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FINDING THE LOST INVOLUNTARY PUBLIC FIGURE

Jeffrey Omar Usman*

Though their quarry is shrouded in mystery,1 and indeed sometimes thought to be only a creature of myth or legend,2 a number of judges, both those acting alone3 and those concentrated in groups,4 claim to have seen an involuntary public figure cross their paths. Descriptions have been offered, and those descriptions have been dutifully reported.5 It is not clear though that the judges saw either the same thing or the same thing from the same angle.6


5 See, e.g., Dameron, 779 F.2d at 742 (indicating that an otherwise private individual became an involuntary public figure by “assum[ing] special prominence in the resolution of [a] public question” by “bec[oming] embroiled, through no desire of his own, in [a public]
Standing at the intersection between defamation claims and the First Amendment to the United States Constitution, the United States Supreme Court has sought to balance the interests of the states in providing redress for the harm caused by defamation injuries arising from media coverage with the need for a robust and vigorous press. In structuring a constitutional framework for adjudication of defamation actions, the Supreme Court cryptically and fleetingly referenced a category of plaintiffs— involuntary public figures. Trying to understand and define the contours of the involuntary public figure category, or indeed to ascertain if it even exists, has been a source of tremendous confusion and uncertainty. The involuntary public figure has become lost. This Article seeks to find the lost involuntary public figure.

In seeking to do so, this Article follows Aristotle’s guidance that “[i]f you would understand anything, observe its beginning and its development.” That is controversy . . . [and] thereby became well known to the public in this one very limited connection”) (second alteration in original) (quoting Gertz v. Robert Welch, Inc., 418 U.S. 323, 351 (1974)) (internal quotation marks omitted); Marcone v. Penthouse Int’l Magazine For Men, 754 F.2d 1072, 1084 n.9 (3d Cir. 1985) (suggesting that the only persons who would qualify as involuntary public figures are “relatives of famous people”); Wells v. Liddy, 186 F.3d 505, 540 (4th Cir. 1999) (“[A]n involuntary public figure has pursued a course of conduct from which it was reasonably foreseeable, at the time of the conduct, that public interest would arise. A public controversy must have actually arisen that is related to, although not necessarily causally linked, to the action. The involuntary public figure must be recognized as a central figure during debate over that matter. Further, we retain two elements of the five-part Reuber test, specifically: (1) the controversy existed prior to the publication of the defamatory statement; and (2) the plaintiff retained public-figure status at the time of the alleged defamation. Additionally, to the extent that an involuntary public figure attempts self-help, the Foretich rule must apply with equal strength.” (citation omitted)); Wilson, 588 S.E.2d at 208–09 (“To prove that a plaintiff is an involuntary public figure, the defendant must demonstrate by clear evidence that (1) the plaintiff has become a central figure in a significant public controversy, (2) that the allegedly defamatory statement has arisen in the course of discourse regarding the public matter, and (3) the plaintiff has taken some action, or failed to act when action was required, in circumstances in which a reasonable person would understand that publicity would likely inhere.”).

See Vincent R. Johnson, Advanced Tort Law: A Problem Approach 220 (2010) (noting that “[c]ourts have employed such a bewildering array of tests in grappling with the elusive idea of ‘involuntary public figure’ status that it is difficult to say anything about this category”); Joseph H. King, Jr., Deus ex Machina and the Unfulfilled Promise of New York Times v. Sullivan: Applying the Times for All Seasons, 95 Ky. L.J. 649, 672 (2006–2007) (noting the “dizzying variety of approaches” “to the involuntary public figure subcategory [that] have been adopted by the courts”).

Stephanie M. Reich et al., An Introduction to the Diversity of Community Psychology Internationally, in International Community Psychology: History and Theories 1, 5 (Stephanie M. Reich et al. eds., 2007). While differing with Aristotle with regard to the value of philosophy, Justice Oliver Wendell Holmes concurred with Aristotle in terms of valuing history: “a page of history is worth a volume of logic.” New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921). This wisdom is also reflected in the modern adage...
precisely how the discussion in this Article begins in Part I, through observation of the beginning and development of the Supreme Court’s jurisprudence on the constitutional limitations imposed upon defamation actions under the First Amendment to the United States Constitution. Part II of the Article then briefly sets forth the constitutional framework that the Supreme Court imposed in 1974 on defamation actions in *Gertz v. Robert Welch, Inc.* The Article then addresses in Part III how the pressures of the First Amendment have eroded the structure that *Gertz* built. In doing so, Part III specifically explores the expanding definition of who constitutes a public official and what qualifies as a matter of public controversy, the weakening of the underlying rationales for *Gertz*’s distinguishing between public and private figures both in terms of access to channels of communication and the definition of voluntariness, and the increasing force of Justice William Brennan’s contention in *Gertz*, advanced in his dissenting opinion, that there is no such thing as a private person. Part IV seeks to demonstrate that, while First Amendment pressures have weakened the edifice created by the *Gertz* structure, there is continuing value and purpose to the *Gertz* framework. Having developed an understanding of the *Gertz* structure as it exists today, the constitutional pressures thereupon, and continuing value thereof, Part V defines the involuntary public figure. Part V also reflects the manner in which this understanding of who qualifies as an involuntary public figure relieves some of the First Amendment pressures on other categories within the *Gertz* framework, while still serving the enduring purposes of *Gertz*’s distinguishing public from private persons. Most notably the Article addresses how the disuse of the involuntary public figure category has resulted in distortion of the concept of voluntariness, which plays a critical role in classification of an individual as a public figure or private individual.

I. THE ROAD FROM *NEW YORK TIMES CO. V. SULLIVAN* TO *GERTZ V. ROBERT WELCH, INC.*

While there are certainly other significant decisions, there are four cases, each decided three to four years apart over the course of the decade between 1964 to 1974, that form the core of the Supreme Court’s exploration of the constitutional constraints upon defamation actions: (1) *New York Times Co. v. Sullivan*, (2) *Curtis Publishing Co. v. Butts*, (3) *Rosenbloom v. Metromedia, Inc.*, and (4) *Gertz v. Robert Welch, Inc.*

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12 403 U.S. 29 (1971).
A. New York Times Co. v. Sullivan

On March 29, 1960, the New York Times published a page-length editorial advertisement, which had been created by civil rights leaders A. Philip Randolph and Bayard Rustin, entitled Heed Their Rising Voices. The advertisement, which listed eighty prominent endorsers, was a successful appeal to raise money to assist Dr. Martin Luther King, Jr. with legal fees incurred during the civil rights struggle. The advertisement’s focus on misconduct of police officials and the reasonable non-violent resistance of civil rights protestors was in accord with the broader civil rights movement strategy of appealing to people’s consciences, especially in the North, by shining a light on the extreme racism then existent in the South.

Iconoclastic Alabama journalist Ray Jenkins, who was one of a small number of regular readers of the New York Times in Montgomery, thought a story on the advertisement would provide insight for his readers into law enforcement’s treatment of civil rights protestors. In Jenkins’ Alabama Journal story, which was published approximately a week after the advertisement in the

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14 KENNETH C. Creech, ELECTRONIC MEDIA LAW AND REGULATION 331 (5th ed. 2007).
15 The list of signatories and endorsers of the advertisement included ministers, musicians, athletes, and a wide variety of other well-known persons including former First Lady Eleanor Roosevelt. Heed Their Rising Voices, N.Y. Times, Mar. 29, 1960, at 25.
16 Powe, supra note 13, at 304–05.
18 Jenkins proved to be a source of irritation over the years to Alabama’s political establishment. See generally RICK PERLSTEIN, NIXONLAND: THE RISE OF A PRESIDENT AND THE FRACTURING OF AMERICA 79 (2008) (describing Jenkins’s role in Alabama’s politics).
19 ANTHONY LEWIS, MAKE NO LAW: THE SULLIVAN CASE AND THE FIRST AMENDMENT 9 (1991). At the time of the article’s publication, there were only 394 issues of the New York Times that were printed for individual subscribers or newsstands in the entire State of Alabama. Id.; KERMIT L. HALL & JOHN J. PATRICK, THE PURSUIT OF JUSTICE: SUPREME COURT DECISIONS THAT SHAPED AMERICA 143 (2006).
20 See HALL & PATRICK, supra note 19, at 143. Jenkins also appreciated the interest that a story involving Dr. King, who was both revered and hated in Montgomery, would generate, as well as the interest attached to learning about the prominent signatories and endorsers. HALL & UROFSKY, supra note 17, at 23.
New York Times, he noted that a number of factual errors appeared in the advertisement, but that the errors were minor in nature. These minor errors would prove extremely problematic for the New York Times and the four Alabama ministers listed as endorsers of the advertisement: Reverends Ralph Abernathy, Joseph Lowery, S.S. Seay, Sr., and Fred Shuttlesworth.

Responding to Jenkins’ story, Montgomery Advertiser editor Grover Hall, Jr. brought his editorial page to a full pitch fury against the New York Times. The advertisement had struck a particularly sensitive cord with Hall, whose southern pride and irritation at what he perceived as hypocritical blindness of the press toward racial tensions in northern cities were pronounced. In his bombastic editorial entitled Lies, Lies, Lies, Hall roared,

[i]there are voluntary liars, there are involuntary liars. Both kinds of liars contributed to the crude slanders against Montgomery . . . in a full-page advertisement in the New York Times . . . Lies, lies, lies . . . and possibly willful ones on the part of the fund-raising novelist who wrote those lines to prey on the credulity, self-righteousness and misinformation of northern citizens.

Taking offense against the advertisement on behalf of the entire State of Alabama, Hall “invited everyone in Alabama to sue the New York Times.” Montgomery Police Commissioner L.B. Sullivan did not need encouragement. He believed the advertisement maligned him personally and the Montgomery police officers he supervised. The entire Alabama political establishment from the Governor downward also bristled at criticism from northern newspapers at their handling of civil rights protestors and had been looking for an opportunity to strike at the northern press. The Attorney General of Alabama advised that the “proper public officials” should file multimillion-dollar lawsuits against the New York Times. Sullivan, who was already irked by the press, even local media such as Hall, struck back.

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23 LEWIS, supra note 19, at 10–11.
24 Id. at 11.
25 Id.
26 GOLD, supra note 21, at 19.
27 Id. at 19–21.
28 Id. at 22–24.
30 Sullivan was regularly engaged in struggles with the press and even Hall was too progressive for Sullivan’s tastes. As an illustration, in 1960 a group of students from Alabama State College demanded to be seated and served in a state cafeteria that was open
Sullivan brought suit in the Circuit Court for Montgomery County, Alabama against the New York Times Company and the four Alabama ministers who had been endorsers.\(^{32}\) Alabama state courts, through both judges and juries, had long been complicit in the maintenance of white supremacy within the State of Alabama.\(^{33}\) It was to those state courts that the Alabama political establishment turned to take action against their political adversaries.\(^{34}\) The New York Times was easily perceived by white Alabamians of the era as among the “outside agitators” against whom their animus was directed.\(^{35}\)

The inclusion of the Alabama ministers tactically eliminated diversity jurisdiction as a route for removing the case to federal court, but their inclusion was not merely tactical.\(^{36}\) The ministers were also a target of the white political establishment.\(^{37}\) Having been locked in a social, political, and legal struggle with Alabama’s white supremacy power structure, Reverends Abernathy, Lowery, Seay,
and Shuttlesworth were perceived as in-state agitators.\footnote{See \textit{id.}} Sullivan sought $500,000 in damages from each of the defendants.\footnote{\textsc{HALL} \& \textsc{Urofsky}, \textit{ supra} note 17, at 31–32.} This was not the first time Alabama’s political apparatus had made active use of the legal system to attack the civil rights movement.\footnote{\textit{Id.} at 15.} As a practical matter, legal costs had proven to be a persistent underlying problem for the movement and now Sullivan was seeking a judgment that would be impossible to pay.\footnote{\textsc{Peter E. Kane}, \textit{Errors, Lies, and Libel} 10 (1992).} The defamation suit was an opportunity to deliver a crushing blow.

In terms of the legal theory and facts underlying his defamation action, Sullivan specifically raised objections to assertions advanced in the third and sixth paragraphs of the advertisement,\footnote{\textsc{Lewis}, \textit{ supra} note 19, at 12.} which said,

\begin{quote}
In Montgomery, Alabama, after students sang “My Country, ’Tis of Thee” on the State Capitol steps, their leaders were expelled from school, and truck-loads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body protested to state authorities by refusing to re-register, their dining hall was pad-locked in an attempt to starve them into submission. . . .

Again and again the Southern violators have answered Dr. King’s peaceful protests with intimidation and violence. They have bombed his home almost killing his wife and child. They have assaulted his person. They have arrested him seven times—for “speeding,” “loitering” and similar “offenses.” And now they have charged him with “perjury” . . . under which they could imprison him for ten years. Obviously, their real purpose is to remove him physically as the leader to whom the students and millions of others—look for guidance and support, and thereby to intimidate all leaders who may rise in the South. Their strategy is to behead this affirmative movement, and thus to demoralize [African] Americans and weaken their will to struggle. The defense of Martin Luther King, spiritual leader of the student sit-in movement, clearly, therefore, is an integral part of the total struggle for freedom in the South.\footnote{\textit{Heed Their Rising Voices}, \textit{ supra} note 15.}
\end{quote}

As Jenkins’s had noted in his \textit{Alabama Journal} story, the advertisement was less than a work of precision.\footnote{\textsc{Gold}, \textit{ supra} note 21, at 18–19.} Among the errors therein, the campus dining hall had not been padlocked on any occasion, the police had a significant presence near the campus but did not “ring” the campus and had not been called to the campus in response to the demonstration at the capitol steps, the students had sung a different
song, and the police had arrested Dr. King four not seven times. Precious little attention was given to the connection between the advertisement’s content and Sullivan or to the advertisement having injured his reputation. Furthermore, the ministers testified without contradiction that they had not seen the advertisement much less authorized use of their names as endorsers. In fact, the ministers only discovered their names were listed on the advertisement, their names having been added to the advertisement as endorsers without the ministers’ knowledge or consent, through Sullivan’s filing of suit against them. Nevertheless, the all-white Montgomery jury lashed out at the ministers and the New York Times, returning $500,000 verdicts against each of the defendants. Moving forward with enforcement of the decision, Sullivan and the Alabama judiciary would prove particularly vindictive towards the ministers, seizing and levying their property for payment of the judgment without following standard procedures in awaiting resolution of the case on appeal.

The jury’s decision shone a path for southern officials to bring the northern press to heel. In the eighteen months that immediately followed the verdict, southern political officials would file defamation actions seeking more than three hundred million dollars in damages related to news coverage of the civil rights movement. The lawsuits targeted journalists who were reporting upon the civil rights movement. While New York Times, Co. v. Sullivan was pending before the Supreme Court, the New York Times Company “pulled its reporters out of Alabama, achieving precisely what the state had hoped—an end to national attention to its racial policies, at least in the pages of the Times.” That the defamation lawsuits were curtailing reporting by the press on the civil rights movement in the South was far from a hidden consequence. A headline in the Montgomery Advertiser boldly celebrated “State Finds Formidable Legal Club to

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45 The advertisement indicated the students were singing My Country ’Tis of Thee. Id. at 18. The students were actually singing The Star-Spangled Banner. Id.  
47 Reflecting on the case, Justice Hugo Black of Alabama quipped “that if any of Sullivan’s friends in Montgomery believed he had ordered the repression of the civil rights movement described in the New York Times advertisement, his ‘political, social and financial prestige has likely been enhanced.’” LEWIS, supra note 19, at 225.  
48 Id. at 12.  
49 HALL & UROFSKY, supra note 17, at 15–18 (discussing how the four ministers’ names came to be included in the advertisement without their knowledge or consent).  
51 HALL & UROFSKY, supra note 17, at 31–33, 68.  
52 Id. at 88; ALFRED H. KNIGHT, THE LIFE OF THE LAW: THE PEOPLE AND CASES THAT HAVE SHAPED OUR SOCIETY, FROM KING ALFRED TO RODNEY KING 228 (1996); Epps, supra note 34, at 785.  
53 KNIGHT, supra note 52, at 229.  
54 AUCOIN, supra note 34, at 68.  
55 NEWTON, supra note 35, at 429.  
56 KNIGHT, supra note 52, at 229.
Swing at Out-of-State Press.”57 The Alabama Journal observed that as a result of the verdict its northern press counterparts might “re-survey . . . their habit of permitting anything detrimental to the south and its people to appear in their columns.”58 In their brief before the Supreme Court, the ministers perfectly described the use of libel suits as a political tool in support of white supremacy. Such suits are “part of a concerted, calculated program to carry out a policy of punishing, intimidating and silencing all who criticize and seek to change Alabama’s notorious political system of enforced segregation.”59

While in retrospect the unconstitutionality of Alabama’s strict liability approach to defamation is clear,60 it was far from that at the time.61 On appeal, the Alabama Supreme Court did not provide any succor to the New York Times.62 To the contrary, the Court noted that the crux of the lawsuit involved libelous portions of the advertisement and that “[t]he First Amendment of the U.S. Constitution does not protect libelous publications.”63 The Alabama Supreme Court, not surprisingly, cited, among others cases, the U.S. Supreme Court’s decision in Chaplinsky v. New Hampshire.64 Therein, the Court had indicated that

[there are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise

57 Id.
60 Judge Alex Kozinski has presented a rendering of the stark consequences of a different conclusion:

If successful, the lawsuits would effectively ring down the curtain on conditions of blacks in the South, for every story and every advertisement commenting on those conditions would expose the media sources to liability. Worse, if L. B. Sullivan—a small-town official from the heart of Dixie—could intimidate The New York Times, the media in this country would become as effective as a toothless guard dog.

61 See KNIGHT, supra note 52, at 229–30.
63 Id. at 40.
any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or “fighting” words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.\(^{65}\)

Nor did this decision reflect a new approach to the intersection of a free press with libel. To the contrary, William Blackstone’s Commentaries had provided that “where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the liberty of the press, properly understood, is by no means infringed or violated.”\(^{66}\) Though the legal revolution that the Warren Court was generating should have perhaps provided him with pause,\(^{67}\) Sullivan’s attorney, M. Roland Nachman, Jr.,\(^{68}\) was understandably confident of his chances of prevailing before the high court. He said, “[t]he only way the Court could decide against me was to change one hundred years or more of libel law.”\(^{69}\)

That is precisely what the U.S. Supreme Court would do. For the Court, the advertisement being libelous under state tort law was not controlling; rather, the Court glided past the heart of Sullivan’s argument, concluding that “libel can claim no talismanic immunity from constitutional limitations.”\(^{70}\) Distinguishing prior precedents that suggested the opposite, the Court noted those prior cases did not involve application of libel suits “to impose sanctions upon expression critical of the official conduct of public officials.”\(^{71}\) The Court rejected the foundation of Sullivan’s argument that libelous speech was not subject to constitutional scrutiny and concluded instead that defamation actions would have to be “measured by standards that satisfy the First Amendment.”\(^{72}\)

In weighing Alabama’s state defamation law against First Amendment standards, neither the inclusion of false information in the advertisement nor the

\(^{65}\) Chaplinsky, 315 U.S. at 571–72 (emphasis added) (citations omitted).

\(^{66}\) 4 WILLIAM BLACKSTONE, COMMENTARIES *151 (emphasis omitted).


\(^{68}\) Nachman, a Montgomery attorney and a graduate of Harvard College and Harvard Law School, was one of the small numbers of Alabamians who subscribed to the New York Times. Lewis, supra note 19, at 111.

\(^{69}\) Powe, supra note 29, at 87.


\(^{71}\) Id. at 268.

\(^{72}\) Id. at 269.
availability of truth as a defense was sufficient to render the verdict sustainable.\(^\text{73}\) The Court concluded that requiring critics of public officials to guarantee the truth of all their statements under the looming threat of a libel judgment would dampen the vigor and limit the variety of public debate.\(^\text{74}\) In order to protect public discourse about the conduct of public officials, the Court determined that an error, even one resulting from negligence, should not be sufficient to recover tort damages.\(^\text{75}\) The Court recognized that “erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the ‘breathing space’ that they ‘need . . . to survive.’”\(^\text{76}\) Quoting John Stuart Mill, the Court observed that “[e]ven a false statement may be deemed to make a valuable contribution to public debate, since it brings about ‘the clearer perception and livelier impression of truth, produced by its collision with error.’”\(^\text{77}\)

To maintain the necessary breathing room for protecting public debate, the Court determined that a public official could not recover damages for a defamatory falsehood relating to his or her official conduct without proof that the statement was made with “actual malice.”\(^\text{78}\) To demonstrate actual malice, claimants would henceforth need to show the statement was made “with knowledge that it was false or with reckless disregard of whether it was false or not.”\(^\text{79}\)

The Court’s holding in \textit{New York Times} was expressly tied to First Amendment limits on defamation actions brought by public officials\(^\text{80}\) regarding their official conduct, and the Court’s reasoning was intertwined with speech regarding governance.\(^\text{81}\) Nevertheless, expansion of this First Amendment protection seemed to be on the horizon. The Court’s declaration in \textit{New York Times} that the constitutional safeguard of the First Amendment “was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people” pointed to constitutional protections relating to defamation actions involving persons other than public officials.\(^\text{82}\)

\(^\text{73}\) \textit{Id.} at 268–69.
\(^\text{74}\) \textit{Id.} at 270–71, 279.
\(^\text{75}\) See \textit{id.} at 268–69.
\(^\text{76}\) \textit{Id.} at 271–72 (quoting NAACP v. Button, 371 U.S. 415, 433 (1963)).
\(^\text{77}\) \textit{Id.} at 279 n.19 (quoting JOHN STUART MILL, \textit{ON LIBERTY} 15 (R.B. McCallum ed., Oxford, B. Blackwell 1946) (1859)).
\(^\text{78}\) \textit{Id.} at 279–80.
\(^\text{79}\) \textit{Id.} at 280.
\(^\text{80}\) Having determined that Sullivan, as the Montgomery County Commissioner in charge of the police, clearly qualified as a public official, the Court did not find it necessary to further address who qualifies as a public official. \textit{Id.} at 283 n.23. The Court provided additional insight in \textit{Rosenblatt v. Baer}, 383 U.S. 75, 85 (1966). Therein, the Court indicated that “the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” \textit{Id.}
\(^\text{82}\) \textit{Id.} at 269 (quoting Roth v. United States, 354 U.S. 476, 484 (1957)) (internal quotation marks omitted).
B. Curtis Publishing Co. v. Butts

That extension of the actual malice standard beyond speech related to public officials occurred in *Curtis Publishing Co. v. Butts*, which addresses two consolidated cases—one involving a former University of Georgia football coach and the other a retired Army General. As for the former, the tenure of James Wallace Butts, Jr., better known as Wally Butts, as the head football coach for the University of Georgia from 1939 to 1960 was so successful that it resulted in his posthumous enshrinement in the college football hall of fame. As 1960 approached, however, Butts’s teams started to have too many losing seasons on the field, and Butts’s character defects were increasingly causing off the field image problems for the university. Though he was removed from the more visible position of head football coach, Butts retained his position as athletic director. At the time, the Georgia athletic director was paid using private funds and was a private employee under Georgia law rather than a state employee. Because the Supreme Court resolved the case on other grounds, it did not consider whether Butts was truly a private employee.

Butts was still the Georgia athletic director on September 13, 1962 when he telephonically crossed paths with Atlanta businessman George Burnett. While making a phone call, a telephone operator mistakenly connected Burnett into a phone conversation between Butts and Alabama football coach Paul “Bear” Bryant. Burnett claimed the conversation involved Butts revealing insider information to an appreciative Bryant that would be helpful for Alabama in their upcoming game against Georgia. The following weekend, Alabama annihilated...

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85 *Vince J. Dooley & Tony Barnhart, Dooley: My 40 Years at Georgia* 125 (2005) (stating that five of Butts’s last eight seasons ended with losing records).
86 *Richard O. Davies & Richard G. Abram, Betting the Line: Sports Wagering in American Life* 107–08 (2001); *Albert J. Figone, Cheating the Spread: Gamblers, Point Shavers, and Game Fixers in College Football and Basketball* 75 (2012) (indicating that boosters pressured to have Butts fired in large part because of his personal financial problems, excessive drinking at nightclubs, and sexual indiscretions with young women, including on out-of-town trips financed at the university’s expense).
87 *Figone, supra* note 86, at 75.
88 *Curtis Publ’g Co.,* 388 U.S. at 135.
89 See *id.* at 135 & n.2.
90 *Figone, supra* note 86, at 75.
91 *Id.*
92 *Id.* at 76.
Georgia thirty-five to zero in the game—a margin of victory that was twice the betting line. Burnett, who had taken notes on the conversation, waited several months before talking with University of Georgia officials. When he finally did so, the University through the Georgia Attorney General’s Office conducted an investigation that found enough cause for concern to force Butts’s resignation in February of 1963.

Sportswriter Frank Graham, Jr. had gotten word from the *Saturday Evening Post* of a scandal involving Butts and was investigating the matter. The reason for the resignation had not yet broken in the press. Like Butts, by 1960 the *Saturday Evening Post* had seen better days. What once had been a publishing powerhouse aimed at Middle America and adorned with Norman Rockwell’s artistry had grown stale and was losing market position. To turn things around, Curtis Publishing hired an energetic editor-in-chief named Clay Blair, who planned to steer the magazine toward “sophisticated muck-racking” and “provoking people.” The Butts/Bryant story fit perfectly with the new direction of the magazine, so the magazine purchased Burnett’s cooperation for $5,000.

Fearing leaks from his own editors and concerned that a competitor might scoop the Butts/Bryant story, Blair created an ad hoc publishing process that lacked the magazine’s normal editorial oversight and review. The March 23, 1963 edition of the *Saturday Evening Post* included the less-than-thoroughly vetted “The Story of a College Football Fix.” Within days of release of the issue, Butts and Bryant filed suits seeking millions of dollars in damages. Relying upon diversity jurisdiction, Butts filed suit in the United States District Court for the Northern District of Georgia. Whatever the truth may be, the

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93 Id.
94 Id. at 77.
95 Id. at 77–78.
96 Id. at 78.
97 FRANK GRAHAM, JR., A FAREWELL TO HEROES 284 (1981).
99 Id.
100 Id. at 168–69.
101 GRAHAM, supra note 97, at 284.
102 FIGONE, supra note 86, at 77–78.
103 DUNNAVANT, supra note 98, at 169–70.
104 FIGONE, supra note 86, at 79.
105 DUNNAVANT, supra note 98, at 170.
106 FIGONE, supra note 86, at 82.
107 James Kirby, who had been the Dean of the Ohio State University College of Law, General Counsel of New York University, and a Professor at the University of Tennessee College of Law, was hired as an observer of the trial by the Southeastern Conference. Id. at 77. In a book he wrote on the scandal, Kirby concludes both Butts and Bryant acted with impropriety but that Alabama would have likely won and covered the betting line spread anyway. JAMES KIRBY, FUMBLE: BEAR BRYANT, WALLY BUTTS, AND THE GREAT COLLEGE
trial itself proved to be no less of a rout than Alabama’s victory over Georgia had been in the allegedly fixed game. The jury returned a $3.6 million verdict for Butts, which was reduced by the trial court to $460,000. Shortly thereafter, the Supreme Court released its New York Times Co. v. Sullivan decision, and the publisher filed a motion for new trial based thereupon. The district court denied the publisher’s motion because Butts was not a public official and because the jury could have concluded the publisher acted with reckless disregard as to whether the article was false or not. The United States Court of Appeals for the Fifth Circuit affirmed the judgment in a divided vote.

The companion case involved former Army General Edwin Walker and the Associated Press’s reporting on his role in riots at the University of Mississippi in opposition to enforcement of court ordered integration. Denied admission to the all-white University of Mississippi on the basis of race, James Meredith successfully challenged the University’s exclusionary policies in court. Mississippi state officials, however, repeatedly refused to honor court orders requiring his admission. The Kennedy administration sought an accommodation with Mississippi Governor Ross Barnett but was unable to reach an accord, or at least an accord that Barnett would honor. Lacking cooperation from state authorities, the Kennedy administration assembled a force of federal marshals and a hodgepodge of other federal officials composed of everyone from Department of Justice attorneys and border agents to federal prison guards to ensure Meredith was able to register and attend classes. On the day before Meredith was to register, federal officials set up a command center and camped out for the night at the Lyceum, a legendary building on the campus, to be prepared to help Meredith register the following morning. Mistakenly believing Meredith was in the

FOOTBALL SCANDAL 189–213 (1986). A number of Bryant biographers have disagreed. See, e.g., DUNNAVANT, supra note 98, at 170.

108 See Kirby, supra note 107, at 91–148.
109 See Figone, supra note 86, at 84.
110 See id.; Kirby, supra note 107, at 183–84.
112 Id. at 139.
113 Id. at 140.
115 Richard K. Scher, Politics in the New South: Republicanism, Race and Leadership in the Twentieth Century 215 (2d ed. 1997); Eagles, supra note 114, at 276–77 (“Determined to keep Meredith out of Ole Miss, the state’s leadership did not know what to do except to be obstructive.”).
118 Id. (“Unprepared and ignorant of local lore, the Kennedy team blundered in its choice of a place to stand. . . . The Lyceum and the Grove were sacred ground at Ole Miss.
a mob of more than two thousand five hundred persons attacked federal officials with Molotov cocktails, guns, and a bulldozer, which was turned into makeshift battering ram to break the federal line. By the time military reinforcements arrived in the middle of the night, one hundred and sixty federal officials had been injured, twenty-eight of them by gunfire, and two persons, a reporter and a local resident, were dead. The morning after, Meredith, who was escorted by five thousand troops, registered for classes. Enduring constant threats and harassment, Meredith lived with a federal marshal for the next two years until he graduated in 1963, becoming the first African American graduate from the University of Mississippi.

Van Savell, a young reporter who blended in well among the college students, had been part of a team of Associated Press (AP) reporters covering the integration of the University of Mississippi. In reporting on the rioting for the AP, Savell

[I am a graduate of the University of Mississippi. For this I am proud of my Country . . . . The question always arises—was it worth the cost? . . . I believe that I echo the feelings of most Americans when I say that “no price is too high to pay for freedom of person, equality of opportunity, and human dignity.”]

indicated that Walker, who was among the rioters, had “assumed command” of the
crowd and “led a charge of students against federal marshals.” He added that
Walker had climbed on a monument, exhorting the rioting crowd with the
admonition “[d]on’t let up now. . . . You must be prepared for possible death. If
you are not, go home now.” After the rioting, Walker was arrested and charged
with, among other offenses, insurrection against the United States—these charges
were later dropped.

Walker was not new to the spotlight. His military career had ended in
controversy over his attempts to indoctrinate soldiers under his command using
controversial voter-rating guides and materials from the John Birch Society. Even before the rioting, Walker had assumed a leadership position in the
opposition to integration of the University of Mississippi. In radio addresses, he
called upon southerners to draw the line, saying “[i]t is time to move. We have
talked, listened and been pushed around far too much for the anti-Christ Supreme
Court. Bring your flags, your tents, and your skillets.”

Walker filed fifteen libel suits against the AP, specifically selecting southern
towns in which newspapers carried the story and in which he thought a
sympathetic jury pool could be found. He sought more than $33 million in
damages. Walker conceded that he had been present and spoken to the students,
but he insisted he counseled restraint, did not exercise any control over the crowd,

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126 Id. at 95–96 (citation omitted) (internal quotation marks omitted).
127 Id. at 95 (omission in original) (citation omitted) (internal quotation marks
omitted).
128 Id. at 96.
129 STEVEN E. ATKINS, ENCYCLOPEDIA OF RIGHT-WING EXTREMISM IN MODERN
AMERICAN HISTORY 186 (2011). Walker, who had served with distinction in World War II
and the Korean War, had also been assigned by President Eisenhower as the commanding
officer to direct the military in aiding the integration of Central High School in Little Rock,
Arkansas. Id. Walker only performed the latter function after his Commander-in-Chief
refused to allow him to resign his commission. Id. The beginning of the end of Walker’s
military career occurred with the publication of a 1961 article in Overseas Weekly that
noted that Walker was using John Birch Society materials as anti-communist indoctrination
material. SARA DIAMOND, ROADS TO DOMINION: RIGHT-WING MOVEMENTS AND
POLITICAL POWER IN THE UNITED STATES 57 (1995). While the Pentagon did have an anti-
communist indoctrination education initiative, the John Birch Society materials confused
the American Left with Soviet Communists. Id. The removal of Walker would become a
major point of confrontation between the American right and left. Id. at 57–58; see also
DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A
WOMAN’S CRUSADE 101–02 (2005); DAVID TALBOT, BROTHERS: THE HIDDEN HISTORY OF
THE KENNEDY YEARS 71–72 (2007); Editorial, Fair Play for Gen. Walker, LIFE, Oct. 6,
130 Benac, supra note 125, at 96.
131 Id. (citation omitted) (internal quotation marks omitted).
132 Id.
133 Id.
and did not lead a charge against federal marshals. The AP lost the defamation case Walker filed in Fort Worth, Texas, and the jury returned a verdict for $800,000, which was reduced to $500,000 by the trial court. The trial court explicitly declined to apply the New York Times Co. v. Sullivan standard; however, the court noted that if the actual malice standard had been applicable, it would have entered a directed verdict for the AP. The Texas Court of Appeals affirmed, and the Texas Supreme Court declined to review the decision.

Addressing Butts’s and Walker’s appeals, the primary issue before the Court was whether the constitutional safeguards afforded speech regarding public officials would be extended to those who did not work for the government. For reasons addressed in more detail in Part III.B below, the U.S. Supreme Court extended the actual malice standard to public figures. Though the Court concluded Butts had made a sufficient showing of wanton and reckless indifference to support a finding of actual malice, the Court’s application of the heightened standard required that the judgment for Walker be set aside. None of the justices, however, provided bright line rules for determining when a person is a public figure. In fact, the Court did not even define the term public figure.

C. Rosenbloom v. Metromedia Inc.

The U.S. Supreme Court continued to expand constitutional restrictions on defamation actions in Rosenbloom v. Metromedia, Inc., though the Court’s focus, or at least the focus of the controlling plurality opinion, shifted from the status of the person defamed (public official/public figure) to considering whether the

\[\text{References}\]

134 Id.
135 Id.
137 Id.
138 See id. at 155. In his plurality opinion, Justice Harlan did not impose the actual malice standard applicable to public officials but instead a less demanding gross negligence standard for public figures. Id. at 160, 166–67; Edward T. Fenno, Public Figure Libel: The Premium on Ignorance and the Race to the Bottom, 4 S. CAL. INTERDISC. L.J. 253, 279–80 (1995); Frederick Schauer, Public Figures, 25 WM. & MARY L. REV. 905, 932 (1984). However, five justices supported the application of the actual malice standard to public figures, though Justices Black and Douglas further maintained that absolute protection should be afforded to the press against defamation suits. Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 & n.7 (1974); see also Catherine Hancock, Origins of the Public Figure Doctrine in First Amendment Defamation Law, 50 N.Y.L. SCH. L. REV. 81, 83 & n.11 (2005–2006).
139 Curtis Pub’g Co., 388 U.S. at 156–59.
141 See Jay Barth, Is False Imputation of Being Gay, Lesbian, or Bisexual Still Defamatory? The Arkansas Case, 34 U. ARK. LITTLE ROCK L. REV. 527, 529–30 (2012) (noting that “public figure” was only defined later in Gertz).
subject matter reported on constituted a matter of public concern.\textsuperscript{142} The case brought before the Court involved George Rosenbloom, a distributor of “nudist magazines” in Metropolitan Philadelphia.\textsuperscript{143} While the police had not been trying to arrest Rosenbloom, he had the misfortune of delivering magazines to a newsstand at the same time Philadelphia police were conducting an anti-obscenity raid, resulting in his arrest.\textsuperscript{144} With Rosenbloom in custody, police officers conducted a search of his home and a barn he used as a warehouse.\textsuperscript{145} During their search, officers found a copious amount of pornography.\textsuperscript{146} With this discovery, a captain with the Philadelphia Police Department Special Investigations Squad contacted multiple media outlets including Metromedia’s WIP Radio to report their find.\textsuperscript{147}

As part of its newscast on October 3, 1963, WIP Radio informed its listeners that

\begin{quote}
City Cracks Down on Smut Merchants. The Special Investigations Squad raided the home of George Rosenbloom . . . this afternoon. Police confiscated 1,000 allegedly obscene books at Rosenbloom’s home and arrested him on charges of possession of obscene literature. The . . . Squad also raided a barn . . . and confiscated 3,000 obscene books. Captain Ferguson says he believes they have hit the supply of a main distributor of obscene material in Philadelphia.\textsuperscript{148}
\end{quote}

Rosenbloom, who argued the materials were not obscene, filed suit, seeking an injunction to prevent the police from interfering with his business and an action against a number of the media outlets that had referred to the materials as obscene.\textsuperscript{149} WIP Radio, which was not part of Rosenbloom’s original suit, covered court proceedings in these cases.\textsuperscript{150} Though it did not mention Rosenbloom by name, the radio station informed its listeners that a distributor of pornography was litigating in an attempt to get a local television station and newspaper to “lay off the smut literature racket” and that “[t]he girlie-book peddler[] say[s] the police crackdown and continued reference to [his] borderline literature as smut or filth is hurting [his] business.”\textsuperscript{151}

\textsuperscript{142} King, \textit{supra} note 6, at 662–63.
\textsuperscript{143} FRALEIGH & TUMAN, \textit{supra} note 58, at 180.
\textsuperscript{145} \textit{Id.}
\textsuperscript{146} \textit{Id.} at 134–35.
\textsuperscript{147} \textit{Id.} at 135.
\textsuperscript{148} \textit{Id.} (quoting Rosenbloom v. Metromedia, 403 U.S. 29, 33 (1971)).
\textsuperscript{149} \textit{Id.}
\textsuperscript{150} \textit{Id.}
\textsuperscript{151} \textit{Id.} (quoting \textit{Rosenbloom}, 403 U.S. at 34–35).
After learning about WIP’s broadcasts, Rosenbloom contacted the station, asserting that his materials were not obscene.\textsuperscript{152} The radio station informed Rosenbloom that the District Attorney’s Office had indicated the materials were obscene.\textsuperscript{153} The District Attorney’s Office was wrong; the trial court ordered entry of an acquittal on the criminal obscenity charges.\textsuperscript{154} Following his acquittal, Rosenbloom brought a defamation suit in federal court against WIP Radio.\textsuperscript{155} The jury returned a $775,000 verdict for Rosenbloom, but the trial court judge reduced the amount of the verdict to $275,000.\textsuperscript{156} The United States Court of Appeals for the Third Circuit reversed the trial court, concluding that the actual malice standard applied even though Rosenbloom was not a public figure because the broadcasts were about matters of public concern and Rosenbloom had not shown actual malice.\textsuperscript{157}

A fractured Supreme Court applied the actual malice standard to Rosenbloom’s defamation claim but could not agree on a reason for doing so.\textsuperscript{158} The three-justice plurality authored by Justice Brennan reasoned that “[i]f a matter is a subject of public or general interest, it cannot suddenly become less so merely because a private individual is involved, or because in some sense the individual did not ‘voluntarily’ choose to become involved.”\textsuperscript{159} Brennan added that “[t]he public’s primary interest is in the event; the public focus is on the conduct of the participant and the content, effect, and significance of the conduct, not the participant’s prior anonymity or notoriety.”\textsuperscript{160} Thus, the plurality viewed its standard as honoring “the commitment to robust debate on public issues, which is embodied in the First Amendment, by extending constitutional protection to all discussion and communication involving matters of public or general concern, without regard to whether the persons involved are famous or anonymous.”\textsuperscript{161}

The Rosenbloom plurality did not ignore arguments in favor of retaining the distinction between public figures and private persons.\textsuperscript{162} However, the members of the plurality concluded such an approach would improperly result in “dampening discussion of issues of public or general concern because they happen to involve private citizens,” thus a heightened standard needed to be applied.\textsuperscript{163} In the plurality’s view, “[v]oluntarily or not, we are all ‘public’ men to some

\begin{thebibliography}{9}
\bibitem{152} Id.
\bibitem{153} Id.
\bibitem{154} Id. at 155–56.
\bibitem{155} POWE, supra note 29, at 92.
\bibitem{156} See id.
\bibitem{159} Id. at 43.
\bibitem{160} Id.
\bibitem{161} Id. at 43–44.
\bibitem{162} Id. at 45–47.
\bibitem{163} Id. at 48.
\end{thebibliography}
degree." Thus, the controlling question after *Rosenbloom* in determining whether the actual malice standard applies was whether the defamatory statement related to a matter of public concern. This approach, which would be the high-water mark for media protection against defamation suits, would be jurisprudentially short-lived, but scholarly attachment thereto endures.

**D. Gertz v. Robert Welch, Inc.**

In *Gertz v. Robert Welch, Inc.*, the Supreme Court redirected its focus to the status of the defamed plaintiff in determining whether the actual malice standard applied, and in doing so the Court created a new structural framework for analyzing defamation cases. The events that gave rise to *Gertz* began with an extended period of harassment of a youth by a police officer. Chicago police officer Richard Nuccio regarded Robert Nelson, a nineteen-year-old in the neighborhood he patrolled, as a hoodlum. Nuccio stopped and patted down Nelson sixty to one hundred times over the course of eighteen months and never found a weapon or contraband. On June 4, 1968, Nelson either ran from or was already running (he had been a runner on his high school track and field team) when he encountered Nuccio. The officer directed him to stop; Nelson did not. Without warning, Nuccio shot and killed Nelson. The Chicago District Attorney’s Office prosecuted Nuccio for murder. At trial, Nuccio claimed self-defense arguing that Nelson had lunged at him with a knife; however, no knife was recovered. Furthermore, the medical evidence established that Nelson had been shot in the back at a distance of approximately eighty feet. A jury convicted Nuccio of second-degree murder.

Nelson’s parents pursued civil monetary damages. Another attorney referred the Nelsons to Elmer Gertz. On behalf of the Nelsons, Gertz pursued a

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164 *Id.*


166 See King, supra note 6, at 663–65.


168 *Id.* at 15.

169 *Id.* at 16.

170 *Id.* at 19.

171 See *id.*

172 *Id.*

173 *Id.* at 11–16.

174 *Id.* at 12, 15–16.

175 *Id.*

176 *Id.*

177 *Id.* at 18–19.
strategy of filing actions in both state and federal courts, naming as defendants Nuccio and the City of Chicago in the state court action but naming only Nuccio in federal court, where liability and immunity issues were more likely to bar recovery against the city given the willful and illegal nature of Nuccio’s conduct.  

Little did Gertz know at the time, he was about to find himself in the crosshairs of the John Birch Society. Created in the 1950s and rising to the height of its influence in the 1960s, the John Birch Society was an ultraconservative anticomunist organization. The organization was focused on safeguarding the nation against communist conspiracies. Its “message centered around the idea that there was a vast left-wing conspiracy of American liberals, international communists, and moderate American Republicans who worked together to undermine the Christian values and individual liberties of Americans.” By 1968 the John Birch Society had become convinced that communists were trying to undermine local law enforcement by discrediting police officers. Robert Welch, the founder of the John Birch Society and the publisher of its monthly magazine American Opinion, articulated that the end game of the conspiracy was to create public pressure to replace local police with a national police force, which could later be used to support a communist dictatorship. The March 1969 issue of American Opinion contained an article entitled FRAME-UP: Richard Nuccio and the War on Police. The article alleged that Nuccio’s prosecution had been part of the communist campaign against local police. The article, among other errors, accused Gertz of being a Communist, framing Nuccio, assisting in planning the 1968 demonstrations at the Democratic National Convention, and having a criminal record.  

Prior to the Supreme Court’s decision in Rosenbloom, Gertz filed a defamation action in the United States District Court for Northern District of Illinois against Robert Welch, Inc., the publisher of American Opinion. Drawing upon the Curtis Publishing Co. v. Butts decision, the publisher argued that Gertz was a public official and/or public figure and that the article was related to a matter

178 Id.
179 Id.
183 LABUNSKI, supra note 144, at 148.
184 Id.
185 Id.
186 Id. at 149; KENNETH C. CREECH, ELECTRONIC MEDIA LAW AND REGULATION 338–40 (5th ed. 2007).
of public concern. Gertz countered that the actual malice standard did not apply to him because he was neither a public official nor a public figure. The trial court, which suffered from confusion throughout the case regarding the applicable constitutional defamation standard, allowed the case to proceed to a jury verdict on a less restrictive standard than actual malice, which resulted in a $50,000 judgment for Gertz. However, after the trial, the trial court set aside the verdict, having determined the actual malice standard applied and that Gertz had not shown actual malice. Applying Rosenbloom, the Seventh Circuit Court of Appeals affirmed. The Supreme Court granted certiorari in the case and subsequently concluded that the actual malice standard did not apply to Gertz, thereby reframing the constitutional constraints on defamation claims.

II. THE GERTZ CATEGORIZATION STRUCTURE

The Gertz Court structured an approach to defamation suits designed to address the inherent tension between states’ interest in redressing injuries arising from defamation and the constitutional safeguards necessary for a vigorous and uninhibited press. While theoretically “the balance between the needs of the press and the individual’s claim to compensation for wrongful injury might be struck on a case-by-case basis,” the Gertz Court recognized the impracticability and substantive undesirability of such an approach. Instead, the Court balanced the competing interests by creating categorical groupings, assigning different types of defamation plaintiffs to different categories, and setting forth rules to govern those categories.

Pursuant to Gertz, plaintiffs in defamation cases can be classified into one of five categories: (1) public officials, (2) all-purpose public figures, (3) limited-purpose public figures, (4) involuntary public figures, and (5) private individuals. The public official designation applies “at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental

188 See id. at 998–1000.
189 See Labunski, supra note 144, at 149.
190 Id.
191 Id. at 149–50.
193 Id.
195 Not all of the contours set forth below are contained in Gertz itself or its predecessors. Some aspects of the structure have been clarified by post-Gertz decisions, but the foundation upon which those subsequent Supreme Court decisions have been placed is Gertz itself.
196 Gertz, 418 U.S. at 342.
197 Id. at 343.
For the heightened protections of the actual malice test to apply to a public official, the allegedly defamatory speech must be related to official conduct or fitness for office. The constitutional protection afforded by the actual malice standard does not apply to people simply because they are public employees.

As for the second category, the Gertz Court described all-purpose public figures as persons who “occupy positions of such persuasive power and influence that they are deemed public figures for all purposes.” All-purpose public figures, a category into which a relatively small number of persons will fall, are individuals with significant fame and notoriety, i.e., “household names.” There is a societal expectation that such persons are fodder for public discussion. Because of the impact of being categorized as such, the Gertz Court established a

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200 See SMOLLA, supra note 2, § 3:23, at 3-60.
202 The Supreme Court in Garrison v. Louisiana, 379 U.S. 64 (1964), expressly concluded that the heightened actual malice standard reached beyond official conduct to fitness for office, including considerations of private character:

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

Id. at 77. Utilizing even starker language, the Supreme Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265 (1971), that

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

Id. at 275.
206 1A ALEXANDER LINDEY & MICHAEL LANDAU, LINDEY ON ENTERTAINMENT, PUBLISHING AND THE ARTS § 4:8, at 4-23 (3d ed. 2014); Gilles, supra note 1, at 251 n.118.
presumption in favor of finding a person to be a limited-purpose as opposed to an all-purpose public figure. The Court declared that “[a]bsent clear evidence of general fame or notoriety in the community, and pervasive involvement in the affairs of society, an individual should not be deemed a public personality for all aspects of his life.” If the plaintiff in a defamation suit is an all-purpose public figure, the constitutional protections of the actual malice standard apply. By definition, at least for purposes of defamation suits, there are no matters of private concern for all-purpose public figures. They are deemed a public figure for “all purposes and in all contexts.”

Addressing the third category, the Court described limited-purpose public figures as persons who have “thrust themselves to the forefront of particular public controversies” or “the vortex of [a] public issue,” “in order to influence the resolution of the issues involved” and in doing so “have assumed roles of especial prominence in the affairs of society.” Such persons are public figures in connection with matters upon which they have assumed such a role, “but in all other aspects of their lives they remain private figures.” Accordingly, they are public figures “for a limited range of issues.” Because the categorization of a person as a limited-purpose public figure inherently involves a determination of whether the speech at issue addresses a “public controversy” or a “public issue,” if the plaintiff is classified as a limited-purpose public figure, a matter of public concern necessarily will be implicated, and the actual malice standard will apply.

Describing the fourth category, the involuntary public figure category (a classification into which the Court anticipated few would fall), the Court defined involuntary public figures as persons who are “drawn into a particular public controversy” and “become a public figure through no purposeful action of [their] own.” As with limited-purpose public figures, because categorization as an involuntary public figure requires a finding of a “public controversy” into which the person has been drawn, invariably a matter of public concern will be implicated, and the actual malice standard will apply.

Finally, persons who are not public officials, all-purpose public figures, limited-purpose public figures, or involuntary public figures are categorized as

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208 Gertz, 418 U.S. at 352.
209 SMOLLA, supra note 2, § 3:23, at 3-60.
211 Gertz, 418 U.S. at 351.
212 Id. at 345, 352.
214 Gertz, 418 U.S. at 351.
215 SMOLLA, supra note 2, § 3:23, at 3-60.
216 Gertz, 418 U.S. at 345, 351.
217 See W. Wat Hopkins, The Involuntary Public Figure: Not So Dead After All, 21 CARDOZO ARTS & ENT. L.J. 1, 27, 30 (2003).
private individuals. As part of balancing the competing needs for a vigorous and uninhibited press with the ability of the states to protect private individuals from defamation, the Gertz Court, reversing Rosenbloom, removed the constitutional mandate that the actual malice standard apply in cases in which the aggrieved plaintiff is a private individual where the matter involved is one of public concern. However, the Gertz Court prohibited states from setting strict liability standards in defamation suits but otherwise enabled states to set their own standards for private individuals.

III. THE EROSION OF THE GERTZ STRUCTURE

Like a beautifully crafted sandcastle built too close to the shore, these categorical distinctions have been hit by successive waves of First Amendment pressure that have taken a toll on the edifice. The categorical lines and rationales advanced in Gertz are worn and rounded. Rather than becoming clearer over time through courts’ application of the Gertz framework, the categories have become more confused, unsettled, and variant.

The Gertz framework has been eroded in at least five significant respects, each of which is discussed below. First pressure from the First Amendment has resulted in state and lower-federal courts expanding the category of persons who

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

The United States Supreme Court, in Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., held that when a private person who is neither a public official nor a public figure sues for defamation arising from publication of matters that are not of public concern, she need not prove actual damages as required in the private person, public concern cases. Thus the common law rule of presumed damages can be applied by the states to cases in this category if the states are so minded.

Several decisions have said or assumed that the Dun & Bradstreet case means that all of the common law rules remain intact, not merely the damages rule. That would mean that in the private person case where the issue is not of public concern, the states would also be free to presume falsehood as well as damages, and possibly even to presume that the defendant was at fault; courts could go back to the old common law of prima facie strict liability in this class of cases. If the rules develop along these lines, courts in private person cases will be required to determine what counts as an issue of public concern.

220 See King, supra note 6, at 650 (referring generally to the post-New York Times Co. v. Sullivan defamation jurisprudence).
constitute public officials, bringing that category into conflict with the rationale underpinning Gertz’s distinguishing of private individuals from public figures.\textsuperscript{221} Second, the definition of what constitutes a matter of public controversy has also significantly expanded to incorporate a significantly broadened scope of persons who will qualify as a public figure.\textsuperscript{222} Third, private individuals’ lack of access to channels of communications provided one of the two critical reasons for the Gertz Court to distinguish public figures from private individuals. Forty years of revolutionary technological change has dramatically reduced the force of this rationale for distinguishing public figures from private persons.\textsuperscript{223} Fourth, the Gertz Court’s second reason for distinguishing public figures from private individuals turned upon the Court’s view that public figures had voluntarily accepted such scrutiny through their actions whereas private individuals had not. Responding to First Amendment pressures, state and lower-federal courts, however, have been expanding the concept of voluntariness into forms that reduce the persuasiveness of the Court’s reasoning in distinguishing public figures from private individuals on this basis.\textsuperscript{224} Fifth, Justice William Brennan’s contention advanced in his dissenting opinion in Gertz that there is no such thing as a private person resonates significantly more today than it would or should have in 1974.\textsuperscript{225}

A. Erosion of the Narrow Understanding of Who Constitutes a Public Official

Writing for the Court, Chief Justice Warren Burger, noted in dicta in \textit{Hutchinson v. Proxmire}\textsuperscript{226} that while the Supreme Court “has not provided precise boundaries for the category of ‘public official’; it cannot be thought to include all public employees.”\textsuperscript{227} Contextualizing low-level public employees within the broader scope of Gertz’s analysis, venerable defamation scholar Professor David Elder has convincingly argued that imposition of the actual malice standard to low-level public employees is antithetical to the general reasoning behind the Gertz framework.\textsuperscript{228} He notes that “[l]ow-ranking or ‘garden variety’ public employees do not in any realistic sense assume the risk of enhanced press scrutiny and they generally have little access to the media for rebuttal on a ‘regular and continuing’ or other basis.”\textsuperscript{229} Accordingly, Elder concludes that such low-level employees have not forfeited their status as private individuals and need not meet the heightened actual malice requirement; relatedly, Elder champions courts adhering to “the thoughtful analysis of Justice Brennan in \textit{Rosenblatt v. Baer}.”\textsuperscript{230}

\textsuperscript{221} See infra Part III.A.
\textsuperscript{222} See infra Part III.B.
\textsuperscript{223} See infra Part III.C.
\textsuperscript{224} See infra Part III.D.
\textsuperscript{225} See infra Part III.E.
\textsuperscript{226} 443 U.S. 111 (1979).
\textsuperscript{227} Id. at 119 n.8.
\textsuperscript{228} See ELDER, supra note 205, § 5:1.
\textsuperscript{229} Id. § 5:1, at 5-10 to -11.
\textsuperscript{230} Id. § 5:1, at 5-11.
addressed above, Justice Brennan indicated that the public official designation applies “at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.”

231 Elder would strictly hold the line “at the very least” level and maintain a restrictive interpretation thereof. This would maintain continuity with the broader Gertz analysis and avoid application of the actual malice test to low-level government employees such as, in Elder’s view, non-command level police officers and public school teachers.

That aspiration has not, however, matched reality in terms of how many state and federal courts have approached the classification of public employees. While there are a significant number of decisions in which courts have drawn lines in a manner akin to what Elder suggests, the dam has been breached, and actual application has moved far afield. Drawing a contrast with the narrow high-level official understanding advanced by some courts and scholars, the First Circuit Court of Appeals, referencing police officers as an example, observed that “[i]n practice, the term [public official] is now used more broadly and includes many government employees.”

235 Professor Laurence Tribe has declared that irrespective of the dicta in Hutchinson v. Proxmire, a narrow and restrictive understanding of what constitutes a public official “has never been applied by the Supreme Court, and lower courts have tended to disregard it as well, with the net effect that the term ‘public official’ now embraces virtually all persons affiliated with the government, such as most ordinary civil servants, including public school teachers and policemen.”

Furthermore, he adds that in doing so, these courts “recognize the anomaly of simultaneously adopting generally restrictive criteria for the public figure status and open-ended criteria for the public official status.”

Nor is it apparent that state and lower-federal courts are proceeding in a manner contrary to the Supreme Court’s analysis in Rosenblatt v. Baer by adopting a more expansive understanding of who qualifies as a public official. Justice Brennan certainly thought the broader understanding reflected in state and lower-

231 Rosenblatt v. Baer, 383 U.S. 75, 85 (1966). The language was evidently added to the opinion to appease Justice Harlan, who did not want to extend the actual malice standard to low-level government employees “without a great deal more thought.”

232 ELDER, supra note 205, § 5:1, at 5-10 to -11.

233 Id. § 5:1, at 5-19.

234 See id. § 5:1, at 5-24 to 5-31.

235 Mangual v. Rotger-Sabat, 317 F.3d 45, 65 (1st Cir. 2003).

236 LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW 866 (2d ed. 1988).


238 Id. § 5:1, at 5-12 (citation omitted).
federal court decisions was the correct reading of his opinion. Writing post-
*Rosenblatt* and *Gertz*, he observed,

> We recognized [in *Rosenblatt v. Baer*], however, that First Amendment protection cannot turn on formalistic tests of how “high” up the ladder a particular government employee stands. Rather, we determined, the focus must be on the nature of the public employee’s function and the public’s particular concern with his work. Accordingly, we held:

> Where a position in government has such apparent importance that the public has an independent interest in the qualifications and performance of the person who holds it, beyond the general public interest in the qualifications and performance of all government employees, . . . the *New York Times* malice standards apply.

In *Rosenblatt* itself, we found this standard satisfied with respect to Baer, a supervisor of a county ski resort employed by and responsible to county commissioners.

Addressing an Ohio Supreme Court decision that had, in his view, adopted an excessively narrow understanding of what constitutes a public official for purpose of application of the actual malice standard, Justice Brennan stated,

> The Ohio court apparently read the language in *Rosenblatt* referring to government employees having “substantial responsibility for or control over the conduct of government affairs” as restricting the public official designation to officials who set governmental policy. This interpretation led it to conclude that finding a public employee like Milkovich to be a “public official” for purposes of defamation law “would unduly exaggerate the ‘public official’ designation beyond its original intendment.”

> The Ohio court has seriously misapprehended our decision in *Rosenblatt*. Indeed, the status of a public school teacher as a “public official” for purposes of applying the *New York Times* rule follows a *fortiori* from the reasoning of the Court in *Rosenblatt* . . . .

> . . . [I]t is self-evident that “the public has an independent interest in the qualifications and performance” of those who teach in the public high schools that goes “beyond the general public interest in the qualifications

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240 *Id.* at 957–58 (emphasis omitted) (quoting *Rosenblatt v. Baer*, 383 U.S. 75, 86 (1966)).
241 Michael Milkovich was a high school wrestling coach and a teacher. *Id.* at 955.
and performance of all government employees[.]” Public school teachers thus fall squarely within the rationale of *New York Times* and *Rosenblatt*. Moreover, Diadiun’s column challenged Milkovich’s qualifications to teach young students in light of his conduct in connection with the Maple Heights/Mentor High School incident. It is precisely this type of discussion that *New York Times* and its progeny seek to protect.242

The more expansive rendering of the public-official category by many state courts and lower-federal courts arose neither from happenstance nor inattention. The broader understanding of the public official category is consistent with honoring the core purpose of the First Amendment, enabling self-governance, a purpose that is discussed in more detail in Part III.B below. In an article that offers a strong defense of application of the actual malice standard to public school teachers, Richard Johnson noted,

[m]ost parents take an acute interest in the “qualifications and performance” of any stranger who has . . . power over their children for six or seven hours per day. This interest is likely to exist even for people who are mostly indifferent to or ignorant of the “qualifications and performance” of senators, governors, and the secretary of agriculture—all of whom are unquestionably public officials.243

This vital role for teachers has not gone unnoticed by courts. For instance, an Illinois appeals court noted that “[p]ublic school teachers and coaches, and the conduct of such teachers and coaches and their policies, are of as much concern to the community as are other ‘public officials’ and ‘public figures.’”244 For similar reasons, courts have regularly concluded that even low-ranking police officers are public officials; for example, the Connecticut Supreme Court concluded that

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242 Id. at 958–60 (citations omitted). Ted Diadiun, a sports columnist for a local newspaper, wrote a column criticizing Milkovich not only for his actions related to a melee that broke-out at a wrestling match, resulting in multiple injuries requiring treatment in a hospital, but also misrepresentation of the surrounding events at a hearing thereupon to the Ohio High School Athletic Association. Id. at 955–57.

243 Richard E. Johnson, *No More Teachers’ Dirty Looks—Now They Sue: An Analysis of Plaintiff Status Determinations in Defamation Actions by Public Educators*, 17 FLA. ST. U. L. REV. 761, 791 (1990); see also Peter S. Cane, Note, *Defamation of Teachers: Behind the Times?*, 56 FORDHAM L. REV. 1191, 1206–07 (1988) (“Education is undeniably an area of intense concern to the public, and educators are the most appropriate focus of that concern.”).

244 Basarich v. Rodeghero, 321 N.E.2d 739, 742 (Ill. App. Ct. 1974); see, e.g., Kelley v. Bonney, 606 A.2d 693, 710 (Conn. 1992) (“Unquestionably, members of society are profoundly interested in the qualifications and performance of the teachers who are responsible for educating and caring for the children in their classrooms.”); Johnston v. Corinthian Television Corp., 583 P.2d 1101, 1103 (Okla. 1978) (“[W]e can think of no higher community involvement touching more families and carrying more public interest than the public school system.”).
“[a]though a comparably low-ranking government official, a patrolman’s office, if abused, has great potential for social harm and thus invites independent interest in the qualifications and performance of the person who holds the position.”245 Accordingly, courts almost invariably classify police officers as public officials.246 Reflecting the self-government rationale in support of this categorization of police officers, Professor Rodney Smolla has observed that “[i]t is hard to conceive of speech more vital to a free and democratic society than speech concerning police officials, for the police are the embodiment of the government’s maintenance of social order.”247 Professor Smolla’s observation provides an accurate and telling indication of why state and lower-federal courts have adopted a more expansive understanding of the category of public officials and the First Amendment values served thereby. It does not, however, lessen Professor Elder’s observation, that this approach, understandable and warranted as it is, puts public official classification at odds with the rationale underlying the Gertz categorization framework distinguishing public figures from private individuals.248

B. Erosion of the Narrow Understanding of What Constitutes a Public Controversy

Chief Justice Warren articulated the reason for extending the actual malice constitutional safeguard to include speech related to public figures upon matters of public concern in his concurring opinion in Curtis Publishing Co. v. Butts:

To me, differentiation between “public figures” and “public officials” and adoption of separate standards of proof for each have no basis in law, logic, or First Amendment policy. Increasingly in this country, the distinctions between governmental and private sectors are blurred. Since the depression of the 1930’s and World War II there has been a rapid fusion of economic and political power, a merging of science, industry, and government, and a high degree of interaction between the intellectual, governmental, and business worlds. Depression, war, international tensions, national and international markets, and the surging growth of science and technology have precipitated national and international problems that demand national and international solutions.

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245 Moriarty v. Lippe, 294 A.2d 326, 330–31 (Conn. 1972); see also Rotkiewicz v. Sadowsky, 730 N.E.2d 282, 287 (Mass. 2000) (noting that “because of the broad powers vested in police officers and the great potential for abuse of those powers, as well as police officers’ high visibility within and impact on a community, that police officers, even patrol-level police officers such as the plaintiff, are ‘public officials’ for purposes of defamation”).


247 SMOLLA, supra note 2, § 2:104, at 2-176 to -177.

248 See ELDER, supra note 205, § 5:1, at 5-9 to -12.
While these trends and events have occasioned a consolidation of governmental power, power has also become much more organized in what we have commonly considered to be the private sector. In many situations, policy determinations which traditionally were channeled through formal political institutions are now originated and implemented through a complex array of boards, committees, commissions, corporations, and associations, some only loosely connected with the Government. This blending of positions and power has also occurred in the case of individuals so that many who do not hold public office at the moment are nevertheless intimately involved in the resolution of important public questions or, by reason of their fame, shape events in areas of concern to society at large.249

Chief Justice’s Warren’s portrait of the public figure, which provided the foundation for the Gertz Court’s embrace and structuring of the public-figure category,250 is plainly the image of “a nominally private person [who] exercises as much, if not more, influence on the determination of public policy issues as do many public officials.”251 In that sense, the public figure doctrine “is heavily grounded in the public policy of facilitating free social discourse—those who voluntarily seek to influence events and issues may appropriately be forced to accept as part of the bargain a greater risk of defamation.”252

In adopting such an approach, the Court honors the core self-governance purpose of the First Amendment.253 Protections for freedom of speech are naturally deduced from principles of self-government, which require the electorate to be able to gain sufficient knowledge to fulfill its responsibilities.254 Simply stated, “speech concerning public affairs . . . is the essence of self-government.”255 In absence of the information derived from such speech, “citizens cannot play their assigned roles in choosing and instructing their representatives and in participating in the formation of public policy.”256 Even where the role of the electorate is viewed as

251 Schauer, supra note 138, at 916.
252 SMOLLA, supra note 2, § 2:35.50, at 2-64.35.
254 See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 27 (1948); Alexander Meiklejohn, The First Amendment Is an Absolute, 1961 SUP. CT. REV. 245, 255.
256 Lidsky, supra note 253, at 810.
more responsive to than generative of public policy, political speech protections still serve a “checking value,” allowing for “checking the abuse of power by public officials” through voters’ use of an electoral “veto power to be employed when the decisions of officials pass certain bounds.” Whatever disagreements the Supreme Court has had over the exact applications of the First Amendment, there has been consensus that the constitutional guarantee protecting freedom of speech safeguards discussions of governmental action and inaction. With nominally private persons exercising considerable influence in guiding and directing public policy questions, it is readily apparent that such persons have entered the arena of public policy determination.

However, Professor Frederick Schauer has properly observed that the Court’s archetype of the public figure as a political actor engaged in influencing and directing political affairs “is only a part, and perhaps only comparatively small part, of the domain of public figures. The universe of public figures includes many people whose involvement in or influence on public policy matters is either attenuated or nonexistent.” For example, the Supreme Court’s recognition of Butts as a public figure has given rise “to a substantial amount of case law according public figure status to sports figures with little or no specific, reasoned discussion of the rationale for such a designation.” Professor Smolla does not make the mistake of failing to provide reasoned articulation in arguing for athletes as public figures. To the contrary, he argues for doing so in straightforward and cogent terms:

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

While Professor Smolla’s defense of the view of athletes as public figures is a strong one, it is also significantly removed from the underlying rationale for imposing the same heightened constitutional protections to speech regarding public

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260 Schauer, supra note 138, at 917.
261 ELDER, supra note 205, § 5:20, at 5-161 (citation omitted).
262 SMOLLA, supra note 213, § 6:40, at 6-361.
figures as public officials.\textsuperscript{263} Athletes are not thrusting themselves into issues of public policy seeking to impact the resolution thereof; rather, they are engaging in an occupation that attracts public attention. It is not necessary that the latest gossip about an athlete’s injury be discussed for the citizenry to participate in democratic self-governance.

While weakening the citadel walls of the underlying justifications for the categorical structure devised by Gertz, state and lower-federal courts’ embracing of an understanding of public controversy that extends beyond the political sphere is not errant. To the contrary, such an approach accurately reflects the broader non-self-governance constitutional purposes served by the speech and press protections of the First Amendment. As noted by Alexis de Tocqueville in discussing the importance of a free press in America, “[i]t is not political opinions only, but all the views of men which are influenced by freedom of the press. It modifies mores as well as laws.”\textsuperscript{264} In accordance therewith, the U.S. Supreme Court has not limited the protections of freedom of speech to purely political speech.\textsuperscript{265} To the contrary, the Court has recognized that “guarantees for speech and press are not the preserve of political expression or comment upon public affairs, essential as those are to healthy government.”\textsuperscript{266} Protected speech could also, for example, be related to economic, religious, or cultural matters\textsuperscript{267} because First Amendment protections embrace a “right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences.”\textsuperscript{268} In fact, in recent years the non-political entertainment-related speech issues that have been before the Supreme Court have been so pronounced in terms of their “sheer volume, [that] . . . media entertainment speech seems to be subtly changing the cultural backdrop of the First Amendment, relegating political speech to a subordinate level within the general cultural awareness,” though the actual importance of political speech is undiminished.\textsuperscript{269}

In addition to its role in democratic self-governance, free speech is also critical for (1) ascertaining truth, (2) realizing individual self-fulfillment, (3) enabling participation from members of society in decision-making on non-

\textsuperscript{263} Compare id. (contending that it is justified to treat professional athletes as public figures), with Schauer, supra note 138, at 917 (arguing that, for the most part, athletes are not public figures because they have “little, if any, effect on questions of politics, public policy, or the organization or determination of societal affairs”); see also Curtis Publ’g Co., 388 U.S. at 162–64 (Warren, C.J., concurring) (outlining the rationales for applying the same standard to public figures and public officials).

\textsuperscript{264} ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 180 (J. P. Mayer ed., George Lawrence trans., 1969).


\textsuperscript{266} \textit{Id}.

\textsuperscript{267} NAACP v. Alabama, 357 U.S. 449, 460 (1958).


political societal questions, and (4) maintaining a balance between societal stability and change. First, addressing the role of free speech in the ascertainment of truth, Justice Oliver Wendell Holmes offered an indelible image of the marketplace of ideas in which purchase of truth is to be found through a Darwinian struggle. Justice Holmes wrote,

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.

Freedom of speech in the marketplace of ideas creates a “proving ground,” in which a “constant competitive interplay of ideas moves society more quickly toward a truthful understanding of the world.”

The other three primary rationales for safeguarding freedom of speech also serve an important role outside the sphere of public policy. The second rationale, safeguarding free speech for the purpose of realizing individual self-fulfillment,

271 See generally JEFFREY ROSEN, THE SUPREME COURT: THE PERSONALITIES AND RIVALRIES THAT DEFINED AMERICA 89–90, 113–14 (2006) (addressing Holmes attachment to a Social Darwinist view of the political process but opposition to constitutionalizing such an approach in economic liberties cases).
provides an essential method of self-expression.275 As noted by Justice Thurgood Marshall, “[t]he First Amendment serves not only the needs of the polity but also those of the human spirit—a spirit that demands self-expression.”276 Under this approach, “truth of expression is irrelevant and secondary to the legal capability of [persons] to express [themselves] . . . .”277

Third, in terms of the role of free speech in societal decision making, free speech enables communication of one’s judgments and creation of a culture and community, whether that is in the area of arts and literature, the sciences, or any other area of knowledge or communal association.278 In this vein, free speech plays a vital role in “decisionmaking on all social values.”279

Finally, safeguarding free speech serves the purpose of balancing societal stability with change by providing a safety-valve release for those holding heterodox views.280 The safety-valve concept reflects a sense that freedom of speech takes the lid off the boiling pot, allowing steam to be released and avoiding more serious social unrest and violence that may follow from not having that release.281 In addition, this balancing of stability with change through avoiding suppression of heterodoxy maintains societal vitality against the tendency toward stagnation and rigidity that in the absence of such freedom threatens to ossify a society.282

While political speech is at the core of the First Amendment,283 the protection of freedom of speech also serves other critical purposes as addressed above. Chief Justice Warren’s justification for the extension of the constitutional safeguards of New York Times Co. v. Sullivan to speech regarding public figures rested on the core self-governance purpose of the First Amendment. The extension of the actual malice standard to persons who are not engaged in influencing political questions but who are public figures with regard to other matters of public concern honors the broader purposes served by the First Amendment.284 This consistent application beyond the political realm constituted a necessary expansion in the understanding of what constitutes a public controversy. However, in embracing this broader understanding in state and lower-federal courts, the categorization structure created by Gertz has been further eroded. If public controversy is

278 Emerson, supra note 270, at 882–83.
280 Emerson, supra note 270, at 884–86.
281 See Scordato & Monopoli, supra note 274, at 199.
282 Emerson, supra note 270, at 884–86.
284 See Schauer, supra note 138, at 931.
understood in terms of matters of public policy, it is much easier to understand whether a person has thrust herself into that arena. Where nonpolitical cultural, religious, sporting, and scientific matters, among others, can constitute a basis for a public controversy, it becomes exceedingly more difficult to discern when someone has thrust herself into that arena and thereby made herself a public figure because the multiplicity and variety thereof is extraordinary.

C. Erosion of the Lack of Media Access Rationale

The chasm between private and public persons’ access to media and means for counteracting defamatory comments stood as one of the two central reasons the Gertz Court distinguished defamation plaintiffs into the categories of public and private persons and applied varying constitutional standards to these different types of plaintiffs.285 The Gertz Court reasoned,

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

The change in access to channels of effective communication for an ordinary citizen from 1974 to 2014 has been extraordinary.287 While the enormity of the societal revolution that has occurred over the last four decades is difficult to fully comprehend, it can be gleaned that “the ability for self-help has spread to the masses.”288 Reflecting on the rapid advance of technologically-driven societal changes, Thomas Friedman observed that when he wrote The World is Flat, “Facebook didn’t exist for most people, ‘Twitter’ was still a sound, the ‘cloud’ was something in the sky, ‘3G’ was a parking space, ‘applications’ were what you sent

285 SMOLLA, supra note 2, § 2:13, at 2-30 (“The Gertz compromise was grounded in two rationales reflecting the Supreme Court’s perceptions about the differences between public and private figures. The first of these rationales is the ‘access to the media’ argument.”).


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

to college, and ‘Skype’ was a typo.” Friedman wrote *The World Is Flat* in 2005, *Gertz* was decided in 1974. In “the mid-1970s, the media landscape was much more sparsely populated than it is today and consumers had far fewer choices.” In 1974, computers were still for governments, large corporations, and a few hobbyists. The internet was an unknown domain reserved for high science and the military. Steve Jobs and Steve Wozniak would not develop their first mainstream computer, the Macintosh, for another ten years. Netscape would not offer the first non-techie Internet interface for another seventeen years. The first blog was twenty years away, and widespread blogging would not appear for twenty-five years.

In 1974 channels of communication were essentially confined to local newspapers, commercial radio stations, the big-three television networks, and national newsmagazines. The limited number and narrowness of control of

289 THOMAS L. FRIEDMAN & MICHAEL MANDELBAM, THAT USED TO BE US: HOW AMERICA FELL BEHIND IN THE WORLD IT INVENTED AND HOW WE CAN COME BACK 59 (2011).
292 See JANNA QUITNEY ANDERSON, IMAGINING THE INTERNET: PERSONALITIES, PREDICTIONS, PERSPECTIVES 39–42 (2005) (noting that computers were extremely expensive, most were so large they could fill an entire room, and many organizations “shared” time on a single computer).
294 ROBERT J. CARBAUGH, CONTEMPORARY ECONOMICS: AN APPLICATIONS APPROACH 103 (7th ed. 2014).
296 ROB BROWN, PUBLIC RELATIONS AND THE SOCIAL WEB: HOW TO USE SOCIAL MEDIA AND WEB 2.0 IN COMMUNICATIONS 26 (2009). As Brown explains,

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

Id. Public participation in blogging started to significantly increase in 1999 with the appearance of Blogger, which was purchased by Google four years later. Id.
media outlets “effectively thwart[ed] any popular participation in the press and commercial radio and television.”

Things have changed dramatically. There has been a “wave of media democratization . . . with the popularization of the Internet, especially Web 2.0 . . . . In contrast to [earlier] participation through the Internet . . . , [more recent] participation in the Internet focuses on the opportunities provided to non-media professionals to []produce media content themselves and to []organize the structures that allow for this media production.”

While Web 2.0, which roughly dates to the year 2000, “is a slippery character to pin down,” the core thereof is technological services including “blogs, wikis, podcasts, Really Simple Syndication (RSS) feeds etc., which facilitate a more socially connected Web where everyone is able to add to and edit the information space.”

From young to old, rich to poor, this technological revolution has been embraced. As of December 2013, the Pew Research Internet Project found that 73% of adults use social media, 71% use Facebook, 22% use LinkedIn, 21% use Pinterest, 18% use Twitter, and 17% use Instagram. People use social media as a “key source [of] news and information,” and an important forum for debate and discussion of public issues. While social media is ascending, traditional media is in sharp decline.

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299 Id. at 292; see also David Lat & Zach Shemtob, Public Figurehood in the Digital Age, 9 J. TELECOMM. & HIGH TECH. L. 403, 410 (2011) (noting that in the mid-1970s “false charges could only be countered through access to a printing press, radio station, or television network—modes of communication that ordinary citizens generally could not tap into”).


301 See Social Networking Fact Sheet, PEW RESEARCH INTERNET PROJECT, http://www.pewinternet.org/fact-sheets/social-networking-fact-sheet/, archived at http://perma.cc/M2R-ENCX (last visited Sept. 27, 2014). The study found that 65% of persons fifty to sixty-four years of age used social media—that number is even higher for younger age groups—and social media usage only had minor fluctuation by household income level with slightly higher use at the lowest income level. Id.


305 THE CONCISE PRINCETON ENCYCLOPEDIA OF AMERICAN POLITICAL HISTORY 58 (Michael Kazin et al. eds., 2011).
81% of Americans read a daily print newspaper.\footnote{Hermann Simon, Beat the Crisis: 33 Quick Solutions for Your Company 13 (2010).} As of 2012, only 23% of Americans did so.\footnote{Number of Americans Who Read Print Newspapers Continues Decline, Pew Research Ctr. (Oct. 11, 2012), http://www.pewresearch.org/daily-number/number-of-americans-who-read-print-newspapers-continues-decline/, archived at http://perma.cc/5DAZ-AB97.} The Internet has now become the main source for news for those under the age of fifty and is only second behind television for all Americans, well ahead of newspaper and radio usage.\footnote{PEW Research Ctr. for the People & The Press, Amid Criticism, Support for Media’s ‘Watchdog’ Role Stands Out 10–11 (2013), available at http://www.people-press.org/files/legacy-pdf/8-8-2013%20Media%20Attitudes%20Release.pdf, archived at http://perma.cc/TJ4W-LSQF.} Seeking to survive the onslaught, traditional media outlets are adapting.\footnote{See Dina A. Ibrahim, Broadcasting and Cable Networks, in 1 Encyclopedia of Social Networks 89, 90–92 (George A. Barnett ed., 2011).} Newspapers and magazines have opened news stories to comments from the public\footnote{See, e.g., Citizen Journalism, Mediashift, PBS, http://www.pbs.org/mediashift/social-media/citizen-journalism/, archived at http://perma.cc/57QG-ZQL7 (last visited July 10, 2014) (providing internet links for individuals to act as citizen journalists regarding current national and international topics).} and created forums for citizen journalism.\footnote{See, e.g., Kosseff, supra note 288, at 266–67.} With editorial controls loosening, newspapers and magazines have also adopted more accommodating approaches to corrections, which have become a more effective mechanism for obtaining self-help.\footnote{See Jamie Lund, Managing Your Online Identity, J. Internet L., May 2012, at 3, 5 (“A good example of this type of ‘right of reply’ is found on RateMyProfessors.com. The content from RateMyProfessors.com is generated by students commenting on the performance of their professors based on various criteria, including easiness, clarity, and helpfulness. The purpose of the site is to allow students to vent or to make endorsements to would-be students about various professors. The site is consequently a receptacle for both insults and praise. To promote an open dialogue, the site allows professors to rebut any particular statement posted about them, with those rebuttals then published in conjunction with the original student comments. In this way, RateMyProfessors.com allows for correction of misinformation with minimum administrative oversight. Right-of-reply websites are models for other sites in that they have managed to allow for uninhibited freedom of expression while also providing a meaningful means of correcting false statements without requiring costly administrative expenditures by the site owners.” (citations omitted)).} Some websites have even created formal right-of-reply features allowing aggrieved parties to set the record straight.\footnote{See Paul Grabowicz, The Transition to Digital Journalism, KDMC/BERKELEY (July 23, 2014), http://multimedia.journalism.berkeley.edu/tutorials/digital-transform/comments-on-news-stories/, archived at http://perma.cc/5VPB-C9CW (noting that “[o]ne of the most basic ways that a news organization can engage people is to provide a way for them to comment on and discuss news stories on the website and postings to staff weblogs”).}
The cumulative effect of the advances in technology and social media is extraordinary and would have been unthinkable to the members of the Supreme Court in 1974. In 2014, “ordinary people can now publish their thoughts on Twitter . . . attack those in power on Blogger . . . and report on events excluded from other mainstream media by sending their own news stories and photos to citizen journalism sites like Demotix.”314 Through their online engagement, ordinary people have “the opportunity to share their experiences (good and bad), air their views and opinions, and vent their frustrations.”315 Not only can ordinary people communicate, but they are also able to do so with a vast potential audience316 and at an extremely low cost.317 Professors Andrea Press and Bruce Williams have observed that “new media . . . challenges elites . . . by providing communication channels for ordinary citizens to directly produce and access information about political, social, and economic life.”318 Technological changes

314 KEN BROWNE, AN INTRODUCTION TO SOCIOLOGY 324 (4th ed. 2011).
316 See Browne, supra note 314, at 324; Michelle Sherman, The Anatomy of a Trial with Social Media and the Internet, J. INTERNET L., May 2011, at 1, 1 (stating that “[s]ocial media is connection. It is communication, a rather unlimited form of it with people speaking to a large audience.”); Aaron Perzanowski, Comment, Relative Access to Corrective Speech: A New Test for Requiring Actual Malice, 94 CAL. L. REV. 833, 835 (2006) (noting that “[t]he average citizen—previously confined to the one-to-one methods of distributing information—enjoys a potential global audience on the internet”).
318 ANDREA L. PRESS & BRUCE A. WILLIAMS, THE NEW MEDIA ENVIRONMENT: AN INTRODUCTION 20 (2010); see also Dan Gillmor, Bloggers Breaking Ground in Communication, EJOURNAL USA GLOBAL ISSUES, March 2006, at 24, 24 (“Software technology that allows writers to easily post their own essays on the World Wide Web has challenged the traditional role of media organizations as gatekeepers to a mass audience. At a steadily increasing pace over the last several years, ordinary citizens have made themselves into reporters and commentators on the social scene. They have made a remarkably rapid ascent onto their own platform in the realm of social and political debate.”). Conservative political commentator Hugh Hewitt has argued that “[t]he power of elites to determine what [is] news via a tightly controlled dissemination system [has] been shattered. The ability and authority to distribute text are now truly democratized.” HUGH HEWITT, BLOG: UNDERSTANDING THE INFORMATION REFORMATION THAT’S CHANGING YOUR WORLD 70–71 (2005); cf. David Gauntlett, Creativity and Digital Innovation, in DIGITAL WORLD: CONNECTIVITY, CREATIVITY AND RIGHTS 77, 80 (Gillian Youngs ed.,
have given rise to a democratization of the means of media production and the manner in which information is obtained, and this has greatly empowered the ordinary person. New-media bloggers are in fact now holding the traditional institutional news media accountable for errors.

This new reality has not gone entirely unnoticed by courts. For example, the Delaware Supreme Court observed that ordinary persons now have available a very powerful form of extrajudicial relief. The internet provides a means of communication where a person wronged by statements of an anonymous poster can respond instantly, can respond to the allegedly defamatory statements on the same site or blog, and thus, can, almost contemporaneously, respond to the same audience that initially read the allegedly defamatory statements. The [person] can thereby easily correct any misstatements or falsehoods, respond to character attacks, and generally set the record straight. This unique feature of internet communications allows a potential plaintiff ready access to mitigate the harm, if any, he has suffered to his reputation as a result of an anonymous defendant’s allegedly defamatory statements made on an internet blog or in a chat room.

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

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319 David Taylor & David Miles, Fusion: The New Way of Marketing 11 (2011); cf. Carne Ross, The Leaderless Revolution: How Ordinary People Will Take Power and Change Politics in the Twenty-First Century, at xvii (2011) (declaring that “in an increasingly interconnected system, such as the world emerging in the twenty-first century, the action of one individual or a small group can affect the whole system very rapidly”).


323 Id. at 386 (citations omitted).
Congress has similarly looked to self-help as an appropriate remedy. In enacting the Communications Decency Act of 1996 (CDA), Congress found that “[t]he Internet and other interactive computer services offer a forum for a true diversity of political discourse, unique opportunities for cultural development, and myriad avenues for intellectual activity.”Congress also found “[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation.” Among other objectives of the CDA, Congress sought “to promote the continued development of the Internet and other interactive computer services and other interactive media [and] to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation.” To serve these ends, Congress passed a measure ensuring 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.” As a practical consequence, this leaves available the remedy of online self-help, a remedy that Congress has found appropriate.

Extra-legal solutions are also available through the emergence of private companies offering online reputation management tools. For example, Reputation.com, also known as Reputation Defender, has embraced facilitating control for individuals and businesses over their online appearance as its corporate mission. To achieve this end, such entities can monitor online commentary, boost positive comments in search engine ranking returns while lowering negative comments, and scrub negative comments by having them removed. This approach offers certain advantages over defamation suits including eliminating defamatory statements and avoiding drawing additional attention to the defamatory material.

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325 Id. § 230(a)(4).
326 Id. § 230(b)(1), (2).
327 Id. § 230(c)(1).
328 See Angelotti, supra note 207, at 485; Allison E. Horton, Note, Beyond Control?: The Rise and Fall of Defamation Regulation on the Internet, 43 VAL. U. L. REV. 1265, 1305–06 (2009).
330 See Lyrissa Barnett Lidsky, Anonymity in Cyberspace: What Can We Learn from John Doe?, 50 B.C. L. REV. 1373, 1390 (2009). See generally Angelotti, supra note 207, at 495 (describing some of the means by which such companies accomplish their objectives on behalf of their clients).
331 See Lidsky, supra note 330, at 1390. Professor Jacqueline Lipton also notes, These services provide a number of advantages over legal solutions to online abuses, including the fact that several of them now have many years of experience with reputation management and have established solid working relationships with websites that host harmful communications. The use of private commercial services does not raise the specter of a First Amendment
Though the Supreme Court has not addressed the availability of technological tools in the context of defamation, the availability of self-help technology services, as opposed to legally imposed restrictions on speech, has proven relevant to the Court’s analysis of other free speech issues. For example, addressing decency-related restrictions, the Court expressly indicated “the mere possibility that user-based Internet screening software would ‘soon be widely available’ was relevant to our rejection of an overbroad restriction of indecent cyberspeech.” The litigation strategy from those aiming to invalidate restrictions imposed by the CDA was squarely focused on the availability of self-help remedies provided by technological services and, thus, on the reduced need for governmentally imposed speech restrictions. As Professor Ann Bartow observed, that was precisely where the Justices turned in analyzing the constitutionality of the decency restrictions imposed by Congress, noting a remedy was available for parents who did not want their children exposed to pornography or “indecency” on the Internet. They could purchase filtering software (a.k.a. “censorware”) and subscribe to related content filtering services to keep undesired words and images away from their computers. In this way they could accomplish with their private purchasing power what the government would not do for them in terms of providing tools to regulate the information that was accessible to their children.

Addressing a free speech issue, though not defamation, nearly two decades ago when internet usage was at a stage of comparative infancy, the U.S. Supreme Court observed that “[t]hrough the use of chat rooms, any person with a phone line

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

can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer.\textsuperscript{335} The empowerment of ordinary citizens has grown exponentially in the last two decades, fundamentally undermining the \textit{Gertz} notion that private persons do not have meaningful access to channels of communication for redressing attacks on their reputations.

\subsection*{D. Erosion of the Voluntariness Rationale}

While the lack of access to channels of communication in 1974 influenced the Supreme Court’s reasoning in distinguishing public and private persons, the heart of the \textit{Gertz} Court’s division of limited-purpose public figures from private individuals was voluntariness.\textsuperscript{336} The \textit{Gertz} Court envisioned public figures as persons “thrust[ing] themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved” and in doing so “assum[ing] roles of especial prominence in the affairs of society.”\textsuperscript{337} Such a person “voluntarily injects himself . . . into a particular public controversy.”\textsuperscript{338} The concept of an involuntary public figure stands in sharp contradistinction with “[w]ords and phrases such as ‘thrust’ . . . and ‘in order to influence the resolution of the issues.’”\textsuperscript{339}

However, “[w]hat is and is not voluntary is by no means self-evident.”\textsuperscript{340} And what is declared by courts to be voluntary looks increasingly less limited to persons thrusting themselves into matters of public controversies in order to influence the resolution thereof. Professor Smolla’s explanation of the application of public figure status to athletes is revealing on this point:

\begin{quote}
Professional athletes voluntarily enter the “arena,” quite literally the “sports arena,” and issues germane to their performance or fitness, including issues relating to mental and physical health, but also to their character and position in society as role models, justify treating professional athletes as public figures and also justifies a reasonably broad understanding of the range of issues concerning the professional athlete’s life that falls within the perimeter of that public figure status.\textsuperscript{341}
\end{quote}

\textsuperscript{335} \textit{Reno}, 521 U.S. at 870.

\textsuperscript{336} Hopkins, \textit{supra} note 217, at 19 (noting that “voluntariness seemed to be the key element in determining whether a libel plaintiff is a public figure”). Questions have been raised, however, about the soundness of the voluntariness rationale. \textit{See}, \textit{e.g.}, Anderson, \textit{supra} note 246, at 527–30 (listing a number of reasons why public figures may not have voluntarily thrust themselves into the public eye, thereby undermining the voluntariness rationale).


\textsuperscript{338} \textit{Id.} at 351.

\textsuperscript{339} SMOLLA, \textit{supra} note 2, § 2:33, at 2-64.12 (quoting \textit{Gertz}, 418 U.S. at 345).


\textsuperscript{341} SMOLLA, \textit{supra} note 213, § 6:40, at 6-361.
Professional athletes have entered an arena that attracts considerable public attention, but professional athletes have not “thrust” themselves to “the forefront of particular public controversies in order to influence the resolution of the issues involved.” Instead, the voluntariness aspect derives from entering into a profession that “command[s] the attention of sports fans.” With this transition, even the voice shifts in a number of judicial opinions from active to passive. For example, in determining whether a plaintiff, a professional football player, was a public figure, the Third Circuit Court of Appeals concluded, “Chuy had been thrust into public prominence.”

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

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

[in our highly mobile, visible, and interactive society, the risk of attracting the attention of the press is as apparent as it is unpredictable.

342 Gertz, 418 U.S. at 345.
344 Id. (emphasis added).
347 Hopkins, supra note 217, at 24.
348 King, supra note 6, at 692 (alterations in original) (quoting Clyburn v. News World Commc’ns, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990)).
349 Marcone v. Penthouse Int’l Magazine for Men, 754 F.2d 1072, 1083 (3d Cir. 1985).
350 King, supra note 6, at 698.
Becoming involved in any number of events, whether voluntarily or involuntarily, e.g., from an accident, natural disaster to a winning lottery ticket (i.e., good luck or bad), makes us vulnerable to media exposure.351 Accordingly, voluntariness is no longer confined to individuals who thrust themselves into the vortex of a public controversy to try to influence the resolution of the matter in controversy.352 Instead voluntariness can be satisfied by a less

352 See, e.g., McDowell v. Paiewonsky, 769 F.2d 942, 949 (3d Cir. 1985); Marcone, 754 F.2d at 1083; Chuy v. Phila. Eagles Football Club, 595 F.2d 1265, 1280 (3d Cir. 1979); Rosanova v. Playboy Enters., 580 F.2d 859, 861 (5th Cir. 1978); see also, e.g., Lohrenz v. Donnelly, 350 F.3d 1272, 1274 (D.C. Cir. 2003) (“Because Lohrenz’s evidence shows that she chose the F-14 combat jet while well aware of the public controversy over women in combat roles, her challenge to the ruling that she was a voluntary limited-purpose public figure once the Navy assigned her to the F-14 combat aircraft rings hollow: she chose combat training in the F-14 and when, as a result of that choice, she became one of the first two women combat pilots, a central role in the public controversy came with the territory. Having assumed the risk when she chose combat jets that she would in fact receive a combat assignment, Lt. Lohrenz attained a position of special prominence in the controversy when she ‘suited up’ as an F-14 combat pilot.”); Clyburn v. News World Commc’ns, Inc., 903 F.2d 29, 33 (D.C. Cir. 1990) (“Clyburn’s acts before any controversy arose put him at its center. His consulting firm had numerous contracts with the District government, he had many social contacts with administration officials, and Medina, at least as one may judge from attendance at her funeral, also enjoyed such ties. Clyburn also spent the night of Medina’s collapse in her company. One may hobnob with high officials without becoming a public figure, but one who does so runs the risk that personal tragedies that for less well-connected people would pass unnoticed may place him at the heart of a public controversy. Clyburn engaged in conduct that he knew markedly raised the chances that he would become embroiled in a public controversy. This conduct, together with his false statements at the controversy’s outset, disable him from claiming the protections of a purely ‘private’ person.”); Dombey v. Phoenix Newspapers, Inc., 724 P.2d 562, 570–71 (Ariz. 1986) (“Dombey sought, received, accepted and struggled to keep appointments as the designated insurance agent of record for a large county and administrator of deferred compensation programs for its employees. While he was not employed by and received no direct benefits from the public body, he did receive significant and valuable benefits because of his position. He did more than compile and transmit research results or publish arcana in obscure learned journals; he made recommendations resulting in substantial expenditures from the public fisc for health and life insurance programs and of private funds obtained by payroll deductions from public employees for the deferred compensation program. By assuming the position that he held, Dombey invited public scrutiny and should have expected that the manner in which he performed his duties would be a legitimate matter of public concern, exposing him to public and media attention. This is not to say that every provider of goods and services to the government becomes a public figure. We believe that no bright line can be drawn. A person who sells legal pads to the judicial department may legitimately expect to retain almost complete anonymity. Those responsible for providing rockets for the space program may not legitimately enjoy the same expectations. Dombey is at neither pole, but we believe that by assuming the positions of agent of record and administrator for the deferred compensation plans, he
demanding showing that plaintiffs willingly engaged in activity that foreseeably put them at risk of public attention. Part of the pressure resulting in lowering the bar of what constitutes voluntariness arises from courts avoiding the involuntary public figure category. Instead of developing the involuntary public figure category, courts have repeatedly stretched their understanding of what constitutes voluntariness to such an extent that they create what Professor Joseph King has termed “stealth involuntary public figure[s].”

E. Devolving of the Private Individual

First in his plurality opinion in Rosenbloom and subsequently in his dissenting opinion in Gertz, Justice Brennan observed that “[v]oluntarily or not, we are all ‘public’ men to some degree.” Justice Brennan did not find agreement from a sufficient number of his colleagues to form a majority around this conclusion. David Lat, founder of the website Above the Law, and Professor Zach Shemtob have argued that “Justice Brennan’s words ring even more true in the digital age.”

Private individuals are certainly less private today than they were in 1974. And for that, as Cassius proclaims to Brutus in William Shakespeare’s Julius Caesar, “[t]he fault, dear Brutus, is not in our stars. But in ourselves.” Judge Alex Kozinski has raised a steady drumbeat for the proposition that the ordinary person’s love affair with technology is killing privacy:

It started with the supermarket loyalty programs. They seemed innocuous enough—you just scribble down your name, number and address in exchange for a plastic card and a discount on Oreos. . . .

. . . Letting stores track our purchases may not appear to be permitting an intensely personal revelation but, as the saying goes, you surrendered any legitimate expectation of anonymity with regard to the manner in which he performed in his positions, his relationship with executives of the governmental agencies and the other matters with which the articles were concerned. . . . Whatever requirement there might be to ‘thrust’ oneself into a public controversy was satisfied by his voluntary participation in activity calculated to lead to public scrutiny.” (citations omitted)).

353 See King, supra note 6, at 688–93.
354 Id. at 688.
356 Lat & Shemtob, supra note 299, at 413.
357 WILLIAM SHAKESPEARE, JULIUS CAESAR act 1, sc. 2, ll. 141–42, at 172 (David Daniell ed., 1998).
are what you eat, and we inevitably reveal more than we thought. Have diapers in your cart? You probably have a baby. Tofu? Probably a vegetarian. A case of Muscatel a week? An alcoholic (with poor taste, at that). The cards also track the “where” and “when” of our shopping expeditions. Making a late-night run to a convenience store near your ex-girlfriend’s house? Buying posters and markers the day before a political rally? If you swiped your card, all that information is now public. . . .

. . . These cards were just the beginning. Fast Track passes quickly followed—with their lure of a shorter commute for a little privacy. Then came eBay and Amazon, which save us from retyping our billing and shipping information, if only we create an account. Before long, convenience became paramount, and electronic tracking became the norm. Nowadays, Google not only collects data on what websites we visit but uses its satellites to take pictures of our homes. 359

Additionally, much of what was formerly squirreled away in a government records office is now readily available online. 360 For instance, a nosy neighbor can discover how much one paid for their home in only a moment on Zillow. 361 A little more work and arrest records, professional licenses, property liens, trademarks, patents, driver’s license information, and bankruptcy history, among other things, are all readily available. 362

Social media reduces the private sphere even further. In 2008, the editors of Webster’s New World Dictionary chose “overshare,” which they defined as “to divulge excessive personal information,” as their word of the year. 363 There exists a common and pronounced tendency to overshare on social media. 364 Professor Bruce Boyden has observed that “[t]oo many people, confronted with the ability to share information with others via social networks, readily avail themselves of that opportunity, causing personal information to be shared from Facebook or Twitter

359 Kozinski & Grace, supra note 358, at 15.
361 David Carlson, How Zillow Fueled My Real Estate Obsession, YOUNG ADULT MONEY (Oct. 15, 2012), http://www.youngadultmoney.com/2012/10/15/how-zillow-fueled-my-real-estate-obsession/, archived at http://perma.cc/AY66-P62A (noting that “[m]uch to the shock of some people that the price they paid for their home is on public record, Zillow aggregates this public record data and makes it easy to see what a home was sold for in the past.”).
364 See Jennifer Rowse, My Life on Facebook: Assessing the Art of Online Social Networking, in ASSESSING NEW LITERACIES: PERSPECTIVES FROM THE CLASSROOM 95, 97–98 (Anne Burke & Roberta F. Hammett eds., 2009).
Through social media, ordinary individuals increasingly document almost every aspect of their lives. Neuroscience analysis helps to explain some of this oversharing, suggesting that disclosure itself, especially personal self-disclosure, functions as an intrinsic reward, stimulating regions of the brain associated therewith. Communications and media studies scholars also have observed that computer-mediated communication eliminates social and biological cues that would signal restraint and instead make the Internet not “feel public to its users” thereby fostering less restricted communication. Seeking to restrain this epidemic of oversharing, a cottage industry of writers caution against oversharing and offer advice on where to draw the line.

Nevertheless, oversharing has arguably become a new socially accepted norm in which the non-over-sharer is the outlier. Facebook CEO Mark Zuckerberg has argued that open sharing of information, not preservation of traditional privacy, is the new social norm. It is difficult to argue with the conclusion that there has been a radical redefinition of social norms at least insofar as people “are freely giving up some of their privacy to strangers, as they willingly friend strangers and

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366 Id. at 40.


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


post information and images they would never have shared so publicly before."373

In selecting “overshare” as their word of the year, Websters’s editors were quite conscious of this duality:

It’s also a word that is rather slip-slippery, chameleon-like. Some people use it disparagingly; they don’t like oversharing. Others think oversharing is good and that one must give full disclosure of one’s inner life. Sometimes there is a generational shift in the way people look at this practice and therefore view the word.374

Even if an individual is cautious about sharing information online, a friend, a parent, an acquaintance, a neighbor, or any other person one interacts with may be far less hesitant about sharing or oversharing what formerly would have been private information about another person.375 And in this new era of social media, “friend” is a far more expansive concept and less-known commodity, a problem only magnified by unfathomable expansion online of the concept of a “friend.”376

Furthermore, even among the most active and adept users of technology, there is little understanding of what is being made publicly available through their online activities.377 Such lack of knowledge, or at least full appreciation thereof, can result in even classically private information such as what one is reading becoming exposed through Internet connectivity programs such as Facebook’s social reader.378

Technology poses an even greater threat by taking pieces of information and enabling aggregation of massive amounts of data about formerly private individuals that can then be made readily accessible.379 "[W]ith the advent of more

373 Laurie Thomas Lee, Privacy and Social Media, in The Social Media Industries 146, 150 (Alan B. Albarran ed., 2013).
374 Word of the Year 2008: Overshare, supra note 363.
375 Frederick S. Lane, American Privacy: The 400-Year History of Our Most Contested Right 255–61 (2009).
379 Lori Andrews, I Know Who You Are and I Saw What You Did: Social Networks and the Death of Privacy 118–19 (2012); Craig Blakeley & Jeff Matsuura,
powerful data mining techniques, the aggregation of seemingly innocuous personal data across a range of social media makes it fairly straightforward to put together a disturbingly detailed profile of the data’s originator.”380 The access to information through aggregation and data mining is fundamentally undermining what was formerly the private sphere.381 Sun Microsystems Chief Executive Officer Scott McNealy indelicately declared: “You have zero privacy. Get over it.” 382 At the very least, technology and people’s use of that technology has resulted in private individuals in 2014 being significantly less private than they were in 1974.

IV. GERTZ’S ENDURING PURPOSES

While the sandcastle of Gertz has been battered by waves of First Amendment pressures and technological changes, it still stands, not yet having been subsumed back into the earth. While the edifice may someday be fully washed away, that day has not yet arrived. Gertz still serves important purposes, especially with regard to protecting the interests of private individuals harmed by media coverage.


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


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


Under First Amendment pressure, it becomes easy to think a plaintiff simply needs to “toughen up” or have “thicker skin.”\textsuperscript{383} Thinking this way can inappropriately diminish appreciation for the seriousness of the injury.\textsuperscript{384} As observed by Justice Stewart, “[t]he right of a [person] to the protection of his own reputation from unjustified invasion and wrongful hurt reflects no more than our basic concept of the essential dignity and worth of every human being.”\textsuperscript{385} Nor is this some transitory right of recent vintage:

There is no doubt about the historical fact that the interest in one’s good name was considered an important interest requiring legal protection more than a thousand years ago; and that so far as Anglo-Saxon history is concerned this interest became a legally protected interest comparatively soon after the interest in bodily integrity was given legal protection.\textsuperscript{386}

Though there are variances in legal schemes for addressing injury from defamation, there is a cross-cultural recognition of the injury and need for redress.\textsuperscript{387} As Professor Anita Bernstein observed, “[m]any belief systems and ideologies that otherwise clash with one another—religious doctrines, secular humanism, and psychological, philosophical, sociological, and anthropological understandings—unite around dignity as central to human life in a society. Dignity encompasses reputation, the center of defamation.”\textsuperscript{388} Simply stated, “publication of untruths about people can hurt those people, often quite severely.”\textsuperscript{389} Tort damages arising from defamation include compensation for out-of-pocket financial losses incurred by the plaintiff, harm suffered to plaintiff’s reputation and standing in the community, personal humiliation, and mental anguish.\textsuperscript{390} Redress of defamation injuries is in accord with traditional and broadly accepted principles undergirding tort law.\textsuperscript{391}

\begin{itemize}
\item \textsuperscript{383} See, e.g., Shulman v. Hunderfund, 905 N.E.2d 1159, 1163 (N.Y. 2009) (noting the need for a public figure defamation plaintiff “to develop a thicker skin”).
\item \textsuperscript{385} Rosenblatt v. Baer, 383 U.S. 75, 92 (1966).
\item \textsuperscript{386} Laurence H. Eldridge, \textit{The Law of Defamation} § 53, at 293–94 (1978).
\item \textsuperscript{387} See Diane Rowland & Elizabeth Macdonald, \textit{Information Technology Law} 393–94 (3d ed. 2005).
\item \textsuperscript{388} Anita Bernstein, \textit{Real Remedies for Virtual Injuries}, 90 N.C. L. REV. 1457, 1462 (2012).
\item \textsuperscript{389} Schauer, \textit{supra} note 138, at 912.
\end{itemize}
Injury prevention by restraining speakers who make statements that may injure the reputation of others also stands as one of the core purposes of defamation actions. The purpose of the actual malice standard is to loosen restraints to allow for a robust flow of debate and discussion. Loosening restraints is not, however, always a good thing for the individual or the broader society. "[U]nfortunately for those defamed, you cannot unring a bell." Where injury has been done to a person’s reputation, the person cannot be returned to the same place of good standing within the community. The internet only magnifies the problem by bringing into effect a propagandist’s vision of telling a lie enough times to make it indelibly fixed as the truth. Even professional service companies, like Reputation.com, discussed above, have limits on their capacity for removing harmful untruthful information from the internet, and accessing the services of these companies is “expensive and beyond the means of many victims.”

Furthermore, lesser restraint through the application of the actual malice standard threatens to lead to increased media errors, which reduce public confidence and injure the media’s role as a watchdog. The proliferation of untrue statements, which is generally deemed low-value speech, not only floods

392 Id. at 792.
394 See, e.g., Connor v. Scroggs, 821 So. 2d 542, 552 (La. Ct. App. 2002) (stating that “[a]ccusing a person of [sexual molestation of a child] without cause is equally horrendous [as the actual crime] in light of the public humiliation such an allegation would cause the accused person”); Blatnik v. Avery Dennison Corp., 774 N.E.2d 282, 293 (Ohio Ct. App. 2002) (upholding a defamation jury award because “[a] man’s reputation is ruined when he is publicly labeled as one who cannot be trusted around women in the workplace”).
395 See generally THOMAS PRESTON, PANDORA’S TRAP: PRESIDENTIAL DECISION MAKING AND BLAME AVOIDANCE IN VIETNAM AND IRAQ 84 (2011) (describing the political tactic of “staying on message and repeating a charge (regardless of the evidence) [as] an age old tactic” that when “[r]epeated enough times . . . becomes engrained in the public mind, easily recalled and difficult to remove”).
396 See Michael L. Rustad, Twenty-First-Century Tort Theories: The Internalist/Externalist Debate, 88 IND. L.J. 419, 430 (2013) (“Even with the help of companies . . . that will attempt to expunge tortious postings, you cannot really ‘unring the bell’ once information is posted, copied, and forwarded around the globe.”).
399 See, e.g., GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 271 (2004) (observing that “false statements of fact are not the sort of expression the First Amendment was meant to promote”).
the marketplace of ideas with inaccurate information but also undermines public confidence in ascertaining truth. Journalist Farhad Manjoo has addressed this latter point in an intriguing book that explores the extraordinary divide over facts, not policy, that have become broken down as a point of consensus and are simply treated as another perspective or rejected as untrue, despite their validity.

Additionally, while ordinary people are now empowered to communicate with mass audiences in a manner that would have been inconceivable for members of the 

\textit{Gertz} Court four decades ago, there remains a divide between the “private individual” and the “public figure” in the extent of their access to audiences. Simply stated, “traditional political, economic, cultural, and media elites are also using—and in many ways still dominating—the Internet.” While the communication reach of private individuals has increased extraordinarily, there are serious questions about the breadth of the audience an ordinary person can reach. As David Lat and Zach Shemtob have asserted, “even in the digital age, famous celebrities still have greater access to communication channels than ordinary citizens.” Accordingly, a substantial divide remains between the extent to which private individuals and public figures can effectively rely on self-help to remedy injuries to their reputations.

Also, the 

\textit{Gertz} assumption of the risk voluntariness rationale has lingering resonance. Professor Susan Gilles has drawn a set of intriguing comparisons between the 

\textit{Gertz} Court’s voluntariness analysis and traditional tort law concepts of primary and secondary assumption of the risk. Primary assumption of the risk, as distinct from secondary assumption of the risk, “does not require proof of either subjective knowledge and appreciation of the risk by the plaintiff or actual consent


\footnote{\textit{See generally} FARHAD MANJOO, \textit{TRUE ENOUGH: LEARNING TO LIVE IN A POST-FACT SOCIETY} 1–2, 19–23 (2008) (discussing the complexities that underlie the counterintuitive paradox that for many people, facts matter less in the digital age).}

\footnote{\textit{See generally} MATTHEW HINDMAN, \textit{THE MYTH OF DIGITAL DEMOCRACY} 38–40, 54–57 (2009) (noting that “communities of Web sites on different political topics are each dominated by a small set of highly successful sites,” which limits the public’s access to information).}

\footnote{\textit{ANDREA L. PRESS \\& BRUCE A. WILLIAMS, THE NEW MEDIA ENVIRONMENT: AN INTRODUCTION} 21 (2010).}

\footnote{\textit{See generally} HINDMAN, \textit{supra} note 402, at 54–57 (highlighting that “blogs almost immediately replicated the winners-take-all distribution of links and traffic that we see in the Web as a whole”).}

\footnote{\textit{Lat \\& Shemtob, \textit{supra} note 299, at 411; Patrick H. Hunt, Comment, \textit{Tortious Tweets: A Practical Guide to Applying Traditional Defamation Law to Twibel Claims}, 73 \textit{LA. L. REV.} 559, 582 (2013) (“To say that all Twitter users do not have an equal voice on the website is an understatement. . . . An average user would likely be hard-pressed to effectively rebut a defamatory statement posted by a user with a larger than average number of followers.”) (citation omitted)).}
to that risk; merely engaging in the activity is sufficient to trigger assumption.\footnote{406} With regard to primary assumption of the risk, even in the absence of individualized knowledge of the risk, persons engaging in certain activities accept certain risks, such as a spectator or ticketholder being hit by a foul ball at a baseball game.\footnote{407} Alternatively, secondary assumption of the risk is focused upon the individual’s knowledge of and voluntary agreement to submit to the risk.\footnote{408} For example, a person accepting a ride from a driver the person knows to be heavily intoxicated.\footnote{409}

Insofar as voluntariness intersects with the primary assumption of the risk category, “[t]he Supreme Court seems to suggest that just as baseball has inherent dangers [that should be] apparent to all, so does public life. Those who seek a role of prominence in society can be deemed to agree to the inherent risks of that ‘sport,’ the danger of false reports.”\footnote{410} As for the secondary assumption of the risk category, Professor Gilles contends that the Court’s understanding of limited-purpose public figure that places herself in the vortex of a public controversy draws a close, though not exact fit, with a subjectively knowledgeable plaintiff who embraces a known risk.\footnote{411} The private individual, however, has neither taken a position that is inherently subject to media attention (primary assumption of the risk) nor entered into a particular controversy knowing the specific attendant dangers of attention (secondary assumption of the risk). To the contrary, under neither formulation has a private individual assumed the risk. Instead she is having the imposition thrust upon her. Similarly, Professor Smolla has observed that “[t]he public figure doctrine is heavily grounded in cultural and moral equity—if you can’t stand the heat of the fire, stay out of the kitchen.”\footnote{412} The private individual neither intended to go into the kitchen nor knew that she was even there.

V. THE LOST INVOLUNTARY PUBLIC FIGURE

While a number of commentators have argued for a restoration of Justice Brennan’s \textit{Rosenbloom} plurality test as the proper constitutional rubric for defamation cases,\footnote{413} there are compromises short of that approach that can strike a

\begin{itemize}
  \item \footnote{406} Gilles, \textit{supra} note 1, at 236.
  \item \footnote{407} \textit{Id.}
  \item \footnote{408} \textit{Id.} at 235.
  \item \footnote{409} \textit{Id.}
  \item \footnote{410} \textit{Id.} at 247.
  \item \footnote{411} \textit{Id.} at 260–62.
  \item \footnote{412} SMOLLA, \textit{supra} note 213, § 6:40, at 6-370.
  \item \footnote{413} Strong arguments have been offered in support of this position. \textit{See}, e.g., Peter J. Hageman, \textit{Rosenbloom: Its Time Has Come Again}, 17 COMM. L. 9, 9–13 (1999); Lat & Shemtob, \textit{supra} note 299, at 404; Douglas B. McKechnie, \textit{The Death of the Public Figure Doctrine: How the Internet and the Westboro Baptist Church Spawned a Killer}, 64 HASTINGS L.J. 469, 490–97 (2013); Howard M. Wasserman, \textit{Two Degrees of Speech Protection: Free Speech Through the Prism of Agricultural Disparagement Laws}, 8 WM. & MARY BILL RTS. J. 323, 349 (2000).}
\end{itemize}
more equitable balance between the enduring purposes served by Gertz and the First Amendment pressures that are pushing on the Gertz classification structure. A significant component of properly accommodating these competing pressures is found by clarifying the mysterious involuntary public figure category. To define this category, it is useful to draw upon principles from an opinion in Rosenbloom, though one considerably less heralded than Justice Brennan’s opinion: Justice White’s concurrence.

Justice White offered a narrower expansion of constitutional constraints on defamation actions than the plurality in Rosenbloom. Addressing WIP Radio’s coverage of Philadelphia pornography distributor George Rosenbloom and his interactions with law enforcement, Justice White advanced the following understanding of why the media coverage should be protected by the actual malice standard:

New York Times Co. v. Sullivan itself made clear that discussion of the official actions of public servants such as the police is constitutionally privileged. “The right of free public discussion of the stewardship of public officials” is, in the language of that case, “a fundamental principle of the American form of government.” Discussion of the conduct of public officials cannot, however, be subjected to artificial limitations designed to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place. In the present case, for example, the public would learn nothing if publication only of the fact that the police made an arrest were permitted; it is also necessary that the grounds for the arrest and, in many circumstances, the identity of the person arrested be stated. In short, it is rarely informative for newspapers or broadcasters to state merely that officials acted unless they also state the reasons for their action and the persons whom their action affected.

Nor can New York Times be read as permitting publications that invade the privacy or injure the reputations of officials, but forbidding those that invade the privacy or injure the reputations of private citizens against whom official action is directed. New York Times gives the broadcasting media and the press the right not only to censure and criticize officials but also to praise them and the concomitant right to censure and criticize their adversaries. To extend constitutional protection to criticism only of officials would be to authorize precisely that sort of thought control that the First Amendment forbids government to exercise.

I would accordingly hold that in defamation actions, absent actual malice as defined in New York Times Co. v. Sullivan, the First Amendment gives the press and the broadcast media a privilege to report and comment upon the official actions of public servants in full detail, with no requirement that the reputation or the privacy of an individual

Professors David Anderson and Laurence Tribe argue the \textit{Gertz} Court’s cryptic discussion of involuntary public figures is intended to encapsulate those individuals qualifying under the rubric set forth in Justice White’s concurring opinion in \textit{Rosenbloom}.\footnote{TRIBE, \textit{supra} note 236, at 880; David A. Anderson, \textit{Libel and Press Self-Censorship}, 53 TEX. L. REV. 422, 450–451 (1975).} Professor Anderson concluded that \textit{Gertz}’s involuntary public figure “is not much broader than the one suggested by Justice White in his concurring opinion in \textit{Rosenbloom}: ‘individual[s] involved in or affected by . . . official action.’”\footnote{Anderson, \textit{supra} note 415, at 451 (quoting \textit{Rosenbloom}, 403 U.S. at 62 (White, J., concurring)).} Similarly, Professor Tribe has observed that the involuntary public figure category “appears to include persons who are involved in or directly affected by the actions of public officials.”\footnote{TRIBE, \textit{supra} note 236, at 880.} Professor Tribe argued that accordingly “the magazine distributor in the \textit{Rosenbloom} case arrested by the police for distributing obscene literature would be an involuntary public figure with respect to reports or comments about the arrest.”\footnote{\textit{Id.} (citation omitted).} Not only does Justice White’s confluence present a viable contender for bringing meaning to the \textit{Gertz} Court’s fleeting and cryptic reference to involuntary public figures, it also provides a useful cornerstone for constructing this category in light of four decades of \textit{Gertz} societal and jurisprudential evolution.

Drawing on Justice White’s confluence and considering the issue from a normative perspective, courts should distinguish an involuntary public figure from a private individual using the following rubric. An otherwise private individual will be treated as an involuntary public figure to the extent that the individual is integrally intertwined with addressing the following:

1. The official conduct or qualifications for office of a public official,
2. The actions of a public figure with regard to a matter of public concern, or
3. A matter of public concern itself.


As for the first species of involuntary public figures—those who are integrally intertwined with addressing the official conduct or qualifications for office of a public official—Justice White quite properly observed that “[d]iscussion of the
conduct of public officials cannot . . . be subjected to artificial limitations designed
to protect others involved in an episode with officials from unfavorable publicity. Such limitations would deprive the public of full information about the official action that took place.\(^{420}\) A contrary resolution would undermine the fundamental animating principle that launched the Supreme Court’s recognition of constitutional limitations upon defamation actions in *New York Times Co. v. Sullivan*. At its core, the *New York Times* decision serves to protect the ability of the people and press to discuss the actions of public officials so as to engage in self-governance. The entwinement of a private person in the official conduct of a public official cannot function as a shield for reports about the conduct of a public official.\(^{421}\) Because enabling democratic self-governance stands as the core


\(^{421}\) A Tennessee Court of Appeals decision in *Lewis v. NewsChannel 5 Network, L.P.*, 238 S.W.3d 270 (Tenn. Ct. App. 2007), is illustrative of this approach:

The undisputed facts in this case establish as a matter of law that Brad Lewis should be deemed to be a public figure for the purpose of NewsChannel 5’s report regarding Major Dollarhide’s official misconduct. He is, to be sure, an involuntary public figure because he did not purposely inject himself into the forefront of the controversy surrounding Major Dollarhide. However, the NewsChannel 5 defendants had the right to report on Major Dollarhide’s disempowerment and on the reasons why the Chief of Police decided to relieve him of his duties. This right necessarily included reporting on the circumstances surrounding Major Dollarhide’s intervention to prevent Brad Lewis from being arrested on December 27, 1998. Without these facts, the public would not have been fully and appropriately informed of the seriousness of Major Dollarhide’s misconduct.

Had the facts that Brad Lewis believes to be libelous been removed from the NewsChannel 5 story, the public would have been left to speculate about the reasons for the Chief of Police’s actions. The public would only have been informed that Major Dollarhide had gone to the scene of an incident where a person was being detained and that he had secured the release of that individual. Based on this information alone, the public would have no way of assessing what Major Dollarhide’s motivation had been or whether Major Dollarhide was being disempowered for an adequate or inadequate reason. Even if the public had assumed that Major Dollarhide had acted improperly in some way, it would have no way of ascertaining how serious his misconduct was.

The fact that Brad Lewis was the person involved in the incident that led to Major Dollarhide’s disempowerment sheds significant light on Major Dollarhide’s conduct. The fact that Brad Lewis allegedly had firearms, betting slips, and a large amount of cash in his possession when he was detained dramatically emphasizes the seriousness of Major Dollarhide’s misconduct. These facts removed ambiguity from the story. They informed the public that Major Dollarhide had intervened to prevent a family member from being arrested for serious criminal offenses. By reporting these facts, the NewsChannel 5 defendants enabled the public to better understand Major
purpose for protecting freedom of speech, the weight on Gertz’s balancing between the state’s interests in protecting a private individual against injury from defamation and the need of a robust and vigorous press are most pronounced in favor of application of the actual malice standard with regard to the species of involuntary public figures who have become intertwined with public officials. Involuntary public figures are not, however, limited to this variety.

First Amendment purposes extending beyond self-governance point toward recognition of a second species of involuntary public figures, those who are integrally intertwined with addressing the actions of a public figure regarding a matter of public concern. The entwinement of a private person with a public figure on a matter of public concern cannot function as a shield for reports about a public figure as to matters of public concern any more than it can as to a public official. As a practical matter, litigation in such cases appears to regularly involve closely related family members or those involved in romantic relationships with all-purpose public figures. There is, however, conceptually no reason to limit this species of involuntary public figure to family members of or those involved in romantic relationships with all-purpose public figures. While strong arguments can be made for distinguishing public officials from public figures, the important First Amendment purposes served beyond the political sphere point toward embracing this application. Failure to apply the actual malice standard in cases wherein private individuals are integrally intertwined with addressing the actions of a public figure regarding a matter of public concern would inhibit the press in reporting on the actions of public figures with regard to matters of public concern. The First Amendment importance of reporting the matter is not diminished by the entwinement of the private person with the public figure and, as reflected in the discussion above, the rationale for dividing private persons from public figures has been diminished. Accordingly, the scale tips, though the question is a closer one

Dollarhide’s corrupt motivation, as well as the seriousness of his breach of his official duty.

Id. at 299–300.

422 The Fifth Circuit’s decision in Brewer v. Memphis Publishing Co., 626 F.2d 1238 (5th Cir. 1980), is illustrative of this approach. Therein, Anita Brewer, who was at one time Elvis Presley’s “number one girlfriend,” and her husband, Joe Brewer, were referenced in media reports about Elvis Presley following the dissolution of his marriage to Priscilla Presley. Id. at 1257–58. The references involved Brewer’s earlier relationship with Elvis. Id. The Court concluded that Brewer had actually become a limited-purpose public figure for purposes of her connection with Elvis and that neither she nor her husband would be treated as private individuals. Id.

423 See generally Mark P. Strasser, A Family Affair? Domestic Relations and Involuntary Public Figure Status, 17 LEWIS & CLARK L. REV. 69, 100 (2013) (noting that “[s]everal cases suggest that family status alone may be enough to make one an involuntary public figure”).

424 See generally Schauer, supra note 138, at 905–35 (arguing important differences exist between public officials and public figures that warrant applying a higher level of constitutional protection to speech regarding public officials than public figures).
than with public officials, in favor of application of the actual malice standard in cases involving otherwise private individuals who are integrally intertwined with addressing the actions of a public figure regarding a matter of public concern.

The third species of involuntary public figures, those integrally intertwined with addressing a matter of public concern itself, is the application in which there is the greatest susceptibility of the Gertz structure collapsing and an implicit restoration of the Rosenbloom test occurring. However, that result need not follow, and in fact an appropriate recognition of this variety of involuntary public figure will reduce First Amendment pressures upon courts to define voluntariness in a questionable manner. In other words, instead of expanding the definition of voluntariness until it becomes almost unrecognizable, courts can instead return voluntariness to a more reasonable interpretation of the concept while developing the involuntary public figure category.

Three cases are particularly helpful in illustrating this species of involuntary public figure: (1) Wiegel v. Capital Times Co.,425 (2) Dameron v. Washington Magazine, Inc.,426 and (3) Atlanta Journal-Constitution v. Jewell.427 In Wiegel, the plaintiff, Joseph Wiegel, declined to exercise soil-erosion-prevention measures that had been recommended but not required by government officials, resulting in more than $100,000 in cleanup costs for taxpayers to rehabilitate waterways bordering his farm.428 A local newspaper, The Capital Times, covered Wiegel’s disinclination to put into place a soil erosion plan and the adverse consequences thereof.429 The Capital Times advocated for increased restrictions to be imposed upon Wiegel to prevent this continuing injury to the public coffers and the environment.430

The plaintiff in Dameron, Merle Dameron, worked as an air traffic controller and had been the only air traffic controller on duty when a plane crashed coming into Dulles Airport in 1974.431 Following a plane crash at Dulles in 1982, the Washingtonian magazine ran a story about the accident and addressed airline safety issues, especially those related to Dulles.432 Relying upon a National Transportation Safety Board report, the author of the story observed that significant strides had been made in improving airline safety including air traffic control improvements, but that more should be done, noting three accidents that were partly attributable to air traffic controllers.433 The author did not list the controllers by name but did list the three accidents.434

The last case, Atlanta Journal-Constitution, involved Centennial Olympic Park security guard Richard Jewell and media reports regarding the Federal Bureau

426 779 F.2d 736 (D.C. Cir. 1985).
428 Wiegel, 426 N.W.2d at 45.
429 Id.
430 Id.
431 Dameron, 779 F.2d at 737–38.
432 Id.
433 Id. at 738.
434 Id.
of Investigation’s turning the focus of its investigation to Jewell as a suspected bomber in an act of domestic terrorism perpetrated at the 1996 Atlanta Olympics.\footnote{Atlanta Journal-Constitution v. Jewell, 555 S.E.2d 175, 178, 182 (Ga. Ct. App. 2001).} In each of these cases, a private individual was integrally intertwined with addressing a matter of public concern.

Caution in application of this category is, however, warranted. Courts should not apply the involuntary public figure designation where the private individual’s involvement in the matter of public concern was only tangential or trivial\footnote{See, e.g., Hopkins, \textit{supra} note 217, at 32 (stating that “[i]f [the plaintiff’s] role is tangential or trivial, the plaintiff is often held to be a private person”).} or where the private individual is simply someone who is “illustrative of some perceived social ill.”\footnote{Jadwin v. Minneapolis Star & Tribune Co., 367 N.W.2d 476, 485 (Minn. 1985).} Under such circumstances, the would-be involuntary public figure is not integral to addressing a matter of public concern. Instead, private individuals remain primarily undifferentiated from other private individuals, and the matter can be addressed meaningfully without their inclusion. Exclusion of reference to such persons is an inconvenience rather than a disabling limitation on the media in addressing a matter of public concern where the private individual is merely tangential, trivial, or simply being used in a representative capacity. That inconvenience does not override the continuing value served by the \textit{Gertz} framework.

\section*{VI. Conclusion}

Professor John C. P. Goldberg astutely observed that \textit{New York Times Co. v. Sullivan} “was about as easy to resolve as a landmark decision could be. But easy cases are not easy in all respects. Precisely because their outcomes are overdetermined, they pose the problem of how to decide subsequent cases, in which all signs are not pointing toward one resolution.”\footnote{John C. P. Goldberg, \textit{Judging Reputation: Realism and Common Law in Justice White’s Defamation Jurisprudence}, 74 U. COLO. L. REV. 1471, 1478 (2003).} L. B. Sullivan and the Alabama political establishment’s aggressive use of defamation law as a tool to support the maintenance of white supremacy by striking at political adversaries in the press and the civil rights movement brought to the surface the dangers posed by defamation suits to democratic self-governance. It was, despite the dramatic change in the centuries of precedent, as noted by Professor Goldberg, an easy case. The Court in \textit{Curtis Publishing Co. v. Butts} extended constitutional safeguards to speech addressing public figures, which the Court conceived of in political terms. In doing so though, the Supreme Court opened a door that state and lower-federal courts walked through to employ the constitutional safeguards of the actual malice standard to serve First Amendment purposes beyond the sphere of debate and discussion regarding public policy. The Court, however, went too far in \textit{Rosenbloom}, not on the facts of the case but in terms of the legal standard adopted by the plurality. The balance between safeguarding the press and safeguarding an
injured private individual had become overly protective of the media and insufficiently so of private individuals. The *Gertz* decision was a response to these excesses of *Rosenbloom*. *Gertz* would prove, at least in the high court’s application and understanding of its standards, to be an overcorrection.

Four decades of jurisprudential and societal change have brought enormous pressure to bear on the *Gertz* framework. That pressure is being released in a number of ways including a dramatically expanded notion of what constitutes voluntariness. The structure itself is potentially in danger of collapse. That is problematic insofar as there are important values that are served by *Gertz* in safeguarding private individuals against the substantial harm that can be caused by defamation.

The involuntary public figure category provides a release valve for some of the pressures that have built up. Justice White perceived the *Rosenbloom* plurality as over-reaching. Instead of the plurality’s giant leap, he offered in his concurrence a more modest step forward. A workable framework for constructing an involuntary public figure can be reestablished on the more modest step forward identified by Justice White with some alterations to reflect jurisprudential and societal changes. By finding the lost involuntary public figure, courts take a small step forward to restoring doctrinal clarity with less danger of again swinging the pendulum too far.
WARNING: A POST-SALE DUTY TO WARN TARGETS SMALL MANUFACTURERS

Jill Wieber Lens*

The majority of states now obligate manufacturers to warn about dangers of their products that are discoverable after the sale. Commentators and courts have been hesitant about this obligation because of the potential burden it puts on manufacturers—the costs of identifying users and warning them of the danger. The consensus is that only a factually dependent post-sale duty to warn should exist, obligating manufacturers to warn only if a reasonable manufacturer would do so. A reasonable manufacturer, of course, would warn only if the danger to be warned of justifies the costs of the warning.

This Article is the first to identify a problem with a factually dependent post-sale duty to warn—it will most likely result in liability for small manufacturers, but not large manufacturers. This is because the costs of issuing the warning for a small manufacturer will always be smaller than for a large manufacturer. This Article is also the first to argue that a factually dependent post-sale duty to warn is inconsistent with the underlying purposes of products liability law and general public policy. Although the factually dependent post-sale duty to warn seems like a perfect solution to the overburdening problem, courts should not adopt it.

I. INTRODUCTION

If you want to see people squirm, we recommend that you gather representatives from industry in a room and then flash the words “post-sale warnings” on a screen. The reaction is guaranteed. The reason is simple. It is one thing to tell a manufacturer that it has the duty to provide an initial warning with the product. 1

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1 JAMES A. HENDERSON, JR. & AARON D. TWERSKI, TEACHER’S MANUAL—PRODUCTS LIABILITY: PROBLEMS AND PROCESS 162 (7th ed. 2011).
But it is another thing to tell manufacturers that they could owe a duty to warn after they have sold the product—practically, a duty to identify users and warn them of a newly materialized danger. As explained by the authors of the Third Restatement of Torts: Products Liability (“Third Restatement”), it is a “monster duty,” a “seemingly . . . timeless duty to warn.”

More than half of the states and the Third Restatement have adopted a post-sale duty to warn. But this is not a reason for manufacturers to hide in fear—at least not all of them. Most of these states have adopted a post-sale duty that is factually dependent. The duty will exist only if a reasonable manufacturer would have warned, which is true only if the costs of issuing the warning were reasonable. The Third Restatement explains, and commentators agree, this factually dependent inquiry is necessary to ensure a post-sale duty to warn does not “impose unacceptable burdens on product” manufacturers. Because the costs are relevant, large manufacturers that distribute their products widely to a large number of customers need not be worried. If issuing a warning would necessitate identifying and contacting three million customers all spread across a region, no duty would likely exist.

This Article is the first to explore a problem with the well-intentioned factually dependent post-sale duty to warn—a problem that should make small manufacturers squirm. Unlike a large manufacturer, a small manufacturer is likely to have fewer customers located in a geographically distinct area. The small manufacturer may even have continuing contact with those customers, and it would not be very expensive for a small manufacturer to warn its customers. Thus, a small manufacturer would owe a post-sale duty to warn and face liability for failing to warn.

This type of factually dependent duty to warn—likely owed by small manufacturers but not large manufacturers—is inconsistent with the underlying theories of products liability. Those underlying theories support a broad post-sale duty to warn, obligating all manufacturers, not just the small manufacturers. A factually dependent post-sale duty to warn is also inconsistent with general public policy. Small manufacturers are already especially vulnerable to the effects of products liability law and have difficulty obtaining products liability insurance. This difficulty will increase now that only small manufacturers face a new form of liability for post-sale conduct.

Ultimately, a broad post-sale duty to warn could be very burdensome on manufacturers because of the costs of warning. A factually dependent version of the duty, however, likely protects only larger manufacturers from those costs. If those costs are real and valid, the solution is to reject any post-sale duty to warn, ensuring that all manufacturers are treated the same.

Part II of this Article explores the differences between the point-of-sale warning obligation and a possible post-sale warning obligation. Part III uses case

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2 Id.
law and the Third Restatement factors to explain how a factually dependent post-sale duty to warn is more likely to create a post-sale warning obligation for small manufacturers than for large manufacturers. Part IV argues that because of the effect on small manufacturers, a factually dependent post-sale duty is inconsistent with the theories underlying products liability law and with general public policy. Part V concludes by arguing the courts should reject any post-sale duty to warn that creates different obligations for different manufacturers. That likely means that courts should reject any post-sale duty to warn.

II. WHAT IS A POST-SALE DUTY TO WARN?

The best way to understand a post-sale duty to warn is to compare it to the well-accepted manufacturer’s point-of-sale duty to warn.4

A. The Basics of a Point-of-Sale Warning

Manufacturers “have a duty to provide consumers with warnings of hidden product dangers and instructions on how products may be safely used.”5 The duty is not to warn of all hidden dangers, however. Instead, the manufacturer is obligated to warn of the foreseeable dangers—the dangers about which the manufacturer knew or should have known at the time of sale.6

Liability for failure to warn is based in negligence.7 If a reasonable manufacturer would have warned about the foreseeable dangers, a defendant is

4 This Article refers to the “manufacturer” instead of “seller.” The common law obligates both manufacturers and sellers to warn. See id. § 1 cmt. e. At the same time, “[l]egislation has been enacted in many jurisdictions that, to some extent, immunizes nonmanufacturing sellers or distributors from strict liability.” Id. A seller would not likely be liable for either a point-of-sale failure to warn or a post-sale failure to warn if it had no involvement in the creation of the warning. See, e.g., TEX. CIV. PRAC. & REM. CODE ANN. § 82.003 (West 2011). Thus, I will refer only to the manufacturer as possibly owing a post-sale duty to warn.


6 Richter v. Limax Int'l, Inc., 45 F.3d 1464, 1471 (10th Cir. 1995) (explaining that manufacturers have a duty to warn of harms “reasonably foreseeable to the manufacturer of the product” and that “a manufacturer cannot be held liable for harm that no reasonable person could anticipate”).

7 Some courts still pretend the standard is based in strict liability, but others admit a “strict liability” failure to warn claim is no different than a negligent failure to warn claim. See, e.g., Anguiano v. E.I. Du Pont De Nemours & Co., 44 F.3d 806, 811–12 (9th Cir. 1995) (stating that “the question whether a manufacturer has a duty to warn under strict liability depends on the standards for determining a duty to warn under a negligence action”); Klem v. E.I. DuPont De Nemours Co., 19 F.3d 997, 1001–03 (5th Cir. 1994) (holding that failure-to-warn claims in strict liability and in negligence duplicate one another); Werner v. Upjohn Co., 628 F.2d 848, 858 (4th Cir. 1980) (stating that although the negligence and strict liability theories may be phrased differently, the issue is generally the same: “was the warning adequate?”); Sell v. Bertsch & Co., 577 F. Supp. 1393, 1397
liable if it failed to act similarly. A defendant cannot be liable for failing to warn of
dangers that were unforeseeable at the time of the sale. Instead, a defendant can be
liable only if it was at fault. That is, it failed to warn about the foreseeable dangers,
the same dangers about which a reasonable manufacturer would warn.

It is still possible for liability for a failure to warn to be strict. That is how the
New Jersey Supreme Court defined the warning obligation in *Beshada v. Johns-
Manville Products Corp.* There, the court affirmed liability for a manufacturer’s
failure to warn about the dangers of asbestos—dangers that, according to the
defendant’s allegations, were unknown to even the scientific community at the
time the product was sold. The court defined a strict liability warning obligation,
and any argument that the defendant “could not have known the product was
dangerous” was irrelevant to a theory of strict liability.

But “American courts and commentators have widely (if not quite
universally) rejected this kind of ‘super-strict’ liability on grounds of fairness,
logic, and practicality.” The main reason for the criticism of *Beshada* and the
rejection of strict liability for failure to warn is that strict liability would be too
harsh and unfair. Requiring warnings of unknowable risks is essentially requiring
the impossible. “A manufacturer cannot fairly be required to issue warnings at the
point of sale of dangers about which it did not know and could not have

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8 447 A.2d 539, 545 (N.J. 1982).
9 Id. at 546. There was a “substantial factual dispute about what defendants knew and
when they knew it.” Id. at 542. For purposes of resolving the defendants’ motion to
dismiss, though, the court assumed the defendants had a lack of knowledge. Id. at 543.
10 Id. at 546.
11 OWEN, *supra* note 5, § 9.2, at 592; THIRD RESTATEMENT, *supra* note 3, § 2 cmt. a
(explaining that the rationale for imposing strict liability does not apply to defects based on
inadequate instruction or warning). Even the New Jersey Supreme Court found differently
a few years later in *Feldman v. Lederle Laboratories*, 479 A.2d 374 (N.J. 1984). In
*Feldman*, the potentially defective products at issue were prescription drugs. Id. at 376–77.
And when prescription drugs were at issue, the court held that drug manufacturers were
obligated to warn only of “dangers of which they know or should have known on the basis
of reasonably obtainable or available knowledge” at the time of sale. Id. at 376. The New
Jersey Supreme Court also noted in *Feldman* that its decision in *Beshada* had been heavily
criticized. Id. at 387–88.
Thus, manufacturers are obligated to warn only of dangers about which they knew or should have known at the time of sale.

Notably, the fault analysis for the point-of-sale warning obligation considers what the defendant knew and what it should have known. The fault analysis does not consider the costs of issuing a point-of-sale warning. That is because the costs are negligible: “the cost of giving an adequate warning is usually so minimal, amounting only to the expense of adding some more printing to a label.”

Obviously, the costs of the injury that result from the inadequate warning outweigh “a few pennies for a bit more paper and a little more ink.” Thus, a reasonable manufacturer would always warn of the foreseeable dangers.


Arguably, there are costs associated with issuing the point-of-sale warning. See James A. Henderson, Jr. & Aaron D. Twerski, Doctrinal Collapse in Products Liability: The Empty Shell of Failure to Warn, 65 N.Y.U. L. REV. 265, 297 (1990) (arguing that “judges and juries... assume erroneously that warnings are virtually costless”); see also Karin L. Bohmholdt, Note, The Heeding Presumption and Its Application: Distinguishing No Warning from Inadequate Warning, 37 Loy. L.A. L. REV. 461, 477 (2003) (explaining that “there are collateral costs associated with providing warnings” including the “costs associated with lost profits from a product containing too many warnings or the costs associated with ‘lost effect’ of an important warning among multiple, less necessary ones”). If a product contains too many warnings, consumers may disregard them. Henderson & Twerski, supra, at 296; see also Cotton v. Buckeye Gas Prod. Co., 840 F.2d 935, 938 (D.C. Cir. 1988) (“The inclusion of each extra item dilutes the punch of every other item. Given short attention spans, items crowd each other out; they get lost in fine print.”). Plus, there is a limit to how much information each warning can include. Id. (“If every foreseeable possibility must be covered, ‘[t]he list of foolish practices warned against would be so long, it would fill a volume.’” (quoting Kerr v. Koenm, 557 F. Supp. 283, 288 n.2 (S.D.N.Y. 1983)). “Even a court which knows, in the abstract, that a limit will ultimately be reached, has no immediate sense of whether the case before it pushes the warning package beyond the appropriate constraints.” Henderson & Twerski, supra, at 301. It is difficult to argue these costs, however, because there is “no available body of hard science from which to draw the data.” Id. at 298.

14 Henderson & Twerski, supra note 13, at 297; see also Ross Labs. v. Thies, 725 P.2d 1076, 1079 (Alaska 1986) (“The cost of giving an adequate warning is usually so minimal, i.e., the expense of adding more printing to a label, that the balance must always be struck in favor of the obligation to warn where there is a substantial danger which will
B. The Basics of a Post-Sale Duty to Warn

A post-sale warning is a warning issued after the sale of the product. It addresses dangers that the seller discovered, or should have discovered, after the sale. These are most likely dangers that were unknowable at the time of sale—the type of danger for which the defendant could not be liable for failing to warn at the point-of-sale. But if the manufacturer discovers or should have discovered a danger after the sale, a post-sale duty would obligate the manufacture to warn users, possibly years after that sale, of that newly materialized danger.

To illustrate the difference, consider an illustration from the *Third Restatement*:

ABC has manufactured and distributed vacuum cleaners commercially to millions of consumers over the course of many years. . . . Five years after the first commercial distribution of Model 14, ABC discovers a risk when the Model 14 is used to vacuum dust from a chemical carpet cleaner newly introduced to the market. No reasonable person in ABC’s position would have foreseen the risk previously, and thus the Model 14 was not defective at time of original sale.15

not be recognized by the ordinary user.”); *Owen*, supra note 5, § 9.2, at 591 (explaining that “the safety benefits of adding a sufficient warning virtually always exceed its monetary costs”).

15 *Third Restatement*, supra note 3, § 10 cmt. e, illus. 2. Courts that have adopted a post-sale duty to warn differ regarding whether the later-discoverable danger (triggering the need for a warning) must be related to a defect existing at the time of sale. Under the *Third Restatement* version, a post-sale duty to warn exists “whether or not the product is defective at the time of original sale.” Id. § 10 cmt. a. Many states, however, have required that a latent and undetectable design defect exist at the time of sale for a manufacturer to owe a duty to warn of the later revealed danger. *Kenneth Ross, Post-Sale Duty to Warn: A Critical Cause of Action*, 27 WM. MITCHELL L. REV. 339, 347 (2000); see also *David G. Owen et al., Madden & Owen on Products Liability* § 11.2, at 688 (3d. ed. 2000); see, e.g., *Romero v. Int’l Harvester Co.*, 979 F.2d 1444, 1450 (10th Cir. 1992) (limiting the post-sale duty to warn to “defects in design, existing but unknown or unappreciated at the time of the original sale, which are subsequently discovered by the manufacturer”); *Patton v. Hutchinson Wil-Rich Mfg. Co.*, 861 P.2d 1299, 1313 (Kan. 1993) (recognizing a post-sale duty to warn “when a defect, which originated at the time the product was manufactured” is later discovered).

There is no obvious need for liability for a post-sale failure to warn if a design defect also exists. Seemingly, the manufacturer would lack an incentive to issue a warning if the product is defectively designed; later issuance of a warning would not negate liability for the defective design. *Third Restatement*, supra note 3, § 10 cmt. j. Still, issuing the warning could be practically beneficial. If the user is warned, the user may be able to avoid injury. Using the example in the accompanying text, the user may not use the vacuum cleaner along with the chemical carpet cleaner. If the user is not injured, the manufacturer cannot be liable despite the existence of a design defect. Alternatively, if the user operates the vacuum cleaner with the chemical carpet cleaner despite being warned, the
If a post-sale duty to warn existed, ABC would be obligated to warn its users of the newly discovered risk. How exactly would ABC warn its users? Obviously, the manufacturer cannot just “change the warning on the product,” because the product has already left the manufacturer’s control. In order for ABC to warn its users of the newly materialized danger, it will have to contact those users. “The manufacturer must try to locate the product, identify its users, and advise them about the newly discovered product hazard.” This will be difficult. The more customers, the more arduous this will be. It will be even more difficult if the product has changed hands over time—if the original purchaser has sold it or given it away.

“Even if the effort to identify and contact current product users is successful, the cost of such an effort might be intolerable.” The writers of the Third Restatement agreed. They concluded that “an unbounded post-sale duty to warn would impose unacceptable burdens on product sellers,” including undertaking the “daunting” “costs of identifying and communicating with product users years after sale.” The serious potential for overburdening sellers is the reason Illinois courts rejected a post-sale duty to warn: “the law does not contemplate placing the manufacturer would have a basis for a comparative fault defense, reducing the plaintiff’s recoverable damages.

Moreover, if the state requires a plaintiff to establish a point-of-sale design defect in order to show a post-sale failure to warn, it will be impossible for a plaintiff to base a post-sale duty to warn on a failure to disclose a danger not knowable until after sale. A design defect exists under the risk-utility test only if “the foreseeable risks of harm posed by the product could have been reduced” with an alternative design. If the danger was unknowable (and obviously unforeseeable) at the time of sale, no design defect exists. Thus, if the danger was unknowable at the time of sale—and only later becomes knowable—there can also be no liability for a post-sale failure to warn if the state also requires a design defect.

Regardless of whether the defect must have existed at the time of manufacture, a post-sale duty to warn is not owed simply because the manufacturer develops a safety advancement. OWEN ET AL., supra, § 11.2, at 691.

16 Lovick v. Wil-Rich, 588 N.W.2d 688, 694 (Iowa 1999) (“[O]nce the product is sold, a variety of circumstances can impede, if not make impossible, the ability of a manufacturer to warn users.”); Schwartz, supra note 12, at 895 (“The warning cannot be attached to the product because the product already has been sold.”).


18 Schwartz, supra note 12, at 895–96; Richmond, supra note 17, at 19.

19 Schwartz, supra note 12, at 896; Richmond, supra note 17, at 19.

20 Schwartz, supra note 12, at 896.

21 THIRD RESTATEMENT, supra note 3, § 10 cmt. a.
onerous duty on manufacturers to subsequently warn all foreseeable users of products\textsuperscript{22} of “defects first discovered after a product has left its control.”\textsuperscript{23}

Despite the potential for overburdening manufacturers, over half the states have adopted a post-sale duty to warn and more are likely to follow given the \textit{Third Restatement} also includes a post-sale duty to warn.\textsuperscript{24} Those states that have


adopted the duty have acknowledged the potential burden on manufacturers, as did the Third Restatement, which stresses that courts consider the “serious potential for overburdening sellers” when examining whether to impose the post-sale duty.25

In order to protect manufacturers, the states that have adopted a post-sale duty have adopted factually dependent versions—the duty will exist only when the facts show the manufacturer would not be overburdened if forced to issue the post-sale warning.26 The Third Restatement similarly dictates that liability for a failure to warn is proper only if a reasonable manufacturer would have issued the post-sale warning.27 Plainly, a reasonable manufacturer would have issued a warning only if the costs of issuing that warning were reasonable. If the costs are unreasonable, then liability is improper.

This is markedly different than the point-of-sale warning obligation. Certain exceptions exist,28 but generally, all manufacturers owe a duty to issue the point-of-sale warning. The fact finder then decides whether the manufacturer breached that duty based on the factual circumstances. With the factually dependent post-sale duty to warn, however, courts frequently declare that a specific manufacturer

25 THIRD RESTATEMENT, supra note 3, § 10 cmt. a.

26 See, e.g., Robinson, 500 F.3d at 697–98 (applying South Dakota law and finding no violation of the duty to warn where the long passage of time would make it unreasonable for the manufacturer to locate all owners of its product and the manufacturer had already conducted a reasonable “post-sale warning campaign”).

27 THIRD RESTATEMENT, supra note 3, § 10(a); see also Schwartz, supra note 12, at 896 (explaining that “cost should be considered in determining whether a manufacturer has made a reasonable effort to warn product users” and that the “facts of a particular case . . . should all be relevant in determining” liability for post-sale failure to warn).

28 For instance, manufacturers do not have to warn of “risks that are either obvious, known to the affected party, or both.” OWEN ET AL., supra note 15, § 9.1, at 519. Similarly, “there is no duty to give a warning to members of a trade or profession against dangers generally known to that group.” Id. § 9.8, at 568. Exceptions to the duty to warn also exist for sellers of bulk materials and raw materials. See generally id. § 9.9.
does not even owe a duty to warn because of the factual circumstances. Similarly, the Third Restatement’s post-sale duty to warn can be read as a rule where the duty would not exist because of the factual circumstances.29

A factually dependent post-sale duty to warn also differs from a point-of-sale duty to warn in its consideration of costs. For the point-of-sale warning, the consideration of fault is limited to whether the danger was foreseeable. A

29 Professor Aaron Twerski was one of the co-reporters of the Third Restatement of Torts: Products Liability. In separate scholarship, Professor Twerski pointed to the post-sale duty rule as an example of a no-duty rule that is dependent on the individualized facts of the case as opposed to a categorical no-duty rule. See Aaron D. Twerski, The Cleaver, the Violin, and the Scalpel: Duty and the Restatement (Third) of Torts, 60 Hastings L.J. 1, 19–21 (2008). In addition, courts often rely on the facts to find that the defendant did not owe a post-sale duty to warn. See, e.g., Lewis v. Ariens Co., 751 N.E.2d 862, 867 (Mass. 2001) (finding no duty where the facts showed the plaintiff “purchased the product at least second hand, sixteen years after it was originally sold, and did not own the product until years after a duty to provide additional warnings arguably arose”). Professor Twerski made his observation in criticizing the version of duty described in drafts of the Third Restatement of Torts: Liability for Physical Harm, written by Professors Michael Green and William Powers. See Twerski, supra, at 21–25. That version describes that “[n]o-duty rules are appropriate only when a court can promulgate relatively clear, categorical, bright-line rules of law applicable to a general class of cases.” Restatement (Third) of Torts: Phys. & Emot. Harm § 7 cmt. a (2010).

The language of Professor Twerski’s individualized facts no-duty rule in the Third Restatement of Torts: Products Liability could also be interpreted as being consistent with the brightline duty rules articulated in the Third Restatement of Torts: Liability for Physical Harm. It could be read as obligating all manufacturers to issue post-sale warnings, a brightline rule, but clarifying that no breach of that duty occurs if a reasonable manufacturer would not have issued the post-sale warning. This is more consistent with reasonableness’s traditional relevance to breach (and not to duty). Under this interpretation, courts do not reject post-sale warning claims because the defendant did not owe a duty, but because the unreasonableness of issuing a warning meant the defendant did not breach as a matter of law. The Third Restatement of Torts: Liability for Physical Harm includes a description of this:

Sometimes reasonable minds cannot differ about whether an actor exercised reasonable care under § 8(b). In such cases, courts take the question of negligence away from the jury and determine that the party was or was not negligent as a matter of law. Courts sometimes inaptly express this result in terms of duty. . . . In fact, these cases merely reflect the one-sidedness of the facts bearing on negligence, and they should not be misunderstood as cases involving exemption from or modification of the ordinary duty of reasonable care.

Id. § 7 cmt. i; see also W. Jonathan Cardi & Michael D. Green, Duty Wars, 81 S. Cal. L. Rev. 671, 729 (2008) (explaining that when a judge dismisses a case because the plaintiff is unable to establish breach as a matter of law, it “requires judges to recognize and acknowledge that they are deciding a matter ordinarily left to the jury,” which “imposes an appropriate psychological hurdle for a judge before so ruling”).
manufacturer owes a duty to warn of foreseeable dangers regardless of the costs of that warning. For a post-sale warning, however, both the foreseeability of the danger and the costs of the warning are considered in the fault evaluation. A reasonable manufacturer would warn only of dangers about which it knows or should know and only if those dangers were substantial enough to justify the costs. Unlike a point-of-sale warning, a manufacturer may not owe a post-sale duty to warn because of the costs of issuing the warning.

III. UNEVENLY BURDENING SMALL MANUFACTURERS WITH THE FACTUALLY DEPENDENT DUTY

Although a factually dependent duty may be a way to ensure manufacturers are not overburdened, a factually dependent duty causes another problem. Courts have relied on particular facts in finding a post-sale duty to warn. The Third Restatement lists those same facts as factors that courts should consider in determining whether a post-sale duty to warn should exist. The facts courts have used and the Third Restatement factors are more likely to be present in cases where the defendant is a small manufacturer with fewer customers than if the defendant is a large manufacturer that widely distributes its product.30

A. Courts Imposing a Duty Based on the Facts

Facts that have motivated courts to impose a post-sale duty to warn include whether (1) the defendant sold the product to a small or otherwise limited market, (2) the defendant sold a small amount of products, and (3) the defendant maintained continuing contact with customers. As illustrated by the cases, these factors are more likely to be present if the defendant is a small manufacturer.

1. Limited or Specialized Market

Several courts have imposed a post-sale duty to warn on manufacturers that sold its product to a limited or specialized market. The Wisconsin Supreme Court, for example, imposed a post-sale duty to warn on a manufacturer of a sausage-stuffing machine in Kozlowski v. John E. Smith’s Sons Co.31 Years after the defendant first developed the product, an additional safety feature was invented

30 A factually dependent duty does not de jure obligate only small manufacturers. On its face, a factually dependent duty applies neutrally to all manufacturers regardless of their size. Despite its neutrality, however, the application of a factually dependent duty will, de facto, create unequal obligations and liability for small and large manufacturers. Because of the factors used, a factually dependent duty will most likely obligate more small manufacturers than large manufacturers to issue a post-sale warning. Similarly, it will more likely create liability for small manufacturers than large manufacturers. My argument could be resolved as an empirical matter as more states adopt a post-sale duty and more plaintiffs pursue that theory of liability. At this point, however, my argument is predictive.

31 275 N.W.2d 915, 918, 923–25 (Wis. 1979).
that would minimize the possibility of an accident due to excessive pressure while cleaning the machine. This feature was not on the machines purchased by the plaintiff’s employer. The court confronted the question of “whether there is a continuing duty to warn.” The court explained that, in determining whether that duty exists, the jury “must look to the nature of the industry” along with other factors.

The nature of the industry helped convince the Wisconsin Supreme Court that the sausage-stuffer manufacturer owed a continuing duty to warn of dangers. “The sale of a sausage stuffer is to a limited market wherein the manufacturer should know of all companies that own its product.” Not only should the defendant have been able to identify all of its customers, it also had the easy ability to notify them through “trade publications that reached 100% of its customers.” In fact, the defendant had actually advertised the existence of a safety feature that would have prevented the plaintiff’s injury in those trade publications, and the defendant listed the safety feature in its repair parts brochure. Because of the limited scope of the industry, the manufacturer owed a “continuing duty to warn of an alleged defective condition in light of the availability of a . . . safety device.” The jury would then decide whether the advertisements that the defendant sent out were adequate post-sale warnings.

The Supreme Court of Pennsylvania similarly relied on the limited market in imposing a post-sale duty in Walton v. Avco Corp. Like the sausage-stuffing machine in Kozlowski, the product in Walton, a helicopter, was sold to a small market. The helicopter in question seized mid-flight due to a failure of an oil pump in the engine, killing the passengers in the ensuing crash. The engine manufacturer had issued a Service Instruction advising of the defect and how to correct it. The engine manufacturer had sent that Service Instruction to the helicopter manufacturer, but not to the helicopter’s owners. The court determined

32 Id. at 916–17.
33 Id. at 917.
34 Id. at 923.
35 Id. at 924. Those other factors included “warnings given, the intended life of the machine, safety improvements, the number of units sold and reasonable marketing practices, combined with the consumer expectations inherent therein.” Id.
36 Id. at 923.
37 Id.
38 Id. at 916, 923.
39 Id. at 923.
40 Id.
41 See id.
43 Id. at 459.
44 Id. at 456.
45 Id.
46 Id. at 457.
the helicopter manufacturer was under a duty to warn its service centers and the purchasers of the affected helicopters. 47

The intermediate court noted the similarities between the case and Kozlowski, including the limited market for the sale of the products. 48 Specifically, the court noted its “cognizan[ce] of the nature of the helicopter manufacturing industry. A helicopter is not a household good, commonly found in almost any home in this country. It is . . . a unique and costly product which is manufactured, marketed, and sold to a specialized group of consumers.” 49 The Pennsylvania Supreme Court similarly relied on the market in affirming the post-sale duty: “[T]he peculiarities of the industry also go far to support this imposition of responsibility.” 50 The court also explained that helicopters “are sold in a small and distinct market.” 51

Although it is possible that any sized manufacturer could sell to a limited market, it is generally true that a small manufacturer is more likely to sell to a limited market than a large manufacturer. A smaller manufacturer is more likely to distribute its products less widely, i.e., less than nationally. Applying this factor of selling to a limited market, it is more likely that a small manufacturer would owe a post-sale duty to warn.

Plainly, a court is much less likely to impose a factually dependent post-sale duty to warn on a larger manufacturer that widely distributes its products. 52 Both the Wisconsin Supreme Court in Kozlowski and the Pennsylvania courts in Walton make this clear. The Wisconsin Supreme Court specifically explained that it was not holding

that there is an absolute continuing duty, year after year, for all manufacturers to warn of a new safety device which eliminates potential hazards. A sausage stuffer and the nature of that industry bears no similarity to the realities of manufacturing and marketing household goods such as fans, snow-blowers [sic] or lawn mowers which have become increasingly hazard proof with each succeeding model. It is beyond reason and good judgment to hold a manufacturer responsible for a duty of annually warning of safety hazards on household items, mass produced and used in every American home . . . . It would place an unreasonable duty upon these manufacturers if they were required to trace the ownership of each unit sold and warn annually of new safety improvements . . . . 53

47 Id. at 459.
49 Id. at 379.
50 Walton, 610 A.2d at 459.
51 Id.
52 See Richmond, supra note 17, at 43 (explaining that “courts are reluctant to find a post-sale duty to warn” if a product is “mass-marketed” and “could get swept away in the currents of commerce” (quoting Walton, 610 A.2d at 459) (internal quotations omitted)).
53 Kozlowski v. John E. Smith’s Sons Co., 275 N.W.2d 915, 923–24 (Wis. 1979).
By pointing out that “[a] helicopter is not a household good,” the intermediate Pennsylvania court in *Walton* similarly implied that it would not find a post-sale duty to warn if the product at issue was a product found in every household. The affirming Pennsylvania Supreme Court echoed that “[h]elicopters are not ‘ordinary goods.’ By their nature they are not the types of objects that could get swept away in the currents of commerce, becoming impossible to track or difficult to locate. Helicopters are not mass-produced or mass-marketed products . . . .” Again, if helicopters were ordinary household goods widely distributed, a duty would likely not exist. Accordingly, application of a factually dependent post-sale duty to warn is unlikely to result in a duty when the product is distributed widely, as is likely the case when the defendant is a large manufacturer.

2. *Number of Products Sold*

Related to the size of the market to which the manufacturer sells is the number of products the manufacturer sells. If the market is small or specialized, it is more likely the manufacturer has not mass-produced products and has instead sold a smaller amount. Not surprisingly, courts have looked to the number of products sold when determining whether to impose a post-sale duty to warn under a factually dependent test.

In addition to the limited market factual analysis in *Kozlowski* and *Walton*, the courts relied on the limited number of products sold as a factual basis for imposing the post-sale duty to warn. In *Kozlowski*, the Wisconsin Supreme Court mentioned “the number of units sold” as relevant to the determination of duty. In fact, the number of units sold was so small the manufacturer should have known all of its customers because there were not that many of them.

In *Walton*, the Pennsylvania Supreme Court noted helicopters are a unique good and are sold only to limited specialized consumers. Again, the manufacturer should have known all of its customers because there were not that many of them.

Distinguishing *Walton*, a Pennsylvania federal court later refused to impose a post-sale duty to warn when the product was a forklift. “[W]hile forklifts are not common household goods, they are certainly much more prevalent than helicopters. Nearly any business which has a loading dock or a warehouse has a

54 *Walton*, 557 A.2d at 379.
55 *Walton*, 610 A.2d at 459.
56 See Richmond, supra note 17, at 43 (explaining that courts have not imposed a post-sale duty to warn in cases involving products that are “ordinary or mass-marketed[,] including[ing] heaters, forklifts, and multipiece tire-rim assemblies”).
57 See *Kozlowski*, 275 N.W.2d at 924.
58 Id. at 923.
59 *Walton*, 610 A.2d 459.
forklift . . . .”61 Because of the commonality and volume of the products sold, no post-sale duty to warn existed.62

Other courts have also mentioned the relevance of the number of products sold to the determination of whether a post-sale duty to warn should exist. In Cover v. Cohen,63 New York’s highest court identified “the kind of product involved and the number manufactured or sold” as relevant.64 In Crowston v. Goodyear Tire & Rubber Co.,65 the North Dakota Supreme Court explained that the number of products sold is not determinative of whether a duty exists, but it “militates against individualized notice to the original purchasers.”66 In Patton v. Hutchinson Wil-Rich Manufacturing Co.,67 the Kansas Supreme Court similarly identified the “number of units manufactured or sold” as relevant.68 The evaluation of this fact, among others, “may indicate that notice to all ultimate consumers who purchased the product prior to the time the manufacturer learned of a potential danger is unreasonable.” 69

Just as a smaller manufacturer is more likely to distribute its products to a smaller, more limited market, a smaller manufacturer is also more likely to sell fewer products, like helicopters or sausage stuffers. This reality means a factually dependent post-sale duty to warn is more likely to exist when a small manufacturer is before the court. Similarly, a factually dependent post-sale duty is less likely to impose a duty on a large manufacturer that distributes its products widely and sells a greater volume of products. In that case, the manufacturer is less able to identify the users needing to be warned and provide the actual warning.

3. Continuing Contact with Customers

Courts have been more likely to impose a post-sale duty to warn when the manufacturer is in contact with the user who needs to be warned. This was true in Kozlowski, Patton, and Walton. The sausage-stuffing machine manufacturer in Kozlowski was in an industry in which it should “know of all companies that own its product.”70 Plus, the defendant had access to its customers through trade journals that reached 100% of its customers.71 The defendant even visited the

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61 Id. at 388.
62 Id.
64 Id. at 872.
65 521 N.W.2d 401 (N.D. 1994).
66 Id. at 409. The court further stated that a large volume of products sold also “suggests that manufacturers cannot totally ignore post-sale information which has the potential to prevent serious injury to so many people.” Id.
68 Id. at 1315.
69 Id.
70 Kozlowski v. John E. Smith’s Sons Co., 275 N.W.2d 915, 923 (Wis. 1979); see also id. at 924 (describing the sausage-stuffer machine market as “limited in scope”).
71 Id. at 923.
plaintiff’s employer’s plant twice, but for an unknown reason, the defendant never disclosed the danger resulting from excessive pressure or the new safety feature that would have eliminated the danger.\textsuperscript{72} This continuing contact helped convince the court a duty existed.

In \textit{Patton}, the Kansas Supreme Court acknowledged that “[n]otification by a manufacturer to all prior purchasers of a product may be extremely burdensome, if not impossible,” weighing against the imposition of a post-sale duty to warn.\textsuperscript{73} But in that particular case, the manufacturer had a way to reach consumers—its retailer had “continuing contact with the consumers.”\textsuperscript{74} In \textit{Walton}, the Pennsylvania Supreme Court described the fact the manufacturer had remained in contact with the plaintiff “for the very purpose of keeping [him] current on all pertinent information” as “[e]ven more important” than the limited market in determining that a post-sale duty to warn existed.\textsuperscript{75}

Maine courts have also recognized the importance of this continuing contact. In \textit{Brown v. Crown Equipment Corp.},\textsuperscript{76} the Supreme Judicial Court of Maine found liability for a failure to warn when the manufacturer knew of the risk, had created a kit to help reduce that risk, was in personal contact with the purchaser who was injured, and had even evaluated the specific forklift that injured the purchaser.\textsuperscript{77} The court had “no difficulty concluding” the manufacturer owed a duty to the plaintiff “as a known user of that forklift.”\textsuperscript{78} The court also characterized the claim as a “straightforward negligence claim,” meaning the duty existed because a reasonable manufacturer would have issued the post-sale warning under those circumstances.\textsuperscript{79}

A New Jersey court held similarly in \textit{Dixon v. Jacobsen Manufacturing Co.}\textsuperscript{80} In \textit{Dixon}, the court focused on the fact that the “manufacturer was aware of the identity of the current owner of the product.”\textsuperscript{81} The manufacturer was aware because the owner had contacted the manufacturer to request “any information” about the machine, covering the fact that an additional safeguard had been added to the machinery since the original manufacture.\textsuperscript{82} The court acknowledged that numerous courts had been reluctant to impose a post-sale duty to warn because of

\textsuperscript{72} See id.
\textsuperscript{73} \textit{Patton}, 861 P.2d at 1314.
\textsuperscript{74} Id.; see also \textit{Reiss v. Komatsu Am. Corp.}, 735 F. Supp. 2d 1125, 1150 (D.N.D. 2010) (refusing to grant summary judgment on the basis of a lack of a post-sale duty to warn partly because the defendant kept records of products sold).
\textsuperscript{76} 960 A.2d 1188 (Me. 2008).
\textsuperscript{77} Id. at 1193.
\textsuperscript{78} Id.
\textsuperscript{79} Id. The Maine court further declined to adopt section 10 of the Third Restatement, instead “recogniz[ing] a post-sale duty to warn indirect, known purchasers as it applies to the facts of this case.” Id. at 1193–94.
\textsuperscript{81} Id. at 922.
\textsuperscript{82} Id. at 923.
“the burden that such a duty places on manufacturers to ascertain the identity of current owners of the product, especially consumer products.” But “[n]o such policy consideration exists where the owner is known,” as in this case. The court thus had “no hesitation in holding that such a duty existed.”

It is possible for a manufacturer of any size to maintain some type of continuing contact with customers. This continuing contact is more likely to occur, however, if the manufacturer has a small number of customers, which a small manufacturer is likely to have. A small manufacturer may keep in contact with the customer for purposes of maintaining the machine, like in Kozlowski, or to ensure the customer is kept up to date. This type of continuing contact is more likely to occur if it is easy for the manufacturer, such as when there are a limited amount of customers. The reality that small manufacturers have a limited number of customers means a court will be more likely to impose a post-sale duty to warn on a small manufacturer.

A large manufacturer, on the other hand, is unlikely to have systematic continuing contact with its customers. When the number of customers is large, systematic continuing contact is more difficult. The lack of continuing contact with customers makes it less likely that a large manufacturer would owe a factually dependent post-sale duty to warn. It is possible that a large manufacturer may have some continuing contact; for example, a customer may contact the manufacturer, as was the case in Dixon. But that is likely the exception.

B. Third Restatement Factors

The Third Restatement states that the duty should exist only “if a reasonable person in the seller’s position would provide such a warning.” The Third Restatement also dictates four factors to determine whether a reasonable person would have provided such a warning:

1. the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property; and
2. those to whom a warning might be provided can be identified and can reasonably be assumed to be unaware of the risk of harm; and
3. a warning can be effectively communicated to and acted on by those to whom a warning might be provided; and
4. the risk of harm is sufficiently great to justify the burden of providing a warning.

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83 Id.
84 Id.
85 Id. at 924.
86 THIRD RESTATEMENT, supra note 3, § 10(a).
87 Id. § 10(b). For a duty to exist, the plaintiff must establish each of these elements. See id. § 10 reporters’ note cmt. a; see also Twerski, supra note 29, at 20.
As was also true of the facts that courts evaluated to determine if a post-sale duty to warn should exist, application of the Third Restatement’s factors will often lead to a small manufacturer owing a post-sale duty to warn, but not a large manufacturer.

1. Knowledge of the Substantial Risk

The first Third Restatement factor clarifies that a warning will only potentially be legally required if “the seller knows or reasonably should know that the product poses a substantial risk of harm to persons or property.”88 This requirement ensures that a manufacturer can be liable only if it is at fault—if it knew or should have known about the danger.

This factor likely applies neutrally to manufacturers regardless of their size. Whether large or small, a manufacturer may become aware, or should have become aware, of a danger presented by its product. If anything, this factor may be present more often for large manufacturers than for small ones. Generally speaking, large manufacturers may have more resources for research and development, meaning they may be more likely to discover dangers. Large manufacturers are also likely to have more customers, increasing the chances that someone might be injured and complain to the manufacturer. At the same time, a customer may be more likely to complain of injury to a small manufacturer than to a large manufacturer because the small manufacturer may be more likely to respond.

Regardless, this factor, imposing a duty only if a manufacturer is aware or should be aware of a danger, likely applies neutrally to all manufacturers regardless of their size. It is, however, only one of four factors.

2. Ability to Identify Those Needing a Warning

The second factor requires a warning only if those needing a warning “can be identified.”89 Identifying those users can be difficult. As an example, if a vacuum manufacturer “manufactured and distributed vacuum cleaners commercially to millions of consumers over the course of many years”90 and if the retailers that

88 Third Restatement, supra note 3, § 10(b)(1).
89 Id. § 10(b)(2). Federal agencies require some industries to track purchases to facilitate government-ordered recalls. The Consumer Protection Safety Commission requires manufacturers of “durable infant or toddler product[s]” to include a registration card with the product and then maintain a record of any returned cards. 16 C.F.R. §§ 1130.3, 1130.8(a) (2014). This enables communication with users to “improve the effectiveness of recalls of, and safety alerts regarding, such products.” § 1130.1(a). The National Highway Traffic Safety Administration also requires that manufacturers of child car seats include a registration card. See 49 C.F.R. §§ 588.4–.5 (2013). Again, the express purpose of this requirement is “to aid manufacturers in contacting the owners of child restraints.” § 588.2.
90 Third Restatement, supra note 3, § 10 cmt. e, illus. 2.
sold the vacuum cleaners have “[o]nly scanty and incomplete sales records,”91 the lack of records would weigh against imposing a post-sale duty to warn on the vacuum manufacturer. In fact, “when no such records are available, the seller’s inability to identify those for whom warnings would be useful may properly prevent a post-sale duty to warn from arising.”92

The inability to identify the user precluded the existence of a duty in Lewis v. Ariens Co.93 There, the plaintiff had purchased a snow blower from a friend’s sister about sixteen years after it was originally sold,94 making the plaintiff difficult to identify. The court described the plaintiff as a “member of a universe too diffuse and too large for manufacturers or sellers of original equipment to identify,” thereby negating a post-sale duty to warn.95

Russell v. Wright96 illustrates the opposite situation. There, the manufacturer of a taser gun operated a certification program to be used in training police officers and regularly updated those training materials.97 The manufacturer’s relationship with the police department enabled it to inform purchasers of any new warnings or information.98 The court explained that this manufacturer was “in a much better position than most manufacturers to ensure that users of its product are kept up to date on new warnings and instructions,” weighing in favor of imposing a post-sale duty to warn.99

Small manufacturers can likely identify those needing a warning more easily than large manufacturers. Naturally, a small manufacturer is likely to sell fewer products and have fewer customers than a larger business.100 The fewer the customers, the more likely it is the manufacturer will have some continuing contact with its customers, perhaps through continuing maintenance and support services like in Russell. Even if contact does not continue, the fewer the customers, the more likely it is the manufacturer might have maintained some purchasing records. But even without records, the fewer the customers, the easier it will be for the manufacturer to identify the customers. In Jones v. Bowie Industries, Inc.,101 the Supreme Court of Alaska found that sufficient evidence supported the jury’s finding of liability for failing to warn after the sale partly because of the relative

91 Id.
92 Id. § 10 cmt. e.
94 Id. at 863.
95 Id. at 867 (quoting Lewis v. Ariens Co., 729 N.E.2d 323, 327 (Mass. App. Ct. 2000)).
97 Id. at 651.
98 Id.
99 Id.
100 See Ross, supra note 15, at 348 (explaining that the ability to identify those needing to be warned will depend on numerous factors, including “the number of units sold”).
ease of identifying customers. The defendant had “produced relatively few hydromulchers like the one that injured [the plaintiff], making identification of the class of ultimate users less burdensome.”

Even if a small manufacturer does not have continuing contact, records, or other means of identifying customers, a small manufacturer is likely to have a more “geographically limited market.” The Third Restatement explains that “[i]ndividual names and addresses are not necessarily required,” but identification of a class of product users or “geographically limited markets” may satisfy this factor. This identification would enable some sort of public notice. Thus, even when a small manufacturer cannot identify individual customers despite the limited amount of products sold, it will likely be able to identify a specific geographical area, which weighs in favor of imposing a post-sale duty to warn.

None of this is true for large manufacturers. Larger manufacturers are less likely to have any continuing contact with customers. A larger manufacturer is also unlikely to maintain customer records simply because of the cost. Why incur what could be a very expensive cost when not legally obligated to do so? The larger the amount of customers, the more expensive the costs may be because of the greater volume of purchases to be tracked. A large manufacturer is also likely to sell to a non-limited market, meaning it would be unable to identify a

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102 Id. at 335–36.
103 Id. at 336; see also Jarrett v. Duro-Med Indus., No. 05-102-JBC, 2007 WL 628146, at *5 (E.D. Ky. 2007) (finding that the customer needing a warning was easily identifiable because the defendant was aware that the plaintiff’s specific wheelchair lacked a working right wheel brake, but it did not warn the plaintiff of the resulting danger).
104 THIRD RESTATEMENT, supra note 3, § 10 cmt. e.
105 Id.
106 Madden, supra note 24, at 47.
107 Regardless of the size of the manufacturer, “in the case of consumer goods, it is unlikely that retailers will maintain detailed sales records allowing the identification of purchasers or users.” Tom Stilwell, Warning: You May Possess Continuing Duties After the Sale of Your Product!, 26 REV. LITIG. 1035, 1055 (2007); see also Ross, supra note 15, at 348–49 (“Establishing a ‘traceability’ system before the product is sold is the most effective way to find customers. However, such systems take planning, considerable effort, and substantial cost.”). Presumably, this is even truer when those detailed sales records would need to be extensive (and thus expensive) because of the volume of customers. Of course, more and more purchases of goods are made online. Because these purchases necessarily do not involve cash, some record of the purchase will exist. These records may make personal communication more feasible, even with a high volume of customers.
The inability to identify customers “may properly prevent a post-sale duty to warn from arising.”

3. The Ability to Effectively Communicate a Warning

The Third Restatement’s third factor asks whether “a warning can be effectively communicated to and acted on by those to whom a warning might be provided.” Comment g explains that if records exist identifying the consumers, “direct communication of a warning may be feasible.”

In Jones, the Alaska Supreme Court affirmed, allowing the jury to decide liability for a post-sale failure to warn partially because the manufacturer could have effectively communicated the warning. Not only was identification of users not particularly burdensome because of the relatively few hydromulchers sold, but the hydromulcher was also a “specialized machine[] with a limited population of users, so that advertisements in trade publications were another viable method of . . . warning.” Similarly, in Jarrett v. Duro-Med Industries, the defendant had direct contact with the plaintiff because the plaintiff brought her wheelchair to the defendant “to request a replacement right wheel brake.” This face-to-face contact provided an opportunity for an effectively communicated warning.

Direct communication is only feasible if the users or consumers are identifiable, which is more likely to be true for small manufacturers. This also means that small manufacturers will likely be able to warn in the most effective way—direct communication—meaning this factor will likely always weigh in favor of liability for a small manufacturer that failed to warn.

Large manufacturers are less likely to be able to warn directly because of the inability to identify their customers. They may have some records based on customer loyalty programs, but records of only customers’ email addresses allows for communication only via email. Even though this is a form of direct communication, it is arguably ineffective given users likely ignore spam-like emails. It is more likely that large manufacturers will not have any ability to identify their many customers, precluding direct communication. In this case, the Third Restatement explains that “it may be necessary to utilize the public media to

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108 THIRD RESTATEMENT, supra note 3, § 10 cmt. e; see also Madden, supra note 24, at 47 (explaining that for some products, “price, perishability, limited useful life, or the availability of such products through typical over-the-counter markets which characteristically do not involve recording the purchasers’ name, will militate against finding a post-sale duty to warn individual product users or consumers”).

109 THIRD RESTATEMENT, supra note 3, § 10(b)(3).

110 Id. § 10 cmt. g.


112 Id.

113 No. 05-102-JBC, 2007 WL 628146 (E.D. Ky. 2007).

114 Id. at *1.

115 Id. at *5.

116 THIRD RESTATEMENT, supra note 3, § 10 cmt. g.
disseminate information regarding risks of substantial harm.”

Thus, a large manufacturer may have to issue some sort of broad public notice through the public media.

The Third Restatement cautions, however, that it may not require this type of broad mass warning. Specifically, it notes that as the amount of those needing to be warned increases, the “costs of communicating warnings may increase and their effectiveness may decrease.” This language suggests a large manufacturer may not be required to issue a mass warning. Indeed, why should the law require a large manufacturer to incur the great expense of a mass warning when the warning is unlikely to be effective anyway? The Third Restatement’s highlighting of the cost and ineffectiveness of a mass notice—the only type of notice a large manufacturer could even do—indicates the large manufacturer would not be obligated to issue such a notice.

4. The Scale of the Harm and the Cost of the Warning

The last Third Restatement factor is whether the “risk of harm is sufficiently great to justify the burden of providing a warning.” This factor instructs courts to look to the burden of providing a warning, i.e., the costs of the warning. “In the post-sale context, identifying those who should receive a warning and communicating the warning to them can require large expenditures.” Because of the cost, even if a substantial risk exists, there may be no duty to warn.

This factor seems neutral in application to small and large manufacturers. Regardless of the size of the business, a warning is legally required only if the risk of harm justifies the costs of that warning. But this factor does not apply neutrally because of the relevance of costs. The costs for small and large manufacturers will not be the same. The cost of a warning would be less expensive for the small manufacturer because of the amount and the geographical limitations of the small manufacturer’s customers. The smaller expense to warn customers will always weigh in favor of a post-sale duty to warn existing for a small manufacturer.

The Third Restatement’s post-sale duty to warn is based in negligence, and “[w]hat is reasonably prudent post-sale conduct for one manufacturer and one type of product may not be reasonable for another manufacturer of an entirely different type of product.” Suppose the product danger is the same for two manufacturers. The first manufacturer’s costs, however, may be so large (because of the number of customers to contact) that issuing a post-sale warning is unreasonable and thus not required. The second manufacturer’s costs to warn may be reasonable simply because there are fewer customers to warn. If the costs are reasonable, then a warning is required. The hypothetical holds true even if the product and the

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117 Id.
118 Id.
119 Id. § 10(b)(4).
120 Id. § 10 cmt. i.
121 Id.
materialized danger are exactly the same. But because of the different costs of a post-sale warning, the small manufacturer with fewer customers would owe a duty and the large manufacturer would not.

There is some possibility that a large manufacturer may still owe a duty even when its costs of warning are high. That is because the size of the harm depends on both the frequency of the harm and its expected severity. Because of the amount of customers, harm to the customers of a large manufacturer will occur more frequently. Three out of six customers of a small manufacturer may be hurt, whereas three million out of six million customers of a large manufacturer may be hurt. The level of harm for three million customers will likely be substantial. If the analysis were a simple benefits of warning (protecting three million consumers) versus costs of warning (again all six million consumers), the large manufacturer would likely owe a duty to warn despite the costs.

However, the Third Restatement does not create this simple weighing of the benefits versus costs analysis. Instead, it also mandates consideration of the effectiveness of the warning. Practically, identifying all six million customers is likely impossible. The only way to warn those six million customers would be through some sort of mass warning. But a mass warning is unlikely to be effective. Even if the harm is substantial because of its frequency, due to the volume of customers, both the costs and the likely ineffectiveness still weigh against the post-sale warning obligation. Thus, even though the frequency of injury is likely to be high for a large manufacturer because of the volume of its customers, this does not mean the large manufacturer will owe a duty to warn. To the contrary, the harm is only one factor that courts weigh against both the extensive costs and the likely ineffectiveness of communication, both of which will weigh against imposing a post-sale warning obligation on larger manufacturers.

For the small manufacturer, though, the harm is a factor weighed against less extensive costs and the likely effectiveness of direct communication, all of which will weigh in favor of imposing a post-sale warning obligation.

Returning to the relevance of costs, the Third Restatement does not instruct courts to look at the costs of warning relative to the specific defendant’s finances. If this were true, then even though a large manufacturer’s costs to warn were large, they may not look so large in relation to the large manufacturer’s overall financial situation. Similarly, a small manufacturer’s costs to warn may be less expensive, but they still may be excessive when compared to the small manufacturer’s overall

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123 Third Restatement, supra note 3, § 10 cmt. d (explaining that there would be no duty to warn of dangers that “occur infrequently and are not likely to cause substantial harm”); see also Crowston v. Goodyear Tire & Rubber Co., 521 N.W.2d 401, 409 (N.D. 1994) (describing that a large volume of products sold also “suggests that manufacturers cannot totally ignore post-sale information which has the potential to prevent serious injury to so many people”).

124 See supra Part III.B.2.

125 Third Restatement, supra note 3, § 10 cmt. g (“As the group to whom warnings might be provided increases in size, costs of communicating warnings may increase and their effectiveness may decrease.”).
financial situation and capability. Despite this disparity, nothing in the *Third Restatement* suggests this type of particularized evaluation of the costs.\(^{126}\)

In any case, such an evaluation of the specific defendant’s finances would not be consistent with negligence law generally.\(^{127}\) “Unreasonable conduct is merely the failure to take precautions that would generate greater benefits in avoiding accidents than the precautions would cost.”\(^{128}\) Accordingly, if the costs of injury outweigh the costs of the precaution,\(^{129}\) then the reasonable actor would have undertaken that necessary precaution. But if the costs of the precaution outweigh the costs of injury, then the precaution is unnecessary and a reasonable actor would not take it,\(^{130}\) even if he could personally afford it. Moreover, the law should not be that a manufacturer is obligated to undertake unnecessary precautions simply because it could afford it.\(^{131}\) This would hurt society as it could cause manufacturers to “undesirably curtail their activities . . . [and] set prices above the proper level, chilling consumption of their products.”\(^ {132}\) Such a law could also be potentially unfair as it would “effectively impose[] a tax on corporate size and success, thereby discouraging growth and development.”\(^ {133}\) Lastly, if abundant financial resources were a reason to impose liability, would insufficient financial resources be a reason to negate liability? Surely, this is not a desirable result.

Thus, for valid reasons, the *Third Restatement* does not contemplate evaluation of the specific defendant’s financial resources. Instead, the costs are evaluated without any context—meaning a large manufacturer’s costs likely will be high, negating the likelihood of post-sale warning liability, and a small manufacturer’s costs likely will be low, increasing the likelihood of post-sale warning liability.

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\(^{126}\) The *Third Restatement* instead explains that identifying users and communicating the warning “can require large expenditures,” and thus the obligation to warn after sale should exist “only if the risk of harm is sufficiently great.” *Id.* § 10 cmt. i.

\(^{127}\) *Id.* (explaining that the “test defining unreasonable conduct is that which governs negligence generally”).

\(^{128}\) McCarty *v.* Pheasant Run, Inc., 826 F.2d 1554, 1557 (7th Cir. 1987).

\(^{129}\) *See, e.g.*, United States *v.* Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (introducing an analytical formula for determining reasonable conduct: weighing the probability and severity of injury versus the burden of adequate precaution).

\(^{130}\) A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 879 (1998) (defining a “socially excessive precaution” as a precaution “that costs more than the reduction of harm produced by it”).

\(^{131}\) *Id.* at 911. This also raises questions of how the jury would determine whether a defendant could “afford” a post-sale warning. Is it that the defendant’s business was profitable overall that year? Or is it that the defendant has excess cash at the time it should have warned?

\(^{132}\) *Id.*

\(^{133}\) *Id.*; see also *id.* at 912 (explaining that “retarding the natural growth of corporations can have adverse consequences, notably, that society forgoes economies of scale in production and in research and development”).
IV. THEORETICAL AND PRACTICAL PROBLEMS WITH A RULE THAT (UNINTENTIONALLY) TARGETS SMALL MANUFACTurers

A law that is more likely to create liability for small manufacturers than for large manufacturers is problematic. It is inconsistent with the theories underlying products liability law. The factually dependent duty is also inconsistent with general public policy because of its potentially devastating consequences for small manufacturers, the same manufacturers already most vulnerable to the effects of products liability. Ironically, a factually dependent duty is also most likely to apply to this most vulnerable manufacturer.

A. Inconsistent with the Underlying Theories of Products Liability

Various theories underlie the imposition of liability on manufacturers when their products injure people. The theories include (1) fairness, (2) the manufacturer’s superior position, (3) self-determination, (4) deterrence, and (5) risk spreading. None of these theories support a factually dependent post-sale duty because of its delineation between manufacturers that have to warn and those that do not. All of these theories, however, likely support the imposition of a broad post-sale duty to warn owed by all manufacturers regardless of the costs of the warning.

1. Fairness

“This idea of fairness embodies the maxim that those who design, market, and profit from a product should also pay for the injuries it causes.” The idea of

134 Technically, the theories of products liability explored in this section are the theories behind imposing strict liability for defective products that injure plaintiffs. There has been gradual movement away from strict liability for defective products. See e.g., David A. Logan, When the Restatement Is Not a Restatement: The Curious Case of the “Flagrant Trespasser,” 37 WM. MITCHELL L. REV. 1448, 1459–60 (2011). If the product is defective because of a manufacturing defect, liability is still strict. If the product is defective because of its design and the jurisdiction uses the consumer expectations test, liability is also strict. But if the product is defective because of an inadequate warning, liability is based in negligence in all jurisdictions. See supra notes 7–10 and accompanying text. Similarly, if the product is defective in its design, liability is essentially based in negligence if the court follows the risk-utility test. See supra note 15. Any liability for a post-sale failure to warn is similarly based in negligence—a manufacturer failing to warn about a later-materialized danger about which it knew or should have known. These theories, although originally invoked to adopt strict liability, can still support negligence-based liability for injuries caused by defective products.

fairness also includes the evaluation of who should bear the costs of the injury, whether it is the manufacturer or the injured consumer. The manufacturer is responsible for the injury and should pay the resultant damages. \(^{136}\) California Supreme Court Justice Traynor long ago pointed to fairness as a reason for making manufacturers liable: “The purpose of . . . liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves.”\(^{137}\)

The fairness theory supports the imposition of a broad post-sale duty to warn on all manufacturers. The manufacturer puts the product on the market and profits from doing so. So, the costs of injuries caused by later-materialized dangers of the product should be borne by the manufacturer who placed the dangerous product on the market. A New Jersey court recognized this fairness rationale when adopting a post-sale duty to warn in Dixon v. Jacobsen Manufacturing Co., explaining that the “imposition of a duty on the manufacturer to warn of dangers after a product is manufactured, and the extent of that duty, is essentially rooted in concepts of fairness.”\(^{138}\)

Between the manufacturer and the injured user, courts should force the manufacturer to cover the costs of the injury resulting from the manufacturer’s failure to issue a post-sale warning. True, the risk was possibly unknowable at the time of manufacture. But by the time a manufacturer may need to issue a post-sale warning, the danger is known (or should have been known). If a manufacturer fails to warn of such a danger, the manufacturer is liable. This is liability based on fault; a reasonable manufacturer would have warned and this defendant is liable for a failure to act like that reasonable manufacturer. Fairness dictates that between a manufacturer who is at fault and an injured user, the manufacturer should be forced to cover the costs of the user’s injury.

Even though fairness supports the imposition of a broad post-sale duty to warn, it does not support the factually dependent version developed in early case law and the Third Restatement because of its consideration of costs. At first glance, it would seem fair to consider the defendant’s costs in determining liability for failing to issue a post-sale warning. But the fairness theory dictates “that the burden of accidental injuries caused by products intended for consumption be placed upon those who market” the product.\(^{139}\) Thus, those who placed the product on the market should be liable regardless of the costs of warning.

\(^{136}\) Wertheimer, supra note 135, at 1238–39 (“[I]f neither the manufacturer nor the consumer is an appropriate cost-avoider, then the entity who placed the product on the market and profited from its sales should pay.”); see also Escola v. Coca Cola Bottling Co., 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring) (“If such products nevertheless find their way into the market it is to the public interest to place the responsibility for whatever injury they may cause upon the manufacturer, who, even if he is not negligent in the manufacture of the product, is responsible for its reaching the market.”).


\(^{139}\) RESTATEMENT (SECOND) OF TORTS § 402A cmt. c (1965).
Similarly, the factually dependent post-sale duty is also inconsistent with the fairness theory because of how it distinguishes between manufacturers. If the costs of issuing a post-sale warning are too great, which will often be true for large manufacturers, that manufacturer will not be liable because a reasonable manufacturer would not have issued a warning. But if the costs are reasonable, which will often be true for small manufacturers, the manufacturer will be liable. The fairness theory, however, would not recognize distinctions based on what types of manufacturers should be liable and which should not, especially any distinction based on costs. Costly warnings or not, the manufacturer put the dangerous product on the market and should have to pay for the injuries the product caused.

Lastly, the factually dependent post-sale duty is inconsistent with the fairness theory because of how it distinguishes between consumers. The factually dependent duty distinguishes between consumers who are limited to a small geographic market (who would be entitled to a warning under a factually dependent post-sale duty to warn) and consumers who are dispersed nationwide (who would not be entitled to such a warning). The fairness theory, however, dictates that “the consumer of such products is entitled to the maximum of protection” from “those who market the products.” All consumers deserve this maximum protection, not just some. Thus, fairness supports the imposition of a broad post-sale duty to warn where all consumers would be warned regardless of the costs.

2. Manufacturer Is in a Superior Position to Discover Dangers

Another principle underlying products liability that is somewhat similar to fairness is the manufacturer’s superior ability to discover dangers. Just as the manufacturer put the dangerous product on the market, the manufacturer is in the best position to eliminate those dangers. As Justice Traynor explained in *Escola v. Coca Cola Bottling Co.*, “[i]t is evident that the manufacturer can anticipate some hazards and guard against the recurrence of others, as the public cannot. Those who suffer injury from defective products are unprepared to meet its consequences.” The manufacturer has this superior position because of “the processes of design, testing, inspection and collection of data on product safety

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140 *Id.*
141 150 P.2d 436 (Cal. 1944).
142 *Id.* at 440–41 (Traynor, J., concurring); see also *id.* at 443 (“The consumer no longer has means or skill enough to investigate for himself the soundness of a product, even when it is not contained in a sealed package, and his erstwhile vigilance has been lulled by the steady efforts of manufacturers to build up confidence by advertising and marketing such devices as trade-marks.”). Justice Traynor used this language to advocate for strict liability. However, it also supports negligence-based liability.
performance in the field.”

Imposing liability should motivate manufacturers “to use this information to help combat the massive problem of product accidents.”

This principle supports the imposition of a post-sale duty to warn for all manufacturers regardless of costs. In the post-sale scenario, the manufacturer is in a superior position to discover dangers from its product. People hurt by products will often complain to the manufacturer and may even sue the manufacturer. Through either form of notification, the manufacturer could discover dangers in its product, including dangers about which it did not know pre-sale. Related to these complaints or not, the manufacturer may also continue to research and develop its products even after sale. Again, through this research, the manufacturer could discover dangers in its product.

An individual user does not have access to this type of information. He has no idea whether others have been harmed by the manufacturer’s product. He also has no idea what additional research has shown regarding the dangers of the product. The discrepancy between the manufacturer’s knowledge and the consumer’s knowledge may even be greater post-sale than it is pre-sale.

Some courts have relied on the manufacturer’s superior position in adopting a post-sale duty to warn. Specifically, the New York Court of Appeals stated:

The justification for the post-sale duty to warn arises from a manufacturer’s unique (and superior) position to follow the use and adaptation of its product by consumers. Compared to purchasers and users of a product, a manufacturer is best placed to learn about post-sale defects or dangers discovered in use.

Alaska courts have cited this language, and Iowa courts have also pointed to this justification as the reason for a post-sale duty. These courts are correct. The manufacturer has superior knowledge of dangers accompanying its products that emerge only after sale. Imposing a post-sale duty to warn would force manufacturers to share this information and help combat product accidents.

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144 *Id.*; see also Voss v. Black & Decker Mfg. Co., 450 N.E.2d 204, 207–08 (N.Y. 1983) (“A manufacturer is held liable regardless of his lack of actual knowledge of the condition of the product because he is in the superior position to discover any design defects and alter the design before making the product available to the public.”).
145 *Third Restatement*, *supra* note 3, § 10 cmt. c (“As a practical matter, most post-sale duties to warn arise when new information is brought to the attention of the seller, after the time of sale, concerning risks accompanying the product’s use or consumption.”).
148 Lovick v. Wil-Rich, 588 N.W.2d 688, 694 (Iowa 1999) (explaining that warning obligations “reduce the chance of injury by equalizing the asymmetry of information between the parties”).
Even though a manufacturer’s superior position supports a post-sale duty to warn, it does not support the factually dependent version that courts have adopted and that is included in the Third Restatement. This is because the factually dependent version of the post-sale duty to warn will obligate some, but not others, to warn based on the costs of the warning. Regardless of those costs, the manufacturer is in a superior position, relative to the consumer, to discover dangers post sale. Also, the manufacturers most likely to have an obligation to warn will be small manufacturers, even though large manufacturers may be in an even more superior position to discover dangers. \[149\] Regardless of its size, the manufacturer is in a superior position, relative to the consumer, to discover dangers post sale. All manufacturers should thus be obligated to warn of dangers materializing after sale.

Plus, a distinction between manufacturers based on the costs of communicating the warning to consumers makes little sense in light of this purpose. Those that can communicate easily, most likely smaller manufacturers, are obligated; those who cannot communicate easily, most likely larger manufacturers, are not obligated despite their superior knowledge. Regardless of the ease of communicating, all manufacturers are in a superior position to discover dangers relative to consumers.

3. Individual Autonomy/Self-Determination

Liability for a point-of-sale failure to warn is also supported by another theoretical justification that is specific only to warning defects—educating users about the risks of the product enables the user to determine whether to purchase the product. This theory supports a broad post-sale duty to warn, but not a factually dependent one that would obligate some manufacturers but not others.

(a) Self-Determination Versus Minimizing Injury

Warnings can serve two purposes. “First, warnings may reduce the risk of product-related injury by allowing consumers to behave more carefully than if they remained ignorant of risks associated with product use.” \[150\] The second purpose is different; it does not simply allow consumers to act more carefully. Instead, warnings provide consumers “the information necessary to choose whether or not they wish to encounter certain kinds of risks on a ‘take it or leave it’ basis.” \[151\]

\[149\] See infra Part IV.B.

\[150\] Henderson & Twerski, supra note 13, at 285.

\[151\] Id. The Third Restatement also recognizes these two purposes: “Warnings alert users and consumers to the existence and nature of product risks so that they can prevent harm either by appropriate conduct during use or consumption or by choosing not to use or consume.” THIRD RESTATEMENT, supra note 3, § 2 cmt. i. Professors James A. Henderson, Jr. and Aaron D. Twerski label this purpose of warnings as the “social utility” purpose. See James A. Henderson, Jr. & Aaron D. Twerski, Closing the American Products Liability Frontier: The Rejection of Liability Without Defect, 66 N.Y.U. L. REV. 1263, 1318 (1991). This purpose requires warnings that will “reduce the risk of product-related injury by
This second purpose promotes individual autonomy. By fully informing a user of the dangers of a product, the user is able to make a cost-benefit decision on whether to purchase the product. “[T]his kind of informed consent value focuses on protecting a user’s individual rights—specifically, the user’s right of self-determination, the right to ‘determine his own fate.’” An adequate warning is required because “the user or consumer is entitled to make his own choice as to whether the product’s utility or benefits justify exposing himself to the risk of harm.”

This self-determination basis for imposing a duty to warn mirrors an informed consent medical malpractice case. This type of medical malpractice case does not question whether the doctor did the proper surgery or adequately performed that surgery. Instead, the focus is on whether the doctor properly disclosed the risks of that surgery to the patient. Proper disclosure is necessary to provide the patient with “adequate information” to enable him to decide “whether he wishes to encounter the risk[s]” associated with treatment. Many states use a standard to determine the required contents of the disclosure based on what a reasonable patient would want to know.

allowing consumers to behave more carefully.” Henderson & Twerski, supra note 13, at 285. The self-determination purpose, on the other hand, enables users to determine whether the utility of the product justifies encountering the risks. This purpose “reflects fairness concerns more clearly than the risk-reduction efforts.”

152 OWEN, supra note 5, § 9.1, at 585; see also OWEN ET AL., supra note 15, § 9.1, at 513–14 (“The latter rationale—informing consent—reflects the societal judgment that a product user or consumer is entitled to make his own choice as to whether the product’s utility or benefits justify exposing himself or others to the risk of harm.”); Henderson & Twerski, supra note 13, at 285 (explaining that the self-determination purpose obligates warnings that “provide consumers with the information necessary to choose whether or not they wish to encounter certain kinds of risks on a ‘take it or leave it’ basis”); THIRD RESTATEMENT, supra note 3, § 2 cmt. i (“[W]arnings allow the user or consumer to avoid the risk warned against by making an informed decision not to purchase or use the product at all and hence not encounter the risk.”).

153 OWEN, supra note 5, § 9.1, at 585 (citing Pavlides v. Galveston Yacht Basin, Inc., 727 F.2d 330, 338 (5th Cir. 1984)). The Fifth Circuit describes self-determination as one of the principles underlying strict liability for failure to warn. Pavlides, 727 F.2d at 338. The other principle underlying strict liability for failure to warn is “social utility” in that “a warning that costs the manufacturer little can prevent severe losses by enabling users to avert harm.”

154 Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973); see also Liriano v. Hobart Corp., 170 F.3d 264, 270 (2d Cir. 1999) (“[A] warning can do more than exhort its audience to be careful. It can also affect what activities the people warned choose to engage in.”).

155 Henderson & Twerski, supra note 13, at 286.

156 See, e.g., Canterbury v. Spence, 464 F.2d 772, 786–87 (D.C. Cir. 1972) (requiring disclosure of “all risks potentially affecting the [patient’s] decision”); Largey v. Rothman, 540 A.2d 504, 508 (N.J. 1988) (requiring a physician to disclose risks that “a reasonable patient . . . would be likely to attach significance to” (quoting Canterbury v. Spence, 464 F.2d 772, 787 (D.C. Cir. 1972) (internal quotation marks omitted)).
(b) Supporting a Post-Sale Duty to Warn Owed by All Manufacturers

The self-determination purpose of warnings supports the imposition of a post-sale duty to warn, enabling the user to continue to make informed decisions regarding product use. When the user first uses a sausage-stuffing machine, a warning enables him to make the informed decision whether to use it. Every time the user uses the machine, he continually needs to make an informed decision. If a danger is discovered six months after he first uses it without being informed of that danger, the user is prevented from making an informed decision whether to continue to use the machine.

Granted, this possible later decision to cease use differs from the initial decision to use. At the initial decision, the user may decide not to purchase the product at all because of the foreseeable dangers. At the later decision, the user has already invested in the product, creating the natural tendency to want to continue use; a decision to cease use would create an additional loss based on the value of the machine at that point. The user needs to be able to balance the foreseeable dangers of continued use against this natural tendency to avoid the loss.157

Whether at the initial or later decision, however, the self-determination purpose aims to ensure the decision belongs to the user—the user can decide if the product’s benefits outweigh its costs (the foreseeable dangers and out-of-pocket losses based on the then-existing value of the product). Without full disclosure of the substantial dangers, including the dangers that arise only years after purchase, this cost-benefit decision is transferred back from the user to the manufacturer.

The Eleventh Circuit alluded to the self-determination purpose in the context of post-sale warnings in Watkins v. Ford Motor Co.158 There, the defendant’s expert testified that once the consumer decided to drive the car at issue, “no warning could guard against the dangers of rollover.”159 The court explained, however, that the purpose of a warning, a point-of-sale or a post-sale warning, is not necessarily to prevent an accident.160 Instead, warnings are required to allow the user “to make an informed decision whether to take on the risks warned of.”161 Once the defendant discovers the risk of a rollover, it must warn the user of that

157 Even if some users choose to continue using the product to avoid the loss, it does not negate the need to warn under the self-determination purpose. See THIRD RESTATEMENT, supra note 3, § 2, cmt. i (“Whether or not many persons would, when warned, nonetheless decide to use or consume the product, warnings are required to protect the interests of those reasonably foreseeable users or consumers who would, based on their own reasonable assessments of the risks and benefits, decline product use or consumption.”).
158 190 F.3d 1213 (11th Cir. 1999).
159 Id. at 1219.
160 Id.
161 Id.
risk so that the user can make an informed decision whether to continue driving the automobile.162

The self-determination purpose requires warnings “whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.”163 It would require disclosure of any risks that are great enough that a reasonable user would want to be informed of them, enabling that reasonable user to decide whether the utility of the product justifies exposure to the danger.164 This purpose requires warnings both at the point of sale165 and at whatever later time the manufacturer discovers, or should discover, a substantial danger about which a reasonable user would want to know.

(c) Lack of Support for a Factually Dependent Post-Sale Duty to Warn

The self-determination principle supports obligating manufacturers to warn of any post-sale dangers about which a reasonable person would want to know. It does not, however, support a factually dependent post-sale duty to warn, mainly

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162 See id. at 1219–20. This analysis in Watkins is the closest a court has come to invoking self-determination in adopting a post-sale duty to warn. The Fifth Circuit invoked self-determination in explaining the reason for a point-of-sale duty to warn under Texas law. Borel v. Fibreboard Paper Prods. Corp., 493 F.2d 1076, 1089 (5th Cir. 1973). In interpreting whether Texas law included a post-sale duty to warn, however, the Fifth Circuit rejected such a duty. See, e.g., McLennan v. Am. Eurocopter Corp., 245 F.3d 403, 430 (5th Cir. 2001) (rejecting a post-sale duty to warn except in situations where (1) the manufacturer voluntarily, but negligently, attempts to provide a warning, or (2) the manufacturer regains control of the product after its initial sale and fails to remedy the known defect before the subsequent sale); Syrie v. Knoll Int’l, 748 F.2d 304, 311 (5th Cir. 1984) (describing that there is no cause of action in Texas “for a failure to warn about hazards discovered after a product has been manufactured and sold”).

163 Borel, 493 F.2d at 1089; see also OWEN ET AL., supra note 15, § 9.1, at 514 (“[A] ‘true choice’ situation arises, and a duty to warn attaches, whenever a reasonable man would want to be informed of the risk in order to decide whether to expose himself to it.”).

164 Davis v. Wyeth Labs., Inc., 399 F.2d 121, 129–30 (9th Cir. 1968) (“When, in a particular case, the risk qualitatively (e.g., of death or major disability) as well as quantitatively, on balance with the end sought to be achieved, is such as to call for a true choice judgment, medical or personal, the warning must be given.”).

165 THIRD RESTATEMENT, supra note 3, § 2 cmt. i (“[W]arnings must be provided for inherent risks that reasonably foreseeable product users and consumers would reasonably deem material or significant in deciding whether to use or consume the product.”); see also Edwards v. Hop Sin, Inc., 140 S.W.3d 13, 16 (Ky. Ct. App. 2003) (“A reasonable consumer, moreover, expects warnings only against latent risks that are substantial, those risks sufficiently likely and sufficiently serious to demand attention. The graver the risk, of course, the less likely it need be to be substantial.”). Substantiality is explicitly relevant to warnings of potential allergic reactions. THIRD RESTATEMENT, supra note 3, § 2 cmt. k (stating that “a warning is required when the harm-causing ingredient is one to which a substantial number of persons are allergic” and that “[t]he more severe the harm, the more justified is a conclusion that the number of persons at risk need not be large to be considered ‘substantial’”).
because of its consideration of the costs of warning. Regardless of the cost, the self-determination principle dictates that the user is entitled to be warned of the substantial risks. That is one reason why the costs of a point-of-sale warning are not relevant to whether a user is entitled to warning of the substantial risks. 166 Instead, consistent with the self-determination principle, the extent of the danger determines whether a warning is required at the point of sale. The factually dependent post-sale duty considers the costs, however, dictating that no duty is owed if the costs are burdensome. This consideration is inconsistent with the self-determination principle.

The consideration of costs also creates a consequence specifically inconsistent with the self-determination principle—it creates two categories of users. If the costs of warning are low, the manufacturer’s customers are entitled to a warning and to determine their own fate. But if the costs of warning are high, the manufacturer’s customers are not entitled to a warning or to determine their own fate. Applied to the reality of the differing costs for small and large manufacturers, the customers of smaller manufacturers will be entitled to decide their own fate, but customers of larger manufacturers will not be similarly entitled. The self-determination principle rejects any idea of some users being entitled to determine their own fates, but not others. A customer of a small manufacturer, “no less than any other product user, has a right to decide whether to expose himself to the risk.” 167

Moreover, the factors that decide who is entitled to notice under a factually dependent version of a post-sale duty to warn are irrational. The number of products sold and the size of the market bear no relationship to whether those customers are especially in need of information. A user of a sausage-stuffing machine should be informed about the newly-discovered danger of using the machine regardless of whether the manufacturer sells dozens or millions of the machines. The self-determination purpose of warnings would not draw any distinction based on the user’s entitlement to information, much less a distinction based on the number of products sold.

4. Deterrence

Another principle behind imposing liability for defective products that injure plaintiffs is that possible liability should motivate manufacturers to make products as safe as practicable. 168 Because the product has left the manufacturer’s control,

166 Practically, this is also because the costs are assumed to be negligible. See supra notes 13–14 and accompanying text. 167 Borel, 493 F.2d at 1106. 168 This was a major motivation behind adopting strict liability as opposed to only imposing liability for fault (negligence). OWEN ET AL., supra note 15, § 5.4, at 287 (explaining that “raising the standard of liability for manufacturers from negligence to strict liability will improve product safety”); see also First Nat’l Bank v. Nor-Am Agric. Prods., Inc., 537 P.2d 682, 695 (N.M. Ct. App. 1975) (explaining that imposing strict liability “will
few ways exist to make a product safer after sale. A manufacturer rarely owes a tort-based duty to recall or retrofit a defective product. Government agencies, however, may require a recall. Notably, the United States Consumer Safety Product Commission does not consider the costs of the recall when determining whether to order it. Instead, it considers the “pattern of defect, the number of defective products distributed in commerce, and the severity of risk to consumers.” See Ross, supra note 15, at 354.

171 Plus, if the manufacturer did issue the warning, it would be voluntarily assuming the duty and could face liability if it acted unreasonably within that voluntary warning campaign. Many states recognize a duty based on its voluntary assumption. See e.g., McLennan v. Am. Eurocopter Corp., 245 F.3d 403, 432 (5th Cir. 2001) (imposing post-sale warning liability when the manufacturer is negligent in its voluntary attempt to provide a post-sale warning); Hodder v. Goodyear Tire & Rubber Co., 426 N.W.2d 826, 833 (Minn. 1988) (explaining that the defendant learned that its products were exploding and voluntarily “undertook a duty to warn of K-rim dangers”). This is consistent with general tort law that imposes a duty to act reasonably when an actor voluntarily assumes a duty.
obligation, but almost control the post-sale obligation. The consideration of costs means a factually dependent post-sale duty does not create the incentive for product safety that the point-of-sale obligation does, much less the incentive the deterrence rationale envisions.

5. The Manufacturer’s Ability to Spread the Risk

The basic idea of risk spreading is that a manufacturer is better able to cover the costs of injuries resulting from defective products because of its ability to integrate those costs into the price of the product.\(^\text{172}\) A broad post-sale duty to warn would be consistent with this rationale, but a factually dependent post-sale duty to warn would not.

(a) Explained

California Supreme Court Justice Traynor pointed to this rationale in Escola v. Coca Cola Bottling Co., explaining “the risk of injury can be insured by the manufacturer and distributed among the public as a cost of doing business.”\(^\text{173}\) Manufacturers can distribute those costs by increasing the price of their goods.\(^\text{174}\) The risk of injury is constant, and “[a]gainst such a risk there should be a general and constant protection and the manufacturer is best situated to afford such protection.”\(^\text{175}\)

Former Vanderbilt University Law School Dean John W. Wade also pointed to risk spreading in his contributions to the development of strict liability. He explained “the manufacturer can more easily obtain appropriate liability insurance coverage” to cover the costs of injuries and can “spread [the loss] among all the consumers” “by pricing his product.”\(^\text{176}\) In his influential work on defining a defect

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\(^\text{172}\) Robert F. Cochran, Jr., Dangerous Products and Injured Bystanders, 81 KY. L.J. 687, 705–06 (1992–1993); see also Ramirez v. Amsted Indus., Inc., 431 A.2d 811, 823 (N.J. 1981) (“In time, the risk-spreading and cost avoidance measures adverted to above should become a normal part of business planning in connection with the corporate acquisition of the assets of a manufacturing enterprise.”).

\(^\text{173}\) 150 P.2d 436, 441 (Cal. 1944) (Traynor, J., concurring).

\(^\text{174}\) See id.

\(^\text{175}\) Id.; see also Note, Economic Loss in Products Liability Jurisprudence, 66 COLUM. L. REV. 917, 952 (1966) (explaining that under the risk-spreading principle, “[t]he manufacturer is expected to provide for such liability by either purchasing insurance, or by self-insuring through the creation of a reserve for anticipated losses. The insurance premium or costs of self-insuring become a manufacturing expense to be passed on to the ultimate purchaser by means of a rise in prices.”).

\(^\text{176}\) John W. Wade, On the Nature of Strict Tort Liability for Products, 44 MISS. L.J. 825, 826 (1973). “A different way of expressing essentially the same idea is to say that the
in strict liability, one of the factors Dean Wade delineated was “[t]he feasibility, on the part of the manufacturer, of spreading the loss by setting the price of the product or carrying liability insurance.”  

As the popularity of strict liability for defective products has diminished, the popularity of the risk-spreading idea underlying strict liability has also diminished. Practically, transaction costs preclude the theoretically simple transfer of money from the increased prices of products to payments to accident victims. “[F]or each dollar that an accident victim receives in a settlement or judgment, it is reasonable to assume that a dollar of legal and administrative expenses is incurred.”  

Regardless of this powerful criticism, courts still sometimes discuss risk spreading, making it appropriate to evaluate whether risk spreading would support the imposition of any post-sale duty to warn.

(b) Likely Support for a Post-Sale Duty to Warn for All Manufacturers

True, manufacturers generally control the prices of their products and could increase those prices to cover costs related to warning of later-known potential dangers. Thus, it seems that risk spreading supports the imposition of a post-sale duty to warn.

At the same time, the danger is unknowable when the manufacturer prices the product, which could make risk spreading difficult. This is another reason why the New Jersey Supreme Court’s decision in Beshada was heavily criticized. Beshada held that a manufacturer could be liable for failing to warn of a danger unknowable at the time of sale. Commentators questioned how a manufacturer could incorporate the costs of an unknowable injury into the price of a product:

Even if one agrees that risk spreading is a valid goal, however, it is questionable whether the manufacturer or its insurer is capable of assessing product risks that are unknowable but nevertheless must be underwritten at the time the product is sold. The manufacturer’s liability exposure, then, is potentially uninsurable. Since the cost and potential loss associated with product risks could not, except on an “open guess basis,” be included in the price of the product, the likely result would be overpricing or underpricing the cost of insurance and of the product.

activity of making the particular product should pay its own way, that the enterprise should bear the liability.”  


178 Id. at 838.

179 Id.


181 Schwartz, supra note 12, at 903–04; see also Henderson & Twerski, supra note 13, at 274–75 (explaining that “manufacturers cannot . . . insure against risks that even reasonably careful persons do not know exist” and “[l]iability for unknowable risks is a
The same consequence could occur with post-sale duty to warn liability. The dangers were unknowable when the product was priced. The cost and potential loss associated with that later discovered danger could not have been included in the price of the product. The manufacturer can do little more than speculate, and “the likely result would be overpricing or underpricing the cost of insurance and of the product.”

There is one difference between liability for a post-sale duty to warn and strict liability under Beshada—a post-sale warning obligation applies only to dangers about which the manufacturer learns or should learn. There is no practical way for a manufacturer to avoid liability under Beshada. A manufacturer could, however, avoid liability for a failure to issue a post-sale warning. Plainly, a manufacturer will not be liable for a post-sale failure to warn if it properly issues an adequate warning of the newly discovered danger.

Still, because of the possible need to issue a post-sale warning, a manufacturer may want to build into the price of the product something to cover the costs of issuing that post-sale warning. Again, this could lead to overpricing the product.

weed that should not be allowed to take root in the failure-to-warn garden); Wertheimer, supra note 135, at 1239 (“Cost spreading will not be possible because the costs of the injuries are not known in advance, usually where the danger of the product was unknowable at the time of sale.”); Ellen Wertheimer, Unavoidably Unsafe Products: A Modest Proposal, 72 Chi.-Kent L. Rev. 189, 197 n.29 (1996) (“The cost-spreading rationale, which requires spreading the costs of injuries before those injuries occur, does not work particularly well in the context of dangers unknowable at the time of sale because it is difficult to insure against an unknowable risk, and impossible to spread the costs of an unknowable danger before that danger materializes.”).

See Joseph A. Page, Generic Product Risks: The Case Against Comment k and for Strict Tort Liability, 58 N.Y.U. L. Rev. 853, 878 (1983) (“Since the offending products would already have been priced and sold, their liability costs could not be assigned to them.”).

Schwartz, supra note 12, at 904.

Still, a post-sale duty to warn may have a similar effect as a Beshada strict liability failure to warn claim. A Beshada strict liability failure to warn claim is a way to hold manufacturers liable for failing to warn of dangers that were unknowable at the time of sale. See Beshada, 447 A.2d at 549. A post-sale duty to warn is also based on those unknowable dangers, except it arises at the time when the dangers become knowable (and the defendant fails to warn of them).

Even if the manufacturer plans to continue to research its product and to issue any warnings that may become necessary, there is no guarantee that actually issuing a warning will mean the defendant is not liable—the plaintiff can still allege that the warning given was inadequate. See Smith v. Ontario Sewing Mach. Co., 548 S.E.2d 89, 96 (Ga. Ct. App. 2001) (“A post-sale warning must be adequate and specific to satisfy the manufacturer-seller’s duty to the ultimate user to protect from harm; a vague or generalized warning that fails to warn of the specific defect, the danger from the defect, and remediation is not an adequate warning.”), vacated, 576 S.E.2d 38 (Ga. Ct. App. 2002). In a recent case pending in Alaska, a manufacturer of a facial moisturizer issued a post-sale warning after it discovered that its moisturizer may have contained a “very low level of common bacteria.” Blake v. Guthy-Renker, LLC, 965 F. Supp. 2d 1076, 1079 (D. Alaska 2013). The plaintiff
Because of the ability to avoid liability, the same impossibility of risk spreading in *Beshada* does not apply to a post-sale duty to warn. A broad post-sale duty to warn, then, is likely consistent with products liability’s underlying risk-spreading rationale.

(c) Lack of Support for a Factually Dependent Post-Sale Duty

A factually dependent post-sale duty is, however, inconsistent with risk spreading because it obligates some manufacturers to warn but not others. The risk-spreading rationale does not recognize any distinctions among which manufacturers should be obligated and which should not.

Although Dean Wade listed the ability of the manufacturer to spread the risk as a factor relevant to whether a defect exists, he did not believe liability should depend on whether the particular defendant had the ability to spread the risk. In fact, Dean Wade did not believe this factor should even be mentioned to the jury. Courts agree. To imply “defendants should be held liable because they had the ability to spread the loss for injuries among all the users of the product by setting the price of the product or by carrying liability insurance” is “simply . . . not the law.” Just as a specific defendant’s ability to spread the risk is not relevant, a defendant’s specific inability to spread the risk is not relevant.

Instead, the risk-spreading rationale ignores the practical differences between manufacturers and assumes that all defendants can spread the risk and should be liable for injuries resulting from defective products. Even small manufacturers that lack the practical ability to raise prices because it will hurt their ability to compete are assumed to be able to spread the risk. Thus, even if the risk-spreading rationale would support a broad post-sale duty to warn, it would not

alleges, however, that this warning was inadequate and thus the manufacturer breached its duty to issue a post-sale warning. *Id.* at 1079–80.

187 *Id.* at 840.
189 See Note, *supra* note 175, at 952 (distinguishing risk spreading from “a loss-bearing or ‘deep-pocket’ justification which would make liability dependent upon whether the manufacturer or injured purchaser can better afford the loss”).
190 Courts have considered the inability to spread the risk when declining to adopt successor liability. See Malloy v. Doty Conveyor, 820 F. Supp. 217, 220 (E.D. Pa. 1993) (declining to find an installer company strictly liable because it was not within the chain of distribution and was thus unable to “control the defect and spread its costs through pricing”); Manh Hung Nguyen v. Johnson Mach. & Press Corp., 433 N.E.2d 1104, 1111 (Ill. App. Ct. 1982) (finding it problematic whether successors, especially small entrepreneurs, can spread the costs); Schmidt v. Boardman Co., 958 A.2d 498, 506 (Pa. Super. Ct. 2008) (finding that successors can be liable if it is shown that the successor had the “ability to assume the original manufacturer’s risk-spreading role [sic]” (quoting Dawejko v. Jorgensen Steel Co., 434 A.2d 106, 109 (Pa. Super. Ct. 1981)) (internal quotation marks omitted)).
support a particularized factual version that would oblige some manufacturers but not others depending on their financial circumstances.

**B. Inconsistent with Public Policy—Crippling Small Manufacturers**

A factually dependent post-sale duty to warn is contrary to public policy because of its practical, economic consequences for small manufacturers—consequences that large manufacturers will not share. Small manufacturers are already disproportionately affected by products liability law. They are the least able to adjust prices to cover the costs of liability or products liability insurance. Imposing a factually dependent duty will only exacerbate these disproportionate effects. Small manufacturers will now face even higher products liability insurance costs, research costs, and actual warning costs.

Courts specifically reject another products liability law due to concern for its adverse effect on small manufacturers. That law is a product-line exception, which would make successor companies strictly liable for products sold by the predecessor company if the successor continued the product line. Because of the potential effects on small manufacturers, many courts reject this product-line exception. Courts should follow this reasoning and similarly reject a factually dependent post-sale duty to warn.

1. **The Already Vulnerable State of Small Manufacturers**

Commentators pointed out a possible disproportionate effect on small manufacturers when courts first adopted strict liability for injuries caused by defective products. Because of various “economic factors[,] it may often be a matter of pure chance as to whether a given manufacturer or industry can adjust its price structure to absorb a new cost thrust upon it.”

Moreover, even if price adjustments are possible, “there will always be uninsured defendants, there will


Is it sound to assume that manufacturers in general are in a position to distribute the risk of all product injuries through the price mechanism? There is substantial reason to doubt that such a generalization is valid as to all industries or for all manufacturers in a specific industry. . . . For example, certain products are subject to what economists call an “elastic demand,” i.e., a slight increase in price will cause a sharp reduction in demand or will turn consumers to a substitute product. In such industries the product’s price is by no means as adjustable as is assumed by the proponents of strict liability.

always be liability in excess of coverage, and there will be members of the group whose competitive situation does not permit them to pass on the cost of the insurance to their customers.”

For a small business, “an increase may mean pricing [itself] out of the market.” True, some manufacturers are easily able to pass on costs, “[b]ut many manufacturers are in a totally different situation. Their position in the industry is vulnerable and their competitive situation delicate. It is these comparatively small manufacturers who suffer when additional costs are added without regard to their situation.” The New Hampshire Supreme Court expressed a similar concern: “The ‘Fortune 500’ companies suffer less economically because they can develop adequate statistics, purchase insurance, and employ expensive experts and legal counsel. For thousands of small manufacturers, the high cost of self-protection or insurance can be prohibitive so as to force them out of business.”

Studies have shown that the increasing cost of products liability insurance has affected small manufacturers. In 1976, a Federal Interagency Task Force found the costs of product liability insurance had greatly increased, and the “increase appeared to have been greater for small, as compared to large, businesses.” Aside from simply being able to afford insurance or spread the costs by increasing the prices of products, “[s]mall businesses are less able to bargain effectively for favorable insurance rates.” A large manufacturer can adapt to retain coverage by

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193 Plant, supra note 191, at 947.
194 Id.
196 Victor E. Schwartz, The Uniform Product Liability Act—A Brief Overview, 33 Vand. L. Rev. 579, 580 (1980); see also Robert A. Van Kirk, Note, The Evolution of Useful Life Statutes in the Products Liability Reform Effort, 1989 Duke L.J. 1689, 1689–90 (“Insurance companies insisted that the drastic rise in both claims and awards necessitated increases in premiums that many small manufacturers found unaffordable.”). The Interagency Task Force made the following “key conclusions about the nature and causes of the problem” of increasing costs of products liability insurance:

1. Although the cost of product liability insurance has increased substantially in most industries, the problem of increasing costs is severe in only a few industries, such as industrial machinery, industrial chemicals, automotive components, and pharmaceuticals.
2. The problem of availability and affordability of product liability insurance is concentrated in the small firms in those industries.

1 INTERAGENCY TASK FORCE ON PRODUCT LIABILITY, U.S. DEP’T OF COMMERCE, PRODUCT LIABILITY: FINAL REPORT OF THE INSURANCE STUDY ES-7 (1977) [hereinafter Task Force].
197 Glenn J. Waldrip, Jr., Comment, Limiting Liability: Products Liability and a Statute of Repose, 32 Baylor L. Rev. 137, 139 (1980). The Comment also explains that
assuming a large deductible or accepting a differently rated plan. “For the smaller firm, particularly the single-product firm, these adaptations are not as feasible. The account is not large enough for its own experience to have credibility for the insurer, and it does not have the financial resources to share a significant proportion of the risk burden itself.”

Congress has addressed this problem numerous times. In a 1992 committee hearing, a Congressman explained that “[t]here is no doubt that the costs and perceived inefficiencies of our product liability system are of great concern to the small business community.” He further explained that “the cost and availability of liability insurance was one of the three chief concerns of small businesses in [his] home state of Virginia” and that reports demonstrating how the “costs of our product liability system fall disproportionately on small businesses are very troubling,” particularly since “[m]any have concluded that the liability insurance crisis is especially severe for small businesses, in terms of both the cost and the availability of insurance.” At the same hearing, Professor Kip Viscusi also testified that the changes in liability insurance premiums “create particular problems for small firms.” Those small firms that are unable to self-insure tend to “have a less diversified product line so that any particular design defect case will tend to hit them harder,” and they “lack some of the economies of scale with respect to litigation that larger firms have.”

Other committee hearings have focused on the effects of products liability law on small manufacturers. As examples, in 1999, a Congressman explained at a hearing that the burden of the tort system on “small business defendants is magnified. The smallest of businesses are more likely to be uninsured or underinsured, which means that one lawsuit puts their economic survival at

the problems associated with obtaining liability insurance are amplified for small manufacturers selling machinery that will be used for many years:

For small firms that manufacture nothing but long-life products such as industrial machinery, the problem is especially acute. Many of these firms have exposures that may amount to 10 to 20 times the current year’s production—i.e. machines now in use that were sold over many years’ time. Thus, in developing a rate to be applied to the current year’s sales, the insurer must multiply the loss potential per machine 10 to 20 times.

Id. at 139–40 (quoting TASK FORCE, supra note 196, at ES-5).

198 TASK FORCE, supra note 196, at ES-5.


200 Id.

201 Id. at 119 (statement of Professor W. Kip Viscusi).

202 Id. at 119–20.
A witness testified that “being sued is one of the most terrifying experiences a small business owner can have.” In a 2004 hearing, panelists described the costs of liability insurance for small manufacturers and the fact that some small manufacturers could not afford it and had to pay litigation costs out of pocket. In 2007, a witness explained to a congressional committee that even small settlements can be damaging to a small business: “When you consider that many small businesses gross $350,000 or less a year, which does not include additional expenses of running the business, like payroll, rent, costs of goods sold, and regulatory costs, $5 to $10,000 can significantly impact a small business owner’s bottom line.” Plus, any settlement, even if small, can drive up insurance premiums.

Congress has introduced numerous bills purporting to protect small manufacturers. The most prominent was the Common Sense Product Liability Reform Act of 1999: Hearing Before the H. Comm. on the Judiciary, 106th Cong. 7 (1999).

Id. at 96–97 (statement by Roger R. Geiger, State Exec. Director, National Federation of Independent Business) (“It is even more frightening for the smallest of small businesses who fear being put out of business for good with one lawsuit. . . . More than half of Ohio’s small businesses have had to raise the cost of products and services because of liability concerns—a cost we as consumers have to pay.”).

See Small Business Liability Reform: Hearing on H.R. 2813 Before the Subcomm. on Regulatory Reform and Oversight of the H. Comm. on Small Bus., 108th Cong. 29–30 (2004) (statement of Lisa Rickard, President, U.S. Chamber Institute for Legal Reform) (“Very small businesses—those with less than $1 million in annual revenues—pay $33 billion of the $88 billion per year. That works out to about $17,000 each per year. What’s even more astonishing is that these very small businesses pay 44%, or $15 billion, of their liability costs out-of-pocket—not through insurance coverage.”); see also id. at 41 (statement of Jo Rae Wager, President, CTO, Inc.) (“[S]imply, many contracting firms can’t afford triple-digit increases in their general liability premiums, that is, if they’re lucky enough to find coverage. Often these increases come to companies that have not even had a claim; it’s simply the nature of the industry.”).


See, e.g., Product Liability Reform Act of 1998, S. 2236, 105th Cong. § 2(a)(3) (1998) (proposing nationwide product liability standards and damage limitations, in part, because “product liability awards can jeopardize the financial well-being of individuals and industries, particularly the Nation’s small businesses”); Product Liability Reform Act of 1997, S. 648, 105th Cong. § 2(a)(5) (1997) (proposing nationwide product liability standards and damage limitations, in part, because “excessive, unpredictable, and often arbitrary damage awards and unfair allocations of liability jeopardize the financial well-being of many individuals as well as entire industries, particularly the Nation’s small businesses”); Product Liability Reform Act of 1997, S. 5, 105th Cong. § 2(a)(5) (1997) (proposing nationwide product liability standards and damage limitations, in part, because “excessive, unpredictable, and often arbitrary damage awards and unfair allocations of liability jeopardize the financial well-being of many individuals as well as entire industries,
Legal Reform Act of 1996, which contained tort reform measures benefitting both small and large manufacturers generally and had bipartisan support in both the United States House of Representatives and the United States Senate.\textsuperscript{209} Despite ultimately passing both Houses, President Clinton vetoed it.\textsuperscript{210}

2. \textit{Additional Costs to Small Manufacturers from the Post-Sale Duty}

Because a factually dependent post-sale duty to warn is likely to apply to small manufacturers, small manufacturers will likely incur additional costs related to insurance, research, and issuing post-sale warnings.

\textit{(a) Products Liability Insurance}

Generally speaking, “[t]he insurance mechanism . . . works best when losses for a class of risks over a period of time are reasonably predictable.”\textsuperscript{211} Premiums can then be set based on those expected risks; ideally, “premiums are set so as to exactly relate to the level of risk that the insured’s own conduct occasions.”\textsuperscript{212}
The level of risk that a manufacturer’s own conduct occasions now includes possible liability for a failure to issue a post-sale warning. This is a new form of liability for manufacturers. When liability, a loss-producing factor, changes, “insurers must respond judgmentally by adjusting their rates to reflect these changing loss-producing factors.”213 Rationally then, insurers may need to increase premiums.

Insurers, however, do not need to increase premiums for large manufacturers. The level of risk that a large manufacturer’s own conduct occasions would likely not include losses due to liability for a post-sale duty to warn. Because the duty is factually dependent on the costs of the warning, it is not likely that a large manufacturer will owe a duty to warn. It is also not likely that a large manufacturer would incur any losses related to a post-sale warning duty.

Small manufacturers, unlike large manufacturers, are likely to owe a post-sale warning duty. Thus, small manufacturers are also likely to incur losses related to a post-sale warning duty. Rationally then, insurers should increase the premiums for the policies of small manufacturers, but not large manufacturers, because of the post-sale obligation.

The question is how much insurers should increase the premiums for small manufacturers. Insurers already have difficulty setting premiums for products liability insurance policies because “it is difficult to estimate future losses with any degree of accuracy.”214 This is especially true because whether a loss is covered depends on whether it arose from an occurrence during the policy period.215 “It
to determine); Waldrip, supra note 197, at 141 (“[D]ecisions concerning both the issuance and cost of policies are made by combining an actuarial analysis of loss experience with judgmental determinations . . . .”). Professor Schwartz explains that products liability insurers use both schedule rating and experience rating to set premiums. Schedule rating includes adjustments to premiums based on “information yielded by an inspection or survey of the insured’s operations.” Schwartz, supra, at 320. Premiums may thus be adjusted based on precautions the manufacturer takes in designing or manufacturing products. Id. Experience rating looks to the insured’s history of claims as a proxy for future risk. Id.

Insurers also consider the number of products sold when determining premiums. Id. at 318 n.21 (explaining that the “premiums for products liability insurance are calculated as a predetermined percentage of dollars of sales,” meaning the “premium [is] a direct function of the number of products sold”). Thus, the insurance premiums for small manufacturers with fewer customers should be smaller than the premiums for large manufacturers. Despite this, studies have shown that small manufacturers still have a more difficult time obtaining and affording liability insurance. See supra notes 196–198 and accompanying text.

213 TASK FORCE, supra note 196, at 1-5. The Report explains that insurers must adjust their rates “when new legal precedents limit defenses.” Id.

214 Waldrip, supra note 197, at 141; see also TASK FORCE, supra note 196, at 1-2 (explaining that “[m]ost companies also require a survey by a loss control specialist before writing liability coverage for products they consider particularly risky”).

215 In the typical products liability policy, the insurer agrees to defend and pay “all sums that [the insured] will become legally obligated to pay as damages arising out of an
does not matter when the product was manufactured or sold, or whether it existed at the time the insurer underwrote the policy.”

This aspect of coverage—that the insurance could cover injuries caused by products sold years before—“has been cited as the cause of severe problems.” The most difficult problem is that “[t]he underwriter is faced with the possibility that any one of the insured’s existing products, including products manufactured over 20 years ago, could cause a loss under the current policy.”

This inability to predict the losses “is, according to most insurers, a major obstacle to underwriting decisions.” Simply because there is no other way to set rates, “[r]ates for product liability insurance are based largely or, for some products, entirely on nonstatistically derived, judgmental estimates of loss frequency and severity.”

The difficulty of setting fair premiums will only increase as insurers begin to contemplate losses due to post-sale warnings. A post-sale duty to warn arises when a manufacturer learns (or should learn) of a danger after selling the product. Whether that danger will materialize is, almost by definition, an uncertainty. The severity of that unknown danger, and the resulting loss, is also uncertain.

Plus, the danger could materialize two weeks after sale, or twenty years after sale. The uncertainty of potential point-of-sale liability arising “from old occurrence or loss event causing bodily injury or property damage.” Task Force, supra note 196, at 1-14.

Id.; see also Waldrip, supra note 197, at 141 (explaining that the insurer can become legally obligated to pay damages resulting from products sold before the policy was in place).

Task Force, supra note 196, at 1-14.

Id. at 1-15; Waldrip, supra note 197, at 141–42 (explaining that difficulty of determining premiums increases because insurers are “forced to set their present premiums at a level sufficient to satisfy potential claims arising from old products that are or could be still in use”).

Task Force, supra note 196, at 1-20.

Id. at 1-40; see also Laurie L. Kratky, Statutes of Repose in Products Liability: Death Before Conception?, 37 Sw. L.J. 665, 676 (1983) (explaining that the “increasing number and average dollar amount of products liability claims and awards” combined with the “highly subjective methods of insurance rate-making” have contributed to a dramatic increase in the premiums of products liability policies); Waldrip, supra note 197, at 141–42.

Two types of rates exist for the basic limits of a policy. Manual rates are derived from data that insurance companies have submitted to the Insurance Services Office regarding premiums, losses, and exposures. Task Force, supra note 196, at 1-36. This data is then analyzed actuarially. Id. Even though this “basic rate is based on aggregate experience, some judgment may be involved in selecting the appropriate classification.” Id. at 1-38. If insufficient data exists to calculate a rate through actuarial techniques, a “(a) rate” is determined based “primarily on judgment.” Id. at 1-36. This judgment based (a) rate is also often used to determine premiums when insurance policy limits exceed $300,000 for bodily injury and $50,000 or $100,000 for property damage. Id. at 1-37.

A statute of repose could cut off the possibility of liability at some point if the state legislature has adopted one. Madden, supra note 24, at 38–39 (“It would . . . seem to follow
products that are or could be still in use . . . contributed to liability premiums increases of over one thousand percent for some manufacturers.” Liability for the post-sale warning obligation is, almost by definition, based on old products that are or could still be in use that were, or should have been, discovered to be dangerous. True, the passage of time may make a factually dependent post-sale duty to warn less likely to exist, as even a small manufacturer may have difficulty identifying users after a long passage of time. But the passage of time is not determinative, meaning liability is still possible, causing even more uncertainty in the estimation of future losses.

There is little doubt that post-sale warning liability will cause substantial uncertainty about a small manufacturer’s potential losses. If any substantial uncertainty exists, the underwriter is forced “to be very cautious, which, in turn, affects the cost and availability of insurance.” Really, the insurer has only two options—either not issue the insurance policy, or set the “premiums high enough to prepare for the worst possibilities.” Either consequence is enough to drive the manufacturer needing the insurance out of business. Without insurance, the small manufacturer likely would be unable to survive even one judgment. With insurance, the small manufacturer would be unlikely to afford the premiums and yet continue in business.

Small manufacturers need to obtain products liability insurance to cover the risk of loss resulting from a post-sale warning because they (and not large

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222 Waldrip, supra note 197, at 142; see also TASK FORCE, supra note 196, at ES-7 (explaining that one factor contributing to “increasing claim costs” is “a manufacturer’s liability for products made years ago”); Kratky, supra note 220, at 676 (“[T]he uncertainty associated with products that have been in use for many years . . . caused many insurers to engage in ‘panic-pricing.’ Unknown liability for an equally unknown number of years has led to a worst-case type of analysis.”).

223 Hanlan v. Chandler, No. 4-0259B, 2008 WL 5608253, at *3 (Mass. Super. Ct. Nov. 13, 2008) (finding no post-sale duty to warn under the Third Restatement because “the crane accident occurred about thirty years after [the manufacturer] first sold the crane” and “[t]he crane changed hands at least three times in those thirty years,” precluding the ability of the manufacturer to identify those needing to be warned).

224 Waldrip, supra note 197, at 141.

225 Id. at 142; see also Kratky, supra note 220, at 676 (explaining that as a result of the uncertainty of future losses, “many insurers have either refused to issue products liability policies altogether or have set premiums so high as to make them effectively unavailable”). True, small manufacturers can avoid liability by actually issuing the post-sale warning, reducing the chance that the insured manufacturer will incur losses. From the insurer’s perspective, however, there is no guarantee that the small manufacturer will actually issue the warning. Plus, if the ability to avoid liability was a reason to not insure a risk, then an insurer would also not insure losses related to liability for point-of-sale warning obligations. Even though a manufacturer will not be liable if it warns of dangers it knows of or should know of, manufacturers still obtain and insurers still issue insurance for losses caused by liability for a point-of-sale warning.
manufacturers) are most likely to face liability related to a post-sale warning. Small manufacturers are also, however, the manufacturers already most likely unable to afford the costs of products liability insurance. And the cost of that insurance is only likely to increase as more jurisdictions adopt a post-sale warning obligation.

(b) Research

Other potentially expensive costs also exist. Mainly, this includes costs associated with ongoing research regarding possible dangers hidden in products. A factually dependent post-sale duty does not expressly obligate a manufacturer to research its products after sale. It does, however, make the manufacturer liable if it fails to warn of dangers about which it should have known. The dangers about which it should have known are the dangers that ongoing research would have revealed. Thus, to avoid liability for a failure to issue a post-sale warning, a small manufacturer will need to continue to research the dangers of its products. This research could be very expensive. Small manufacturers will be forced to incur the costs of this continuing research, but large manufacturers will not.

(c) Costs of Actually Issuing the Post-Sale Warning

If the obligation to issue a post-sale warning exists under the factually dependent version of the duty, the costs of actually issuing that warning are reasonable. Even if reasonable though, there are still costs associated with issuing the warning. The costs include expenses related to the logistics of issuing the warning itself—producing the post-sale warning itself and communicating that warning to the manufacturer’s customers. If these costs are extensive and unreasonable, as they likely will be for a larger manufacturer, a manufacturer will not have to incur them because it will not be obligated to issue the post-sale warning. But if the costs are reasonable, as they likely will be for a smaller manufacturer, the small manufacturer will have to incur

226 See Richter v. Limax Int’l, Inc., 45 F.3d 1464, 1470–71 (10th Cir. 1995) (affirming jury’s verdict finding liability for a failure to warn that jogging on a trampoline could cause stress fractures because plaintiff’s evidence showed that reasonable tests would have revealed that foreseeable danger).

227 See Ross, supra note 15, at 345 (explaining how a post-sale duty to warn “may require manufacturers to investigate when reasonable grounds exist for the seller to suspect that a hitherto unknown risk exists”); see also Kenneth Ross & J. David Prince, Post-Sale Duties: The Most Expansive Theory in Products Liability, 74 BROOK. L. REV. 963, 969 (2009) (“The language in section 10 could be used to argue that the scope of other manufacturers’ and suppliers’ legal duties are extended by requiring reasonable affirmative actions to learn of post-sale product risks.”).

228 See Kociemba v. G.D. Searle & Co., 707 F. Supp. 1517, 1528–29 (D. Minn. 1989) (discussing limiting a post-sale duty to situations where the manufacturer knows of the danger to alleviate the potentially “crushing burden on manufacturers to retest products”).
them and issue the warning. Thus, a small manufacturer will likely have to spend money issuing post-sale warnings, but a larger manufacturer likely will not.

3. Courts’ Concern for Small Manufacturers as the Main Reason to Reject the Product-Line Exception

Potentially devastating economic consequences for small manufacturers—the same consequences that could very well result from the imposition of a factually dependent post-sale duty to warn—are the very reason that numerous courts have rejected another specific products liability law. That law is a product-line exception to the general rule that a successor company cannot be strictly liable for products manufactured and sold by the predecessor corporation. The product-line exception would impose strict liability on the successor if it “continues the output” of the line of products.

The Florida Supreme Court rejected the product-line exception “due in part to the threat of economic annihilation that small businesses would face under such a rule of expanded liability. Because of their limited assets, small corporations would face financial destruction from imposition of liability for their predecessor’s products.”

An Illinois court also rejected the exception because of small manufacturers’ inability to obtain insurance:

Recent studies indicate that many manufacturers, and in particular small manufacturers, have a difficult problem obtaining products liability insurance and find it impossible to cover the risks by raising prices because they have to compete with larger manufacturers who can keep the price down. . . . Additionally, it is one thing to assume that a manufacturer can acquire insurance against potential liability for its own products and another to assume it can acquire such insurance for the products made by a different manufacturer. We do not know whether insurance companies will readily provide such insurance. We cannot assume it as fact.

Numerous other state courts have agreed. Courts are concerned about how this rule, obligating all successor manufacturers, would affect small manufacturers.

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231 Bernard, 409 So. 2d at 1049.
Courts should similarly be concerned with how a factually dependent post-sale duty, which possibly will apply only to small manufacturers, would affect those manufacturers.

V. CONCLUSION

One would not expect too many complaints about a law that imposes obligations only if those obligations are reasonable. How could a law be unfair or problematic if it imposes liability only if conduct is unreasonable?


The Massachusetts Supreme Court described this “very real threat” to small manufacturers as an “issue[] of broad public policy involving balancing the interests of future plaintiffs and defendants, which the Legislature is better equipped to resolve.” Guzman, 567 N.E.2d at 932–33. Two state courts that rejected a post-sale duty also noted that the issue should be resolved by the legislature instead of a court. Campbell v. Gala Indus., Inc., No. Civ.A.6:04-2036-RBH, 2006 WL 1073796, at *5 (D.S.C. Apr. 20, 2006) (refusing to “legislate from the bench”); Palmer v. Volkswagen of Am., Inc., 905 So. 2d 564, 601 (Miss. Ct. App. 2003) (refusing to recognize a post-sale duty to warn “in the absence of legislative action”). Those courts did not cite the consequences to small manufacturers as a reason for the legislature being better equipped to resolve the existence of a post-sale duty to warn. But if the legislature is best equipped to evaluate the potential consequences to small manufacturers that will result from the product-line exception, it may similarly be best equipped to evaluate the consequences to small manufacturers that will result from a factually dependent post-sale duty to warn.
But what is reasonable for one manufacturer may not be reasonable for another depending on the manufacturer’s circumstances. If a manufacturer has only a few customers, it is reasonable to obligate that manufacturer to contact those few customers to warn them. But if a manufacturer has thousands of customers, such an obligation would likely not be reasonable because of its expense. Because of the cost, it is reasonable for the large manufacturer to not warn.

Unintentionally, a factually dependent post-sale duty to warn creates a scenario where small manufacturers are more likely than large manufacturers to owe a duty to warn after the sale and be liable if they breach that duty. Further, it creates a scenario where customers of small manufacturers are more likely to receive and benefit from a post-sale warning, whereas customers of large manufacturers will be left without that safety benefit:

Is it credible to have a body of law that permits a cause of action for a person who suffers serious burns when his custom-made suit, made of readily flammable material, catches fire, whereas the person who suffers identical injuries from a department-store suit made of the same material recovers nothing?234

The obvious answer is no. But that is exactly what a factually dependent post-sale duty does. It is also exactly why courts should not adopt a factually dependent post-sale duty to warn.

Essentially, courts are left with only two options in adopting or modifying a post-sale warning obligation: obligate all manufacturers regardless of the costs, or reject any post-sale duty to warn because the costs of warning are too burdensome. The first option is unlikely given the widespread belief that a post-sale duty to warn would be very burdensome on manufacturers. The solution to that burden is not to adopt a duty that would exist only if the costs are reasonable—that factually dependent duty is more likely to obligate small manufacturers than large manufacturers. Instead, the solution to that burden is to reject any post-sale duty to warn.

234 John C.P. Goldberg & Benjamin C. Zipursky, The Easy Case for Products Liability Law: A Response to Professors Polinsky and Shavell, 123 Harv. L. Rev. 1919, 1942 (2010). Professors Goldberg and Zipursky made this point in response to an argument made by Professors A. Mitchell Polinsky and Steven Shavell. Polinsky & Shavell, supra note 178, at 1452. Generally, Professors Polinsky and Shavell argued the costs of liability outweighed the benefits in improving product safety, especially when other mechanisms exist to improve product safety—mainly government regulation and the market. See id. at 1452. They admitted, however, that the conclusion applies better to widely sold products. Id. Professors Goldberg and Zipursky questioned the legitimacy of a products liability system that would apply to small manufacturers, but not large ones. See Goldberg & Zipursky, supra, at 1942. The point applies equally as well to a factually dependent post-sale duty to warn.
OUTSIDERS LOOKING IN:
ADVANCING THE IMMIGRANT WORKER MOVEMENT
THROUGH STRATEGIC MAINSTREAMING

Jennifer J. Lee*

I. INTRODUCTION

How can subordinated groups best advance their agenda? The recent success of undocumented immigrant youth activists (“DREAMers”) can be instructive, from the creation and extension of the program for deferred action for childhood arrivals (DACA) that provides for temporary immigration relief to the passage of numerous state laws providing for in-state tuition regardless of immigration status. At the same time, those within the movement have questioned the adherence to a DREAMer identity of the successful and culturally integrated student, who endorses mainstream exclusionary immigration norms while undermining the affirmation of a broader immigrant identity of all ages and backgrounds. As a result, some DREAMers have rejected the heavily compromised “comprehensive” immigration reform approach that provides a direct road to U.S. citizenship for some undocumented youth because it also continues to treat “immigrants as criminals.” They have engaged in more assertive civil
disobedience tactics, such as “travel[ing] to Mexico and return[ing] to the United States through a legal port of entry, openly declaring their immigration status as a unique form of protest . . .”\textsuperscript{5} The DREAMer movement presents an age-old problem of social movements: whether change should be pursued from the inside or outside. Groups who work from the inside may more realistically have the opportunity to address subordination maintained by the dominant class, but they also find themselves unwittingly acquiescing to an unjust hierarchical system. On the outside, groups can more radically challenge the system by bringing new normative ideals to the fore, an approach that can be both risky and have little chance of success.

The immigrant worker movement confronts this very same dilemma. To a certain degree, the story of the immigrant worker movement today is a familiar tale about law and culture. Law depends on dominant cultural norms, which have constrained the rights of immigrant workers. As a result, immigrant workers, community advocates, and public interest attorneys have been forced to embrace, construct, and perpetuate mainstreaming narratives of immigrant workers in legal cases, public policy campaigns, and grassroots actions. Mainstreaming involves the use of interpretive frames correlated to dominant cultural values that endeavor to create connections to mainstream society.\textsuperscript{6} One interpretive frame emphasizes the social identity of immigrant workers who contribute to society through the dignity of their own work. The other interpretive frame focuses on immigrant workers who are victimized by criminal employers who fail to obey the rule of law. In turn, the resulting legal framework begins to reflect these cultural narratives about immigrant workers.

This Article offers one of the first critical examinations of this law-and-culture phenomenon, and how immigrant workers can use cultural narratives to advance the movement. My discussion about “immigrant workers” will be limited to the largest and most vulnerable subclass—those without lawful work authorization.\textsuperscript{7} These immigrant workers live as outsiders. Many commentators have reflected on the invisibility, exclusion, or partial inclusion of immigrant workers.


\textsuperscript{7} Immigrant workers are a diverse group who faces considerable challenges. Immigrant workers include those who have lawful authorization to work, such as unskilled workers on temporary H-2A and H-2B visas, high-tech workers on H-1B visas, and lawful permanent residents with “green cards.”
workers who lack full political citizenship as “aliens” within our laws. The collective prejudice of communities can situate immigrants as the “other”—outside of clearly marked “boundaries of who is an accepted member of society.” Inflammatory anti-immigrant rhetoric magnifies this exclusion, depicting immigrants as criminals and invaders bent on conquering and pillaging rather than integrating into U.S. society. Federal immigration enforcement and some state and local policies exacerbate the inhospitable climate that immigrant workers face daily. The courts have limited legal remedies for immigrant workers, and government agencies generally neglect the enforcement of workplace standards.

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9 Stumpf, supra note 8, at 377.


It is within this framework that immigrant workers must determine how they can most effectively advance their movement.

To some extent, this Article assumes generalities across the immigrant worker movement, whereas in reality the movement is more dynamic and plural, with varied agendas for the multiple immigrant movements. Some movements may simply focus on providing redress to immigrant workers. Other movements may seek more broadly to end the exploitation of immigrant workers by addressing the overall decline of workplace standards for immigrant workers.\(^{15}\)

With these various agendas in mind, the immigrant worker movement could focus on working from outside the system. One possibility is to work to transform the cultural dialogue into a more global conception of immigrant workers grounded in transnational citizenship or universal human rights. While such transformative cultural narratives provide a normative vision for the movement and offer the possibility of changing consciousness incrementally, such narratives are often impractical by themselves to achieve more immediate reform. More radical actions by immigrant workers can more directly challenge dominant culture that is ultimately responsible for their exploitation. They provide important counternarratives to the mainstream discourse about immigrant workers but can also be precarious for immigrant workers subject to deportation and rejected as too extreme. Even with the best efforts to change the mainstream dialogue, immigrant workers are often constrained as outsiders who are essentially trapped within a framework that can be unresponsive to these strategies.

Working from the inside, however, is fraught with well-known perils. Mainstreaming necessarily creates stereotypes and classes of outsiders, resulting in disfavoring immigrant workers who do not fit the role of the “good immigrant”—the iconic hard worker or victim. Interpretive frames associated with dominant groups can also obscure the need for fundamental structural change. On the other hand, given the constraints of the current system, the option of mainstreaming is often more likely to succeed. The use of mainstream narratives is not only more immediate and accessible but also has favorably impacted the legal rights of immigrant workers. And when immigrant workers’ voices power the mainstream narratives, the use of such narratives can empower workers and create solidarity among immigrant workers.

My argument is that because mainstream cultural narratives are often the most viable option, those that are owned, shaped, and cleverly deployed by immigrant workers can best promote the legal rights of immigrant workers while promoting their inclusion into society. This is what I term “strategic mainstreaming.” For strategic mainstreaming to be truly successful, advocates must ensure that

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\(^{15}\) Outside of the context of workplace rights, the blended identity of the immigrant as worker can be connected to the advocacy agenda that seeks to reform the immigration system, from curbing enforcement to creating new pathways to citizenship.
immigrant workers are actively informing, if not leading, such activism. This approach corresponds to a vision of advocacy that respects the voice of subordinated individuals and communities, which maximizes empowerment and solidarity while minimizing the damage created by aligning with the dominant class. Minimizing damage might involve creating alliances with other subordinated groups or incorporating outsider strategies as part of the normative vision for the movement. At the same time, strategic mainstreaming offers a way that immigrant workers can gain political traction and power, often through the use of multifaceted advocacy with local mainstream institutions. The cultural phenomenon of mainstreaming immigrant narratives has proven to be effective in advancing legal rights in a current climate where immigrant workers, as outsiders, will continue to suffer from subordination because they lack traditional political power.

When immigrant workers use strategic mainstreaming, they are furthering their political goal of full membership into mainstream society. While the focus on legal rights may appear to accede to an inherently inequitable legal system, it is a pragmatic strategy for outsiders seeking to achieve a more normative vision of universal rights or full citizenship. Despite its perils, strategic mainstreaming is often the most viable option for achieving the inclusion of immigrants, which over time will help increase familiarity with immigrants as societal members. With such inclusion, immigrant workers will have built the political power to possibly achieve the normative vision for transforming their condition.

To develop my account of how immigrant workers can use cultural narratives to achieve their agenda, I divide this Article into four parts. Part II explores the interplay of law and culture in the immigrant worker movement by reviewing the ways that a variety of protagonists in the areas of litigation, immigration relief, public policy, and direct actions have opted to use mainstream cultural narratives to argue in favor of immigrant workers’ rights. Part III examines the political realities of considering alternative cultural narratives that are more transformative or radical for immigrant workers. Part IV addresses the concerns raised by using cultural narratives that correlate to dominant mainstream interests. Part V sets forth the vision of strategic mainstreaming as a viable way forward.

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II. MAINSTREAMING IMMIGRANT WORKERS

As of late, the story of the immigrant worker movement often involves developing cultural narratives that are sympathetic and recognized by mainstream society. This is no coincidence. It reflects the well-known relationship between law and culture where law is “neither objective nor fixed but rather dependent on the relationship law shares with the dominant cultural and social patterns of society.”

The politics and ideology derived from dominant cultural values have necessarily created the law that impacts immigrant workers. In order to advance their legal rights, the immigrant worker movement has had to search for openings in which to present cultural narratives that might provide a basis for finding a common ground identity with dominant cultural values. It has done so by the mainstreaming of immigrant workers in the courts, administrative agencies, legislature, and media. As a result, legal decisions, agency practices, public policy, and employer practices reflect these mainstream cultural narratives, which are actively shaping the legal rights of immigrant workers.

Given that immigrant workers are outsiders, social movement theory provides insight into how the immigrant worker movement can advance its agenda through mainstream cultural narratives. Professors Ron Eyerman and Andrew Jamison, for example, argue that a key to the success of social movements is to become a “serious and sympathetic agent of change” by outwardly expressing a collective identity that is familiar to mainstream society. Others like Professors Donatella della Porta and Mario Diani discuss a social movement’s use of interpretive frames, which allows the transformation of the natural into a social or political problem. They explain that the success of a social movement lies in the ability of actors to express their own values and motivations “in order to adapt them in the most efficient manner to the specific orientations of the sectors of public opinion which

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21 della Porta & Diani, supra note 6, at 69.
they wish to mobilize.” A social movement becomes more powerful when the messages of the movement align with the values of mainstream culture, which are “explicitly associated with . . . dominant groups.” This alignment is similar to Professor Derrick Bell’s theory of how the racial equality espoused by Brown v. Board of Education was made possible by the convergence of interests between blacks and whites. Professor Richard Delgado has similarly argued that immigrants evoke sympathy by relating to the mainstream and may find power by identifying with familiar categories and linking up with larger groups, while Professor Fatma Marouf explains that one strategy to reduce intergroup bias is to combine members of separate groups into a single more inclusive group; “from ‘us’ and ‘them’ to a more inclusive ‘we.’” To the extent that a social movement can also use the messaging to reaffirm tradition, it provides a link to the cultural heritage and institutions of the country and acquires considerable weight.

When examining the immigrant worker movement through this law-and-culture frame, the interpretative frames of the movement consist of two mainstreaming cultural narratives. The first frame focuses on the universality of being a worker. These are individuals who, like anyone else in the workforce, are seeking the same things out of life through the dignity of their own work—the ability to survive independently and provide a better future for their children. These workers are willing to perform jobs that are dirty, dangerous, and undesirable, which in the popular imagination is a direct counter to the negative

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22 Id. at 68.
23 Id. at 76–77, 80.
28 See DELLA PORTA & DIANI, supra note 6, at 75–76.
connotations of immigrant workers as criminals, freeloaders, and job stealers. By identifying as a worker, the emphasis is on the similarities between the persuader and the audience. This frame also resonates with mainstream tradition because of the almost mythic status of the United States as a place where hard work will accomplish the American Dream.

The second frame focuses on immigrant workers as victims of criminal employers who fail to obey the rule of law. This interpretive frame resonates with mainstream cultural narratives that seek to criminalize “new or pressing social challenges.” It does so by using “codes and symbols [that] not only form part of the mainstream culture . . . but [that] are also explicitly associated with dominant groups.” As “innocent victims of [actors] out of control,” this narrative also presents “no neutrals[] in the struggle between good and evil.” This frame can argue in favor of the greater good of workers generally, while de-emphasizing immigration status to make concepts more politically palatable.

The protagonists of the immigrant worker movement who seek to deploy these mainstream cultural narratives for legal advocacy consist of a varied group operating in a range of forums. In section A, the focus is on immigrant workers who, through public interest attorneys, file litigation to address workplace violations or petition for immigration status based on their exploitation. Section B discusses the coalitions of immigrant workers, community advocates, and public interest attorneys who have advocated with governmental agencies or legislative bodies to reform public policy. Finally, section C examines immigrant workers who have engaged in direct actions against employers in order to obtain legal redress. Protagonists have had to determine the extent to which a particular forum embraces mainstream cultural narratives and whether mainstreaming is the more viable option. While the following discussion provides a taxonomy about how different protagonists operate, it is worth noting that the movement sometimes engages in multifaceted strategies that include legal action, public policy reform,


32 STEWART ET AL., supra note 6, at 157.


34 DELLA PORTA & DIANI, supra note 6, at 76.

35 STEWART ET AL., supra note 6, at 68, 161–62.
and direct action, driven by a variety of protagonists that fall outside of these classifications.

A. Public Interest Attorneys and Their Clients Pursue Traditional Legal Remedies

With traditional legal remedies, immigrant workers face two obvious constraints derived from the dominant cultural values about immigrants. The first is that immigrant workers, despite their presence within the U.S. territorial borders, are not entitled to the full panoply of rights accorded to U.S. citizens. The second is that immigration law is firmly grounded in the need to restrict the unlimited influx of immigrant workers. Despite these constraints, public interest attorneys and their clients have continued to file traditional legal cases to advance the rights of immigrant workers. They have litigated and filed complaints with administrative agencies to address workplace violations and pursued immigration relief for workplace exploitation. The administrative and judicial forums that adjudicate such complaints have often constrained immigrant workers to mainstream narratives in order to be successful. As a result, immigrant workers have provided new societal images of themselves as hard workers who have otherwise been victimized by their criminal employers. By developing these cultural narratives about immigrant workers, public interest attorneys, along with their clients, have brought about an identity transformation of immigrant workers in the law—one that is both sympathetic and familiar to mainstream society.

1. Litigating Workplace Exploitation

A number of favorable court decisions for immigrant workers have embraced the interpretive frames of the knowing employer, the innocent victimized worker, or the universal worker. These decisions reflect an attempt by the immigrant worker movement to limit the holding of Hoffman Plastic Compounds, Inc. v. NLRB. The Court in Hoffman Plastic held that the National Labor Relations Board is

38 The term “public interest attorneys” is meant broadly to include those who work for nonprofits, take cases pro bono, or recover fees after prevailing in a legal case.
39 The focus herein is on claims that have been adjudicated by the courts, although there is robust work by public interest attorneys that involves interfacing with administrative agencies. See infra Part III.B.
40 See EYERMAN & JAMISON, supra note 20, at 166; see also Marouf, supra note 27, at 177 (discussing the “strategic repertoire” of shifting focus from immigrant to worker identity).
Board (NLRB) could not award an unauthorized worker with back pay as a remedy under the National Labor Relations Act because it was prohibited by the Immigration Reform and Control Act (IRCA). IRCA prohibits the hiring of immigrant workers who lack lawful authorization to work, like employee Jose Castro, who fraudulently obtained employment unbeknownst to the employer. \(^{43}\) Hoffman Plastic sent shock waves about the demise of the ability of immigrant workers to organize and assert their rights and has undoubtedly had some negative impacts. \(^{44}\)

Despite Hoffman Plastic, immigrant workers continue to use a variety of laws to obtain redress for workplace exploitation of immigrant workers, such as the Fair Labor Standards Act (FLSA), Title VII of the Civil Rights Act of 1964 (Title VII), the Trafficking Victims Protection Reauthorization Act (TVPRA), the Migrant and Seasonal Agricultural Worker Protection Act (MSAWPA), and various state equivalents. The balance of courts refuse to extend Hoffman Plastic to other laws impacting workers \(^{49}\) and continue to reaffirm the right of

\(^{42}\) Id. at 151–52.

\(^{43}\) Id. at 141.


unauthorized workers to access the courts to address their workplace exploitation based on unpaid wages,\textsuperscript{50} discrimination,\textsuperscript{51} and health and safety violations.\textsuperscript{52}

The interpretive frame of the culpable employer, in contrast to the innocent victim, has helped to establish the continued access of immigrant workers to the courts after \textit{Hoffman Plastic}.\textsuperscript{53} While immigrant workers may be unlawfully present, court decisions have focused instead on a narrative of “knowing” employers who engage in illegal conduct against workers while violating federal immigration law. In the context of FLSA coverage, where immigrant workers may seek those wages “actually earned,”\textsuperscript{54} courts further justify access to FLSA by


\textsuperscript{52} See Bollinger Shipyards, Inc. v. Dir., Office of Worker’s Comp. Programs, 604 F.3d 864, 879 (5th Cir. 2010); Madeira v. Affordable Hous. Found. Inc., 469 F.3d 219, 249 (2d Cir. 2006). The majority of states have held that unauthorized workers are entitled to workers’ compensation coverage, except for two state decisions that have restricted certain benefits based on immigration status. O’Donovan, \textit{supra} note 49, at 304–06; \textit{see also} Sanchez v. Eagle Alloy Inc., 658 N.W.2d 510, 514–16, 521 (Mich. Ct. App. 2003) (affirming coverage of unauthorized workers under the state workers’ compensation law, but denying wage-loss benefits for those who had obtained their jobs by use of false documents from the time that their illegal status became known); Reinforced Earth Co. v. Workers’ Comp. Appeal Bd., 810 A.2d 99, 108–09 & n.12 (Pa. 2002) (affirming coverage of unauthorized workers under the workers’ compensation law, but permitting suspension of benefits when the loss of earning power is caused by immigration status).

\textsuperscript{53} Courts arrive at these decisions for reasons apart from mainstream frames. Under the FLSA, for example, courts also consider the legislative history and statutory nature of FLSA, including its broad definition of employee. See Cunningham-Parmer, \textit{supra} note 36, at 1373–79; \textit{see also} Jin-Ming Lin v. Chinatown Rest. Corp., 771 F. Supp. 2d 185, 190 (D. Mass. 2011) (arguing the court has no discretion under FLSA to determine who is an employee).

\textsuperscript{54} The cases are numerous: \textit{see supra} note 50 and accompanying text. Courts also provide deference to the U.S. Department of Labor’s interpretation on the issue. See Zavala v. Wal-Mart Stores, Inc., 393 F. Supp. 2d 295, 324 (D.N.J. 2005); U.S. Dep’t of Labor,
rationalizing that employers have incentives to participate in illegal workplace conduct against workers who are in the United States with “the hope of getting a job [] at any wage.” These same employers cannot then turn around and receive immunity from the same law they have violated. In Solano v. A Navas Party Production, Inc., for example, the court rejected any argument that Plaintiff, as an “illegal immigrant,” could not recover his wages since “Defendants clearly knew of the Plaintiff’s immigration status as they paid him in cash and did not report his wages.” Courts allude to the inherent inequitable result of precluding an award against such a “knowing employer,” particularly noting scenarios when workers may have been “misled by their employer.” Professor Hiroshi Motomura has noted that courts engage in this “comparative culpability,” which justifies recognition of “the rights of an unauthorized worker even when such recognition might seem foreclosed.” Focusing on employer wrongdoing results in the rebalancing of culpability to shift the focus from the Hoffman Plastic “con-artist”


57 Chellen v. John Pickle Co., 434 F. Supp. 2d 1069, 1099, amended and superseded by 446 F. Supp. 2d 1247 (N.D. Okla. 2006); Singh, 214 F. Supp. 2d at 1061. While this emphasis on the “knowing employer” could potentially raise the stakes for unauthorized workers who—like Jose Castro—use false papers to work, no court so far has required that a worker prove employer wrongdoing beyond the nonpayment of wages to have an actionable FLSA claim. The court in Ulin v. Lovell’s Antique Gallery found that the plaintiff was entitled to relief under FLSA regardless of whether he used false documents to obtain the job. No. C-09-03160 EDL, 2010 WL 3768012, at *9 (N.D. Cal. Sept. 22, 2010). Professor Christine Cimini reviews workers’ compensation, tort, and product liability cases where the use of fraudulent documents by immigrant workers affected their ability to recover damages. Christine N. Cimini, Undocumented Workers and Concepts of Fault: Are Courts Engaged in Legitimate Decisionmaking?, 65 Vand. L. Rev. 389, 412–14 (2012). It is noteworthy, however, that these cases are firmly in the minority. Compare id. at 412 nn.99–100 (citing cases where fraudulent immigration documents prohibited employees’ ability to collect worker’s compensation benefits), with supra note 52 and accompanying text (cases where courts have held that unauthorized workers are entitled to workers’ compensation coverage).

employee to the exploitative employer who might have real incentives to follow the law—be it FLSA or IRCA—if it is actually enforced.60

Cases that use the innocent victim narrative have also managed to facilitate the litigation of immigrant workers’ legal claims. Immigrant worker litigants have largely won protective orders to prevent employers who seek to use immigration status as a vehicle to intimidate litigants and sidetrack litigation.61 Immigrant workers are often reluctant to use litigation strategies because of the fear of retaliation for asserting their rights.62 Courts have largely rejected employers’ attempts to justify the relevancy of immigration status by finding it largely irrelevant,63 especially as to the credibility of immigrant workers as witnesses.64 In an effort to rebalance the culpability of actors, courts have noted that immigrant

60 Cunningham-Parmeret, supra note 36, at 1391–92.
62 There are a variety of factors that make immigrant workers reluctant to proceed with litigation. See Jennifer J. Lee, Private Civil Remedies: A Viable Tool for Guest Worker Empowerment, 46 Loy. L.A. L. Rev. 31, 72–73 (2012). A protective order, in and of itself, will often not change that dynamic. Once immigrant workers decide to proceed with litigation, however, a protective order can be helpful to protect against employer retaliation.
workers, many of whom “are willing to work for substandard wages in our economy’s most undesirable jobs,” would experience an in terrorem effect that would permit countless acts of illegal and reprehensible conduct to go unreported.\textsuperscript{65} In \textit{David v. Signal International},\textsuperscript{66} allowing inquiry into plaintiff’s status was “tantamount to a categorical ruling precluding foreign nationals from any protection against the type of abuses alleged.”\textsuperscript{67} Courts have also used the innocent victim frame—particularly for immigrant workers who may be fearful, non-English speaking, and unaware of their rights—to facilitate immigrant worker access to FLSA collective actions.\textsuperscript{68} In \textit{Leon v. Pelleh Poultry Corp.},\textsuperscript{69} the court justified the equitable tolling of wage claims under FLSA because it found that “immigrant Latino manual workers routinely working longer than ten hours per day and forty hours per week” did not have the opportunity to learn about their rights.\textsuperscript{70} In \textit{Suarez v. S & A Painting & Renovation Corp.},\textsuperscript{71} the court authorized the mailing of an opt-in notice to coworkers under the collective action mechanism of FLSA, in part, based on the immigrant class who “did not know enough to complain” and may have been unaware of their rights to overtime pay.\textsuperscript{72}

Further, the interpretive frame of the universal worker has also resonated with the courts by connecting the legal plight of immigrant workers to the greater good of all workers. Litigants may be more successful if they advocate policy justifications that consider the impact on workers generally, rather than just on the litigants before the court. Courts, for example, rationalize that denying wage and hour protections for immigrant workers has the perverse result of harming citizen workers by encouraging employers to engage in illegal hiring of unauthorized workers, contrary to IRCA.\textsuperscript{73} According to Professor Motomura, this focus on “citizen proxies” can emphasize “the practical ties between unauthorized migrants and other persons.”\textsuperscript{74} Courts have also discussed policy justifications that look at the impact of the legal claims by immigrant workers on the workforce more

\textsuperscript{65} \textit{Rivera}, 364 F.3d at 1064–65; see also \textit{Avila-Blum}, 236 F.R.D. at 191 (stating that the disclosure of immigration status would discourage illegal alien workers from litigating unlawful discrimination and other employment-related claims).
\textsuperscript{66} 257 F.R.D. 114 (E.D. La. 2009).
\textsuperscript{67} \textit{Id.} at 125.
\textsuperscript{68} \textit{Gortat v. Capala Bros.}, No. 07 Civ. 3629(ILG)(SMG), 2012 WL 1116495, at *3 (E.D.N.Y. Apr. 3, 2012); \textit{Ansoumana v. Gristede’s Operating Corp.}, 201 F.R.D. 81, 86 (S.D.N.Y. 2001).
\textsuperscript{70} \textit{Id.} at *3.
\textsuperscript{71} No. 08-CV-2984 (CPS)(JO), 2008 WL 5054201 (E.D.N.Y. Nov. 21, 2008).
\textsuperscript{72} \textit{Id.} at *2.
\textsuperscript{74} Motomura, supra note 59, at 1753–54.
generally. The Ninth Circuit in *Rivera v. NIBCO*\(^{75}\) emphasized the underlying purpose of private actions brought under Title VII—“to deter future discrimination and vindicate national policy of the highest priority,” which should equally apply to “victims of invidious discrimination” who are immigrant workers.\(^{76}\) In *Madeira v. Affordable Housing Foundation, Inc.*\(^{77}\) the court not only emphasized that “both the illegal employment relationship and the personal injury” were the product of wrongdoing by others but also that a failure to cover immigrant workers with state health and safety laws would seriously undermine the state’s significant interest in promoting workplace safety.\(^{78}\) By framing the plight of immigrant workers as more universal, litigants are able to provide some courts, which are willing to consider the importance of policies impacting workers more generally, with a rationale to find common ground with the mainstream.

2. *Immigration Law Remedies*

Immigration law is another realm where the very limited benefits available are allocated based on dominant cultural values such as family relationships, high-skilled professions, and clean criminal histories.\(^{79}\) In particular, the increased intersection of immigration with criminal law\(^{80}\) has largely resulted in limiting the rights of immigrant workers by increasing the removal of immigrants. While there are very few avenues for low-wage immigrant workers to petition for immigration status through their employer, immigrants may petition for immigration status based on certain kinds of victimization. By focusing on these limited openings, public interest attorneys and their clients—particularly when having to cooperate with Immigration and Customs Enforcement (ICE), the FBI, or local law enforcement—have been essentially constrained to deploying a cultural narrative about criminal employers who victimize immigrant workers in order to be successful. The use of these cultural narratives, however, has managed to expand

\(^{75}\) 364 F.3d 1057 (9th Cir. 2004).

\(^{76}\) Id. at 1068.

\(^{77}\) 469 F.3d 219 (2d Cir. 2006).

\(^{78}\) Id. at 237, 247–48.


the conceptual framework of these laws so that they apply to a broader number of immigrant workers.81

The immigration remedies available to immigrant workers are U visas and T visas, and prosecutorial discretion. For a U visa, a petitioner must show that they are a victim of an enumerated crime, which includes assault, trafficking-related crimes, perjury, obstruction of justice, and extortion.82 For a T visa, a petitioner must show they are a victim of a severe form of human trafficking, which is defined as “[t]he recruitment, harboring, transportation, provision, or obtaining of a person for labor or services through the use of force, fraud, or coercion for the purpose of subjection to involuntary servitude, peonage, debt bondage, or slavery.”83 For prosecutorial discretion, an immigrant worker who is in removal proceedings must show that they are involved in a workplace dispute and are not otherwise considered to be a threat to public safety, national and border security, and the integrity of the immigration system.84

While each of these remedies has varying requirements, they all require the petitioner to persuade decision makers that the petitioner qualifies for immigration relief. In order to qualify for a U visa, the applicant must receive certification from a “Federal, State, or local law enforcement official,” “a Federal or State judge,” or “Federal, State, or local authorities investigating or prosecuting criminal activity.”85 A T visa does not require a similar certification, although the applicant must show compliance “with any reasonable request for assistance in the Federal, State, or local investigation or prosecution” and that they have at least sought

81 Federally funded legal services organizations are able to represent individuals who qualify for U and T visas as an exception to the general prohibition on representing immigrant workers without lawful immigration status. Aliens Eligible for Assistance Under Anti-Abuse Laws, 79 Fed. Reg. 21,872 (Apr. 18, 2014) (to be codified at 45 C.F.R. § 1626.4).
Prosecutorial discretion requires the agreement of federal prosecutors who are pursuing the immigrant worker’s removal.87

A successful case, therefore, involves using the cultural narrative of the criminal employer and the innocent victim to convince decision makers to support an application for immigration relief. The need for such an innocent victim narrative may be magnified when working with law enforcement agencies versus working with agencies that have more traditionally focused on labor violations, such as the Equal Employment Opportunity Commission (EEOC) and the Department of Labor.88 Further, these narratives have been used to push the boundaries of victimization to include immigrant workers who would otherwise not be eligible for relief. For the U visa, such advocacy has sought to expand the conception of workplace exploitation as equivalent to crimes enumerated by the U visa statute.89

The crimes of extortion or obstruction of justice, for example, may cover retaliatory threats of deportation for the nonpayment of wages,90 while the crimes of perjury and fraud in foreign labor contracting may cover those who were recruited with false promises from abroad.91

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87 In fact, although the program was brought out with much fanfare, it has largely been a disappointment for immigrant worker advocates, as the numbers of cases that have been granted discretion are miniscule and dwindling. See Paloma Esquivel, Deportation Case Closure Rise, but Backlog Continues, L.A. TIMES BLOG (July 25, 2012, 4:03 PM), http://latimesblogs.latimes.com/lanow/2012/07/deportation-cases-closed.html, archived at http://perma.cc/D7B3-9MF8.
89 Eunice Hyunhye Cho, formerly at the National Employment Law Project, tracked the work of advocates who use U visas for exploited immigrant workers. E-mail from Eunice Hyunhye Cho, Staff Att’y, Nat’l Emp’t Law Project (July 8, 2013 1:12 MST) (on file with Utah Law Review). In Garcia v. Audubon Communities Management, LLC, for example, advocates were able to get the judge in a civil lawsuit to certify Plaintiffs for U visas for the crimes of involuntary servitude and trafficking based on their allegations of exploitation by their employer, which included consistent underpayment of wages and threats to evict them from housing or call law enforcement when workers complained about the lack of payment. Civil Action No. 08-01291, 2008 WL 1774584, at *1–4 (E.D. La. Apr. 15, 2008).
90 In Colorado, advocates used the crime of extortion to cover situations where employers threatened immigrant workers with deportation or calling immigration authorities in order to withhold wages from them. 8 U.S.C. § 1101(a)(15)(U)(i)(ii) (2012).
T visa advocacy has focused on arguing for a more expansive conception of coercion, by reinforcing that physical force is unnecessary for the crime of forced labor and a victim’s particular situation is relevant. 92 Professor Kathleen Kim discusses the legal development of what she calls “situational coercion,” which “evaluates all the circumstances surrounding the alleged trafficking scenario, paying special attention to power inequalities and the workers’ individual characteristics that may render them vulnerable to exploitation.” 93 Around the country, public interest attorneys have used antitrafficking coalitions to increase the receptivity of federal law enforcement agencies to labor trafficking issues, by educating them about the multiple ways in which immigrant workers can be victimized. 94

The reality is, however, that many immigrant workers will still fail to qualify for these immigration remedies because they cannot otherwise show, despite having suffered workplace exploitation, that the employer’s behavior was criminal for purposes of immigration law. Aware of such limitations, advocates are currently seeking legislative reform to increase the kinds of criminal activity tied to workplace abuse or retaliation against immigrant workers that would make them eligible for U visas. 95 In the meantime, federal agencies remain receptive to these claims by immigrant workers, despite the hostile climate of immigration enforcement. 96 Using the cultural narrative of the criminal employer and the victimized worker, public interest attorneys, along with their clients, can continue to expand the conceptual framework of these laws in order to maximize the availability of immigration relief for immigrant workers.


94 Telephone Interview with Patricia Medige, Former Co-Chair, Freedom Network (May 29, 2014) (on file with Utah Law Review).

95 Title III of the Border Security, Economic Opportunity, and Immigration Modernization Act has incorporated the POWER Act provisions. S. 744, 113th Cong. §§ 3101, 3201 (as passed by Senate, June 27, 2013).

B. Coalitions Reform Public Policy

Beyond the anti-immigrant climate created by federal, state, and local policies, immigrant workers also suffer from the general decline of workplace standards for low-wage workers and the general neglect of governmental agencies providing oversight of low-wage industries. These policies reflect the dominant cultural trends of the past decades. As such, workplace exploitation abounds for immigrant workers. With the recognition that effective public policy advocacy provides an opening for direct change, coalitions of immigrant workers, community advocates, and public interest attorneys have come together to affirmatively create local legislative changes and advocate for change with local agencies. This opening provided by elected officials and agency personnel is largely dependent on locality. It is also constrained by a governmental culture that can contain actors that are both anti-immigrant and probusiness. In order to succeed, therefore, coalitions have often chosen to embrace cultural narratives that focus on the criminality of employers, while emphasizing the social identity of the hard worker. By emphasizing the dichotomy between the evil employer and the virtuous victimized worker, the symbolic struggle aligns with the mainstream value of fighting crime. By promoting the identity of the hard worker and downplaying immigration status, coalitions manage to create a familiar character within American mythology while creating a connection more broadly across all low-wage workers. Coalitions, therefore, deliberately use these frames to strategically persuade decision makers, who are assessing public policy alternatives, to elect the option that resonates with mainstream values.

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97 Rebecca Smith, *Human Rights at Home: Human Rights as an Organizing and Legal Tool in Low-Wage Worker Communities*, 3 STAN. J. C.R. & C.L. 285, 288–89 (2007); see also Bernhardt et al., *supra* note 19, at 13, 17–18 (describing how the decline in government enforcement from 1975 to present has negatively impacted low-wage workers); Munger, *supra* note 8, at 672–75 (noting how governmental policies that have reduced regulation and downsized the welfare state have resulted in the convergence between immigrants and the indigenous working poor in their exclusion from social citizenship).

98 The use of community advocates refers to a wide range of staff from community-based organizations, such as immigrant rights organizations, unions, worker centers, and faith-based institutions.

99 This section focuses on advocacy work with domestic agencies. As such, it does not cover the advocacy with foreign consulates in the United States that provide support to immigrant workers who are their nationals. See SHANNON GLEESON, *CONFLICTING COMMITMENTS: THE POLITICS OF ENFORCING IMMIGRANT WORKER RIGHTS IN SAN JOSE AND HOUSTON* 15 (2012); Peter J. Spiro, *The (Dwindling) Rights and Obligations of Citizenship*, 21 WM. & MARY BILL RTS. J. 899, 910 (2013).


In their public policy campaigns, coalitions have focused on a variety of issues that plague immigrant workers, including wage theft (i.e. the nonpayment of wages) and the misclassification of workers. The prevalence of wage theft violations among low-wage immigrant workers is enormous—a recent report found that more than two-thirds of low-wage workers surveyed in New York, Chicago, and Los Angeles had experienced a pay violation in the past workweek. Of the thousands of workers surveyed for this report, seventy percent were foreign-born workers. The misclassification of low-wage workers is on the

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105 ANNETTE BERNHARDT ET AL., BROKEN LAWS, UNPROTECTED WORKERS: VIOLATIONS OF EMPLOYMENT AND LABOR LAWS IN AMERICA’S CITIES 5 (2009). Forty-three percent of the workers surveyed had experienced retaliation after having tried to form a union or complained about a workplace issue. Id. at 3.

106 Id. at 14.
rise with employers seeking to exclude workers from employment protections. By misclassifying workers as independent contractors, larger companies try to insulate themselves from liability as employers. Employers may also establish a structure where the workers appear to be solely employed by a contractor, staffing, or temporary leasing agency. Historically, this contingent structure was commonly found in agricultural work and the garment industry, but in recent decades is expanding to other industries.

Across the country, coalitions have campaigned around the issue of wage theft by advocating for local legislative changes. They emphasize that immigrant workers are necessary to the U.S. economy and that they seek to better their lives, as everyone else, through honest hard work. One worker stated, “It’s hard enough to get by in this economy, [but] it’s shameful that employers would steal...
money from our families and our children.”  

Another recounted, “I worked hard and did my part but my employer didn’t want to pay what he owed me. It was really hard on my family; I could barely buy food and clothes for my kids.” By focusing on the criminality of employers, campaigns have increased the political salience of the mistreatment of these workers by fitting neatly with the American appetite to fight crime. Coalitions have transformed wage theft from a traditionally civil issue of nonpayment of wages into a criminal act. Language choice, by describing the way to see the world, is a well-known strategy in political communication because the control of language is “more likely to successfully translate belief into policy.” In New York, one of the wage theft bill sponsors would begin public appearances by stating, “There is a crime spree in this neighborhood.” The messaging in New York was that law-abiding employers have nothing to fear where, in fact, criminal employers are gaining an unfair competitive advantage over lawful employers. In Miami, ethical employers were approached to provide individual letters of support for the ordinance against wage theft. Coalitions have also framed the issue of misclassification of workers as payroll fraud against the government. In Illinois, for example, passage of the Employee Classification Act created civil penalties for misclassifying employees in the construction trades and created a private right of action by aggrieved employees. Similar to the arguments made in favor of preventing wage theft, proponents of regulating misclassification argue that law-abiding employers are disadvantaged by their counterparts who fail to play by the rules, resulting in fraud against the government. These lost governmental revenues are especially salient in times of local and state budget crises.


114 See Axt et al., supra note 110, at 156. The terminology of wage theft, for example, is a relatively recent phenomenon, where “a review of major newspapers and print sources reveals that the term ‘wage theft’ did not appear at all in the press until 2005.” Theodor, supra note 110, at 22. In the span of just six years, news stories using this frame have increased from eight in 2005 to nearly 200 in 2010. Id.


116 Axt et al., supra note 110, at 156.

117 Id.

118 BOBO, supra note 110, at 220.

119 NELP, Winning Wage Justice, supra note 110, at 85.

120 Employee Classification Act, 820 ILL. COMP. STAT. 185/1–185/999 (2008).

121 BOBO, supra note 110, at 238–39; Vaughn, supra note 107, at 144.
Coalitions have used these same narratives to actively advocate with local governmental agencies to improve enforcement policies. Local agency personnel become more sympathetic toward immigrant workers when they can show that their employer is comparatively engaged in serious wrongdoing. In New York, Make the Road New York, in collaboration with the Retail, Wholesale, and Department Store Union, has partnered with the New York Department of Labor in targeted-enforcement efforts. Professor Nik Theodore describes this collaboration as “‘modeled after neighborhood watches that are designed to reduce street crime, this program—New York Wage Watch—targeted commercial districts for workplace sweeps, sending investigators into worksites to check for violations, and educating employers, workers, and neighborhood residents about employment laws.’” By targeting the worst actors in certain industries, this initiative focused on a more systematic method of collecting wages while also improving overall compliance and strengthening deterrence.

The Workers Defense Project, formerly Casa Marianella, worked with the Austin Police Department and the local county attorney’s office to file criminal charges against employers who, through the crime of theft of service, have demonstrated an “intent not to pay” wages. This collaboration provided the local community with serious leverage in convincing employers that unpaid wages carried serious consequences. Most recently, other cities in Texas are attempting to replicate the use of criminal charges against employers who fail to pay wages, particularly given the recent state amendment to close the loophole for employers who have made a partial payment.

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123 THEODORE, supra note 110, at 18–19.

124 Id. at 19.

125 Id.

126 Workers Defense Project (WDP) is a membership-based organization that empowers low-income workers to achieve fair employment through education, direct services, organizing, and strategic partnerships. Who We Are, WORKERS DEF. PROJECT http://www.workersdefense.org/about-us/, archived at http://perma.cc/7CZF-BJXY (last visited Aug. 7, 2014).


128 FINE, supra note 110, at 88.

At times, these coalitions have deemphasized immigration status to make concepts more politically palatable by deliberately using an interpretative frame that fits all workers. Wage theft campaigns have managed to reshape the public imagination about immigrant workers and frame their exploitation within the greater context of the government’s failure to protect all low-wage workers. The passage of laws addressing immigrant worker exploitation has occurred, in part, because coalitions have come together with labor unions to push such legislation. In New York, the ability to project unanimous labor support was an important factor as unions had historical ties to legislative leaders that immigrant worker groups did not have at that time. In Miami, while the coalition consisted of unions such as Service Employees International Union (SEIU) and UNITE HERE, it reached out to the southern American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) to gain even broader labor support. In Washington, Casa Latina joined the Washington State Labor Council to more effectively press for governmental change. In the 1990s, there was a marked shift by unions to affirmatively recruit and organize immigrant workers based on the recognition of shared interests and the need to revive life in declining unions. While the support of labor has been crucial for building power, it has also provided these coalitions with the broader stamp of legitimacy by reframing the issue away from immigrants to its impact on all workers.

Coalitions have framed their campaigns to resonate with mainstream culture, whether it is by transforming the social identity of immigrant workers, minimizing immigration status by focusing on the greater good of all workers, or seeking to

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criminalize these “new” social challenges. They do so by using mainstream symbols that are familiar to dominant groups making decisions about public policy. Campaigns are complicated organisms so that without deconstructing the unique and localized political context, it may be hard to tell exactly how any one accomplishment was achieved. A collective examination across these diverse campaigns has revealed, however, that coalitions have consistently used these common cultural narratives in order to take advantage of the limited opportunities that have been created by the dominant cultural framework. Thus, the mainstreaming of immigrant workers, which has become reflected in reformed public policies, plays a role in advancing immigrant workers’ rights.

C. Direct Actions by Immigrant Workers

Given the limitations created by traditional venues such as the courts, administrative agencies, and the legislature, immigrant workers have sometimes turned to direct actions. Immigrant workers may picket, protest, or take other highly visible action to highlight the issue of workplace exploitation. Through these actions, immigrant workers are forced to choose among the interpretive frames that would most effectively achieve their goals. Many times immigrant workers take this opportunity to provide cultural narratives that shame employers by exposing the ways in which they defy the rule of law, while shifting the narrative from immigrants as criminals to immigrants as hard workers employed in undesirable jobs. Both of these narratives become almost necessary in altering perceptions of a mainstream audience, whether it is employers, consumers, or the public at large. These narratives tell a story, which becomes a primary means of creating identification between the narrator and audience. By using these cultural narratives, immigrant workers are actively reshaping the legal practices of employers.

Immigrant workers capture the attention of employers with lively pickets that target foot traffic, impact commercial reputation, and garner media coverage. One group picketing in an employer’s residential neighborhood used a flyer recounting the worker’s story of exploitation: “[S]he suffered a variety of abuses including working without payment, working without meal or rest breaks, being transported from one client’s home to another in dangerous vehicles, being forced to clean homes on her knees and use pure bleach without any safety equipment,

136 Forman, supra note 33, at 346–47.
137 DELLA PORTA & DIANI, supra note 6, at 76.
138 See GLEESON, supra note 99, at 17 (describing the concept of “political field,” which requires an examination of an individual’s actions in relation to other actors and the context in which they occur).
139 STEWART ET AL., supra note 6, at 55, 250.
140 FINE, supra note 110, at 81–82.
and suffering regular verbal harassment and humiliation by the [employer]." \(^{141}\) Another flyer distributed by picketers in front of the employer’s business stated: “We worked 10–12 hours per day, in dirty, unsafe factories.” \(^{142}\) After an employer refused to comply with the court order, immigrant workers picketed an employer’s house with highly visible copies of the judgment that had been enlarged. \(^{143}\) Instead of the foreignness of workers, these actions emphasize the foreign nature of unscrupulous employers conducting business in an otherwise “lawful” society of commerce. \(^{144}\)

Direct actions are especially suitable at revealing the criminality of employers by exposing the secrecy that typically accompanies employment relationships in low-wage industries. \(^{145}\) The Domestic Workers United (DWU) has been at the forefront of exposing the privacy of domestic work and the unlawful coercion that can occur behind closed doors for immigrant workers who provide services, such as childcare, housekeeping, or elder care. \(^{146}\) DWU has engaged in regular gatherings in front of employer homes in demonstrations of shame. \(^{147}\) In one action, DWU held press conferences, picketed, and drew attention to the plight of an immigrant worker who “cared for a disabled child while also cleaning, cooking, ironing, sweeping, and hand washing clothes for the entire household” and worked “six days a week for less than $2.00 an hour and was forced to sleep in a sewage-filled basement.” \(^{148}\) The renowned Fair Food Program by the Coalition of Immokalee Workers (CIW) has similarly succeeded in publicly exposing how market mechanics manage to exploit farm workers. \(^{149}\) Because of CIW’s historic work in uncovering six human trafficking operations in Florida, CIW continues to link their Fair Food Program to slavery where its flyers remind the public that in

\(^{142}\) Id. at XVII.
\(^{143}\) Fine, supra note 110, at 81.
\(^{144}\) Ironically, the “evil” employers are often foreign themselves, which raises questions both about the difficulty of enforcing laws against mainstream employers, see Lee, supra note 62, at 48–49, and the kind of message that is sent about worker exploitation by foreign cultures, see Leti Volpp, Migrating Identities: On Labor, Culture, and Law, 27 N.C. J. Int’l L. & Com. Reg. 507, 510–11 (2002).
\(^{145}\) See Theodore, supra note 110, at 13.
\(^{147}\) Id. at 427.
\(^{148}\) Id. at 428.
\(^{149}\) See Greg Asbed & Sean Sellers, The Fair Food Program: Comprehensive, Verifiable and Sustainable Change for Farmworkers, 16 U. Pa. J.L. & Soc. Change 39, 43–45 (2013). The CIW’s movement is imbued with basic human rights principles for farm workers. Id. at 48. To the extent that CIW is targeting other progressive groups—ethical consumers, students, and faith-based communities—human rights as an interpretive frame can serve well to recruit these groups to their cause. Id. at 43.
the most extreme cases, workers have “been forced to labor against their will through the use or threat of physical violence.” Companies that refuse to join the Fair Food Program are failing to “ensure slavery is not in its supply chain.” The terminology of “slavery” is a perfect example of how a movement transforms perceptions with a slogan that “encapsulate[s] an intolerable situation in a few striking, memorable words.”

Direct actions may be used in conjunction with litigation or other legal efforts. The Restaurant Opportunities Centers United (ROC), which organizes restaurant workers (some of them immigrant workers), uses direct action in combination with litigation and public policy reform to advance the rights of such workers. It uses “workplace justice” campaigns to hold “low-road” actors publicly accountable. In one such campaign, workers engaged in weekly protests for its campaign against the Andiamo chain of restaurants in Michigan. Andiamo was a particularly bad actor that was exposed for failing to pay wages, engaging in national origin discrimination (including calling its workers “wetbacks”), and acting in a retaliatory manner. Their direct action strategy was accompanied by federal litigation and complaints filed with the NLRB. As a
result of these efforts, the workers ultimately reached a resolution of “innovative anti-discrimination measures, complaint-resolution procedures, training, hiring, break, uniform and equipment policies, along with translation of employee materials for non-English speakers.” These multifaceted efforts may represent the best integration of legal strategy with grassroots movements.

Given the constraints of traditional legal strategies, direct actions are sometimes the only available way to advance the legal rights of workers. Through these direct actions, immigrant workers have often embraced mainstream cultural narratives through storytelling, transcending the negative stereotypes of immigrants while focusing on the criminal acts of the employer. This storytelling affects public perceptions and brings about changes in thinking, feeling, and acting. Employers’ legal practices may begin to respond to such cultural narratives. By using these cultural narratives, immigrant workers have communicated a message that connects to a mainstream audience and have helped to establish themselves as serious and sympathetic agents of change.

III. ALTERNATIVES TO MAINSTREAMING

There are alternative approaches to mainstreaming to choose from. In an ideal world, a more transformative or radical approach from the outside alone would persuasively alter the hostile environment for immigrant workers. For this reason, it is worthwhile to examine alternative cultural narratives that provide for consciousness raising and a more comprehensive vision for addressing fundamental structural inequities. The movement sometimes frames immigrant workers as global citizens or as universal rights holders. In the alternative, an even more radical cultural narrative could be produced from acts of civil disobedience.

159 Id. The Andiamo campaign also involved reaching out to larger groups, such as United Auto Workers, who supported the campaign as a struggle by workers regardless of “industry or union membership.” Nathan Skid, Andiamo Restaurant Group Reaches Agreement in Worker Dispute, CRAIN’S DETROIT BUS. (Mar. 1, 2011, 5:18 PM), http://www.craindetroit.com/article/20110301/free/110309994/andiamo-restaurant-group-reaches-agreement-in-worker-dispute, archived at http://perma.cc/CCH9-U2X2.


162 See Delgado, Rodrigo’s Homily, supra note 26, at 1276; Stewart et al., supra note 6, at 20.

that seek to reject the existing political and social order responsible for the exploitation of immigrant workers. While these alternatives may provide for a normative vision for the movement, they must also be considered within the existing framework where immigrant workers lack traditional political power. Given this significant reality for immigrant workers who are roused to fight and win, they may ultimately be forced to embrace aspects of mainstreaming strategies to succeed.164

Many scholars have explored ways to address the inherent contradiction between the employment of immigrant workers and the failure, based on their lack of immigration status, to accord them equal rights. Some proposals conceive of citizenship rights beyond the territorial boundaries of the United States. Professor Jennifer Gordon offers a new immigration status of “transnational labor citizenship,” which would entitle the holder to come and go freely between the sending country and the United States, and to work in the United States without restriction.”165 Professor Linda Bosniak suggests a universal citizenship that extends beyond the boundaries of a nation-state.166 Others propose the use of international law as a way to conceive of immigrant workers as universal rights holders. For instance, Professor Ruben Garcia advocates for the use of international human rights in framing immigrant worker rights.167 In fact, these proposals, in many respects, represent the normative ideal for immigrant workers. The cultural narrative of the universal rights holder, for example, serves as a rallying cry for internally organizing workers themselves because it provides individuals with a sense of empowerment as being endowed basic rights as human beings.168 To the extent that movements work on these transformative possibilities, they provide important counter narratives to the mainstream culture by raising consciousness.

These interpretive frames are not dissimilar to the mainstreaming tactics in that they also create a narrative that seeks to be inclusionary of immigrant workers into mainstream society. The difference, however, is that the use of international

164 See Frances Fox Piven & Richard A. Cloward, Poor People’s Movements: Why They Succeed, How They Fail 36 (1977).
166 See Linda Bosniak, Universal Citizenship and the Problem of Alienage, 94 NW. U. L. Rev. 963, 981 (2000); see also Núñez, supra note 37, at 870 (discussing a postterritorial approach to immigrant workers where their rights accorded in the employment sphere are based on membership rather than the immigration status of workers).
law framing as a cultural narrative has generally not persuaded mainstream institutions to help move reform efforts forward.169 This is because the universal rights holder frame has generally failed to resonate with the values of mainstream culture, which diverge from international human rights norms.170 Further, any interpretive frame about universal citizenship lacks widespread appeal, based on the extremely contentious debate about the comparatively modest proposals to legalize some immigrants. Recent legislation proposed by Congress is being exacted at a substantial price, which is intended to ensure that lawful status is earned as an entitlement.171 Those who cannot qualify for such status in the first instance will be left vulnerable to become part of the new underclass of immigrant workers. Further, the realization of citizenship in and of itself will not solve many of the ills faced by immigrant workers.172

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171 The bill requires that those with registered provisional immigrant (RPI) status maintain a more or less solid work trajectory for ten years to earn lawful permanent residency (LPR). S. 744, 113th Cong., § 2102 (as passed by Senate, June 27, 2013). This requirement creates a potentially exploitative dynamic between employers and immigrant workers desperate to hold on to their jobs at any price. RPIs, who are low-wage workers, will have difficulty meeting the minimum income requirements to show that they will not become a “public charge” to qualify for LPR. Id. §§ 2101, 2323. Further, RPIs are ineligible for any benefits, including access to affordable health insurance. Id. §§ 2101–2102.

As an alternative, movements can choose a more radical cultural narrative to challenge mainstream institutions. In the United States, the somewhat fragmented Occupy Wall Street movement has taken on the cause of immigrant workers, finding a common theme of exploitation by the one percent. The movement has garnered international attention while engaging in actions ranging from civil disobedience to more combative tactics that have led to clashes with the police.

In Brazil, workers who were furious about living and working conditions set fire to the worksite during a twenty-six day strike at the Jirau Dam. While dam workers have won some concessions from prior strikes, the most recent uprisings have been attributed to “vandals,” resulting in the arrival of military police to keep order and to prevent discouraged workers from quitting.

These more radical actions can bring attention to an intolerable situation. The problem is that they can be written off by the mainstream as radical or criminal elements. At times, unlawful acts alone have been shown to thwart a movement, while an approach that is conducted within the established rules of the game may more easily gain an audience. They also carry risks to the participants, which can include the imposition of criminal charges and deportation for immigrant workers. Immigrant workers may recognize their economic power as workers, although the ability to wield such power to affect labor market dynamics may be complicated by their immigration status as well as the underlying structure of employment relationships for low-wage workers.

The 2006 immigrant marches raised the possibility of mass resistance, but have yet to be replicated on that sort

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176 See STEWART ET AL., supra note 6, at 74, 235–37.


178 FINE, supra note 110, at 257–58; Moody, supra note 135, at 155.
of scale. The rise of contingent work and subcontracting among immigrant workers, as among all low-wage jobs, makes the efficacy of stopping production less realistic, unless it otherwise resembles a fictionalized universe depicted in the film *A Day Without a Mexican*. To the extent that there are immigrant workers who are willing to engage in even more radical tactics, they should continue to do so as such grassroots uprisings not only contribute diverse counter narratives in the public discourse but also embolden other immigrant workers into political action. The vast majority of immigrant workers, however, will disfavor such strategies because they do not wish to jeopardize the lives they have built for themselves and their families in the United States. It is also unclear that the use of coercive tactics alone against the dominant class is a winning strategy to convince the mainstream that change is necessary to advance the rights of immigrant workers.

Given the limited resources available to create, organize, and maintain social movements, the pragmatic question becomes, therefore, how to develop a strategy that advances rights within the current political reality. A consistent cultural narrative is that immigrants are people who will not and cannot become “American.” They not only lack full political citizenship but also experience outright prejudice created by anti-immigrant hostility. As a result, the reality for immigrant workers is that they live as subordinated members of U.S. society. As outsiders, immigrant workers practically need mainstream narratives to transform their situation into a social or political problem for the dominant class. The development of immigrant worker rights’ usually becomes possible not because of any local consensus about the normative ideals associated with universal citizenship or human rights but rather based on the movement’s ability to construct cultural narratives to address political realities.
politically unpopular group with little political voice. Working within established institutions such as the courts, administrative agencies, media, and legislature, therefore, often becomes a better way to address political realities.

While the focus on the use of law, particularly on individual legal rights, could be equated with accepting the unjust hierarchical social structure, it provides immigrant workers with a realistic opportunity to address their subordination maintained by the mainstream. Outsiders, like immigrant workers, cannot so easily reject working within the contours of the system as legal rights provide them with tangible gains to address their condition. While identifying harms created for immigrants who seek to attain mainstream “respectability” may be helpful, it fails to acknowledge that immigrants themselves may seek to be respected and understood within U.S. society. Nor do such critiques about immigrants seeking conformity with U.S. society ultimately offer a practical alternative, short of a complete transformation of the existing political and social order. Addressing legal rights incrementally with an eye towards political ends may be preferable to a wholesale rejection of the existing order with radical or transformative strategies, if a more radical approach will likely result in failure. Depending on the particular forum, locality, or goal, alternative strategies that are more transformative or radical may run alongside of or may even be preferable to mainstreaming. An approach that is conducted within the established rules of the game, however, is most commonly what is required by the constraints of the mainstream cultural narratives, providing the potential to change the situation of immigrant workers.

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186 See MINDA, supra note 18, at 115 (“The goal of such work was to illustrate how legal doctrine, as a manifestation of the ideology of liberalism, contributed to an unjust, hierarchical social structure.”).


189 See, e.g., Monisha Das Gupta, Rights in a Transnational Era, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP, supra note 161, at 402, 419 (arguing for an abandonment of the discourse of civil rights and citizenship and engaging in a “thoroughgoing and historicized analysis of current forms of colonialism that gird the subjugation and displacement of indigenous people and migrants”).


191 STEWART ET AL., supra note 6, at 235–37. Even with direct actions, immigrant workers are careful to confine their persuasive efforts to actions that are protected by the First Amendment. See, e.g., SMITH, supra note 141, at xix–xx (discussing tips for picketing at a private business or home).
IV. RESPONSES TO THE PERILS OF MAINSTREAMING

How should the immigrant worker movement manage the tradeoffs raised by mainstream cultural narratives? The perils of mainstreaming are well known—they include the creation of disadvantaged out-groups and group-based stereotypes. The strong identification with mainstream norms can also become an obstacle limiting the capacity to create more structural changes. The various forums where immigrant workers seek to advance their rights, such as the courts, administrative agencies, and legislatures, vary in the extent to which they are wedded to the dominant cultural framework. When immigrant workers are forced to embrace mainstreaming in these forums, the immediate benefits are more appreciable and hold promise to help empower and build the movement of immigrant workers. A closer examination of the costs helps to clarify the risks for immigrant workers, community advocates, and public interest attorneys. The way for movements to manage the use of mainstream cultural narratives is to proceed “with their eyes open”—where protagonists construct a more thoughtful strategy that seeks to minimize the costs. They can do so by focusing on connections between similarly subordinated groups, even those with different agendas, to collectively challenge underlying structural inequities that help maintain a normative vision for the movement.

The public narrative of the iconic hard-working immigrant can create a class of outsiders who are neither sympathetic nor any familiar embodiment of mainstream values. The interpretive frame of the hard-working immigrant worker is the counterpoint to the lazy unemployed worker who subsists on government benefits. Those who subsist on welfare entitlements are seen as outcasts of society who individually lack work ethic that is embedded in the U.S. tradition. There is a persistent fear that immigrants come to the United States to drain public resources, even though they are barred from most public benefits. Immigration reform proposals epitomize this fear by barring those who obtain lawful immigration status from any federal means-tested benefit or subsidy provided by the Affordable Care Act.

Similarly, by emphasizing the victimization of immigrant workers, criminal immigrants become an out-group. Much of the criticism pertaining to T visas, for example, is devoted to the narrowness with which the government has implemented the mandate of the statute, particularly in viewing who is considered a “worthy” victim. Prosecutorial discretion similarly continues this unseemly


193 See S. 744, 113th Cong., §§ 2101, 2323 (as passed by Senate, June 27, 2013).

194 See, e.g., Jennifer M. Chacón, Misery and Myopia: Understanding the Failures of U.S. Efforts to Stop Human Trafficking, 74 FORDHAM L. REV. 2977, 3022–23 (2006) (asserting that “[i]mmigration law has long categorized individuals who have been
focus on rewarding immigrants who are “worthy” of immigration status while leaving behind the “unwanted” immigrants who are considered a “threat to public safety.”195 And although the U and T visas have fairly generous waivers for past

exploited in the workforce as criminals rather than victims”); Jennifer M. Chacón, Tensions and Trade-Offs: Protecting Trafficking Victims in the Era of Immigration Enforcement, 158 U. PA. L. REV. 1609, 1615 (2010) (“[S]ome efforts to address the problem of trafficking within the framework of heightened border restrictions have the perhaps unintended effect of reinforcing migrants’ vulnerability to exploitation.”); Grace Chang & Kathleen Kim, Reconceptualizing Approaches to Human Trafficking: New Directions and Perspectives from the Field(s), 3 STAN. J. C.R. & C.L. 317, 325 (2007) (noting that illegal immigrants trafficked to Los Angeles are exploited in many fields, including domestic, agricultural, and industrial and factory work, and arguing that law enforcement focuses too much on sex trafficking exploitation while ignoring exploitation in the workplace); Joyce Koo Dalrymple, Human Trafficking: Protecting Human Rights in the Trafficking Victims Protection Act, 25 B.C. THIRD WORLD L.J. 451, 473 (2005) (arguing that the Trafficking Victims Protection Act (TVPA) should—which it does not currently do—“grant protection to victims of all forms of trafficking, so that they are not dissuaded from seeking assistance or are left without relief”); Ankita Patel, Back to the Drawing Board: Rethinking Protections Available to Victims of Trafficking, 9 SEATTLE J. FOR SOC. JUST. 813, 828–29 (2011) (“[T]he law presents Immigration[sic] and Customs Enforcement (ICE) with a conflict of interest; the agency is responsible for detaining and deporting undocumented immigrants while also identifying and providing trafficking victims with the certification necessary to obtain a T-visa.”); Hussein Sadruddin et al., Human Trafficking in the United States: Expanding Victim Protection Beyond Prosecution Witnesses, 16 STAN. L. & POL’Y REV. 379, 395 (2005) (discussing weaknesses and limitations of the TVPA); Jayashri Srikantiah, Perfect Victims and Real Survivors: The Iconic Victim in Domestic Human Trafficking Law, 87 B.U. L. REV. 157, 201 (2007) (comparing and distinguishing illegal immigrants from sex trafficking victims); Robert Uy, Blinded by Red Lights: Why Trafficking Discourse Should Shift Away from Sex and the “Perfect Victim” Paradigm, 26 BERKELEY J. GENDER L. & JUST. 204, 207–08 (2011) (contending that there is too much focus on trafficking only as a “sex” issue and not a labor issue); see also Marouf, supra note 27, at 174 (identifying more generally the problems associated with victim-based immigration relief).

195 Prosecutorial discretion, for example, is disfavored for those deemed to have a lengthy criminal record, gang membership, immigration violations (including unlawful re-entry and immigration fraud), felony convictions, or misdemeanor violations involving violence, sexual abuse, driving under the influence, and drug distribution. Prosecutorial Discretion by U.S. Immigration and Customs Enforcement (ICE) in Cases Involving Immigrant Workers, NAT’L EMP’T L. PROJECT (Jan. 2012), http://www.nelp.org/page/-/Justice2012/ProsecutorialDiscretionImmigrantWorkers.pdf?nocdn=1?nocdn=1, archived at http://perma.cc/R7LZ-QVYE; see also Prosecutorial Discretion and Immigrant Workers: Recommendations for Implementation, NAT’L IMMIGRATION L. CTR. (Mar. 2012), http://nilec.org/PDimmworkers.html, archived at http://perma.cc/4AT2-S7QF (“[C]ertain immigrant workers may qualify for prosecutorial discretion, including individuals cooperating with federal, state or local law enforcement authorities.”) (citation omitted) (internal quotation marks omitted).
criminal history, the relief is discretionary, requiring immigrant workers to create a sympathetic portrayal of themselves as victims. The meaning of public safety is already distorted by the immigration laws, where those who have committed minor crimes can face severe consequences under the immigration system. The emphasis on worthy victims potentially raises the stakes for viewing those immigrant workers who have used fraudulent documents to obtain work as criminals. Overall, it can help feed the criminalization hysteria that surrounds immigrants.

Further, the interpretive frame of the hard-working or victimized immigrant, or the “good immigrant,” may help to support stereotypes about immigrant workers in mainstream culture. These generalizations can fuel intergroup bias by relying on simple stereotypes rather than a more complex understanding of individuals. Immigrants, for example, become essentialized workers who are divorced from their individual characteristics as human beings. Professor Leticia

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197 See, e.g., COMM. FOR PUB. COUNSEL SERVS., IMMIGRATION IMPACT UNIT, IMMIGRATION CONSEQUENCES OF MASSACHUSETTS CRIMINAL CONVICTIONS 3 (2012), available at http://www.nationalimmigrationproject.org/legalresources/cd_so_Chart%20Massachusetts%20Offenses%20updated%20August%202012.pdf, archived at http://perma.cc/Y3V2-Z6JF (“Convictions for minor criminal offenses can have disastrous and irrevocable consequences to noncitizen[s].”).
198 Under the proposed Border Security, Economic Opportunity, and Immigration Modernization Act, the act of entering unlawfully or working with a false social security number is converted from a civil violation into a federal crime. S. 744, 113th Cong., §§ 3102, 3704 (as passed by Senate, June 27, 2013); see also Cimini, supra note 58, at 412–13 (identifying cases where courts barred employees because of IRCA-related fraud).
Saucedo explains how a cultural mythology exists about immigrant workers being well suited for low-wage work with little reward because of their complacency and pliability. Immigrant workers may have to act the part of the powerless victim to achieve results, although that may be contrary to their personal empowerment. Professor Leti Volpp explains that the victimization of immigrants risks characterizing them as passive, where the dangerous intersection of culture and victim status can lead to a portrayal of immigrants who lack the wherewithal to act for themselves without the intervention of “the largesse of the benign state.”

The conception of the “good immigrant” also sets native-born individuals against immigrants, creating divisions among subordinated groups, often along racial lines. In particular, this narrative reinforces the out-group status of African Americans. The hard-working immigrant is easily contrasted with those who subsist on welfare entitlements, who in the public imagination are often African-American. The emphasis on the innocent immigrant is pitted against the common conception of the criminality of African-Americans. The problem may also become magnified by workers themselves, where immigrant workers seek to ally themselves with Whites by being “‘not Black,’” and African-American workers seek to emphasize their similarities with Whites as “‘citizens.’”


Volpp, supra note 144, at 509.

The forgotten group among these categorizations is immigrants from Africa. Zachery Williams et al., A History of Black Immigration into the United States Through the Lens of the African American Civil and Human Rights Struggle, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP, supra note 161, at 159, 160.

See, e.g., Leland Ware & David C. Wilson, Jim Crow on the “Down Low”: Subtle Racial Appeals in Presidential Campaigns, 24 ST. JOHN’S J. LEGAL COMMENT. 299, 311 (2009) (describing the subtle racial appeal of Reagan’s attack on the food stamps program illustrated by an able-bodied African American who was taking advantage of the system).


Gordon & Lenhardt, supra note 29, at 1226–27; see also Shannon Gleeson, Labor Rights for All? The Role of Undocumented Immigrant Status for Worker Claims Making, 35 LAW & SOC. INQUIRY 561, 590 (2010) (discussing how Latino immigrants seek to identify
Finally, these interpretive frames overall defuse focus from structural inequalities that facilitate the exploitation of such workers. They do so by creating a strong identification with certain mainstream norms and values that can limit the capacity for fundamental change of structural inequities in the workplace that contribute to immigrant worker exploitation. This public narrative of the quintessential immigrant worker, who is willing to work long hours in dead-end jobs for low wages, perpetuates the notion that unemployment is the result of lazy individuals who refuse to be gainfully employed. It ignores the significant reality that a social safety net is required because of the underlying structural inequalities that not only create unemployment but also merge low-wage work with poverty. The allegedly organic phenomenon of low-wage industries dominated by immigrant workers belies the extreme degradation of workplace standards that make it so that no native-born workers will do such jobs, obfuscating the underlying need to address systemic issues related to raising the overall workplace standards of low-wage workers. Immigrant workers have suffered because of overall governmental policies related to low-wage jobs and immigration. By addressing the evil perpetrated by individual employers, however, the mainstream perception becomes that the exploitation of immigrant workers is entirely the result of private actions.

The on-the-ground reality faced by immigrant workers, however, requires real solutions to their problems. Immigrant workers, community advocates, and public interest attorneys have used mainstream cultural narratives to push the boundaries of existing law and advance the legal rights of immigrant workers. In the litigation realm, public interest attorneys push the envelope by using strategies such as wage liens and traditional collections to become more effective at recovering monetary judgments. Cases continue to harness the “joint employment doctrine” to hold themselves as “good” workers, distinguishing themselves from the “hypercriminalized stereotype of African Americans”).

See DELLA PORTA & DIANI, supra note 6, at 68.


Sheepherder jobs in the United States, for example, are dominated by immigrant workers because of the job terms and conditions. In Colorado, for $650 per month, 24 hours per day, 7 days per week, workers are expected to live in housing without running water, bathroom facilities, or electricity. MIGRANT FARM WORKER DIV., COLO. LEGAL SERVS., OVERWORKED AND UNDERPAID: H-2A HERDERS IN COLORADO 4–6 (2010).

See Saucedo, supra note 202, at 975–76.

The fear is that any efforts to placate the movement can transform the climate, which nourishes the protest into one where the movement is co-opted by mainstream power. PIVEN & CLOWARD, supra note 164, at 29–32.

NELP, WINNING WAGE JUSTICE, supra note 110, at 113–15.
larger companies liable under a maze of subcontracting\textsuperscript{214} and to seek broader workplace relief through collective or class actions.\textsuperscript{215} The POWER Act proposal has sought to vastly expand the definition of immigrant workers who would qualify for victim visas.\textsuperscript{216} Coalitions advocating for public policy reform have had unprecedented success in advocating for the expansion of legal rights related to the nonpayment of wages, misclassification of workers, and retaliation by employers. Direct action campaigns have engaged private employers to obtain redress and reform. Multifaceted campaigns that tactically combine these strategies provide for some of the most successful efforts to effectuate change for immigrant workers.\textsuperscript{217} As a result, the use of mainstream cultural narratives in framing these legal rights have resulted in immediate benefits for real people, whether it is the receipt of monetary compensation, immigration status, or workplace reform.

The framing of mainstream cultural narratives can lead to personal empowerment, if immigrant workers own their narratives. The careful construction of such cultural narratives to give voice to the lived experiences of immigrant workers can lead to empowerment by giving them a way to define themselves and resist their definition by dominant society.\textsuperscript{218} Work “provides people with dignity, achievement, and personal identity” by allowing immigrant workers to provide for their families and advance economically.\textsuperscript{219} While victimization can render an individual feckless, it can also empower victims if the victimization is addressed wisely.\textsuperscript{220} Workers have come forward to speak publicly about their experiences


\textsuperscript{216} See \textit{supra} note 95.

\textsuperscript{217} See \textit{supra} sources cited note 153.

\textsuperscript{218} See Lara Karaian, \textit{The Troubled Relationship of Feminist and Queer Legal Theory to Strategic Essentialism: Theory/Praxis, Queer Porn, and Canadian Anti-discrimination Law}, in \textit{FEMINIST AND QUEER LEGAL THEORY: INTIMATE ENCOUNTERS, UNCOMFORTABLE CONVERSATIONS} 375, 378–79 (Martha Albertson Fineman et al. eds., 2009) (discussing the theory of “strategic essentialism” where subordinated groups can be empowered if provided “a means to self-define, as opposed to being defined by those who would oppress them”).

\textsuperscript{219} Cunningham-Parmeter, \textit{supra} note 36, at 1411; Gordon & Lenhardt, \textit{supra} note 29, at 1194.

\textsuperscript{220} See Volpp, \textit{supra} note 144, at 509.
not only for the cathartic effect but also with the underlying motivation to impact the lives of existing and future workers. Criminalization of employers helps to rebalance the power between employers and employees, particularly given the usual focus of criminalizing immigrants.

Those who work with immigrant workers, however, need to ensure that the workers themselves power the narratives. Otherwise the narratives reflect a form of myth making by outsiders, which results in the (sometimes unwitting) subordination of individuals by advocates. Many of the public policy campaigns include immigrant workers precisely because community advocates recognize that the voices of immigrant workers should supply the narratives and lead campaign strategy. Others have amply criticized the regnant mode of lawyering where traditional attorneys work on behalf of rather than with client communities. Instead, lawyers should empower clients by privileging their narratives and providing them with political agency. Public interest attorneys, in particular, need to consider how to enable immigrant workers to tell their own stories within their legal case and engage in choices about legal remedies. In this way, victims can pursue legal remedies, while possessing the agency to vindicate their rights. They can be empowered by the positive impact their actions can have on the lives of existing workers or future employees, including those who more broadly are members of the mainstream. Given the vulnerability and outsider status of immigrant workers, this empowerment is necessary for mobilizing the movement.

While these strategies, for the most part, advocate for the legal rights of individual immigrant workers, the construction of a common outward identity among immigrant workers can also create a collective identification that promotes solidarity. By linking the messaging with the subjective experience of an individual, it enables such immigrant workers to see across the movement to link between themselves and others with common interests, values, and histories. The construction of common narratives by telling stories allows some immigrant

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222 Fine, supra note 110, at 249; Interview with Lisa Duran, Exec. Dir., Derechos Para Todos/Right for All People, in Denver, Colo. (July 18, 2013) (on file with Utah Law Review). But see Moody, supra note 135, at 155 (The immigrant worker movement tends to be dependent on staffers who are frequently, though not exclusively drawn from the educated middle class, so that “skill often substitutes for mass social power” needed for effective movements.).
225 Lee, supra note 62, at 68.
226 See Cunningham-Parmeter, supra note 36, at 1409.
227 della Porta & Diani, supra note 6, at 109.
228 Id.
229 Delgado, supra note 221, at 2437.
workers to erase the shame and more readily take action to advance their legal rights.230 Worker centers or other community-based organizations that work with immigrant workers can assist in the formation of this collective identity, particularly for immigrant workers in industries that have decentralized workplaces, such as domestic workers and day laborers. 231 They can create solidarity among workers by ultimately connecting individual issues to the larger systemic problem, while serving as a springboard for organizing and empowering immigrant workers to address workplace issues.232

These mainstream narratives also offer a way to identify with larger groups, such as the “new” working poor that will be necessary to create power.233 To the extent that the workplace is an arena for the public interaction of different groups, it has the potential to create a common bond and experience between groups.234 Within the labor movement, divisions along race and immigration status remain, which can undermine the possibility of a broader solidarity among low-wage workers. 235 At the same time, there are concrete examples of worker solidarity across race and immigration status lines.236 Such cooperation potentially provides for the creation of narratives that may more broadly encompass all low-wage workers, relating to the common sentiment of a certain powerlessness vis-à-vis their employer. The welfare-to-work policies of the 1990s managed to push out large swaths of the poor into low-wage jobs whose economic situations have often worsened since leaving welfare.237 The connection across traditionally divided

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232 See id. Marco Nuñez, Executive Director of El Centro Humanitario para los Trabajadores, has described how the process of sharing wage theft experiences helps workers strip away the individual shame, see how it is linked to a more systemic issue, and follow through with their complaint. Nuñez, supra note 230; see also GORDON, supra note 153, at 186 (describing how a legal clinic can help explain the link between the individual claims and the systemic issues).
233 GORDON, supra note 153, at 288–89; see GLEESON, supra note 99, at 197.
234 Cunningham-Parmeter, supra note 36, at 1412; Gordon & Lenhardt, supra note 29, at 1195 (citing Kenneth L. Karst, The Coming Crisis of Work in Constitutional Perspective, 82 CORNELL L. REV. 523, 543 (1997)).
236 Gordon & Lenhardt, supra note 29, at 1234–35.
groups by ethnicity, race, or immigration status may become possible because of the commonality of this experience.

The aspiration is by engaging all low-wage workers in a communicative relationship, the narrator and listener create a “we” through their identification, which provides for group identification and can help lessen the stereotyping of immigrant workers. And while the focus on private employers may appear to avoid systemic issues, the reform of law governing the workplace holds the promise of addressing some of these social inequities. In this regard, the identification of the immigrant worker movement with the larger labor movement can help fight against complacently accepting incremental reforms while devising ways to raise the normative standards for all low-wage workers. The support by national unions of immigrant workers opens up the possibility of broader reform for low-wage workers. The deployment of such mainstream cultural narratives that encompass all low-wage workers, therefore, can help transform perceptions to make dominant forces understand that structural changes to the private industry are necessary, becoming a significant tool for contributing to future change.

Despite the perils of mainstreaming, the use of mainstream cultural narratives is a way for immigrant workers to gain much-needed benefits. A better approach to mainstreaming, however, will require minimizing the harm created by aligning with dominant groups, while also grappling with how to be inclusive of all members. Immigrant workers can best inform themselves of these potential harms by creating connections with similarly subordinated groups—be it

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239 The recent movement among workers in the fast-food industry has brought together a diverse group of workers. See, e.g., Alan Feuer, Life on $7.25 an Hour, N.Y. TIMES, Dec. 1, 2013, at MB 1; see also Fred Tsao, Building Coalitions for Immigrant Power, in IMMIGRANT RIGHTS IN THE SHADOWS OF CITIZENSHIP, supra note 161, at 329, 338–39 (describing connections made between Illinois Coalition for Immigrant and Refugee Rights and the African American community in Chicago based on “bolstering wages and working conditions for all workers”).

240 STEWART ET AL., supra note 6, at 250.

241 Marouf, supra note 27, at 139, 142.


243 See Narro, supra note 153, at 105; see also MILKMAN, supra note 134, at 2–3 (highlighting the central role of immigrants in revitalizing labor in southern California in the 1990s).

244 Griffith, supra note 134, at 638.

245 On the other hand, members of out groups may belong to other in groups, such as parents or churchgoers, which provide them with membership in local communities.
immigrants from different ethnicities or native-born workers of different races—although significant challenges remain to create such alliances. Immigrant workers themselves should power the cultural narratives used by the movement to reflect their real experiences. Only then will such narratives result in empowering workers and open up the possibility of strengthening a common identification among workers to engage in collective action.

V. STRATEGIC MAINSTREAMING

Through strategic mainstreaming, the immigrant worker movement can advance its agenda. This approach requires that immigrant workers inform, shape, and lead multifaceted approaches with local institutions that can minimize harm while leading to the increased acceptance of immigrant workers. In the previous Part, the discussion notes the importance of having immigrant workers owning mainstream narratives and the positive impact it can have on empowerment and on collective identification. It also acknowledges the need to reach out to similarly subordinated groups to minimize the risks of aligning with the mainstream while watching against the complacency associated with incremental gains that can operate to disarm a movement. As the costs impact their own communities and futures, immigrant workers as participants in—if not leaders of—these strategies will simply have a better opportunity to gauge what approaches might minimize these risks. Minimizing these risks requires a connection to the outsider vision, both as an internal organizing principle and a long-term goal. Strategic mainstreaming ultimately recognizes that given the constraints of the current system, opting for mainstream cultural narratives can more pragmatically serve the goal of incorporating immigrant workers into dominant society and can serve as the precursor to building movements with political power.

246 See, e.g., Omatsu, supra note 161, at 277–78 (recounting immigrant worker leaders with Korean Immigrant Worker Advocates who were able to bridge the racial divide among workers promoted by their employers).

247 See Cho, supra note 206, at 110.

248 Omatsu, supra note 161, at 277–78.

By deploying a multifaceted approach, strategic mainstreaming maximizes its success. This approach, referred to by professor Scott Cummings as a “legal pluralist” approach, involves attacking the problem from various angles through the judiciary, legislature, and executive, as well as public opinion, taking advantage of how employer and employee activities intersect with the law in multiple ways. Use of litigation is effective, for example, because the courts can be a better recourse in light of failed governmental institutions, and litigation can be used to assist with organizing efforts for the underlying movement. Advocacy with administrative agencies can favorably impact immigrant workers because regulations are continually reinterpreted by the agency. Both the judiciary and executive are more removed from the direct political process, which provides immigrant workers with potential advantages. On the other hand, coalitions have, at times, managed to navigate the legislative process despite the lack of traditional political power, resulting in the enactment of favorable laws protecting workers. Direct actions by immigrant workers can help sway public opinion while effectively changing employer practices, often when traditional legal strategies are stalled. Further studies are needed to better measure the relative efficacy of different strategies in advancing the legal rights of immigrant workers, as factors beyond cultural narratives play a role in making a particular strategy successful. But each of these strategies commonly uses mainstream cultural narratives to resonate with the values of dominant society.

Another clever approach to maximize the success of strategic mainstreaming is to “go local.” The use of strategic mainstream narratives to advance the rights of immigrant workers have had more success at the local level in traditionally progressive jurisdictions, given the large geographic diversity of the United States and the fairly divergent politics of different regions. It is worth noting that national organizations, such as the National Employment Law Project and National Day Laborer Organizing Network, provide critical

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250 Cummings, supra note 160, at 5.
252 Cummings, supra note 160, at 6.
253 Scott L. Cummings, Litigation at Work: Defending Day Labor in Los Angeles, 58 UCLA L. REV. 1617, 1621 (2011) (finding that the underlying conditions point in favor of a litigation-based approach for day laborers in Los Angeles, not only because they are politically weak but also because they possess a strong legal right to solicit work in public that, if protected, is self-enforcing); see also Deborah M. Weissman, Law as Largess: Shifting Paradigms of Law for the Poor, 44 WM. & MARY L. REV. 737, 750 (2002) (“In a larger sense, the judicial system is the primary setting to challenge social conditions that bear oppressively on those without means.”).
254 See sources cited supra note 103.
255 See supra note 138 and accompanying text.
256 Scott L. Cummings, Critical Legal Consciousness in Action, 120 HARV. L. REV. F. 62, 69 (2009). It is worth noting that national organizations, such as the National Employment Law Project and National Day Laborer Organizing Network, provide critical
makes sense where mainstream culture in certain urban corridors, for example, may have more interaction with immigrant workers as employees, neighbors, and community members. Local culture shapes the particularities of any given strategy, informing immigrant workers of the possible openings and alliances needed to achieve their agenda. The devolution of issues impacting immigrants to the local level may be a result of the lack of national consensus towards immigration at the federal level, or simply the natural response of local communities adapting to demographic changes. Regardless of the cause, a number of scholars, such as Peter Spiro and Rick Su, have recognized this trend of devolution as a potentially favorable trend for immigrants. Localities not only have more firsthand experience with the demographic change but are also more intimately familiar with the legal and cultural assumptions that shape how communities are structured and organized. Successful relationships with local agencies have led to investigatory and enforcement resources favoring immigrant workers and expanded interpretations of workplace exploitation that qualifies as criminal activity for victim-based immigration relief. In 2013, using these local relationships, there were an unprecedented number of local laws enacted that restored rights to immigrants, such as laws concerning access to drivers’ licenses and higher education.


Gordon, supra note 100, at 2136–37.


Rodríguez, supra note 259, at 605; Su, supra note 260, at 1624.

disempower clients, multifaceted approaches provide public interest attorneys with the opportunity to not only collaborate within varied interdisciplinary coalitions but to also get involved in community efforts where immigrant workers are active participants. Such multifaceted work diminishes the inherent risk of having outsiders (even “benevolent” ones) construct narratives for subordinated individuals. Using local relationships also provides immigrant workers, who are likely to be more involved and engaged at the local level; employees; neighbors; and community members to play an active role. Strategic mainstreaming requires this kind of engagement by immigrant workers.

In the long term, the choice of strategic mainstreaming—reframing immigrants as workers or victims—can help immigrant workers with the political goal of becoming full members of society, even though they may not have formal citizenship status. Immigrant workers may also be consumers, church members, students, or parents who are engaged in actions that serve to incorporate them into mainstream society. The workplace, however, still remains one of the most important arenas for the interaction of groups leading to the opportunity to engage in a shared experience. A critical mass of low-wage immigrant workers in a community can lead to the partial incorporation in the body politic, because there is a practical need for communities to adapt to the presence of immigrant workers. Work helps to incorporate immigrant workers into the polity over time and serves as a pathway to significant components of citizenship. While recognizing the divisions that exist between immigrant and native-born workers, by exercising their workplace rights, immigrant workers have the potential to create loyalty between these groups where “all residents have opportunities to invest in the community . . . .” Regardless of the fact that many immigrant workers cannot formally vote, they have exercised their political power in public policy campaigns by petitioning or engaging elected officials or in direct actions against employers. When immigrant workers use mainstream cultural narratives in

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267 Gordon & Lenhardt, supra note 29, at 1219.

268 Cunningham-Parmeter, supra note 36, at 1412.

269 Nonvoters may wield influence in other ways, such as through their children. Currently 22.7% of all children in the United States had parents who were immigrants. IMMIGRATION POL’Y CTR., Strength in Diversity, supra note 178. “New Americans,” which
litigation, public policy, or direct action campaigns, whether they fail or succeed, they are exercising political power and facilitating their inclusion into mainstream society. This inclusion increases familiarity with immigrant workers as individuals, which can improve mainstream attitudes about social policy impacting immigrant workers. Societal incorporation through mainstream cultural narratives, therefore, can eventually help immigrant workers build the political power necessary to effectuate changes in public policy to achieve a more normative vision.

Immigrant workers are increasingly coming out of the shadows energized by the possibility of change. While these movements are still at a nascent stage, legitimation in mainstream society will not end the social and economic struggles of immigrant workers. In this sense, the broader strategies of universal citizenship or human rights for immigrant workers play a significant role in organizing workers and providing a more normative vision for the struggle. The dominant class needs to be able to find a corresponding identity with immigrant workers that assist with this gradual integration process. With the immediate reality of immigrant workers as outsiders, the movement’s continued articulation of a collective identity that resonates with the mainstream will be a necessary choice to fundamentally alter the willingness of the broader society to recognize the need for change.

VI. CONCLUSION

The immigrant worker movement has the power to change law through cultural narratives. This power, however, is significantly constrained because dominant cultural values delineate the available opportunities. The law generally disadvantages immigrant workers because it embodies mainstream cultural narratives of immigrants as outsiders, criminals, and job stealers. In response, a more transformative or radical conception of immigrant worker rights is a strategy that can fail to connect with the mainstream culture, and at times, be antagonistic.

includes immigrants and children of immigrants, account for one in ten registered voters. It is ultimately this demographic shift that may help address some of the more difficult issues facing the out groups of immigrants. Tsao, supra note 239, at 336–37 (describing the Illinois Coalition for Immigrant and Refugee Rights strategy of moving naturalized citizens and the U.S.-born children of immigrants towards voting and civic engagement); see also Spiro, supra note 99, at 909–10 (noting the ways in which nonvoting immigrants may exert political influence).

270 GORDON, supra note 153, at 278–79.

271 Social psychology research supports that increased intergroup contact can improve attitudes about social policy. THOMAS F. PETTIGREW & LINDA R. TROPP, WHEN GROUPS MEET: THE DYNAMICS OF INTERGROUP CONTACT 171–72 (2011).

272 See Das Gupta, supra note 189, at 403 (criticizing full citizenship as an end, in and of itself, because it “reinscribes the policing functions of borders that territorialize racialized, ethnicized, and gendered notions of belonging”).
On the other hand, the movement has, at times, successfully opted for cultural narratives that resonate with mainstream interests to advance their rights. In turn, these successes are reshaping the legal landscape for immigrant workers.

My conclusion that strategic mainstreaming is a worthwhile enterprise, therefore, is ultimately informed by pragmatism. Given that immigrant workers are politically unpopular, mainstream cultural narratives offer a way to gain political traction and wield power most effectively. If advances can be made at the local level that have an immediate impact on lives, then immigrant workers should take advantage of those openings. Protagonists involved in shaping these narratives, particularly public interest attorneys and community advocates, need to carefully consider how to use the voices of immigrant workers to power the narratives to maximize empowerment and solidarity. Immigrant workers, in alliance with other subordinated groups, need to be informing, shaping, and leading such strategies to ensure that they minimize unintended consequences for disfavored groups while continuing to fight for outsider reforms.

The hope is that mainstream cultural narratives will help with the incorporation of immigrant workers into mainstream society. This incorporation process is generally significant not only to create increased familiarity with immigrants as societal members but to also increase their political power. Over time, the shift of demographics or increasing impact of globalization may change the legal framework. An increasing number of native-born U.S. citizens live in households with immigrants, which may help realize a more normative vision for immigrant workers. Globalization may reveal the salience of a more universal conception of human rights or citizenship. In the meantime, immigrant workers will continue to need mainstream cultural narratives to advance their agenda.

273 See supra note 269 and accompanying text.
BUILDING THE CANON OF UTAH CONSTITUTIONAL LAW: LESSONS FROM THE UTAH PUBLIC INTEREST STANDING DOCTRINE

Jordan Dez*

I. INTRODUCTION

There exists an uneven dialogue between the Utah judiciary and the Utah bar on pleading under the Utah Constitution. While the bench encourages legal arguments based in the State Constitution, members of Utah’s legal community have noted challenges to succeeding on state constitutional claims. When the bar tries to make a constitutional claim, there is little case law on which to base an argument, and when the Utah Constitution is pleaded, the court will often decide on other grounds. The bar should anticipate few cases to support a state constitutional proposition. However, in the interest of developing the Utah constitutional canon, advocates should not opt for a mere footnote to the one case remotely on point or undeveloped arguments relying on nothing more than the plain text of the Utah Constitution. Rather, the brief that gives modern and historical meaning to the text by using various interpretational tools that have been offered by the Utah Supreme Court not only has a good chance of being heard but also can push forward new state constitutional doctrine.

Since the 1970s, the Utah Supreme Court has given meaning to state constitutional provisions independent of the interpretations of their federal counterparts. This tradition is known as New Judicial Federalism and, consistent with this tradition, Utah courts have been departing from positions historically

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1 State v. Bobo, 803 P.2d 1268, 1272 (Utah Ct. App. 1990) (“Until such time as attorneys heed the call of the appellate courts of this state to more fully brief and argue the applicability of the state constitution, we cannot meaningfully play our part in the judicial laboratory of autonomous state constitutional law development.” (citations omitted)), overruled on other grounds by State v. Tiedemann, 162 P.3d 1106 (Utah 2007); Christine M. Durham, Employing the Utah Constitution in the Utah Courts, UTAH B.J., Nov. 1989, at 25, 25–27.

2 Paul Wake, A Precious Birthright or Federal Porridge: Which Should Utah Lawyers Choose?, UTAH B.J., Jan./Feb. 2007, at 27, 30 (“Sometimes, the Utah Supreme Court has talked a good talk about its willingness to interpret the Utah Constitution, and then resorted to the easy lockstep approach in interpreting the state’s constitution.”).

3 See id.


interpreted “lockstep”\textsuperscript{6} with the U.S. Constitution, in favor of a more “primacist”\textsuperscript{7} approach. When a state judiciary takes a primacist approach, they first turn to the state constitution to provide relief. If relief cannot be provided under the state constitution, they will then turn to the U.S. Constitution.\textsuperscript{8} Conversely, under a lockstep approach, the state judiciary will interpret the state constitutional provisions to mean the same as their federal counterparts.\textsuperscript{9} Under a third “interstitial” approach, a court will only turn to the state constitution if relief cannot be provided under the U.S. Constitution.\textsuperscript{10}

One example of a Utah court’s early participation in New Judicial Federalism is the public interest standing doctrine, also known as “alternative standing.” In Jenkins v. State,\textsuperscript{11} the Utah Supreme Court introduced the public interest standing doctrine into the Utah constitutional dialogue based solely on the respondent’s briefing grounded in sister state law.\textsuperscript{12} Previously, standing had always been a question interpreted lockstep with the U.S. Constitution.\textsuperscript{13} But as judiciaries, including Utah’s, became more willing to depart from lockstep traditions, the stage was set for success under arguments based in the Utah Constitution.

Since the salad days of New Judicial Federalism and Jenkins v. State, the Utah constitutional record has developed, as have the tools for interpretation. This Note argues that although the current Utah Supreme Court will show more restraint than the Jenkins v. State court in adopting new doctrine, these developments have not altered the court’s continuing commitment to the primacist approach.\textsuperscript{14} The Utah Supreme Court will hear and rule on arguments based in the text of the Utah Constitution when they are developed beyond the plain dictionary meaning. The manner in which the court utilized constitutional interpretation to develop the Utah public interest standing doctrine and the Utah Supreme Court’s proposed methods of constitutional interpretation from American Bush v. City of South Salt Lake\textsuperscript{15}

\textsuperscript{7} See id. at 837.
\textsuperscript{8} See id.
\textsuperscript{9} See id. at 839 & n.2.
\textsuperscript{10} Id. at 837.
\textsuperscript{11} 585 P.2d 442 (Utah 1978).
\textsuperscript{12} Id. at 443 (citing State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)); see also Brief for Respondent-Plaintiff at 18–22, Jenkins v. State, 585 P.2d 442 (Utah 1978) (No. 17566) (relying on sister state law and an analogy to a Utah taxpayer standing case to argue for a more flexible standing doctrine).
\textsuperscript{13} Cf. State v. Kallas, 94 P.2d 414, 420 (Utah 1939) (“This court is committed to the rule that an attack on the validity of a statute cannot be made by parties whose interests have not been, and are not about to be, prejudiced by the operation of the statute.”).
\textsuperscript{15} 140 P.3d 1235, 1239–53 (Utah 2006).
illuminate the historical developments in the Utah Supreme Court’s approach to state constitutional interpretation. Drawing from these developments, this Note outlines an approach that, if followed, will help practitioners build a more vigorous state constitutional canon as they raise arguments in a manner more likely to be well received by Utah courts. With this goal in mind, this Note will proceed as follows.

First, Part II examines the modern history of interpreting the Utah Constitution by reviewing the development of the public interest standing doctrine. This history frames the current direction of textual interpretation. The doctrine is evidence that the Utah Constitution is a vibrant and relevant document. Though it shows that the court may be more conservative in its departures from lockstep analysis, it is still willing to depart, particularly if the claims are based in well-substantiated textual arguments.

Part III, then, discusses what it takes to mount a constitutional argument in the Utah courts. Though “plain meaning” textual arguments are sufficient to persuade some members of the Utah Supreme Court, the strongest textual arguments should be supported with historical context that conveys the intent of the 1895 Utah voters and drafters of the Utah Constitution—that is, through an analysis of the text of the Utah Constitution, the constitutional traditions of sister states, and the society that adopted the Utah Constitution.

II. PUBLIC INTEREST STANDING DOCTRINE AND NEW JUDICIAL FEDERALISM

The public interest standing doctrine is consistent with the modern trend of state courts developing state constitutional doctrine independent of the federal analysis—even in the face of contrary precedent. This trend arguably began in 1977, when Justice William Brennan penned an article in the Harvard Law Review calling upon state courts to look to their own constitutions to protect individual liberties in the wake of the U.S. Supreme Court’s conservative approach to these protections. State courts responded positively to Justice Brennan’s call, beginning a trend referred to as New Judicial Federalism.

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16 Id. at 1264 (Durham, C.J., dissenting). But see State v. Hoffmann, 318 P.3d 225, 236–37 (Utah Ct. App. 2013) (“[S]tate constitutional analysis . . . limited to the truism that article I, section 14 may provide greater protections to Utah citizens than the Fourth Amendment’ fails to advance an adequate state constitutional analysis. . . . [Plaintiff’s brief] does not quote or analyze the constitutional text, which our supreme court has consistently held to be the starting point of state constitutional analysis. It does not discuss the original understanding of article I, section 14. And it does not discuss historical and textual evidence, sister state law, or policy arguments.” (quoting State v. Worwood, 164 P.3d 397, 405 (Utah 2007))).

17 JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 24 (2005) (citing William J. Brennan, Jr., State Constitutions and the Protection of Individual Rights, 90 HARV. L. REV. 489, 503 (1977)); see also Milo Steven Marsden, Note, The Utah Supreme Court and the Utah State
The public interest standing doctrine entered the Utah constitutional dialogue in 1978, just a year after the publication of Justice Brennan’s article.19 The doctrine expanded the state standing analysis, going against prior precedent that had interpreted standing as consistent with the Article III federal analysis.20 The doctrine began as a footnote in Jenkins v. State,21 was then included as dicta in Jenkins v. Swan,22 and was later promoted to an alternative holding in Utah Chapter of Sierra Club v. Utah Air Quality Board23 and City of Grantsville v. Redevelopment Agency.24 In 2013, more than thirty years after its initial decision in Jenkins v. State, the Utah Supreme Court solidified its public interest standing doctrine in Gregory v. Shurtleff.25 The journey, however, from Jenkins v. State to Gregory v. Shurtleff tracks the ebb and flow of the Utah court’s participation in New Judicial Federalism, revealing a modern court that remains avowedly primacist, yet unwilling to make drastic departures from traditional interpretation.

A. The Doctrine

Lynn Jenkins was a Utah man with a penchant for initiating civil litigation pro se.26 His lawsuits included claims alleging that public school teachers were infiltrating the legislature,27 public officials were still practicing law,28 and that he was taxed too much because of the large land holdings of local religious

\[\text{Constitution, 1986 Utah L. Rev. 319, 320 (noting the trend toward state constitutional interpretation as a reaction to the more conservative Burger Court).}\]

\[\text{GARDNER, supra note 17, at 25.}\]

\[\text{Jenkins v. State, 585 P.2d 442, 443 (Utah 1978).}\]

\[\text{See id. at 444 (Wilkins, J., concurring in part and dissenting in part) (“[Plaintiff] did not allege (or show) any direct interest or injury as a basis for commencing this action. In my opinion this is fatal.”); Baird v. State, 574 P.2d 713, 716 (Utah 1978) (“The general rule is applicable that a party having only such interest as the public generally cannot maintain an action. In order to pass upon the validity of a statute, the proceeding must be initiated by one whose special interest is affected, and it must be a civil or property right that is so affected.”); State v. Kallas, 94 P.2d 414, 420 (Utah 1939) (“This court is committed to the rule that an attack on the validity of a statute cannot be made by parties whose interests have not been, and are not about to be, prejudiced by the operation of the statute.”).}\]

\[\text{585 P.2d at 443 & n.3 (citing State ex rel. Sego v. Kirkpatrick, 524 P.2d 975 (N.M. 1974)).}\]

\[\text{675 P.2d 1145, 1149 (Utah 1983).}\]

\[\text{148 P.3d 960, 972 (Utah 2006).}\]

\[\text{233 P.3d 461, 467 (Utah 2010).}\]

\[\text{299 P.3d 1098, 1102–06 (Utah 2013).}\]

\[\text{See, e.g., Jenkins v. MTGLQ Investors, 218 F. App’x 719, 725 (10th Cir. 2007); Jenkins v. Swan, 675 P.2d 1145 (Utah 1983); Jenkins v. Finlinson, 607 P.2d 289 (Utah 1980); Jenkins v. Bishop, 589 P.2d 770 (Utah 1980); Jenkins v. State, 585 P.2d 442, 443 (Utah 1978).}\]

\[\text{Jenkins v. State, 585 P.2d at 443.}\]

\[\text{Finlinson, 607 P.2d at 290.}\]
institutions.29 Surely the framers and founders would expect a good citizen like Mr. Jenkins to grind his axe with the proper branch of government; however, rather than seek a remedy through the legislature or local government, Mr. Jenkins chose the expediency of the judiciary. Though perhaps Mr. Jenkins never got the justice he sought, and was eventually enjoined from bringing further suit without representation by counsel,30 in parsing through his chaotic briefs to determine if he had standing, the Utah Court of Appeals initiated a modern doctrine of state constitutional jurisprudence: public interest standing.31

Under the case and controversy limitation of the U.S. Constitution,32 a party that brings suit must suffer individual injury before he or she has standing to file suit.33 However, many state constitutions, including the Utah Constitution, are textually different from the U.S. Constitution in that they do not include the “case and controversy” language that moors the federal justiciability doctrines.34

Under the modern Utah public interest standing doctrine, as stated in Gregory, if a party does not have “traditional standing,” which is coextensive with Article III analysis, a party may gain standing upon showing (1) the appropriate party has brought suit, and (2) the dispute raises an issue of significant public importance.35 A party is an “appropriate party” to bring suit if (1) the party is competent to effectively assist the court in developing and reviewing the relevant legal and factual questions; (2) the issue is unlikely to be raised if the party is denied

29 See Swan, 675 P.2d at 1153.
30 MTGLQ Investors, 218 F. App’x at 725 (“Because we find this appeal frivolous and Mr. Jenkins’s pattern of litigation activity manifestly abusive, we conclude that filing restrictions are necessary.”).
31 Jenkins v. State, 585 P.2d at 443.
32 U.S. CONST. art. III, § 2, cl. 1.
34 Article VIII, section 1 of the Utah Constitution reads:

The judicial power of the state shall be vested in a Supreme Court, in a trial court of general jurisdiction known as the district court, and in such other courts as the Legislature by statute may establish. The Supreme Court, the district court, and such other courts designated by statute shall be courts of record. Courts not of record shall also be established by statute.

Article VIII, section 3 of the Utah Constitution reads:

The Supreme Court shall have original jurisdiction to issue all extraordinary writs and to answer questions of state law certified by a court of the United States. The Supreme Court shall have appellate jurisdiction over all other matters to be exercised as provided by statute, and power to issue all writs and orders necessary for the exercise of the Supreme Court’s jurisdiction or the complete determination of any cause.

standing; and (3) the issue is not more appropriately addressed by another branch of government.  

B. Departing from a Lockstep Past

When attempting to argue under the Utah Constitution, there may be no precedent on which to base an argument, or the available case law may have historically interpreted the Utah Constitution lockstep with the U.S. Constitution. However, the development of the public interest standing doctrine shows that the court is willing to depart from stare decisis if such an interpretation would conflict with a “correct” reading of the Constitution and further exemplifies the inherent challenges for the judiciary associated with the delicate balance between upsetting once settled law and providing independent meaning to the Utah Constitution.

Jenkins v. State was a departure from stare decisis. Prior to Jenkins v. State, Utah courts had interpreted standing lockstep with the federal analysis. After Jenkins v. State, the Utah Supreme Court adhered to the precedent created in that case. However, there is a back and forth, as seen in Utah Transit Authority v. Local 382 of the Amalgamated Transit Union and Gregory, that shows evidence of a court that is willing to depart from stare decisis when adherence to old doctrine would lead to an “incorrect” interpretation. While Utah Transit Authority refused to extend the public interest standing doctrine and attempted to entirely repudiate the doctrine, the Gregory court, in turn, refused to follow the precedent in Utah Transit Authority, and limited that case to a mootness distinction.

In Utah Transit Authority, the UTA brought an action against the transit union stemming from failed collective bargaining negotiations. Before the case reached the Utah Supreme Court, the parties negotiated an agreement but still sought review of the case to guide them in future negotiations. Both parties argued for an exception to the traditional mootness doctrine under a public interest exception. The court refused to extend the exception to mootness and, in so doing, held the public interest standing doctrine to be unconstitutional. The tools

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36 Id. at 1109–10 (citing Sierra Club, 148 P.3d at 972). The requirement of “the most appropriate party” became “an appropriate party” in Cedar Mountain Environmental, Inc. v. Tooele County ex rel. Tooele County Commission, 214 P.3d 95, 98 (2009).
37 See GARDNER, supra note 17, at 49 (noting that when state courts attempt to interpret their own constitutions there may be no precedent on which to rely).
38 289 P.3d 582 (Utah 2012).
39 Id. at 590.
40 Gregory, 299 P.3d at 1119 (Lee, J., concurring in part and dissenting in part). The Gregory dissent relied on the reasoning in Utah Transit Authority, and encouraged the court to “repudiate our prior dicta” on public interest standing. See also id. at 1119–21.
41 Utah Transit Auth., 289 P.3d at 584.
42 Id. at 585.
43 Id.
44 Id. at 590; see also Gregory, 299 P.3d at 1121–22 (“[T]he power we wield must be ‘judicial,’ we are foreclosed from making law or announcing our views in an advisory or
of interpretation used were the text of the Constitution, history from the Constitutional Convention, an inquiry into the processes of other states, and judicial traditions in Utah.

Justice Lee’s dissent in Gregory follows the “model” set forth in Utah Transit Authority. Justice Lee argued that standing is a constitutional requirement under the judicial power clause of the Utah Constitution, which reads that “[t]he judicial power of the state shall be vested in a Supreme Court.” Justice Lee used the history and intent of the framers to define the scope of judicial power. Furthermore, Justice Lee contended that under the traditional standing analysis, the appellants did not have standing on either of their claims. The dialogue between the dissent and majority evidences the tension between departing from stare decisis and giving new independent significance to state constitutional provisions. While the majority adheres to precedent that has been developed over a thirty-year period, the dissent builds on the precedent of Utah Transit Authority. All of these modern interpretations both adhere to some precedent, and depart from other precedent, all in search of the correct interpretation of the Utah Constitution.

Accordingly, the role of stare decisis in state constitutional interpretation may not be as strong as in other legal contexts. The basic issue in this endeavor is whether the legitimacy of judicial review is threatened more by following a questionable precedent or by completely abandoning precedent in favor of a principle consistent with state constitutional interpretation. In his discussion of the role of precedent in constitutional interpretation, Justice Jack Landau of the Oregon Supreme Court notes that the process of giving independent significance to state constitutional provisions will often be offensive to stare decisis because it requires departing from prior holdings that assume the state and federal constitutions should be interpreted similarly.

Still, a balance must be struck between rejection of incorrect interpretations and judicial restraint. Professor Michael Paulsen argues that stare decisis is contrary to an originalist reading of a constitution. Even in the case where an interpretive theory gives a prior judiciary’s interpretation the status of constitutional meaning, by the same logic, the current judiciary, tasked with interpreting the meaning of the law and constitution, should have complete power

other non-judicial posture. . . . [O]ur exercise of the judicial power must be in the context of the issuance of ‘writs’ or in our resolution of ‘cases,’ a formulation that implies a particular form for exercising the judicial power.” (citations omitted)).

45 *Gregory*, 299 P.3d at 1120.
46 UTAH CONST. art. VIII, § 1.
47 *Utah Transit Auth.*, 289 P.3d at 587.
48 *Gregory*, 299 P.3d at 1132.
49 Landau, supra note 6, at 838.
50 Id. at 867.
to overturn prior precedent. As such, Professor Paulsen asks the question, “Why last year’s judge and not this year’s judge?”

Though these commentaries are directed at federal constitutional interpretation, the criticisms gain even more traction in the state context where judiciaries are moving away from a lockstep approach and toward giving state constitutions independent significance, and the corpus of case law is in its nascent stage. In the case of public interest standing, although the expressly primacist Utah Supreme Court has been willing to depart from prior precedent, the departure is gradual and cautious. Under the public interest standing doctrine, only when “traditional” standing does not permit a plaintiff to litigate her claim will the court then look for alternative standing. The dual nature of the doctrine—traditional analysis followed by alternative analysis—is distinct from the standing doctrines of other states and may signal the current court’s reticence to make drastic departures from a lockstep doctrine. Alternative standing creates an interesting paradox of state constitutional interpretation—it is primacist, meaning that the court starts with the Utah constitutional doctrine of “traditional” standing, but Utah’s traditional standing is the same as the federal standing doctrine. In a sense, this doctrine is interstitial—alternative standing will only be an option when standing is not granted under a traditional analysis. This doctrine evinces a court that is not brazen in its New Judicial Federalism but will gradually incorporate a new doctrine with a counterbalance of judicial restraint.

The history of the public interest standing doctrine reflects a more cautious shift in the Utah courts’ state constitutional jurisprudence. The doctrine first emerged in Jenkins v. State, where the court provided no explanation or justification for the doctrine, just a citation to a New Mexico case: “Appellants cite the usual rule that one must be personally adversely affected before he has standing to prosecute an action. While such is true, it is also true this Court may grant standing where matters of great public interest and societal impact are concerned.” The concurrence in Jenkins v. State went into slightly more detail to justify the doctrine. The justification provided by Justice Crocket was essentially

\[ E.g., Jenkins v. Swan, 675 P.2d 1145, 1149 (Utah 1983) (“[T]he inherent role of the judiciary [is] to interpret constitutional provisions.”). \]

\[ Paulsen, supra note 51, at 292 (emphasis removed). \]

\[ Landau, supra note 6, at 867, 869–70 (“The argument that precedent must give way to a correct interpretation of a constitution presupposes that an obviously ‘correct’ interpretation exists. I have no doubt that, in many cases, that is precisely the case. And, in such cases, if it can be shown that prior cases cannot be reconciled with the wording of the constitution properly considered in its context and in light of applicable rules of construction, the prior cases should be abandoned.”). \]

\[ See supra note 14 and accompanying text. \]


\[ See id. (Crockett, J., concurring). \]
based in efficiency: “to avoid delays and minimize the time, effort and expense of further litigation.”

In his book on interpreting state constitutions, Professor James Gardner comments that opinions of this era were often “surprisingly perfunctory and contain[ed] little actual analysis or argument.” Professor Gardner also notes that the history of state constitutional drafting “has proceeded mainly through a process of borrowing, swapping, and copying from somebody else’s constitution.” The origins of the public interest standing doctrine hail from this approach—“borrowing” from a New Mexico doctrine, with “surprisingly” little analysis.

Looking to sister state traditions persists as a viable tool to support a textual argument, but it may not be given as much weight by the 2014 court as it was in Jenkins v. State. The Utah Transit Authority court looked to sister state constitutional law to justify Utah interpretations but used this tool in tandem with others. In that case, the court noted that many other states have adopted constitutional provisions to allow for advisory opinions from the bench. Utah was in good company with other states who had prohibited advisory opinions. The Utah Transit Authority court found this to support the proposition that Utah was in the no-advisory-opinions camp, which was largely based on the framers’ statements during the debate of the Constitutional Convention that indicated they disapproved of the judiciary making advisory opinions.

C. The Restrained Judicial Federalism

Five years after the Jenkins v. State opinion, the court pulled back from its broad holding, changing the scope of the doctrine and its use of constitutional interpretation. In Jenkins v. Swan, the constitutional arguments for the public interest standing test were further elaborated and the doctrine subsequently limited. Justice Durham, writing for the court, begins her interpretation with the text of the

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59 Id. Though the Utah Supreme Court has used policy justifications for constitutional interpretation in the past, see, e.g., Soc’y of Separationists, Inc. v. Whitehead, 870 P.2d 916, 921 n.6 (Utah 1993), this approach has since been limited by the Court to being employed only to discern intent of the founders and electorate, Am. Bush v. City of S. Salt Lake, 140 P.3d 1235, 1240 & n. 3 (Utah 2006).
60 GARDNER, supra note 17, at 36.
61 Id. at 6.
63 See, e.g., Am. Bush, 140 P.3d at 1285 (Nehring, J., dissenting) (“By 1895, Utah’s debate over the wording of a criminal libel component of its constitution was a common, perhaps obligatory, item on the agenda of state constitutional conventions. A canvass of the constitutions of the fifty states shows that thirty-four expressly address criminal libel.”).
64 See Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union, 289 P.3d 582, 587–88 (Utah 2012).
65 Id. at 587.
66 Id.
67 See id. at 587.
judicial power clause but then goes on to restrain the doctrine based on the traditions of the federal and state judiciaries:

Unlike the federal system, the judicial power of the state of Utah is not constitutionally restricted by the language of Article III of the United States Constitution requiring “cases” and “controversies,” since no similar requirement exists in the Utah Constitution. We previously have held that “this Court may grant standing where matters of great public interest and societal impact are concerned.” Jenkins v. State, Utah, 585 P.2d 442, 443 (1978) (footnote omitted). However, the requirement that the plaintiff have a personal stake in the outcome of a legal dispute is rooted in the historical and constitutional role of the judiciary in Utah. 68

The above interpretation is first based in a textual difference—the lack of the “case and controversy” language in article XIII of the Utah Constitution. Justice Durham relies on the precedent from Jenkins v. State but then looks to the historical traditions of the Utah judiciary to restrain the doctrine. Interestingly, the citation to the New Mexico case is omitted from the analysis, perhaps to draw attention away from the “sister state” nature of that interpretational tool. Also, in developing her arguments for the history and tradition of judicial power, Justice Durham looks to the mainstays of the federal standing analysis on injury to justify the court’s restriction of the doctrine. 69

Both the Jenkins v. Swan majority and, later, the Gregory dissent examine the historical understanding of “judicial power” to pull back from the broad holding in Jenkins v. State. 70 This analysis led the Gregory dissent to conclude that public interest standing is unconstitutional and the Jenkins v. Swan majority to limit the doctrine to an “alternative” standing—turning to it when “traditional” standing is not available or when there is an “interested party.” 71

The alternative standing doctrine in Utah is distinct from other states that have seized the textual lack of case and controversy to broaden their standing doctrine. For example, the Michigan Supreme Court in Lansing Schools Educational Association v. Lansing Board of Education 72 chose to reject its prior interpretation of standing as lockstep with the federal standing test in favor of a historical precedent that allowed for public interest standing. 73 In reaching its conclusion in

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69 Id. at 1148–50.
70 Id. at 1149–51; Gregory v. Shurtleff, 299 P.3d 1098, 1122 (Utah 2013) (Lee, J., concurring in part and dissenting in part).
71 Gregory, 299 P.3d at 1121–22 (Lee, J., concurring in part and dissenting in part); Swan, 675 P.2d at 1149–51.
72 792 N.W.2d 686 (Mich. 2010).
73 See id. at 686–700; see also Kenneth Charette, Standing Alone?: The Michigan Supreme Court, the Lansing Decision, and the Liberalization of the Standing Doctrine, 116 PENN ST. L. REV. 199, 203, 206 (2011) (noting the Lansing court “held that in order to
Lansing, the Michigan Court overruled Lee v. Macomb County Board of Commissioners. 74 The Lee court had interpreted the relevant Michigan constitutional provisions on standing lockstep with the federal test. 75 In contrast, under the Lansing test, a plaintiff has standing to bring a suit if either (1) he or she has a specific legal cause of action, or (2) the trial court, in its discretion, believes the plaintiff to have standing for some other reason. 76 In so holding, the Michigan court did not even address its early nineteenth century standing jurisprudence that had limited the jurisdictional reach to deciding cases and controversies, foregoing a “historical” analysis of its centuries’ old lockstep tradition. 77

Michigan and Utah courts’ standing approach may reflect differences in constitutional allotment of power. By constitutional amendment, the Michigan judiciary can make advisory opinions, whereas in Utah the framers expressly withholding this power from the Utah judiciary. 78 Whatever the reason, although the Utah Supreme Court is willing to depart from stare decisis, it seems more inclined to do so at a gradual pace. The court will not make revolutions in its departure from precedent. It will instead ground its decisions in the traditions of the judiciary. The move away from precedent, however, can be done while wielding the interpretational tools that have been developed over the past thirty years. Although Utah’s standing analysis is not entirely distinct from its federal counterpart, it is evidence that the Utah judiciary will look to the Utah Constitution to provide relief. More importantly, the Utah judiciary is willing to depart from a historical lockstep analysis if prior precedent is contrary to a textual reading of the Utah Constitution.

III. UNDERSTANDING THE UTAH SUPREME COURT’S APPROACH TO STATE CONSTITUTIONAL INTERPRETATION

In order to succeed on Utah constitutional claims, it is essential to first turn to the guidance provided by the Utah Supreme Court. In American Bush v. City of South Salt Lake, Utah’s teaching case 79 on state constitutional interpretation, Chief

adhere to its historical precedent, it was necessary to abandon the federal test for standing and return to a set of prudential considerations”).

74 Lansing Sch. Educ. Ass’n, 792 N.W.2d at 699.
76 Lansing Sch. Educ. Ass’n, 792 N.W.2d at 699.
77 Id.
78 Justice Lee looked to the history of the Constitutional Convention in Utah Transit Authority to support the position that the Utah Constitution does not grant the judiciary the power to make advisory opinions. Utah Transit Auth. v. Local 382 of the Amalgamated Transit Union, 289 P.3d 582, 587 (Utah 2012).
79 “In many states, there are opinions, ‘teaching cases,’ that set forth a general approach to state constitutional interpretation, together with a number of specific rules.”
Justice Durham, Justice Parrish, Justice Durrant, and Justice Nehring all wrote separate opinions outlining their individual approaches to interpreting the text of the Utah Constitution.\(^8\) Justice Lee had not yet joined the court at the time of *American Bush*,\(^8\) but shared his views on Utah constitutional interpretation in the majority opinion that he authored in *Utah Transit Authority*\(^8\) and in his dissent in *Gregory*.\(^8\)

In *American Bush*, after losing in federal court, the owners of nude dancing establishments and lingerie shops challenged a city zoning ordinance on state constitutional grounds under article I protections of free speech and takings.\(^8\) The justices took the time to address “the poverty of [] Utah case law” concerning the Utah Constitution by elaborating their individual approaches to state constitutional interpretation.\(^8\) The *American Bush* court was required “to grapple with the difficult questions permeating the debate as to the proper method to follow when interpreting our state constitution.”\(^8\) The four opinions in the *American Bush* decision give sophisticated analysis of the interplay between a plain meaning analysis of text and a textual analysis that is informed by the historical evidence of the intent of the drafters and voters who ratified the Constitution.

Although Chief Justice Durham’s dissent and concurrence applied a plain meaning analysis to article I of the Utah Constitution,\(^8\) the majority took the approach that plain meaning must be informed by historical context.\(^8\) Through an inquiry into the text itself, the state of the law on a national level—which is primarily an examination of sister state traditions, and an analysis of the legal traditions of Utah in 1895, the meaning intended by the voters and drafters of the Constitution can be divined. Though flexibility may bring into question the legitimacy of historical interpretation, it may also be a strong tool when advocating for a particular interpretation of the Utah Constitution. The history of voters’ intentions was determinative in *American Bush* and boiled down to nude dancing not being included in the public imagination of speech at the time of the


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\(^8\) See 289 P.3d at 586–90.

\(^8\) See 299 P.3d 1098, 1118–27 (Utah 2013).

\(^8\) *Am. Bush*, 140 P.3d at 1238–39; UTAH CONST. art. I §§ 1, 7, 15.

\(^8\) *Am. Bush*, 140 P.3d at 1239.

\(^8\) Id. at 1255 (Durrant, J., concurring).

\(^8\) Id. at 1260.

\(^8\) Id. at 1239.
ratification.\textsuperscript{89} In the absence of a rich constitutional record, such arguments can be influential in bringing a successful challenge under the Utah Constitution.

\textit{A. The Complications of Plain Meaning Analysis}

In \textit{American Bush}, Chief Justice Durham took a plain meaning approach to textual interpretation.\textsuperscript{90} Under this approach, “\textit{[o]nly if the textual language is ambiguous or unclear should we look outside the words to external sources.}”\textsuperscript{91} Under the established Utah doctrine of the plain meaning approach, the words of the Constitution must be given their “commonly understood meaning” if the text is not ambiguous.\textsuperscript{92} For example, the majority of the court in \textit{Utah School Boards Association v. Utah State Board of Education}\textsuperscript{93} took the plain meaning approach to interpreting the text of article X but looked to case law and legislative history following on the heels of the ratification of the Constitution to divine that plain meaning.\textsuperscript{94}

Chief Justice Durham’s plain meaning analysis in \textit{American Bush}, however, looked more to a modern plain meaning to determine the use of the word “communicate” in article I of the Utah Constitution.\textsuperscript{95} Chief Justice Durham cited to a 1995 edition of Webster’s Dictionary and also the comparison of the text with the language of the U.S. Constitution to determine the plain meaning of the word.\textsuperscript{96} Justice Durrant, however, eschewed this particular approach to plain meaning interpretation in his concurrence.\textsuperscript{97} He wrote that there are three approaches to the text of the Constitution: (1) the contemporary-context approach, (2) the subjective approach, and (3) the historical approach:

\begin{quote}
All three of these approaches ask the question “what does the provision mean?” The contemporary-context approach asks “what \textit{should} the provision mean in the context of our modern values and attitudes?” The subjective approach asks “what \textit{should} the provision mean according to the interpreting judge’s own personal values and attitudes?” The historical approach asks “what \textit{did} this provision mean to those who drafted and ratified it?” While the answer to the first two questions would seem to be a moving target, the answer to the last one, at least in
\end{quote}

\begin{footnotes}
\item[89] \textit{Id.} at 1254.
\item[90] \textit{Id.} at 1264 (Durham, C.J., concurring in part and dissenting in part).
\item[91] \textit{Id.} at 1266.
\item[93] \textit{Id.}
\item[94] \textit{Id.} at 1241–42.
\item[95] \textit{Am. Bush}, 140 P.3d at 1266–67 (Durham, C.J., concurring in part and dissenting in part).
\item[96] \textit{Id.}
\item[97] \textit{Id.} at 1255–56 (Durrant, J., concurring).
\end{footnotes}
theory, is fixed. . . . I believe that the appropriate question is the last one.98

The majority opinion, authored by Justice Parrish, also takes the historical approach to plain meaning. For the majority, plain meaning must necessarily be informed by historical context.99 Additionally, a plain meaning argument will not stand up on a meaning derived from the modern dictionary. Rather, advocates must prove that the meaning was plain to the drafters and voters of the Utah Constitution in 1895.

B. Historical Evidence of Intent

The *American Bush* majority put forward three steps to a contextual analysis of the Utah Constitution that will ultimately inform an interpretation of the intent of the drafters of the Constitution and the ratifying public: (1) analyze the text; (2) support the analysis with historical evidence of the state of the law when the Constitution was drafted and ratified; and (3) provide further context for a textual interpretation with Utah’s particular legal traditions at the time of drafting, both common law and statutory.100

1. The Text

Justice Parrish first looked to the text of the Utah Constitution as the “surest indication of the intent of its framers and the citizens of Utah who voted it into effect.”101 The majority reached the conclusion that article I, sections 1 and 15 were complementary provisions that should be read together.102 To reach this

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98 Id. at 1256.
99 Id. at 1239 (majority opinion) (“While we first look to the text’s plain meaning, we recognize that constitutional ‘language . . . is to be read not as barren words found in a dictionary but as symbols of historic experience illumined by the presuppositions of those who employed them.’ We thus inform our textual interpretation with historical evidence of the framers’ intent.” (citations omitted)).
100 Id. at 1240. Justice Parrish patently rejected previous approaches to constitutional interpretation that considered policy arguments. Id. at 1240 n.3 (“We have intentionally excluded the consideration of policy arguments suggested by *Society of Separationists v. Whitehead*, 870 P.2d 916, 921 n.6 (Utah 1993).”).
101 Id. at 1241.
102 Id. at 1241–42 (“The framers of the Utah Constitution divided the freedom of speech guarantees into three distinct clauses. The first clause (the ‘liberty and responsibility clause’), contained in section 1 of the declaration of rights, defines the scope of the freedom of speech. *Id.* art. I, § 1. The second clause (the ‘governmental restriction clause’), contained in the first sentence of section 15, prohibits governmental actions that abridge or restrain those rights. *Id.* art. I, § 15. These first two clauses of general application function in concert; the first defines what is protected, while the second defines the limits of governmental action in relation to those protected activities. The third clause (the ‘criminal libel clause’), contained in the second sentence of section 15, illustrates the limits of
conclusion, Justice Parrish applied the “conventional method[] of constitutional
interpretation” that reads other provisions dealing with the same topic to determine
the meaning of a textual provision. Like Chief Justice Durham, Justice Parrish
also compared the text of the Utah Constitution to the U.S. Constitution, noting the
lack of specific language in the latter. After determining that the different
constitutional provisions on speech are to be read together, Justice Parrish looked
to the constitutional traditions of sister states in 1895 to discern the meaning of
substantive provisions.

2. Sister State Constitutional Traditions

Appellant, American Bush, argued that article I of the Utah Constitution
provided more protection for speech than the First Amendment of the U.S.
Constitution. In judging this proposition, Justice Parrish situated Utah within the
history of speech clauses in sister states around the nation. She noted two distinct
trends in state constitutional speech clauses. The first is from the colonies
immediately after the Revolutionary War. At that time, states were basing their
speech provisions on a series of letters by Trenchard and Gordon known as Cato’s
Letters, “that argued for more extensive rights of expression without fear of
government reprisal.” The Utah speech clauses are not so expansive, however,
for they contain language limiting speech by making individuals “responsible for
the abuse” of the right. The majority noted that this language derives from
William Blackstone, whose philosophy on the press advocated for no restraint of
publication but did provide punishment for abuses of liberty. This argument is
reinforced by a citation to a California case that is contemporaneous to the
ratification of the Utah Constitution that attributes California’s similar
constitutional language to Blackstone. This deep look into the state of the law in
1895 led the majority to the general conclusion that Utah’s protection for speech is
not necessarily more expansive than its federal counterpart because it contains
limiting language that is not present in the U.S. Constitution.

In contrast, in his dissent, Justice Nehring looked to the history of the press at
the time of the Constitutional Convention, as well as the tradition of sister states
and concluded that “[b]y 1895, Utah’s debate over the wording of a criminal libel
component of its constitution was a common, perhaps obligatory, item on the
governmental action, and by inference the scope of individual freedoms, in the specific
instance of criminal libel prosecutions.”.

103 Id.
104 Id. at 1242–43.
105 Id. at 1238–39.
106 Id. at 1246.
107 Id. at 1247.
108 Id. at 1245.
109 Id. at 1248 n.13.
110 See id. at 1248.
agenda of state constitutional conventions,” and did not signify a commitment to a Blackstonian constitutional agenda.111

In addition to using sister state constitutions to contextualize the intent of the framers in 1895, sister state constitutional jurisprudence is also called upon when those courts interpret constitutional language similar to that of Utah. Justice Parrish cited Colorado, Indiana, and Tennessee case law that applied a similar textual approach to constitutional language similar to that of Utah and concluded that their states’ constitutions did not protect obscenity.112 Conversely, Chief Justice Durham’s opinion cited to a modern case from Oregon that interpreted a speech clause similar to Utah’s to protect speech similar to that present in American Bush.113 Though looking to sister state interpretations does not lead to absolute results in textual interpretation, it does provide advocates with forty-nine different possible arguments to support a proposition.

3. Historical Context of the Ratifying Society

(a) Voters’ Intentions

Unlike the federal constitution, the electorate, not the drafters, ratified state constitutions.114 Therefore, in construing state constitutions, courts may look to the intention of the drafters and, more importantly, to the intentions of the voters115:

Through the process of voting for the constitution on November 5, 1895, the citizens of Utah circumscribed the limits beyond which their elected officials may not tread. As ‘[a]ll political power is inherent in the people,’ Utah Const. art. I, § 2, only Utah’s citizens themselves had the right to limit their own sovereign power to act through their elected officials. Judicial officers may not substitute their own wisdom for that of the people of Utah inasmuch as the citizens limited the actions of their elected officials in certain areas but left them free in other areas to exercise their judgment in representing their constituents. To do so would be to deny political powers to the citizens of Utah that they in their wisdom and judgment had retained for themselves.116

111 Id. at 1285 (Nehring, J., dissenting).
112 Id. at 1252 (majority opinion).
113 Id. at 1274 (Durham, C.J., concurring in part and dissenting in part).
114 Williams, supra note 79, at 194–96.
115 Landau, supra note 6, at 862–63 (“The authoritative character of state constitutions derives from their adoption by a vote of the people, not from the views of their drafters. Thus, it should be the views of the voters who adopted state constitutions that should be the focus of the interpretation of those documents. Evidence about what framers or drafters had in mind might be relevant; the framers were themselves voters, and their views might have been available to voters.”) (citations omitted)).
116 Am. Bush, 140 P.3d at 1241 (citations omitted).
This is the driving force of Justice Parrish’s opinion in American Bush. The court ultimately concluded that in light of the clear disapproval the people of Utah had for nude dancing at the time of the adoption of the Utah Constitution, nude dancing was not a form of expressive communication that the electorate intended to protect by means of article I of the Utah Constitution. 117

Though it is often difficult to generalize what the entire group of voters is thinking when they ratify a constitution, 118 the common law and statutes of 1895 provide “the clearest picture” of the intentions of the drafters and voters of the time. 119 Justice Parrish cited to a statute that was enacted shortly after the Constitution was ratified that made “it a crime to ‘employ any female to dance, promenade, or otherwise exhibit herself’ in any ‘saloon, dance cellar, or dance room, public garden, public highway, or in any place whatsoever, theatres excepted,’ or for a female to engage in such activity.” 120 Thus, the legislature elected by the ratifying public reaffirmed that it was within their power to prohibit nudity. 121 In light of this evidence, the majority concluded that article I of the Utah Constitution was not intended to protect nude dancing. 122

(b) The Utah Constitutional Convention

When interpreting the Utah Constitution, the justices rely on the record from Utah’s Constitutional Convention to varying degrees. For example, Justice Parrish considered the Constitutional Convention to be one source for identifying the meaning of constitutional provisions in American Bush. 123 But, she also noted that the record of discussion and vote counts did not convey the mindset of all the men that voted. 124 Specifically, Justice Parrish examined the debate and votes on two amendments that were proposed and rejected during the Convention. 125 The first proposed amendment she reviewed exemplified one of the weaknesses of reviewing the convention record, namely the frequent problem that vote counts and competing floor statements can be interpreted to support multiple conflicting

117 Id. at 1254.
118 These arguments do not always apply with equal force in the case of state constitutional interpretation because of the rich record of recent amendments and recorded intentions of the framers. Landau, supra note 6, at 862. For a good explanation of the history of the Utah Constitutional Convention and ratification process, see generally JEAN BICKMORE WHITE, CHARTER FOR STATEHOOD: THE STORY OF UTAH’S STATE CONSTITUTION (1996); see also Paul Wake, Fundamental Principles, Individual Rights, and Free Government: Do Utahns Remember How to Be Free?, 1996 UTAH L. REV. 661, 662.
119 Am. Bush, 140 P.3d at 1250.
120 Id. at 1252 (citing Utah Rev. Stat. § 4244 (1898)).
121 Id.
122 Id.
123 See id. at 1248–50.
124 Id.
125 Id.
conclusions. The second proposed amendment was more susceptible to a single interpretation, but while Justice Parrish found it helpful in the analysis, it was by no means the main thrust of her opinion.

For Justice Lee, the intent of the drafters is central to the state constitutional inquiry. And to identify intent, Justice Lee turned to the Utah Constitutional Convention in his majority opinion in *Utah Transit Authority*:

During the course of the state’s constitutional convention, delegate Thomas Maloney proposed an amendment to article VIII that would have expressly authorized the Utah Supreme Court to issue advisory opinions when requested by the governor or legislature. When questioned why he would propose such a clause, Maloney responded that it had “worked well” in other states (including Massachusetts, Maine, and Colorado) and that the legislature “may want an opinion” on matters of significance. Two other delegates voiced their objection to the proposed amendment, however, and it was roundly rejected by the body of the convention.

Based on these statements, Justice Lee later argued in his *Gregory* dissent that a constitutional amendment would be necessary to create the public interest standing doctrine.

By contrast, Justice Durham’s majority opinion in *Gregory* did not address the framers’ intentions, nor did the historical cases that developed the public interest standing doctrine use this interpretational tool. The *Gregory* court instead responded:

At the state level, the recognition of an alternative form of standing is simply not the type of jurisprudential development which is predicated on explicit constitutional authorization. The dissent suggests that this

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126 Id. at 1248–49
127 Id. at 1250.
130 In response to the dissent’s argument that the framers explicitly withheld the authority to issue advisory opinions, thus not intending public interest standing, Justice Durham responded for the majority with arguments grounded in sister state law:

We . . . align with the courts of numerous other states in determining that the lack of a “case or controversy” requirement in our state constitution permits the development of alternative, public-interest standing doctrines.

E.g. *id.* at 1105 n.9.
court requires explicit textual authorization to articulate the scope of the judicial power to assess standing. We reject this view.\footnote{Gregory, 299 P.3d at 1105 n.9.}

If intent can be surmised from the records of the Constitutional Convention, such intent would be helpful to an argument, but by no means necessary.

\textit{(c) Jurisprudential Philosophy}

Although Justice Parrish does not give much weight to the “discussion” of the Constitutional Convention, the legal treatises that are referenced in the Constitutional Convention are cited throughout \textit{American Bush}.\footnote{See, e.g., Am. Bush v. City of S. Salt Lake, 140 P.3d 1235, 1240–41 (Utah 2006).} Particularly, Justice Nehring and Justice Parrish cite passages from Thomas Cooley to support the proposition that the Constitution is derived from natural law, or that the rights and powers of the Constitution existed before the document was created.

\begin{quote}
[A state constitution] is not the beginning of a community, nor the origin of private rights; it is not the fountain of law, nor the incipient state of government; it is not the cause, but consequence, of personal and political freedom; it grants no rights to the people, but is the creature of their power, the instrument of their convenience.\footnote{Id. at 1240 (quoting THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 36–37 (Leonard W. Levy ed., Da Capo Press 1972) (1868)).}
\end{quote}

Justice Nehring inquires into the jurisprudential philosophies of the drafters to determine their intent.\footnote{Id. at 1282–83 (Nehring, J., dissenting).} Unlike the majority, Justice Nehring determines that the philosophy behind article I, section 15 of the Constitution and article I, section 1 was not Blackstonian. Rather, Justice Nehring capitalizes on the Thomas Cooley reference to a natural rights approach throughout the speech clauses:

\begin{quote}
I reach my conclusion, therefore, that the text and history of article I, section 1 and article I, section 15 manifest the intention of the framers to protect the expansive rights of expression inherent to every person, independent of governmental intrusions justified by Blackstonian philosophy or by extrapolation from the criminal libel provisions of article I, section 15. I am therefore convinced that the majority is wrong in concluding that the men who drafted and ratified the Utah Constitution intended the “responsibility for abuse” provision to empower the government to restrict “immoral” speech.\footnote{Id. at 1287.}
\end{quote}
From Justice Nehring’s interpretation, as well as the majority’s Blackstonian interpretation, we see that arguing the jurisprudential philosophies may also gain traction at the Utah Supreme Court. Like the play between voters’ intention and drafters’ intention, there is room here for advocates to move.

Also illuminating from Justice Nehring is that he ultimately yearns for the lockstep days:

If there is one other matter upon which the majority and the Chief Justice are in accord, it is in their dissatisfaction with federal First Amendment jurisprudence. I am far less troubled by it. In fact, I have come away from this appeal with a newfound sympathy for it. The attraction of the federal First Amendment approach may have more to do with my unease over the alternatives proposed by my colleagues . . . . I have, therefore, come to be convinced that there is merit in the federal “intermediate scrutiny” model and that we should incorporate it into our analytical approach to the regulation of free expression under the Utah Constitution.137

It has also been posited that Justice Nehring has a more interstitial approach to constitutional interpretation.138

The tools presented in American Bush are malleable. The sheer volume of approaches in the opinion substantiates the claim that a simple footnote to a plain meaning argument is not what the court is requesting. With this collection of interpretational tools, none is particularly essential to success. What will get the attention of the court is an argument using as many of these tools as possible.

IV. CONCLUSION

In the current era of Utah constitutional case law, the legal community will have to be creative—and even deviceful—to piece together compelling briefs to argue cases under the Utah Constitution. In contrast to the early days of New Judicial Federalism where the court introduced new interpretations into the Utah constitutional dialogue from nothing more than a party’s citation to sister state law, sophisticated briefing is now necessary to succeed on a Utah Constitutional claim. Even where there is little case law or unfavorable prior precedents, practitioners may still find success by raising arguments grounded in the text of the Utah Constitution and supported by those sources the court has identified as useful for interpreting its text. The strongest textual arguments will be those supported by historical evidence of the intent of the 1895 Utah voters and drafters of the Utah Constitution, analysis of the constitutional traditions of sister states, and the history of the society that adopted the Utah Constitution.

137 Id.
138 See Furse, supra note 80, at 1655 (citing Utah v. Robinson, 254 P.3d 183, 186 n.14 (Utah 2011)).
CLEAR AS MUD: RECREATING PUBLIC WATER RIGHTS THAT ALREADY EXIST

Kathryn A. Tipple*

In accumulating property for ourselves or our posterity, in founding a family or a state, or acquiring fame even, we are mortal; but in dealing with truth we are immortal, and need fear no change or accident.1

I. INTRODUCTION

The federal government has a history of deferring to state water law even in federally owned territories, a deference memorialized in statutes such as the Desert Lands Act of 1877,2 the Reclamation Act of 1902,3 and the Federal Power Act.4 However, in certain circumstances, the federal government continues to assert its primacy with respect to water through reserved land, for federal purposes. Most prominently, the federal government has overriding plenary authority to protect, maintain, and improve navigation for interstate commerce in navigable waters, an authority that gives rise to the federal navigation servitude and that overrides both state and private property interests.5 Moreover, when the federal government reserves public lands for particular purposes, it impliedly reserves water rights sufficient to support those purposes.6 Such federal reserved water rights, or Winters7 rights, ensure as a matter of federal law that tribes, national parks, national forests, and other specifically reserved federal areas have legal rights to the water that they need.8

Federal public lands that the U.S. Bureau of Land Management (BLM) manages have a more complicated water rights history. Few BLM lands are reserved for a particular use, and as the following will illustrate, this makes

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1 HENRY DAVID THOREAU, WALDEN 87 (E.P. Dutton & Co., Inc. 1959) (1854).
traditional federal reserved water rights difficult to establish. In 1926, President Calvin Coolidge reserved to the federal government land containing water to be managed for livestock watering in the Public Water Reserve Number 107 (PWR 107). These reserves were established to promote western settlement and prevent monopolization of scarce water resources, and are still important sources of water for serving public use on federally managed lands, such as BLM lands. Nevertheless, the history of PWR 107 illustrates how defined federal priorities for public water use can become unclear over time. Initially, federal authority to reserve water from state allocation expanded during the early twentieth century as it was unclear how broad the original purpose was meant to be; however, the federal authority has since been limited and refined as growth in local demands on limited water and reserved land restrict expansive reservations. This expansion and contraction in the scope of federal authority to reserve water has done little to completely identify and quantify the water sources reserved by PWR 107. Today, PWR 107 reservations are an ambiguous legal concept.

Diverging interests in public water and land in the Interior West have muddied PWR 107’s significance and implied legal duties. This public water reserve will become an important right to identify in Utah and Nevada in particular because it withdraws and reserves the surrounding federal lands that may limit project development on public lands. Where states and local BLM offices endeavor to use more water and land for energy and resource development, especially in areas where PWR 107 reserves may exist, the federal government needs to clarify what PWR 107 sets aside and how other uses of BLM land may interact with these reserves. It is unclear how completely PWR 107 waters are recorded with state water administrators and further uncertain what federal duty is owed to these claims in light of climate change or state adjudication. These uncertainties will likely be challenged through litigation. Citizen groups can file legal claims in response to interference with reserved waters, demanding federal administration of

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9 The BLM has a multiple-use mission to sustain and administer several aspects of public lands under the Federal Land Policy and Management Act of 1976 (FLPMA). 43 U.S.C. § 1701 (2012). By contrast, land reserved for particular purposes has been deemed to carry with it a reservation of sufficient water to accomplish the government’s purpose. See, e.g., Cappaert v. United States, 426 U.S. 128, 147 (1976) (involving a national monument that was reserved specifically to preserve a unique pool environment and therefore included a reservation of the amount of water needed to fulfill this purpose).

10 Public Water Reserve No. 107, Exec. Order of Apr. 17, 1926, 3 C.F.R. § 297.5 (1938); see also 43 C.F.R. § 297.5.


12 See Muhn, supra note 11, at 68–69, 145.

13 See id. at 145.
PWR 107 claims through the judiciary.\textsuperscript{14} In Colorado, some PWR 107 claims have been decreed under state water law through formal adjudication.\textsuperscript{15} However, in Nevada, conflicting priorities for public water and land uses have animated litigation, pitting mineral development against water reserves.\textsuperscript{16} Ultimately, multiple uses and scarce resources will pressure the federal agencies and federal courts to consider clarifying the effect of PWR 107.

This Note describes the history that both broadened and refined the use of public waters initially reserved by the federal government, illustrates several issues western states may face in dealing with PWR 107 waters, and discusses several legal issues that will prove formative for PWR 107 legal claims in the coming years. Part II illustrates the long history of implied federal water reserves and PWR 107, and it demonstrates how federally reserved waters confound the autonomy of state-governed prior appropriation and state water rights. Part III lays out several pressing federal water reserve and PWR 107 issues in the western states—including Utah—describing how these issues are created by divergent interests in water use and are unique to western states. These imminent water issues will require legal action to define PWR 107 claims within states’ water rights records, as well as the actual authority underlying federal public water claims. Part IV pursues the potential for legal controversy in Utah if federally reserved water claims are not quantified. Should the federal government not defend the PWR 107 rights in the face of public land development, the muddy definition of these rights will become an important legal tool for members of the public to assert citizen-suit claims against those charged with protecting public water interests on federal lands.

The law will ultimately develop through judicial opinions, out of a necessity to clarify the confusion surrounding the modern objectives of PWR 107. This Part will also discuss implied federal reserved water rights generally to further demonstrate uncertainties over federal water interests, federal and state cooperation, and the burdens on state water allocation. Importantly, these water reservations were judicially created and geographically established at creation. They also encompass very large amounts of quantified water rights in some cases, unlike the PWR 107 springs. Nonetheless, because PWR 107 rights were created in

\textsuperscript{14} See, e.g., Great Basin Mine Watch v. Hankins, 456 F.3d 955, 966–67 (9th Cir. 2006).


a blanket executive reservation, these springs may create greater uncertainties than other federal reserved water rights.

II. WATER IN THE WEST: NECESSITY DRIVEN DOCTRINES

A. A New Right in a New Land

Water is an essential public resource in the western United States, where a semiarid climate challenged early settlers. The history of western water law demonstrates a disconnect between federal policy and western realities. Initially, the federal government owned most of the land in the West, having secured title to land that was either ceded by the original states or obtained through agreement with Native Americans and foreign powers. The riparian water rights doctrine, which controlled water rights in the comparatively wet eastern United States during the nineteenth century, recognized that owners of land that abut surface waters have shared rights to the common source of water. The riparian doctrine had little practical application in the federally owned, arid West where water was generally scarce. As a result, Colorado miners, among other early settlers, created water-use practices that led to a new system of water rights:

Imperative necessity, unknown to the countries which gave it birth, compel[led] the recognition of another doctrine in conflict therewith . . . . [T]he first appropriator of water from a natural stream for a beneficial purpose has, with the qualifications contained in the constitution, a prior right thereto, to the extent of such appropriation.

And, Colorado enacted this new water law doctrine, known as prior appropriation, for its state. Eventually the U.S. Supreme Court formally recognized that western water rights on public lands could be acquired under state prior appropriation law. In 1907, the U.S. Supreme Court held in *Kansas v. Colorado* that states had the authority to choose the foundation of their water law, be it either riparian rule or prior appropriation, though many state legislatures were already permitting

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18 United States v. City & Cnty. of Denver, 656 P.2d 1, 6 n.9 (Colo. 1982); see generally PAUL W. GATES, HISTORY OF PUBLIC LAND LAW DEVELOPMENT (1968) (outlining the history of U.S. government land acquisition in the West).
21 City & Cnty. of Denver, 656 P.2d at 6–7 (quoting Coffin v. Left Hand Ditch Co., 6 Colo. 443, 447 (Colo. 1882)) (alterations in original).
22 Id. at 6–9; Coffin v. Left Hand Ditch Co., 6 Colo. 443, 446–47 (Colo. 1882).
23 City & Cnty. of Denver, 656 P.2d at 7–8.
24 206 U.S. 46 (1907).
water rights for beneficial uses based on prior appropriation. As states throughout the West adopted prior appropriation, the Court subsequently allowed states to limit the federal government’s control over water. In 1935, the Court discussed the formative role that the Desert Land Act of 1877 played in severing water rights from land ownership for appropriation and use elsewhere. By 1978, *California v. United States* summarized the state of western water law by holding that the federal government would both recognize prior private water use in western states and “confirm[] the policy of appropriation for a beneficial use, as recognized by local rules and customs, and the legislation and judicial decisions of arid-land states, as the test and measure of private rights in and to the non-navigable waters on public domain.” However, the federal government still reserved, either expressly or implicitly, its rights to water necessary for interstate commerce and navigation, and to fulfill the mission of federally reserved lands. While Congress signaled substantial deference to state appropriation and use of western water through the enactment of several laws including the 1902 Reclamation Act, the federal government continued to assert its interest in western waters, winning a series of cases decided by the U.S. Supreme Court. Thus, while states seemed to gain control over water use in the West, the federal government found it necessary to retain some control over a key component of the land value—the water.

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25 *Id.* at 94.
26 See A. Dan Tarlock, *The Future of Prior Appropriation in the New West*, 41 NAT. RESOURCES J. 769, 770 (2001) (“Prior appropriation was so entrenched in the West by the end of the nineteenth century that it allowed western states to limit the federal government’s role for most of the twentieth century to that of a water provider to state water right holders . . . .”).
29 *Id.* at 657 n.11 (quoting *Cal. Or. Power Co.*, 295 U.S. at 155) (alterations in original).
30 See United States v. Rio Grande Dam & Irrigation Co., 174 U.S. 690, 703, 707–09 (1899) (construing common law and congressional acts to protect the United States’ interest in navigable waters); see also *Winters v. United States*, 207 U.S. 564, 577 (1908) (acknowledging federal authority to reserve water but determining the reservation was later repealed); Desert Lands Act of 1877, 43 U.S.C. § 321 (2012) (opening nonnavigable waters to public appropriation and use).
31 Reed D. Benson, *Deflating the Deference Myth: National Interests vs. State Authority Under Federal Laws Affecting Water Use*, 2006 UTAH L. REV. 241, 266–67; see also *Winters*, 207 U.S. at 577 (“The power of the [federal] Government to reserve the waters and exempt them from [state] appropriation under the state laws is not denied, and could not be.”); *Kansas v. Colorado*, 206 U.S. 46, 117–18 (1907) (recognizing a federal interest in interstate water rights though denying the United States’ attempt to intervene in the case); *Rio Grande Dam & Irrigation Co.*, 174 U.S. at 708–09 (“[T]he navigable waters of the United States should be subjected to the direct control of the National Government, and . . . nothing should be done by any State tending to destroy that navigability without the explicit assent of the National Government . . . .”).

In 1908, in conjunction with the recognition of western state authority and the prior appropriation doctrine, the U.S. Supreme Court recognized the federal government’s need and authority to reserve some of the water in the West. In *Winters v. United States*, the Court ruled that land reserved for tribes included the implicit reservation of sufficient water to fulfill the purpose of the land reservation. The priority date for the implied water reservation was to be the date that Congress, or later the executive, reserved the land for a particular purpose. This was a major shift from prior appropriation water rights. Under prior appropriation, water use became a right once the water was diverted and used for a beneficial purpose. The seniority of this right was the date the water was put to use, prioritizing against other uses of the water. By contrast, federal reserved water rights were created based on the designated use the land was set aside for and could be quantified later, though the priority date of the water right was set as the time of the land reservation. In essence, federal reserved water rights set aside unspecified amounts of water with very old priority dates to serve particular uses of designated federal lands.

While several types of nontribal federal public lands are also subject to the *Winters* doctrine, including national parks and national forests, lands managed by the BLM have a particularly convoluted history regarding federal reserved water

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33 The long and full history of the federal government’s interest in public water reserves, including both reserves by the legislative and executive branches, was in part motivated by desires to protect the West and the land resources from private land ownership monopolies and in part motivated by the American ideal of agriculture and stockmen. See Muhn, supra note 11, at 142–44.

34 207 U.S. 564 (1908).

35 Id. at 573–78.

36 Id. The priority date may also be the date of a treaty entered into between the U.S. and an Indian tribe. See United States v. Adair, 723 F.2d 1394, 1414 (9th Cir. 1983) (“[P]riority for a particular water right dates from the time of first use. . . . [W]here, as here, a tribe shows its aboriginal use of water . . . and then enters into a treaty with the United States that reserves this aboriginal water use, the water right thereby established retains a priority date of first or immemorial use.”).


38 Id.

39 Id. This is why prior appropriation is known as the “first in time doctrine.” Id.

40 Id.

41 See id.

rights. Until 1926, the General Land Office, which merged with the Grazing Service to become the BLM in 1946, had ad hoc authority to reserve federal water claims for the public lands that it controlled.\footnote{See Siobhan McIntyre & Timothy P. Duane, Water, Work, Wildlife, and Wilderness: The Collaborative Federal Public Lands Planning Framework for Utility-Scale Solar Energy Development in the Desert Southwest, 41 ENVTL. L. 1093, 1158 n.551 (2011).} In 1926, President Calvin Coolidge invoked his authority under the Pickett Act of 1910 to issue an executive order withdrawing public lands, as well as reserving public water used for livestock watering.\footnote{43 U.S.C. § 141 (1970) (repealed 1976) (providing the President of the United States the authority to withdraw, reserve, or revoke public lands for water use or public purposes).} The Pickett Act granted the President authority to withdraw lands and reserve them for public purposes “to be specified in the orders of withdrawals, and such withdrawals or reservations [would] remain in force until revoked by him or by an Act of Congress.”\footnote{Id.} This authority was further referenced in the Stock Raising Homestead Act of 1916 (SRHA), which stated that lands containing water needed for public use may be reserved under the Pickett Act and managed by delegated authority under the secretary of the interior.\footnote{46 U.S.C. § 300 (1970) (repealed 1976).} Subsequent to the passage of the SRHA, the secretary of the interior sent a proposed executive order to President Coolidge.\footnote{Id.} In it, the secretary stressed the need to retain title and supervision of springs and water holes in the unreserved public domain before additional private users could control the waters by exercising claims under the pending Taylor Grazing Act.\footnote{Id.; 43 U.S.C. § 315 (2012).} The same day the draft order was received, President Coolidge created PWR 107 by executive order, reserving all unreserved public land containing a spring or water hole.\footnote{Public Water Reserve No. 107, Exec. Order of Apr. 17, 1926, 3 C.F.R. § 297.5 (1938); see also 43 C.F.R. § 297.5.} In the executive order creating PWR 107, President Coolidge declared:

[T]hat every smallest legal subdivision of the public land surveys which is vacant, unappropriated, unreserved public land and contains a spring or water hole, and all land within one quarter of a mile of every spring or water hole located on unsurveyed public land be, and the same is hereby, withdrawn from settlement, location, sale, or entry, and reserved for public use in accordance with the provisions of Sec[ion] 10 of the act of December 29, 1916.\footnote{Id.} The purpose of reserving land to reserve the water through a public water reserve “was to prevent the monopolization by private individuals of springs and
waterholes on public lands needed for stockwatering.”

PWR 107 land reserve includes a “federal reserved water right and [provides] that the United States has the right to administer those water rights.” For example, after the Taylor Grazing Act was passed, the federal government permitted grazing rights on federal land that included access to the reserved waters. Several states have recognized PWR 107 water claims during state water adjudications. Courts have since recognized that this reserved water right, reserved and withdrawn, has the priority date of the executive order. The date the withdrawal was made, April 17, 1926, is the priority date for these water claims. Only an executive act may revoke the PWR 107 reserve. Like Winters reserved water rights, PWR 107 waters were reserved for federal priorities and were otherwise reserved from state allocation. As will be discussed, PWR 107 reserves create even greater uncertainty than Winters reserves. Not only is the quantity of water reserved not identified in the reservation but the locations of springs and water holes included in the reserves were also not specified at the time PWR 107 was issued—setting the stage for federal ambiguity over the quantity and location of protected waters and the scope of use permitted under PWR 107.


While federal reserved water rights were first recognized in 1908, the scope of these kinds of rights has been the subject of ongoing debate. In 1963 the U.S. Supreme Court held that federal reservations and the reserved water rights they entail are not limited to habitable land with water resources for Indian reservations, but apply equally on lands reserved for other government purposes, such as national forest land. Cappaert v. United States extended the scope of federal reserved water authority to a federal monument, prohibiting groundwater pumping that would lower water levels in a subterranean pool in the Death Valley National

51 Great Basin Mine Watch v. Hankins, 456 F.3d 955, 966 (9th Cir. 2006) (quoting United States v. State, 959 P.2d 449, 453 (Idaho 1998)) (internal quotation marks omitted); see also United States v. City & Cnty. of Denver, 656 P.2d 1, 32 (Colo. 1983) (“The purpose of the reservation was to prevent monopolization of water needed for domestic and stock watering purposes.”).
53 Id. at 452–53.
54 See, e.g., id. at 453; City & Cnty. of Denver, 656 P.2d at 32.
57 Muhn, supra note 11, at 135.
58 Id.
Monument because the pumping would have harmed the purpose of the monument. 60 United States v. New Mexico 61 established the applicability of the reserved rights doctrine to National Forest Service lands. 62 In 1979, Solicitor for the Department of the Interior Leo Krulitz attempted to expand federal reserved water right authority even further, claiming that “non-reserved” federal water rights could “aris[e] out of the land management functions of the federal agencies . . . independent of whether the public lands are reserved or not . . . [and] have a priority date as of the date the water was first applied to use.” 63 The Department of Justice later denied that non-reserved rights exist. 64

In addition to the general attempt to expand the scope of federal reserved water rights, federal agencies also sought to broaden the scope of PWR 107 claims. In a 1979 Department of the Interior opinion analyzing PWR 107 claims, Krulitz called for the entire flow of springs to be reserved under PWR 107 and stated that the water could be used for purposes beyond stockwatering. 65 This broad interpretation, however, was muted by the Department of Justice and the Department of the Interior; these departments clarified that reserved spring water must only be for the amount of flow “necessary” to serve the use outlined in PWR 107 and that PWR 107 only reserved water from important, large enough springs, as opposed to all springs. 66 Despite clarifications, PWR 107 claims and other federal water reserves have expanded the scope of federal authority over water use in the West since the early part of the century. 67

Changes in executive interpretations of federal reserved water rights and PWR 107 are not the only factors complicating a determination of the continuing vitality and scope of these water claims. Judicial and legislative developments also contribute to the complicated picture. Initially, the federal government was not

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60 See id. at 141.
62 See id. at 715–17 (recognizing reserved rights for stockwatering in the national forests).
64 See MacDonnell, supra note 63, at 398.
66 Purposes of Executive Order of April 17, 1926, Establishing Public Water Reserve No. 107, 90 Interior Dec. 81, 81–83 (1983); see also Liston, supra note 65, at 134, 134 n.70 (limiting reserved water on PWR 107 lands to amounts required for human and animal consumption). While these subsequent decisions limit the application of PWR 107, they still affirm the federal government’s authority to claim PWR 107 rights on federal land.
67 The Wilderness Act, 16 U.S.C. §§ 1131–36 (2006 & Supp. II 2008), and the Wild and Scenic Rivers Act, 16 U.S.C. §§ 1271–87 (2006), allow for federal water reserves to be attached to federal designations as long as the primary purpose is explicit and the water reserve is necessary to meet the purpose of the federal designation.
subject to jurisdiction in state courts for water rights adjudications. The McCarran Amendment provided a limited waiver of federal sovereign immunity to involuntary joinder, allowing for general adjudication of water right claims, including those claims held by federal entities, to occur in state courts. Through this amendment, Congress recognized the primacy of state prior appropriation. To date, state adjudication of federal reserved water claims has served to limit federal claims to state water resources. Some parties originally argued during adjudications that the federal interests in state waters were divested under the equal footing doctrine. Under this doctrine, each western state admitted into the union was to be on equal footing with the original states, the waters and soils of all states were reserved to the states, and new states had the same rights over these waters and soils. Despite this, courts have repeatedly held that federal water reservations made prior to statehood have continuing vitality after statehood where there is no indication of congressional intent to cede these water reserves to the new state. Nonetheless, the federal government’s claims to water reserves are subject to adjudication in state courts. And given that state water adjudications are

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68 See United States v. City & Cnty. of Denver, 656 P.2d 1, 8 (Colo. 1982) (“As sovereign, the United States was privileged to withhold such consent [to state adjudication].”).

69 McCarran Amendment, 651, Title II, § 208(a) to (c), 66 Stat. 560 (1952) (codified as amended at 43 U.S.C. § 666 (1952)); see also City & Cnty. of Denver, 656 P.2d at 8 (“Until the enactment of the McCarran Amendment, however, the prior appropriation system in Colorado could not be applied to the adjudication or administration of the water rights of the United States, because Congress had not consented to the determination of such water rights by state courts.”); BUREAU OF LAND MGMT., supra note 11 (“Prior to [the McCarran Amendment], the federal government had reserved the right not to be included in general basin adjudications conducted under state law. The McCarran Amendment, however, recognized that the exemption of the federal government from these adjudications would undermine the state’s water allocation systems.”).

70 City & Cnty. of Denver, 656 P.2d at 8–9.

71 See, e.g., id. at 4–5 (“The acts admitting the western territories into the United States, which guaranteed each state ‘equal footing’ with the original states, reserved ownership of unappropriated lands within the state to the federal government but made no provision with respect to unappropriated waters.”).

72 See id. The equal footing doctrine is based on U.S. CONST. art. IV, § 3, cl.1.


74 See, e.g., City & Cnty. of Denver, 656 P.2d at 20–34 (finding several reserved rights survived Colorado statehood and articulating the rule that “[t]he extent of federal reserved water rights is controlled by the intent of Congress and the purposes for which the lands are reserved”); cf. Idaho v. United States, 533 U.S. 262, 273, 280–81 (2001) (finding title to submerged lands reserved by the government prior to Idaho statehood remained federal lands held in trust after statehood, where there was no evidence of congressional intent that the lands be given to the State); United States v. Milner, 583 F.3d 1174, 1183 (9th Cir. 2009) (rejecting a party’s recourse to the equal footing doctrine because the doctrine is inapplicable where the federal government has expressly reserved the lands and where Congress has recognized the reservation in a manner that demonstrates its intent not to transfer the lands to the new state).
ongoing for decades, this leaves the federal water claims rather uncertain.\(^75\) Without knowing how much water has been reserved, or without a formal state decree for a PWR 107 right, federal reserved waters are dubbed an intrusion, and even “a wild card that may be played at any time.”\(^76\)

It has also been argued that PWR 107 is no longer valid because the purpose of the order has been nullified by a subsequent public land use act.\(^77\) In 1976, the Federal Land Policy Management Act (FLPMA) was enacted and directly repealed the Pickett Act and the SHRA.\(^78\) However, in a savings clause, FLPMA explicitly stated that the Act would not terminate or affect any already existing reservations, including any federal right to water on public lands.\(^79\) Courts consistently recognize that FLMMA, rather than abrogating the purpose of PWR 107, sustained the full force of these reserved rights.\(^80\)

Today, reserved water rights claims reflect a tenuous balance between federal authority and state law. Reserved water rights do not expressly mandate the BLM to file a claim with the state.\(^81\) So, unless the federal government is hailed into court for general adjudication or is required by state law to file a statement of claim, or files for a decree, the extent of the water right may remain unquantified. The primary purpose of the reservation, and therefore the nature of the uses allowed under the reserved right, may also remain in question. Moreover, a PWR 107 claim would only reserve from state control the amount of water necessary to meet the primary purpose of the reservation,\(^82\) and PWR 107 applies only to the


\(^{81}\) See Federal Water Rights of the National Park Service, Fish and Wildlife Service, Bureau of Reclamation and the Bureau of Land Management, 86 Interior Dec. 553, 576, 587 (June 25, 1979) (noting that state appropriation requirements do not apply to reserved water rights and that the PWR 107 reserves are made “regardless of whether the water source has been the subject of an official finding as to its existence and location”). But the combination of the McCarran Amendment and state law could lead to such a requirement.

\(^{82}\) See BUREAU OF LAND MGMT., supra note 11; see also United States v. New Mexico, 438 U.S. 696, 718 (1978) (clarifying that implied water rights refer to the necessary amount of water for the purpose of the reservation); United States v. City & Cnty. of Denver, 656 P.2d 1, 31–33 (Colo. 1982) (“Any amount in excess of the amount needed to prevent monopolization [of public waterhole or spring waters] is not reserved water.”).
amount of water needed for human consumption and stock watering. Reserved water sources can therefore be shared among multiple users, and states may appropriate the excess waters in accordance with state law. Notably, many reserved water rights claims, including PWR 107, have not been adjudicated or quantified with the states. Further, while some records may be incomplete, the BLM also has authority to approve land exchanges and leasing that may inadvertently extinguish undocumented PWR 107 claims on federal lands conveyed into state ownership.

III. WATER PRIORITIES: BEYOND COWS IN THE DESERT

The booming western states today have countless more water demands than the federal government could have imagined in the early 1900s. The federal government initially intended PWR 107 to be used for the public purpose of stock watering and human consumption, ultimately allowing life to be sustained on the western frontier. The issue, clear as the virgin spring, was that while there was plenty of open land in the West, there was not the equivalent bounty in water. The scopes of both federal water reserves and the PWR 107 executive order expanded and contracted over time in terms of what waters could be reserved for federally defined purposes. Concurrently, western states grew and the doctrine of prior appropriation developed. The actual legal reach and implication of the federal reserved water rights and PWR 107 in the face of state water appropriation and growing—often conflicting—resource demands have become crucial for resource planning. As will be discussed, PWR 107 claims are sometimes quantified and included in state water management plans and administrative records. However, conflicting interests in limited water resources could potentially become a legal issue where federal reserved water rights and PWR 107 are not identified or completely quantified, such as in Utah. Finally, climate change considerations may further confuse how much water is actually available for competing water uses.

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83 City & Cnty. of Denver, 656 P.2d at 51.
84 See, e.g., id. at 32 (“The law of prior appropriation still governs the allocation of excess waters.”).
85 BUREAU OF LAND MGMT., supra note 11.
87 See Public Water Reserve No. 107, Exec. Order of Apr. 17, 1926, 3 C.F.R. § 297.5 (1938); see also 43 C.F.R. § 297.5.
88 See Muhn, supra note 11, at 73.
A. PWR 107 and the West

1. Western States That Manage PWR 107

Nationally, PWR 107 was a withdrawal and reservation of federal land from appropriation and was intended to guarantee that water would be available for stockwatering and domestic use. Initially, the order was “construed to withdraw those springs and water holes capable of providing enough water for general use for watering purposes,” which would not include tiny springs or perennial streams. The order reserved “every smallest legal subdivision of the public land surveys which is vacant unappropriated unreserved public land and contains a spring or water hole.” The actual water sources included under the order were not itemized because the United States Geological Survey (USGS), the federal office charged with surveying water sources, “did not have the data to be more specific.” The USGS began conducting surveys to designate PWR 107 waters but because the Department of the Interior had not defined the amount of water needed to qualify a water source as providing enough water to be reserved, the USGS adopted a case-by-case determination of what was large enough. This left the actual definition of a source reserved under PWR 107 unclear: States that had abundant water sources or less stockwatering demand, where water reservations would serve little purpose, were eventually exempted by executive order and agency rules from the PWR 107 reserves. The exemption indicated that not all public domain was withdrawn and reserved simply because there was a spring that could function as a public water reserve. Individuals in these exempt states could continue to make entries for public domain land under other laws without having to survey the land for possible PWR 107 springs.

Each state not exempted has managed public domain for PWR 107 very differently. Nevada has long had a policy of not championing PWR 107 water reservations, as well as BLM assertions of water resource claims. There have

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89 Id. at 111, 117–120 (internal quotation marks omitted).
90 Public Water Reserve No. 107, Exec. Order of Apr. 17, 1926, 3 C.F.R. § 297.5 (1938); see also 43 C.F.R. § 297.5.
91 Muhn, supra note 11, at 116 (“The location of the watering places intended to be included in the order, however, was not definitely defined because the information available was insufficient for that purpose.”) (internal quotation marks omitted).
92 Id. at 118–20, 122–23.
93 Id. at 123–24. Alabama, Alaska, Arkansas, Florida, Kansas, Louisiana, Michigan, Minnesota, Mississippi, Nebraska, North Dakota, Oklahoma, South Dakota, and Wisconsin were exempt from filing PWR 107 affidavits during the surveys. Id.
94 Muhn, supra note 11, at 123–24.
95 Id.
been a few recent administrative decisions and cases brought in Nevada District Court considering whether mining developments on BLM land would disrupt PWR 107 waters. With certain state interests in ranching and mining, Nevada, through the state engineer, has enforced a strong policy against granting BLM water permit claims in general. The BLM has participated in claim negotiations with the state but ultimately has yielded to the state’s assertion of primacy over water. Conversely, in Montana, the state and even individual permittees have readily recognized BLM’s claims and applications for federal water rights during adjudication. The Montana state BLM officials have even reached out to federal BLM officials to quantify federal water claims in a show of cooperative policy administration. Montana manages public waters by quantifying the very amount of water reserved by various federal reserves. Similarly, Colorado has recognized PWR 107 claims and other federal reserved waters, albeit on an ad hoc basis, through adjudication in the state’s water courts. This allows for Colorado, like Montana, to administratively manage the source and amount of water that is reserved, thereby managing more completely the remaining water resources under state law.

2. PWR 107 Is a “Known Unknown” in Utah

Unlike other states in the West, Utah has no strong policy for small PWR 107 water reserves. Neither the state nor the BLM field offices have completely recorded or quantified these waters in resource management plans. Uncertainty over quantification of federal reserved water rights exists in Utah. The state also has not settled two much larger federal water reserves for tribes. The lack of accounting of the PWR 107 springs could become another large issue for the state. In the late 1870s, John Wesley Powell wrote of the “great numbers of cool springs” in the Uinta-White Valley, in eastern Utah, documenting for Congress that “[m]any good springs are found in this region, and eventually this will be a favorite district for pasturage farms.” It is likely that the federal executive

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98 REPORT ON BLM WATER, supra note 96, at 14–16.
99 Id.
100 Id. at 16–17.
101 Id. at 17–18.
102 Env’t & Natural Res. Div., supra note 15. New Mexico and Idaho have also formed similar state/federal cooperation on a case-by-case basis, as in Colorado. Id. This is exemplified by the several visible and politicized adjudications, including the Gila River Adjudication and Snake River Adjudication, respectively. Id.
intended to reserve some of these springs under PWR 107 for stockwatering. To better account for these waters, each BLM field office could report the locations of PWR 107 springs, seeps, and waterholes, formally in a centralized location online, on maps, or in administrative record keeping. More completely, the BLM could file with the state engineer for a formal decree, or the BLM could file the claims, by basin, during a basin-wide adjudication by the state. The state would then be able to more accurately account for state water resources available for appropriation or reallocation.

Utah state law allows for allocation of water rights under the prior appropriation doctrine. The state engineer holds the authority to grant new appropriation of water if the proposal includes a beneficial use and if a five-part test is met:

1. There must be unappropriated water available,
2. The proposed appropriation cannot impair existing rights or interfere with more beneficial uses,
3. The proposed plan must be physically and economically feasible and not detrimental to the public welfare,
4. The applicant must have the financial resources to complete the proposed project, and
5. The application was filed in good faith and not for purposes of speculation or monopoly.

As described, the state may grant applications to appropriate waters of a spring or water hole in excess of the PWR 107 reservation under state law. But, the existence of unaccounted for and unquantified PWR 107 reserves, and unquantified federal reserved water rights with senior priority dates, would make it difficult for the state engineer to reasonably administer the prior appropriation system because granting new appropriations requires the aforementioned showing that existing rights will not be impaired.

The lack of complete accounting is indicative of the history of PWR 107 in Utah. Initially, the Utah state engineer decided not to concern himself with PWR 107 and proceeded with water rights appropriation in accordance with state law.

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104 Limited information is currently available from the BLM on PWR 107 claims in Utah. For example, the Department of the Interior Bureau of Land Management maintains a digital Public Status Serial Register, and from this page it is possible to query a variety of land and resource information, including Public Water Reserves. BUREAU OF LAND MGMT., Reporting Application, U.S. DEP’T OF INTERIOR, http://www.blm.gov/landandresourcesreports/rptapp/criteria_select.cfm?rptId=206&APPCD=2&, archived at http://perma.cc/3BFU-BGF7 (last visited Sept. 3, 2014) (requiring the user to select “Other Query Parameter,” set the “Casetype” field to “231104,” and further narrow the search by the appropriate geographical unit).

105 UTAH CODE ANN. § 73-3-1 (West 2014).

only.\textsuperscript{107} In \textit{United States v. Schmutz},\textsuperscript{108} the state engineer granted private water rights in central Utah, even though the waters had been used as stock water for over thirty years.\textsuperscript{109} The state engineer disregarded that PWR 107 had reserved the land and water, allowing private grantees to block access to the area and declaring, “all public waters . . . the property of the state and . . . subject to appropriation under the laws of the state.”\textsuperscript{110} The court spoke of the apparent shared interests between the state and the federal government in preserving water resources for the public, but ultimately decided the case on other grounds, refusing to rule on PWR 107’s preemption of state law.\textsuperscript{111}

Since the 1930s, Utah has partially recognized federal reserved water rights, including some PWR 107 waters, but to this day has not fully quantified the reservations, leaving a gap in the data and information available through the BLM and the state.\textsuperscript{112} Utah’s 1990 State Water Plan expressed concern for the lack of federally reserved water rights on record—both the sources and the reserved quantities—to be used in conjunction with other state planning and management decisions.\textsuperscript{113} By 2001, the state water plan recognized that progress had been made to rectify some of the information gap through cooperation with the BLM; however, actual PWR 107 rights were not specified in the water plan. Some BLM offices are including PWR 107 information in their resource management plans, though more complete records of these reserved waters are not readily evident.\textsuperscript{114} Further, the progress to account for federal reserved water rights was only generally stated without further elaboration or discussion of PWR 107 water record keeping.\textsuperscript{115} The state water plans still do not delineate all federally reserved water rights—or PWR 107 waters—in Utah, though it appears the state and BLM are aware of the importance of defining these waters for the sake of water resource planning.

\textsuperscript{107} United States v. Schmutz, 56 F.2d 269, 270 (D. Utah 1931).
\textsuperscript{108} 56 F.2d 269 (D. Utah 1931).
\textsuperscript{109} \textit{Id.} at 270–71; Muhn, supra note 11, at 74–75, 126.
\textsuperscript{110} Muhn, supra note 11, at 126 (internal quotation marks omitted).
\textsuperscript{111} \textit{Id.} at 126–28.
\textsuperscript{112} \textit{See, e.g.,} Grant L. Hacking, 50 IBLA 154, 155 (Sept. 30, 1980) (using a memorandum to establish that the BLM State Solicitor in Utah had identified PWR 107 waters that would prohibit a pipeline right-of-way).
Federal reserved water rights and PWR 107 can muddy state management of water resources, as well as federal management of public lands. Federal waters have been reserved on federal lands that were withdrawn for a stated purpose. These lands include Indian reservations, national forests created as forest reserves, and national parks and monuments. Currently there are several uncertainties about these reservations that will make state water management in light of federal interests very difficult. Moreover, PWR 107, by order, reserved public lands and public water to meet federal purposes of preventing water monopolization and providing for stockwatering in the arid West. This order most immediately affected lands that were already federally held, withdrawing them from the public disposal, though not specifying the location of the reserves. If these water sources are not identified and quantified, there are several issues regarding PWR 107 and federal reserved water rights claims that will confound BLM and state management of water resources and public lands. In the face of continued development on BLM land and climate change, these unquantified rights will demand clarification in the near future.

1. Federally Reserved Lands with Federal Water Interests

(a) Indian Reservations

Arguably the most important federal reserved waters rights for Utah are those that are implied with land withdrawals made for Indian reservations.116 These reserved rights are the most important because of the large volume of water potentially involved, the early priority date associated with reservation establishment, and because federally reserved water rights, unlike rights granted under state systems, cannot be lost due to nonuse.117 The combined effect of these three attributes means that the largest and most senior rights within a river basin may be lying dormant. If developed, these dormant rights could force existing water users with a later priority date to curtail their appropriated water use.

When the federal government created Indian reservations, it generally expressly reserved only the land. The U.S. Supreme Court held, however, that with the land came a reservation of sufficient quantities of water to fulfill the purpose of Indian reservations.118 A “permanent homeland” would be otherwise unsupportable without water.119 Undoubtedly, these reserved waters have some of

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116 Ruple & Keiter, supra note 106, at 119.
117 Id.
118 NAT’L RESEARCH COUNCIL, WATER TRANSFERS IN THE WEST: EFFICIENCY, EQUITY, AND THE ENVIRONMENT 92–93 (1992). The purpose of the reservation was defined in terms of agriculture potential and the amount of irrigable acreage available on the Indian reservation. Id. at 94; see also Winters v. United States, 207 U.S. 564, 572 (1908).
119 NAT’L RESEARCH COUNCIL, supra note 118, at 93.
the earliest priority dates in Utah.\textsuperscript{120} Colorado, California, Montana, Nevada, Idaho, and Arizona have all negotiated court-approved settlements to quantify how much water was intended to be reserved to fulfill the needs of many Indian reservations.\textsuperscript{121} However, Indian reserved water rights have not been quantified in Utah.\textsuperscript{122}

In the Uintah Basin, in northeastern Utah, several demands on water resources make quantifying the Uintah and Ouray Indian Reservation water rights imperative. These demands include irrigation purposes, existing and proposed energy development projects, population growth, and changes in water availability resulting from a changing climate. The Department of the Interior, the State of Utah, and the Northern Ute Tribe are currently in negotiations to settle Indian reserved rights claims for the Ute Indian Tribe.\textsuperscript{123} These negotiations have been ongoing for many years. A settlement would clarify the amount of water reserved for the reservation, where the water would come from, and whether the water would be restricted to particular uses.\textsuperscript{124} Given the development demands on water in this particular region of the state, desire to settle the quantification of the reserved waters is high.\textsuperscript{125}

Once the amount of water for an Indian reservation is quantified and agreed upon, the concept of beneficial use may not be traditionally applicable under the terms of the settlement; Indian reserved rights may be put to any beneficial use without a change application typically required for other beneficial use changes.\textsuperscript{126} Another important aspect of Indian reserved waters is that under at least some settlement agreements, Indian reserved water rights may be leased to support off-reservation uses.\textsuperscript{127} “[S]everal Indian tribes believe that the most productive and profitable uses of their reserved water rights are off the reservation.”\textsuperscript{128} Ultimately, the federally created land and water reservations for tribes could significantly serve both the tribes that have been denied full administration of their water rights and

\textsuperscript{120} See Ruple & Keiter, supra note 106, at 119. The Uintah and Ouray Indian Reservation was established in 1861. \textit{id}.

\textsuperscript{121} NAT’L RESEARCH COUNCIL, supra note 118, at 93. Difficulties with implementation of these established settlements are not discussed in this Note.

\textsuperscript{122} One reservation in Washington County has quantified their water reservation; however, this is the only settlement in Utah to have been approved. H.R. REP. NO. 106-743, at 1 (2000).

\textsuperscript{123} Ruple & Keiter, supra note 106, at 119–21.

\textsuperscript{124} \textit{id}. Under one scenario there would be limited restrictions on the Tribe’s use of water, allowing for leasing or selling the water or water rights and transferring the water for uses occurring by non-Indians and off the reservation. \textit{id}. at 121.

\textsuperscript{125} \textit{id} at 121.

\textsuperscript{126} NAT’L RESEARCH COUNCIL, supra note 118, at 94 (“[R]ights quantified on the basis of the amount of practicably irrigable acreage within a reservation can be applied to mining, municipal uses, irrigating a resort’s golf course, or even maintaining instream flows for a fishery.”).

\textsuperscript{127} The actual legal right to “transfer water off the reservation remains unresolved in the courts, and Congress has chosen to deal with the issue in an ad hoc manner.” \textit{id} at 95.

\textsuperscript{128} \textit{id} at 94.
energy development on public lands, if the tribes seek to pursue such options. Without finality in the water settlement, all parties are stalled from moving forward with future planning and management. Further, should a settlement agreement be ratified, the state engineer will need to consider how the ratified senior water rights would affect other state appropriated water uses from the same water sources. There reasonably could be issues of over appropriation and disruption to current water uses caused by a call of the river, or exercise of these senior priority water rights that the state has otherwise not had to consider.

(b) National Parks and Wilderness Areas

The first withdrawal of public lands to create a national park, and the implied reservation of water with it, was for what was to become Hot Springs National Park in Arkansas. In Utah, there are several national parks that have been created since the Hot Springs National Park, though the ensuing water rights have been fiercely debated. The federal government ultimately settled with the State of Utah over water rights reserved for Zion National Park. This settlement, like all settlements involving federal reserved water rights, demanded a careful balancing of already allocated water rights, state priorities for the implicated water resources, and purposes of the federally reserved national park. The parties agreed that the state would recognize the federal reserved water rights claims by the National Park Service; the parties quantified how much water and which water supply source would be claimed; and the parties stipulated that federal government claims would be subordinate to already allocated state water rights from the same water sources and subject to administrative management by the state engineer. Achieving a settlement and recognizing the reserved water right, the state went on to resolve the details of additional federal reserved water rights claims for Rainbow Bridge, Hovenweep, Cedar Breaks, Timpanogos Cave National Monuments, and the Golden Spike National Historic Site.

Wilderness Areas are designated under the Wilderness Act of 1964 and, after legal consideration and negotiation, also may include implied federal water rights in the land designation. Each federal land designation in Utah could implicate more federal water reservations. Given the nature of federal land ownership in

131 See id.
132 Id.
133 Env’t & Natural Res. Div., supra note 15.
Utah, another federal land designation could involve additional claims of federal reserved water rights and could necessitate additional careful settlements between the state and the federal government in potentially over-allocated water basins.

2. Federal Reserves on Public Lands Competing with Private Interests

Federal reserved water rights and PWR 107 claims have also protected public water use for private interests. The flocks of settlers who would originally use PWR 107 to access watering holes, for example, were dependent on this withdrawal and reservation of land for establishing their personal livelihood in the West. Public lands also offer opportunities for multiple use and development through leasing; in Utah there is strong interest in energy development that would involve leases on public land. Potential private interests in resource extraction or access across multiple use BLM lands could be in direct conflict with existing PWR 107 reserves. However, because the location of PWR 107 waters and the amount of other federal reserved water rights are unknown, these unclear conflicts will likely require judicial attention in a variety of possible legal disputes. This could serve to only further muddle the claims.

(a) Proposed Resource Development

The desert West is a frontier for energy resource extraction. Where the federal government once reserved water from federal disposal and state appropriation for the purposes of Indian reservations, human consumption, and livestock watering, future natural resources projects may divert the primary purposes of these reservations. Utah needs to carefully consider how to allocate water for mining and energy development on BLM land with unquantified federal reserved water rights and possibly unidentified PWR 107 reservations. Should uses of the same water and land conflict, the state engineer will need to work with the BLM to resolve the conflict or else face judicial scrutiny.

An oil shale proposal in Utah and Colorado illustrates how water rights and land use for energy development on public lands may conflict with federal

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136 See, e.g., Great Basin Complaint, supra note 97. A recent Nevada decision suggests that PWR 107 must be adjudicated by the state engineer to be legally reserved and that PWR 107 never withdrew the land from metalliferous mining claims. Great Basin Res. Watch v. U.S. Dep’t. of Interior, No. 3:13-cv-00078-RCJ, 2014 WL 3696661, at *5–8 (D. Nev. July 23, 2014) (holding that though the BLM had notified the Nevada state engineer of the status of springs as PWR 107, the springs had not been adjudicated and it was proper for the BLM to decide now the springs were too small to be PWR 107 springs).
reserved water rights and PWR 107. The Government Accountability Office (GAO) released a report in 2010 stating that oil shale in the Green River Formation could play a large role in helping meet domestic energy demand. An estimated seventy-two percent of the oil shale is located under federal lands managed by the BLM. The GAO currently estimates that 42 to 504 gallons of water are needed per barrel of oil produced depending on the type of operation. Water for oil shale development must be appropriated under governing state law. The Green River Formation considered for oil shale development spans states with prior appropriation law. The GAO also notes that private companies currently operating in Utah and Colorado hold enough private water rights to start the initial oil shale development in the area. In addition to possibly being able to purchase additional water rights from private permit holders, like legacy agricultural users, state officials informed oil shale companies that the Ute Indian Tribe might consider leasing water rights to the development project. Federal reserved water rights will need to be quantified completely in this area to help the state manage future water supplies for all users; this quantification could lend certainty to water available for oil shale development.

PWR 107 also makes energy development in the West uncertain. Much of the development would occur on BLM land. In Utah, the only federal reserved water rights that the BLM holds result from PWR 107. Unlike other federal reserved

139 Id. at 8; see also id. at 3 (stating that the Rand Corporation estimates that thirty to sixty percent of the oil shale in this formation could be recovered, amounting to roughly one and one half trillion barrels of oil); BUREAU OF LAND MGMT., U.S. DEP’T OF THE INTERIOR, ENERGY FACTS: ONSHORE FEDERAL LANDS 8 (2005), available at http://www.blm.gov/pgdata/etc/medialib/blm/wo/Communications_Directorate/general_publications/energy_facts.Par.76690.File.dat/energy_brochure_2005.pdf, archived at http://perma.cc/LLP9-J2QK.
141 BUREAU OF LAND MGMT., FEDERAL RESERVED WATER RIGHTS, supra note 11.
142 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 140, at 6. 
143 Id. at 26–27; see also Ruple & Keiter, supra note 106, at 99–101 (discussing the difference between waters actually diverted and waters consumed by agriculture rights, in terms of how much water is actually available for reallocation, and finding that irrigation rights in this area are some of the oldest, having advantageous priority dates for new users).
144 U.S. GOV’T ACCOUNTABILITY OFFICE, supra note 140, at 27.
145 BUREAU OF LAND MGMT., FEDERAL RESERVED WATER RIGHTS, supra note 11, at 2.
water rights, PWR 107 waters would not be available for development and the oil shale companies may only consider applying to the state to use any excess water from a PWR 107 spring. Should PWR 107 water not be recorded properly, the spring and reserved land could be inadvertently disturbed by development, possibly drawing legal attention that could stall the development. Without complete records with the BLM’s and the state water engineer’s offices, it is uncertain whether a lack of PWR 107 accounting will upset proposed oil shale development.

(b) Existing Private Interests

Additional concerns over quantification of federal reserved water rights and PWR 107 claims include current water allocation. Throughout Utah, agriculture and grazing is heavily permitted. Should impending quantification of federal reserved water rights claims expose overallocation, existing state water permit holders may find their water rights have a less valuable priority date or they may be entitled to use less water during times of shortage.

Further, once a PWR 107 water claim is identified, other historic uses of the land could also be disrupted. In *Kane County v. United States*, the Utah District Court held that historic use of a road that traversed PWR 107 reserves could establish a nonfederal title to the land. The local county had sued to quiet title to several roads including one running across PWR 107 land. The county argued that the roads were valid R.S. 2477 rights-of-way with vested rights to continued access based on historic use. The court noted that the secretary of the interior, by Interpretation No. 92, had identified the specific PWR 107 springs and land reservations on the land in question, and where an established road crossed the reserved land, title to the land could only be held by the United States and not the county. The court ultimately decided that the road could not establish nonfederal title through R.S. 2477 because the already-existing PWR 107 had reserved land from the public domain for public access, regardless of road use. The court further noted that a coal withdrawal on the same land could not preempt the PWR 107 reservation because the withdrawal only precludes certain private appropriation while a reserve, like PWR 107, withdraws the land and dedicates the

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147 Id. at *58–60.
148 See id. at *1–3, *58–60.
149 Id. at *1–3. These rights-of-way were granted by An Act Granting the Right of Way to Ditch and Canal Owners over the Public Lands and for Other Purposes. Ch. 262, § 8, 14 Stat. 251, 253 (1866) (repealed 1976). FLPMA later repealed this act, but like PWR 107, grandfathered in already existing rights-of-way. *Kane Cnty.*, 2013 WL 1180764, at *2. Kane County was asserting that their use of the road pre-dated FLPMA though the court recognized that PWR 107 reserved the land first. *Id.*
151 *Id.*
land to a specific public use. As uses of federal lands overlap with reservations such as PWR 107, literally and figuratively, courts will likely be called upon to continue to define how PWR 107 claims may preclude other rights to water and land.

C. Additional Concerns: Climate Change on the Western Front

Finally, PWR 107 relies upon springs and seeps in a semiarid region that have not all been identified. With prolonged drought and changes in precipitation and snowpack, it is unclear whether a once-designated water source will continue to flow, let alone provide enough water to remain important under PWR 107, or even satiate any use for that matter. Climate change could alter the recharge of the springs or potentially dewater the spring entirely, altering how agencies are supposed to quantify the reserved waters. Reduced stream flow is also evident, which would interfere with the amount of water available for larger implied federal reserved water rights that have yet to be settled.

With changes in water supply, it will become imperative to clarify what a PWR 107 claim actually is. Uncertainties still exist over what an unadjudicated PWR 107 claim creates. Without being formally quantified, the amount of water that would be reserved could also be disputed, and should the spring have a reduction in flow, either from basin use or climate change, it is unclear if the status of a reserved water and land can be lost with diminished water flow.

The technological development for resource extraction, legislative limitations on federal water reserves, and possible ramifications of climate change greatly increase the need for complete administrative records and adjudication of federally reserved waters. And without clear records of PWR 107 claims, these specific federal reservations could create judicial hassle and legal liabilities much larger than the springs themselves. It will be unclear what legal duties the BLM owes to public water reserves should these claims not be fully defined.

152 Id. at *58.
153 While Utah courts have discussed how PWR 107 rights relate to other rights such as public rights-of-way and coal reserves, another impending issue that has not been resolved is whether mitigation may offset these competing rights. For example, if one claim to the public land should interfere with the public water reserve on that land, does the BLM have the authority to mitigate impairment to the water reserve by designating another spring a water reserve?
154 Cf. Ruple, supra note 135, at 376–77 (concluding Utah’s future development plans of the Upper Colorado River already exceed the available water flow and citing the National Research Council and Bureau of Reclamation who both find that drought and warmer temperatures in Utah will likely reduce stream flow in the Colorado River).
155 See Great Basin Complaint, supra note 97.
156 See id. at 9–11, 19.
IV. THE FUTURE OF PWR 107 IN UTAH

Utah has a history of managing water resources for local interests. Otherwise undeterred by the “Semidesert with a Desert Heart,” Utah’s early Mormon settlers “attacked the desert full-bore” and irrigated the valleys with determination. At present, the leaders of Utah may once again influence federal policy pertaining to water resources through local policy development. PWR 107 is ripe for clarification; as demonstrated by unique cases in Nevada, there is a vacuum of clear legal definitions of the authority and liabilities under PWR 107 claims on BLM land. Utah should now seek to establish clear administrative records of these water sources to avoid similar litigation. Moreover, complete administrative record keeping of all federal reserved water rights and PWR 107 claims will mitigate legal conflict regarding scarce and likely overallocated resources.

A. State and Federal Tensions

First, impending PWR 107 legal conflicts are likely to arise between the state and the BLM because the federal government has been unclear about what these claims are legally, as well as passive in managing other federal reserved water rights. Utah has yet to formalize recognition of PWR 107 completely in the state records, though BLM field offices record these waters in federal land use records. It may seem desirable for the state to assert primacy and request full property and administrative rights over all federally reserved waters and PWR 107 claims while the federal records and legal authority are unclear. Such a movement would allow the state to set clearer land and water resource objectives. However, a modern Sagebrush Rebellion would be a difficult action for the states to take.

In 1982, federal legislative representatives from Nevada attempted to effect revocation of PWR 107, declaring that PWR 107 was “no longer valid and there was no useful purpose for [the withdrawals’] continuance.” The primacy of state law over water rights was not a wholly compelling argument, though the interior

158 Id. at 2. The Bureau of Reclamation launched a federal irrigation program in 1902 based on Utah’s model. Id.
159 See Muhn, supra note 11, at 142–45.
161 REPORT ON BLM WATER, supra note 96, at 8–9.
solicitor did determine that the amount of water actually reserved could be determined on a case-by-case basis and all water deemed not reserved could be claimed pursuant to state law. 162 Utah may similarly step in and try to manage reservations should the state interest be great enough. 163 For now it appears that Utah instead prefers some joint ownership and coordination with management of PWR 107 resources. Whether in negotiations or in legal controversy over public water rights, Utah will certainly raise state primacy concerns for the federal government to consider.

Presently, for its part, the BLM has been unclear about specific PWR 107 duties. The BLM is responsible for carrying out the prerogatives ordered in PWR 107:

It is . . . incumbent on BLM to: protect existing water rights of the United States; oppose applications for water detrimental to U.S. rights or interests; protect the quality of water resource values; provide food and habitat for fish and wildlife; manage the public lands on the basis of multiple use and sustained yield. 164

However, strong, transparent policy posture about how the agency should manage PWR 107 waters that may conflict with other uses of public land is wanting.

There is a similar lack of federal duty regarding federal reserved water rights. Agencies such as the BOR and the BLM, who already manage large amounts of water and land in the West, are deferring to state prerogatives in certain circumstances such as small scale water projects; “the federal government’s role at the present time is largely passive.” 165 This is both disquieting, given the importance of the history of constitutional federal supremacy in the West, 166 and “[i]ronic,” given that the federal government played a huge role in creating the West through water and land use policies that still exist. 167 The Department of the Interior likewise supports granting state actions deference regarding water resource

162 Id. at 9.
163 In an analogous situation, in October of 2013, Utah stepped in during the partial federal government shutdown and asserted the state interest in tourism dollars while the federal government grappled with national spending priorities. Michael Muskal, Zion and Bryce Open. Utah Sidesteps Shutdown, Pays to Open Parks, L.A. TIMES (Oct. 11, 2013), http://www.latimes.com/nation/nationnow/la-na-utah-reopen-national-parks-government-shutdown-20131011,0,441762.story#axzz2iF0Ru0C7, archived at http://perma.cc/PQL6-YXZD.
164 REPORT ON BLM WATER, supra note 96, at 4.
165 See NAT’L RESEARCH COUNCIL, supra note 118, at 87–88.
166 See, e.g., United States v. California, 694 F.2d 1171, 1176 (9th Cir. 1982) (finding, after a long legal history, that state law could be used to manage a federally funded water project provided that state control not be contrary to “the clear and manifest purpose of Congress”).
167 NAT’L RESEARCH COUNCIL, supra note 118, at 87.
management and water transfers. However, while the Department of the Interior requires that water transfers comply with seven different principles protecting third party interests, federal interests, and environmental impacts, the Department of the Interior has also chosen to “pursue a reactive, rather than proactive, posture regarding specific potential” water management decisions by the states. The federal government has been legislating matters of unenumerated Indian reservation water rights since 1982 and has been concurrently grappling with water rights concerning federal interests in wildlife; however, Congress has yet to “put its imprimatur on any general statement of law either approving or limiting federal water transfers.” Provided “the national interest in the environment and in the well-being of Indian tribes toward which the nation has a trust obligation, this inaction is difficult to justify.” In the 1980s it was found that the BLM was not implementing policy to protect federal interests in water rights, even “subordinating the Federal position to State water laws, ceasing to assert or defend Federal property rights by nonassertion of reserved water rights, and declining to appeal State court rulings detrimental to Federal rights and interests.” The response has been threatened legal action and more difficult settlement negotiations by the tribes themselves. Utah needs to be able to anticipate a stronger federal push to quantify federal reserved water rights in Utah and possible liability over PWR 107 claims.

Utah and the BLM have been working cooperatively to align local and national interests in Utah land and water resources. In 1984, the state and federal government demonstrated cooperative potential in the hearings for the Utah Land Management and Improvement Act. The BLM has a policy of not asserting federal water rights when the state can serve the interests of PWR 107 at least as well as the BLM, if not better. The BLM does not formally recognize that states are able to protect public water rights better than the federal government, but there is much room for Utah to assert state priorities, be it through development or conservation of the water resources. Even with cooperative management of the water resources, adjudication may still be difficult if water users feel the reserved rights to water are being disregarded.

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168 Id. at 89. The Department of the Interior has formal policy supporting and facilitating voluntary water transactions. Id.

169 Id.

170 Id. at 90.

171 Id.

172 REPORT ON BLM WATER, supra note 96, at 4.


174 REPORT ON BLM WATER, supra note 96, at 10.

175 See id.
Second, it is imperative that Utah and the BLM take note of public standing in PWR 107 lawsuits. PWR 107 was initiated to withdraw a particular amount of land and water from the public domain and state appropriation to guarantee a public purpose. It is more likely that the public will demand to be involved in ad hoc claims over PWR 107 and potential water transfers and public land leases than it is that the executive or Congress will clarify the current duties owed PWR 107 and other federal reserved water rights.176

Historically, asserting a PWR 107 water claim depended heavily on the testimony of living witnesses “who could verify that the claimant or his predecessor(s) was in fact the first to use a certain water on the federal lands for stock water.”177 Today, water claims that are not protected from other permissible BLM land uses may be asserted by more than just the original stockmen. With the court recognition of standing for water users beyond these stockmen in a PWR 107 judicial complaint, both the states and the BLM could face public liability for inadequate protection of the public interest in reservations.

Public interest reviews are one manner by which Utah and the BLM could engage the public and avoid litigation over lack of information about PWR 107 claims and administration. A public interest review process identified by the National Research Council includes first identifying “elements that constitute the public interest” in the proposed water management decisions and then stating “policy guidance to resolve conflicts among competing interests.”178 To be successful, “[p]ublic participation in the review processes is essential” because broad participation will increase the likelihood that all elements of the public interest are identified.179 This policy recommendation implicates administrative law procedures. The National Research Council encourages procedures that would increase the amount of third-party participation, as well as the burdens to the state agency, including permission to present and speak, legal ability to influence management decisions and representation, and financial and legal support to investigate the impacts.180 The Administrative Procedures Act already legally

177 WAYNE HAGE, STORM OVER RANGELANDS: PRIVATE RIGHTS IN FEDERAL LANDS 164 (3d ed. 1994).
178 NAT’L RESEARCH COUNCIL, supra note 118, at 98–99.
179 See id. at 99.
180 Id. at 100–01.
requires many of these procedures for interested parties, though it is not necessarily clear whether Utah has formal public review guidance that extends to general members of the public. The National Research Council advocates for comprehensive planning as well, encouraging states to create plans that outline clear policy interests and guidance, thus creating predictability in water management decisions. But this would require the BLM and Utah to fully document the water rights already appropriated and the purpose of PWR 107 rights.

Citizen groups have recently wielded PWR 107 rights to attempt to defeat mining projects that allegedly conflicted with the water reserves in Nevada. In Nevada, Great Basin Mine Watch v. Hankins has paved the way for future cases to be brought by the public challenging land leasing when the BLM appears to not defend PWR 107 rights. And though Utah limits water disputes to water right holders, the standing recognized in Hankins for the public could expose state and BLM decisions regarding energy development to litigation over public interests in PWR 107.

V. CONCLUSION

“Speculation. Water monopoly. Land monopoly. . . . John Wesley Powell was pretty well convinced that those would be the fruits of a western land policy based on wishful thinking, willfulness, and lousy science.” PWR 107 was created to avoid water monopolization through land reservation. However, it would seem that management of public water reserves on federal lands has succumbed to some of John Wesley Powell’s concerns: management has been incomplete, ad hoc, and potentially based on incomplete hydrological data. PWR 107, as well as federal water reserves in general, pits western states against the BLM where there is a lack of comprehensive and clear reserves. As priorities for water uses on public lands shift, well-founded policy for resource allocation must include quantification and clarification of federally reserved waters. Public citizens will possibly leverage PWR 107 to challenge energy development where the BLM is otherwise complicit, especially as new technologies allow for extraction of resources previously inaccessible. Energy development companies will need to work more with federal and state water authorities as prior appropriation has already tied up most water resources in the West. These pressures will inevitably require federal courts to further define the scope and intentions of PWR 107. Utah faces additional uncertainty over federal reserved water rights claims involving Indian water

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181 See, e.g., 5 U.S.C. §§ 553(c), 553(e), 554(c) (2012).
183 Id. at 99.
184 See, e.g., Great Basin Mine Watch v. Hankins, 456 F.3d 955, 966 (9th Cir. 2006).
186 REISNER, supra note 157, at 43.
reservations, national parks, and wilderness reserves. As these demands for water become more relevant and valuable, Utah and the federal government will need to define competing reservation priorities and legal duties. This will need to be done through clear policy definition, assertions of federal authority, comprehensive planning, and consideration of public interests and involvement. Should competing interests come to a head as they have in Nevada, the Utah public may be able to leverage PWR 107 to assert public interests in unclear water claims. This would require the judiciary to instead grapple with clarifying what water reservation purposes and duties are and could lead to further confusion. Western water rights were originally secured despite competing interests, priorities, and governments. While complete monopolies may have been avoided, and life in the desert has been supported, the next juncture in federal reserved water rights and PWR 107 claims will no doubt be momentous. The present circumstances in Utah provide a ripe environment for defining the next phase of PWR 107 legal authority—possibly recreating or changing what these water rights actually are.