not to hear.

In *AAPC*, a group of political and nonprofit consultants who used robocalls to call cellphones challenged the 1991 Telephone Consumer Protection Act.<sup>28</sup> The Act effectively prohibited robocalls to cellphones, but via a 2015 amendment, it carved out from its prohibition robocalls that were made to collect federal government debt.<sup>29</sup> The consultants sought a declaratory injunction on the grounds that the exception violated the First Amendment's proscription on content-based restrictions.<sup>30</sup> The Court agreed, finding that the statute as amended favored one particular set of speakers over others.<sup>31</sup> Most relevant to the thesis in *Reimagining First Amendment Remedies*, the Court then found the 2015 amendment severable from the rest of the statute and struck the debt collection robocall exception while leaving the rest of the Act intact.<sup>32</sup> The Act as revised by the Court's finding of unconstitutionality did not discriminate on the basis of content, and so it applied to the consultants' robocalls just as it would any others.<sup>33</sup> In other words, the political consultants lost for winning; they successfully demonstrated the amendment violated the First Amendment, but their successful challenge left the restriction on their own speech, as well as on *any* speaker who sought to speak via robocall, in place. Justice Gorsuch noted the incongruity in his dissent and wrote separately to argue that the consultants should have been granted an injunction preventing the Act's enforcement against them.<sup>34</sup>

To be sure, the result the Court reaches in *AAPC* nets out at less speech. Despite Professors Krotoszynski and Roberts's claims, however, the seemingly incongruous result in *AAPC* is not so much the result of insufficient creativity with respect to remedy. Rather, it is rooted in the nature of the substantive challenge that First Amendment doctrine requires the speaker to bring. The statute's use of a content-based distinction to favor certain content resulted in the Court's striking of the distinction, which resulted in a broader statute that restricted *more* speech than it did before it was challenged—an irony recognized over forty years ago by then-Justice Rehnquist, who noted in *Carey v. Brown* that under the content-neutrality doctrine, “the State would fare better by adopting more restrictive [but content-neutral] means, a judicial

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28. 47 U.S.C. § 227 (2018).

29. See *Barr*, 591 U.S. at 615–18.

30. *Id.* at 613–14.

31. *Id.* at 636.

32. *Id.* at 630–31.

33. *Id.* at 633–34.

34. See *id.* at 652 (Gorsuch, J., concurring in judgment in part and dissenting in part) (“Because the challenged robocall ban unconstitutionally infringes on their speech, I would hold that the plaintiffs are entitled to an injunction preventing its enforcement against them[, which is] the traditional remedy for proven violations of legal rights likely to work irreparable injury in the future.”).

incentive I had thought this Court would hesitate to afford.”<sup>35</sup> Or as Justice Gorsuch put it in *AAPC*, “the [consultants’] prize for winning is no relief at all.”<sup>36</sup> But the remedy the Court chose is underlaid by an uncontroversial doctrinal point: Governments cannot treat some categories of speech more favorably than others.

Accordingly, upon finding a First Amendment violation, the Court in *AAPC* was faced with two options: (1) severing the favorable treatment and letting stand the restriction that treated all categories of speech equally, effectively preserving the status quo prior to the statute’s content-discriminatory amendment; or (2) invalidating the entire statute based on the amendment that demonstrated a content preference, which was the remedy sought by the consultants for obvious reasons.<sup>37</sup> But Option 2 would have overridden an express severability clause elsewhere in the Communications Act, of which the Telephone Consumer Protection Act (“TCPA”) was a part.<sup>38</sup> It would have also imputed the unequal treatment that Congress enacted in the debt collection amendment to the entire Act—consigning a law that was otherwise content-neutral on its face to the fate of a content-based amendment. The Court would have in effect replaced the constitutionally valid statute that Congress had written, the content-neutral pre-amendment TCPA, with one that violated the First Amendment.

So, Justices Rehnquist in *Carey* and Gorsuch in *AAPC* are both correct in claiming that declaring a law’s content preference as violating the First Amendment often results in less speech. But that is because the substantive law of content neutrality requires that result. Remedial creativity does not provide an end around it. Courts should not treat a content-neutral statute as if it were content-based for the benefit of one affected speaker’s relief; remedies are a way to effectuate substantive law, not to rewrite it.

Additionally, it is hard to see how a more listener-protective approach to remedy would have changed in *AAPC* for the First Amendment-related better. Permitting all robocalls instead of severing the Act’s content preference and leaving the rest of the Act intact would have undoubtedly resulted in a great

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35. *Carey v. Brown*, 447 U.S. 455, 475 (1980) (Rehnquist, J., dissenting) (emphasis omitted); see also Martin H. Redish, *The Content Distinction in First Amendment Analysis*, 34 STAN. L. REV. 113, 137 (1981) (stating that “[i]n a perverse sense, then, it appears that the more expression we prohibit, the closer we come to attaining the goal of the equality principle” supporting strict scrutiny for content-based restrictions).

36. *Barr*, 591 U.S. at 653 (Gorsuch, J., concurring in judgment in part and dissenting in part).

37. The consultants did make a substantive argument for invalidation of the Act in toto, based on the principle that underinclusiveness to a claimed compelling state interest can violate strict scrutiny, and the debt collection exception demonstrated that the government interest in consumer privacy was insufficiently compelling. But the Court made short work of that argument on the ground that the debt collection robocalls were a fraction of a fraction of the total robocalls barred by the Act. See *id.* at 622–23.

38. *Id.* at 629.

amount of speech to *unwilling* listeners, given the fact that, as the Court notes, the Act reflected the wishes of literally millions of Americans who were complaining about robocalls as unwanted.<sup>39</sup> Professors Krotoszynski and Roberts's proposal is helpful where the information the government seeks to suppress would be valuable to listeners. Still, it does not tell us what courts should do when the listeners who would receive the speech have no interest in hearing it.

As that disconnect shows, asking whether listeners would be interested in or willing to hear the speaker's speech when crafting a First Amendment remedy also begs the question of *which* listeners would be interested. The cases in which Professors Krotoszynski and Roberts argue the Court took or should take, listeners into proper account when crafting a remedy for the speaker involve civil rights protesters, pure political speech, government whistleblowers, and journalists uncovering wrongdoing.<sup>40</sup> Claiming that a broader approach to crafting remedies for such speakers is compelled by the First Amendment, however, could well involve a viewpoint preference with respect to their messages of the type courts are often justifiably wont to avoid. There may have been some fellow students in Mary Beth Tinker's math class<sup>41</sup> who were interested in hearing her anti-war message; there may have also been others who were more interested in learning math. Presuming the presence of willing listeners, in other words, presumes the absence of unwilling ones. And willing-listener-based theory has its greatest First Amendment influence in commercial speech doctrine;<sup>42</sup> a necessary result of adopting the Article's proposal would thus seem to be more invalidation of advertising regulations, a default outcome I am not sure the authors would approve of.

The underlying assumption that listeners are interested in receiving speech raises other cross-doctrinal problems that the Article's approach does not help much to solve. What does a listener-sensitive remedial approach in First Amendment cases leave left of captive audience doctrine, where the Court recognizes that granting the speaker a right to speak interferes with the right of an unwilling listener to be left alone in their home?<sup>43</sup> In a case like *Frisby v. Schultz*, where the Court upholds an ordinance that prevented directed picketing outside someone's residence,<sup>44</sup> should more attention be given to the neighbors' interest in hearing the picketers' speech, instead of

39. *Id.* at 613.

40. See Krotoszynski & Roberts, *supra* note 13, at 923–25, 931–32, 935–36.

41. See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 504 (1969); see also *Tinker*, 393 U.S. at 517–18 (Black, J., dissenting) (indicating “[t]here [was] also evidence that a teacher of mathematics had his lesson period practically ‘wrecked’ chiefly by disputes with Mary Beth Tinker”).

42. *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–61 (1976).

43. See *Rowan v. U.S. Post Off. Dep’t*, 397 U.S. 728, 736–38 (1970).

44. See *Frisby v. Schultz*, 487 U.S. 474, 486–88 (1988).

the homeowner's interest in refusing to listen to it? What about students protesting the War in Gaza via an encampment in a public university quad—do the relevant listeners include the students who would rather take a shorter route to class, or who must meet on Zoom rather than in person because of the sound caused by the disruption? Or, as discussed above, who are the willing listeners whose rights or interests are being infringed by a federal statute that bars robocalls? Any entering of hypothetical willing listeners in the equitable balance will necessarily undervalue an unwilling listener's interest in having the speech suppressed. This problem is not an insurmountable. But by choosing speakers like journalists, civil rights protesters, and whistleblowers, Professors Krotoszynski and Roberts implicitly favor remedial flexibility in some First Amendment cases over others. They do so explicitly in the billboard example, arguing that where the successful challenger intended to use a billboard for commercial speech rather than political speech, "the scope of the appropriate remedy should be narrower."<sup>45</sup> All of which is fine, but it will provide an opportunity for judges to smuggle in their own preferences in the name of crafting equitable relief in First Amendment cases.

And finally, to return to the views of Justice White that I summarized in the Introduction above, it is often (always?) the case that there are other, nonconstitutional interests at issue in First Amendment cases. Justice White's position was that in defamation cases, the (actual) reputational interest in clearing one's name could justify a remedial approach that minimized the (theoretical) chilling effects of presumed and punitive money damages on speakers while leaving the relevant liability rules where the common law left them.<sup>46</sup> Might there be a set of cases, including but not limited to defamation cases, where equitable remedial flexibility is called for to recognize a state interest that might be in tension with listeners' interests? I raise this last point not to criticize the Article that Professors Krotoszynski and Roberts chose not to write; the one they did choose to write is thoughtful, novel, and necessary. However, as Justice White recognized, even in the First Amendment context, the equities can travel in more than one direction.

## CONCLUSION

There is an alternative reading of *Reimagining First Amendment Remedies* as a meta-critique of First Amendment courts as engaging in, as today's youth like to say, a kind of self-own. When applying the doctrine, these courts pretend to care about a speaker's choice of audience, listener interests, democratic deliberation, self-governance, and the marketplace of ideas. But when they turn the corner from finding violations of substantive law to crafting the proper remedies to address those violations, these same courts reveal themselves as thoroughbred self-autonomists.

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45. Krotoszynski & Roberts, *supra* note 13, at 964.

46. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 393–95, 400–02 (1974) (White, J., dissenting).

The reason we know this, Professors Krotoszynski and Roberts argue, is that when a constitutional violation has been found and it is time for the court to tell the government what to do next, the concerns about listeners and their access to information essentially disappear when it comes time to balance the equities. When it is time to craft a remedy, it is about the speaker. The speaker wins, but the *reasons* it is important that the speaker win fade into the background, if not disappear completely. This statement is, at best, an oversight and, at worst, a disservice to the First Amendment itself.

*Reimagining First Amendment Remedies* raises important and pressing questions about what the First Amendment is for. It necessarily does not—nor could any article—give courts exercising remedial powers in speech cases instructions that they can follow in every situation. But the core starting point the Article advocates for is the right one: once a right to speak has been deemed protected, the remedy for the successful litigant should protect the continued exercise of that right: for that speaker, for the rights of other speakers similarly situated, and for those who would benefit as audiences of that speech. Otherwise, a government seeking to suppress speech does not learn from losing, and the First Amendment fails to tame it.