Wake Forest Journal
of
Law & Policy

VOLUME 12 | June 2022 | NUMBER 3

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Wake Forest Journal *of* Law & Policy

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WAKE FOREST JOURNAL OF LAW & POLICY
(ISSN 2160-4967)

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Single issue price is $20.00. Wake Forest University School of Law alumni pay $15.00 per issue; current School of Law students pay $12.00 per issue. Contact the 2021-2022 Business Editor, Ashley Williams, at willa219@wfu.edu for ordering information.

Back issues in complete sets, volumes, or individual issues may be obtained from: William S. Hein & Co., Inc., 2350 North Forest Road, Getzville, New York, 14068-1296, and may be accessed online at www.heinonline.org.

The *Journal* welcomes submissions of articles, essays, notes, comments, and empirical studies. Each manuscript should be typed, double-spaced, and in Times New Roman, 12-point typeface. The *Journal* accepts submissions via Scholastica, but it also accepts submissions directly via email to wfulawpolicyjournal@gmail.com.

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"NAVIGABLE WATERS" DOES NOT INCLUDE MUD PUDDLES: THE CLEAN WATER ACT'S LEGISLATIVE HISTORY SUPPORTS A NARROW, COMMERCIAL-FOCUSED INTERPRETATION

ISAIAH MCKINNEY†

I. INTRODUCTION

What is a navigable water? This question has been at the center of much litigation, including a trilogy of Supreme Court decisions, dating back to the 1980s.[1] The Clean Water Act of 1972[2] ("CWA") authorized the Environmental Protection Agency ("EPA") to regulate pollution in the nation's "navigable waters."[3] This authority gave the EPA, along with the Army Corps of Engineers ("Army Corps"), the power to regulate the dumping, filling, and altering of the navigable waters.[4] The CWA, however, was not especially clear on the scope of the waters these agencies could regulate. The CWA defines "navigable waters" as "waters of the United States, including the territorial seas."[5] This definition has created much speculation as to exactly what "waters of the United States" means.[6] While some have argued that "navigable waters"

† J.D. candidate 2022, Wake Forest University School of Law. A very special thanks to Tony Francois. This Comment is his brainchild, and he was gracious enough to suggest I write it. He thought it; I just put his thoughts to paper. Also, a special thanks is owed to Charles Yates, whose research of the use of the different words in the legislative history was very helpful as I tried to appreciate the landscape of this project.

1. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–24 (1985); Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 161 (2001); Rapanos v. United States, 547 U.S. 715, 716 (2006).
2. Clean Water Act, 33 U.S.C. §§ 1251–1357; Pub. L. No. 92-500 (1972).
3. Clean Water Act, 33 U.S.C. § 1252(a).
4. *Id.* § 1344; Pub. L. No. 92-500 § 404 (1972). This Comment cites to both the U.S. Code and the Public Law Number when referencing § 404.
5. Clean Water Act, 33 U.S.C. § 1362(7).
6. *See, e.g.*, Lorraine C. Friedlein Buck, *Narrowing "Navigable Waters": The Fifth Circuit Limits Federal Jurisidiction Under the Clean Water and the Oil Pollution Acts.* In re Needham, 12 MO. ENV'T. L. & POL'Y REV. 48, 49 (2004) (stating that "navigable waters" in the CWA was to be defined the same as in the Oil Pollution Act); Kimberly Breedon, *The Reach of* Raich*: Implications for Legislative Amendments and Judicial Interpretations of the Clean Water Act*, 74 U.

(and thus "waters of the United States") is a broad term encompassing wetlands, tributaries, swamps, etc., others argue it is limited to traditionally navigable waters.[7]

Since the EPA and Army Corps can regulate "navigable waters,"[8] the scope of that phrase directly impacts the scope of these agencies' jurisdictions. Both agencies have issued multiple regulations defining "navigable waters" since the CWA was passed, most of which define the term very broadly.[9] Those who support a broad definition often cite to the legislative history of the CWA, where a conference report states that the "conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation."[10] However, in a 2001 Supreme Court decision, *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers* ("*SWANCC*"), the Court cited this statement from the conference report and determined that despite the "broadest possible constitutional interpretation" language, Congress was only interested in regulating waters that were used in navigation.[11] Unfortunately, the Supreme Court did not reference any portion of the legislative history to support its assertion. This Comment fills that gap, showing that Congress's use of different terms, including "navigable waters," "lakes," "rivers," "tributaries," and "wetlands," indicates Congress's intent to regulate actually navigable waters used in commercial navigation, not small bodies of water upstream from such waters.

This Comment first provides a brief overview of the CWA and the regulations interpreting "navigable waters" and explains why the scope of the definition is so important to all Americans.

CIN. L. REV. 1441, 1442 (2006) (describing the interpretive difficulties Congress's definition of "navigable waters"); William W. Sapp et al., *From the Fields of Runnymede to the Waters of the United States: A Historical Review of the Clean Water Act and the Term Navigable Waters,* 36 ENV'T. L. REP. NEWS & ANALYSIS 10190, 10191, 10202 (2006).

7. *Compare* Sapp et al., *supra* note 6, at 10202, *and* Mark Squillace, *From "Navigable Waters" to "Constitutional Waters": The Future of Federal Wetlands Regulation*, 40 U. MICH. J.L. REFORM 799, 799, 814 (2007), *with* Virginia S. Albrecht & Stephen M. Nickelsburg, *Could* SWANCC *Be Right: A New Look at the Legislative History of the Clean Water Act,* 32 ENV'T. L. REP. NEWS & ANALYSIS 11042, 11048–50 (2002).

8. 40 C.F.R. § 230.3 (2021) (EPA); 33 C.F.R. § 328.1 (2021) (Army Corps); *see infra* Part I.B.

9. *See infra* Part I.B.

10. S. REP. NO. 92-1236 (1971), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., 93D CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 144 (Comm. Print 1973).

11. Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 168 n.3 (2001).

Then, this Comment examines the trilogy of cases interpreting the regulations and the scope of the CWA. Finally, the bulk of this Comment analyzes the use of certain terms in the legislative history of the CWA. In the end, it will be clear that Congress was concerned with regulating pollution in actually navigable waters used in navigation, not difficult-to-define small bodies of water not used in navigation.

A. The Clean Water Act

The Clean Water Act's full title is The Federal Pollution Control Act Amendments of 1972.[12] It amended the Federal Pollution Control Act of 1948,[13] which granted federal support for state enforcement of pollution regulation.[14] Rather than creating a federal water pollution regulatory system, the 1948 Act required states to create their own regulatory plans.[15] In 1972, Congress decided to create a robust federal pollution regulation scheme after public outcry over polluted waters became deafening in the 1960s.[16] This included outrage over the thirteenth fire on the Cuyahoga River in Ohio within 101 years.[17] Congress responded by passing the CWA, the purpose of which was to restore and maintain the "chemical, physical, and biological integrity of the Nation's waters."[18] The CWA centralized pollution management and charged the EPA with determining limitations on point source discharges, installing pollution control devices, and completely eliminating pollution discharges by 1985.[19] As part of their duties under the CWA, the Army Corps and EPA were assigned to regulate the discharge of fill or dredge materials into the navigable waters under § 404.[20] Regulating discharges into navigable waters under §

12. *See* CONG. RSCH. SERV. LIBR. CONG., 93D CONG., LEGISLATIVE HISTORY OF THE WATER POLLUTION CONTROL ACT AMENDMENTS OF 1972, at 1 (Comm. Print 1973).

13. Pub. L. No. 80-845, 62 Stat. 1155 (1948).

14. *See* Elaine Eichlin Henninger, Chemical Manufacturers Association v. Natural Resources Defense Council, Inc.*: Congressional Ambiguity Allows EPA's Safety Valve to Remain Open*, 35 CATH. U. L. REV. 595, 601 (1986).

15. Stephen M. Johnson, *From Protecting Water Quality to Protecting States' Rights: Fifty Years of Supreme Court Clean Water Act Statutory Interpretation*, 74 SMU L. REV. 359, 365 (2021).

16. *Id.* at 361.

17. *History of the Clean Water Act (CWA)*, U.S. ENV'T. PROT. AGENCY, https://cfpub.epa.gov/watertrain/moduleFrame.cfm?parent_object_id=2571 (last visited Oct. 15, 2021).

18. 33 U.S.C. § 1251(a).

19. Henninger, *supra* note 14, at 603–04.

20. 33 U.S.C. § 1344; Pub. L. 92-500, § 404 (1972).

404 has become the center of the litigation over the CWA, and this litigation has been largely over what constitutes "navigable waters."[21] While the CWA references "navigable waters" forty-nine times,[22] the definition within the CWA is limited to merely "the waters of the United States, including the territorial seas."[23] One of the main regulatory tasks the EPA and Army Corps have undertaken is defining "navigable waters."[24]

B. History of "Waters of the United States" Regulations

In 1973, the EPA first released a regulation defining "navigable waters" as navigable waters and their tributaries, interstate waters, intrastate lakes, rivers, and streams used by interstate travelers, and intrastate lakes, rivers, and streams which are fished and used for industrial purposes in interstate commerce.[25] In 1974, the Army Corps limited navigable waters to those used or usable "by the public for purposes of transportation or commerce," including "interstate or foreign commerce."[26] After litigation over the limited 1974 regulation, the Army Corps expanded the definition of "waters of the United States" to include "[c]oastal and inland waters, lakes, rivers and streams" that were navigable, "including adjacent wetlands," tributaries of navigable waters, and "interstate waters and their tributaries, including adjacent wetlands."[27] Finally, as a catchall, the regulation also defined "navigable waters" as "[a]ll other waters of the United States not identified . . . above, such as isolated wetlands and lakes, intermittent streams, prairie potholes, and other waters that are not part of a tributary system to interstate waters or to navigable waters

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21. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123–24 (1985); Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 161 (2001); Rapanos v. United States, 547 U.S. 715, 716 (2006).

22. Clean Water Act, 33 U.S.C. §§ 1251–1357.

23. *Id.* § 1362(7).

24. *See* 40 C.F.R. § 125.1(o) (1973).

25. *Id.*

26. 33 C.F.R. § 209.260(e)(1) (1974) ("It is the water body's capability of use by the public for purposes of transportation or commerce which is the determinative factor, and not the time, extent or manner of that use."); § 209.260(c) ("Navigable waters of the United States are those waters which are presently, or have been in the past, or may be in the future susceptible for use for purposes of interstate or foreign commerce. A determination of navigability, once made, applies laterally over the entire surface of the water body, and is not extinguished by later actions or events which impede or destroy navigable capacity.").

27. 33 C.F.R. § 323.2(a)(2)–(4) (1978).

of the United States, the degradation or destruction of which could affect interstate commerce."[28]

In 1986 and 1987, the EPA and Army Corps respectively passed identical regulations expanding "waters of the United States" to include "mudflats, sandflats, wetlands, sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds" (1) that could be used by interstate travelers for recreational purposes, (2) from which fish or shellfish could be taken and sold in interstate commerce, or (3) that could be used for industrial purposes in interstate commerce.[29] Ever since, their regulations have been nearly identical.[30] While regulations have been promulgated since then—most recently in 2020 by the Navigable Waters Protection Rule[31]—the 1986 and 1987 regulations are the ones currently being applied at the time of this writing.[32]

C. Why the Definition of Navigable Waters Matters

As the definition of the "waters of the United States" has varied, so has the scope of the power the EPA and Army Corps can wield. This regulatory power has real-life consequences for real people because under a broader definition, these agencies can more heavily restrict a person's ability to use their property.

Take the situation of the Sacketts, for example. The Sacketts own two-thirds of an acre in Idaho, and they have been trying to build on their property since 2007.[33] Their property is west of Priest Lake, but it is not adjacent to it as a few parcels separate them from the lake.[34] They prepared to build a home by filling in their property, only to receive a compliance order from the EPA ordering them to stop filling because the property was a wetland adjacent to navigable water and waters of the United States.[35] The EPA also

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28. *Id.* § 323(a)(5).

29. 40 C.F.R. § 230.3(s)(3) (1986) (EPA); 33 C.F.R. § 328.3(a)(3) (1987) (Army Corps).

30. *See* The Navigable Waters Protection Rule: Definition of "Waters of the United States", 85 Fed. Reg. at 22254.

31. *See id.* at 22250.

32. *See Current Implementation of the Waters of the United States*, ENV'T. PROT. AGENCY, https://www.epa.gov/wotus/current-implementation-waters-united-states (Dec. 20, 2021).

33. Sackett v. U.S. Env't Prot. Agency, 566 U.S. 120, 124 (2012).

34. *Id.*

35. *Id.* The EPA determined their filling project fell under these regulations: 33 C.F.R. § 328.3(c) (1994) (adjacent wetland); 33 U.S.C. § 1362(7) (1972) (navigable water), 40 C.F.R. § 232.2 (1986) (waters of the United States). *Sackett*, 566 U.S. at 124.

informed the Sacketts that they were violating the CWA by "discharg[ing] pollutants into the waters of the United States without a permit."[36] The Sacketts sought a hearing with the EPA, but it was denied.[37] They sued in federal court, arguing that the compliance order was arbitrary and capricious under the Administrative Procedure Act, 5 U.S.C. § 706(2)(A) ("APA"), as well as a due process violation under the Fifth Amendment.[38] The District Court for the District of Idaho and the Ninth Circuit Court of Appeals both dismissed their claims for lack of subject matter jurisdiction because the APA did not permit pre-enforcement review.[39] The Sacketts sought relief at the United States Supreme Court, which determined they were entitled to judicial review as this compliance order was a judicially reviewable final agency action.[40] Since the 2012 Supreme Court decision, the Sacketts have continuously been in litigation on the merits in an attempt to build their dream home.[41] At the time of this writing, the Ninth Circuit had recently rejected the Sacketts' claim that their property was not covered by the regulation.[42] The Sacketts had challenged the validity of the compliance order and argued that the order lacked legal authority under a narrow interpretation of § 404's authority to regulate "waters of the United States."[43] The Ninth Circuit reasoned that the compliance was lawful under a broader interpretation of "waters of the United States."[44] The Ninth Circuit concluded that the Sacketts' property was a wetland under § 404 and was therefore subject to the permitting requirements.[45] The Sacketts petitioned the Supreme Court to hear their case again, this time on the merits,[46] and certiorari was granted.[47]

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36. *Sackett*, 566 U.S. at 124–25.

37. *Id.* at 125.

38. *Id.*

39. *Id.*

40. *Id.* at 131.

41. *See* Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1082 (9th Cir. 2021).

42. *Id.* at 1093.

43. *See id.* at 1089. The Sacketts alleged that the compliance order was unlawful under the *Rapanos* plurality. *Id.* at 1087–88; *see also infra* Part II.C.

44. *Sackett*, 8 F.4th at 1092–93. The Ninth Circuit determined the order was lawful under Justice Kennedy's concurrence in *Rapanos*; *see also infra* Part II.C.

45. *Sackett*, 8 F.4th at 1093.

46. Petition for Writ of Certiorari, Sackett v. U.S. Env't Prot. Agency (*Sackett II*), 142 S. Ct. 896 (2022) (No. 21-454).

47. *Sackett II*, 142 S. Ct. 896.

For the Sacketts, the EPA's authority—or lack thereof—has had a tremendous impact on their daily lives, and it has prohibited them from building their dream home for many years. If the definitions of "navigable waters" and "waters of the United States" were limited to waters used in commercial navigation, as the legislative history suggests, the Sacketts would not be within the EPA's jurisdiction, and they would have been able to build their home years ago. This expansion of the agencies' regulatory authority to include lands like wetlands is not authorized by the CWA, and as the legislative history indicates, Congress never intended such authority.[48] The CWA was intended to regulate waters used in navigation, not land like the Sacketts' property.[49]

Not only does a broad interpretation have a direct impact on people like the Sacketts, who must meet the EPA's requirements to build on property containing mud puddles, but it also restricts basic property rights. It is a restriction of the right to use, which is one of the most fundamental property rights.[50] Further, the agencies have overstepped the bounds of what their authority was intended for—limiting the dispersion of pollutants into actually navigable waters.[51] A broad interpretation of "navigable waters" allows the EPA and Army Corps to expand their reach far beyond what Congress originally intended, which violates the separation of powers.[52]

II. THE TRILOGY

The Supreme Court has addressed these regulations three times.[53] The first two cases addressed the legislative history of the CWA,[54] while the third focused only on the text of the statute.[55] At issue in all of these cases, and in *Sackett,* was § 404 of the CWA, which

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48. *See infra* Part III.

49. *See infra* Part III.

50. Dickman v. Comm'r, 465 U.S. 330, 336 (1984) (stating that the right to use is "perhaps of the highest order" of property rights).

51. *See infra* Part III.

52. *See infra* Part III.

53. United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 123 (1985); Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 162 (2001); Rapanos v. United States, 547 U.S. 715, 722–23 (2006).

54. *See Riverside Bayview*, 474 U.S. at 132–33; *SWANCC*, 531 U.S. at 168 n.3, 170.

55. *Rapanos*, 547 U.S. at 730–39; *but see id.* at 804 (Stevens, J., dissenting) (addressing legislative history).

prohibits discharging fill or dredge material into the navigable waters without a permit from the Army Corps.[56]

A. Riverside Bayview

In 1985, the Supreme Court held that the Army Corps had the authority under the CWA to regulate the discharge of fill material into adjacent wetlands.[57] The Court also determined that the regulation's definition of "wetlands"[58] was a proper expansion of the Army Corps' authority under § 404.[59] The Court further decided that the trial court's findings established that the respondent's property was sufficiently saturated to be a wetland under the regulation.[60]

Importantly, the Court looked at the legislative history to justify this broad authority under the CWA.[61] The Court stated that the legislative history supported "the reasonableness of the [Army] Corps' approach of defining adjacent wetlands as '[navigable] waters' within the meaning of § 404(a)."[62] The Court claimed that Congress "define[d] the waters covered by the Act broadly" and that "the term 'navigable' as used in the Act [was] of limited import."[63] The Court determined Congress intended to regulate some waters that would not traditionally be considered navigable, and the Court decided that the regulation's interpretation of "adjacent wetlands" as such waters was reasonable.[64]

B. SWANCC

In 2001, the Court again looked at the scope of the waters of the United States under the CWA, this time regarding the 1986

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56. 33 U.S.C. § 1344 (providing the current amended version of the provision).

57. *Riverside Bayview*, 474 U.S. at 139.

58. *Id.* at 124 ("The 1977 definition reads as follows: 'The term "wetlands" means those areas that are inundated or saturated by surface or ground water at a frequency and duration sufficient to support, and that under normal circumstances do support, a prevalence of vegetation typically adapted for life in saturated soil conditions. Wetlands generally include swamps, marshes, bogs and similar areas.'").

59. *Id.* at 129.

60. *Id.* at 130–31.

61. *Id.* at 132.

62. *Id.*

63. *Id.* at 133.

64. *Id.* at 133–34.

regulation.[65] At issue was an interpretation of the regulation, referred to as the Migratory Bird Rule, that allowed the EPA to regulate waters that could be used by migratory birds and endangered species.[66] As part of the analysis, the Court examined the Army Corps' 1974 regulation, which defined navigable waters as those that could be used in commerce or transportation.[67] The Court affirmed that the 1974 regulation was limited to waters used in navigation: "Respondents put forward no persuasive evidence that the Corps mistook Congress'[s] intent in 1974."[68] In Footnote 3, the Court explained that there was no evidence in the legislative history that Congress intended to exert anything more than its commerce power over navigation,[69] which is part of its authority over channels of interstate commerce,[70] rather than its broader power over things affecting commerce.[71] The Court left open the possibility that "navigable waters" in § 404 also included non-navigable waters adjacent to navigable waters, like streams and tributaries.[72] However, the Court emphasized that this was unclear and not at issue.[73] While "navigable" could have a limited import, as the Court expounded in *Riverside Bayview*,[74] it still "has at least the import of showing us what Congress had in mind as its authority for enacting the CWA: its traditional jurisdiction over waters that were or had been navigable in fact or which could reasonably be so made."[75] The Court was clear that Congress was interested in waters that were or could be used in the transportation of goods in commerce.[76] The Court ultimately determined that isolated ponds that were habitats for migratory birds were not within the scope of the CWA, and thus, it held the Migratory Bird Rule was outside the statutory authority of the CWA.[77]

65. Solid Waste Agency of N. Cook Cnty v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 164 (2001).
66. 51 Fed. Reg. 41206, 41217 (Nov. 13, 1986).
67. *SWANCC*, 531 U.S. at 168.
68. *Id.*
69. *Id.* at 168 n.3.
70. *Id.* at 173.
71. Albrecht & Nickelsburg, *supra* note 7, at 11042.
72. *SWANCC*, 531 U.S. at 171.
73. *Id.*
74. *See* United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 133 (1985).
75. *SWANCC*, 531 U.S. at 172.
76. *Id.* at 168 n.3, 172.
77. *Id.* at 171–72.

C. Rapanos

In this fractured opinion, the Court split 4-1-4.[78] This time the issue was whether, under § 404's grant of permits to dump into navigable waters, wetlands located near intermittently dry ditches that drained into navigable waters were "adjacent wetlands" and regulatable as "navigable waters."[79] Writing for the plurality, Justice Scalia recognized that while the Act's term "navigable waters" is broader than traditionally navigable waters, "navigable" still meant something.[80] "*The waters* of the United States," rather than just "*water* of the United States," referred to something more specific than general water.[81] Justice Scalia determined that "waters of the United States" referred to "continuously present, fixed bodies of water," like oceans, lakes, and rivers, rather than intermittently flowing dry waterbeds.[82] After determining that the ditches were not navigable waters, Justice Scalia analyzed whether the wetlands were adjacent to navigable waters.[83] He determined that "only those wetlands with a continuous surface connection to bodies that are 'waters of the United States' in their own right, so that there is no clear demarcation between 'waters' and wetlands, are 'adjacent to' such waters and covered by the Act."[84]

Justice Kennedy concurred only in the judgment and applied a "significant nexus" test to determine if the wetlands could be regulated as "navigable waters."[85] Justice Kennedy determined that waters would be treated as "navigable water" if they had a significant nexus with waters that are navigable in fact.[86] There is a significant nexus "if the wetlands, either alone or in combination with similarly situated lands in the region, significantly affect the chemical, physical, and biological integrity of other covered waters more readily understood as 'navigable.'"[87] The Court ultimately

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78. Rapanos v. United States, 547 U.S. 715, 718 (2006).
79. *Id.* at 729.
80. *Id.* at 731.
81. *Id.* at 732 (emphasis added).
82. *Id.* at 733, 739.
83. *Id.* at 739–42.
84. *Id.* at 742.
85. *Id.* at 759 (Kennedy, J., concurring in the judgment).
86. *Id.*
87. *Id.* at 780.

vacated for the lower courts to determine if the ditches were "waters of the United States" and if the wetlands were adjacent.[88]

That is where things stand today. The fractured *Rapanos* decision has left the state of the definition of "navigable waters" in limbo. There is a circuit split over which test for navigable waters to apply.[89] While *Rapanos* is fascinating, it is largely beyond the scope of this Comment. Rather, the rest of this Comment addresses Footnote 3 in *SWANCC*, which indicated that Congress was only concerned with regulating the channels of commerce—navigable waters used in commercial navigation.

III. THE LEGISLATIVE HISTORY OF THE CWA

In *SWANCC*, the Court stated that the legislative history suggests Congress was only interested in commercial navigation when considering the CWA, but the Court did not offer any support for that assertion.[90] The purpose of this Comment is to show that the Court was indeed correct, and Congress was only concerned with waters used in navigation.

While many scholars have analyzed the legislative history of the CWA, mostly concluding it supports an expansive interpretation including wetlands,[91] this Comment takes a different approach. Rather than just looking at the statements made in reports and floor statements, this Comment examines the number of times and the different ways certain words were used to get a broad scope of what Congress intended in the CWA. In this Comment, the number of

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88. *Id.* at 757.

89. The circuits have generally split into four camps. The first camp has held that Justice Kennedy's concurrence and his "significant nexus" test is the controlling opinion. *See, e.g.*, United States v. Gerke Excavating, Inc., 464 F.3d 723, 724–25 (7th Cir. 2006); United States v. Robison, 505 F.3d 1208, 1221–22 (11th Cir. 2007); Sackett v. U.S. Env't Prot. Agency, 8 F.4th 1075, 1088–91 (9th Cir. 2021). The second camp has applied Justice Kennedy's concurrence without ruling out Justice Scalia's "continuous surface connection" test. *See, e.g.*, Precon Dev. Corp. v. U.S. Army Corps of Eng'rs, 633 F.3d 278, 288 (4th Cir. 2011). The third camp has determined that a wetland is within the CWA's jurisdiction if it meets either test. *See, e.g.*, United States v. Johnson, 467 F.3d 56, 66 (1st Cir. 2006); United States v. Donovan, 661 F.3d 174, 183 (3d Cir. 2011); United States v. Bailey, 571 F.3d 791, 799 (8th Cir. 2009). The fourth camp has applied both tests without endorsing either. *See, e.g.*, United States v. Lucas, 516 F.3d 316, 326–27 (5th Cir. 2008); United States v. Cundiff, 555 F.3d 200, 210 (6th Cir. 2009).

90. Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs (*SWANCC*), 531 U.S. 159, 168 n.3 (2001).

91. *See, e.g.*, Breedon, *supra* note 6, at 1442; Sapp et al., *supra* note 6, at 10191; Squillace, *supra* note 7, at 814.

times words constituting a commercial use for navigable waters—words like "navigable waters," "oceans," "lakes," and "rivers,"—will be compared with words indicating an expanded meaning of navigable waters—like "tributary," "wetland," and "pond."

Within this legislative history analysis, this Comment first examines the way the phrase "navigable waters" was used to show that Congress at large, as well as most individual members of Congress, used "navigable waters" as the shorthand reference because it was actually interested in truly navigable waters, not smaller bodies of water. Second, this Comment compares the use of "navigable waters" with the use of "tributaries," "wetlands," and "ponds" to show that Congress intended to regulate large bodies of water, not smaller bodies upstream of navigable-in-fact waters. Third, this Comment contrasts the uses of the words "lakes," "rivers," and "oceans" with the uses of "tributaries" and "wetlands" and "ponds" to demonstrate that Congress was interested in large, commercial bodies of water, not smaller ones. Finally, this Comment analyzes the way Congress used the words "tributaries" and "wetlands," further showing Congress's lack of interest in these bodies of water.

It is important to note that different types of legislative history carry different interpretive weight. The Supreme Court has given much guidance on the credence that should be paid to different types of legislative history.[92] Throughout this analysis, as the different pieces of legislative history are analyzed, this Comment points out the different weight and usefulness of each type. Even when not conclusive, like individual floor statements, each type of legislative history can provide some perspective to show what the general conception of "navigable waters" was at the time.

A. "Navigable Waters" Throughout the Legislative History

The extensive use of "navigable waters" throughout the legislative history suggests that Congress gave great weight to the word "navigable" and was interested in waters that were actually navigable. "Navigable waters" is used 231 times on 201 different

92. *See, e.g.*, Garcia v. United States, 469 U.S. 70, 76 (1984); Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–95 (1951); Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 385 (2012).

pages throughout the legislative history.[93] It was used throughout the history, as can be seen by the high ratio of pages it appears on compared to the number of times used.[94] Its appearance on so many pages signals that "navigable waters" was the working phrase Congress used when referring to regulatable waters. In comparison, "navigable waters" is defined as "waters of the United States,"[95] and yet "waters of the United States" only appears forty-seven times.[96] "Waters of the United States" would make sense for a placeholder phrase when discussing it during deliberations, if that is what is meant, but that is not the phrase chosen. The forty-seven uses of "waters of the United States" compared to the 231 uses of "navigable waters" clearly shows that "navigable waters" was the working phrase Congress decided to use. In fact, Congress did not even try to use the popular acronym "WOTUS."[97] Instead, the phrase of choice was "navigable waters."[98] This implies Congress was interested in actually "navigable" waters. Each time Congress used this phrase, it signaled a limitation on the types of waters regulated. If Congress had not intended to limit waters to those that were "navigable," it would have used a different phrase.

There are three main types of material in the legislative history that contain the term "navigable waters." These materials are committee reports, floor speeches, and letters.

i. Committee Reports

Committee reports contain the most references to "navigable waters," with 106 uses.[99] Committee reports are the most authoritative type of legislative history when determining Congress's intent.[100] While not conclusive of Congressional intent,

93. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12. Included in this number are four quotations from the bill itself. Since these are from the bill and do not provide any insight into Congress's analysis when debating over the bill, these four references are not analyzed. Within the committee print there are four other uses of "navigable waters" that were not included in this number because they are included in an appendix of other proposed bills, so they are not truly part of the legislative history.

94. *Id.*

95. 33 U.S.C. § 1362(7).

96. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

97. *Id.*

98. *Id.*

99. *Id.*

100. *See* Garcia v. United States, 469 U.S. 70, 76 (1984); Zuber v. Allen, 396 U.S. 168, 186 (1969).

committee reports are a result of a detailed deliberation process, and the product contains much of the compromise and nuance Congress addressed in passing legislation that other forms of legislative history do not capture.[101]

While Congress did not define "navigable waters" in committee reports,[102] the Senate conference report makes an oft-repeated statement about the scope of the definition of "navigable waters": "Navigable waters" is to "be given the broadest possible constitutional interpretation."[103] This is, in fact, the portion of the legislative history Justice Rehnquist was addressing in Footnote 3 of *SWANCC* when he wrote that even this interpretation of "navigable waters" did not support the claim that Congress intended to do anything more than regulate waters used in navigation.[104] And while many scholars reference this statement from the report to support an interpretation beyond regulating the channels of commerce,[105] this statement does not necessarily support such a broad interpretation. The full statement in the conference report is as follows: "The conferees fully intend that the term 'navigable waters' be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes."[106] By stating the "broadest possible constitutional interpretation," Congress dodged the question of how broadly to define "navigable waters" and left it to the courts to determine its scope.[107]

Although not a definition, this statement deserves further analysis and can provide insight into Congress's intentions. The second half of this statement, from "possible constitutional interpretation" onward, appears to address a controversy over whether Congress could regulate intrastate waters usable in navigation when connected with overland transportation. It was well established in an 1870 Supreme Court opinion, *The Daniel Ball*,

101. *See Garcia*, 469 U.S. at 76.; *Zuber*, 396 U.S. at 186; *see also* Squillace, *supra* note 7, at 814–30.

102. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178. In his summary of the committee report, Senator Muskie states, "The conference agreement does not define [navigable waters of the United States]." *Id.*

103. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178.

104. *See supra* Part II.B.

105. *See* Breedon, *supra* note 6, at 1443; Sapp et al., *supra* note 6, at 10202; Squillace, *supra* note 7, at 829–30.

106. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 327.

107. Sapp et al., *supra* note 6, at 10202.

that Congress could regulate interstate navigable waters that served as channels of commerce.[108] But there were questions as to whether a water could be a "channel of commerce" if it was an intrastate water that was only usable in commercial navigation when connected with overland transportation, like highways, railroads, etc.[109] And while this would expand what could be regulated, these waters still had to be usable in navigation and transportation of cargo.[110]

It seems that this controversy is what the conference report was referring to in two ways. First, the report states that the term "navigable waters" was to be given the "broadest *constitutional* meaning."[111] When the CWA was passed, there was much debate about the constitutionality of regulating intrastate waters.[112] Therefore, when the committee report mentioned "constitutional meaning," the report was likely referring to that constitutional debate, and rather than addressing it, just stated that "navigable waters" should be defined as broadly as constitutionally permissible. Second, the reference to the "agency determinations" is probably referring to the EPA's position at the time that it lacked the authority to regulate intrastate waters over constitutional concerns,[113] and the EPA's reluctance to regulate was central to this debate.[114]

It appears then, Congress used this statement to direct the courts to determine a permissible construction of "navigable

108. 77 U.S. 557, 563 (1870) ("Those rivers must be regarded as public navigable rivers in law which are navigable in fact. And they are navigable in fact when they are used, or are susceptible of being used, in their ordinary condition, as highways for commerce, over which trade and travel are or may be conducted in the customary modes of trade and travel on water. And they constitute navigable waters of the United States within the meaning of the acts of Congress, in contradistinction from the navigable waters of the States, when they form in their ordinary condition by themselves, or by uniting with other waters, a continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water.").

109. Albrecht & Nickelsburg, *supra* note 7, at 11045–46.

110. *See* Utah v. United States, 403 U.S. 9, 11 (1971) ("The [waterway] was used as a highway and that is the gist of the federal test.").

111. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 327 (emphasis added).

112. Albrecht & Nickelsburg, *supra* note 7, at 11046–47.

113. U.S. ENV'T PROT. AGENCY, OFF. OF GEN. COUNS., OPINION: DEFINITION OF NAVIGABLE WATERS (1971) ("[T]here must be a water connection between states" in order to regulate "navigable in fact waters.").

114. *See* Albrecht & Nickelsburg, *supra* note 7, at 11048–49.

waters" and to ignore the agencies' limitations.[115] If this is indeed what Congress was doing, first, Congress was intentionally being vague,[116] since that sentence in the conference report is not indicative of specifically how broadly Congress wanted to define "navigable waters." Second, Congress was still concerned with commercial navigation and was regulating channels of commerce, not things that affect commerce.[117] So even if this sentence is understood to mean that Congress wanted to regulate intrastate waters involved in navigation through overland routes, Congress was still only focused on regulating the channels of commerce, as Footnote 3 in *SWANCC* states.

While that section of the committee report suggests the definition was limited to channels of commerce, the way the report uses "navigable waters" in connection with "oceans," "territorial seas," and the "waters of the contiguous zone," further supports the conclusion that Congress only intended to regulate waters used in navigation. The term "navigable waters" is used nineteen times with "ocean/s,"[118] seventeen times with "waters of the contiguous zone" or the "contiguous zone,"[119] and six times with "territorial seas."[120] Often, these bodies of water are all listed together as a group.[121] This grouping, and the comparison of navigable waters with these other terms for large bodies of water, also indicates that Congress considered navigable waters to be large bodies of water that are used in commerce.

Therefore, the extent of the use of "navigable waters" throughout the committee reports, the way its scope was limited to

115. This Comment does not concede that federal regulation of intrastate waters is constitutional, or even that the CWA permits such an interpretation. Rather the scope of this Comment is whether the legislative history suggests Congress limited its jurisdiction to navigable waters used in navigation. Even if Congress does have the authority to expand the jurisdiction to include waters connectable via overland transportation, both the committee report and Senator Muskie's statements were only concerned with regulating the channels of commerce. This expansion is a very limited expansion.

116. Congress was vague most likely because there were not enough votes for a completely broad or completely narrow interpretation.

117. Albrecht & Nickelsburg, *supra* note 7, at 11047–48.

118. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

119. *See id.*; 33 U.S.C. § 1362(9) (defining "contiguous zone" as "the entire zone established or to be established by the United States under article 24 of the Convention of the Territorial Sea and the Contiguous Zone").

120. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12; 33 U.S.C. § 1362(8) (defining "territorial seas" as the waters from the low water mark of the coast extending seaward for three miles).

121. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

commercial navigation, and its use alongside other large bodies of water all indicate that Congress was interested in actually navigable bodies of water.

ii. Floor Speeches

Members of Congress used "navigable waters" ninety-seven times in floor speeches in the legislative history.[122] Floor speeches are generally not a reliable type of legislative history to show legislative intent because members of Congress can say anything, regardless of what Congress as a whole wishes.[123] Statements from the bill's sponsor, however, are afforded some weight.[124] The bill's sponsor here, Senator Edmond Muskie, is one of the congressmen who wanted "waters of the United States" to be interpreted very broadly.[125] In Senator Muskie's speech summarizing the committee report, he defined "navigable waters" expansively.[126] But even though he sponsored the bill and his statements carry more weight than other members of Congress, his statements are still not controlling indicators of Congressional intent.[127] His summary contained the following paragraph:

> The Conferees fully intend that the term "navigable waters" be given the broadest possible constitutional interpretation unencumbered by agency determinations which have been made or may be made for administrative purposes . . . *It is intended that the term "navigable waters" include all water bodies, such as lakes, streams, and rivers, regarded as public navigable waters in law which are navigable in fact. It is further intended that such waters shall be considered to be*

122. *Id.*

123. McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 494 (1931) (holding that committee or floor statements by Congress members are "individual expressions . . . with out [sic] weight in the interpretation of a statute"); Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 385 (2012) ("[T]he views of a single legislator, even a bill's sponsor, are not controlling.").

124. *See* Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394–95 (1951); *see also* Ernst & Ernst v. Hochfelder, 425 U.S. 185, 202–03 (1976).

125. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178.

126. *Id.* at 161–84.

127. *Mims*, 565 U.S. at 385 ("[T]he views of a single legislator, even a bill's sponsor, are not controlling."); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) (same); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) (same).

> *navigable in fact when they form, in their ordinary condition by themselves or by uniting with other waters or other systems of transportation, such as highways or railroads, a continuing highway over which commerce is or may be carried or with other States or with foreign countries in the customary means of trade and travel in which commerce is conducted today. In such cases the commerce on such waters would have a substantial economic effect on interstate commerce.*[128]

This definition is based on language from *The Daniel Ball*, which had provided the first real definition of "navigable waters."[129] However, there are notable differences between *The Daniel Ball*'s definition and Senator Muskie's. First, Senator Muskie's definition expands the channels of commerce to include waters connected to overland routes, rather than just waterways.[130] Second, the Senator said that navigable waters would have a "substantial economic effect on interstate commerce."[131] While this phrase could imply that he was interested in regulating waters that affected interstate commerce,[132] this needs to be taken in context with the immediately prior limitations on "navigable waters." "Effect on interstate commerce" is not another way for waters to be considered "navigable"; rather, "effect on interstate commerce" is a result of being a "navigable water."[133] If a water is used to transport goods, even in connection with highways, railroads, etc., it is a navigable water and *will therefore* have an "economic effect on interstate commerce." It is an effect, not the cause, of being a "navigable water."[134]

So, even if Senator Muskie's oft-cited remarks are the definitive definition of the scope of "navigable waters"[135] (which they are not since this is merely one congressperson's opinion), "navigable waters" was expanded but still limited to waters used in commercial navigation. And this is consistent with Footnote 3 in

128. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178 (emphasis added).

129. The Daniel Ball, 77 U.S. 557, 563 (1870).

130. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178; *see also supra* notes 104–16 and accompanying text.

131. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178.

132. Rather than just channels of commerce.

133. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 178.

134. *Id.*

135. *See supra* note 115.

SWANCC. Moreover, this expansion is limited to Congress's commerce power over channels of commerce, rather than over things affecting commerce, as the Court claimed in *Riverside Bayview*.[136]

Representative John Dingell, one of the cosponsors of the House bill,[137] also argued that the definition Congress created expanded the "limited view of navigability" in *The Daniel Ball*.[138] Representative Dingell stretched the definition of "navigable waters" to include tributaries of main streams because a waterway merely needs to be "a link in the chain of commerce," rather than "part of a navigable interstate or international commercial highway."[139] But he never explained how a non-navigable tributary could be used as a link in the chain of commerce. And not only was Representative Dingell focused on regulating the "channels of commerce," but like Senator Muskie, his remarks have little weight.[140]

Turning more broadly to the speeches, when discussing whether "waters of the United States" includes "ground waters," members of Congress differentiated "ground waters" from "navigable waters."[141] The separation here emphasizes the limitations on "navigable waters." It was not a catchall term for any and all waters in the United States. "Navigable" means something, which is further evidence Congress was concerned with waters used in navigation.

Thirty-five different congressmen referred to "navigable waters" in their floor speeches, including one letter from a senator that was read into the record.[142] This vast array of members of Congress all referring to "navigable waters" shows the extent to which Congress used this phrase. This constant reference to "navigable" indicates that Congress did not intend to regulate all waters but was interested in waters used as channels of commerce.

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136. *See* Albrecht & Nickelsburg *supra* note 7, at 11047, 11052.

137. Sapp et al., *supra* note 6, at 10202.

138. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 250.

139. *Id.* (first quoting Utah v. United States, 403 U.S. 9, 11 (1971); then U.S. v. Underwood, 4 ERC 1305, 1309 (D.C., Md., Fla., Tampa Div., June 8, 1972)).

140. *See* Mims v. Arrow Fin. Servs., LLC, 565 U.S. 368, 385 (2012) ("[T]he views of a single legislator, even a bill's sponsor, are not controlling."); Chrysler Corp. v. Brown, 441 U.S. 281, 311 (1979) (same); Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102, 118 (1980) (same).

141. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 589–92.

142. *Id.* at 1389.

iii. Letters

There are twenty-five references to "navigable waters" in the letters to Congress contained in the legislative history. Thirteen of these are in letters to Congress from the EPA, while the others are from various people and newspapers.[143] In the EPA's letters, it referred to "navigable waters" four times in connection with "oceans," as well as two times with "contiguous zone" while analyzing the statute.[144] The EPA did differentiate "navigable waters" from "interstate waters" once,[145] but that does not mean it was interested in regulating non-navigable waters.[146] Also, the letters have very little probative value regarding Congress's intent, since they are not even written by members of Congress.[147] Still, the comparison of "navigable waters" with other bodies of water used in commercial navigation further supports that "navigable waters" was generally understood to be limited to waters used in navigation.

B. "Navigable Waters" Compared with "Tributaries" and "Wetlands"

Further evidence of the commercial intent of Congress can be seen in the number of times "navigable waters" was used compared with the use of "tributary/ies" and "wetlands," as well as "pond/s." "Navigable waters" was used 231 times.[148] "Tributary" and "tributaries" were used a total of thirteen times.[149] "Wetlands" appeared twice.[150] The vast disparity here is strong evidence that Congress did not intend to regulate small bodies of water like tributaries and wetlands. The words "pond" and "ponds" were used nineteen times, but all but one of those references are clearly to man-made ponds, like fish ponds, holding ponds, and lagoons.[151] Adding the one non-man-made pond reference with tributaries and

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143. *See id.* at 141.

144. *Id.*

145. *Id.* at 1192.

146. *See supra* Part III.A.1 (discussing the use of intrastate waters in navigation).

147. United States v. Reilly, 827 F. Supp. 1076, 1078 (D. Del. 1993) ("In any event, the opinions of Executive Agencies expressed to Congressional committees, while meriting some weight in considering legislative history, are merely evidence of opinions which may have been considered by Congress in passing a law.").

148. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

149. *Id.*

150. *Id.*

151. *Id.*

wetlands, that is sixteen times the legislative history refers to these small bodies of water.[152] This low number, compared to the 231 uses of "navigable waters," is strong evidence that Congress did not intend to regulate these small bodies of water and that they were not considered "navigable waters."

C. Comparison of "Oceans," "Seas," "Lake/s," and "Waterways" with "Tributaries," "Wetlands," and "Ponds"[153]

Throughout the legislative history, Congress referred to the terms "seas," "oceans," "lakes," and "waterways" with such frequency that it demonstrates that Congress intended to regulate large bodies of water usable in commercial navigation. "Lake/s" was used 703 times.[154] Among those uses of "lake/s" were seventy-six references to "Lake Erie," forty-eight references to "Lake Tahoe," seventeen references to "Lake Michigan," and 126 references to "Great Lakes."[155] While "lake" may also be used to refer to smaller lakes, 267 of these 703 references to "lake/s" referred to massive lakes that would be considered navigable in fact due to their size.[156]

Congress spent extensive time discussing large, navigable bodies of water that were regularly used in commerce. Congress used "ocean/s" a total of 203 times.[157] "Sea/s" appeared 100 times.[158] "Waterway/s" was used 200 times.[159] All of these are large bodies of water that would refer to actually navigable waters.[160] In contrast, Congress mentioned three different types of water—"tributaries," "wetlands," and "ponds"—that are upstream of

152. *Id.*

153. The term "stream/s" is used 251 times, but without analyzing each use it is hard to tell if what is being referred to is a small body of water, similar to a tributary, or whether it is a larger body like a "navigable stream." For an example of this challenge, the phrase "navigable stream" appears seven times. Therefore, without further analysis beyond the scope of this Comment, examining the number of times "stream/s" is used is not determinative.

154. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

155. *Id.*

156. *See* Sapp et al., *supra* note 6, at 10191.

157. *See* CONG. RSCH. SERV. LIBR. *supra* note 12.

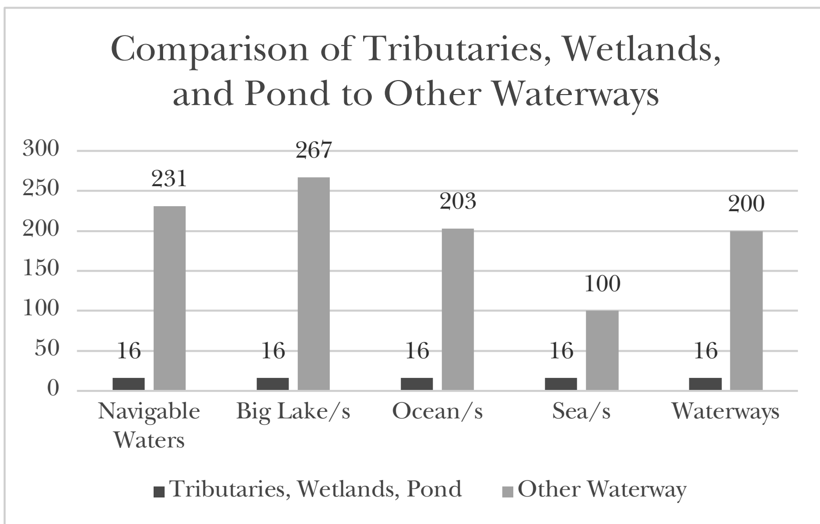
158. *See id.*

159. *See id.*

160. *See* Sapp et al., *supra* note 6, at 10191.

actually navigable water only sixteen times.[161] The drastic difference between the number of times actually navigable waters used in navigation was referenced compared to small bodies of water not associated with navigation is strong support that Congress was interested in actually navigable waters used in navigation.

Before turning to the last section, the chart below gives a visual image of the stark differences between the number of times words for small bodies of water were used compared with words for actually navigable waters used in commerce.



D. Analysis of the Fifteen Uses of "Tributaries" and "Wetlands"

The fifteen occurrences of "tributaries" and "wetlands" are not conclusive evidence that Congress intended the phrase "navigable waters" to extend to these bodies of water. First, only one of these references is to a citable committee report,[162] and it merely discusses the pollution in the Passaic River Basin and its tributaries.[163] Eleven of the uses of "tributaries" and "wetlands" are from speeches by members of Congress, none of which are by bill

161. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

162. There are two references, but the other reference discusses a definition that was not adopted in the final law, and therefore does not indicate the intentions of Congress. *See infra* Part III.D.

163. H.R. REP. NO. 92-911 (1972), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 803.

sponsors, so their interpretive weight is de minimis.[164] Two instances are from letters, which, again, offer almost no value in determining the intentions of Congress.[165] Finally, one reference is to a committee report that examined a Senate version of a bill that defined navigable waters much more broadly than the CWA did when actually passed.[166] This report was written on October 28, 1971, in support of Senate Bill 2770 (1971).[167] However, that bill was not passed in the House of Representatives, and the definition of "navigable waters," which included tributaries, was changed.[168] Therefore, any reference to that definition is worthless as it never became law—in fact, Congress rejected that definition.

But not only are the sources of these references weak support for legislative intent, their content also does not provide any support for the notion that "navigable waters" includes "tributaries" or "wetlands." Representative Dingell is the only member of Congress who argued that "navigable waters" should include tributaries.[169] Representative Ichrod mentioned that a Nixon executive order[170] expanded a prior statutory definition[171] of "navigable waters" "to include tributaries of navigable streams."[172] However, he was not advocating for an expansion of regulation over tributaries, but rather expressing his frustration with the impact the regulations of tributaries had on fish hatcheries.[173] This executive order was not something Congress substantially considered while debating the CWA.[174]

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164. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12; *see also supra* notes 123–24 and accompanying text.

165. *See* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12; *see also* United States v. Reilly, 827 F. Supp. 1076, 1078 (D. Del. 1993) ("In any event, the opinions of Executive Agencies expressed to Congressional committees, while meriting some weight in considering legislative history, are merely evidence of opinions which may have been considered by Congress in passing a law.").

166. S. REP. NO. 92-414 (1971), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 1419.

167. *Id.*

168. *Compare* S. 2770, § 502(7) (1971) *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 1698, *with* 92-500 § 502(7)(1972), *as reprinted in* CONG. RSCH. SERV. LIBR. CONG., supra note 12, at 73; *see also* Sapp et al., *supra* note 6, at 10201–02.

169. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 250; *see also supra* Part III.A.ii.

170. Exec. Order No. 11,574, 35 Fed. Reg. 19,627 (Dec. 23, 1970).

171. Refuse Act of 1899, 33 U.S.C. § 407.

172. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12, at 427.

173. *See id.* at 427–28.

174. Further, while the Refuse Act is discussed in detail throughout the legislative history (343 times), this Executive Order was only mentioned 6 times, and only the one comment by Mr. Ichrod discussed the application of it to tributaries. *See id.*

All of the other references to "tributaries" or "wetlands" do not implicate the extent of "navigable waters." A number of these references appear in the context of concerns about pollution in waters and tributaries, but neither members of Congress (other than Representative Dingell) nor letters nor the committee report claim Congress was regulating these small, non-navigable bodies of water.[175] Rather, these references to tributaries focus more broadly on the extent of pollution occurring in these waters.[176] While an argument could be made that members of Congress would not discuss the pollution in the tributaries if they were not interested in regulating them, they never mentioned an intent to regulate these small bodies of water. Further, only eight congressmen referred to either "wetlands" or "tributaries."[177] This limited number, combined with the limited interpretive value of such floor statements,[178] provides no support for an argument that Congress intended to broadly regulate small bodies of water. For that reason, the references to "tributaries" and "wetlands" are outliers and not indicative of an intent to regulate them. Rather, Congress intended to regulate large bodies of water used in navigation.

IV. CONCLUSION

Despite citations to a report that Congress intended the term "navigable waters" to have its broadest constitutional interpretation, Congress never intended to regulate more than waters used in navigation. The extensive use of "navigable waters" demonstrates Congress's concern with navigability. Both the vast number of uses and the way in which the term is used indicate Congress's recognition of the limitations of the term "navigable." Further, although Congress did not define "navigable waters" beyond "waters of the United States, including the territorial seas," it only intended the term to extend to waters used as channels of commerce. The large number of times "navigable waters" and other

175. CONG. RSCH. SERV. LIBR. CONG., *supra* note 12.

176. *See id.*

177. *Id.*

178. McCaughn v. Hershey Chocolate Co., 283 U.S. 488, 494 (1931) ("[S]uch individual expressions [(committee or floor statements by Congress members)] are with out [sic] weight in the interpretation of a statute"); Zuber v. Allen, 396 U.S. 168, 186 (1969); Nat'l Lab. Rel. Bd. v. SW Gen., Inc., 137 S. Ct. 929, 943 (2017) (describing why individual floor statements are "the least illuminating forms of legislative history" after two Senators contradicted each other).

large, commercial bodies of water like "oceans," "seas," and "lakes" appear in the legislative history compared to the sixteen times "tributaries," "wetlands," and "ponds" appear is still further supporting evidence. Finally, the individual uses of "tributaries" and "wetlands" do not indicate Congress intended to regulate these small bodies of water.

When the legislative history is examined as a whole, rather than when one phrase is cherry-picked out of context, the commercial concerns of Congress are clear. The narrow scope Congress was concerned with is widely misunderstood in the scholarship, and the Supreme Court must address it—the *Sackett II* case is a perfect opportunity. An inappropriately broad interpretation of "navigable waters" has been used to justify overly extensive regulations, which have imposed immense burdens on property owners like the Sacketts who seek to build on their property. Therefore, the Supreme Court should honor the original congressional intent and clarify that the CWA only applies to actually navigable waters used in commercial navigation.

LESSONS FROM CAPE FEAR: "FOREVER CHEMICALS" HAUNT NORTH CAROLINA WATERS

EHREN WILDER†

I. INTRODUCTION

In the summer of 2017, the North Carolina Department of Environmental Quality ("DEQ") became aware of the release of dangerous contaminants into the state's drinking water.[1] The substance in question was not lead, plastic, or any other high-profile contaminant but was instead a little-known chemical compound called GenX.[2] GenX is among a family of man-made chemicals known collectively as perfluoroalkyl and polyfluoroalkyl substances ("PFAS"); they are also referred to as "forever chemicals" for their ability to accumulate and remain in the environment almost indefinitely without breaking down.[3] These chemicals can contaminate ground and surface water supplies and have been correlated with increased risks of severe health problems in humans and animals.[4] The potential health and environmental impact of this contamination event led to a flurry of research, surveys, ecological evaluations, and regulatory action in its immediate aftermath.[5] However, progress on PFAS regulation seems to have

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1. *GenX in the Lower Cape Fear River Basin*, N.C. DEP'T HEALTH & HUM. SERVS., https://epi.dph.ncdhhs.gov/oee/a_z/genx.html (Feb. 24, 2022).

2. *Id.*

3. *PFAS Explained*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/pfas/pfas-explained (last visited Feb. 25, 2022).

4. *Id.*; *Per- and Polyfluoroalkyl Substances*, N.C. DEP'T HEALTH & HUM. SERVS., https://epi.dph.ncdhhs.gov/oee/a_z/pfas.html (Jan. 6, 2022).

5. *See generally* Mei Sun et al., *Legacy and Emerging Perfluoroalkyl Substances Are Important Drinking Water Contaminants in the Cape Fear River Watershed of North Carolina,* ENV'T. SCI. & TECH. LETTERS (Nov. 10, 2016), https://chhe.research.ncsu.edu/wordpress/wp-content/uploads/2017/08/PFECAs_Sun_ESTL2016-2.pdf (detailing one of the first comprehensive studies of PFAS contamination in North Carolina).

slowed in recent years, due at least in part to the ongoing COVID-19 crisis, which has no doubt dominated much of the public's attention as well as that of federal and state legislatures.

The primary source of the 2017 contamination event was discovered to be a factory owned by the Chemours Company ("Chemours"), formerly part of the DuPont chemical company, operating near Fayetteville, North Carolina.[6] Chemours had been releasing GenX into the Cape Fear River—over a period of more than a decade—which led to the contamination of the entire Cape Fear River Basin.[7] Industrial outflow and air emissions from the factory threatened the drinking water of several counties and municipalities, most notably Fayetteville and Wilmington in eastern North Carolina.[8] Subsequent research has also revealed the presence of PFAS across more than a dozen North Carolina water sources—even those without a direct source of contamination from factories.[9] While the contamination of the Cape Fear River Basin has been an ongoing environmental crisis, comprehensive legislative and regulatory action to address this event, and others like it, remains largely nonexistent.[10]

To address this shortcoming in state and federal action, previous scholarship concerning PFAS contamination has recommended a number of approaches, two of which are addressed further in this Comment. First, there has been broad consensus among legal academics and experts that the federal government ought to take steps to restrict the use of PFAS.[11] Due to the ubiquity of these chemicals in the manufacture of countless consumer goods, PFAS contamination affects nearly every state in the United

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6. *GenX in the Lower Cape Fear River Basin*, *supra* note 1.

7. *Id.*

8. *Id.*

9. *See MCOLF Atlantic PFAS Drinking Water Well Sampling*, NAVAL FACILITIES ENG'G SYS. COMMAND, https://www.navfac.navy.mil/products_and_services/ev/products_and_services/env_restoration/installation_map/navfac_atlantic/midlant/cherry_point/mcolf_atlantic_pfas.html (last visited Feb. 26, 2022); Michelle Jewell, *PFAS Present Throughout the Yadkin-Pee Dee River Food Chain*, N.C. STATE UNIV. (June 5, 2020), https://cals.ncsu.edu/applied-ecology/news/pfas-in-yadkin-pee-dee-river-food-chain.

10. *GenX in the Lower Cape Fear River Basin*, *supra* note 1.

11. *See generally* Carly Johnson, Comment, *How the Safe Drinking Water Act & the Comprehensive Environmental Response, Compensation, and Liability Act Fail Emerging Contaminants: A Per- and Polyfluoroalkyl Substances (PFAS) Cast Study*, 42 MITCHELL HAMLINE L.J. PUB. POL'Y & PRAC. 91, 92–93, 95 (2021); Gabriela Elizondo-Craig, *"Forever Chemicals" Are in Our Bodies, Drinking Water, and the Environment: Now Is the Time to Hold Polluters Accountable and Ramp Up Regulation in the United States*, 63 ARIZ. L. REV. 255, 257–58 (2021).

States, which makes it a particularly well-suited target for federal action.[12] However, the federal government, like many state governments, has so far been reticent to take expansive action on PFAS regulation.[13] Second, recent scholarship has recommended the recognition of tort liability against PFAS polluters in state legal codes, thereby allowing private citizens to seek redress for harms caused to their health or property by contamination.[14] While this Comment briefly addresses these two approaches, the primary focus is the potential for state legislative action in North Carolina.

To that end, Section I provides a comprehensive explanation of PFAS and their impacts on human health and the environment in order to highlight the dire need for regulatory intervention. In addition, the lack of substantive action at the federal level will also be examined to emphasize the need for state legislation. Section II further discusses the background of the Cape Fear contamination event as well as ongoing legislative and regulatory action relating to Chemours; this analysis serves to emphasize the shortcomings in North Carolina's existing regulatory framework for managing and deterring similar events in the future. Lastly, Section III provides a final recommendation for the manner and method by which the North Carolina legislature can combat PFAS contamination in the state.

These sections demonstrate that state action is not only the most effective means by which North Carolina can address PFAS contamination in the short term but also that such action is the most achievable method of protecting North Carolina citizens and property in the future. The strengthening of North Carolina's existing regulatory framework to allow for expanded oversight over PFAS-related industries as well as greater authority to levy fines and force compliance among offending companies is the surest means by which our water can remain safe for generations to come.

12. *PFAS Explained*, *supra* note 3.

13. *See infra* Section I.B.

14. *See generally* Miranda Goot, Comment, *Emerging Thoughts: A Principled Framework for Regulating GenX as an Emerging Contaminant*, 98 N.C. L. REV. 629, 650 (2020); Paul Quackenbush, *Patching a Persistent Problem: PFAS and RCRA's Citizen Suit Provision*, 50 ENV'T L. REP. 10896, 10905–07 (2020).

II. PFAS: WHAT ARE THEY?

In order to address the most effective methods for regulating PFAS, the nature of these chemicals must first be clearly understood. This section addresses two primary questions. First, what are PFAS and how do they endanger human health and the environment in North Carolina? The specific health and environmental danger posed by PFAS highlights the severity of this issue as well as the dire necessity of state regulation. Second, in light of these dangers, what steps has the federal government taken (or not taken) to safeguard the nation's water? The absence of substantive action by the federal government demonstrates that state and local action in North Carolina is the most feasible method of combating PFAS contamination. By answering these two questions, it becomes clear that the North Carolina legislature must acknowledge the dangers of PFAS and take action to restrict their use. And while the exact method of regulation is addressed in Section III, clearly defining the nature of the threat posed by PFAS is a vital first step.

A. Health and Environmental Impact

It must first be acknowledged that most individuals in the United States have been exposed to PFAS, perhaps even from the moment they were born.[15] These chemicals are found in countless consumer products including cookware, textiles, plastics, and even pizza boxes, to name only a few.[16] However, despite their ubiquity, research regarding PFAS and their specific impact on human and environmental health is a developing field that still lacks clear, definitive answers.[17] This is due in large part to the novelty of PFAS themselves; despite being used in industrial settings since the 1940s, the threat posed by these chemicals has only recently become a

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15. *PFAS Explained*, *supra* note 3.

16. *Id.*; *see Our Current Understanding of the Human Health and Environmental Risks of PFAS*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/pfas/our-current-understanding-human-health-and-environmental-risks-pfas (last visited Mar. 16, 2022) [hereinafter *Our Current Understanding*]; *see also* WANDA BODNAR, N.C. POL'Y COLLABORATORY, NORTH CAROLINA POLICY COLLABORATORY FIREFIGHTING FOAM (AFFF) INVENTORY AND RECOMMENDATIONS1,3(Apr.15,2021), https://ncpfastnetwork.com/wpcontent/uploads/sites/18487/2021/04/ Collaboratory-AFFF-Final-Report-15Apr2021.pdf (discussing the dangers of PFAS in firefighting foam and pesticides).

17. *PFAS Explained*, *supra* note 3.

matter of scientific study and regulatory attention.[18] Furthermore, while some types of PFAS, most notably perfluorooctyl sulfonate ("PFOS") and perfluorooctanoic acid ("PFOA"), have been the subject of research, regulation, and even health advisories from the Environmental Protection Agency ("EPA"), newer compounds like GenX have yet to receive the same attention.[19] This problem has been exacerbated by the new types of PFAS created each year.[20]

The widespread and ubiquitous nature of PFAS has likely been one of several reasons for the muted response from federal and state governments. Not only are these chemicals used in industries vital to the economy, but there is a constant stream of new compounds which industry leaders purport to be "cleaner" and safer for the environment.[21] For instance, when PFOS and PFOA received critical attention from the EPA, manufacturers like Chemours simply developed GenX as an allegedly safer alternative.[22] Regulation in a piecemeal fashion—that is, by researching and restricting individual types of PFAS one compound at a time—simply cannot keep pace. Comprehensive restrictions on all PFAS compounds are essential to safeguard water sources from further contamination.

The necessity of restrictions becomes even clearer when considering the specific human health risks associated with PFAS compounds. As stated previously, research regarding PFAS and human health is somewhat indefinite due to the sheer number of unique compounds to study. However, some health risks have been strongly correlated to PFAS generally, especially the PFOS and PFOA variants and GenX.[23] Based on research studies of exposure in animals, these chemicals can damage both male and female reproductive systems, leading to sterility in some instances, as well as cause developmental disorders in exposed offspring.[24] PFAS have

18. *Id.*

19. *Risk Management for Per- and Polyfluoroalkyl Substances (PFAS) under TSCA*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/assessing-and-managing-chemicals-undertsca/ risk-management-and-polyfluoroalkyl-substances-pfas#tab-3 (last visited Feb. 28, 2022).

20. *Id.*

21. *PFAS Explained, supra* note 3.

22. *GenX in the Lower Cape Fear River Basin, supra* note 1.

23. *PFAS Explained, supra* note 3.

24. *Id.*; *Our Current Understanding, supra* note 16; *GenX in the Lower Cape Fear River Basin, supra* note 1.

also been correlated with liver and kidney damage in otherwise healthy adults.[25]

Furthermore, risks to human health increase the longer these chemicals remain in the environment; PFAS have been shown to accumulate in both the environment and the human body and remain there for long periods of time—truly earning the title "forever chemical."[26] Studies of human populations subjected to prolonged exposure, particularly through surface and groundwater contamination, have revealed decreased infant birth rates and immune system responses as well as increased cholesterol, thyroid disorders, and even cancer.[27] The risks to human health alone should be sufficient to pressure federal and state governments to take action to safeguard their citizens, but the danger does not stop there.

Health risks at the individual level become even more alarming when considered alongside the impact of PFAS on the environment. In particular, the manner in which these "forever chemicals" accumulate and remain in local environments threatens ecosystems across the country.[28] Several studies have indicated that PFAS chemicals contaminate wildlife ecosystems from the bottom up, meaning that relatively low annual concentrations in water sources can eventually lead to elevated concentrations in wildlife.[29] For instance, contamination in the Yadkin-Pee Dee River food chain in North Carolina revealed that PFAS contamination in local water accumulated in algae, then in insects that fed on the algae, followed by the fish that fed on the insects, and so on up the food chain.[30] Most notably, at each ascending level of the food chain, the concentration of PFAS in wildlife became greater as the animals consumed the accumulated PFAS from their prey.[31]

Additional cause for concern lies in the means by which these chemicals are able to enter ecosystems and water sources. For instance, researchers have discovered elevated levels of PFAS, including GenX, in surface water sources that have no direct source

25. *PFAS Explained*, *supra* note 3; *GenX in the Lower Cape Fear River Basin*, *supra* note 1.
26. Jewell, *supra* note 9.
27. *Our Current Understanding*, *supra* note 16.
28. Jewell, *supra* note 9; Sun et al., *supra* note 5.
29. Jewell, *supra* note 9.
30. *Id.*
31. *Id.*

to the chemicals.[32] Whereas the Cape Fear River was directly contaminated by factory outflow, rivers like the Yadkin have no industrial source and yet are still contaminated by PFAS.[33] This indicates that the chemicals can travel through migrating wildlife, rainfall, and even air emissions.[34]

The implications for humans who drink water or consume animal products originating from these water sources is clear: environmental contamination of local ecosystems puts human health at risk.[35] While human exposure to PFAS through consumer goods like plastics or cookware is generally well below EPA thresholds for danger, consumption of contaminated water and food resources has been correlated with considerably higher concentrations of PFAS in humans.[36] In addition, while water treatment plants may be able to remove PFAS from water, contamination of fish and wildlife has no such safeguard.[37] With these human health and environmental threats in mind, the question remains: what exactly is the condition of North Carolina with respect to PFAS contamination?

As stated previously, PFAS have been found in North Carolina in the Cape Fear River Basin near Wilmington and Fayetteville, as well as the Yadkin River, which supplies much of Winston-Salem's drinking water.[38] However, these are not the only contaminated water sources in the state. The North Carolina Department of Health and Human Services ("NCDHHS") has also identified contamination events in Greensboro and Atlantic, North Carolina.[39] Unfortunately, the full extent of contamination is currently impossible to assess. Because counties and municipalities are not required to measure for PFAS in their annual water quality reports, the primary source of research is an organization called the NC PFAS Testing Network.[40] While its work has been helpful in

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32. Sun et al., *supra* note 5.

33. Jewell, *supra* note 9.

34. *Id.*

35. *PFAS Explained*, *supra* note 3.

36. *Id.*

37. *Per- and Polyfluoroalkyl Substances*, *supra* note 4 (noting that treating water for PFAS contamination is not a standardized practice across the state and that many municipal plants do not test for PFAS).

38. *GenX in the Lower Cape Fear River Basin*, *supra* note 1; Jewell, *supra* note 9.

39. *Per- and Polyfluoroalkyl Substances*, *supra* note 4.

40. *What is the NC PFAS Testing Network?*, N.C. PFAS TESTING NETWORK, https://ncpfastnetwork.com/about (last visited Feb. 26, 2021).

identifying new contamination events in the state, it is still in its infancy and perhaps years from offering definitive research findings.[41] Even still, the organization has created a helpful guidance document for state and local regulation.[42] While the North Carolina government has at least taken some initial steps to address PFAS in the state, the federal government has largely resigned itself to a wait-and-see approach despite the severity of PFAS contamination.

B. Federal Response

With the threat of PFAS to humans and ecosystems now firmly established, it is natural to wonder: what is the federal government doing about this? Unfortunately, very little of substance has been done. However, considering the traditional methods by which federal regulatory action occurs—research, rule proposals, public comments, and all the other steps involved in agency rulemaking—this lack of action should come as no surprise.[43] The primary governmental actor overseeing environmental harms is the EPA, and the relevant statutory mandates from which the EPA derives its authority are the Clean Water Act, the Safe Drinking Water Act, and the Toxic Substances Control Act.[44] These statutes give the EPA broad, but far from unlimited, authority to address environmental contaminants like PFAS. However, as an executive agency, the EPA's efforts to address PFAS are also subject to outside political pressures. Environmental regulations, including for PFAS, were consistently impeded during the Trump administration, and whether the Biden administration will make regulation a priority remains to be seen.[45]

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41. *See Publications*, N.C. PFAS TESTING NETWORK, https://ncpfastnetwork.com/publications (last visited Feb. 26, 2021) (noting that all of its publications are produced after 2019).

42. N.C. PFAS TESTING NETWORK, FINDINGS AND RECOMMENDATIONS OF THE NORTH CAROLINA PER- AND POLYFLUOROALKYL SUBSTANCES TESTING NETWORK (Apr. 15, 2021), https://ncpfastnetwork.com/wp-content/uploads/sites/18487/2021/04/NC-PFAST-Network-Final-Report_revised_30Apr2021.pdf.

43. *Risk Management for Per- and Polyfluoroalkyl Substances (PFAS) under TSCA*, *supra* note 19.

44. *See* Clean Water Act, 33 U.S.C. § 1251; Safe Drinking Water Act of 1974, 42 U.S.C. § 300f; Toxic Substances Control Act, 15 U.S.C. § 2601.

45. Cheryl Hogue, *Trump EPA Takes Last-Minute Actions on PFAS*, C&EN (Jan. 21, 2021), https://cen.acs.org/environment/Trump-EPA-takes-last-minute/99/i3.

The EPA's record is rendered even more suspect upon review of its past actions on PFAS regulation. First, industry studies, which clearly demonstrated the potential harms of PFAS, have been available to the EPA since as early as the 1950s without the agency taking action.[46] In addition, while the EPA has recognized the inherent risks of these chemicals since the 1990s, the agency failed to take any action until 2006.[47] Even then, the agency opted for a wait-and-see approach, relying on the voluntary phaseout of PFAS by corporations rather than taking affirmative steps to regulate them.[48] Second, the EPA has generally allowed new types of PFAS, like GenX, onto the open market without substantial review.[49] This trend continued, and even worsened, when the Trump administration EPA issued an "action plan" which set regulatory goals for 2019 that were ultimately never met.[50]

With this record in mind, it should be no surprise that, to date, the EPA has taken no definitive, binding action to restrict PFAS use. Instead, the agency has developed the previously mentioned "action plan" for researching PFAS contamination. The EPA Administrator has called for the creation of a "Council on PFAS," and as recently as March 10, 2021, the EPA has issued an advance notice of proposed rulemaking regarding PFAS.[51] These preliminary actions, while important first steps for regulation, are a far cry from the sweeping regulatory action required to address the immediate threat of PFAS contamination. Instead, they demonstrate that the EPA, even under new leadership with the Biden administration, remains in the earliest stages of the regulatory process.[52] Rather than waiting for regulatory action, which could be years away, some members of the United States Congress have proposed statutory restrictions on the use of PFAS, but these too remain unlikely to be successful in the short term.

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46. COMM. ON ENERGY & COM., FACT SHEET FOR H.R. 2467 (July 2021), https://sarbanes.house.gov/sites/sarbanes.house.gov/files/FACT-SHEET_PFAS-Action-Act_2021.pdf#:~:text=H.R.%202467%2C%20the%20PFAS%20Action%20Act%20of%202021%2C,PFAS%20contamination%20in%20their%20air%2C%20land%2C%20and%20water.

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *EPA Actions to Address PFAS*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov /pfas/epa-actions-address-pfas (last visited Oct. 16, 2021).

52. *Id.*

The primary example of legislative action at the federal level is the PFAS Action Act of 2021.[53] At the time of this Comment's writing, this bill has been passed by the House of Representatives and is currently awaiting review by the Committee on Environment and Public Works before being submitted to the Senate.[54] While the existence of this bill is promising, especially in light of the environmental goals of the Biden administration and many Democratic proponents, its success is far from guaranteed. Among other things, the bill would establish grants and additional funding for research, testing, and outreach.[55] Most importantly, substantive restrictions would be placed on certain unsafe methods of disposing of PFAS as well as their use in products such as firefighting foams.[56] While this would be a significant departure from the existing wait-and-see approach, the bill is not without its shortcomings.

Even if the PFAS Action Act of 2021 was passed in its current form, the terms of the bill would still fail to address many issues relevant to North Carolina. The primary shortcomings of this bill are twofold. First, the terms of the bill contain few actual restrictions on the use of PFAS.[57] Aside from firefighting foams and certain disposal techniques, manufacturers will be able to continue to use existing PFAS—and even develop new types of PFAS—so long as they comply with relatively relaxed reporting and monitoring requirements.[58] Second, enforcement mechanisms are severely lacking due to a five-year grace period for industry compliance.[59] Before enforcement could begin, the EPA would need to promulgate rules under the bill's authority—a process which itself could take years.[60] Only then would the five-year grace period even begin to count down.[61]

This delay in enforcement could result in years of continued contamination before manufacturers can even be held accountable for violations. In addition, the delay would leave continued enforcement of the bill vulnerable to changes in the balance of

53. PFAS Action Act of 2021, H.R. 2467, 117th Cong. (2021).

54. *H.R. 2467 - PFAS Action Act of 2021*, CONGRESS.GOV, https://www.congress.gov/bill/117th-congress/house-bill/2467/text (last visited Oct. 16, 2021).

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

political power; the election of a president who views such regulations unfavorably might upend the entire process, as occurred previously with the Trump administration.[62] While this bill would be a vital first step toward national regulation, it would also leave North Carolina and other states in a position similar to how they are without the bill; that is, the government would remain focused on research and monitoring while manufacturers continue to contaminate the state's water. The shortcomings of the federal approach to PFAS regulation make it clear that state action is required. However, as shown in Section II, relying on North Carolina's existing framework of enforcement is also far from ideal.

III. CAPE FEAR: LESSONS LEARNED

The inadequacy of North Carolina's current regulatory framework for managing contaminants like PFAS may be best exemplified by the state's handling of Cape Fear. To that end, this section addresses two primary questions. First, how exactly did the Cape Fear contamination event occur, and how did North Carolina regulators respond? A discussion of the circumstances surrounding the Cape Fear event, as well as the state's legal and regulatory action taken against Chemours, demonstrates the shortcomings of the state's current approach. Second, what steps have been taken by the North Carolina legislature to address these perceived shortcomings? The answers to these two questions demonstrate that regulatory and judicial action has failed to substantively alter the activities of Chemours, especially as it continues to violate corrective orders.[63] Additionally, legislative action has stalled out despite bipartisan support for legislation.[64] While the proposed method of regulating PFAS in the state is discussed in Section III, it is first essential to understand the current framework of regulation and enforcement before recommendations for improvements may be made.

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62. COMM. ON ENERGY & COM., *supra* note 46.

63. *See DEQ Assesses Penalties of Nearly $200,000 for Chemours Violations*, N.C. DEP'T ENV'T QUALITY (Mar. 31, 2019), https://deq.nc.gov/news/press-releases/2021/03/31/deq-assesses -penalties-nearly-200000-chemours-violations.

64. *See* H.R. 1108, 2019 Gen. Assemb., Reg. Sess. (N.C. 2019).

A. Cape Fear and Ongoing Litigation

Before discussing the litigation between North Carolina and Chemours, the background and scale of the Cape Fear contamination event must first be understood. The Cape Fear River Basin refers to a system of rivers and surface water sources—as well as the largest watershed in the state—which annually supplies between one and two million North Carolina residents with drinking water .[65] Of this number, approximately one million of these residents are affected by industrial contaminants, like GenX, on an annual basis as of 2019.[66] By way of comparison, this means that roughly one in ten North Carolina residents receive potentially contaminated water from the Cape Fear River watershed alone without even considering other sources of drinking water.[67] While contamination has been detected in this river system for decades, the exact source remained unknown until the City of Wilmington, North Carolina began an investigation of the corporation DuPont, which operated the factory upstream of the city.[68]

DuPont's factory, which would later merge with Chemours, had operated on the banks of the Cape Fear River in Fayetteville, North Carolina since the 1980s.[69] Some evidence, including testimony from former employees, suggests that the company had been allowing a variant of PFAS, known as PFOA, to be discharged into the Cape Fear River for decades.[70] In 2007, DuPont's activities became known, and two years later, in 2009, it switched from PFOA to its new compound, GenX, largely in response to health concerns voiced by the public and the EPA.[71] However, evidence suggests that the company did not stop discharging contaminants into the Cape Fear River at any point; it simply replaced the dangerous PFOA with

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65. Sheena Scruggs, *PFAS–A Problem in North Carolina Drinking Water*, NAT'L INST. ENV'T HEALTH SCI. (Mar. 2019), https://factor.niehs.nih.gov/2019/3/feature/2-featurepfas/ index.htm; *see also Cape Fear River Basin*, N.C. DEP'T ENV'T QUALITY, https:// deq.nc.gov/cape-fear-river-basin (last visited Feb. 26, 2022).

66. Scruggs, *supra* note 65.

67. *See id.*; *QuickFacts: North Carolina*, CENSUS.GOV, https://www.census.gov/quickfacts /NC (last visited Feb. 24, 2022) (indicating the population of North Carolina in early 2020 was roughly ten million).

68. *See* John Wolfe, *Part of the River: Anger and Uncertainty After Decades of Drinking Water Contamination*, SCALAWAG (May 22, 2018), https://scalawagmagazine.org/2018/05/ part-of-the-river-anger-and-uncertainty-after-decades-of-drinking-water-contamination.

69. Scruggs, *supra* note 65.

70. *Id.*

71. *Id.*

the allegedly "safer" GenX.[72] In 2012, GenX was first detected in the Cape Fear River, and in 2014, the City of Wilmington was finally able to pinpoint the upstream DuPont factory as the source.[73] Perhaps unsurprisingly, faced with criticism from regulators and the public at large, DuPont transferred ownership to its own spinoff company, Chemours, in 2015 as a means of avoiding negative publicity and liability.[74] Chemours, rather than DuPont, then became the object of North Carolina's subsequent litigation.

The first and only major action taken against Chemours was the entry of a court-approved Consent Order in 2019, which, among other requirements, required Chemours to pay twelve million dollars in civil penalties and one million dollars in investigative costs to the DEQ.[75] While the order also included research and monitoring requirements, its primary requirements for Chemours were threefold. First, Chemours was required to provide permanent drinking water for affected residents.[76] Second, Chemours had to design and implement safer water treatment systems at its Fayetteville factory subject to approval by the DEQ.[77] And third, Chemours was prohibited from exceeding a predetermined wastewater outflow limit for contaminants.[78] These steps, taken together, seemed to ensure that North Carolina residents would be protected from immediate pollution in the short term even while research into the exact harms of GenX continued.

While the civil penalties, provision of drinking water for residents, and research and monitoring requirements contained in the Consent Order were certainly major steps in holding Chemours accountable, the required changes to the design and wastewater

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72. *Id.*

73. *See* Vaughn Hagerty, *Toxins Taint CFPUA Drinking Water*, STAR NEWS, https://www.starnewsonline.com/story/news/environment/2017/06/07/toxin-taints-cfpua-drinking-water/20684831007 (June 8, 2017, 10:38 AM).

74. Scruggs, *supra* note 65.

75. *State Officials Require Chemours to Provide Permanent Drinking Water and Pay $12 Million Penalty*, N.C. DEP'T ENV'T QUALITY (Nov. 21, 2018), https://deq.nc.gov/news/press-releases/2018/11/21/release-state-officials-require-chemours-provide-permanent-drinking; *see also Attorney General Josh Stein Takes Legal Action Against DuPont Over PFAS Pollution*, N.C. DEP'T JUST. (Oct. 13, 2020), https://www.ncdoj.gov/attorney-general-josh-stein-takes-legal-action-against-dupont-over-pfas-pollution (signaling renewed efforts to hold Chemours accountable through judicial means).

76. N.C. DEP'T ENV'T QUALITY, *supra* note 75.

77. Consent Order, State v. Chemours Co. FC, LLC (Feb. 25, 2019) (No. 17 CVS 580), https://files.nc.gov/ncdeq/GenX/2019-02-25-Consent-Order—-file-stamped-and-fully-executed—b—w-.pdf.

78. *Id.*

outflow of the factory itself was the cornerstone of the order; without these changes, the order could not viably safeguard the public in the long term.[79] And so, the violation of these two requirements in 2021 by Chemours—just two years after the order was put into effect—severely undercut the state's efforts to safeguard the public.[80]

In response to Chemours' violations, the DEQ and other regulatory bodies levied fines totaling approximately $200,000 against Chemours for failing to adequately design and implement its water treatment system and for exceeding the minimum threshold for wastewater discharge.[81] In effect, Chemours opted to pay the state's relatively minimal fines rather than to pay the hefty expenses associated with these substantial alterations to its factory.[82] The reason for this decision becomes obvious when considering the income of Chemours, the costs of alterations, and the relatively limited size of the fines for violating the Consent Order. According to Chemours' annual report, the company's adjusted net income for the year in question was approximately $400 million.[83] The $200,000 worth of fines levied against the company, even after including the $13,000,000 in initial penalties, account for only 3.3% of the company's annual income.[84] The primary shortcoming of North Carolina's regulatory framework is therefore one of means: agencies, whose primary authority for enforcement is to issue fines, are simply incapable of holding companies as profitable as Chemours truly accountable until legislators grant them additional authority to do so.

B. Legislative Response

In light of the perceived shortcomings of North Carolina regulators to effectively force compliance from companies like

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79. N.C. DEP'T ENV'T QUALITY, *supra* note 75 (explaining the civil penalties, provision of drinking water for residents, and research and monitoring requirements contained in the Consent Order).

80. Press Release, N.C. Dep't of Env't Quality, DEQ Assess Penalties of Nearly $200,000 for Chemours Violation (Mar. 31, 2021), https://deq.nc.gov/news/press-releases/2021/ 03/31/deq-assesses-penalties-nearly-200000-chemours-violations.

81. *Id.*

82. *Id.*

83. CHEMOURS, CHEMOURS COMPANY 2020 ANNUAL REPORT 71–73 (2020), https:// s21.q4cdn.com/411213655/files/doc_financials/2020/ar/2020-Chemours-Annual-Report.pdf.

84. *Id.*

Chemours, some state legislators have proposed new laws. In particular, there are two bills which have yet to be passed, one introduced in the House and the other in the Senate, and each would address PFAS in drastically different ways. To start, the House bill, known by the short title "PFAS Contamination Mitigation Measures," was introduced in 2019 and has since stalled out in committee.[85] While the likelihood of this bill becoming law in its present form is unlikely, its terms may be instructive for future attempts to restrict PFAS in the state. This bill's requirements are twofold. First, companies who manufacture or use PFAS in their industrial processes would be required to notify state agencies and, more importantly, "eliminate" PFAS from their wastewater before allowing it to enter state waterways.[86] Second, the DEQ would be required to conduct large-scale surveys and research of PFAS in the state with additional action pending based on their findings.[87] While the elimination of all PFAS from wastewater would certainly be an improvement over current standards, the bill itself does not establish any explicit penalty or enforcement mechanism for violations.[88] This omission alone clearly undercuts the effectiveness of such legislation and fails to address the concerns regarding regulatory enforcement that have become apparent following Cape Fear.

The Senate bill, known by the short title "PFAS Manufacture/Use/Sale Ban," was introduced in 2021 and is currently awaiting committee review.[89] While this bill is more likely to become law, at least in some form, its success is far from guaranteed.[90] Regardless, a brief study of its terms will be equally useful for crafting future legislation, and, unlike the House bill, this one is remarkably straightforward. Rather than bothering with monitoring and reporting requirements, the Senate bill simply restricts all manufacture, use, and distribution of PFAS in the state.[91] However, a complete ban on PFAS would come with a price. The most immediate issue with this approach would be the economic impact on state revenue from manufacturing. Because

85. H.R. 1108, 2019 Gen. Assemb., Reg. Sess. (N.C. 2019).
86. *Id.*
87. *Id.*
88. *Id.*
89. S. 638, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021).
90. *Id.*
91. *Id.*

PFAS are such ubiquitous chemicals, a total ban would almost certainly damage North Carolina's ability to keep current manufacturers in the state, let alone attract new ones.[92] Additionally, the bill's enforcement measures are severely lacking.[93] First-time violations may result in civil fines of no greater than $5,000 while repeat offenses may reach as high as $10,000, but no company may be fined in excess of $200,000 in any single month.[94] While these fines may be sufficient to force compliance from smaller companies, larger corporations like Chemours are unlikely to be similarly deterred.

Similar to Chemours' lack of compliance with the previously discussed Consent Order, a corporation's annual income renders these civil fines wholly inadequate as a means of deterrence. Without a method of punishing companies beyond fines, such as ordering factories to close until compliance is met, companies may opt to simply pay their fines and continue operation as usual. For instance, even the maximum $200,000 of fines monthly, which would equal an annual penalty of $2,400,000, would account for only 0.6% of Chemours' annual adjusted income.[95] Without similar restrictions both at the federal level and in other states that Chemours operates in, the deterrence provided by these fines would likely be minimal. These attempts at legislation, while important steps toward addressing PFAS, are still inadequate to protect the state from ongoing and future contamination. A new approach is essential.

IV. REGULATIONS AND REMEDIES

Having established the health and environmental risks of PFAS in Section I and the shortcomings of current safeguards in North Carolina in Section II, the most effective means of regulating PFAS may now be analyzed and recommended. This section first addresses another approach to regulation, namely the recognition of civil liability, before turning to the primary topic of state action. By demonstrating the practical issues associated with the

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92. *See PFOA, PFOS, and Other PFAS*, U.S. ENV'T PROT. AGENCY, https://www.epa.gov/pfas/basic-information-pfas (last visited Oct. 16, 2021) (noting the ubiquity of PFAS in many sectors of consumer good production).

93. *Id.*

94. *Id.*

95. CHEMOURS, *supra* note 83.

establishment of private rights of action against companies, the necessity of expanding regulatory authority at the state level becomes even clearer, and a final recommendation, informed by the previously discussed legislative bills, is made.

A. Practicality of Tort Liability and "Citizen Suits"

The recognition of private civil liability against companies that violate environmental standards, either as torts or as civil suits to enforce environmental standards, has been repeatedly recommended as an effective means of deterring pollution, and it is certainly not without its merits.[96] Such an approach would allow states to reduce their own regulatory costs by pushing monitoring and enforcement onto private actors.[97] Additionally, the threat of civil liability from harmed plaintiffs, especially in the form of class action lawsuits, could serve as a more effective deterrent than simple fines levied by regulatory agencies. While citizen suits that rely on private actors to enforce violations of statutes could prove effective, tort liability, on the other hand, would face substantial practical hurdles in North Carolina.

First, there would be an immediate issue regarding the proof necessary to establish that the plaintiff suffered a harm as a result of PFAS. As discussed in Section I, research surrounding PFAS, especially newer compounds like GenX, is still in its infancy.[98] Demonstrating that any particular harm was caused by PFAS, let alone a specific compound from a specific company, would prove exceedingly difficult. Second, the nature of PFAS emissions in North Carolina, specifically their ability to pollute water sources beyond those with direct sources of industrial wastewater, would also make it difficult for plaintiffs to trace the source of their harm.[99] Because PFAS can be found in surface and groundwater sources as a result of air emissions and rainwater, plaintiffs would be hard-pressed to identify any individual company which could be held responsible for their harm.[100] For these reasons, North Carolina

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96. *See generally* Goot, *supra* note 14 at 646–47; Quackenbush, *supra* note 14 at 10907.

97. *See* S. 638, 2021 Gen. Assemb., Reg. Sess. (N.C. 2021); H.R. 1108, 2019 Gen. Assemb., Reg. Sess. (N.C. 2019) (both relying on substantial appropriations of funds for monitoring compliance in the state).

98. *PFOA, PFOS, and Other PFAS*, *supra* at note 92.

99. Jewell, *supra* note 9.

100. *Id.*

would be better served by an alternate approach, relying on state action rather than private action.

B. Expanding State Regulatory Authority

Rather than relying on federal regulations or the recognition of tort liability in the form of "citizen suits," the North Carolina legislature should focus on expanding its existing regulatory framework. Any future legislative action ought to be informed by the previous bills, which have been introduced at both the state and federal levels to address PFAS contamination. First, it should be noted that an outright ban on all PFAS in the state, as was recommended by the North Carolina Senate bill previously discussed, should be avoided.[101] PFAS are simply too pervasive and useful in industrial manufacturing to reasonably be banned, especially when manufacturers may simply pay fines and continue their operations unchanged. The better option would be to restrict the emissions of PFAS from factories as the North Carolina House Bill suggested.[102] That option, however, leads to a second important point: harsher enforcement mechanisms are required to ensure compliance with these restrictions.

Due to the sheer financial power of companies like Chemours, enforcement mechanisms must go beyond simple fines. For compliance to be successful, agencies like the DEQ must be able to exercise greater control over offending companies, even to the point of pausing operations until compliance is met. Lastly, legislation should incorporate some aspects of the federal PFAS Action Act of 2021 in order to be most effective in combatting PFAS contamination.[103] Specifically, provisions relating to community outreach and ongoing research into the harms of PFAS should be expanded.[104] This would also include additional funding for the NC PFAS Testing Network and the required reporting of PFAS levels in annual municipal water quality reports.[105] These additions to any proposed legislation, informed by past attempts at legislation as well the lessons learned from Cape Fear, will help to ensure that future laws are able to effectively address PFAS in North Carolina.

101. S. 638.
102. H.R. 1108.
103. PFAS Action Act of 2021, H.R. 2467, 117th Cong. (2021).
104. *Id.* § 1459(e).
105. *What Is the NC PFAS Testing Network?*, *supra* note 40.

V. CONCLUSION

This Comment demonstrates the dire need for state action to regulate and restrict PFAS in North Carolina. Section I provided a comprehensive explanation of PFAS and their impacts on human health and the environment, which further highlighted the state's need for regulatory intervention. Section II provided the background of the Cape Fear contamination event, the ongoing legislative and regulatory action relating to Chemours, and the shortcomings of North Carolina's existing regulatory framework. Lastly, Section III provided a final recommendation for the manner and method by which the North Carolina legislature can combat PFAS contamination in the state. State action is not only the most effective means by which North Carolina can address PFAS contamination in the state but also the most achievable method of protecting North Carolina citizens in the future. The strengthening of North Carolina's existing regulatory framework to allow for (1) expanded oversight of PFAS-related industries, (2) greater authority to levy effective fines and force compliance among offending companies, and (3) public research and outreach to mobilize public opinion toward demanding change is the surest means by which water can remain safe for generations to come.

THE TRUTH ABOUT POLICE DECEPTION AND MINORS: WHY NORTH CAROLINA SHOULD BAN POLICE LYING TO MINORS DURING INTERROGATIONS

ALEXANDRA WARNOCK†

"Anybody who understands what goes on during a police interrogation asks for a lawyer and shuts up."—James Duane, You Have the Right to Remain Innocent

I. INTRODUCTION

In 1989, five teenagers were arrested and falsely accused of raping and assaulting a female jogger.[1] The juveniles were vilified in the media and given life sentences for crimes they did not commit.[2] While none of the "Central Park Five" teenagers committed the crime, all but one falsely confessed after being interrogated by the police.[3] Reflecting on his experiences as one of the Central Park Five, Kevin Richardson stated, "I want everybody to know that we're survivors of this and we don't want to see another Central Park Five."[4] Unfortunately, North Carolina saw another group of five juveniles convicted of murder under similar circumstances in 2002.[5]

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1. Jim Dwyer, *The True Story of How a City in Fear Brutalized the Central Park Five*, N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us-real-story.html.

2. *Id.*

3. *The Central Park Five*, HISTORY (Sept. 23, 2019), https://www.history.com/topics/1980s/central-park-five.

4. Aisha Harris, *The Central Park Five: 'We Were Just Baby Boys,'* N.Y. TIMES (May 30, 2019), https://www.nytimes.com/2019/05/30/arts/television/when-they-see-us.html.

5. *Winston-Salem 5, Convicted in 2002 Murder, Could Soon Get New Trial*, WBTW NEWS 13 (Mar. 10, 2021), https://www.wbtw.com/news/state-regional-news/winston-salem-5-convicted-in-2002-murder-could-soon-get-new-trial.

This group, known as the "Winston-Salem Five," were only teenagers when they were coerced into false confessions and ultimately sent to prison.[6] One expert found the similarities between the two cases to be "astonishing," because in both cases, two of the five remain in prison to this date, awaiting a retrial granted by the North Carolina Innocence Inquiry Commission.[7]

Sadly, these cases are not isolated incidents.[8] Exoneration data suggests that false confessions by juveniles are common among the wrongfully convicted.[9] One study found that 32% of more than 125 proven false confessions were given by minors.[10] Another study that looked at exonerations found that juveniles were three times more likely to make false confessions than adults.[11]

The Supreme Court has recognized the particularly vulnerable nature of juveniles during police interrogations and put into place some protections during the interrogation process.[12] Additionally, states such as North Carolina have gradually added more protections for juveniles during police interrogations.[13] However, statistics collected from the National Registry of Exonerations suggest that more should be done to protect vulnerable youth who are subject to police interrogation.[14] Despite the safeguards currently in place, exoneration rates in cases where false confessions were present have not declined.[15]

Recognizing the need for additional juvenile protections, states have recently begun to ban police from lying to juveniles

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6. *Id.*

7. *Id.*

8. *Wrongful Convictions of Youth*, BLUHM LEGAL CLINIC, NW. PRITZKER SCH. L., https://www.law.northwestern.edu/legalclinic/wrongfulconvictionsyouth/understandproblem (last visited Feb. 26, 2022).

9. *Id.*

10. *Id.*

11. *Id.*

12. *See* J.D.B. v. North Carolina, 564 U.S. 261, 264 (2011).

13. *See id.* at 273–75.

14. NAT'L REGISTRY OF EXONERATIONS, AGE AND MENTAL STATUS OF EXONERATED DEFENDANTS WHO CONFESSED (2020), https://www.law.umich.edu/special/exoneration/Documents/Age%20and%20Mental%20Status%20of%20Exonerated%20Defendants%20Who%20Falsely%20Confess%20Table.pdf.

15. Dustin Cabral, *Exonerations by State*, NAT'L REGISTRY EXONERATIONS, http://www.law.umich.edu/special/exoneration/Pages/Exonerations-in-the-United-States-Map.aspx (Apr. 11, 2022).

during police interrogations.[16] These bans are necessary if we are to ensure that "we don't see another Central Park Five."[17] North Carolina should follow suit and ban police deception during youth interrogations.

This article examines how police deception during interrogation leads to false juvenile confessions. Part I discusses existing data on wrongful convictions for juveniles and the leading police interrogation method—the Reid Technique. Part II discusses how a false confession negatively impacts a jury's finding of truth. Part III discusses issues with police lying to youths during interrogations, first looking at existing research on youths and then looking at case law that outlines why juveniles should be treated differently. Part IV analyzes the current juvenile interrogation reforms in effect in North Carolina and where the current reforms in North Carolina fall short. Finally, Part V discusses why further legislative action to ban police deception during juvenile interrogations is a necessary next step.

II. THE REID TECHNIQUE CAUSES NUMEROUS WRONGFUL CONVICTIONS

False confessions are the leading cause of wrongful convictions among children.[18] Data from the National Registry of Exonerations found that 36% of 211 people who were wrongly convicted as children falsely confessed.[19] Police in the United States are typically allowed to lie and use deceptive techniques to get suspects to confess.[20]

The police interrogation process has long been considered inherently coercive.[21] It is not uncommon for police officers to promise leniency or insinuate that incriminating evidence exists,

16. Kate Elizabeth Queram, *States Look to Ban Police from Lying During Interrogations*, ROUTE FIFTY (June 1, 2021), https://www.route-fifty.com/public-safety/2021/06/states-look-ban-police-lying-during-interrogations/174428.

17. Harris, *supra* note 4.

18. Nigel Quiroz, *Five Facts About Police Deception and Youth You Should Know*, INNOCENCE PROJECT (May 13, 2021), https://innocenceproject.org/police-deception-lying-interrogations-youth-teenagers.

19. *Id.*

20. *Id.*

21. *See* Miranda v. Arizona, 384 U.S. 436, 467 (1966); *see also* Ariel Spierer, *The Right to Remain a Child*, 92 N.Y.U. L. REV. 1719, 1722 (2017).

even when it does not.[22] While several interrogation techniques exist, the Reid Technique is the most commonly used police interrogation tactic in the United States.[23] This coercive technique was discussed in *Miranda* and served as part of the Supreme Court's reasoning that *Miranda* warnings should be constitutionally required.[24] In *Miranda*, the Court used the Reid Technique Manual to demonstrate some of the coercive police techniques used during interrogations.[25] Ultimately, the Court established *Miranda* warnings as a way of "[balancing] the state's need for information from suspects with protecting autonomy and freedom from police coercion."[26] *Miranda's* reasoning is rooted in the Fifth Amendment: without constitutional safeguards, individuals were not adequately protected from self-incrimination under the Fifth Amendment.[27] Despite *Miranda*'s criticism of the Reid Technique's coercive nature, the technique is still used throughout the United States.[28]

There are three main phases to the Reid Technique: the factual analysis phase, the interviewing stage, and the interrogation phase.[29] First, during the factual analysis phase, an officer develops leads and suspects.[30] Second, in the interviewing phase, the officer conducts an interview of the subject analyzing baseline behaviors of the subject.[31] The interviewer then monitors whether the subject deviates from these baseline behaviors during "behavior-provoking" questions.[32] Third, during the interrogation phase, psychological tactics are used to get the interviewee to confess to the alleged crime.[33]

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22. Jaclyn Diaz, *Illinois is the 1st State to Tell Police They Can't Lie to Minors in Interrogations*, NPR (July 16, 2021), https://www.npr.org/2021/07/16/1016710927 /illinois-is-the-first-state-to-tell-police-they-cant-lie-to-minors-in-interrogat.

23. Spierer, *supra* note 21, at 1725.

24. *See Mirand*a, 384 U.S. at 445.

25. *Id.* at 448–55.

26. Barry C. Feld, *Behind Closed Doors: What Really Happens When Cops Question Kids,* 23 CORNELL J.L. & PUB. POL'Y 395, 397 (2013).

27. *Id.*

28. *Miranda,* 384 U.S. at 456; *see* Michael Bret Hood & Lawrence J. Hoffman, *Current State of Interview and Interrogation,* FBI L. ENF'T BULL. (Nov. 6, 2019), https:// leb.fbi.gov/articles/featured-articles/current-state-of-interview-and-interrogation.

29. Hood & Hoffman, *supra* note 28.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

The Reid Technique Manual instructs interviewers only to interrogate those that they believe are guilty.[34] Thus, the focus of the interrogation becomes getting the suspect to admit rather than to collect information on the likelihood that this person committed the crime.[35] Using the Reid Technique, officers rely on their behavioral analysis interview skills to determine whether they believe the suspect committed the crime.[36] The Reid Technique ultimately raises questions about investigator bias and the accuracy of behavioral analysis interview cues for determining one's culpability.[37] However, research suggests that laypersons are not skilled in determining whether or not someone is telling the truth.[38] Further, more training does not make a substantial difference in a person's ability to determine the truthfulness of another person.[39]

The interrogation portion of the technique has a nine-step process that can be categorized into three phases.[40] In the first phase, the interviewer tells the suspect they are guilty and attempts

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34. Wyatt Kozinski, *The Reid Interrogation Technique and False Confessions: A Time for Change*, 16 SEATTLE J. FOR SOC. JUST. 301, 311 (2017).

35. *Id.*

36. *Id.* at 310.

37. *Id.* at 317.

38. Saul M. Kassin, *False Confessions: Causes, Consequences, and Implications for Reform*, 1 POL. INSIGHTS FROM BEHAV. & BRAIN SCI. 112, 113 (2014).

39. *Id.*

40. INGE SEBYAN BLACK & LAWRENCE J. FENNELLY, INVESTIGATIONS AND THE ART OF THE INTERVIEW 76–77 (4th ed. 2020) (The nine steps of the Reid Technique are as follows: "(1) Direct confrontation. Advise the suspect that the evidence has led the police to the individual as a suspect. Offer the person an early opportunity to explain why the offense took place.
(2) Try to shift the blame away from the suspect to some other person or set of circumstances that prompted the suspect to commit the crime. That is, develop themes containing reasons that will psychologically justify or excuse the crime. Themes may be developed or changed to find one to which the accused is most responsive.
(3) Try to minimize the frequency of suspect denials.
(4) At this point the accused will often give a reason why he or she did not or could not commit the crime. Try to use this to move toward the acknowledgement of what they did.
(5) Reinforce sincerity to ensure that the suspect is receptive.
(6) The suspect will become quieter and listen. Move the theme of the discussion toward offering alternatives. If the suspect cries at this point, infer guilt.
(7) Pose the 'alternative question,' giving two choices for what happened—one more socially acceptable than the other. The suspect is expected to choose the easier option, but whichever alternative the suspect chooses, guilt is admitted. As stated earlier, there is always a third option that is to maintain that they did not commit the crime.
(8) Lead the suspect to repeat the admission of guilt in front of witnesses and develop corroborating information to establish the validity of the confession.
(9) Document the suspect's admission or confession and have him or her prepare a recorded statement (audio, video, or written).").

to prevent the suspect from denying guilt.[41] In the second phase, the police officer presents the suspect with different scenarios on how the crime was committed and attempts to minimize the crime by offering mitigating factors that make the crime more justifiable.[42] In the third phase, the officer pressures the suspect into confessing by acting overly confident in the existing evidence against the suspect.[43] The manual even encourages officers to lie and make up fake evidence to bolster the validity of the officers' presumption of the suspect's guilt.[44] One way the Reid Technique does this is by encouraging interrogators to make up false witness statements or physical evidence that does not exist.[45]

The Reid Technique operates under the presumption of guilt. However, there is no distinction between how adults and juveniles are treated under this technique.[46] The Reid Technique is used in North Carolina, and the Reid organization continues to host training programs across the country, including in North Carolina.[47]

Many scholars have called for the technique to be replaced with less coercive techniques, such as the PEACE method.[48] The PEACE method alternatively focuses on the overall factfinding of investigation as opposed to obtaining a confession from the suspect in question.[49] This method is considered "less confrontational, less accusatory, less deceptive, more conversational, and more focused on gathering information."[50] Whereas the focus of the Reid

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41. *Id.* at 77.

42. *Id.* at 77–78.

43. *Id.*

44. Kozinski, *supra* note 34, at 325.

45. DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 135–36 (2012).

46. Buffie Brooke Merryman, *Arguments Against Use of the Reid Technique for Juvenile Interrogations,* 10 COMM. L. REV. 16, 16–18 (2010).

47. *Id.*; *The Reid Technique of Investigative Interviewing and Advanced Interrogation Techniques*, REID, https://reid.com/programs/58068 (last visited Mar. 15, 2022) (training classes for the Reid technique can be found here). The Reid organization is a for-profit organization that trains police officers on the Reid Technique. *About,* REID, https://reid.com/about (last visited Mar. 27, 2022). Data on how prevalent the Reid Technique is in North Carolina was not available on the University of North Carolina School of Government website. Eighty percent of security professionals rely on the Reid organization for building their own skills and for their staff. *Id.*

48. Spierer, *supra* note 21, at 1746–47.

49. *Id.* at 1748.

50. *Id.*

technique is primarily on obtaining a confession, the PEACE method is focused obtaining accurate and reliable information.[51]

III. FALSE CONFESSIONS NEGATIVELY INFLUENCE A JURY'S VERDICT

False confessions are incredibly detrimental to our country's legal system. Ultimately, confessions play a major role in influencing a jury's verdict. When a defendant confesses, the likelihood that a jury reaches a guilty verdict greatly increases.[52] In *Arizona v. Fulminante*, the Supreme Court acknowledged the heavy weight a confession can have on a verdict.[53] In this case, the defendant's confession was coerced and violated the Fifth and Fourteenth Amendments.[54] The Court found that admitting this confession was not harmless error because it was unlikely that the prosecution would have pursued the case at all absent the confession.[55]

Research shows that false confessions have a detrimental impact on a jury's decision on a defendant's guilt.[56] In a study on the impact of confessions on a jury, a mock jury received three different versions of a murder trial transcript: one with a low-pressure interrogation leading to a defendant's confession, one with a high-pressure interrogation leading to a defendant's confession, and a control group.[57] In the low-pressure interrogation transcript, the police briefly interrogated the defendant before he admitted to committing the alleged crime.[58] In the high-pressure interrogation transcript, the defendant was interrogated aggressively for an extended period of time and eventually admitted to the alleged crime.[59] The confession stemming from this

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51. FORENSIC INTERVIEW SOLS., THE SCIENCE OF INTERVIEWING 5 (n.d.), https://www.fis-international.com/assets/Uploads/resources/PEACE-A-Different-Approach.pdf; Spierer, *supra* note 21, at 1721.

52. *Id.* at 1722.

53. Arizona v. Fulminante, 499 U.S. 279, 296 (1991) (internal quotation marks omitted) (quoting Bruton v. United States, 391 U.S. 123, 139–40 (1968) (White, J., dissenting)).

54. *Id.* at 282.

55. *Id.* at 297.

56. Kassin, *supra* note 38, at 117–18.

57. *Id.* at 116.

58. *Id.* at 117.

59. *Id.*

interrogation was reasonably perceived to be involuntary.[60] Although participants reading the high-pressure interrogation transcript said the confession was involuntary and that it would not influence their verdict, this group had a higher rate of guilty verdicts.[61] This study demonstrates how damaging false confessions can be to a jury's verdict, even when a jury is aware of the coercive nature of the interrogation.

Because research suggests that juveniles are especially vulnerable to false confessions, this study demonstrates how police lying to juveniles can be especially problematic to our court's fact-finding process.[62] The more likely someone is to confess to a crime they did not commit, the more likely it is that jury verdicts will be influenced.[63] Thus, juveniles are more likely to have juries convict them of crimes that they did not commit than adults because they are more likely to have falsely confessed.[64]

IV. ISSUES WITH POLICE DECEPTION DURING JUVENILE INTERROGATIONS

A. Research Suggesting Youth Should Be Treated Differently During Interrogations

False confessions are a leading cause of wrongful convictions.[65] Twenty-nine percent of DNA exonerations involved individuals who falsely confessed.[66] The rate of false confessions is much higher among youths, with 49% of these false confessions overturned by DNA evidence in cases where the confessor was twenty-one years or younger.[67] The use of DNA evidence to overturn convictions has shown that false confessions are common in cases where one was wrongfully convicted.[68]

Police deception is an especially problematic practice when youths are involved. Parts of the brain responsible for future

60. *Id.*

61. *Id.*

62. *Id.* at 113.

63. *Id.* at 117.

64. *Id.* at 114.

65. Richard A. Leo, *False Confessions: Causes, Consequences, and Implications*, 37 J. AM. ACAD. PSYCH. & L. 332 (2009).

66. *DNA Exonerations in the United States*, INNOCENCE PROJECT, https://innocenceproject.org/dna-exonerations-in-the-united-states (last visited Feb. 23, 2022).

67. *Id.*

68. *See id.*

planning, judgment, and decision-making do not fully develop until an individual reaches their mid-twenties.[69] One study on false confessions in juveniles suggests that the risk of taking responsibility for an act one did not commit is higher in juveniles than adults.[70] The study tested participants in three age groups: (1) twelve and thirteen-year-olds, (2) fifteen and sixteen-year-olds, and (3) young adults aged eighteen to twenty-six years old.[71] In this study, the youths were presented with false evidence indicating liability for an act that they did not commit.[72] The study ultimately concluded that adolescents were more likely than adults to falsely confess to an action they did not actually do.[73] The findings of this study are inextricably linked to our juvenile interrogation process. The study highlights that "it is possible that current police tactics in the United States increase the possibility of innocent people falsely confessing."[74]

B. The Court's Recognition that Minors Should Be Treated Differently During Police Interrogations

Courts historically recognized the differences between children and adults in the police interrogation setting.[75] In 2005, *Roper v. Simmons* established that individuals who are seventeen years old and younger cannot be sentenced to death.[76] In *Roper v. Simmons*, Justice Kennedy notably relied on studies that demonstrated the major differences between juvenile and adult decision making.[77] For example, he cited one study showing that juveniles' lack of maturity can lead to impulsive actions and decisions.[78] Justice Kennedy then noted that juveniles are more susceptible to peer pressure from outside groups than adults are, which can impact their control over decision making.[79] In

69. Quiroz, *supra* note 18.

70. Allison D. Redlich & Gail S. Goodman, *Taking Responsibility for an Act Not Committed: The Influence of Age and Suggestibility*, 27 L. HUM. BEHAV. 141 (2003).

71. *Id.* at 144.

72. *Id.*

73. *Id.* at 141.

74. *Id.* at 152.

75. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 570 (2005); Graham v. Florida, 560 U.S. 48, 67 (2010); J.D.B. v. North Carolina, 564 U.S. 261, 273 (2011).

76. *Roper*, 543 U.S at 578.

77. *Id.* at 569.

78. *Id.*

79. *Id.*

discussing this, Justice Kennedy cited to a study finding that youths have "less control, or less experience with control, over their own environment."[80] In his reasoning as to why juveniles should not be given the death penalty, Justice Kennedy also acknowledged that the character of a juvenile is not as well formed as the character of an adult.[81]

In the 2010 case, *Graham v. Florida*, the Supreme Court confirmed its view that juveniles should be treated differently from adults in our legal system.[82] The Court reaffirmed *Roper*, which determined that juveniles lack maturity and responsibility and are more susceptible to outside influences than adults.[83] The Court noted that no subsequent data has negated *Roper*'s findings and that research continually showed fundamental differences between juvenile and adult minds.[84] These differences give juveniles a limited understanding of the juvenile justice system. The Court noted here that juveniles do not understand the roles of the actors within the criminal justice system in the same way adults do.[85] The Court used a juvenile's lack of understanding of the role of a lawyer during criminal proceedings as an example of this.[86] *Graham* reaffirmed the findings of the Supreme Court in *Roper*.[87] This limited understanding is important to note as it demonstrates how juveniles may not understand the implications of their actions during police interrogations. Juveniles may not understand their right to silence in the same way that adults do. Further, even if a lawyer is present during an interrogation, juveniles may be less willing than adults to work with the lawyer or view them as being on their side. This notion that juveniles would act differently than adults in criminal proceedings was emphasized in *J.D.B. v. North Carolina*.[88]

In *J.D.B.*, the Supreme Court established that children should not be treated the same as adults during police interrogations and failing to distinguish between children and

80. *Id.*
81. *Id.* at 570.
82. Graham v. Florida, 560 U.S. 48, 68 (2010).
83. *Id.* at 68.
84. *Id.*
85. *Id.* at 78.
86. *Id.*
87. *Id.* at 68.
88. *See* J.D.B. v. North Carolina, 564 U.S. 261, 269 (2011).

adults during police interrogations would violate the Constitution.[89] In *J.D.B.*, a police officer took a thirteen-year-old boy into a conference room and interrogated him for at least half an hour without giving the child his *Miranda* warnings.[90] Under *Miranda*, the standard for holding someone in custody was whether "a reasonable person [would] have felt that he or she was at liberty to terminate the interrogation and leave."[91] While an adult would not be in custody in this situation, the Court found that the child was in custody because a child's age informs the *Miranda* custody analysis.[92] In this new *Miranda* analysis that accounts for the differences between children and adults in custody, the Court factors in situations where "a reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go."[93] Thus, *J.D.B.* opens the door to reshaping protections for juveniles during interrogation.

Beyond *J.D.B.*, courts and states recognize that something needs to be done to prevent false confessions from juveniles. Courts, therefore, give children extra protections during interrogations.[94] For example, a 1998 Kansas Supreme Court decision outlines some of the many instances where courts found that a bright-line rule was necessary to protect juveniles during interrogations, as opposed to allowing courts to decide under the totality of the circumstances whether a juvenile's rights were violated during an interrogation.[95]

While state courts have not banned police from lying during investigations, they have placed additional restrictions on police when interacting with juveniles.[96] For instance, in Massachusetts, the state's highest court imposed a requirement that a parent or guardian be present with the juvenile at the time of their police interrogation.[97] Kansas adopted a similar rule in 1998, requiring an adult to be present during juvenile interrogations.[98] Moreover, in

89. *Id.* at 281–83.

90. *Id.* at 265–66.

91. *Id.* at 279 (quoting Thompson v. Keohane, 516 U.S. 99, 112 (1995)).

92. *Id.* at 265.

93. *Id.* at 272.

94. *See, e.g.*, *In re* B.M.B., 264 Kan. 417, 955 P.2d 1302 (1998).

95. *Id.* at 432.

96. *See, e.g.*, Commonwealth v. A Juvenile (No. 1), 449 N.E.2d 654, 657 (Mass. 1983); *In re* B.M.B., 955 P.2d at 1312–13.

97. A Juvenile (No. 1), 449 N.E.2d at 657.

98. *In re* B.M.B., 955 P.2d at 1312–13.

North Carolina, parents are required to be present during interrogations, and juvenile interrogations must be recorded.[99] However, despite the current safeguards, false confessions continually account for a significant portion of North Carolina's exonerations.[100] According to the National Registry on Exonerations, North Carolina has exonerated sixty-seven people since 1989.[101] In eleven of the sixty-seven cases where individuals were exonerated, a false confession was present.[102] This data relates only to the number of exonerations, so the actual number of false confessions leading to false convictions is possibly much higher.[103] Thus, North Carolina should do more to protect juveniles during the police interrogation process. The state should ban police from lying to juveniles during interrogations to further protect juveniles from being pressured into false confessions.

V. NORTH CAROLINA'S REFORMS IN JUVENILE INTERROGATIONS AND ISSUES WITH THE STATE'S CURRENT SAFEGUARDS FOR CHILDREN DURING POLICE INTERROGATIONS

North Carolina has added more protections to juveniles during police interrogations over time. North Carolina General Statute 7B-2101 governs police interrogations. According to G.S. 7B-2101(b), parents must be present during interrogations.[104] In 1997, this statute applied only to juveniles under the age of fourteen.[105] In 2015, the age for requiring a parent to be present was changed from fourteen to sixteen, and to this day, parents are only required to be present if a juvenile is sixteen or younger.[106]

Subsequent case law has further solidified that a parent cannot waive the child's right to have a parent present either. For example, *In re Butts* found that a parent voluntarily leaving the interrogation room did not sufficiently waive the child's right to have a parent present.[107] In this case, the child had made the statement that "it happened," admitting to his guilt, while his parent

99. N.C. GEN. STAT. §§ 7B-2101(b), 7B-806 (2021).
100. Cabral, *supra* note 15.
101. *Id.*
102. *Id.*
103. *See id.*
104. N.C. GEN. STAT. § 7B-2101(b) (2021).
105. *See* 1998 N.C. Sess. Laws 810.
106. 2015 N.C. Sess. Laws 126.
107. *In re* Butts, 582 S.E.2d 279, 283 (N.C. Ct. App. 2003).

was present.[108] Even so, the court found that his admission of guilt did not make a difference in the child's right to have a parent present during the entire interrogation process.[109] The court ruled that the child's later admissions without the parent present would not be admissible in court despite the one admission with the parent present.[110]

In 2011, North Carolina enacted a statute furthering its protections for children during police interrogations.[111] The state rewrote General Statute 15A-211 on Custodial Interrogations, placing a recording requirement on "all custodial interrogations of juveniles in criminal investigations conducted at any place of detention."[112]

One reform North Carolina and other states have adopted is the new requirement that an adult be present during police interrogations with children.[113] This reform is beneficial because in many instances a child will have an adult they trust to support them. Whereas a police officer primarily hopes to obtain a confession during an interrogation, a third-party adult can help prevent the child from getting in trouble with the law, especially if the child is innocent. This reform is particularly beneficial when it comes to waiving one's *Miranda* rights. Research suggests that juveniles lack an understanding of *Miranda* rights and how they apply during the interrogation process.[114] The rate of juvenile waivers of *Miranda* rights during interrogations is 90%—much higher than the rate at which adults waive their *Miranda* rights.[115]

However, North Carolina's requirement that an adult be present during juvenile interrogations is not without its flaws. The requirement that a parent, guardian, attorney, or other adult figure in a minor's life be present during interrogations only applies to minors ages sixteen and under.[116] Thus, seventeen-year-olds are not

108. *Id.* at 284.
109. *Id.*
110. *Id.* at 282.
111. *See* JANET MASON, U. N.C. SCH. GOV'T, 2011 LEGISLATION ENACTED: JUVENILE LAW (Oct. 2011), https://www.sog.unc.edu/sites/www.sog.unc.edu/files/course_materials/Mason%20Juvenile%20Legislation_0.pdf.
112. *Id.* at 5.
113. N.C. GEN. STAT. § 7B-2101(b) (2021).
114. Feld, *supra* note 26, at 454.
115. *Id.* at 429.
116. N.C. GEN. STAT. § 7B-2101(b) (2021).

protected by this statute and could be left vulnerable during police interrogations.

Additionally, there are times parents or other adults could do more harm than good in a police interrogation. Parents frustrated with their children may be convinced that their children are guilty and actually want their children to face legal consequences for their alleged wrongs. Parents have even gone so far as to try to convince their children to confess to the alleged crime.[117] North Carolina's requirement that a parent or guardian must be present in the police interrogation process does not require that the parent actually be on the child's side or protect the child in any way during the process.[118] An Illinois court discussed a case where this issue arose.[119] In *In re D.W.*, the juvenile suspect did not want to speak with anyone about the alleged crime, but the suspect's mother effectively acted as an agent of the police.[120] She testified that her son would not talk to anyone until she arrived at the sheriff's office and told him that he had to talk to someone.[121] She got him to admit to the crime and addressed her son in a "loud, scolding voice."[122] On appeal, the court found that the "trial court might well conclude that [the deputy] had the mother present" in the interrogation so she could persuade her son to confess.[123] The court held that the trial court did not err in finding that the mother acted as an agent of the police in a way that was detrimental to her son.[124]

Similarly, other states have found that parental presence weighs against the validity of a child's *Miranda* waiver and can make a confession inadmissible.[125] In one New Jersey case, a mother badgered her son in front of the police in order to get him to cooperate.[126] The court in this case ruled that the mother effectively acted as an agent of the police and her presence here contributed

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117. *E.g.*, *In re* D.W., 440 N.E.2d 140, 141 (Ill. App. Ct. 1982).

118. *See* N.C. GEN. STAT. § 7B-2101(b) (2021).

119. *In re* D.W., 440 N.E.2d at 141.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. *See* State *in re* A.S., 999 A.2d 1136 (N.J. 2010) (holding that a mother who badgered her son in front of the police acted as an agent of the police); State *ex rel.* J.E.T., 10 So. 3d 1264 (La. Ct. App. 2009) (finding that the parent had presented an "obvious conflict" and was not shown to serve as someone interested in child's welfare).

126. State *in re* A.S., 999 A.2d at 138.

to making her son's confession inadmissible.[127] While having a parent that is not helping the child and effectively serving as an agent of the police may cause courts to render a confession of guilt inadmissible, this is not something that should be left up to chance.[128] Thus, there is a need for greater protections to juveniles during the interrogation phase.

One Supreme Court brief, *Joseph H. v. California*, uses cases of parents causing more harm than good during the juvenile interrogation phase to argue that juveniles should be entitled to have their lawyer present in addition to a parent or guardian during the interrogation process.[129] The North Carolina statute on interrogation procedures states, "When the juvenile is less than 16 years of age, no in-custody admission or confession resulting from interrogation may be admitted into evidence unless the confession or admission was made in the presence of the juvenile's parent, guardian, custodian, or attorney."[130] In the North Carolina interrogation statute, if a child's parent is present, an attorney is not required to also be there.[131] This effectively means that an attorney is not required to be present during interrogations for children.[132] Even if an attorney were present, an attorney may not be able to mitigate the damage a parent could do to their child's case. A child may be more trusting of their parent than an attorney that was recently appointed to them and whom they just met. The child may also not want to get in trouble at home with their parent, and the child might confess because their parent told them to confess rather than listening to their attorney, assuming the attorney is telling the child it is best not to confess. Finally, North Carolina's requirement that an adult be present during juvenile interrogations is not enough to protect juveniles during police interrogations because if police lie during interrogations, the adult present is also hearing the lie and possibly believing it as the truth. The adult present could also be influenced by the police's deceptive tactics and not do the best job at protecting the child's interests.

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127. *Id.*

128. *Id.*

129. Petitioner's Reply Brief at 3, Joseph H. v. California, 137 S. Ct. 34 (2016) (No. 15-1086).

130. N.C. GEN. STAT. § 7B-2101(b) (2021).

131. *Id.*

132. *Id.*

Another reform in North Carolina's juvenile justice system is the use of electronic recordings during juvenile interrogations.[133] Although this is a positive reform in that it holds officers accountable for the things they may say during an interrogation, it is not a foolproof way to prevent problematic interrogation methods. While it may help a juvenile defendant's case for a jury to have the opportunity to hear any coercive measures the officers used against the juvenile, it does not stop a juvenile's false confession from happening. Further, initiating these recordings is up to officers.[134] Thus, these recordings are subject to human error and an officer's own discretion. Officers could forget to turn on recordings during interrogations or only record a portion of the interrogation, leaving out the coercive tactics that contributed to a juvenile's false confession.

Further, the act of confessing can adversely influence a jury, regardless of what else they hear on the recording.[135] As previously mentioned, a study on the impact of false confessions on a jury found that even when juries are aware that coercive police tactics were used during interrogations, jury verdicts are influenced by false confessions.[136] This study further demonstrates why false confessions are detrimental to a jury verdict, regardless of whether or not a recording can shed light on the coercive nature of the interrogation.[137]

Recordings of juvenile interrogations have given insight into the process so much so that they have been part of the reasoning behind the 2021 move for Oregon to ban police from lying during juvenile interrogations.[138] Recordings have shown courts the types of deceptive tactics police use, but recordings may not solely prevent the actual false confessions that deceptive interrogations lead to from getting admitted into court.[139]

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133. N.C. GEN. STAT. § 15A-211 (2021).

134. *Id.*

135. Kassin, *supra* note 38, at 117.

136. *Id.*

137. *Id.*

138. Innocence Staff, *Oregon Deception Bill is Signed into Law, Banning Police from Lying to Youth During Interrogations*, INNOCENCE PROJECT (June 16, 2021), https://innocenceproject.org/deception-bill-passes-oregon-legislature-banning-police-from-lying-to-youth-during-interrogations.

139. *Id.*

VI. A PROPOSAL FOR CHANGE: THE BAN ON POLICE LYING DURING JUVENILE INTERROGATIONS "NEED NOT AWAIT JUDICIAL ACTION"[140]

An additional protection North Carolina should enact to protect juveniles during the interrogation process is to ban police from lying during interrogations with juveniles. Data collected on police exonerations suggests that further reforms should be enacted in North Carolina to prevent false confessions.[141] The National Registry of Exonerations tracks the number of exonerations by year where a false confession was present.[142] While the data is limited in that it only shows exonerations and not wrongful convictions that have not been overturned, the database tracks all the exonerations in the United States and can be separated by state, year, and contributing factors.[143] When examining the number of exonerations where a false confession was present in North Carolina, there are no major changes in the number of false confession exonerations in relation to the changes made in the 2000s in North Carolina law.[144] Similarly, in the United States, there has been no noticeable decline in exonerations from false confessions.[145] Rather, false confession exonerations have been increasing in number across the United States.[146] It is clear that the current protections are not eliminating the problem of false confessions in North Carolina and the United States.

In 2021, two states moved to ban police from lying to juveniles during interrogations, spurred by the continued issue of false confessions.[147] In July 2021, Illinois, once the false confession capital of the United States, was the first state to ban police lying to

140. *In re* Joseph H., 367 P.3d 1, 6 (Cal. 2015) ("Finally, it bears to mention that considerations of special safeguards for young children need not await judicial action.").

141. Cabral, *supra* note 15.

142. *Id.*

143. *Id.*

144. *See id.*

145. Emily Barone, *The Wrongly Convicted: Why More Falsely Accused People are Being Exonerated Today Than Ever Before*, TIME (Feb. 17, 2017), https://time.com/wrongly-convicted.

146. *Id.*

147. Emma Ockerman, *How Cops Lie to Kids in Interrogations and Get Away with It*, VICE (June 25, 2021, 9:58 AM), https://www.vice.com/en/article/4av4xd/how-cops-lie-to-kids-in-interrogationsand-get-away-with-it.

juveniles during interrogations.[148] Shortly thereafter, Oregon followed suit by enacting its own ban on lying to juveniles during police interrogation.[149] The Oregon bill was originally sponsored by Senator Chris Gorsek, a former police officer.[150] Senator Gorsek stated that "this is a professional standard I teach and we have reliable data showing that untruthfulness used in interviews can lead to false confessions."[151] Moreover, New York, where the Central Park Five were wrongfully convicted, is in the process of following Oregon and Illinois in banning police from lying to juveniles as well as adults.[152]

These states have paved the way for a movement across the United States to ban police from lying to juveniles. North Carolina, home of the "Winston-Salem Five" should consider following suit. Steve Drizin, a nationally recognized expert on false confessions and Director of the Center on Wrongful Convictions at Northwestern Pritzker School of Law, considers banning police from lying during juvenile interrogations to be the next generation of reform in juvenile justice.[153] Drizin acknowledged the impact recordings have had on future reforms, stating: "Recording gave us a window inside the interrogation room. When we've peered through that window over the past two decades, we've seen again and again how lies about evidence and false promises of leniency contribute to false confessions by youthful suspects."[154] It is time to take action on this insight from the juvenile interrogation recording statute in North Carolina.

While states should advocate for change both judicially and legislatively to increase protections for juveniles during police

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148. Diaz, *supra* note 22; N'dea Yancey-Bragg, *Illinois to Become First State to Ban Police Officers From Lying to Minors During Interrogations*, USA TODAY (June 1, 2021), https://www.usatoday.com/story/news/nation/2021/06/01/illinois-ban-police-lying-minors-interrogations/7489269002. One of the bill's sponsors, Senator Robert Peters stated that "Chicago is the wrongful conviction capital of the nation, and a disproportionate number of wrongful convictions were elicited from Black youth by police who were allowed to lie to them during questioning." *Id.* He hopes that this bill will end this trend. *Id.*

149. Innocence Staff, *supra* note 138.

150. *Id.*

151. *Id.*

152. Rocco Parascandola, *Proposed N.Y. Legislation Would Ban Police Tactic of Lying to Suspects to Get a Confession*, N.Y. DAILY NEWS (Mar. 8, 2021), https://www.nydailynews.com/new-york/nyc-crime/ny-ny-bill-ban-police-lying-interrogation-20210308-jxcppdatdvcgtkneng2uxirp6i-story.html.

153. Innocence Staff, *supra* note 138.

154. *Id.*

interrogations, the best course of action is for North Carolina to enact a statute that bans police from lying to juveniles during interrogations, like that of Illinois and Oregon.[155]

A dissenting judge on the California Supreme Court recognized the need for further state action on these matters in *In re Joseph H.*[156] The dissent acknowledged the many states, including North Carolina, that have implemented extra safeguards for juveniles during the interrogation process.[157] While judicial action is certainly better than no action at all, legislative action banning police lying to juveniles would likely provide a quicker remedy than judicial bans. Additionally, judges may be hesitant to create the sort of guidelines that would ban police from lying to juveniles.[158] Judges can be hesitant to "legislate from the bench" and create new laws.[159] It is not hard to imagine a situation where the current Supreme Court would hesitate to create new laws, especially when it comes to such an action that would substantially alter the way that police officers conduct business.

Many officers in North Carolina and across the United States rely on the Reid Technique to conduct business.[160] This technique relies heavily on deception and coercion.[161] Some have argued that the Reid Technique should be abandoned for a less coercive method, such as the PEACE method.[162] An outright ban on lying would prevent officers from using the Reid Method or any other subsequent method that incorporates the coercive and deceptive tactics essential to the Reid Technique.[163] This would also prevent officers from incorporating coercive techniques into their interrogations under other methods.[164] Moreover, police officers that have used the Reid Technique for many years could be at risk of lying to juveniles out of habit. By banning lying altogether,

155. *Id.*

156. *In re* Joseph H., 367 P.3d 1 (Cal. 2015).

157. *Id.*

158. *Id.*; *see* Arthur Eisenburg, *Dear Brett Kavanaugh, Justices Do Make Law,* AM. C.L. UNION (July 13, 2018), https://www.aclu.org/blog/free-speech/dear-brett-kavanaugh-justices-do-make-law. Justice Kavanaugh stated that Justices "must interpret the law, not make the law," demonstrating a hesitancy by some judges to create new laws. *Id.*

159. *Id.*

160. Spierer, *supra* note 21, at 1721.

161. *Id.* at 1724.

162. *Id.* at 1725.

163. *Id.* at 1724.

164. *Id.*

statements that are fruit of the poisonous tree of deception could be excluded from trial.

VII. CONCLUSION

North Carolina should act swiftly to protect juveniles during interrogations. Courts and states have long recognized the inherently vulnerable nature of juveniles during the interrogation process.[165] North Carolina has made beneficial reforms to the juvenile interrogation process by requiring an adult to be present during the interrogation of juveniles and requiring that juvenile interrogations be recorded.[166] However, juvenile false confessions continually occur, and more must be done to protect these individuals.[167] The time has come for North Carolina to enact the next generation of juvenile justice reform and ban police from lying during juvenile interrogations.

165. J.D.B. v. North Carolina, 564 U.S. 261, 271–72 (2011).
166. N.C. GEN. STAT. § 7B-2101(b) (2021).
167. Spierer, *supra* note 21, at 1750.

TRANSGENDER ATHLETE BANS AND THE ANATOMY OF ANTI-TRANSGENDER POLITICS

SOPHIA PERSEPHONE BARRY-HINTON†

I. INTRODUCTION

In an interview with transgender actress Laverne Cox, *Time* magazine proclaimed that 2014 was the "tipping point" for transgender rights and visibility in the United States.[1] This journalistic language lingered in popular consciousness into the following decade and continues to color perception of modern transgender history.[2] In the following years, the terrain of LGBTQ+ rights activism shifted radically in response to the countrywide legalization of same-gender marriage, which for years had dominated the priorities and legal reform efforts of activist circles at the expense of other issues like antidiscrimination laws, health care access, youth homelessness, and the unique interests of groups who did not fit into the "assimilationist" image that marriage activists relied on for success—including bisexual and transgender

† Sophia Persephone Barry-Hinton is a third-year law student and known subversive. This Comment was inspired by their commitment to bodily autonomy and opposition to gendered hierarchies, all the more necessary at a time where transgender people have been singled out for political and social repression. They would like to thank their families—both legal and chosen—for providing comfort, light, and support. She would also like to thank the many outlaws and outsiders, both dead and alive, both those who she has broken bread with and those she is vastly separated from by space or time, who stand or stood opposed to all forms of domination. She draws upon their strength and fortitude when her own supply runs low. Finally, they would like to reach out to all fellow trans and queer people who fear the current climate; they hope their words, in some small way, can be a real weapon against the coming darkness.

1. Katy Steinmetz, *The Transgender Tipping Point*, TIME MAG. (May 29, 2014, 6:08 AM), https://time.com/135480/transgender-tipping-point.

2. *See, e.g.*, Laurie Penny, *What the Transgender Tipping Point Really Means*, NEW STATESMAN (June 24, 2014), https://www.newstatesman.com/politics/welfare/2014/06/laurie-penny-what-transgender-tipping-point-really-means; Samantha Allen, *Whatever Happened to the Transgender Tipping Point?*, DAILY BEAST (Apr. 10, 2017, 2:01 PM), https://www.thedailybeast.com/whatever-happened-to-the-transgender-tipping-point.

people.[3] With access to marriage apparently resolved by *Obergefell v. Hodges*, attention was freed up to focus on new problems and fresh attempts at legal reform.[4] At the same time, this new liberty of focus generated new risks and battles.

The label of the "transgender tipping point" is certainly true in a sense. The visibility of transgender people vastly expanded over the past decade, resulting in an uptick and expansion of activism, theory, and media that demanded more nuanced and realistic understandings of transgender life—not as deviant, clownish, or shameful, but as a worthy and complex part of the tapestry of humanity.[5] However, as Michel Foucault observed in a different context, "visibility is a trap."[6] Increased visibility also brings increased scrutiny.[7] In this context, increased scrutiny manifested in various executive and legislative branch attacks by right-wing political actors as well as certain segments of feminist activists.[8]

One form of attack that generates abundant media fervor is banning transgender athletes, particularly transgender girls, from participating in women's sports because of their assigned sex at birth.[9] In Idaho, for example, the "Fairness in Women's Sports Act" created a variety of standards around participation in school sports for girls.[10] Teams or competitions designated for women or girls were unilaterally unavailable for those assigned male at birth ("AMAB"), while the inverse was not true.[11] The Act also established a private cause of action for any student "deprived of an athletic opportunity" by a violation of the preceding section, and allowed an unidentified class of persons to dispute a student's sex and verify

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3. Leonore F. Carpenter, *Getting Queer Priorities Straight: How Direct Legal Services Can Democratize Issue Prioritization in the LGBT Rights Movement*, 17 U. PA. J.L. & SOC. CHANGE 107, 126–27 (2014).

4. Obergefell v. Hodges, 576 U.S. 644 (2015).

5. June Thomas, *Great News: More Americans Personally Know Someone Who's Transgender*, SLATE (Mar. 31, 2016, 2:06 PM), https://slate.com/humaninterest /2016/03/more-americans-know-someone-whos-transgender-thats-important.html.

6. MICHEL FOUCAULT, DISCIPLINE AND PUNISH 200 (Alan Sheridan trans., Vintage Books 2d ed. 1995) (1977).

7. *Id.*

8. Heron Greenesmith, *A Room of Their Own: How Anti-Trans Feminists are Complicit in Christian Right Anti-Trans Advocacy*, POL. RSCH. ASSOC. (July 14, 2020), https:// www.politicalresearch.org/2020/07/14/room-their-own.

9. David Chen, *Transgender Athletes Face Bans from Girls' Sports in 10 U.S. States*, N.Y. TIMES (Oct. 28, 2021), https://www.nytimes.com/article/transgender-athlete-ban.html.

10. IDAHO CODE § 33-6202 (2021).

11. *Id.*; IDAHO CODE § 33-6203 (2021).

their genitalia, hormone profile, and birth certificate.[12] These three elements—barring transgender girls from participating in girls' sports, establishing a private cause of action, and establishing a sex verification process—are the core components of existing athletic bans in many states.[13]

Transgender participation in sports also generated two major lawsuits that illustrate how the issue ballooned into an apparent culture war.[14] *Hecox v. Little* and *Soule v. Connecticut Association of Schools, Inc.* arose through nearly opposite circumstances.[15] *Hecox* was a lawsuit by a coalition of transgender and cisgender female athletes challenging the aforementioned Idaho Act.[16] *Soule*, by contrast, was brought on behalf of cisgender female students by their parents, challenging the district's permittance of transgender girls' participation in women's sports divisions on the grounds that it produces a competitive disadvantage and violates Title IX of the Education Amendments of 1972.[17] The plaintiffs in *Soule* were motivated largely by the success of two transgender girls in track.[18] Both cases are currently awaiting appeal after being resolved—by preliminary injunction and motion to dismiss, respectively—in favor of the more "trans-friendly" side.[19] These two cases, in conjunction with the legislative bans, are at the center of the political and legal debates around transgender rights in sports.[20]

Focusing on youth athletics might seem like an oddly hyper-specific method for repressing transgender and queer people, since adolescent transgender athletes are presumably a small proportion of an already comparatively small population.[21] But curiously, these

12. IDAHO CODE §§ 33-6205, 33-6203 (2021).

13. *See, e.g.*, FLA. STAT. § 1006.205 (2021) (incorporating all three components); W. VA. CODE § 18-2-25d (2021) (establishing private cause of action and determining participation in athletics based on assigned sex); TENN. CODE. ANN. § 49-6-310 (2021) (determining participation in athletics based on assigned sex).

14. Hecox v. Little, 479 F. Supp. 3d 930, 944 (D. Idaho 2020); Soule by Stanescu v. Connecticut Ass'n of Sch., Inc., No. 3:20-CV-00201 (RNC), 2021 WL 1617206 (D. Conn. Apr. 25, 2021).

15. *Hecox*, 479 F. Supp. 3d at 931.

16. *Id.* at 944.

17. *Soule*, 2021 WL 1617206, at *1–2.

18. *Id.*

19. *The Coordinated Attack on Trans Student Athletes,* AM. C.L. UNION (Feb. 26, 2021), https://scholarworks.wm.edu/cgi/viewcontent.cgi?article=2677&context=honorstheses.

20. *Id.*

21. *Id.*

bans on transgender women from participating in women's sports proved radically more successful in legislatures than other similar legislation focused on transgender people.[22] For instance, the athletic bans found wider reach than bans on gender-affirming health care for adolescents, discrimination in the use of public facilities like bathrooms or locker rooms, and explicit exclusion from insurance coverage for particular kinds of gender-affirming care.[23]

This legislative success is especially clear in 2021, which saw a flood of anti-transgender legislation in which the sports bans outperformed similarly conceived bills.[24] For example, although a ban on transgender youth from accessing gender-affirming health care prevailed despite a gubernatorial veto in Arkansas,[25] similar bills died in committee in a variety of other states,[26] and Arkansas' widely criticized statute is the only one currently codified.[27] By contrast, athletic bans exist in nine states, including Arkansas, eight of which were first proposed and then quickly passed in 2021.[28] Additionally, even states without this type of legislation receive guidance from state athletics associations that often set discriminatory requirements for transgender participation, whether that be a surgery requirement or a birth certificate

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22. Katelyn Burns, *The Massive Republican Push to Ban Trans Athletes, Explained*, VOX (Mar. 26, 2021, 12:51 PM), https://www.vox.com/identities/22334014/trans-athletes-bills-explained.

23. *See generally Snapshot: LGBTQ Equality by State – Gender Identity*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps (Feb. 15, 2021).

24. Priya Krishnakumar, *This Record-Breaking Year for Anti-Transgender Legislation Would Affect Minors the Most*, CNN (Apr. 15, 2021, 9:46 AM), https://www.cnn.com/2021/04/15/politics/anti-transgender-legislation-2021/index.html.

25. Samantha Schmidt, *Arkansas Legislators Pass Ban on Transgender Medical Treatments for Youths, Overriding Governor's Veto*, WASH. POST (Apr. 6, 2021, 6:37 PM), https://www.washingtonpost.com/dc-md-va/2021/04/06/arkansas-transgender-ban-override-veto.

26. *Outlawing Trans Youth: State Legislatures and the Battle over Gender-Affirming Healthcare for Minors*, 134 HARV. L. REV. 2163, 2164 (2021).

27. *Compare* ARK. CODE. ANN. § 20-9-1502 (2021), *with, e.g.*, Vulnerable Child Compassion and Protection Act, S.B. 10 (Ala. 2021) (died in the House), *and* Youth Health Protection Act, S.B. 514 (N.C. 2021) (failed to advance through the legislature).

28. IDAHO CODE §§ 33-6202, 6203, 6205 (2021); MONT. CODE ANN. §§ 20-7-1305–1307 (2021); FLA. STAT. § 1006.205 (2021); W. VA. CODE § 18-2-25d (2021); TENN. CODE. ANN. § 49-6-310 (2021); ARK. CODE. ANN. § 16-129-104 (2021); MISS. CODE ANN. § 37-97-1 (2021); ALA. CODE § 16-1-52 (2022). Mississippi has yet to categorize its ban within the statutory code. South Dakota promulgated its policy through executive order.

change.[29] This is something of a curiosity: what is it about sports and transgender people, particularly transgender women and girls, that made these bills a success where similarly minded legislation failed?

Certain liberal critiques of the athletics bans fail to grasp their fundamental purpose.[30] For instance, some point out that there are not actually any "out" transgender women attempting to compete with cisgender women in the jurisdictions that pass these bills, while others observe that transfeminine athletes do not make up a large enough portion of the general population to actually put cisgender women at risk of losing out en masse to their transgender counterparts.[31] Both approaches regard the bans on transgender athleticism as forms of distraction or obfuscation, a manufactured response to a non-issue.[32]

There may be a certain truth to this assessment; yet this attitude implicitly suggests that if transgender women were a larger and more prevalent population, either generally or in the sports world, then the fearmongering and doomsaying of conservatives and trans-antagonistic feminists would actually be valid and justified. A trans-feminist perspective is therefore necessary to unpack the full implications and problems of these laws.[33]

Through the trans-feminist lens, legislative attacks on transgender athletes are part of a joint project between conservative evangelicals and trans-hostile feminists to regain control over the

29. Chris Mosier, *High School Policies*, TRANSATHLETE, https://www.transathlete.com/k-12 (last visited Mar. 18, 2022).

30. Ashley Schwartz-Lavares, *Trans Women Targeted in Sports Bans, But Are They Really at an Advantage?*, ABC NEWS (Apr. 7, 2021, 7:13 PM), https://abcnews.go.com/US/trans-women-targeted-sports-bans-advantage/story?id=76909090.

31. *See, e.g.*, Jeremy W. Peters, *Why Transgender Girls are Suddenly the G.O.P.'s Culture-War Focus*, N.Y. TIMES (May 3, 2021), https://www.nytimes.com/2021/03/29/us/politics/transgender-girls-sports.html; David Crary & Lindsay Whitehurst, *Lawmakers Can't Cite Local Examples of Trans Girls in Sports*, ASSOCIATED PRESS (Mar. 3, 2021), https://apnews.com/article/lawmakers-unable-to-cite-local-trans-girls-sports; Zoe Christen Jones, *The Bans on Transgender Athletes – 6 Facts*, CBS NEWS (June 7, 2021, 1:00 PM), https://www.cbsnews.com/news/transgender-athlete-bans-facts.

32. Jones, *supra* note 31.

33. The core principles of trans-feminist philosophy are bodily autonomy and the social mutability and historical flexibility of gender and sex. Talia Mae Bettcher, *Trans Feminism: Recent Philosophical Developments*, PHIL. COMPASS, at 1 (2017). These two principles are extended into a variety of different political and epistemological commitments. For primers or examples of trans-feminist philosophy, see Talia Mae Bettcher, *Full-Frontal Morality: The Naked Truth About Gender,* 27 HYPATIA 319, 319 (2011) [hereinafter *Full-Frontal Morality*]; THE TRANSGENDER STUD. READER (Susan Stryker & Stephen Whittle eds., 2006); C. RILEY SNORTON, BLACK ON BOTH SIDES: A RACIAL HISTORY OF TRANS IDENTITY (2017); JUDITH BUTLER, GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY (1990).

social meaning of gender and sex.[34] Whether the bills actually impact a substantial amount of real people or not is something of a tangential issue because the broader but more indirect social consequences are ultimately more important.[35] Sports are a lingering area where assigned sex is believed to have a non-arbitrary and non-socially contingent effect on one's personhood and capabilities.[36] Protecting that belief is vital for protecting the whole artifice of gender.[37] What makes the transgender sports bans particularly successful is that they shore up this ideological project with minimal blowback.[38]

In Section II, this Comment reviews basic trans-feminist definitions and assumptions that are critical in order to understand the substantive character of the arguments. Section III identifies the main arguments of the anti-LGBTQ+ political project as expressions of three tendencies: delineating cisgender women as inferior, painting transgender women as deviant, and affirming the worldview of the patriarchal family. It achieves this through a blend of case and statutory analysis and political-philosophical critique, drawing influence from gender studies. Finally, in Section IV, this Comment looks to the future of equitable sports policy and LGBTQ+ liberation activism.

II. BACKGROUND AND TERMINOLOGY

Attitudes towards transgender rights and liberation are highly contingent on one's background assumptions about what gender is within a given society.[39] As such, it is prudent to clarify the

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34. *See* Katelyn Burns, *The Rise of Anti-Trans "Radical" Feminists, Explained*, VOX (Sept. 5, 2019, 11:57 AM), https://www.vox.com/identities/2019/9/5/20840101/terfs-radical-feminists-gender-critical; *see also* Hélène Barthélemy, *Christian Right Tips to Fight Transgender Rights: Separate the T from the LGB*, S. POVERTY L. CTR. (Oct. 23, 2017), https://www.splcenter.org/hatewatch/2017/10/23/christian-right-tips-fight-transgender-rights-separate-t-lgb.

35. Peter Hayes, *Transgender Athlete Fight to Heat Up as Legislatures Return*, BLOOMBERG L. (Oct. 7, 2020, 4:01 AM), https://news.bloomberglaw.com/us-law-week/transgender-athlete-fight-to-heat-up-as-legislatures-return.

36. *See, e.g.*, Raymond Grant, Note, *Equal Rights Amendment v. Title IX: Should Male-Student Athletes Be Allowed to Compete on Female Athletic Teams?*, 47 SUFFOLK U. L. REV. 845, 859 n.28 (2014).

37. Birgit Braumüller et al., *Gender Identities in Organized Sports—Athletes' Experiences and Organizational Strategies of Inclusion*, 5 FRONTIERS IN SOCIO. 1, 3 (2020).

38. Peters, *supra* note 31.

39. Zawn Villines, *What to Know About Gender Bias in Healthcare*, MED. NEWS TODAY (Oct. 25, 2021), https://www.medicalnewstoday.com/articles/gender-bias-in-healthcare.

underlying assumptions of this Comment as well as the terminological decisions that have gone into it.

Traditionally, the terms "sex" and "gender" are taken to be synonymous.[40] Talia Bettcher describes this worldview as "the natural attitude," a form of common sense that under scrutiny turns out to be neither truly common nor particularly sensible.[41] The natural attitude, which might also be labeled biological essentialism, holds that "two (mutually exclusive) sexes exist, every human being is 'naturally' one or the other, and exceptions to this division may be dismissed as 'unnatural.'"[42] This appeal to nature is not merely descriptive but a form of normative "moral order" that structures how bodies are understood and treated.[43]

Feminist theory and activism in the twentieth century inaugurated a distinction between gender and sex.[44] This distinction is a conceptual tool which argues that sex is a dimorphic set of observable biological qualities, including reproductive organs, chromosomes, and hormone profiles.[45] Gender, on the other hand, is a constructed phenomenon, the set of cultural and sociopolitical assumptions imposed on the aforementioned biological differences, often referred to within feminist literature as "sexual difference."[46] The sex-gender distinction's utility for feminist activism is that it undermined an essential feature of patriarchal thought and social practice: that women were subordinate because of their bodies and not because of the values and norms societies impose on those bodies.[47]

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40. Lauran Neergaard, *Science Says: Sex and Gender Aren't the Same*, AP NEWS (Oct. 23, 2018), https://apnews.com/article/politics-science-health-gender-identity-biology.

41. *Full-Frontal Morality*, *supra* note 33, at 320.

42. *Id.*; *see also* Robin Dembroff, *Beyond Binary: Genderqueer as Critical Gender Kind,* 20 PHILOSOPHERS' IMPRINT 1, 15 (2020) (identifying the four axes of dominant Western gender ideology: binary, biology, teleology, and hierarchy).

43. *Full-Frontal Morality*, *supra* note 33, at 320.

44. Debra Bergoffen & Megan Burke, *Simone de Beauvoir*, STAN. ENCYC. PHIL. (Mar. 27, 2020), https://plato.stanford.edu/entries/beauvoir/#SecoSexWomaOthe ("The most famous line of *The Second Sex* [by Simone de Beauvoir] is credited by many as alerting us to the sex-gender distinction. Whether or not Beauvoir understood herself to be inaugurating this distinction, whether or not she followed this distinction to its logical/radical conclusions, or whether or not radical conclusions are justified are currently matters of feminist debate.").

45. SALLY HASLANGER, RESISTING REALITY: SOCIAL CONSTRUCTION AND SOCIAL CRITIQUE 184 (2012).

46. *Id.*

47. Kathleen Lennon, *Feminist Perspectives on the Body*, STAN. ENCYC. PHIL. (Sept. 21, 2019), https://plato.stanford.edu/entries/feminist-body.

Other thinkers and actors would go even further and argue that sexual difference itself is ideological or normative, since assigning a body a "sex" is also imposing a gendered value onto it, and some bodies—particularly those with intersex characteristics—do not meet the dimorphic standard laid out within the sex-gender distinction.[48] In other words, sex is not objective while gender is constructed; both are products of human meaning-making, and their "objectivity" only emerges within a given social landscape.[49] It is this latter assumption, that "sexual difference" is not above epistemological critique as a category, that guides this Comment.

Those who live and understand themselves as basically fitting to the gender socially associated with the sex they were assigned at birth are contemporarily referred to as "cisgender."[50] However, some people find themselves incapable of adjusting to the "natural attitude" and its moral order.[51] "Transgender" is a contemporary umbrella term for people whose gender expression conflicts with the predominant values and traits associated with assigned sex by the society in which they live, and who understand themselves as such.[52] This recognition of self-consciousness is critical to separate out transgender existence from gender nonconformity—a sometimes related, but non-identical, phenomenon.[53] Likewise, defining "transgender" as a particular way of life within a highly gendered society disrupts the prevailing psycho-medical model of transgender life, which treats transgender existence as a medical aberration to be solved through "treatment."[54] Instead, this definition embraces a more complex

48. *E.g.*, JUDITH BUTLER, GENDER TROUBLE 3 (1990).

49. *Gender and Health*, WORLD HEALTH ORG., https://www.who.int/healthtopics/gender#tab=tab_1 (last visited Mar. 5, 2022).

50. *Cisgender*, *MERRIAM-WEBSTER.COM*, https://www.merriam-webster.com/dictionary/cisgender (last visited Mar. 5, 2022).

51. *See* Talia Bettcher, *Feminist Perspectives on Trans Issues*, STAN. ENCYC. PHIL. (Sept. 21, 2020), https://plato.stanford.edu/entries/feminism-trans.

52. *Transgender People, Gender Identity and Gender Expression*, AM. PSYCH. ASS'N (2014), https://www.apa.org/topics/lgbtq/transgender.

53. *Id.*

54. Aviva Stahl, *Prisoners, Doctors, and the Battle Over Trans Medical Care*, WIRED (July 8, 2021), https://www.wired.com/story/inmates-doctors-battle-over-transgender-medical- care.

sociological account that considers a broader range of social factors and lived experiences.[55]

Much of transgender existence is tethered to forms of medical pathology.[56] The most famous of which is "gender dysphoria," a psychiatric diagnosis of suffering or discomfort with one's assigned sex.[57] The medical model results in common expectations that all trans people must undergo the same kinds of hormone treatments and surgeries and must explain or understand themselves in identical terms or narratives.[58] This model further assumes that dysphoria is a purely internal process rather than a dialogue with the external qualities of a highly gendered, patriarchal society.[59]

Yet, actual transgender life does not, and need not, comply with these sorts of reductive narratives, and transgender people might pursue a more limited biomedical intervention or avoid biomedicine altogether.[60] To be transgender is a social status within a particular type of society, not a disease state.[61] This is particularly necessary to remember in the context of the sports industry, which places a variety of medical gatekeepers in the path of transgender and intersex athletes and often demands that they undergo hormone therapy, invasive surgeries, or other forms of sex verification in order to compete with dignity.[62]

This Comment frequently uses the term "transfeminine" as an adjective to describe people who were assigned male at birth but live and understand themselves as nonbinary or as trans women. While this term has certain limitations at capturing the full range of experiences and gender expression within that group of people, the

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55. *See* Lloyd Minor, *Nature, Nurture, Sex, and Gender*, STAN. MED., https://stanmed.stanford.edu/2017spring/sex-gender-nature-and-nurture-stanford-school-of-medicine-dean-lloyd-minor.html# (last visited Mar. 5, 2022).

56. *See, e.g.*, Guy T'Sjoen et al., *Endocrinology of Transgender Medicine*, 40 ENDOCRINE REV. 97, 97, 112–13 (2019).

57. Robin Dembroff, *Moving Beyond Mismatch*, 19 AM. J. BIOETHICS 60, 60 (2019).

58. Sandy Stone, *The Empire Strikes Back: A Posttranssexual Manifesto*, *in* BODY GUARDS: THE CULTURAL POLITICS OF GENDER AMBIGUITY 221 (1991).

59. Austin H. Johnson, *Rejecting, Reframing, and Reintroducing: Trans People's Strategic Engagement with the Medicalization of Gender Dysphoria*, 41 SOCIO. HEALTH & ILLNESS 517, 517 (2019).

60. Stone, *supra* note 58.

61. Lisa R. Miller & Eric Anthony Grollman, *The Social Costs of Gender Nonconformity for Transgender Adults: Implications for Discrimination and Health*, 30 SOCIO. F. 809, 809 (2015).

62. *See generally* Florence Ashley, *Gatekeeping Hormone Replacement Therapy for Transgender Patients is Dehumanising*, 45 J. MED. ETHICS 1 (2019).

term is less unwieldy than other descriptors and most accurately captures the kinds of people targeted by athletics bans.[63]

These various definitional considerations are worth discussing because one function of the athletics bans and their associated rhetoric is to flatten transgender experience in a variety of ways.[64] That kind of flattening, likewise, is often deployed in well-intentioned attempts to defend the rights and interests of transgender people.[65] The goal of the above discussion, however, is to consider the broad diversity among transgender people and use that diversity to show the ultimate dangers of the anti-LGBTQ legal coalition.

III. ANALYSIS

As argued elsewhere, there are reasons—like promoting transgender and queer participation in athletics—to support the participation of transgender girls in sports, regardless of whether or not the anti-LGBTQ coalition is correct in its arguments.[66] However, the function of this Comment is not a review of relevant endocrinological science in order to disprove disagreeable claims about transgender athletes.[67] Nor does this Comment accept the basic truth of the claims for the sake of argument while offering alternative conclusions and implications.[68] Instead, the goal here is to clarify why the claims are being made in the first place.

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63. *See, e.g.*, Ali Durham Greey, *'It's Just Safer When I Don't Go There': Trans People's Locker Room Membership and Participation in Physical Activity*, 2022 J. HOMOSEXUALITY 1, 1.

64. *See, e.g.*, Isabel Lohman, *Farragut Student Files Federal Lawsuit to Overturn Tennessee's Transgender Sports Law*, TENNESSEAN (Nov. 4, 2021, 4:23 PM), https://www.tennessean.com/story/sports/high-school/2021/11/04/tennessee-transgender-sports-law-farragut-student-sues-overturn/6281150001 ("To have the legislature pass a law that singled out me and kids like me to keep us from being part of a team, that crushed me, it hurt very much. I just want to play, like any other kid.").

65. *E.g.*, Meghan Mangrum, *Metro Nashville School Board Refuses to Update Policy Under State's New Transgender Student-Athlete Ban*, TENNESSEAN (Nov. 29, 2021, 7:07 AM), https://www.tennessean.com/story/news/education/2021/11/29/nashville-school-board-refuses-update-policy-under-transgender-athlete-ban/6365041001 (declining to update school district policy in order to defend rights of transgender students).

66. *See* Seth Barry-Hinton, *Transgender Women in Sports: Sexual Difference and Fairness*, WAKE FOREST J.L. & POL'Y: DE NOVO (Dec. 18, 2020), https://wfulawpolicyjournal.com/2020/12/18/transgender-women-in-sports-sexual-difference-and-fairness.

67. *See, e.g.*, Roslyn Kerr & C. Obel, *Reassembling Sex: Reconsidering Sex Segregation Policies in Sport*, 10 INT'L J. SPORT POL'Y & POL. 305, 305 (2018).

68. *See* Barry-Hinton, *supra* note 66.

The attacks on transgender athletes, and the justifications that are proffered as an explanation, serve a variety of social and ideological functions for the anti-LGBTQ+ coalition at this particular historical moment.[69] First, these bills perpetuate the widely accepted notion that people assigned female at birth ("AFAB") are innately physically weaker and, by extension, more vulnerable and inferior.[70] Second, these attacks continue a political program also embodied by bathroom bills and youth health care bans of positioning transgender people as deviants and thereby unworthy of participation in public life.[71] Third, upholding myths of "male" superiority and "female" inferiority reaffirms an ideology called reproductive futurism, a worldview that seeks to protect abstract ideas of "Children" (rather than specific, extant children) within the family unit in order to preserve a distinctly patriarchal-capitalist society and civilization.[72] This ideology is the unifying characteristic of the anti-LGBTQ+ worldview towards gender and sex,[73] and thus has similar explanatory power when it comes to other queer and women's liberation issues.

There are three different lines of social and legal argument offered to justify bans on transgender, and specifically transfeminine, athletes from competing in the appropriate gender division.[74] The first argument expresses concerns about privacy and personal safety, particularly safety from malicious actors.[75] This line of reasoning is the weakest—it fails to appear in the text of many of the athletics bans at all, unlike the other two arguments.[76] In many ways, this concern is a repackaging of other panics and anxieties about transgender people, as well as gay people, existing and participating in public life.[77]

The second and more superficially persuasive argument is that allowing transfeminine athletes to participate in women's

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69. *Id.*

70. *Id.*

71. *See generally* JAY JAXEN JONAH, YOUTHREX RSCH. & EVALUATION EXCH., TRANS YOUTH AND THE RIGHT TO ACCESS PUBLIC WASHROOMS (2016), https://www.issuelab.org/resources /33746/33746.pdf.

72. *See generally* LEE EDELMAN, NO FUTURE: QUEER THEORY AND THE DEATH DRIVE (2004).

73. *Id.*

74. *See* Jon Pike, *Safety, Fairness, and Inclusion: Transgender Athletes and the Essence of Rugby*, 48 J. PHIL. SPORT 155 (2020); Barry-Hinton, *supra* note 66.

75. *See, e.g.*, Pike, *supra* note 74.

76. *See, e.g.*, W. VA. CODE § 18-2-25D (2022).

77. *See* Jonah, *supra* note 71.

sports undermines principles of fairness and substantive equality, due to trans women's supposed natural superiority in physical ability compared to cisgender women (regardless of current hormone profile, individual skill and training, or specific sport).[78] In pursuing this argument, conservatives essentially imply that transgender women and cisgender women's interests are primarily conflicting, rather than aligned.[79]

The third line of reasoning criticizes the supposed redefinition of "sex" to encompass more contemporary understandings of gender in a way that purportedly collides with the statutory intent of Title IX.[80] This argument is typified by the conservative backlash to Justice Gorsuch's majority opinion in *Bostock v. Clayton County*.[81] Each of these legal arguments contain serious weaknesses, but they also betray some of the core intentions behind the attacks on transgender athletes and why that class of people is perceived as a viable target for the anti-queer ideological project.[82]

A. The Myths of Female Inferiority and the Ideological Function of Sex-Segregated Sport

The belief that AFAB people are naturally and metaphysically predestined to be biologically weaker, slower, and fundamentally less capable in sports and other physical activities compared to their AMAB counterparts is arguably the core thesis of the bans on transgender athletes from sex-segregated competition.[83] For example, one attorney with the Alliance Defending Freedom ("ADF"), a Christian conservative organization representing the plaintiffs in *Soule v. Connecticut*, stated that AMAB people unilaterally and innately have a variety of physiological

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78. *See* Barry-Hinton, *supra* note 66.

79. *Id.*

80. *Id.*

81. *See, e.g.*, Rena M. Lindevaldsen, Bostock v. Clayton County*: A Pirate Ship Sailing Under a Textualist Flag*, 33 REGENT U. L. REV. 39, 69–70 (2021). Author's note: Lindevaldsen is an attorney with Liberty Counsel, an evangelical legal nonprofit. She is currently being sued by the Southern Poverty Law Center for allegedly helping her ex-lesbian-turned-evangelical client kidnap the client's child to Nicaragua in order to avoid giving custody to the child's other mother. Interpret that as you will.

82. *See* Barry-Hinton, *supra* note 66.

83. *See, e.g.*, IDAHO CODE § 33-6202 (2021); *see also* Alistair Magowan, *Transgender Women in Sport: Are They Really a 'Threat' to Female Sport?*, BBC (Dec. 18, 2018), https://www.bbc.com/sport/46453958.

advantages, including "greater explosive power."[84] The argument goes that sexual difference is clear-cut and leads directly to athletic advantage for AMAB people and disadvantage for AFAB people.[85] Permitting transfeminine athletes to participate alongside cisgender women would, therefore, rob the latter of their ability to excel in sports because the former would naturally rise to the top.[86]

Yet, the internal logic of this claim is highly spurious. Examining its inner workings suggests that the real purpose of the athletics bans is to maintain an association between being AFAB and being physically weaker, vulnerable, and in need of protection by men from gender deviance.[87] Men's sports are constructed as "categorically superior," thus, making it an already highly volatile ideological landscape.[88] Of course, men's sports were also designed with men in mind.[89]

Yet, at least part of the "gender gap" in sports and physicality is not merely biological, but social.[90] Iris Marion Young, in her work of feminist phenomenology entitled "Throwing Like a Girl," asserts that one explanation of the differences between cisgender men and cisgender women is that the latter are objectified and disempowered through stereotypes and cultural norms imposed by a patriarchal society.[91] When a person is told from birth that her body is more fragile, more vulnerable, and overall weaker than others, those social messages—received from family, education, and politics—can be internalized as inescapable biological reality and affect the way that she manipulates her body.[92]

This offers some explanation of cisgender women who reject the idea that they have common interests with transgender women: "the woman lives her space as confined and enclosed around her at

84. Aallyah Wright, *Families Say Athletic Bans Would Exact Toll on Rural Transgender Youth*, PEW (Mar. 24, 2021), https://www.pewtrusts.org/en/research-andanalysis/blogs/stateline/2021/03/24/families-say-athletic-bans-would-exact-toll-on-rural-transgender-youth.

85. *See id.*

86. *See id.*

87. *See id.*

88. Erin E. Buzuvis, *Transgender Student-Athletes and Sex-Segregated Sport: Developing Policies of Inclusion for Intercollegiate and Interscholastic Ethics*, 21 SETON HALL J. SPORTS & ENT. L. 1, 10 (2011).

89. *See id.*

90. *See* Iris Marion Young, *Throwing Like a Girl: A Phenomenology of Feminine Body Comportment Motility and Spatiality*, 3 HUM. STUD. 137, 141–53 (1980).

91. *See id.*

92. *See id.*

least in part as projecting some small area in which she can exist as a free subject."[93] When oppression is seen as a fact of biological reality, how can it be resisted—and who in their right mind would want to adopt the signifiers of that biological reality? Yet, transgender women often try to comport themselves in similar ways that cisgender women do to gain social acceptance or "pass," prompted by social convention to adopt forms of disempowerment in order to pass unnoticed and unhindered through a misogynistic society.[94] In other words, both cis and trans women are subjected to misogynistic social forces that affect their bodily comportment.[95]

Anne Fausto-Sterling makes a similar argument through the lens of biology rather than political philosophy and phenomenology.[96] One common claim by the anti-LGBTQ coalition, for instance, is that AMAB people's "denser bones" puts them at a distinct athletic advantage and that this is a product of *being* AMAB.[97] Fausto-Sterling, however, observes that a variety of things contribute to bone density—including a society that encourages or coerces sex-segregated forms of labor and imposes sex-segregated standards of diet and exercise on preadolescent or adolescent AFAB children.[98] These kinds of double standards can shape physiology on an individual and collective level.[99] Thus, while complex physiological differences between a variety of sexes do exist, the cultivation of those differences and the imposition of values like "weakness" or "strength" onto those differences is social.[100]

The ideas put forward by Young and Fausto-Sterling—that the physiological differences resulting from so-called "sexual difference" are at least partly socially contingent and influenced by repressive gender norms—are further affirmed when looking at the history of sex-segregated sport.[101] There is a certain curiosity to the

93. *Id.* at 154.

94. *See* Katie Kirkland, *Feminist Aims and a Trans-Inclusive Definition of "Woman,"* 5 FEMINIST PHIL. Q. 1, 19 (2019).

95. *See id.*

96. Anne Fausto-Sterling, *The Bare Bones of Sex: Part 1 – Sex and Gender*, 30 SIGNS 1491, 1491 (2005).

97. Ray Hacke, *Girls Will Be Boys and Boys Will Be Girls: The Emergence of the Transgender Athlete*, 25 SPORTS L.J. 57, 61 (2018).

98. Fausto-Sterling, *supra* note 96, at 1514–15.

99. *Id.*

100. Not just the imposition of values onto sexual difference, but the concept of sexual difference itself is a form of valuation.

101. Buzuvis, *supra* note 88, at 4.

notion that sex-segregated sport was a kind of symbolic or material victory for women.[102] In reality, the creation of sex-segregated sport was not introduced as a form of fair play for cisgender women, but instead was dictated and directed by men who wanted to prevent women from adopting "masculine traits" and keep men from being "feminized" through mutual association of the sexes.[103] The ideal was not fairness of competition but separating the sexes to cultivate their respective gendered virtues—what the legal sphere usually calls sex-stereotypes.[104] This cultivation played out on the very structure of the field; certain sports like softball and six-player basketball were invented entirely for the sake of sex-segregation, the emphasis was on leisure and fitness rather than competition, and the attire was more restrictive and "modest."[105] There is likely continuity between this history of sex-segregated sport as a form of arbitrary patriarchal power and the contemporary attempt to assert control over transgender athletes.

The assumption that sex-segregation was created for women's benefit seems partly like a conflation of Title IX, which *does* have women's educational and material interests in mind and seeks to protect their right to sport, with the history of sex-segregated sport, which did not.[106] In fact, some school districts even argued that AFAB people's supposedly immutable and predetermined physical weakness should preclude them from participating in sport altogether or disallow them from participating on all-male sports teams where no alternatives were available—arguments that did not often hold up to judicial scrutiny after Title IX.[107] In fact, the reason that these defenses against

102. *See, e.g.*, Brianna January & Brennan Suen, *As Trans Americans Face Record Violence, Right-Wing Media Has Been Flooded with Stories Attacking Trans Athletes*, MEDIA MATTERS FOR AM. (Oct. 30, 2019, 10:07 AM), https://www.mediamatters.org/facebook/trans-americans-face-record-violence-right-wing-media-have-been-flooded-stories-attacking.

103. Buzuvis, *supra* note 88, at 4.

104. *Id.*

105. *Id.*; *see also* EILEEN MCDONAGH & LAURA PAPPANO, PLAYING WITH THE BOYS: WHY SEPARATE IS NOT EQUAL IN SPORT 167–77 (2009).

106. *Compare* Julie Tamerler, *Transgender Athletes and Title IX: An Uncertain Future*, 27 JEFFREY S. MOORAD SPORTS L.J. 139 (2021) (arguing that Title IX allowed the rapid expansion of women's educational opportunities), *and* Erin E. Buzuvis, *Challenging Gender in Single-Sex Spaces: Lessons from a Feminist Softball League*, 80 L. & CONTEMP. PROBS. 155, 160 (2017) (explaining that many early sports programs for women were paternalistically constructed to focus on "leisure" sports and ensure participants were untainted by masculinity).

107. Saint v. Neb. Sch. Activities Ass'n, 684 F. Supp. 626, 629 (D. Neb. 1988); Lantz v. Ambach, 620 F. Supp. 663, 665 (S.D.N.Y. 1985); *see also* Scott Skinner-Thompson & Ilona

discrimination claims failed is because they relied on broad generalizations about physical differences between boys and girls without consideration of the individual and how they might deviate from an average person.[108] The parallels to transgender women are clear.

It is also worth observing that, of the two sex-segregated classes of sport, women's divisions and teams are more heavily gatekept than men's divisions.[109] Many of the athletics bans have explicit carveouts for AFAB people to participate in men's teams or competitions.[110] It is similarly clear from the character of the lawsuits and surrounding rhetoric that the main targets of the bans are transgender girls who want to participate in girls' and women's sports.[111] If the belief in sex-segregated sport was purely justified on safety and fairness concerns produced by sexual difference, and not transphobic and misogynist attempts to control a narrative, there would likely be more concern about transgender boys and men participating and competing in men's divisions.[112] Yet, this talking point has remained conspicuously absent.[113] In fact, when transgender boys and men who participate in sports are subjected to similar criticism, it is not on the grounds of their safety but seemingly on the grounds that cisgender boys and men are discomforted by the thought of losing to transgender competitors.[114]

These myriad contradictions all point to an effort to preserve a status quo rather than a genuine concern about fairness. That status quo is one in which "womanhood" is associated with weakness and inferiority.[115] Transgender women do not even

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M. Turner, *Title IX's Protections for Transgender Student Athletes*, 28 WIS. J.L. GENDER & SOC'Y 271, 274–76 (2013).

108. Buzuvis, *supra* note 88, at 7.

109. *See* Hecox v. Little, 479 F. Supp. 3d 930, 944 (D. Idaho 2020).

110. *Id.*

111. Buzuvis, *supra* note 88, at 14–15.

112. Tamerler, *supra* note 106, at 153–54.

113. *See, e.g.*, Rebekah Harding, *Mack Beggs is Still Grappling with Ignorance*, MEN'S HEALTH (Sept. 16, 2020), https://www.menshealth.com/trending-news/a33984383/mack-beggs-transgender-wrestler-interview; Samuel Braslow, *Boxer Patricio Manuel, a Transgender Pioneer, is Still Looking for His Next Fight*, ESPN (June 22, 2021), https://www.espn.com/boxing/story/_/id/31662608/boxer-patricio-manuel-transgender-pioneer-looking-next-fight; *see also* Buzuvis, *supra* note 88, at 7.

114. Harding, *supra* note 113; Braslow, *supra* note 113; *see also* Buzuvis, *supra* note 88, at 7.

115. Susan M. Cruea, *Changing Ideals of Womanhood During the Nineteenth-Century Woman Movement*, 2005 BOWLING GREEN ST. U. GENERAL STUD. WRITING FAC. PUBL'N 188, 189.

necessarily escape being painted with that brush since some argue that they only seek to participate in women's sports because they could not succeed in men's sports.[116] This illustrates the second goal of the anti-LGBTQ+ coalition: pushing transgender people out of public life.

B. *The Control of Public Space and the Justifications for Sport*

The desire to preclude transgender people from public life is best represented by "Promise to America's Children" ("Promise"), an anti-LGBTQ coalition made up of conservative politicians, the ADF, the Family Policy Alliance, the Heritage Foundation, and other similar right-wing Christian organizations.[117] Promise seeks to promote federal and state legislation in accordance with a variety of principles.[118] Two of those principles are to prevent the provision of gender-affirming health care—like puberty blockers to minors—and to prevent the participation of transgender girls in girls' sports.[119]

The irony, of course, is that by trying to ban or repress gender-affirming health care for transgender girls, these anti-queer forces would force them to undergo the painful, depressing, and alienating experience of a testosterone-based puberty that they actively seek to avoid or delay.[120] Then, they claim that any physiological differences brought by testosterone-based puberty preclude transgender girls from athletic participation unless they are willing to suffer further alienation and repression on a boys'

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116. Alan Dawson, *The Biggest Thing Critics Continually Get Wrong About Transgender Athletes Competing in Women's Sports*, BUS. INSIDER (Apr. 17, 2019), https://www.businessinsider.com/what-critics-get-wrong-about-transgender-athletes-in-womens-sports-2019-4.

117. Heron Greenesmith, *New Anti-Trans Promise*, POL. RSCH. ASSOC. (Feb. 12, 2021), https://www.politicalresearch.org/2021/02/12/new-anti-trans-promise.

118. *Id.*

119. *Id.*

120. *Puberty Blockers for Transgender and Gender-Diverse Youth*, MAYO CLINIC (Feb. 19, 2022),https://www.mayoclinic.org/diseases-conditions/gender-dysphoria/in-depth/pubertal-blockers/art-20459075.

team.[121] As with other forms of misogyny, there is a gendered double bind at work here.[122]

That double bind is a part of what this Comment refers to as the control of public space.[123] Under the anti-LGBTQ+ coalition's legal regime, it would be ideal for transgender people to remain an aberration without legal protections, public visibility, or social success.[124] For instance, institutionalized sport is perceived as an opportunity to rise through the ranks of American class hierarchy.[125] That illustrates both why the issue is so emotionally charged for parents, as in *Soule*, and what the political function or implication of shutting transgender people out of sport is.[126] The message, effectively, is that by precluding transgender people from participating in sports in a dignified way, they are also deprived of all the intrinsic and extrinsic virtues of sport, including financial gain.[127]

Sports do not solely exist for the individual; they are facilitated by our society in part because they serve broad public goals.[128] Some of those goals are noble or commendable: the promotion of virtues like teamwork or self-actualization, the aesthetic appreciation of someone who has mastered or honed a particular skill or talent, and the surpassing of personal

121. Kim Elsesser, *What Makes an Athlete Female? Here's How the Olympics Decide*, FORBES (July 27, 2021), https://www.forbes.com/sites/kimelsesser/2021/07/27/what-makes-an-athlete-female-heres-how-the-olympics-decide/?sh=7b10ea794f9c.

122. For further discussion of the double binds placed on transgender women—and women in general—see Kirkland, *supra* note 94, at 10, 12.

123. *See supra* Section II.B.

124. *See generally* Ramón Spaaij, *Changing People's Lives for the Better? Social Mobility through Sport-Based Intervention Programmes: Opportunities and Constraints*, 10 EUR. J. FOR SPORT & SOC'Y 53, 54 (2013) (stating that "sport provides the poor and underprivileged with a means for upward social mobility through mechanisms such as increased occupational and income status, educational attainment and symbolic capital").

125. *See generally Legislation Affecting LGBTQ Rights Across the Country 2021,* AM. C.L. UNION, http://www.aclu.org/legislation-affecting-lgbtq-rights-across-country-2021 (last visited Mar. 4, 2022) (identifying Anti-Trans Bills that "target transgender people, limit local protections, and allow the use of religion to discriminate").

126. *See* Soule, *supra* note 17, at 1 (exemplifying how parents both pursue and defend against civil actions regarding transgender participation in sports on behalf of their children).

127. *See* Patrick S. Shin, *Sex and Gender Segregation in Competitive Sport: Internal and External Normative Perspectives,* 80 L. & CONTEMP. PROBS. 47, 48 (2017) (explaining that sports offer both "internal" and "external" values to the participant).

128. *See id.* at 49 (stating that competitive sports have an "institutional character" which is intertwined with public rules and social values).

limitations.[129] Some of those goals are more ethically dubious: the promotion of nationalism and other arbitrary group identities, the accumulation of capital by corporate entities, and, of course, the reinforcement of gender hierarchy.[130]

But regardless of whether any particular value of sport is good or bad, what the athletics bans accomplish by shutting transgender people out of sport is depriving them of all these various forms of public life.[131] The message is effectively that transgender people cannot participate in these sorts of public virtues.[132] They are not welcome to rise through the ranks of the American class system or act as representatives of the nation.[133] Nor are they worthy of praise for the hard work and self-actualization that cisgender athletes deserve, as all of their accomplishments are reduced down to biology, hormone therapy, or a psychological defect.[134] They are effectively marked off as "Other."[135] It is the same driving motivation behind discouraging transgender people from using public facilities like bathrooms,[136] or discouraging

129. *See, e.g.*, *id.* at 52 (noting sports values include the "ideals of fair competition, the abilities and traits necessary for excellence, winning and setting records, and general notions of what is 'good for the sport'").

130. *See, e.g.*, *id.* at 55 (explaining how sex segregation in sports has been criticized as enforcing a gender hierarchy by "perpetuat[ing] harmful societal prejudices about the inferior status of women").

131. *See id.* at 48–49 (stating that competitive sports correlate to many areas of public life including public recognition, money, social status, social esteem, well-being, and social mobility).

132. *See generally* Julie Kliegman, *Lawmakers Say Trans Athlete Bans Are About Protecting Women's Sports . . . So Why Are These Three States Targeting Boys and Men?*, SPORTS ILLUSTRATED (Jan. 25, 2022), https://www.si.com/golf-archives/2022/01/25/luc-esquivel-trans-sports-ban-boys-and-mens-teams-daily-cover (quoting Chris Mosier's words: "It's about banning trans people and limiting our access to our everyday activities . . . erasing trans people from public view").

133. *See generally id.* (revealing that "trans people are often overlooked in sports").

134. *See generally id.* (relating the experience of Luc Esquivel, a transgender boy who was banned from playing in high school men's golf in the state of Tennessee, despite his willingness to demonstrate his abilities).

135. *See generally Transgender Exclusion in Sports: Suggested Discussion Points With Resources to Oppose Transgender Exclusion Bills*, AM. PSYCH. ASS'N, https://www.apa.org/pi/lgbt/resources/policy/issues/transgender-exclusion-sports (last visited Feb. 27, 2022) (stating that excluding transgender athletes "can encourage divisiveness and compromise group cohesion, undermining the benefits . . . from team sports").

136. *See generally* Stephen Rushin & Jenny Carroll, *Bathroom Laws as Status Crimes*, 86 FORDHAM L. REV. 1, 7 (2017) (discussing how transgender bathroom bans "effectively criminalize the status of being trans").

transgender adolescents from self-identifying and seeking gender-affirming medical care until it is past a point of no return.[137]

Now that womanhood has been painted with different colors of inferiority—either biological weakness or exclusion from public life and its benefits—the whole project of athletics bans begins to crystallize into something darker.

C. Reproductive Futurism and the Social Meaning of Sex

Reproductive futurism is a concept coined by Lee Edelman that describes a particular way of viewing the world and, particularly, the future.[138] In Edelman's critical account, all politics center around fighting for a better future for children with the idea being that a structure should be built or maintained that can then be transferred like a possessory interest to future generations.[139] All political parties and positions seem to act on behalf of "the Child" and its future, which is not necessarily the future of actual living, breathing children, but a symbolic future in which an idealized, hypothetical child is the beneficiary of any possible political action.[140] As a hollow vessel that can be filled with any possible political content, the Child can stoke moral outrage or justify all kinds of atrocity or discrimination in its defense.[141] Reproductive futurism need not manifest to that level of extremity, of course, but its fundamental attitude towards children is nevertheless dehumanizing and abstract.

In the transgender athletics context, for instance, both sides frame the ban in terms of the devastating effect on children.[142] The anti-LGBTQ coalition claims that "[w]hen we ignore biological

137. *See generally* Eliza Chung, *Trans Adults Deserve a Right to Sue for Gender-Affirming Care Denied at Youth*, 24 CUNY L. REV. 145, 148 (2021) (discussing how "discriminatory animus or a wanton disregard for science that supports gender transition as a valid medical treatment" delays the transition process and causes more complications for the transgender individual).

138. EDELMAN, *supra* note 72, at 2–3.

139. *Id.*

140. Katherine Mason, *"Won't Someone Think of the Children?": Reproductive Futurism and Same-Sex Marriage in US Courts, 2003-2015*, 15 SEXUALITY RSCH. SOC. POL'Y 83, 89 (2018).

141. *See generally id.* (suggesting that the Child has been used as an argument for both promoting and opposing same-sex marriage).

142. *Compare* Wright, *supra* note 84 (stating "barring transgender kids from school sports would jeopardize their mental and physical health and increase their isolation"), *with* Hacke, *supra* note 97, at 129 (stating that "including [transgender female] athletes denies opportunities to, or arguably endangers, biological females").

reality . . . girls get hurt,"[143] and Arkansas' sports ban bears the darkly comical title of "Gender Integrity Reinforcement Legislation For Sports Act" ("GIRLS Act").[144] Defenders of transgender athletes often use similar kinds of language to make their case but extend a more inclusive coverage to the category of "girl."[145]

Reproductive futurism, however, is not a generic political ideology appropriate to all political environments at all times.[146] It is characteristic of the capitalist mode of production, which requires regular reintroduction of new workers into the labor market and therefore, encourages the formation of a private family unit in which a father acts as boss, a mother pulls double duty as human resources department and gestational vessel, and a child serves as property to be shaped and molded into either the role of father or mother: a "productive member of society."[147] "Fighting to create a future for our children" is therefore a subtle way of directing people into particular kinds of family units and governing those family units in particular ways.[148]

The concept of reproductive futurism helps explain the disparity in success and reception of the bans on transgender youth athletes and the bans on gender-affirming health care for adolescents.[149] When Arkansas Governor Asa Hutchinson vetoed the latter, he rationalized it as a form of "legislative interference

143. Wright, *supra* note 84.

144. Paige Cushman, *Arkansas AG Introduces Bill to Ban Transgender Athletes from Girls' Sports*, SINCLAIR BROAD. GRP., INC. (Feb. 22, 2021), https://katv.com/news /local/arkansas-ag-introduces-bill-to-ban-transgender-athletes-from-girls-school-sports.

145. *See generally* Wright, *supra* note 84.

146. *See generally* SOPHIE LEWIS, FULL SURROGACY NOW: FEMINISM AGAINST FAMILY 164–65 (Verso, 2019).

147. *See generally id.* at 126, 128–30; *see also* Lucille M. Ponte & Jennifer L. Gillan, *From Our Family to Yours: Rethinking the "Beneficial Family" and Marriage-Centric Corporate Benefit Programs*, 14 COLUM. J. GENDER & L. 1, 3–4, 19–22, 28 (2005) ("during the mid-twentieth century, the corporate order underwrote a version of consumer citizenship, branding the ideal typical American social and consumer unit as a white, middle-class, nuclear family.").

148. For a discussion about how competing paradigms of family structures have been formed through media and corporate influences, see Ponte & Gillan, *supra* note 147, at 20–22.

149. *See* Matt Loffman, *New Poll Shows Americans Overwhelmingly Oppose Anti-Transgender Laws*, PBS NEWSHOUR (Apr. 16, 2021, 5:00 PM), https://www.pbs.org/newshour /politics/new-poll-shows-americans-overwhelmingly-oppose-anti-transgender-laws (showing a breakdown in how the polling data changes whether the proposed law in question deals with transgender athletes and transgender healthcare issues).

with physicians and parents."[150] The children's desires and goals are not mentioned—they exist to be governed and overridden by the whims of parents and doctors.[151] It is likely that Hutchinson wished to avoid establishing a precedent of state governments heavily intervening in parental medical decision-making, because in many other situations—such as abortion or conversion therapy—the anti-LGBTQ coalition would be more than happy to give parents unlimited rein to control their children.[152]

Thus, when the anti-LGBTQ coalition argues that AFAB people are naturally weaker, more vulnerable, and less capable at physical activities, or that transgender women and girls should be deprived of the public benefits of sport in order to protect cisgender women and girls from them, it does not matter whether any such people actually exist in their jurisdictions.[153] The idea is to conjure a specter, "the fascism of the baby's face," which can justify a need to maintain and assert control over the social meanings of sex and gender at a time when they seem to be conceptually slipping.[154] The attack on transgender athletes is an attack on bodily autonomy in a field where bodily autonomy is seen as largely irrelevant, and thus can more easily be rationalized.[155]

IV. CONCLUSION

The core argument of this piece is that sexual difference and its meaning within the context of sports must be reevaluated and that the preservation of ideological forms of sexual difference is a central goal of anti-LGBTQ politics and the athletics bans. However, there are a variety of other considerations—like what the

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150. Andrew DeMillo, *Arkansas Governor Vetoes Transgender Youth Treatment Ban*, ASSOCIATED PRESS (Apr. 5, 2021), https://apnews.com/article/arkansas-legislature-us-news-legislation-asa-hutchinson-83d07a502678f9745bb00f91aa4865f6.

151. *See id.* ("'The bill is over broad, extreme and does not grandfather those young people who are currently under hormone treatment,' he said, 'in other words, the young people who are currently under a doctor's care will be without treatment when this law goes into effect.'").

152. *Id.*

153. *See generally* Thomas O'Donnell, *Opinion: Can Transgender Females Destroy Girls Sports? Here's What the Numbers, Science and Common Sense Say,* DES MOINES REG. (Mar. 4, 2022, 10:31 AM), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2022/03/04/transgender-girls-wont-destroy-girls-sports-follow-science/9356140002.

154. EDELMAN, *supra* note 72, at 75.

155. Jennifer Finney Boylan, *Abortion Rights and Trans Rights Are Two Sides of the Same Coin*, N.Y. TIMES (Oct. 10, 2021), https://www.nytimes.com/2021/10/10/opinion/trans-abortion-rights.html.

values of sport are in the first place—that are rarely broached during this conversation.[156] What follows are some considerations from two perspectives: priority recommendations for LGBTQ+ activism and policy recommendations based on the values of sports.

The picture painted above is bleak for LGBTQ+ activism, in some ways, because it suggests that transphobia is not simply a matter of irrational understanding or fear of the different. Rather, like other modes of oppression, it is an ideological outgrowth of social systems that code bodies differently for the sake of upholding the powerful.[157] What is necessary, then, is for gay and transgender liberation activists to focus on a politics of bodily autonomy, as the central value which unites feminist and LGBTQ+ liberationist struggles, including transgender athleticism.

Policy recommendations should therefore be grounded not just on the particular values of sport but the values of including transgender people within sport and promoting their bodily autonomy. Lindsay Hecox, the plaintiff in *Hecox v. Little,* succinctly described the value of sports beyond personal victory when she wrote, "I, like all athletes, participate in sports for the same reasons as my peers: to challenge myself, to improve my fitness, to engage socially, and to be a part of a team."[158] To that end, Connecticut's policy model, which allows self-identification as the determination for which sports team or division a youth participates in, is one possible solution.[159]

Another possibility is to pursue the end of sex-segregation in sport altogether on the grounds that it is harmful; not just for transgender people, but for everyone.[160] One possibility is to blend together the Paralympics system, which has divisions based on individual physical capability,[161] with weight class divisions already

156. *See supra* Section II.A.

157. *See generally* Karissa Provenza, *Operating within Systems of Oppression*, 18 HASTINGS RACE & POVERTY L.J. 295, 306, 311 (2021).

158. Lindsay Hecox, *Anti-Trans Laws Are Preventing Trans Women From Playing on Women's Sports Teams,* TEEN VOGUE (May 14, 2020), https://www.teenvogue.com/story/ anti-trans-law-women-sports.

159. Catherine Jean Archibald, *Transgender and Intersex Sports Rights*, 26 VA. J. SOC. POL'Y & L. 246, 257 (2019).

160. *Id.*; Nancy Leong & Emily Bartlett, *Sex Segregation in Sports as a Public Health Issue,* 40 CARDOZO L. REV. 1813, 1844–45 (2019).

161. *What Is Classification?*, WORLD PARA ATHLETICS, https://www.paralympic.org /athletics/classification (last visited Mar. 3, 2022).

used within sex-segregated sport.[162] This would likely be even more controversial as a strategy than simply incorporating transgender people into the prevailing system of sex-segregated sport. However, it would also allow for nonbinary and intersex people to participate in sport with fewer forms of difficulty and may help undo some of the ways in which sex-segregation harms and restricts both cisgender and transgender women by coding their bodies and athletic abilities as lesser.[163]

162. Jacob Queen, *What Is a Weight Class?*, WISEGEEK (Feb. 13, 2022) https://www.wisegeek.com/what-is-a-weight-class.htm.

163. Jessica L. Adair, *In a League of Their Own: The Case for Intersex Athletes*, 18 SPORTS L.J. 121, 135–37 (2011).

WEAPONIZING SPEECH: ANALYZING DONALD TRUMP'S EXECUTIVE ORDERS ON SECTION 230

JEN KEUNG†

I. INTRODUCTION: A NEW PUBLIC SQUARE

The entwining of social media and politics is not new. Modern political discourse has largely migrated from physical locations, such as a street or park, into cyberspace.[1] While traditional legal doctrine treats cyberspace as a "mere transmission medium that facilitates the exchange of messages sent from one . . . geographical location to another," trying to tie online transactions to physical locations can be troublesome.[2] In the legal analysis of multijurisdictional and cross-border electronic communications, many quandaries can be resolved by conceiving of cyberspace as a distinct "space."[3] Cyberspace has minimal territorially based boundaries as the cost and speed of message transmission is independent of any physical location.[4]

Within cyberspace, social media platforms, such as Facebook and Twitter, have become increasingly important political tools that allow candidates to reach mass audiences at low cost and activists to organize protests overnight.[5] Amid the ever-increasing economic

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1. Joshua A. Tucker et al., *From Liberation to Turmoil: Social Media and Democracy*, 28 J. DEMOCRACY 46, 47 (2017).

2. David R. Johnson & David Post, *Law and Borders—The Rise of Law in Cyberspace*, 48 STAN. L. REV. 1367, 1378 (1996).

3. *Id.*

4. *Id.* This Comment acknowledges the fact that online censorship occurs in numerous parts of the world. However, with few exceptions, direct censorship of online content is prohibited by the First Amendment in the United States. *See* Brett M. Pinkus, *The Limits of Free Speech in Social Media*, ACCESSIBLE L. (Apr. 26, 2021), https://accessiblelaw.untdallas.edu/limits-free-speech-social-media.

5. Tucker et al., s*upra* note 1, at 50.

and political power of tech giants, both Democrats and Republicans question Big Tech's role in regulating free speech.[6]

During the 2020 U.S. presidential election, Twitter suggested that some of President Trump's tweets may lack factual basis and attached "fact check" warning labels to his content on mail-in ballot fraud.[7] In response, Trump accused Twitter of "interfering" with the election and "stifling" free speech.[8] To retaliate and crack down on companies like Twitter, Trump issued Executive Order 13925 Preventing Online Censorship[9] ("EO13925") on May 28, 2020, directing federal regulators to take away legal protections that shield platforms from liability for hosting content online.[10] In signing the order at the Oval Office, Trump told reporters that online platforms have "had unchecked power to censure, restrict, edit, shape, hide, alter virtually any form of communication between private citizens or large public audiences," and he "cannot allow that to happen."[11]

In Trump's EO13925, he stated that social media companies have ceased to function as "passive bulletin boards, and ought to be viewed and treated as content creators."[12] For example, he claimed some U.S. companies have helped "spread false information about China's mass imprisonment of religious minorities," "origins of the COVID-19 pandemic," and "undermined pro-democracy protests in Hong Kong."[13] Regardless of whether these claims are true, the sheer abundance of speech on the internet today has splintered society into a digital divide created by political polarization and mass misinformation. The spread of such information "can go viral in seconds, especially with the help of bots."[14] For instance, in the

6. Ellen L. Weintraub & Thomas H. Moore, *Section 230*, 4 GEO. L. TECH. REV. 625, 628 (2020).

7. Tim Wu, *Trump's Response to Twitter is Unconstitutional Harassment*, N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/06/02/opinion/trump-twitter-executive-order.html.

8. *Id.*

9. Exec. Order No. 13,925, 85 Fed. Reg. 34,079 (May 28, 2020).

10. Maggie Haberman & Kate Conger, *Trump Signs Executive Order on Social Media, Claiming to Protect 'Free Speech,'* N.Y. TIMES (June 2, 2020), https://www.nytimes.com/2020/05/28/us/politics/trump-order-social-media.html.

11. *Id.*

12. Exec. Order No. 13,925, *supra* note 9.

13. *Id.* at 34080.

14. Thomas Ryan, *Is Truth Hanging on by a Thread?*, 54 UIC J. MARSHALL L. REV. 315, 317 (2021).

2018 midterm elections, bots contributed to retweeting a message supporting Ted Cruz more than 30,000 times within hours.[15]

The internet intermediary business model focuses on profit generation by using algorithms to increase engagement and advertisement.[16] By manipulating sentimental content, internet intermediaries gain profit for the time users spend on their screens.[17] Hence, the interests of these intermediaries and their users may not always align. However, the mere fact that the internet will continue to grow in chaotic and problematic ways does not necessarily "grant the president an alarming authority . . . to use the power of the state against speech with which he disagrees."[18]

The legal protection addressed in Trump's EO13925 is Section 230 of the Communications Decency Act of 1996 ("Section 230")—the main "liberating force that jolted the massive and sustained growth of the internet marketplace and the free and robust exchange of ideas online."[19] This Comment maintains that Trump's EO13925 targeting Section 230 is a form of political persecution that ultimately weaponizes free speech to wield political power.

Part II of this Comment discusses the background of First Amendment principles in cyberspace, Section 230, as well as its underlying issues and subsequent developments. Part III analyzes Section 230 pertaining to Trump's EO13925. On one hand, providing internet intermediaries the ability to take down certain harmful content is crucial, as they are often the "first responders" with the means to control such speech. On the other hand, holding intermediaries liable for being the host of certain types of content would undermine free speech because they may over-remove content that can be beneficial and therefore fail to preserve the vibrant free speech that we currently enjoy. Part IV proposes solutions to reconcile the existing tension between these two opposing views.

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15. Bryan Casey & Mark A. Lemley, *You Might Be a Robot*, 105 CORNELL L. REV. 287, 289 (2020).

16. THE SOCIAL DILEMMA (Exposure Labs 2020).

17. *Id.*

18. Wu, *supra* note 7.

19. Kyler Baier, *Replacing What Works with what Sounds Good: The Elusive Search for Workable Section 230 Reform*, 26 ILL. BUS. L.J. 40 (2021).

II. BACKGROUND

This section explores cyberspace as the new "public sphere."[20] Within this realm, internet intermediaries have unsettled existing legal doctrines and prompted the creation of Section 230. This section discusses the benefits and challenges of Section 230 pertaining to freedom of speech on the internet.

A. Cyberspace as the New Public Sphere

The groundbreaking development of social media platforms over the past two decades has drastically transformed the landscape of traditional media and journalism.[21] In the past, radio, television, newspapers, and books formed the "old hegemony of state-structured and territorially-bound public life."[22] Nowadays, private social media platforms have gradually taken over this role as they evolved from direct electronic communications into a virtual gathering space.[23] The first online communication services, such as CompuServe, America Online, and Prodigy, emerged in the 1980s and 1990s and introduced users to digital communication via emails, online chatrooms, and bulletin board discussions.[24] In the following years, numerous social media platforms appeared, with Facebook spearheading the movement.[25] In 2021, Statista found that eighty-two percent of the U.S. population is on social media.[26] This percentage has steadily grown since 2008 as younger generations are more likely to use such networks than older generations.[27]

One of the most popular terms within contemporary studies of media and politics is the "public sphere."[28] The language of this

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20. *See generally* John Keane, *Structural Transformations of the Public Sphere*, 1 COMM. REV. 1 (1995).

21. *Id.* at 1.

22. *Id.*

23. *The Evolution of Social Media: How Did it Begin, and Where Could It Go Next?*, MARYVILLE UNIV., https://online.maryville.edu/blog/evolution-social-media (last visited Mar. 23, 2022).

24. *Id.*

25. *Id.*

26. *Percentage of U.S. Population Who Currently Use Any Social Media from 2008 to 2021*, STATISTA, https://www.statista.com/statistics/273476/percentage-of-us-population-with-a-social-network-profile (last visited Mar. 23, 2022).

27. *Id.*

28. Keane, *supra* note 20, at 1.

term was initially used as "a weapon in support of 'liberty of the press' and other publicly-shared freedoms" to guard against monarchs and courts from abusing their power and to protect the realm of life in which citizens could freely express their opinions and exchange ideas.[29] Townhall meetings, book clubs, and literary circles all formed small-scale, bottom-up micro-spheres for citizens to express themselves and form their identities.[30] Yet, with the ever-growing power of profit-calculating modern capitalist economies, the idea of the "public sphere" has shifted towards preventing "organized capitalism [and] advertising agencies" from controlling and manipulating digital platforms.[31]

Internet intermediaries largely fall into two categories: "(i) conduits, which are technical providers of internet access or transmission services; and (ii) hosts, which are providers of content services, such as online platforms (e.g., websites), caching providers and storage services."[32] This Comment mainly focuses on the latter—content providers such as online platforms. What distinguishes online platforms from traditional forms of media includes algorithmic interactivity, scale, and supervising abilities.[33] First, rather than passive conduits for users' communications, platforms provide users the ability to like, share, comment, and save the information that they see online. Moreover, "every 'like,' every share, every click of every user is tracked and analyzed by online companies."[34] Armed with their users' data, platforms can "leverage their market position to trade this information in ancillary or secondary markets . . . [and] design their platforms in ways that shape the form and substance of their users' content."[35] Second, platforms such as Facebook, Twitter, and Instagram act as macro-public spheres with the ability to reach hundreds of millions of

29. *Id.* at 1–2.

30. *Id.* at 9.

31. *Id.*

32. *What is an Internet Intermediary?*, MEDIA DEF., https://www.mediadefence.org/ereader/publications/introductory-modules-on-digital-rights-and-freedom-of-expression-online/module-2-introduction-to-digital-rights/what-is-an-internet-intermediary (last visited Apr. 14, 2022).

33. FED. TRADE COMM'N, A LOOK AT WHAT ISPS KNOW ABOUT YOU: EXAMINING THE PRIVACY PRACTICES OF SIX MAJOR INTERNET SERVICE PROVIDERS 4–6 (Oct. 21, 2021), https://www.ftc.gov/system/files/documents/reports/look-what-isps-know-about-you-examining-privacy-practices-six-major-internet-service-providers/p195402_isp_6b_staff_report.pdf.

34. Weintraub & Moore, *supra* note 6, at 629.

35. *Id.*

individuals across the globe instantaneously.[36] These platforms become "natural monopolies" in providing public forum venues.[37] Third, unlike a newspaper, due to the sheer amount of speech available on the internet, it is practically impossible for platforms to moderate and control every single piece of content they host. While most platforms use filtering software to block the use of harmful content, they nevertheless do not exercise as much editorial control as a newspaper.[38] These distinctions are vital as we turn to the discussion of free speech on the internet.

B. Freedom of Speech

i. The State Action Requirement

The First Amendment of the U.S. Constitution states that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances."[39]

The First Amendment generally restrains government action and protects private actors.[40] However, a state supreme court can still interpret its state constitution "to provide greater protection for individual liberties than the Supreme Court does under the Bill of Rights."[41] In *PruneYard Shopping Center v. Robins*, the U.S. Supreme Court affirmed the decision of the California Supreme Court and held that a privately-owned shopping center that had a policy prohibiting people from engaging in any "publicly expressive activity" could not exclude a group of peaceful high

36. Keane, *supra* note 20, at 8–9.

37. *Id.* at 7.

38. Olivier Sylvain, *Discriminatory Designs on User Data*, KNIGHT FIRST AMEND. INST. AT COLUMBIA UNIV. (Apr. 1, 2018), https://knightcolumbia.org/content/discriminatory-designs-user-data.

39. U.S. CONST. amend. I.

40. Michael I. Katz, *Free Speech and Social Media: The First Amendment Limits State Actors–Not Private Companies*, ORANGE CNTY. BAR ASS'N (July 2021), https://www.ocbar.org /All-News/News-View/ArticleId/6116/July-2021-Cover-Story-The-First-Amendment-Limits-State-Actors-Not-Private-Companies.

41. Gower, PruneYard Shopping Center v. Robins *(1980)*, FIRST AMEND. ENCYCLOPEDIA, https://www.mtsu.edu/first-amendment/article/583/pruneyard-shopping-center-v-robins (last visited Mar. 23, 2022).

school students from protesting within its premises.[42] This case added jurisprudence addressing free speech on private property.[43]

PruneYard's reasoning should not extend to online platforms. In addition to providing goods and services, shopping malls generally provide people a venue for social gatherings, performances, and entertainment. As such, PruneYard's policy that prohibited people from engaging in "publicly expressive activity" fundamentally contradicted its own purpose.[44] While online platforms also provide users a venue for entertainment and public discourse, unlike shopping malls, platforms are "directly in the business of curating speech environments" as they provide users with terms of service for using their platforms.[45] These terms protect users from "harassment, cyberbullying, hate speech, or other conduct which, if allowed free reign, would make the platform less inviting and unsafe."[46] In turn, by contractually agreeing to such terms, users acknowledge that their freedom of speech is subject to such rules.[47] People do not typically sign such contractual agreements when entering a shopping mall. Extending the reasoning in *PruneYard* to platforms would not only "invite courts, i.e., the state, to decide what speech rules are appropriate" online, but it also contradicts "the very purpose of the state action doctrine," which is "to keep the state out of the business of regulating the speech of private actors."[48]

Private entities can still be regulated as state actors for speech purposes if they "perform a traditional, exclusive public function, such as running a company town in [*Marsh v. Alabama*]."[49] In *Marsh*, an individual "was convicted of criminal trespass for distributing literature without a license on a sidewalk in a town . . . owned by a private company."[50] The Supreme Court found that the private company acted akin to a municipal government because it "owned the streets, sidewalks, and business block, paid the sheriff,

42. PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 77 (1980).
43. Gower, s*upra* note 41.
44. *PruneYard*, 447 U.S. at 77.
45. Katz, *supra* note 40.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*; *see also* Marsh v. Alabama, 326 U.S. 501 (1946).
50. JAMES GRIMMELMANN, INTERNET LAW: CASES & PROBLEMS 611 (10th ed. 2020).

privately owned and managed the sewage system, and owned the building where the United States post office was located."[51]

The definition of private actor can be murky when it involves an individual that assumes a government role.[52] For example, in *Campbell v. Reisch,* Missouri state representative Cheri Toalson Reisch blocked Mike Campbell, one of Reisch's constituents, on her Twitter account.[53] Campbell sued Reisch under 42 U.S.C. § 1983, claiming that she had violated his First Amendment right to speak on her account.[54] The Eighth Circuit held that "it is not enough that the defendant is a public official, because acts that public officials take in 'the ambit of their personal pursuits' do not trigger § 1983 liability."[55] Since Reisch used her account in private ways, such as a campaign newsletter, she did not intend her account to be like a public park and, therefore, could manage her page as she liked.[56]

Conversely, in *Knight First Amendment Institute at Columbia v. Trump,* the Second Circuit held that President Trump's Twitter account was unabashedly used for official purposes in part because he described his tweets as "official statements" of the president.[57] In essence, *Knight Institute* held that Trump could not block an individual for tweeting abuse at him because Trump was a state actor and the First Amendment applied.[58] However, Twitter could block the individual for tweeting abuse at Trump because it is a private actor and the First Amendment does not apply.[59]

ii. Platforms as Non-State Actors

The rationale behind ruling platforms as private actors in First Amendment jurisprudence is grounded in the landmark 1997 Supreme Court decision *Reno v. ACLU*, which challenged the Communications Decency Act ("CDA") as violating the First Amendment.[60] The CDA originally imposed criminal sanctions for

51. *Id.*
52. *See* Campbell v. Reisch, 986 F.3d 822, 825–26 (8th Cir. 2021).
53. *Id.* at 823.
54. *Id.*
55. *Id.* at 824.
56. *Id.* at 825.
57. Knight First Amend. Inst. at Columbia Univ. v. Trump, 928 F.3d 226, 231–32 (2d Cir. 2019).
58. *See* Samantha Briggs, *The Freedom of Tweets: The Intersection of Government Use of Social Media and Public Forum Doctrine*, 52 COLUM. J.L. & SOC. PROBS. 1, 6–7 (2018).
59. GRIMMELMANN, *supra* note 50, at 132.
60. Reno v. Am. C.L. Union, 521 U.S. 844, 849 (1997).

the knowing transmission of obscene or indecent materials via the internet.[61] In *Reno*, the Supreme Court held that such criminal sanctions were unconstitutional.[62] The Supreme Court reasoned that the CDA's uncertainty and vagueness was problematic because content-based regulation on the internet would create a chilling effect on free speech.[63] While there are aforementioned differences between online platforms and traditional forms of media, the nature and quality of the internet has led the Supreme Court to regulate online speech akin to newspapers, books, and magazines and decline to regulate it as it did with radio and television in the First Amendment context.[64]

Traditional forms of media, such as newspapers, enjoy special constitutional protection because of their central role in democracy.[65] Similarly, bloggers and independent activists online are "invoking laws originally written for the benefit of reporters and institutional media."[66] Media shield laws, which have been enacted in forty-nine states, protect reporters from being required to turn over confidential information.[67] Media shield laws have even been extended to websites like Apple Insider, which is "devoted to rumors and leaks about forthcoming Apple products."[68] A California court in *O'Grady v. Superior Court* stated that "the open and deliberate publication on a news-oriented Web site of news gathered for that purpose by the site's operators" was "conceptually indistinguishable from publishing a newspaper."[69]

Unlike *PruneYard* and *Marsh*, platforms should not be considered state actors. Offering the public a forum to speak is not and should not be a function performed exclusively by the state. As mentioned previously, numerous private venues and local groups have existed for centuries without rigid government control.[70] Plus,

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61. *Id.* at 859–860. The CDA originally imposed criminal sanctions for transmitting obscene or indecent messages to anyone under 18 years old (47 U.S.C. § 223(a)(1)(B)) and for sending or displaying of patently offensive material to anyone under 18 years old (47 U.S.C. § 223(d)).

62. *Reno*, 521 U.S. at 871–72, 882.

63. *Id.* at 871–72.

64. *Free Speech in the Modern Age*, 31 FORDHAM INTELL. PROP., MEDIA & ENT. L.J. 978, 989–90 (2021).

65. GRIMMELMANN, *supra* note 50, at 134.

66. *Id.*

67. *Id.*

68. *Id.* at 134–35.

69. O'Grady v. Superior Court, 44 Cal. Rptr. 3d 72, 99 (Ct. App. 2006).

70. *See* GRIMMELMANN, *supra* note 50, at 134–35.

even if some platforms assume certain governmental functions, from a regulatory standpoint, it would be difficult to draw the line between which ones should be considered state actors and which ones should not. A bright-line rule is necessary to make online speech easier to govern at its current stage.

Treating platforms as state actors merely because they provide a forum for public speech would significantly dilute the state action requirement.[71] Although the state action requirement is broad in the Fourth Amendment search and seizure context, First Amendment principles state that "restrictions on freedom of speech imposed through state action must not be vague, must be for important governmental reasons and must be narrowly tailored to the risk of harm."[72] Freedom of speech would substantially erode should the stringent state action requirement be eliminated. Thus, even if a platform's conduct has state action characteristics, there must be "a significantly close nexus between the State and the challenged action of [the private entity] so that the action of the latter may be fairly treated as the State itself."[73] As such, in *Manhattan Community Access Corp. v. Halleck*, the Supreme Court wrote that "[W]hen a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor. The private entity may thus exercise editorial discretion over the speech and speakers in the forum."[74]

C. Section 230

Section 230 of the CDA provides platforms robust immunity to allow and remove harmful content.[75] Section 230 was originally a small and overlooked fragment of a bill Congress passed to regulate the pervasiveness of obscene and indecent online speech.[76] Yet, it

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71. Katz, *supra* note 40, at 25.

72. *See* GRIMMELMANN, *supra* note 50, at 593.

73. Cyber Promotions, Inc. v. Am. Online, Inc., 948 F. Supp. 436, 441 (E.D. Penn. 1996) (quoting Blum v. Yaretsky, 457 U.S. 991, 1004 (1982)). The court held that AOL was not a state actor. *Id.*

74. Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1930 (2019).

75. *See generally* VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW (2021) (discussing the broad immunity provided by Section 230 of the CDA).

76. Baier, *supra* note 19, at 40.

has now become one of the most important pieces of legislation ever passed with respect to free speech on the internet.[77]

Section 230 states that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[78] Under Section 230, internet intermediaries are not liable for (1) communications or content posted by people who use their services; (2) their services' design or structure, or whether and how to allow people to have accounts; or (3) discretionary decisions about removing or restricting access to certain objectionable content.[79] While several exceptions to the law exist, at its core, it is a simple policy indicating that users, instead of internet intermediaries, should be liable for the illegal content they post online.[80] Protected intermediaries include not only "Internet Service Providers (ISPs), but also a range of 'interactive computer service providers," including basically any online service that publishes third-party content."[81]

Section 230 immunity only applies to the extent that the internet intermediary or user is not also the information content provider of the content at issue.[82] The CDA defines an information content provider as any person or entity that is responsible, in whole or in part, for the creation or development of information provided through the internet or any other interactive computer service.[83] By contrast, a search engine, such as Google, displaying information on third-party websites would be entitled to Section 230 immunity as it is merely an interactive service provider.[84] Sometimes, internet intermediaries can fill a dual role as an interactive service provider and an information content provider.[85] In such cases, courts engage in a highly fact-intensive determination.[86]

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77. *Id.*
78. 47 U.S.C. § 230.
79. BRANNON & HOLMES, *supra* note 75, at 8–24.
80. *Id.* at 24–29 (discussing the exceptions provided by Section 230(e)).
81. *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Mar. 23, 2022).
82. BRANNON & HOLMES, *supra* note 75, at 4.
83. 47 U.S.C. § 230(f)(3).
84. Baier, *supra* note 19, at 42–43.
85. Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 408 (6th Cir. 2014).
86. *E.g.*, FTC v. LeadClick Media, LLC, 838 F.3d 158, 175–76 (2d Cir. 2016); Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124–25 (9th Cir. 2003).

i. Publisher or Distributor

To determine whether an internet intermediary is an interactive service provider or information content provider, courts often look at whether the intermediary exercised editorial control over its content. For example, Section 230 was enacted in 1996 against the backdrop of the state defamation case *Stratton Oakmont, Inc. v. Prodigy Services Co.*[87] The New York court in *Stratton Oakmont* held that the internet intermediary moderated its forums by exercising "editorial control" and was therefore subject to liability for defamatory content posted on its website.[88] The *Stratton Oakmont* case stands in sharp contrast to *Cubby, Inc. v. CompuServe, Inc.*, which had an identical issue but a different outcome.[89] Since the internet intermediary in question did not moderate its content, the New York court in *Cubby* held that it was not a publisher but rather a distributor, which is subject to a more lenient liability standard.[90]

Following these two cases, in *Zeran v. America Online, Inc.*, the Fourth Circuit became the first appellate court to interpret Section 230.[91] The *Zeran* court ruled in favor of the internet intermediary and reasoned that imposing liability on ISPs with knowledge of defamatory statements would stifle free speech on the internet and create a disincentive for self-regulation of harmful content.[92] Due to the vast amount of questionable posts on the internet, it is extremely difficult for ISPs to manage their content efficiently and error-free. Hence, notice-based liability would, as the *Zeran* court noted, discourage self-regulation because any efforts as such would likely either lead to more frequent notice of potentially unlawful material or create a stronger basis for liability based on the knowledge acquired during this self-regulation.[93]

Courts today continue to construe the law broadly to confer sweeping immunity on internet intermediaries with very few

87. Baier, *supra* note 19, at 41; Stratton Oakmont, Inc. v. Prodigy Servs. Co., No. 31063/94, 1995 WL 323710 (N.Y. Sup. Ct. May 24, 1995).

88. *Stratton Oakmont, Inc.*, 1995 WL 323710, at *5.

89. Baier, *supra* note 19, at 41; Cubby, Inc. v. CompuServe, Inc., 776 F. Supp. 135 (S.D.N.Y. 1991).

90. *Cubby Inc.*, 776 F. Supp. at 141.

91. Ashley Johnson & Daniel Castro, *The Exceptions to Section 230: How Have the Courts Interpreted Section 230?*, INFO. TECH. & INNOVATION FOUND. (Feb. 22, 2021), https://itif.org/publications/2021/02/22/exceptions-section-230-how-have-courts-interpreted-section-230.

92. *Id.* at 333.

93. *Id.*

exceptions.[94] An individual impacted from the existence or removal of online content is unlikely to recover damages from internet intermediaries.[95]

ii. Section 230(c)(1)

Section 230(c)(1) provides immunity for internet intermediaries that *allow* harmful content.[96] It bars any cause of action that treats intermediaries as a publisher or speaker for third-party content.[97] Intermediaries can exercise a publisher's traditional editorial functions, such as content publication, removal, postponement, or alteration.[98] Besides editorial functions, courts have also allowed intermediaries to decide whether to provide users with an account[99] and to determine when to demonetize user's postings on a video-sharing platform.[100]

iii. Section 230(c)(2)

Section 230(c)(2), on the other hand, provides immunity to intermediaries that *remove* harmful content.[101] The content must fall under one of the categories below.[102] This statute, entitled "Protection for 'Good Samaritan' blocking and screening of offensive material," states that:

> (2) No provider or user of an interactive computer service shall be held liable on account of—
>
> (A) any action voluntarily taken in good faith to restrict access to or availability of material that the provider considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise

94. *E.g.*, Force v. Facebook, Inc., 934 F.3d 53 (2d Cir. 2019); Domen v. Vimeo, Inc., 433 F. Supp. 3d. 592, 603 (S.D.N.Y. 2020).

95. *See, e.g.*, *Domen*, 433 F. Supp. 3d at 607–08; Barnes v. Yahoo!, Inc., 579 F.3d 1096, 1105–06 (9th Cir. 2009).

96. 47 U.S.C. § 230(c)(1).

97. *Id.*

98. Zeran v. Am. Online, 129 F.3d 327, 330 (4th Cir., 1997).

99. Fields v. Twitter, 217 F. Supp. 3d 1116, 1123 (N.D. Cal. 2016).

100. Lewis v. Google LLC, 461 F. Supp. 3d 938, 954 (N.D. Cal. 2020).

101. 47 U.S.C. § 230(c)(2).

102. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1123 (9th Cir. 2003).

> objectionable, whether or not such material is constitutionally protected . . . .[103]

However, unlike Section 230(c)(1), Section 230(c)(2) has its limitations. In *Song Fi, Inc. v. Google Inc.*, the plaintiffs alleged, among other things, that YouTube's removal and relocation of their music video "Luv ya" violated the website's Terms of Service.[104] The video featured a little boy and girl who dressed up to go to a restaurant on Valentine's Day.[105] YouTube's Community Guidelines prohibit, "among other things, uploading videos with pornographic, obscene, or otherwise objectionable content."[106] YouTube removed the video and relocated it because it "determined that the view count for 'Luv ya' was inflated through automatic means, and thus violated its Terms of Service."[107] The court held that YouTube's Section 230(c)(2)(A) claim failed because it led to an "unbounded" reading of the term "otherwise objectionable," which would enable intermediaries to "block content for anticompetitive purposes or merely at its malicious whim."[108] Since the video itself was not objectionable—rather, the view count was—it did not fall under the meaning of Section 230(c)(2)(A).[109]

iv. No Good Samaritan Action Required

The CDA's primary intent under Section 230(c)(2) was to regulate the dissemination of harmful content on the internet.[110] However, most courts have held that intermediaries are not required to remove harmful content to enjoy Section 230 immunity.[111] In cases where intermediary defendants take advantage of the broad immunity, courts have nevertheless accepted that intermediaries are eligible for statutory immunity even when they do not adopt any of the self-policing policies that

103. 47 U.S.C. § 230(c)(2)(A).
104. Song Fi, Inc. v. Google, Inc., 108 F. Supp. 3d 876, 879 (N.D. Cal. 2015).
105. *Id.* at 880.
106. *Id.*
107. *Id.*
108. *Id.* at 884.
109. *Id.*
110. Exec. Order No. 13,925, *supra* note 9.
111. *See* Universal Commc'n Sys., 478 F.3d 413, 420 (2007); Green v. Am. Online, 318 F.3d 465, 472 (3d Cir. 2003); Zeran v. Am. Online, Inc., 129 F.3d 327, 332–33 (4th Cir. 1997); Barrett v. Rosenthal, 146 P.3d 510, 525 (Cal. 2006).

Congress had intended[112] and when they have actual notice of the allegedly objectionable content.[113]

D. Criticisms of Section 230

Criticisms of Section 230 are not new.[114] Due to the openness of the internet, defamatory statements, obscene photos, private conversations, and embarrassing information can be easily shared online. Content can quickly go viral due to cognitive biases and evolving algorithmic practices.[115] Silos of information and polarization of ideas act to reinforce preexisting beliefs. Microtargeted political advertising as well as inauthentic users and bots spread misinformation.[116]

The online marketplace of free ideas arguably no longer guarantees equality as certain voices are amplified while others are stifled.[117] Some private companies, such as Facebook, have de-platformed users and taken steps to police user content.[118] Filter bubbles are created to "prevent the counterspeech that First Amendment jurisprudence celebrates."[119] Additionally, "[t]he U.S. Intelligence Community confirmed that the 2016 presidential election faced disinformation threats online from Russian state actors in order to 'undermine the U.S.-led liberal democratic order.'"[120] The campaign spread a conspiracy theory known as "Pizzagate" against Democratic candidate Hilary Clinton by indicating that she was involved in a child sex ring and murdered children.[121] The misinformation led to an armed man appearing at a neighborhood pizza restaurant to investigate what he believed to be one of Clinton's underground vaults containing a child sex

112. *See* Blumenthal v. Drudge, 992 F. Supp. 44, 52 (D.D.C. 1998).

113. Jones v. Dirty World Entm't Recordings LLC, 755 F.3d 398, 407 (6th Cir. 2014); *Universal Commc'n Sys.*, 478 F.3d at 420; *Zeran*, 129 F.3d at 332.

114. *See* Patricia Spiccia, *The Best Things in Life Are Not Free: Why Immunity Under Section 230 of the Communications Decency Act Should Be Earned and Not Freely Given*, 48 VALPARAISO U. L. REV. 369, 393–96 (2013).

115. *See generally* Lili Levi, *Real "Fake News" and Fake "Fake News,"* 16 FIRST AMEND. L. REV. 232, 241 (2017).

116. Weintraub & Moore, *supra* note 6, at 627.

117. *See generally* Joan Donovan & Danah Boyd, *Stop the Presses? Moving From Strategic Silence to Strategic Amplification in a Networked Media Ecosystem*, 65 AM. BEHAV. SCI. 333, 339 (2019).

118. *Free Speech in the Modern Age*, *supra* note 64, at 991.

119. Weintraub & Moore, *supra* note 6, at 627.

120. Ryan, *supra* note 14, at 330.

121. *Id.* at 330–31.

ring.[122] Other widespread conspiracy theories include those surrounding QAnon, 9/11, Flat Earth theory, and the COVID-19 pandemic.[123]

Removing the questionable content often proves much more challenging. Since platforms are not treated as the publisher or speaker of any information provided by its users, they are, to a certain extent, immune to the illegal content published on their sites.[124] As mentioned previously, the law mainly punishes publishers, not distributors, of harmful content.[125] As a result, it provides "no incentive for [platform]s to remove defamatory and harassing content" to comply with notice and takedown orders.[126] Taken together, unlimited speech does not necessarily translate to more common good. Critics of Section 230 argue that traditional First Amendment principles are insufficient to address internet speech as it has become "a virtually untouchable space for ideas."[127]

III. Analysis of Trump's Executive Order

Executive orders have increasingly become a political tool for presidents to pass laws without going through the typical lengthy process.[128] This section discusses how Trump's EO13925 came into being and its implications on the freedom of speech.

A. Tensions Between Trump and Twitter

Tensions between Twitter and Trump had been escalating quickly around the time when Trump issued EO13925.[129] On May

122. *Id.*

123. Fortesa Latifi, *The 9 Most Popular Conspiracy Theories in Recent History*, TEEN VOGUE (June 23, 2021), https://www.teenvogue.com/story/most-popular-conspiracy-theories.

124. 47 U.S.C. § 230(c)(1).

125. Andrew Bolson, *The Internet Has Grown Up, Why Hasn't the Law? Reexamining Section 230 of the Communications Decency Act*, INT'L ASS'N OF PRIV. PROS. (Aug. 27, 2013), https://iapp.org/news/a/the-internet-has-grown-up-why-hasnt-the-law-reexamining-section-230-of-the.

126. *Id.*

127. *Free Speech in the Modern Age*, *supra* note 64, at 990.

128. *What is an Executive Order?*, A.B.A. (Jan. 25, 2021), https://www.americanbar.org/groups/public_education/resources/teacher_portal/educational_resources/executive_orders; *Executive Orders*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/statistics/data/executive-orders (Feb. 21, 2022).

129. Exec. Order No. 13,925, *supra* note 9; Kate Conger, *Twitter Had Been Drawing a Line for Months When Trump Crossed It*, N.Y. TIMES (May 30, 2020), https://www.nytimes.com/2020/05/30/technology/twitter-trump-dorsey.html.

29, 2020, Trump weighed in on the clashes between the police and protesters in Minneapolis by saying, "when the looting starts, the shooting starts."[130] In turn, a group of Twitter officials gathered and debated whether the "messaging system Slack and Google Docs . . . pushed people towards violence."[131] The Twitter officials soon decided that "Twitter would hide . . . Trump's tweet behind a warning label that said the message violated its policy against glorifying violence."[132] The company also added fact-checking labels and warnings to three other messages from Trump on Twitter, including one tweet regarding mail-in ballot fraud.[133]

B. Trump's Executive Order as a "Prior Restraint" on Speech

Different types of online speech are subject to varying standards.[134] Trump's EO13925 is essentially a prior restraint on speech.[135] The most stringent and exacting judicial test is used for prior restraints, which occurs "when a speaker must obtain permission from a government official before being allowed to speak at all."[136] Prior restraints of speech are presumptively unconstitutional.[137] Under prior restraint, the government controls what and how speech or expression can be publicly released.[138] Throughout American history, prior restraint has been viewed as a form of oppression, as the Founding Fathers specifically used language in the First Amendment to guard against such violation of fundamental democratic principles.[139]

The few exceptions to prohibitions against prior restraint include obscenity, injunctions on court documents, and national security.[140] The government has a compelling interest in keeping defense documents classified if they might jeopardize ongoing

130. Conger, *supra* note 129.
131. *Id.*
132. *Id.*
133. *Id.*
134. GRIMMELMANN, *supra* note 50, at 122.
135. Wu, *supra* note 7.
136. GRIMMELMANN, *supra* note 50, at 122.
137. *Id.*
138. Elianna Spitzer, *What Is Prior Restraint? Definition and Examples*, THOUGHTCO (June 30, 2019), https://www.thoughtco.com/prior-restraint-definition-4688890.
139. *Id.*
140. *Id.*

military action, particularly during wartime.[141] However, courts have determined that the government must prove an inevitable, direct, and immediate danger to justify reviewing and restricting publication in the name of national security.[142] Here, a private entity preventing Trump from inciting violence would serve the opposite of endangering national security, let alone qualify to fall under either of these exceptions. In other words, banning Trump from using his Twitter account was unlikely to result in any "inevitable, direct, and immediate danger."[143]

C. Trump's Executive Order as Political Persecution

To understand the political aspect of Trump's EO13925, we should first ask whether viewpoint discrimination by platforms poses a threat to free speech at all. In fact, no empirical study has shown that platforms control speech in a matter that is "systematically biased toward any particular viewpoint."[144] But even if such biases exist, the rules of engagement established by "each social media platform [would] constitute an exercise of free speech in their own right."[145]

One concern is that large social media platforms, such as Facebook, Instagram, and Twitter, to a certain degree monopolize and control channels of communication and even receive funding from political parties.[146] As recipients of government funding,[147] Big Tech companies may be more willing to promote certain political views than others. Following the U.S. Capitol riots on January 6, 2021, U.S. Senator Josh Hawley claimed that large social media platforms quickly silenced conservative voices.[148] In a matter of days, "Apple and Google refused to make Parler available on their app stores, and Amazon soon denied Parler access to its cloud computing service."[149]

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141. *Id.*
142. *Id.*
143. *Id.*
144. Katz, *supra* note 40, at 24.
145. *Id.* at 25.
146. JOSH HAWLEY, THE TYRANNY OF BIG TECH 11 (2021).
147. *Id.* at 9.
148. *Id.*
149. *Id.*

Even if such claims were accurate, the platforms were merely doing so to comply with the law.[150] The FBI's website openly sought and continues to seek "the public's assistance in identifying individuals who made unlawful entry into the U.S. Capital and committed various other alleged criminal violations . . . on January 6, 2021."[151] Conservative platform Parler was under significant scrutiny because it had warned the FBI of "'specific threats of violence being planned at the Capitol' in advance of the January 6 riot."[152] For example, a Parler user claimed "he would be wearing body armor at a planned event on Jan. 6 and asserted it was 'not a rally and it's no longer a protest.'"[153]

Platforms typically have a Terms of Service to which all users must read and agree before posting content on their sites.[154] As mentioned previously in *Song Fi, Inc.*, Section 230(c)(2)(A) allows platforms to remove harmful content if it falls under one of the categories listed in the statute.[155] Here, the specific threats of violence at the Capitol on Parler can certainly qualify as "excessively violent" material that is subject to removal by the platforms.[156] Therefore, Apple, Google, and Amazon's ban on the Parler app met Section 230(2)(c)(A)'s requirement.[157]

On the contrary, Trump's EO13925 was directly aimed at stifling political opposition.[158] The main section that Trump had objected to in his EO13925 was subparagraph (c)(2) of Section 230 on the removal of harmful content.[159] In other words, Trump disagreed with Twitter's decision to include fact-check warning labels to his tweets and claimed to be the victim of censorship. Trump stated on Twitter that his controversial statements were "very simple" and "nobody should have any problem with this other

150. 47 U.S.C. § 2302(c)(2)(A).

151. *U.S. Capitol Violence*, FBI, https://www.fbi.gov/wanted/capitol-violence (last visited Mar. 5, 2022).

152. Matt Zapotosky, *Conservative Platform Parler Says It Warned FBI of 'Specific Threats of Violence' Ahead of Capitol Riot*, WASH. POST, Mar. 26, 2021, at A17, https://www.washingtonpost.com/national-security/parler-fbi-capitol-riot/2021/03/25/addba25a-8dae-11eb-a6bd-0eb91c03305a_story.html.

153. *Id.*

154. Sandra Braman & Stephanie Roberts, *Advantage ISP: Terms of Service as Media Law*, 5 NEW MEDIA & SOC'Y 422, 422 (2003).

155. 47 U.S.C. § 230 (c)(2)(A).

156. *Id.*

157. *See* 47 U.S.C. § 230(c)(2)(A).

158. Haberman & Conger, *supra* note 10.

159. Exec. Order No. 13,925, *supra* note 9.

than the haters, and those looking to cause trouble on social media."[160] This statement, coupled with EO13925, indicate Trump's intent to use the power of the state against speech with which he disagrees and speech that disagrees with him—namely, the fact-check warning labels.

Procedurally, executive orders cannot simply rewrite congressional statutes such as Section 230 without clearing significant hurdles.[161] Although a president may issue an executive order without consultation or permission from Congress, executive orders are subject to judicial review to ensure that they are within the limits of the Constitution.[162] Executive orders are akin to employment orders—agencies receive them from the president, but they are not legally obligated to follow.[163] The agency can challenge the president by indicating that the executive order is unconstitutional.[164] However, if the agency does comply with the order despite the fact that it was unconstitutional, a legally binding rule or interpretive rule emerges, and an injured plaintiff may have standing to sue through the court system.[165] Courts can strike down the executive order if they decide that the order is arbitrary and capricious.[166]

Although there are significant safeguards to prevent the executive branch from abusing executive orders, the extent of power agencies have in refusing to perform executive orders remains a mystery.[167] This is largely because there are very few publicized cases of such clashes.[168] If an agency repeatedly refuses to comply with a president's orders, they may have to pay a political price. For instance, Trump fired the Secretary of Defense, Mark

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160. Conger, *supra* note 129.

161. Rachel Augustine Potter, *Why Trump Can't Undo the Regulatory State So Easily*, BROOKINGS INST. (Feb. 6, 2017), https://www.brookings.edu/research/why-trump-cant-undo-the-regulatory-state-so-easily.

162. *Executive Orders and the Supreme Court*, JURIST (Oct. 18, 2014), https://www.jurist.org/archives/feature/executive-orders-and-the-supreme-court.

163. *See* Potter, *supra* note 161.

164. *See* Scott Slesinger & Robert Weissman, *Ordering Agencies to Violate the Law*, REG. REV. (June 27, 2017), https://www.theregreview.org/2017/06/27/slesinger-weissman-ordering-agencies-violate-law.

165. Lisa Manheim & Kathryn A. Watts, *Reviewing Presidential Orders*, 86 U. CHI. L. REV. 1743, 1773 (2019).

166. *Id.* at 1811.

167. *See* Slesinger & Weissman, *supra* note 164.

168. *Id.*

Esper,[169] and the Secretary of State, Rex Tillerson, over political disagreements.[170]

Moreover, the president may actively appoint new agency heads who agree with his viewpoint and are likely to comply with his orders.[171] In Trump's EO13925, he requested the Federal Communications Commission ("FCC") and the Federal Trade Commission ("FTC") to take actions that would significantly erode Section 230.[172] The chairmen of both agencies were nominated by Trump.[173] In January 2017, Trump designated Ajit Pai as the FCC chairman and renominated him for another five-year-term.[174] In October of 2017, Trump nominated Joseph Simons to be the chairman of the FTC.[175] Taken together, agency decisions may succumb to political pressure.

In fact, Trump was not the only president who issued a large number of executive orders.[176] Since the Clinton administration, there has been a centralization of agency policy making.[177] Presidents can now affirmatively order agencies to act promptly. This phenomenon is alarming because the standard sixty-day notice and comment period before passing a final decision on a proposed rule is lost.[178] The public may therefore only hear about a new rule through news channels or press conferences as a done deal.[179] As such, overriding Section 230 via presidential executive orders is equivalent to the kind of government censorship that the Founding Fathers hoped to avoid under the First Amendment.

169. Barbara Starr et al., *Trump Fires Secretary of Defense Mark Esper*, CNN (Nov. 9, 2020), https://www.cnn.com/2020/11/09/politics/trump-fires-esper/index.html.

170. *Trump Fires Rex Tillerson as Secretary of State*, BBC (Mar. 13, 2018), https://www.bbc.com/news/world-us-canada-43388723.

171. *See id.*

172. Exec. Order No. 13,925, *supra* note 9.

173. *See* Seth Fiegerman, *Trump's FCC Head Gets Another Outcry*, CNN (Oct. 2, 2017, 6:35 PM), https://money.cnn.com/2017/10/02/technology/business/ajit-pai-reappointed/index.html; *see also* Press Release, Fed. Trade Comm'n, Joseph Simons Sworn in as Chairman of the FTC, (May 1, 2018), https://www.ftc.gov/news-events/press-releases/2018/05/ joseph-simons-sworn-chairman-ftc.

174. Fiegerman, *supra* note 173.

175. *Id.*

176. Gerhard Peters & John T. Woolley, *Executive Orders*, AM. PRESIDENCY PROJECT, https://www.presidency.ucsb.edu/node/323876 (last updated Mar. 20, 2022).

177. Robert J. Duffy, *Regulatory Oversight in the Clinton Administration*, 27 PRESIDENTIAL STUD. Q. 71, 71–72 (1997).

178. MAEVE P. CAREY, CONG. RSCH. SERV., R42612, MIDNIGHT RULEMAKING: BACKGROUND AND OPTIONS FOR CONGRESS 2 (Oct. 4, 2016).

179. Exec. Order No. 14,043, 86 Fed. Reg. 50,989 (Sept. 9, 2021).

IV. PROPOSED SOLUTIONS

The cyberspace and Section 230 have significantly matured together over the past decade. Section 230, also known as "The Twenty-Six Words That Created the Internet,"[180] was initially designed to protect start-up, entrepreneurial, and fledgling internet companies from incurring liability when they monitored their user content, as these firms were essential for a competitive online marketplace.[181] Nowadays, such small-scale platforms are squeezed out by larger monopolies such as Facebook and Twitter.[182] With vast economic and political power, platforms such as Facebook and Twitter are much more capable than the little guys at regulating and removing harmful content.

Still, upholding Section 230 is crucial to ensure that platforms will not be penalized for Good Samaritan content moderation. Imposing strict tort or criminal liability on platforms would lead to either the over-policing of content and stifling of free speech or a hands-off approach in which platforms do nothing to avoid being perceived as a publisher or content creator. This section proposes several solutions to finding a middle ground between upholding Section 230 and curing its existing flaws.

A. Transparent Terms of Service

First, platforms should provide a transparent Terms of Service agreement to users. Unlike radio listeners, internet users must engage in active and informed participation. As websites become increasingly interactive through like, comment, subscribe, and repost features, very few sites on the internet act as a passive bulletin board. Platforms should require users to agree to their Terms of Service that permit them to remove user content. Users must also bear the responsibility of understanding and complying by the rules. Platforms should provide, in addition to the typical lengthy and complex Terms of Service, a simpler, more user-

180. *See, e.g.*, JEFF KOSSEFF, THE TWENTY-SIX WORDS THAT CREATED THE INTERNET 2 (2019).

181. Weintraub & Moore, *supra* note 6, at 626.

182. Dina Srinivasan, *The Antitrust Case Against Facebook: A Monopolist's Journey Towards Pervasive Surveillance in Spite of Consumers' Preference for Privacy*, 16 BERKELEY BUS. L.J. 39, 40 (2019).

friendly, and transparent disclosure of its filtering software, content moderation regulations, and user guidelines.

B. Filtering Software

Second, platforms should implement filtering software to regulate content even if the technology is imperfect. Due to the sheer amount of content that is being generated every second, algorithms that require platforms to review all content in detail before publication may ultimately fail due to their impracticality.[183] Moreover, relying on algorithms to review such content can also create an oversimplification of what is "good" and "bad" content. Any rating system that classifies or describes content depends on the subjectivity of the rater. While platforms aim to be entirely neutral, such technological neutrality may not exist. Filtering software that blocks harmful content may ignore the context in which the content was created and inevitably exclude beneficial content. Despite such challenges, existing filtering software is better than no review at all. Large platforms should continue to invest in filtering technology and upgrade their content review functionality to protect users. As the technology matures, the cost of such features may eventually decrease and become affordable to smaller platforms.

C. Notice-Based Liability Regime

Third, a notice-based liability regime should be implemented. As suggested by the *Zeran* court, to avoid notice-based liability, a platform should perform a careful but quick investigation of the circumstances surrounding the harmful content, form a legal judgement of the content's unlawful nature, and make an on-the-spot editorial decision regarding the risk of liability by allowing the publication of that content.[184] These three steps may be completed relatively easily by existing filtering software that quickly detects harmful content and posts warnings and disclaimers on such content. Platforms may also provide a "report" feature for content that gets left out by the software so that their users can submit the questionable content for a more in-depth

183. *Section 230 of the Communications Decency Act*, ELEC. FRONTIER FOUND., https://www.eff.org/issues/cda230 (last visited Mar. 23, 2022).

184. Zeran v. Am. Online, Inc., 129 F.3d 327, 333 (4th Cir. 1997).

review. Although software and algorithms may not always have the legal expertise and human intelligence to process a piece of content in its entirely, their editorial decisions are nonetheless better than a hands-off do-nothing approach.

This notice-based liability regime should not erode the state action requirement. Under the state action requirement, injured plaintiffs must demonstrate that the state was responsible for the violation in order to have standing.[185] Platforms do not become state actors by following this regime. Instead, they should be given opportunity to temporarily disable the content from public view, evaluate the questionable content, and provide a reasonable explanation should they refuse to comply with takedown orders from an agency. As such, Section 230 may be reformed to include: Section 230(c)(1) "shall not apply unless the provider or user takes reasonable steps to prevent unlawful uses of its services."[186] Or that: Section 230(c)(1) "shall not apply if the provider or user does not expeditiously disable access to the information after being notified of its unlawful character."[187]

D. Reform California Law

Finally, due to the difficulty of reforming Section 230, an easier method may be to reform California law. Not only are Big Tech companies concentrated in California, but their users are also prolific there.[188] While federal law can preempt state law, it can also leave "state law largely untouched," or only preempt state laws that are "inconsistent with the federal scheme."[189] The Supreme Court has long held that Congress has the authority to regulate interstate commerce under the Commerce Clause,[190] while the Dormant Commerce Clause prohibits states from doing so.[191]

However, a state may regulate a platform even if the platform engages in interstate commerce. "Where [a] statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental,

185. Lujan v. Defenders of Wildlife, 504 U.S. 560, 559–562 (1992).

186. GRIMMELMANN, *supra* note 50, at 627.

187. *Id.*

188. *Rankings: Overall Rankings in 2020,* MILKEN INST., http://statetechandscience.org/statetech.taf?page=state-ranking (last visited Mar. 20, 2022).

189. GRIMMELMANN, *supra* note 50, at 114.

190. U.S. CONST. art. 1, § 8, cl. 3.

191. *Id.*

it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits."[192] Concerns about national uniformity is not part of the balancing analysis.[193] Therefore, California may regulate platforms engaging in interstate commerce without violating the Dormant Commerce Clause.

To create incentives for platforms, the reformed law cannot be overly strict. Currently, platforms have powerful data harvesting mechanisms.[194] They inject collected user data into an algorithm that generates targeted advertisements and exploits the "basic human compulsion to react to material that outrages."[195] To combat unethical data harvesting practices, the California Consumer Privacy Act ("CCPA") may be reformed so that platforms are taxed on the amount of data that they harvest. This gives platforms the financial incentive to only collect the data that they need, not any data that they want. The tax rate cannot be too high; otherwise, platforms may eventually move out of California to avoid the heavy tax burden. Platforms may prefer to reside in California despite higher taxes due to its politically friendly climate as it is where most of their contributors and users reside.

V. CONCLUSION

In the new cyber public square, free speech is not truly free. Politicians use Section 230 to weaponize speech while Big Tech monopolies have stifled certain forms of speech. Yet, courts continue to provide platforms with broad immunity under Section 230 primarily because they are more than passive bulletin boards but less than content creators.[196] Even with highly interactive features, platform algorithmic content generation does not equate to a newspaper editor who selectively approves articles to be featured on the daily news. At most, it is a clever robot that feeds humans what we want to see.

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192. Pike v. Bruce Church, 397 U.S. 137, 142 (1970).

193. Quik Payday, Inc. v. Stork, 549 F.3d 1302, 1303 (2008) (finding that the state did not violate any of these prohibitions, and therefore the regulation was constitutional).

194. Keith N. Hylton, *Digital Platforms and Antitrust*, 98 NEB. L. REV. 272, 276 (2019).

195. Weintraub & Moore, *supra* note 6, at 627.

196. Carafano v. Metrosplash.com, Inc., 339 F.3d 1119, 1124 (9th Cir. 2003) (holding that the ISP could not be considered an information content provider "because no profile has any content until a user actively creates it").

Trump's EO13925 categorized platforms as content creators in order to severely erode the legal protections that Section 230 currently affords.[197] Furthermore, Trump's rationale behind issuing EO13925 arose from his dissatisfaction of being fact-checked on Twitter. In other words, Trump used the executive order to benefit his personal interests—a tremendous abuse of power by the executive branch.

While problems with Section 230 continue to exist, the law should not be repealed in its entirety. Instead, platforms should develop a new business model that focuses on corporate social responsibility rather than shareholder profitability. As social media content becomes more extreme, especially in areas of sex, violence, crime, and invasion of privacy, freedom of speech online should be harnessed. Harnessing Donald Trump's violent speech and preventing EO13925 from becoming law is essential to democracy because they are a blatant misuse of political power that put real lives in danger. It is antidemocratic to entice violence and manipulate politics to stifle opposing views. As first responders to such criminal activity and harmful content, platforms should take the front-line role in regulating, financing, and operating the constantly changing digital infrastructure. In turn, the cyberspace can become more democratized, people-oriented, and more socially responsive to the community's needs.

197. Exec. Order No. 13,925, *supra* note 9.