DISSENT, DISAGREEMENT AND DOCTRINAL DISARRAY: FREE EXPRESSION AND THE ROBERTS COURT IN 2020

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ABSTRACT

Using the United States Supreme Court's 2019 rulings in *Manhattan Community Access Corp. v. Halleck*, *Nieves v. Bartlett*, and *Iancu v. Brunetti* as analytical springboards, this Article explores multiple fractures among the Justices affecting the First Amendment freedoms of speech and press. All three cases involved dissents, with two cases each spawning five opinions. The clefts compound problems witnessed in 2018 with a pair of five-to-four decisions in *National Institute of Family and Life Advocates v. Becerra* and *Janus v. American Federation of State, County, and Municipal Employees*. Partisan divides, the Article argues, are only one problem with First Amendment jurisprudence as the Court enters the third decade of the twenty-first century. Other troubles range from vehement disagreement in *Nieves* about crafting a federal rule impacting both speech and press rights to a split in *Brunetti* over when and how the Court should save a statute via a narrowing construction. Furthermore, perceived political partisanship separates the Justices today not only on the standard of scrutiny that applies in a case—*Becerra* and *Janus* rendered this vivid—but also on a case's framing and the concomitant selection of precedent to steer the inquiry, as occurred in *Halleck*. Ultimately, the Article concludes that the rifts render free-expression jurisprudence even more muddled today than in the past. The Justices simply are not operating from the same First Amendment playbook. Worse yet, they function at times—particularly in cases such as *Halleck*—in a manner that strips away the increasingly thin veneer that personal ideologies are set aside when deciding cases.

INTRODUCTION

Penning the majority opinion for the United States Supreme Court in the First Amendment[1] case of *Terminiello v. Chicago*, Justice William O. Douglas asserted

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[1] The First Amendment to the U.S. Constitution provides, in relevant part, that "Congress

that "a function of free speech under our system of government is to invite dispute"[2] and that speech might "best serve its high purpose when it induces a condition of unrest."[3] That case centered on a breach-of-the-peace dispute stemming from a heavily and angrily picketed address delivered by Arthur Terminiello in a Chicago auditorium to more than 800 people.[4]

Seventy-one years later, Justice Douglas's words are proving prescient. This time, however, free speech is inviting disputes and provoking unrest among a much smaller cadre of individuals—namely, the Supreme Court's nine Justices. As this Article argues, the Court's free-expression jurisprudence is a disorderly and often partisan mess, perhaps even more so than in the past, as it enters the 2020s.[5]

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shall make no law . . . abridging the freedom of speech, or of the press . . . ." U.S. CONST. amend. I. The Free Speech and Free Press Clauses were incorporated ninety-five years ago through the Fourteenth Amendment Due Process Clause as fundamental liberties to apply to state and local government entities and officials. *See* Gitlow v. New York, 268 U.S. 652, 666 (1925) (finding "that freedom of speech and of the press—which are protected by the First Amendment from abridgment by Congress—are among the fundamental personal rights and 'liberties' protected by the due process clause of the Fourteenth Amendment from impairment by the States").

[2] 337 U.S. 1, 4 (1949).

[3] *Id.*

[4] *Id.* at 2–4. The speech was met by fierce protest and picketing outside the auditorium. As the Supreme Court of Illinois described it:

> An hour before the meeting, a strong picket line was formed in front of the auditorium. The number in the picket line gradually increased to several hundred and a crowd estimated at 1000 persons gathered outside to protest the meeting. Despite the presence of approximately seventy policemen, a number of disorders occurred. Some persons braved the picket line. Others were escorted by police. . . . Missiles of all kinds were thrown at the building. Twenty-eight windows were broken. Stench bombs fell on the steps to the auditorium.

City of Chicago v. Terminiello, 79 N.E.2d 39, 41 (Ill. 1948).

[5] This is not to say, however, that the situation in First Amendment law has either ever or always been much better. As former Yale Law School Dean Robert Post wrote twenty years ago, "The simple and absolute words of the First Amendment float atop a tumultuous doctrinal sea. The free speech jurisprudence of the First Amendment is notorious for its flagrantly proliferating and contradictory rules, its profoundly chaotic collection of methods and theories." Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 CALIF. L. REV. 2353, 2355 (2000). More recently, Toni M. Massaro, Dean Emerita of the University of Arizona James E. Rogers College of Law, bluntly wrote that free speech doctrine is "extremely messy." Toni M. Massaro, *Tread On Me!*, 17 U. PA. J. CONST. L. 365, 370 (2014); *see also* Joshua D. Rosenberg & Joshua P. Davis, *From Four Part Tests to First Principles: Putting Free Speech Jurisprudence into Perspective*, 86 ST. JOHN'S L. REV. 833, 834 (2012) (contending that "First Amendment law seems to have evolved into a morass of apparently unrelated, hyper-technical, and generally incoherent three-and four-part tests that more closely resemble the Internal Revenue Code and regulations than it does anything else in the law").

To wit, briefly consider three cases decided in 2019 that collectively comprise the heart of this Article: *Manhattan Community Access Corp. v. Halleck*,[6] *Nieves v. Bartlett*,[7] and *Iancu v. Brunetti*.[8] In *Halleck*, the Court split five to four.[9] All five Justices in the majority—John Roberts, Clarence Thomas, Samuel Alito, Neil Gorsuch, and Brett Kavanaugh—were nominated by Republican presidents and are typically considered conservative.[10] Conversely, all four Justices in the dissent—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—were nominated by Democratic presidents and are generally deemed liberal.[11]

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[6] 139 S. Ct. 1921 (2019). On remand from the U.S. Supreme Court and in accord with that decision, the U.S. Court of Appeals for the Second Circuit in August 2019 affirmed the earlier judgment of a federal district court dismissing the First Amendment claim of DeeDee Halleck and Jesus Papoleto Melendez. Halleck v. Manhattan Cmty. Access Corp., 774 F. App'x 41, 41 (2d Cir. 2019); *see* Halleck v. City of New York, 224 F. Supp. 3d 238, 247 (S.D.N.Y. 2016) (concluding that the plaintiffs failed to successfully plead that the Manhattan Community Access Corporation, operating as the Manhattan Neighborhood Network ("MNN"), was a state actor, and dismissing the First Amendment claim against MNN accordingly for lack of state action).

[7] 139 S. Ct. 1715 (2019). On remand from the U.S. Supreme Court and in accordance with that decision, the U.S. Court of Appeals for the Ninth Circuit remanded the case "to the district court for further proceedings consistent with the Supreme Court's opinion." Bartlett v. Nieves, 926 F.3d 1179, 1180 (9th Cir. 2019).

[8] 139 S. Ct. 2294 (2019).

[9] *See Halleck*, 139 S. Ct. at 1925 (identifying the Justices in the majority and dissenting opinions).

[10] *See Current Members*, SUP. CT. U.S., https://www.supremecourt.gov/about/biographies.aspx [https://perma.cc/9JJ6-CPQ5] (identifying the President of the United States who nominated each of the current Justices) (last visited Apr. 14, 2020); *see also* Adam Liptak, *Supreme Court Won't Hear Planned Parenthood Cases, and 3 Court Conservatives Aren't Happy*, N.Y. TIMES (Dec. 10, 2018), https://www.nytimes.com/2018/12/10/us/politics/planned-parenthood-supreme-court.html [https://nyti.ms/2G8zqDd] (identifying Justices Thomas, Alito, and Gorsuch as "the [C]ourt's three most conservative justices," and Chief Justice Roberts and Justice Kavanaugh as "the [C]ourt's other conservatives").

[11] *See Current Members*, *supra* note 10 (identifying the President of the United States who nominated each of the current Justices); *see also* Robert Barnes, *Divided Supreme Court Says Execution Can Proceed—But the Death Warrant Had Already Expired*, WASH. POST (Apr. 12, 2019, 5:12 PM), https://www.washingtonpost.com/politics/courts_law/divided-supreme-court-says-execution-can-proceed--but-the-death-warrant-had-already-expired/2019/04/12/01b17484-5d16-11e9-a00e-050dc7b82693_story.html [https://perma.cc/HTZ4-VUWF] (identifying Justice Breyer's "fellow liberal colleagues" as Justices Ginsburg, Sotomayor, and Kagan); David G. Savage & Suhauna Hussain, *Supreme Court Rules Apple Can Face Antitrust Suits From iPhone Owners Over App Store Sales*, L.A. TIMES (May 13, 2019, 7:27 AM), https://www.latimes.com/politics/la-na-pol-supreme-court-apple-smart-phone-20190513-story.html [https://perma.cc/472F-EWKS] (reporting that in the case of *Apple v. Pepper*, 139 S. Ct. 1514 (2019), Justice Kavanaugh was "joined by the [C]ourt's four liberal justices," and identifying the Justices joining Kavanaugh as Ginsburg, Breyer, Sotomayor, and Kagan).

The conservative quintet framed[12] its decision in *Halleck* as fighting the danger that big government poses to individual liberties.[13] In doing so, the majority protected the Manhattan Neighborhood Network (MNN)—a private, non-profit corporation that operates public-access cable channels in New York City—from being treated as a government actor and thus allowing it to escape the First Amendment's free-speech strictures[14] under the state action doctrine.[15] Writing for the majority, Justice Brett Kavanaugh reasoned that the Court's 1974 ruling in *Jackson v. Metropolitan Edison Co.*[16] supplied the relevant precedent for deciding if MNN should be treated as a state (or governmental)[17] actor.[18] *Jackson*, as explained later,[19] articulates

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[12] *See* Robert M. Entman, *Framing: Toward Clarification of a Fractured Paradigm*, 43 J. COMM. 51, 52 (1993) (asserting that "[t]o frame is to select some aspects of a perceived reality and make them more salient in a communicating text, in such a way as to promote a particular problem definition, causal interpretation, moral evaluation, and/or treatment recommendation for the item described" (emphasis omitted)); Dietram A. Scheufele & David Tewksbury, *Framing, Agenda Setting, and Priming: The Evolution of Three Media Effects Models*, 57 J. COMM. 9, 12 (2007) (noting that "the term 'framing' refers to modes of presentation that journalists and other communicators use to present information in a way that resonates with existing underlying schemas among their audience" (citations omitted)).

[13] As Justice Kavanaugh reasoned for the *Halleck* majority:

> It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the Constitution, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty. Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise.

Halleck, 139 S. Ct. at 1934. Kavanaugh's observation here about individual liberty tracks Justice Byron White's contention that "[c]areful adherence to the 'state action' requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power." Lugar v. Edmondson Oil Co., 457 U.S. 922, 936 (1982).

[14] *Halleck*, 139 S. Ct. at 1926 ("In operating the public access channels, MNN is a private actor, not a state actor, and MNN therefore is not subject to First Amendment constraints on its editorial discretion.").

[15] For more information about the state action doctrine, see Isaac Saidel-Goley & Joseph William Singer, *Things Invisible to See: State Action & Private Property*, 5 TEX. A&M L. REV. 439, 445 (2018) ("The state action doctrine is the principle that the scope of the United States Constitution is limited to governmental conduct and does not extend to the behavior of private persons."); Louis Michael Seidman, *State Action and the Constitution's Middle Band*, 117 MICH. L. REV. 1, 3 (2018) (noting that "the state action doctrine embodies the principle that government action—rather than action taken by private individuals—triggers constitutional limitations").

[16] 419 U.S. 345 (1974).

[17] *See* Jed Rubenfeld, *Privatization and State Action: Do Campus Sexual Assault Hearings Violate Due Process?*, 96 TEX. L. REV. 15, 27 (2017) (noting that the word "state," as used in the state action doctrine, "means governmental (not Montana or Idaho)").

[18] *Halleck*, 139 S. Ct. at 1928–34.

[19] *See infra* notes 119–23 and accompanying text (discussing *Jackson* and the rule it created).

a public function exception to the state action doctrine's general principle[20] that the Constitution applies only to governmental actors, not private ones.[21]

In diametric opposition, the dissent framed the case not as about the dangers of big government, but rather as one involving a simple agency relationship in which the government (New York City) delegated its duties to operate a public forum (public access channels) to a private entity (MNN), thus transforming the private entity into a state actor.[22] Justice Sonia Sotomayor, in authoring the dissent, pulled no punches in hammering Justice Kavanaugh's opinion. In her opening sentence, she derided the majority, as if it were writing fiction, for creating a "story about a case that is not before us."[23] Sotomayor ended her opinion by calling the majority's decision "misguided."[24]

In between, she reasoned that the Court's decision in *West v. Atkins*[25]—not, as the majority found, its ruling in *Jackson v. Metropolitan Edison Co.*[26]—supplied the correct precedent for determining whether MNN was a government actor.[27] In holding that MNN was, indeed, a state actor,[28] the dissent would have allowed the First Amendment case of DeeDee Halleck and Jesus Papoleto Melendez, two local

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[20] *See* David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1229 (1999) (noting that the state action doctrine embodies "the general principle that constitutional rights, at both the federal and state levels, operate only against the government").

[21] ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 544 (5th ed. 2015).

[22] As Justice Sonia Sotomayor reasoned for the dissent:

> This is not a case about bigger governments and smaller individuals . . . ; it is a case about principals and agents. New York City opened up a public forum on public-access channels in which it has a property interest. It asked MNN to run that public forum, and MNN accepted the job. That makes MNN subject to the First Amendment, just as if the City had decided to run the public forum itself.

Halleck, 139 S. Ct. at 1945 (Sotomayor, J., dissenting) (internal citation omitted).

[23] *Id.* at 1934.

[24] *Id.* at 1945.

[25] 487 U.S. 42 (1988).

[26] 419 U.S. 345 (1974).

[27] Justice Sotomayor reasoned here that:

> *West* resolves this case. Although the settings are different, the legal features are the same: When a government (1) makes a choice that triggers constitutional obligations, and then (2) contracts out those constitutional responsibilities to a private entity, that entity—in agreeing to take on the job—becomes a state actor for purposes of § 1983.

Halleck, 139 S. Ct. at 1940 (Sotomayor, J., dissenting).

[28] *See id.* at 1945 (arguing that "as long as MNN continues to wield the power it was given by the government, it stands in the government's shoes and must abide by the First Amendment like any other government actor").

producers of public-access programming who claimed MNN punished them for the content of an anti-MNN film they made,[29] to proceed.

In brief, the conservative and liberal Justices not only disagreed on the outcome in *Halleck*, but also on its factual framing and the applicable case-law precedent. Unfortunately, this state of affairs was largely unsurprising. That is because the Justices divided five to four along the exact same partisan lines in a pair of 2018 First Amendment rulings—*National Institute of Family and Life Advocates v. Becerra*[30] and *Janus v. American Federation of State, County, and Municipal Employees*.[31] In *Becerra* and *Janus*, the Justices not only differed over the result, but they also diverged on the applicable standard of scrutiny by which to measure the laws at issue in those cases.[32]

The distinct danger is that such partisan rifts will exacerbate the already growing gap in public confidence between Republicans and Democrats when it comes to trusting the U.S. Supreme Court. Most notably, a Pew Research Center survey released in August 2019 revealed that "three-quarters of Republicans and Republican-leaning

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[29] *See id.* at 1927 (majority opinion) ("The two producers claimed that MNN violated their First Amendment free-speech rights when MNN restricted their access to the public access channels because of the content of their film.").

[30] 138 S. Ct. 2361 (2018). *In Becerra*, the Court considered whether a state statute (the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act) that compelled anti-abortion crisis pregnancy centers to disclose certain information, including the fact that California offers low-cost and free abortion services, violated the centers' First Amendment right of free speech. *Id.* at 2368. The five Justices nominated by Republican presidents—John Roberts, Clarence Thomas, Anthony Kennedy, Samuel Alito, and Neil Gorsuch—ruled for the religious-based, anti-abortion centers and concluded that the law likely violated their First Amendment rights. *Id.* at 2368–78. The four Justices nominated by Democratic presidents—Ruth Bader Ginsburg, Stephen Breyer, Sonia Sotomayor, and Elena Kagan—disagreed and joined in a dissent penned by Breyer. *Id.* at 2379 (Breyer, J., dissenting); *see supra* notes 10–11 (providing information on who nominated the Justices and their political leanings).

[31] 138 S. Ct. 2448 (2018). In *Janus*, the five conservative Justices held that a state law compelling public employees who are not union members to pay an agency fee to the union that represents them in collective bargaining violated the First Amendment. *Id.* at 2486. The four liberal Justices, in a dissent authored by Elena Kagan, accused the conservatives of "turning the First Amendment into a sword, and using it against workaday economic and regulatory policy." *Id.* at 2501 (Kagan, J., dissenting). She accused the majority of "weaponizing the First Amendment" and using it against the "state and local governments (and the constituents they serve) [that] think that stable unions promote healthy labor relations and thereby improve the provision of services to the public." *Id.* at 2501. More briefly put, the First Amendment was used to bludgeon unions. *See id.*

[32] *See generally* Clay Calvert, *Is Everything a Full-Blown First Amendment Case After* Becerra *and* Janus*? Sorting Out Standards of Scrutiny and Untangling "Speech as Speech" Cases From Disputes Incidentally Affecting Expression*, 2019 MICH. ST. L. REV. 73 (2019) (reviewing the disagreements among the Justices in both *Becerra* and *Janus*).

independents have a favorable opinion of the Supreme Court, compared with only about half (49%) of Democrats and Democratic leaners . . . . The 26 percentage-point difference between the two parties is among the widest it has been over the past two decades."[33] Continued partisan splits on the Supreme Court in First Amendment cases, one might assume, will further widen this gulf, particularly among individuals who identify themselves as liberal Democrats.[34]

Furthermore, a May 2019 Quinnipiac University poll of more than 1,000 registered voters nationwide revealed that a majority—55%—thinks that the Supreme Court is mainly motivated by politics.[35] In contrast, only 38% of respondents thought the Court was mainly motivated by the law.[36] The 55% figure for those who think the Court is mainly motivated by politics is particularly worrisome because, only ten months earlier, a smaller percentage—50%—believed that was the case.[37] In brief, the Court's credibility in the public's mind, as an institution "free from political pressure,"[38] is eroding. Politically divided free-expression decisions such as *Halleck*, *Becerra,* and *Janus* in the span of just two Terms surely aggravate the problem.

It is not, however, just perceived politics or ideologies that divide the Justices today. Consider *Nieves v. Bartlett*,[39] another case at the center of this Article.[40] Pivoting on the question of whether the existence of probable cause[41] to arrest a

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[33] Claire Brockway & Bradley Jones, *Partisan Gap Widens in Views of the Supreme Court*, PEW RES. CTR. (Aug. 7, 2019), https://www.pewresearch.org/fact-tank/2019/08/07/partisan-gap-widens-in-views-of-the-supreme-court/ [https://perma.cc/D263-HUY4].

[34] Specifically, the Pew Research Center study found that:

> The widening partisan gap has been largely driven by liberal Democrats, who have become much more negative in their views. Just 40% of liberal Democrats currently have a favorable view of the Supreme Court—the lowest percentage among this group in at least 15 years. Liberal Democrats are now far less likely than conservative and moderate Democrats (57% favorable)—or Republicans regardless of ideology—to view the court positively.

Id.

[35] Press Release at 2, Quinnipiac Univ. Poll, U.S. Voter Support for Abortion Is High, Quinnipiac Univ. Nat'l Poll Finds; 94 Percent Back Universal Gun Background Checks (May 22, 2019), https://poll.qu.edu/images/polling/us/us05222019_usch361.pdf [https://perma.cc/TJS4-WYQD].

[36] *Id.*

[37] *See id.* at 3 (noting the polling results released in July 2018).

[38] Erwin Chemerinsky, *The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review*, 62 TEX. L. REV. 1207, 1254 (1984).

[39] 139 S. Ct. 1715 (2019).

[40] *See infra* Part II (addressing *Nieves*).

[41] *See* Amanda Peters, *Mass Arrests & the Particularized Probable Cause Requirement*, 60 B.C. L. REV. 217, 218 (2019) ("The U.S. Supreme Court has repeatedly described probable cause as the facts and circumstances the officer knows that would warrant a reasonable, prudent person in believing a criminal offense has been, is being, or will be committed by the suspect.").

person under the Fourth Amendment[42] defeats that person's Section 1983 claim[43] that the arrest was wrongfully made in retaliation for exercising First Amendment rights,[44] *Nieves* produced five separate opinions, including three (either partial or full) dissents.[45] In delivering the Court's opinion, Chief Justice John Roberts fashioned a federal rule for Section 1983 lawsuits: a finding of probable cause to arrest a person defeats that person's claim that the arrest was wrongfully made in retaliation for the person exercising his First Amendment rights, *unless* the person can "present[] objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been."[46]

Roberts explained that the back-half of this rule—the exception or qualification to the general principle that a finding of probable cause will defeat a First Amendment retaliatory arrest claim—is designed "for circumstances where officers have

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[42] The Fourth Amendment to the U.S. Constitution states that:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV. The Fourth Amendment was incorporated more than fifty-five years ago through the Due Process Clause as a fundamental freedom to apply to all government actors. *See* Aguilar v. Texas, 378 U.S. 108, 108 (1964); Mapp v. Ohio, 367 U.S. 643, 660 (1961).

[43] This refers to a lawsuit claiming a federal civil rights violation by a state official under 42 U.S.C. § 1983. *See* Richard H. Fallon, Jr., *Bidding Farewell to Constitutional Torts*, 107 CALIF. L. REV. 933, 936 (2019) ("A signal development came in 1871, when Congress enacted 42 U.S.C. § 1983, which creates a cause of action for damages or injunctive relief against state officials who violate federal constitutional rights."). That statute provides, in key part, that:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable.

42 U.S.C. § 1983 (2012). The underlying premise of the statute is "that federal courts should have the power to vindicate federal rights." Arturo Peña Miranda, Comment, *"Where There Is a Right (Against Excessive Force), There Is Also a Remedy": Redress for Police Violence Under the Equal Protection Clause*, 65 UCLA L. REV. 1678, 1713 (2018).

[44] *See Nieves*, 139 S. Ct. at 1721 ("We are asked to resolve whether probable cause to make an arrest defeats a claim that the arrest was in retaliation for speech protected by the First Amendment.").

[45] *See id.* at 1719 (identifying the five opinions in the case).

[46] *Id.* at 1727.

probable cause to make arrests, but typically exercise their discretion not to do so."[47] Parsing the new rule in a slightly different fashion, a Section 1983 plaintiff filing a First Amendment retaliatory arrest claim after *Nieves* must prove there was no probable cause to arrest him—a "no-probable-cause requirement"[48]—in order to proceed with a claim, *unless* he can show there was probable cause to arrest both him and other similarly situated individuals, yet those other individuals: (1) were not engaged in the same type of protected speech as the plaintiff, and (2) were not arrested.

The problem, as explained in greater detail in Part II, is that four Justices objected either to part or all of this new federal rule, thereby weakening its strength and indicating that a relatively minor change in the composition of the Court could spell its demise.[49] For now, it suffices to briefly review the disagreements among the Justices.

In particular, Justice Clarence Thomas issued a solo opinion objecting to the back-half exception facet of the rule.[50] He bluntly reasoned that it "has no basis in either the common law or our First Amendment precedents."[51] For Justice Thomas, there is no need for an exception or qualification to the first part of the rule, which requires a plaintiff to demonstrate the absence of probable cause to arrest.[52]

Justice Neil Gorsuch objected in *Nieves* to the Court creating a cut-and-dried rule regarding the impact of probable cause in First Amendment–based retaliatory arrest claims under Section 1983.[53] He was also troubled by a separation-of-powers issue,[54]

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[47] *Id.*

[48] *Id.*

[49] *See infra* Part II (addressing *Nieves*).

[50] *Nieves*, 139 S. Ct. at 1728 (Thomas, J., concurring in part, concurring in judgment).

[51] *Id.*

[52] *See id.* at 1730 ("The requirement that plaintiffs bringing First Amendment retaliatory-arrest claims plead and prove the absence of probable cause is supported by the common law and our First Amendment precedents. The majority's new exception has no basis in either.").

[53] *See id.* at 1734 (Gorsuch, J., concurring in part, dissenting in part) ("But rather than attempt to sort out precisely when and how probable cause plays a role in First Amendment claims, I would reserve decision on those questions until they are properly presented to this Court and we can address them with the benefit of full adversarial testing.").

[54] *See* Miller v. French, 530 U.S. 327, 341 (2000) ("The Constitution enumerates and separates the powers of the three branches of Government in Articles I, II, and III, and it is this 'very structure' of the Constitution that exemplifies the concept of separation of powers." (quoting INS v. Chadha, 462 U.S. 919, 946 (1983))); *see also* David A. Carrillo & Danny Y. Chou, *California Constitutional Law: Separation of Powers*, 45 U.S.F. L. REV. 655, 657 (2011) (observing that the separation of powers doctrine "was woven into the design of the Federal Constitution and the very structure of the articles defining, delegating, and separating the powers of the three branches of the federal government," and adding that the doctrine "secures liberty in the fundamental political sense of the term, by placing structural limits on the ability of any branch of the government to influence basic political decisions" (citations omitted)); Patrick M. Garry, *The Unannounced Revolution: How the Court Has Indirectly Effected a Shift in the Separation of Powers*, 57 ALA. L. REV. 689, 694–95 (2006) ("The doctrine of separation of powers, in its purest form, states that the preservation of political liberty requires that

with the Court reading into Section 1983 a probable cause requirement when the text of that statute is silent on this point.[55] It is better left to Congress to amend the statute with a probable cause mandate, he intimated, rather than have the Court read one into it.[56]

Justice Ruth Bader Ginsburg objected to the majority's test in its entirety, concluding that it will "leave press members and others exercising First Amendment rights with little protection against police suppression of their speech."[57] This is especially important because Ginsburg recognizes that the new rule from *Nieves* affects not only free speech rights, but also the rights of journalists.[58] For Justice Ginsburg, the correct rule to apply is the balancing test the Court fashioned more than forty years ago in *Mt. Healthy City School District Board of Education v. Doyle*.[59] That case did not involve an arrest, but rather pivoted on the plaintiff's claim that a school district chose not to rehire him in retaliation for speaking out on a radio station regarding a school matter.[60]

Moreover, Justice Sonia Sotomayor agreed in her dissent with Ginsburg that *Mt. Healthy* supplies the appropriate rule in First Amendment retaliatory arrest claims.[61] In the process, she criticized the majority for creating a rule that "risks letting flagrant violations go unremedied"[62] and that, under the exception facet to the general rule that probable cause defeats a retaliatory arrest claim, "arbitrarily insist[s] upon comparison-based evidence"[63] and "reject[s] direct evidence of unconstitutional motives."[64]

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government be divided into three branches and that each branch be given a corresponding identifiable function—e.g., legislative, executive, or judicial.").

[55] *Nieves*, 139 S. Ct. at 1730.

[56] Justice Gorsuch reasoned here that "[m]aybe it would be good policy to graft a no-probable-cause requirement onto the statute, as the officers insist; or maybe not. Either way, that's an appeal better directed to Congress than to this Court. Our job isn't to write or revise legislative policy but to apply it faithfully." *Id.* (Gorsuch, J., concurring in part, dissenting in part).

[57] *Id.* at 1735 (Ginsburg, J., concurring in judgment in part, dissenting in part).

[58] *See supra* note 57, *infra* notes 214–17, 291–95 and accompanying text (exploring or ruminating on the possible impact of the *Nieves* test on both professional journalists and citizen journalists).

[59] 429 U.S. 274 (1977). Justice Ginsburg wrote:

> I remain of the view that the Court's decision in *Mt. Healthy City Bd. of Ed. v. Doyle* . . . strikes the right balance: The plaintiff bears the burden of demonstrating that unconstitutional animus was a motivating factor for an adverse action; the burden then shifts to the defendant to demonstrate that, even without any impetus to retaliate, the defendant would have taken the action complained of.

Nieves, 139 S. Ct. at 1734–35 (Ginsburg, J., concurring in judgment in part, dissenting in part) (internal citation omitted).

[60] *Mt. Healthy*, 429 U.S. at 282–84.

[61] *Nieves*, 139 S. Ct. at 1742 (Sotomayor, J., dissenting).

[62] *Id.* at 1735.

[63] *Id.* at 1737.

[64] *Id.* at 1738–39.

Furthermore, and as discussed more extensively in Part II,[65] she focused on the danger that the exception facet of the new rule poses to citizen journalists who use cell phones to film police performing their duties.[66]

In brief, this is no way to produce a durable federal rule affecting the First Amendment rights of speech and press. Four Justices—two nominated by Republican presidents (Thomas and Gorsuch), two nominated by Democratic presidents (Ginsburg and Sotomayor)—disagree with it in either some or all aspects. At the very least, this is an inauspicious start for a test that may hinder journalists as they play a watchdog role on police activities.[67]

Finally, briefly consider *Iancu v. Brunetti*,[68] the third of the trio of 2019 First Amendment decisions addressed in this Article.[69] The Court there concluded that a federal statutory provision[70] that allowed the United States Patent and Trademark Office (PTO) to deny registration for immoral or scandalous marks violated the First Amendment because it allowed the PTO to engage in viewpoint discrimination.[71] The ruling enabled Erik Brunetti to register "FUCT" as the mark for a brand of clothing.[72]

Although six Justices agreed with this result, *Brunetti* nonetheless generated five opinions, including three that dissented in part and would have narrowly interpreted the term "scandalous" to save it,[73] and one that, although refusing to give "scandalous" a limiting construction, offered Congress a virtual roadmap for redrafting that part of the statute in constitutional fashion.[74] In brief, *Brunetti* exposes disagreements

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[65] *See supra* notes 57–58, *infra* notes 214–17, 291–95 and accompanying text (exploring the possible impact of the *Nieves* test on both professional journalists and citizen journalists).

[66] *Nieves*, 139 S. Ct. at 1740.

[67] *See infra* notes 214–17, 291–95 and accompanying text (exploring the possible impact of the *Nieves* test on both professional journalists and citizen journalists).

[68] 139 S. Ct. 2294 (2019).

[69] *See infra* Part III (addressing *Brunetti*). *See generally* Clay Calvert, Iancu v. Brunetti's *Impact on First Amendment Law: Viewpoint Discrimination, Modes of Offensive Expression, Proportionality and Profanity*, 43 COLUM. J.L. & ARTS 37 (2019) (providing a comprehensive analysis of other issues in *Brunetti* not addressed in this Article).

[70] 15 U.S.C. § 1052(a) (2019). The relevant part of the statute allows the PTO to deny registration if a mark "[c]onsists of or comprises *immoral*, deceptive, or *scandalous* matter." *Id.* (emphasis added).

[71] *See Brunetti*, 139 S. Ct. at 2300 ("The facial viewpoint bias in the law results in viewpoint-discriminatory application.").

[72] The PTO had blocked Brunetti's efforts to register "FUCT" under the immoral or scandalous provision. *Id.* at 2297–98.

[73] *Id.* at 2303 (Roberts, C.J., concurring in part, dissenting in part); *id.* at 2304 (Breyer, J., concurring in part, dissenting in part); *id.* at 2308 (Sotomayor, J., concurring in part, dissenting in part).

[74] *See id.* at 2303 (Alito, J., concurring) ("Our decision does not prevent Congress from adopting a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas.").

among the Justices about when it is proper for the Court to exercise the "cardinal principle of statutory construction"[75] of adopting a saving interpretation.[76]

In summary, a mere three cases—*Halleck*, *Nieves*, and *Brunetti*—generated twelve opinions. Justice Sotomayor proved the least likely to go along with the majority, penning opinions that dissented, either in part or full, in all three disputes.[77] She was joined by all of her liberal colleagues (Ginsburg, Breyer, and Kagan) in *Halleck*[78] and by one (Breyer) in *Brunetti*.[79] At the opposite end of the continuum, Justice Kavanaugh was the only Justice who was part of the majority in all three cases and who did not either write or join a concurrence or dissent.[80] Across the trio of cases, Chief Justice Roberts[81] and Justices Ginsburg,[82] Breyer,[83] and Gorsuch[84] each authored opinions dissenting in part, while Justices Thomas[85] and Alito[86] drafted concurrences.

Part I of this Article examines in greater detail partisan disagreements among the Justices in *Halleck* over the state action doctrine and, in turn, the First Amendment.[87] Part II then delves more deeply into the multiple splits in *Nieves*,[88] while Part III does the same for *Brunetti*.[89] Ultimately, the Article concludes by contending that the Court, in its free-expression jurisprudence, now must (1) rise above continuing ideological divides in cases such as *Halleck* that simultaneously erode any semblance of doctrinal

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[75] Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937). The Court added in *Jones & Laughlin* that "as between two possible interpretations of a statute, by one of which it would be unconstitutional and by the other valid, our plain duty is to adopt that which will save the act." *Id.*

[76] *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 562 (2012) ("And it is well established that if a statute has two possible meanings, one of which violates the Constitution, courts should adopt the meaning that does not do so.").

[77] *See Brunetti*, 139 S. Ct. at 2308 (Sotomayor, J., concurring in part, dissenting in part); Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1934 (2019) (Sotomayor, J., dissenting); Nieves v. Bartlett, 139 S. Ct. 1715, 1735 (2019) (Sotomayor, J., dissenting).

[78] *Halleck*, 139 S. Ct. at 1934.

[79] *Brunetti*, 139 S. Ct. at 2308.

[80] Justice Kavanaugh authored the majority opinion in *Halleck*. *See Halleck*, 139 S. Ct. at 1925 (noting that Kavanaugh "delivered the opinion of the Court"). Kavanaugh joined the majority opinion authored by Chief Justice Roberts in *Nieves*. *See Nieves*,139 S. Ct. at 1719 (noting that Kavanaugh joined the opinion of the Court delivered by Roberts). He also joined the majority opinion authored by Justice Kagan in *Brunetti*. *See Brunetti*, 139 S. Ct. at 2297 (reporting that Kavanaugh joined the opinion of the Court delivered by Kagan).

[81] *Brunetti*, 139 S. Ct. at 2303 (Roberts, C.J., concurring in part, dissenting in part).

[82] *Nieves*, 139 S. Ct. at 1734 (Ginsburg, J., concurring in part, dissenting in part).

[83] *Brunetti*, 139 S. Ct. at 2304 (Breyer, J., concurring in part, dissenting in part).

[84] *Nieves*, 139 S. Ct. at 1730 (Gorsuch, J., concurring in part, dissenting in part).

[85] *Id.* at 1728 (Thomas, J., concurring in part and in judgment).

[86] *Brunetti*, 139 S. Ct. at 2302 (Alito, J., concurring).

[87] *Infra* Part I.

[88] *Infra* Part II.

[89] *Infra* Part III.

coherence and any confidence in the Court as a government entity functioning in a politically non-partisan manner; (2) deliver opinions, particularly in disputes such as *Nieves* that feature attempts to fashion definitive federal rules, that are either much more unified (in terms of agreement among the Justices) or minimalistic (in terms of scope and impact) when such unity is nigh impossible; and (3) resolve differences, especially in cases akin to *Brunetti* that pivot on statutory interpretation, regarding when speech-restricting statutes should be afforded saving constructions and when, in contrast, it should be left to lawmakers to cure the statutory deficiencies.

In brief, there are lessons to be learned from a fractious Supreme Court term and three very divisive cases. The Article next examines *Halleck*.

I. *MANHATTAN COMMUNITY ACCESS CORP. V. HALLECK*: WEAPONIZING THE STATE ACTION DOCTRINE TO DEFEAT A FIRST AMENDMENT CLAIM?

Among "the traditional structural paradigms"[90] for analyzing a case or fact pattern is the Issue-Rule-Analysis-Conclusion (IRAC) formula.[91] As one scholar rather wryly writes, "IRAC is seen as both the bane of law student existence and as having a near-magical ability to create a successful exam outcome."[92] A key facet of this "yellow-brick-road" strategy for academic achievement is identifying the appropriate rule to apply when analyzing an issue and a collection of facts.[93]

If law students sometimes are flummoxed in choosing the correct rule when deploying IRAC's methodology, then they should take solace in *Manhattan Community Access Corp. v. Halleck*.[94] That is because even the Justices of the U.S. Supreme Court could not agree on the correct rule to apply to determine if Manhattan Neighborhood Network (MNN), a private, non-profit entity that operates public access cable channels in New York City, should be deemed a state actor subject to the First Amendment's doctrines. In turn, and as explained later, the selection of different

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[90] Jennifer Sheppard, *Once Upon a Time, Happily Ever After, and in a Galaxy Far, Far Away: Using Narrative to Fill the Cognitive Gap Left by Overreliance on Pure Logic in Appellate Briefs and Motion Memoranda*, 46 WILLAMETTE L. REV. 255, 283 (2009).

[91] *See* Jacob M. Carpenter, *Identifying Inefficiencies: Exploring Ways to Write Briefs More Quickly Within the Time Demands of Legal Practice*, 18 WYO. L. REV. 409, 436 (2018) (citations omitted) (identifying the IRAC formula as one of "the basic organizational paradigms taught in law schools").

[92] Soma R. Kedia, *Redirecting the Scope of First-Year Writing Courses: Toward a New Paradigm of Teaching Legal Writing*, 87 U. DET. MERCY L. REV. 147, 150 (2010).

[93] *See id.* (noting that under IRAC, a key is to apply a "rule to a given set of facts using analogy and distinction. The pattern can be adapted for statutory analysis and policy argument, but the essential structure stays the same: the rule is always the central element of the inquiry"); *see also* Bret Rappaport, *Using the Elements of Rhythm, Flow, and Tone to Create a More Effective and Persuasive Acoustic Experience in Legal Writing*, 16 LEGAL WRITING 65, 67 (2010) (identifying IRAC as the "yellow brick road" in legal writing (emphasis omitted)).

[94] 139 S. Ct. 1921 (2019).

rules by the conservative and liberal Justices resulted in them reaching polar opposite conclusions that, in terms of the end result in *Halleck*, comport with broad-based ideological stereotypes.[95] In IRAC parlance, selection of a different "R" by each bloc of Justices caused it to reach a different "C" than the other one.

Furthermore—and critically for purposes of reaching the outcome against the First Amendment rights of the filmmakers in *Halleck*—the majority and dissent analyzed two critical issues in a very different sequence. Those issues were: (1) a state action question (Should MNN be treated as a state actor?), and (2) a First Amendment question (Are public access channels public forums in which the government cannot engage in viewpoint discrimination?).[96]

For the majority, the only issue—the determinative, case-killing one for the filmmakers[97]—was whether MNN was a state actor. As Justice Kavanaugh put it, to first analyze whether running public access channels is the same thing as operating "a public forum for speech"[98] is to put the proverbial cart before the horse because it "mistakenly ignores the threshold state-action question."[99]

In contrast, the *Halleck* dissent started with the First Amendment question and concluded that "public-access channels are a public forum."[100] It only then turned to the state action issue, with Justice Sotomayor reasoning that:

> If New York's public-access channels are a public forum, it follows that New York cannot evade the First Amendment by contracting out administration of that forum to a private agent. When MNN took on the responsibility of administering the forum, it stood in the City's shoes and became a state actor . . . .[101]

In brief, because the majority first found that operating public access channels did not make MNN a state actor,[102] there was no need to analyze the First Amendment question of whether those same channels are public forums. Contrarily, because the dissent started with the First Amendment issue and determined that public access

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[95] *See infra* notes 131–32 and accompanying text (addressing these stereotypes).

[96] *See* Dawn Carla Nunziato, *From Town Square to Twittersphere: The Public Forum Doctrine Goes Digital*, 25 B.U. J. SCI. & TECH. L. 1, 3 (2019) (noting that the Supreme Court's public forum doctrine "provides strong protections for freedom of speech and assembly and . . . prohibits government officials from discriminating against or silencing speakers based on their viewpoint," and adding that the public forum doctrine "traditionally applies to government-owned or controlled, rather than privately-owned or controlled, property").

[97] *See supra* note 29 and accompanying text (identifying the filmmakers in *Halleck*).

[98] *Halleck*, 139 S. Ct. at 1930.

[99] *Id.*

[100] *Id.* at 1939 (Sotomayor, J., dissenting).

[101] *Id.* at 1939–40.

[102] *See infra* notes 119–29 and accompanying text (explaining how the majority reached this conclusion by applying the rule from *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974)).

channels are public forums triggering constitutional concerns, then finding that MNN was a state actor was relatively easy, as New York City simply had delegated the channels' operation to MNN, letting "it s[tand] in the City's shoes."[103]

Before examining the different rules applied in *Halleck* and how they were chosen, it helps to understand what public access channels are and how MNN came to operate them in Manhattan. The Federal Communications Commission explains on its website that "public access channels are available for use by the general public."[104] A federal statute permits governmental entities to require cable system operators (Comcast, Charter, Cox, etc.) that are awarded franchises to supply cable in particular locales to create and set aside space in their packages for such channels.[105]

As is relevant in *Halleck*, the state of New York embraced this federal opportunity by adopting a statute that requires "[e]very cable television franchisee" with a minimum capacity of thirty-six channels to create "at least one full-time activated channel for public access use."[106] Gaining time on a public access channel, per New York law, is determined "on a first-come, first-served, nondiscriminatory basis,"[107] with such channels being designated only "for noncommercial use."[108] Municipalities in New York, in turn, may designate an entity to administer these channels.[109] Editorial control by governmental municipalities and cable company franchisees over the content appearing on public access channels is severely limited to obscenity[110] and other types of speech not protected by the First Amendment.[111]

In *Halleck*, New York City entered into a cable-franchise agreement with Time Warner (now known as Charter).[112] As described above, this meant that under New

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[103] *See Halleck*, 139 S. Ct. at 1939–40 (Sotomayor, J., dissenting); *see also infra* notes 167–73 and accompanying text (explaining the dissent's logic on the delegation issue under *West v. Atkins*, 487 U.S. 42 (1988)).

[104] *Public, Educational, and Governmental Access Channels ("PEG Channels")*, FED. COMM. COMMISSION, https://www.fcc.gov/media/public-educational-and-governmental-access-channels-peg-channels [https://perma.cc/B9QV-5SGQ] (last updated Dec. 9, 2015).

[105] 47 U.S.C. § 531(b) (2012).

[106] N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(b)(1) (2019).

[107] *Id.* § 895.4(c)(4).

[108] *Id.* § 895.4(a)(1).

[109] *Id.* § 895.4(c)(1).

[110] Obscenity is not protected by the First Amendment. *See* Roth v. United States, 354 U.S. 476, 485 (1957) (concluding that "obscenity is not within the area of constitutionally protected speech or press"); *see also* Miller v. California, 413 U.S. 15, 24 (1973) (establishing the current three-part test for determining when speech is obscene).

[111] N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(c)(8)–(9).

[112] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1927 (2019) ("Time Warner (now known as Charter) operates a cable system in Manhattan."); *id.* at 1935 (Sotomayor, J., dissenting) ("Years ago, New York City (no longer a party to this suit) and Time Warner Entertainment Company (never a party to this suit) entered into a cable-franchise agreement. . . . Time Warner received a cable franchise; the City received public-access channels." (internal citation omitted)).

York law, Time Warner had to create public access channels for New York City.[113] New York City, in turn, designated MNN "to operate Time Warner's public access channels in Manhattan."[114] The question at the heart of *Halleck*—whether MNN, a private entity, should nonetheless be treated as a state actor subject to the First Amendment's provisions[115]—arose after MNN suspended DeeDee Halleck's and Jesus Papoleto Melendez's access to its facilities.[116] The pair produced public access programming in Manhattan and alleged being suspended because of the content of a film they made "about MNN's alleged neglect of the East Harlem community."[117] They claimed the suspension violated their First Amendment freedom of speech.[118] A key question thus was whether MNN, despite being a private entity, should be treated as a state actor subject to the First Amendment.

The five conservative Justices, in an opinion written by Brett Kavanaugh, picked a rule from the case of *Jackson v. Metropolitan Edison Co.*[119] to resolve the state action question. In *Jackson*, the Court concluded that a privately owned business (Metropolitan Edison) authorized by a state commission to supply electricity to residents of York, Pennsylvania, was not a state actor despite it being heavily regulated by the commission and holding a partial monopoly over electrical services in that geographic area.[120]

As parsed by Justice Kavanaugh in *Halleck*, the rule from *Jackson* narrowly holds that a private entity should be treated as a government actor if it "performs a traditional, exclusive public function."[121] Indeed, the Court in *Jackson* observed that government action is "present in the exercise by a private entity of powers traditionally exclusively reserved to the State."[122] In *Jackson*, a six-Justice majority concluded that, in Pennsylvania, supplying a "utility service is not traditionally the exclusive prerogative of the State."[123]

Applying this rule to the facts in *Halleck*, the majority held that MNN was not a state actor.[124] It reasoned that operating public access cable channels "has not

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[113] N.Y. COMP. CODES R. & REGS. tit. 16, § 895.4(b)(1).

[114] *Halleck*, 139 S. Ct. at 1927.

[115] *See id.* at 1926 ("The question here is whether MNN—even though it is a private entity—nonetheless is a state actor when it operates the public access channels.").

[116] *Id.* at 1927.

[117] *Id.*

[118] *Id.*

[119] 419 U.S. 345 (1974).

[120] *Id.* at 346, 358–59.

[121] *Halleck*, 139 S. Ct. at 1928 (citations omitted).

[122] *Jackson*, 419 U.S. at 352 (citations omitted).

[123] *Id.* at 353. In reaching this conclusion, the majority reasoned that "Pennsylvania courts have rejected the contention that the furnishing of utility services is either a state function or a municipal duty." *Id.*

[124] Justice Kavanaugh explained:

> Operating public access channels on a cable system is not a traditional,

traditionally and exclusively been performed by government,"[125] citing two significant facts. These facts were that, historically across the country, "a variety of private and public actors have operated public access channels"[126] and that, more geographically specific, "early Manhattan public access channels were operated in large part by private cable operators, with some help from private nonprofit organizations."[127] This provided an entrée for Kavanaugh to conclude that "operating public access channels on a cable system is not a traditional, exclusive public function within the meaning of this Court's cases."[128] He also cited *Jackson* favorably for the proposition that a business does not become a state actor simply because it faces heavy government regulation.[129]

This outcome meant that MNN could freely discriminate against Halleck and Melendez based on content they produced without triggering the First Amendment's prohibition against viewpoint censorship.[130] Fitting perhaps the broadest of stereotypes about conservatives, Kavanaugh dubbed it a victory for "individual liberty and private enterprise"[131] over the intrusive powers of big government that would have plagued MNN had the First Amendment applied.[132] This framing comports with what

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> exclusive public function. A private entity such as MNN who opens its property for speech by others is not transformed by that fact alone into a state actor. Under the text of the Constitution and our precedents, MNN is not a state actor subject to the First Amendment.

Halleck, 139 S. Ct. at 1934.

[125] *Id.* at 1929.

[126] *Id.*

[127] *Id.* at 1929–30.

[128] *Id.* at 1930.

[129] *Id.* at 1932.

[130] *See id.* at 1927 ("The two producers claimed that MNN violated their First Amendment free-speech rights when MNN restricted their access to the public access channels because of the content of their film."). Viewpoint-based censorship is generally prohibited under the First Amendment. As former Justice Anthony Kennedy recently explained, viewpoint discrimination is "a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny." Matal v. Tam, 137 S. Ct. 1744, 1765 (2017) (Kennedy, J., concurring in part, concurring in judgment). It occurs when, within a particular subject matter or topic of speech, "the government has singled out a subset of messages for disfavor based on the views expressed." *Id.* at 1766; *see* Frederick Schauer, *Not Just About License Plates:* Walker v. Sons of Confederate Veterans*, Government Speech, and Doctrinal Overlap in the First Amendment*, 2015 SUP. CT. REV. 265, 282 (noting that "from the perspective of the First Amendment's prohibition on viewpoint discrimination, for government to tell citizens that they can express one view but not the opposing view is a central violation of the very idea of freedom of speech").

[131] *Halleck*, 139 S. Ct. at 1934.

[132] As Kavanaugh put it:

> It is sometimes said that the bigger the government, the smaller the individual. Consistent with the text of the Constitution, the state-action doctrine enforces a critical boundary between the government and the individual, and thereby protects a robust sphere of individual liberty.

scholar Stephen Feldman calls the "classical liberal self"[133] philosophy, under which "[t]he absence of government action supposedly equates with individual liberty."[134]

Before turning to the *Halleck* dissent, a closer examination of the state action doctrine and *Jackson* is beneficial. A key question is whether *Jackson* actually supplied the correct rule for determining state action in *Halleck*. It is a fair query to pose because the state action doctrine long "has been anything but clear and simple"[135] in its application and is, in fact, "notoriously incoherent."[136] As Professors Kimberly Yuracko and Ronen Avraham recently summed up the problems, "There is no single on-off switch whereby constitutional scrutiny is triggered or avoided. State action doctrine is more of a morass—a set of rather loose doctrines and rules that are highly dependent on the context and consequences of each particular case."[137]

Given such doctrinal ambiguity, *Halleck* provided a crucible for melding a combustible combination of forces—a state action doctrine "beset by inconsistency and disagreement"[138] and an equally messy First Amendment doctrine[139]—ripe for exploitation by jurists seeking to promote their own ideologies. In other words, with no clear, must-follow path on either the state action or the First Amendment front, the Justices seemingly could pick and choose principles and cases that would lead them to outcomes suiting their own values.

Professor Christopher Schmidt asserts that while *Jackson*'s exclusive-and-traditional test added precision for determining whether a private entity is performing a public function and thus becomes a state actor, "it is the very clarity of the public function test that critics attack for being inadequately responsive to the need to extend constitutional oversight over activities that, while not necessarily traditionally and exclusively public functions, the government has delegated to private

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> Expanding the state-action doctrine beyond its traditional boundaries would expand governmental control while restricting individual liberty and private enterprise. We decline to do so in this case.

Id.

[133] Stephen M. Feldman, *Postmodern Free Expression: A Philosophical Rationale for the Digital Age*, 100 MARQ. L. REV. 1123, 1182 (2017).

[134] *Id.*

[135] Saidel-Goley & Singer, *supra* note 15, at 446.

[136] *Id.*; *see also* Nathan S. Chapman, *The Establishment Clause, State Action, and* Town of Greece, 24 WM. & MARY BILL RTS. J. 405, 408 (2015) (noting that "commentators have largely concluded that the state action doctrine is incoherent").

[137] Kimberly A. Yuracko & Ronen Avraham, *Valuing Black Lives: A Constitutional Challenge to the Use of Race-Based Tables in Calculating Tort Damages*, 106 CALIF. L. REV. 325, 348 (2018).

[138] Gillian E. Metzger, *Privatization as Delegation*, 103 COLUM. L. REV. 1367, 1411 (2003).

[139] *See* Joseph Blocher, *Nonsense and the Freedom of Speech: What Meaning Means for the First Amendment*, 63 DUKE L.J. 1423, 1478 (2014) (observing that "First Amendment doctrine and the language games on which it is based are messy and ongoing projects"); *see also supra* note 5 (addressing the generally and historically confused state of First Amendment law).

entities."[140] Indeed, as attorney David Howard observes, *Jackson*'s public function test "has been interpreted narrowly, and federal courts generally find that only functions like holding elections, exercising eminent domain, and operating a company-owned town, constitute state action."[141]

The *Halleck* majority thus picked a state-action test with a "restrictive definition of public function,"[142] thereby reducing the odds that a private entity will be considered a state actor. *Jackson* requires the function in question to have been performed both traditionally *and* exclusively by the government.[143] This is hard to satisfy, as the Court acknowledged in *Flagg Bros., Inc. v. Brooks*, because "[w]hile many functions have been traditionally performed by governments, very few have been 'exclusively reserved to the State.'"[144]

There are, however, alternative approaches for finding state action. Indeed, *Jackson* more broadly framed the state action question as about "whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself."[145] The Court observed the looseness and imprecision of this standard in 2001 in *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*.[146] It wrote there that:

> What is fairly attributable [to the State] is a matter of normative judgment, and the criteria lack rigid simplicity. From the range of circumstances that could point toward the State behind an individual face, no one fact can function as a necessary condition across the board for finding state action; nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason against attributing activity to the government.[147]

Dean Erwin Chemerinsky notes that this explication of state action does not focus on a public function, with the Court in *Brentwood Academy* instead concentrating on "the government's 'entwinement' with the private entity."[148] Writing for the majority in *Brentwood Academy*, Justice David Souter used the term "entwinement"[149]

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[140] Christopher W. Schmidt, *On Doctrinal Confusion: The Case of the State Action Doctrine*, 2016 BYU L. REV. 575, 588 (2016).

[141] David M. Howard, *Rethinking State Inaction: An In-Depth Look at the State Action Doctrine in State and Lower Federal Courts*, 16 CONN. PUB. INT. L.J. 221, 227–28 (2017).

[142] Nat Stern, *State Action, Establishment Clause, and Defamation: Blueprints for Civil Liberties in the Rehnquist Court*, 57 U. CIN. L. REV. 1175, 1193 (1989).

[143] *See supra* notes 121–22 and accompanying text.

[144] 436 U.S. 149, 158 (1978).

[145] Jackson v. Metro. Edison Co., 419 U.S. 345, 351 (1974).

[146] 531 U.S. 288 (2001).

[147] *Id.* at 295–96.

[148] CHEMERINSKY, *supra* note 21, at 544 n.54.

[149] *Brentwood Acad.*, 531 U.S. at 291.

in concluding that "a statewide association incorporated to regulate interscholastic athletic competition among public and private secondary schools"[150] should be treated as a state actor.[151] Chemerinsky dubs the decision's entwinement standard, which may be distinguished from a related "entanglement" approach to state action,[152] "a much more expansive exception to the state action doctrine than found in prior cases. But the exception is not defined with any precision."[153]

What is most relevant from *Brentwood Academy* for understanding *Halleck*, however, is that the Court remarked that it had treated a private entity as a state actor when the entity was "delegated a public function by the State."[154] The Court in *Brentwood Academy* cited its 1988 decision in *West v. Atkins*[155] as standing for this delegation-of-duties proposition.[156] *West*, in turn, is the case on which the *Halleck* dissent hung its decision that MNN was a state actor.[157]

In *West*, the Court held that Samuel Atkins, a private physician who had a contract with the State of North Carolina to supply orthopedic services on a part-time basis at a state-run prison hospital, was a state actor when he treated inmate Quincy West.[158] The Court found that Atkins's work in treating West was "fairly attributable to the State."[159] The fact that Atkins worked on a contractual basis and was not a state employee made no difference because he still was "authorized and obliged to treat prison inmates."[160]

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[150] *Id.* at 290.

[151] *See id.* at 291 ("We hold that the association's regulatory activity may and should be treated as state action owing to the pervasive entwinement of state school officials in the structure of the association, there being no offsetting reason to see the association's acts in any other way.").

[152] *See* CHEMERINSKY, *supra* note 21, at 542 (noting that the entanglement exception to the general rule that private entities are not state actors holds "that private conduct must comply with the Constitution if the government has authorized, encouraged, or facilitated the unconstitutional conduct").

[153] *Id.* at 552.

[154] *Brentwood Acad.*, 531 U.S. at 296.

[155] 487 U.S. 42 (1988).

[156] *See Brentwood Acad.*, 531 U.S. at 296 (citation omitted).

[157] *See* Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1939–40 (2019) (Sotomayor, J., dissenting) (opining that the conclusion that MNN is a state actor "follows from the Court's decision in *West v. Atkins*").

[158] *West*, 487 U.S. at 54–58.

[159] *Id.* at 54.

[160] *Id.* at 55. The Court reasoned:

> It is the physician's function within the state system, not the precise terms of his employment, that determines whether his actions can fairly be attributed to the State. Whether a physician is on the state payroll or is paid by contract, the dispositive issue concerns the relationship among the State, the physician, and the prisoner.

Id. at 55–56.

The *Halleck* majority gave short shrift to *West*. It mentioned *West* only once, coming in a footnote.[161] There, the majority found that *West* only applies when the government outsources a constitutionally mandated obligation to a private entity.[162] Justice Kavanaugh explained that in *West*, North Carolina "was constitutionally obligated to provide medical care to prison inmates."[163] In particular, the Tar Heel State had an Eighth Amendment[164] obligation to ensure that the medical care it provided to inmates was not so shoddy or deliberately indifferent as to constitute cruel and unusual punishment.[165] For Kavanaugh, *West* was readily distinguished from *Halleck* because in *Halleck*, the government had no constitutional "obligation to operate public access channels."[166]

The dissent in *Halleck* pushed back on this cursory effort to confine *West* to cases involving the delegation of constitutional obligations. Justice Sotomayor contended that the majority ignored a critical fact in *West*—namely, that North Carolina "had no constitutional obligation to open the prison or incarcerate the prisoner in the first place."[167] The Eighth Amendment obligation regarding proper medical treatment only arose after the state chose to run prisons.[168] This, for Justice Sotomayor, was analogous to the situation in *Halleck* because New York City

> had no constitutional obligation to award a cable franchise or to operate public-access channels. But once the City did award a

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[161] *Halleck*, 139 S. Ct. at 1929 n.1.

[162] *Id.*

[163] *Id.*

[164] The Eighth Amendment provides that "[e]xcessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII. The Eighth Amendment's prohibition on cruel and unusual punishment has been incorporated through the Fourteenth Amendment's Due Process Clause to apply to the states. Robinson v. California, 370 U.S. 660, 666–68 (1962); *see* Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 433–34 (2001) ("Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.").

[165] As the majority put it in *West*:

> Contracting out prison medical care does not relieve the State of its constitutional duty to provide adequate medical treatment to those in its custody, and it does not deprive the State's prisoners of the means to vindicate their Eighth Amendment rights. The State bore an affirmative obligation to provide adequate medical care to West; the State delegated that function to respondent Atkins; and respondent voluntarily assumed that obligation by contract.

West, 487 U.S. at 56 (internal citations omitted).

[166] *Halleck*, 139 S. Ct. at 1929 n.1.

[167] *Id.* at 1943 (Sotomayor, J., dissenting).

[168] *Id.*

> cable franchise, New York law required the City to obtain public-access channels . . . and to open them up as a public forum . . . . That is when the City's obligation to act in accordance with the First Amendment with respect to the channels arose.[169]

Applying *West*, the dissent had little difficulty finding that MNN should be treated as a state actor.[170] In brief, by initially concluding that public access channels are public forums triggering First Amendment concerns, the dissent made the state action determination easy. It became a simple instance of a state actor (New York City) farming out its constitutional obligations to a private entity (MNN).[171] As Justice Sotomayor encapsulated it, "The First Amendment does not fall silent simply because a government hands off the administration of its constitutional duties to a private actor."[172] Thus, as noted above, the order in which the dissent addressed the issues was pivotal; by choosing to first resolve the First Amendment public forum issue, the dissent was able to settle the second issue—the state action question—in a very different fashion from the majority.[173]

Finally, just as the *Halleck* majority articulated why *West* did not supply the correct rule,[174] so too did the dissent explain why the rule from *Jackson*, which the majority embraced, was inapplicable. *Jackson*, as Sotomayor wrote, applies when a private entity chooses to enter and do business in a heavily government-regulated marketplace.[175] That is distinct from the factual scenario in *Halleck* where, as Sotomayor wrote, MNN took on a "role because it was asked to do so by the City"[176] and was "deputized"[177] by the City to carry it out. In brief, *Jackson* applies when a private company wanders into a heavily regulated field to do business; *West* applies when a governmental entity delegates a constitutional responsibility—even one that it took on, even if it did originally not need to do so—to a private entity.

Perhaps *Halleck* simply involves dueling stereotypes. If siding with MNN fits a conservative cliché of embracing individual liberty and attacking big government,[178]

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[169] *Id.* at 1943–44 (internal citations omitted).

[170] *Id.* at 1940–41.

[171] *Id.*

[172] *Id.* at 1941.

[173] *See supra* notes 100–03 and accompanying text (addressing the order in which the dissent treated the issues).

[174] *See supra* notes 161–66 and accompanying text (addressing the majority's reasoning on why *West* was inapplicable).

[175] *Halleck*, 139 S. Ct. at 1942–43 (Sotomayor, J., dissenting).

[176] *Id.*

[177] *Id.* at 1943.

[178] *See* Steven J. Heyman, *The Conservative-Libertarian Turn in First Amendment Jurisprudence*, 117 W. VA. L. REV. 231, 235 (2014) (asserting that "conservative jurisprudence" contains a strand "which holds that the Constitution should be interpreted to promote a libertarian conception of individual freedom and to limit the power and functions of the state").

as Justice Kavanaugh framed the outcome,[179] then ruling in favor of the right of two local filmmakers to criticize the business practices of MNN in allegedly neglecting the community of East Harlem fits what might be considered the old-school view of liberals as champions of the speech rights of the little guy.[180]

This all merits comparison with a memorable, acrimonious remark from a 2018 Supreme Court First Amendment decision. Specifically, in her dissent on behalf of the same bloc of four liberal Justices in *Janus v. American Federation of State, County, and Municipal Employees*, Elena Kagan accused the conservative majority of "weaponizing the First Amendment"[181] and "using it against workaday economic and regulatory policy."[182]

It might well be said that in *Halleck*, the conservative majority weaponized the state action doctrine. It did so to shield the editorial decisions of a business from the forces of First Amendment doctrine that otherwise would have interfered with its ability to engage in viewpoint discrimination. *Halleck's* bottom line is that the speech rights (in terms of autonomous editorial control and decision-making) of a corporate entity—albeit a non-profit one[183]—prevailed over the speech rights of individual filmmakers who criticized it. The former's speech rights triumphed precisely because the First Amendment did *not* apply. And by using the state action doctrine as a weapon to deny the First Amendment's relevance against a business entity, the *Halleck* majority adds support to Dean Chemerinsky's thesis that the Roberts Court "is not a free speech Court."[184] It is perhaps more accurate, then, to say that the Court, as it enters the third decade of the twenty-first century, is a champion of First Amendment speech rights and First Amendment expansionism when five conservative Justices want it to be.

II. SPLINTERING ON SPEECH AND PRESS RIGHTS IN *NIEVES V. BARTLETT*: A LESSON IN HOW NOT TO CREATE A FEDERAL RULE?

If the nation's highest appellate body is not necessarily a free *speech* Court today,[185] might it also not be a free *press* Court? It is a difficult query to resolve head on due to the paucity of press cases. As Dean Lyrissa Lidsky observed in 2012, "[T]he Supreme Court under Chief Justice John Roberts has taken up relatively few First

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[179] *Supra* notes 131–32 and accompanying text.

[180] *See* Kathleen M. Sullivan, *Discrimination, Distribution and Free Speech*, 37 ARIZ. L. REV. 439, 440 (1995) ("It used to be that censorship was associated with the right and free speech libertarianism with the left.").

[181] 138 S. Ct. 2448, 2501 (2018) (Kagan, J., dissenting).

[182] *Id.*

[183] Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1926 (2019) (describing MNN as "a private nonprofit corporation").

[184] Erwin Chemerinsky, *Not a Free Speech Court*, 53 ARIZ. L. REV. 723, 734 (2011).

[185] *Id.*

Amendment cases directly involving the media."[186] In fact, remarking on "the paucity of press cases before the Court,"[187] Lidsky contended that with "such scant evidence, any predictions about the Roberts Court's likely path in 'press cases' must be circumspect."[188]

Indeed, the prospects for robust constitutional protection of journalists—seemingly under siege today on multiple fronts[189]—seem sadly slim. That is because, as Professors RonNell Andersen Jones and Sonja West recently wrote—in addressing press freedom in an era when the President of the United States is openly hostile to journalists—that

> the Supreme Court has long been wary of interpreting the First Amendment's Press Clause as an active and vibrant defender of press freedom—at least in any manner that might distinguish it from the Speech Clause. The Court has repeatedly declared that the press should not receive any constitutional privileges that are not equally shared by all speakers, and therefore the constitutional rights the press does enjoy tend to be the same rights that we all possess.[190]

Andersen Jones and West argue that rather than narrowly focusing on President Donald Trump's repeated antipathy and bellicosity toward the mainstream press, one must "engage in a broader conversation about the critical roles of the press in our society, the mechanisms by which we have protected those roles in the past, the

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[186] Lyrissa Lidsky, *Not a Free Press Court?*, 2012 BYU L. REV. 1819, 1819.

[187] *Id.* at 1834.

[188] *Id.*

[189] *See* BRIAN S. BROOKS ET AL., NEWS REPORTING & WRITING, at v (13th ed. 2020) ("The constant partisan attacks on the press at the national level roll like an avalanche down to the smallest news outlet. Trust in the media has suffered from the toxic atmosphere. Journalists are subjected to verbal and sometimes physical abuse."); Lili Levi, *The Weaponized Lawsuit Against the Media: Litigation Funding as a New Threat to Journalism*, 66 AM. U. L. REV. 761, 763 (2017) ("From Donald Trump's vituperative threats against the press during the 2016 presidential election, to judicial distaste for modern journalistic practices, to declining public esteem for a self-sabotaging press, news organizations today are facing a war against the media." (internal citations omitted)).

[190] RonNell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 573 (2017). Professor West elaborates in another article that:

> The Supreme Court occasionally offers up rhetoric on the value of the free press, but it steadfastly refuses to explicitly recognize any right or protection as emanating solely from the Press Clause. Because the freedoms to publish and to disseminate speech are also protected by the Speech Clause, the Press Clause has been left with nothing to do.

Sonja R. West, *Awakening the Press Clause*, 58 UCLA L. REV. 1025, 1028 (2011) (internal citations omitted).

potential impact of underprotecting newsgatherers, and how we can best preserve our free and independent press."[191] One of those critical roles, of course, is for the press to be a watchdog on government officials,[192] functioning "as a powerful antidote to any abuses of power by governmental officials."[193] This watchdog role sometimes is called the checking value of a free press.[194] Other roles for the press in serving the public, as Andersen Jones notes in a more recent article, include "informing, contextualizing, narrating, and educating."[195]

How the Roberts Court feels about the press and the multiple tasks it performs is finally coming into view, even if just partially so. Specifically, the U.S. Supreme Court in May 2019 decided *Nieves v. Bartlett*.[196] The ruling directly impacts the rights of not just mainstream and professional members of the press,[197] but also so-called citizen journalists.[198] These latter individuals, sometimes armed with nothing

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[191] Andersen Jones & West, *supra* note 190, at 595.

[192] *See* Jonathan Mermin, *Free But Not Independent: The Real First Amendment Issue for the Press*, 39 U.S.F. L. REV. 929, 929 (2005) ("A fundamental tenet of our First Amendment tradition is that the press does not simply report what public officials say, but acts instead as a 'watchdog' over the government.").

[193] Mills v. Alabama, 384 U.S. 214, 219 (1966).

[194] *See* Vincent Blasi, *The Checking Value in First Amendment Theory*, 2 AM. B. FOUND. RES. J. 521, 527 (1977) (observing the value that a free press "can serve in checking the abuse of power by public officials," and noting the then-recent impact of the First Amendment "on American life by facilitating a process by which countervailing forces check the misuse of official power").

[195] RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 527 (2019).

[196] 139 S. Ct. 1715 (2019).

[197] *See* Steen Steensen, *Cozy Journalism: The Rise of Social Cohesion as an Ideal in Online, Participatory Journalism*, 5 JOURNALISM PRAC. 687, 688 (2011) (asserting that "professional ideology becomes what separates the journalist from the blogger, the press agent, the spin-doctor and other professionals and non-professionals, who select, interpret, frame and distribute information to an audience," and adding that "ideas like independence, objectivity, and accuracy, have been portrayed as vital to the professional ideology of journalism").

[198] *See* D. Jasun Carr et al., *Cynics and Skeptics: Evaluating the Credibility of Mainstream and Citizen Journalism*, 91 JOURNALISM & MASS COMM. Q. 452, 454 (2014) (asserting that a "narrow definition of citizen journalism focuses on the reporting of newsworthy events, usually disasters or crises (events that the mainstream media cannot predict), typically using new media technologies, and often before the mainstream media arrive on the scene," while a "broader definition of citizen journalism includes a range of information gathering and reporting activities, such as blogging (or microblogging) and image sharing, as well as reporting breaking news" (internal citations omitted)); Sue Robinson & Cathy Deshano, *Citizen Journalists and Their Third Places: What Makes People Exchange Information Online (or Not)?*, 12 JOURNALISM STUD. 642, 643 (2011) (asserting that citizen journalism "is used pervasively to describe everyone from bloggers to those who merely contribute to news forums"); *see also* Clay Calvert & Mirelis Torres, *Putting the Shock Value in First Amendment Jurisprudence: When Freedom for the Citizen-Journalist Watchdog Trumps the Right of Informational Privacy on the Internet*, 13 VAND. J. ENT. & TECH. L. 323, 342 (2011) ("Generally, the term

but smartphones, also perform as watchdogs holding government actors, including police, accountable for their actions in the true spirit of the Free Press Clause.[199]

For instance, a twenty-three-year-old barber named Feidin Santana used his smartphone in April 2015 to perform a "vital journalistic function."[200] In particular, Santana recorded video in North Charleston, South Carolina, of a white police officer, Michael T. Slager, shooting in the back and killing a fleeing, unarmed black man, Walter L. Scott.[201] It was simply a recent example of the power of video to reveal alleged police malfeasance. George Holliday's 1991 video of Los Angeles police officers beating Rodney King with batons provides an older reminder of the watchdog role that everyday citizens can play in exposing incidents of government officials seemingly abusing their positions of power.[202] Indeed, as one scholar notes, "few would remember the name of Rodney King had it not been for the video of a citizen journalist who left an indelible imprint on American racial consciousness."[203]

Multiple federal appellate courts, in fact, now give constitutional support to such acts of citizen journalism by recognizing a qualified First Amendment right to record police performing their duties in public venues.[204] Indeed, in the course of recognizing such a right to record, the U.S. Court of Appeals for the Third Circuit remarked in 2017 that it was joining "this growing consensus."[205]

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citizen-journalism refers to the increasingly frequent activity among common citizens—amateur journalists—of gathering news and disseminating information to the general public, and contrasts with what might be called old journalism.").

[199] *See* Leathers v. Medlock, 499 U.S. 439, 447 (1991) (asserting that "[t]he press plays a unique role as a check on government abuse," and adding that the press serves a key role "as a watchdog of government activity"); *see also* Ricardo G. Fernández-Martínez, *The Spontaneous Video and Its Impact on the Digital Press*, 32 COMM. & SOC'Y 213, 213 (2019) (noting that "[c]urrent mobile technology has resulted in a boom in citizen journalism and video activism as, thanks to online communications and web 2.0 applications, a video can now be shared within seconds").

[200] Clay Calvert, *The First Amendment Right to Record Images of Police in Public Places: The Unreasonable Slipperiness of Reasonableness & Possible Paths Forward*, 3 TEX. A&M L. REV. 131, 132 (2015) (citation omitted).

[201] *Id.* at 132–33.

[202] *See* CLAY CALVERT, VOYEUR NATION: MEDIA, PRIVACY, AND PEERING IN MODERN CULTURE 5 (2000) (describing the Holliday video).

[203] Nicole Maurantonio, *Remembering Rodney King: Myth, Racial Reconciliation, and Civil Rights History*, 91 JOURNALISM & MASS COMM. Q. 740, 751 (2014).

[204] *See* Clay Calvert, *The Right to Record Images of Police in Public Places: Should Intent, Viewpoint, or Journalistic Status Determine First Amendment Protection?*, 64 UCLA L. REV. DISC. 230, 237–38 (2016) (citations omitted) (addressing appellate court rulings on this issue); Howard M. Wasserman, *Police Misconduct, Video Recording, and Procedural Barriers to Rights Enforcement*, 96 N.C. L. REV. 1313, 1319 (2018) (noting that six federal appellate courts "have recognized a First Amendment right for members of the public to record police and other public officials performing their public functions in public spaces").

[205] Fields v. City of Philadelphia, 862 F.3d 353, 356 (3d Cir. 2017).

So, how is *Nieves* relevant here? Imagine that a journalist, be she of either the professional or common citizen variety, is arrested. The arrest ostensibly is for violating a lawful order to stand back further, supposedly for both her own safety and that of police officers, on a public sidewalk. The sidewalk is located immediately adjacent to a street where several officers are arresting dozens of protestors for blocking traffic. The journalist, however, claims she was arrested not because she did anything wrong, but because she exercised her qualified First Amendment right to record video of the officers making the arrests, which she perceived as physically abusive.

If she files a Section 1983 claim[206] alleging she was arrested in retaliation for exercising her First Amendment rights of speech and press, then she initially must clear the new federal rule fashioned in *Nieves*, as described earlier.[207] Specifically, she would need to prove either that there was no probable cause to arrest her or, if probable cause existed, that it also existed to arrest similarly situated individuals who were not arrested and who were not engaged in the same First Amendment–protected activity of recording police.[208] The majority added that both facets of this new rule involve purely objective inquiries, under which "the statements and motivations of the particular arresting officer are 'irrelevant.'"[209] The latter half of the rule—the exception to the general principle that a plaintiff must prove there was no probable cause to arrest—is objective because it focuses on comparing the plaintiff to others: Were there others similarly situated to the plaintiff, but who were not engaged in the same First Amendment–protected activity and who were not arrested?[210] Only if the plaintiff clears the *Nieves* rule can her claim proceed to the next steps set forth by the Court in *Mt. Healthy City School District v. Doyle* for a successful First Amendment retaliation claim.[211]

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[206] *See supra* note 43 and accompanying text (addressing Section 1983 claims).

[207] *See supra* notes 46–48 and accompanying text (describing the rule from *Nieves*).

[208] *See* Nieves v. Bartlett, 139 S. Ct. 1715, 1727 (2019) (concluding that while "probable cause should generally defeat a retaliatory arrest claim," a plaintiff need not prove the absence of probable cause to win when he "presents objective evidence that he was arrested when otherwise similarly situated individuals not engaged in the same sort of protected speech had not been").

[209] *Id.* (quoting Devenpeck v. Alford, 543 U.S. 146, 153 (2004)).

[210] *Id.*

[211] 429 U.S. 274, 287 (1977). Under the *Mt. Healthy* test, a plaintiff carries the initial burden of showing that her exercise of a constitutionally protected right was a substantial or motivating factor for the negative action taken against her by a government actor. *Id.* If the plaintiff can demonstrate this, then she will win unless the government actor can prove by a preponderance of the evidence that the negative action would have been taken against the plaintiff regardless of whether she was exercising a constitutionally protected right. *Id.* In brief, the *Mt. Healthy* test involves burden shifting. *See* Frank D. LoMonte & Clay Calvert, *The Open Mic, Unplugged: Challenges to Viewpoint-Based Constraints on Public-Comment Periods*, 69 CASE W. RES. L. REV. 19, 59–60 (2018) (noting that the *Mt. Healthy* test "initially imposes burdens on the plaintiff. Only if the plaintiff satisfies those hurdles does the burden eventually shift to the government" (internal citation omitted)).

Regardless of one's beliefs about either the value of videotape to expose the truth or the merits of the difficult-to-define concept of citizen journalism,[212] the *Nieves* rule is both journalistically and constitutionally important. That is because "participatory cultures, which now enable citizens to become the collectors and disseminators of news, have become important influences on news operations."[213] Yet, one of the most remarkable and disappointing things (from a free press–advocacy perspective) about *Nieves* is that only two Justices—Ruth Bader Ginsburg[214] and Sonia Sotomayor[215]—even mentioned the possible detrimental impact on the press of the Court's newly minted rule in First Amendment–based retaliatory arrest cases. Furthermore, only Sotomayor addressed its likely negative consequences on, in her words, a "citizen journalist."[216] In doing so, Sotomayor articulated a seemingly not so far-fetched hypothetical in which a citizen journalist is arrested for trespassing after using a phone to stream video on a social media platform of a heated encounter between police and an individual who might be a neighborhood prowler.[217]

In brief, *Nieves* reveals two problems for First Amendment jurisprudence. The first trouble, as described in the Introduction, is the disunity among the Justices in fashioning a federal rule affecting First Amendment rights.[218] The second problem, as noted immediately above, is that a mere two Justices squarely addressed the implications of the rule on journalists, with the rest missing a prime opportunity to contextualize the rule within the framework of the Free Press Clause.[219] The remainder of this Part of the Article addresses these two problems.

Regarding the lack of unity in fashioning the *Nieves* rule, four Justices wrote separate opinions, each complaining in some fashion about certain aspects of the

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[212] *See* Seth C. Lewis et al., *Thinking About Citizen Journalism: The Philosophical and Practical Challenges of User-Generated Content for Community Newspapers*, 4 JOURNALISM PRAC. 163, 166 (2010) (asserting that "citizen journalism can be hard to define").

[213] Melissa Wall, *Change the Space, Change the Practice?: Re-Imagining Journalism Education with the Pop-Up Newsroom*, 9 JOURNALISM PRAC. 123, 123 (2015).

[214] *See Nieves*, 139 S. Ct. 1734–35 (Ginsburg, J., concurring in judgment in part, dissenting in part) (concluding that she "would not use this thin case to state a rule that will leave *press members* and others exercising First Amendment rights with little protection against police suppression of their speech" (emphasis added)).

[215] *See id.* at 1741 (Sotomayor, J., dissenting) (questioning the impact on "a reporter [who] is investigating corruption in a police unit" due to the majority's holding that statements of arresting officers are irrelevant under the new rule's exception to the general requirement that a plaintiff must prove there was no probable cause to arrest).

[216] *Id.* at 1740.

[217] *Id.*

[218] *See supra* notes 50–66 and accompanying text (providing an overview of the opinions of four Justices—Thomas, Gorsuch, Ginsburg, and Sotomayor—who wrote opinions in *Nieves* that were critical of the majority's new rule in some manner).

[219] *See supra* notes 214–17 and accompanying text (noting how only Justices Ginsburg and Sotomayor directly addressed the possible deleterious ramifications of the *Nieves* rule on journalists).

new standard.[220] Before examining the frets and quibbles of those Justices, it helps to appraise the disharmony in *Nieves* by comparing it to other cases in which the Court adopted a federal rule affecting the First Amendment rights of speech and/or press. As suggested below, it is possible to generate a durable, long-lasting rule even if some Justices on the Court that initially adopted it vented disagreements.

Most notably, in the 1964 defamation case of *New York Times Co. v. Sullivan*, Justice William Brennan wrote for the Court that the First and Fourteenth Amendments required adopting

> a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.[221]

Significantly, in embracing the actual malice rule as a fault standard,[222] not all of the Justices agreed about its soundness. In a concurrence joined by William Douglas, Hugo Black complained that actual malice was poorly defined and would be hard to prove and disprove.[223] He also lamented that actual malice "provides at best an evanescent protection for the right critically to discuss public affairs and certainly does not measure up to the sturdy safeguard embodied in the First Amendment."[224] In brief, although Black agreed with the outcome reversing a libel judgment for plaintiff L.B. Sullivan and against the *New York Times*, he thought that actual malice, as a federal rule, did not go far enough in protecting First Amendment interests.[225]

Justice Arthur Goldberg also wrote a concurrence joined by Douglas.[226] As with Justice Black, Goldberg believed the actual malice rule failed to afford sufficient safeguards for critics of public officials' conduct.[227] All totaled, three Justices in *New York*

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[220] *Supra* notes 50–66 and accompanying text.

[221] 376 U.S. 254, 279–80 (1964).

[222] *See* Derigan Silver & Ruth Walden, *A Dangerous Distinction: The Deconstitutionalization of Private Speech*, 21 COMMLAW CONSPECTUS 59, 63 (2012) ("The Court labeled this fault standard 'actual malice.'").

[223] *N.Y. Times Co.*, 376 U.S. at 293 (Black, J., concurring).

[224] *Id.*

[225] *See id.* ("Unlike the Court, therefore, I vote to reverse exclusively on the ground that the *Times* and the individual defendants had an absolute, unconditional constitutional right to publish in the *Times* advertisement their criticisms of the Montgomery agencies and officials.").

[226] *Id.* at 297 (Goldberg, J., concurring).

[227] *See id.* at 298 (reasoning "that the Constitution affords greater protection than that provided by the Court's standard to citizen and press in exercising the right of public criticism," and concluding that "the First and Fourteenth Amendments to the Constitution afford to the citizen and to the press an absolute, unconditional privilege to criticize official conduct despite the harm which may flow from excesses and abuses").

Times Co.—Black, Goldberg, and Douglas—thought that actual malice was a problematic rule and did not provide enough protection to First Amendment interests.[228]

When the actual malice rule was extended in 1967 to apply to public *figures* (not just public *officials*) in *Curtis Publishing Co. v. Butts*,[229] the Court was even more fractured on its applicability. As the Court later explained, the actual malice rule was extended by *Curtis Publishing* not in the Court's opinion delivered by Justice John Marshall Harlan,[230] but rather by Chief Justice Earl Warren in a concurrence joined in key parts by four other Justices.[231] The Court in *Gertz v. Robert Welch, Inc.* sorted out the tortuous path in *Curtis* through which actual malice came to apply to public figures:

> Chief Justice Warren stated the principle . . . that the *New York Times* test reaches both public figures and public officials. . . . Brennan and . . . White agreed with the Chief Justice on that question. . . . Black and . . . Douglas reiterated their view that publishers should have an absolute immunity from liability for defamation, but they acquiesced in the Chief Justice's reasoning in order to enable a majority of the Justices to agree on the question of the appropriate constitutional privilege for defamation of public figures.[232]

Despite such early hiccups, the actual malice rule lives on decades later as the fault standard for both public official and public figure plaintiffs in defamation cases. Although Justice Clarence Thomas recently expressed disagreement with its extension to public figures,[233] the actual malice rule seems unlikely to be jettisoned

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[228] Both Justices Black and Goldberg called for adopting an absolute rule of protection. *See id.* at 293 (Black, J., concurring) (concluding "that the Times and the individual defendants had an absolute, unconditional constitutional right to publish in the Times advertisement their criticisms of the Montgomery agencies and officials"); *id.* at 305 (Goldberg, J., concurring) ("For these reasons, I strongly believe that the Constitution accords citizens and press an unconditional freedom to criticize official conduct.").

[229] 388 U.S. 130, 155 (1967).

[230] In delivering the judgments of the Court in *Curtis Publishing* and its companion case of *Associated Press v. Walker*, Justice Harlan issued a plurality opinion that was joined only by three other Justices (Tom Clark, Potter Stewart and Abe Fortas). *Id.* at 133. Harlan called for a federal rule under which public figures would need to prove "highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." *Id.* at 155.

[231] *See* Gertz v. Robert Welch, Inc., 418 U.S. 323, 336 (1974) (noting that while Harlan announced the result in *Curtis Publishing* and its companion case of *Associated Press v. Walker*, "a majority of the Court agreed with Mr. Chief Justice Warren's conclusion that the *New York Times* test should apply to criticism of 'public figures' as well as 'public officials'").

[232] *Id.* at 336 n.7.

[233] In early 2019, Justice Thomas derided *New York Times Co.*'s adoption of the actual malice rule and later Supreme Court decisions extending its reach to other scenarios as "policy-driven

by the Court anytime in the near future.[234] In fact, the Court extended it in 1988 from the realm of defamation law to the tort of intentional infliction of emotional distress (IIED) in *Hustler Magazine v. Falwell*.[235] Of the eight Justices who participated in *Falwell*, only one—Byron White—expressed a mild problem with extending actual malice from *New York Times Co.* and libel to IIED.[236]

More recently, the Court in *Snyder v. Phelps* seemed to adopt another First Amendment–based rule in the realm of tort law.[237] It held there that speech "at a public place on a matter of public concern"[238] receives "'special protection' under the First Amendment"[239] against tort causes of action. That broad rule precluded Albert Snyder, a private-figure plaintiff, from recovering under the tort theories of IIED and intrusion into seclusion, as well as civil conspiracy theories related thereto.[240]

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decisions masquerading as constitutional law." McKee v. Cosby, 139 S. Ct. 675, 676 (2019) (Thomas, J., concurring in the denial of certiorari). Thomas's concern, particularly as it involves stretching actual malice's application from public-official plaintiffs to public-figure plaintiffs, is that "[n]one of these decisions made a sustained effort to ground their holdings in the Constitution's original meaning." *Id.* at 678. As Thomas explained, "[t]here are sound reasons to question whether either the First or Fourteenth Amendment, as originally understood, encompasses an actual-malice standard for public figures or otherwise displaces vast swaths of state defamation law." *Id.* at 680. He ultimately concluded that "[w]e should reconsider our jurisprudence in this area." *Id.* at 682.

[234] Lower courts, in fact, are now starting to wrestle with Thomas's attack on the actual malice rule in *McKee*. For instance, in May 2019, U.S. Magistrate Gordon Gallagher rejected the plaintiffs' argument that, based on Thomas's opinion in *McKee*, Gallagher should consider if "[*New York Times Co.*] sets an impossible standard, thus displacing the possibility of proving up a mere negligence claim." Anderson v. Colo. Mountain News Media Co., No. 18-cv-029 34-CMA-GPG, 2019 U.S. Dist. LEXIS 135665, at *27 (D. Colo. May 20, 2019). Magistrate Gallagher bluntly rebuffed this contention. *See id.* ("This Court declines the invitation to overturn a half-century of Supreme Court jurisprudence.").

[235] 485 U.S. 46, 56 (1988). The Court wrote there that:

> public figures and public officials may not recover for the tort of intentional infliction of emotional distress by reason of publications such as the one here at issue without showing in addition that the publication contains a false statement of fact which was made with "actual malice," i.e., with knowledge that the statement was false or with reckless disregard as to whether or not it was true.

Id.

[236] *See id.* at 57 (White, J., concurring) ("As I see it, the decision in *New York Times Co. v. Sullivan* . . . has little to do with this case, for here the jury found that the ad contained no assertion of fact." (internal citations omitted)).

[237] The word "seemed" is strategically used in this sentence because, in penning the majority opinion, Chief Justice Roberts asserted that "[o]ur holding today is narrow. We are required in First Amendment cases to carefully review the record, and the reach of our opinion here is limited by the particular facts before us." 562 U.S. 443, 460 (2011).

[238] *Id.* at 458.

[239] *Id.*

[240] *See id.* at 460 ("Because we find that the First Amendment bars Snyder from recovery for intentional infliction of emotional distress or intrusion upon seclusion—the alleged

In *Phelps*, only one Justice—Samuel Alito—openly disagreed with this rule, at least to the extent that it applies to private-figure plaintiffs.[241] Justice Breyer, in a solo concurrence, also expressed reservations about extending the rule to all situations involving private-figure plaintiffs.[242]

The bottom line is that venerable federal rules affecting the First Amendment—especially the actual malice rule—are not always born out of unanimity among the Justices. Thus, the mere fact that there was disagreement in *Nieves* over the rule it created does not mean that its future is doomed or destined to be short lived.

The problem in *Nieves*, however, is significantly different from that in *New York Times Co.*, which spawned the actual malice rule. In *New York Times Co.*, the dissension was not over whether there should be a federal rule or how that federal rule should be created. The rift simply was over whether the rule (actual malice) went far enough in protecting the press; six Justices believed it did, while three Justices thought it should have bestowed more protection.[243]

In *Nieves*, not only were more Justices—four—in disagreement about all or part of the rule than in *New York Times Co.*, but their concerns ran deeper than just whether a rule went far enough in protecting First Amendment interests. Justice Thomas's primary objection to the exception or qualification facet of *Nieves*'s general rule that a plaintiff must prove a lack of probable cause was that it "has no basis in either the common law or our First Amendment precedents."[244] Without such precedent, Thomas complained that the Court was crafting the "exception as a matter of policy."[245]

Indeed, Thomas clearly objects to the Court creating federal rules as a matter of policy. Earlier in 2019 and prior to *Nieves*, Thomas expressed his objection to both the creation of the actual malice rule in *New York Times Co.* and its later extension to public-figure plaintiffs as "policy-driven decisions masquerading as constitutional law."[246] He bluntly wrote in *McKee v. Cosby* that "[w]e should not continue to reflexively apply this policy-driven approach to the Constitution."[247] Instead, when fashioning federal rules affecting free speech or press, the Court "should carefully

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unlawful activity Westboro conspired to accomplish—we must likewise hold that Snyder cannot recover for civil conspiracy based on those torts.").

[241] *See id.* at 473 (Alito, J., dissenting) ("I would therefore hold that, in this setting, the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern.").

[242] *See id.* at 462 (Breyer, J., concurring) ("As I understand the Court's opinion, it does not hold or imply that the State is always powerless to provide private individuals with necessary protection.").

[243] *See supra* notes 223–28 and accompanying text (addressing disagreement with the actual malice rule in *New York Times Co.*).

[244] Nieves v. Bartlett, 139 S. Ct. 1715, 1728 (2019) (Thomas, J., concurring in part, concurring in judgment).

[245] *Id.* at 1729.

[246] McKee v. Cosby, 139 S. Ct. 675, 676 (2019).

[247] *Id.*

examine the original meaning of the First and Fourteenth Amendments."[248] This neatly comports with the common perception of Thomas as "an avowed originalist."[249] In the absence of identifying a rationale in the original meaning of those amendments for creating a federal rule, Thomas believes it should be left to state legislative bodies to fashion those rules.[250]

In brief, Thomas's discontent, as evidenced in *Nieves*, centers on the proper foundation or grounding for creating federal rules affecting the First Amendment. Fashioning federal rules as a matter of policy in the absence of historical precedent is, for him, misguided.

Furthermore, and unlike the three Justices in *New York Times Co.* who objected to the actual malice rule,[251] Thomas's concern was not whether the *Nieves* rule went far enough in protecting First Amendment interests. In fact, it was quite the opposite. Thomas contended that "the majority's rule risks chilling law enforcement officers from making arrests for fear of liability, thus flouting the reasoning behind the emphasis on probable cause in arrest-based torts at common law."[252] He also worried that this exception, which helps plaintiffs who cannot prove the absence of probable cause, was "overbroad"[253] because it might apply to "*all* offenses, including serious felonies."[254] In other words, if there is going to be an exception to help plaintiffs prevail in First Amendment–based retaliatory arrest cases, then it should be cabined to only individuals arrested for less serious crimes.

Justice Gorsuch expressed multiple concerns with the *Nieves* rule. These included: (1) whether it was the proper role for the Court to fashion a definitive no-probable-cause federal rule in Section 1983 retaliatory arrest actions;[255] (2) whether melding a Fourth Amendment probable cause rule onto a First Amendment–based claim for retaliatory arrest even makes sense in the first place, given that the two amendments protect very different interests;[256] and (3) whether *Nieves*, as briefed

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[248] *Id.*

[249] Derigan Silver & Dan V. Kozlowski, *The First Amendment Originalism of Justices Brennan, Scalia and Thomas*, 17 COMM. L. & POL'Y 385, 408 (2012); *see also* Heidi Kitrosser, *Interpretive Modesty*, 104 GEO. L.J. 459, 471 (2016) (describing Justice Thomas, along with the late Justice Antonin Scalia, as "two of originalism's highest profile advocates").

[250] *McKee*, 139 S. Ct. at 682 ("We did not begin meddling in this area until 1964, nearly 175 years after the First Amendment was ratified. The States are perfectly capable of striking an acceptable balance between encouraging robust public discourse and providing a meaningful remedy for reputational harm.").

[251] *Supra* notes 223–28 and accompanying text.

[252] Nieves v. Bartlett, 139 S. Ct. 1715, 1729–30 (2019).

[253] *Id.* at 1729.

[254] *Id.*

[255] As Justice Gorsuch put it, "Maybe it would be good policy to graft a no-probable-cause requirement onto the statute, as the officers insist; or maybe not. Either way, that's an appeal better directed to Congress than to this Court. Our job isn't to write or revise legislative policy but to apply it faithfully." *Id.* at 1730 (Gorsuch, J., concurring in part, dissenting in part).

[256] Gorsuch pointed out that "the First Amendment operates independently of the Fourth

and argued, provided the proper vehicle for resolving the relationship between probable cause and First Amendment retaliatory arrest claims.[257] For Justice Gorsuch, it was simply enough in *Nieves* to more loosely conclude that a plaintiff does not always need to prove the absence of probable cause to arrest to win a First Amendment retaliatory claim and, concomitantly, a finding that there is probable cause will not always provide a defense to the arresting officer or officers.[258] It was sufficient for Gorsuch, as he put it in suggesting the Court engaged in judicial overreach by creating a federal rule when it was not asked to do so, "to resolve the question on which we *did* grant certiorari—whether 'probable cause defeats . . . a First Amendment retaliatory-arrest claim under §1983.'"[259] Answering it with the words "no, not always" seemingly would have done the trick for him.

For Justice Ginsburg, the problem was not merely that creating a new federal rule was unnecessary,[260] but also that the rule the *Nieves* majority invented was also harmful to First Amendment speech and press interests.[261] She also questioned whether *Nieves* even supplied the right vehicle for creating a federal standard, calling it a "thin case."[262]

Finally, Justice Sotomayor penned a dissent that—unlike the opinions of Thomas, Gorsuch, and Ginsburg—did not concur with any aspect of the majority's

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and provides different protections. It seeks not to ensure lawful authority to arrest but to protect the freedom of speech." *Id.* at 1731 (emphasis omitted). He elaborated:

> Like a Fourteenth Amendment selective arrest claim, a First Amendment retaliatory arrest claim serves a different purpose than a Fourth Amendment unreasonable arrest claim, and that purpose does not depend on the presence or absence of probable cause. We thus have no legitimate basis for engrafting a no-probable-cause requirement onto a First Amendment retaliatory arrest claim.

Id. at 1732.

[257] *See id.* at 1734 ("But rather than attempt to sort out precisely when and how probable cause plays a role in First Amendment claims, I would reserve decision on those questions until they are properly presented to this Court and we can address them with the benefit of full adversarial testing.").

[258] *See id.* ("I would hold, as the majority does, that the absence of probable cause is not an absolute requirement of such a claim and its presence is not an absolute defense.").

[259] *Id.*

[260] As noted earlier, Justice Ginsburg would have applied the traditional *Mt. Healthy* test without adding a threshold layer—what now is the *Nieves* rule—to it. *See supra* note 59 and accompanying text. As she explained the *Mt. Healthy* test, "The plaintiff bears the burden of demonstrating that unconstitutional animus was a motivating factor for an adverse action; the burden then shifts to the defendant to demonstrate that, even without any impetus to retaliate, the defendant would have taken the action complained of." *Nieves*, 139 S. Ct. at 1735 (Ginsburg, J., concurring in the judgment in part, dissenting in part).

[261] *See id.* (contending that the majority's rule "will leave press members and others exercising First Amendment rights with little protection against police suppression of their speech").

[262] *Id.*

decision.[263] Sotomayor ultimately agreed with Justice Ginsburg that *Mt. Healthy* already provides the correct approach to First Amendment retaliatory arrest claims, thereby negating the need for creating a new federal rule in *Nieves*.[264] In the process, she blasted the *Nieves* rule for: (1) being unclear;[265] (2) relying only on objective and comparative evidence and rejecting direct statements by officers that might be more relevant to illicit motives to arrest;[266] and (3) selling short the important First Amendment interests that must be balanced against those of law enforcement under the Fourth Amendment.[267]

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[263] Justices Thomas, Gorsuch and Ginsburg each concurred with some facet of the majority opinion. *See id.* at 1728 (Thomas, J., concurring in part, concurring in judgment); *id.* at 1730 (Gorsuch, J., concurring in part, dissenting in part); *id.* at 1734 (Ginsburg, J., concurring in the judgment in part, dissenting in part).

[264] *Id.* at 1742 (Sotomayor, J., dissenting).

[265] *See id.* at 1741 ("What exactly the Court means by 'objective evidence,' 'otherwise similarly situated,' and 'the same sort of protected speech' is far from clear.").

[266] *Id.* at 1738–40. She encapsulated the problem, writing, "[T]he majority suggests that comparison-based evidence is the sole gateway through the probable-cause barrier that it otherwise erects. Such evidence can be prohibitively difficult to come by in other selective-enforcement contexts, and it may be even harder for retaliatory arrest plaintiffs to muster." *Id.* at 1740.

In criticizing the majority's rejection of direct statements by police officers as evidence of the reasons for their actions, Justice Sotomayor managed to land a glancing verbal blow to the Court's ruling just one year earlier in *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), against a same-sex couple's right to have a baker make them a cake celebrating their wedding. Specifically, she cited *Masterpiece Cakeshop* immediately after the following statement: "The Court's decision to cast aside evidence of the arresting officer's own statements is puzzling. . . . In other contexts, when the ultimate question is why a decisionmaker took a particular action, the Court considers the decisionmaker's own statements (favorable or not) to be highly relevant evidence." *Id.* at 1739 (internal citation omitted). In *Masterpiece Cakeshop*, the majority focused on a statement made by a member of the Colorado Civil Rights Commission that helped the majority to conclude that the Commission was hostile to the cake baker's religion and that the baker thus did not receive a fair hearing regarding whether he unlawfully discriminated against the same-sex couple. *Id.* at 1729–30. Justice Sotomayor joined a dissenting opinion authored by Justice Ginsburg in *Masterpiece Cakeshop*. *Id.* at 1748 (Ginsburg, J., dissenting). That dissent questioned the authoritative relevance and persuasive power of statements made by Commission members. *See id.* at 1751 ("Whatever one may think of the statements in historical context, I see no reason why the comments of one or two Commissioners should be taken to overcome [the baker's] refusal to sell a wedding cake to [the couple].").

[267] Sotomayor explained her thinking on this last problem:

> The power to constrain a person's liberty is delegated to law enforcement officers by the public in a sacred trust. The First Amendment stands as a bulwark of that trust, erected by people who knew from personal experience the dangers of abuse that follow from investing anyone with such awesome power. . . . Because the majority shortchanges that hard-earned wisdom in the name of marginal convenience, I respectfully dissent.

Nieves, 139 S. Ct. at 1742 (Sotomayor, J., dissenting) (internal citation omitted).

On the latter two of these three points, Sotomayor intimated that adopting an objective rule of proof (rather than one examining direct statements of law enforcement officers and other subjective indicators of malicious intent to arrest),[268] simply because it might reduce frivolous lawsuits against officers or be more convenient to them, unnecessarily and incorrectly tilts the balance between the First Amendment rights of plaintiffs and the interests of officers.[269] Put more bluntly, sacrificing First Amendment rights at the altar of police convenience and expeditious litigation is imprudent. Justice Sotomayor's expressed fear was with the "ill-intentioned officer"[270]—she graciously dubbed those of this ilk "rare"[271]—who might "openly and unabashedly"[272] violate the First Amendment rights of citizens.

Her trepidation in *Nieves* comes as no surprise. Sotomayor's concern tracks her prior worries about law enforcement abuses of power in cases such as *Utah v. Strieff*.[273] The Court there held that evidence seized following an unlawful investigatory stop of a suspicionless individual was nonetheless admissible.[274] The evidence was not excludable, the majority reasoned, because the officer, after stopping the individual, learned of a valid arrest warrant on the individual and seized the evidence while searching him incident to arrest on that warrant.[275] Justice Sotomayor's unease with police using post hoc, pretextual justifications to validate unlawful stops of otherwise suspicionless individuals[276]—in particular, minorities—was palpable.[277]

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[268] *See id.* at 1738–39 ("But by rejecting direct evidence of unconstitutional motives in favor of more convoluted comparative proof, the majority's standard proposes to ration First Amendment protection in an illogical manner.").

[269] On this point, Justice Sotomayor elaborated:

> As for the risk of litigating dubious claims, the Court pays too high a price to avoid what may well be a marginal inconvenience. Prevailing First Amendment standards have long governed retaliatory arrest cases in the Ninth Circuit, and experience there suggests that trials in these cases are rare—the parties point to only a handful of cases that have reached trial in more than a decade. . . . Even accepting that, every so often, a police officer who made a legitimate arrest might have to explain that arrest to a jury, that is insufficient reason to curtail the First Amendment. No legal standard bats a thousand, and district courts already possess helpful tools to minimize the burdens of litigation in cases alleging constitutionally improper motives.

Id. at 1737–38 (internal citations omitted).

[270] *Id.* at 1739.

[271] *Id.*

[272] *Id.*

[273] 136 S. Ct. 2056, 2064 (2016) (Sotomayor, J., dissenting).

[274] *Id.* at 2059 (majority opinion).

[275] *Id.*

[276] *See id.* at 2070 (Sotomayor, J., dissenting) ("This case involves a *suspicionless* stop, one in which the officer initiated this chain of events without justification.").

[277] *See id.* at 2069 ("This Court has allowed an officer to stop you for whatever reason he wants—so long as he can point to a pretextual justification after the fact.").

She called it "no secret that people of color are disproportionate victims of this type of scrutiny."[278] Sotomayor wrote "that unlawful police stops corrode all our civil liberties and threaten all our lives."[279]

It is clear that, for Justice Sotomayor, the First Amendment's freedoms of speech and press are especially important because they can be utilized to expose police impermissibly exploiting their Fourth Amendment powers to arrest. Specifically, she stressed the importance of video captured by smartphones and news organizations in providing probative evidence of wrongful arrests.[280] She was concerned with the possibility that a "citizen journalist" who films police would lose his or her protection under the back-half of the *Nieves* rule because of its narrow focus on comparative evidence when such evidence might not exist.[281] As Sotomayor concluded in her dissent, the First Amendment provides a "bulwark" of defense against police officers who may abuse the "sacred trust" conferred to them by the public to make arrests fairly and honestly.[282] In brief, Sotomayor heartedly embraces the watchdog function of the press when it comes to protecting individuals against arrests that may violate their Fourth Amendment rights.[283]

To summarize, the fracturing in *Nieves* over adoption of a federal rule was much more complex than it was in *New York Times Co*. In *New York Times Co.*, it was simply a matter of three Justices contending that the Court should have gone much further than the actual malice rule in safeguarding First Amendment interests.[284] In other words, every Justice in *New York Times Co.* agreed with a pivotal, foundational premise: A First Amendment rule was needed to provide a fortress of protection from civil liability for defamation for individuals and journalists who dare to criticize the conduct of government officials.[285] The *New York Times Co.* Justices only differed as to whether the actual malice rule satisfactorily served this premise.

In stark contrast, the concerns in *Nieves* ranged from: (1) establishing the criteria necessary to create a federal rule protecting First Amendment interests;[286] (2) to

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[278] *Id.* at 2070.

[279] *Id.* at 2071.

[280] Nieves v. Bartlett, 139 S. Ct. 1715, 1739–40 (2019).

[281] *Id.* at 1740.

[282] *Id.* at 1742.

[283] *See supra* notes 192–94 and accompanying text (addressing the watchdog function).

[284] *See supra* notes 223–28 and accompanying text (addressing the views of the three Justices in *New York Times Co.* who thought actual malice was the incorrect rule to apply).

[285] As Justice William Brennan wrote for the Court in *New York Times Co.*, "[W]e consider this case against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

[286] *See supra* notes 244–54 and accompanying text (addressing Justice Thomas's qualms about creating federal rules in the name of policy concerns and in the absence of any historical precedent or original understanding of the First Amendment).

whether a new federal rule was even necessary;[287] (3) to whether the new rule went too far (instead of not going far enough, as in *New York Times Co.*) in protecting First Amendment values;[288] (4) to whether the issue of creating a definitive federal rule regarding the relationship between probable cause and First Amendment retaliatory arrest claims was adequately teed up and addressed by the parties in *Nieves*.[289] Such dissension is, to put it mildly, less than optimal for producing a hearty and enduring federal rule that affects not only speech rights, but also—as described above[290] and encapsulated immediately below—the rarely considered rights of the mainstream press and citizen journalists.

As noted earlier, both Justices Ginsburg and Sotomayor fretted over the deleterious effects of the *Nieves*[291] rule on the press. Ginsburg, in fact, opened her opinion by citing multiple lower court decisions acknowledging that the police power to arrest "can be abused to disrupt the exercise of First Amendment speech and press rights."[292] She wrapped up her opinion by asserting that the *Nieves* rule "will leave press members and others exercising First Amendment rights with little protection against police suppression of their speech."[293] In a nutshell, two Justices vigorously voiced complaints regarding the looming, journalism-menacing ramifications of *Nieves* on a free press—a press that, at least for Sotomayor, encompasses within its ambit, the average citizen journalist.[294] That is tremendous news for free-press advocates. It also provides a glimpse into how two of the current Justices feel about the significance of a free press in a democratic society.

The negative flipside, however, is that two out of nine Justices constitutes less than twenty-five percent of the Court's composition. Seven Justices did not directly mention the impact of the *Nieves* rule on either journalists or the press. To his credit, Justice Gorsuch noted the importance of the First Amendment (although not specifically the significance of journalists or the press) in a free society.[295]

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[287] *See supra* notes 59, 264 and accompanying text (addressing the conclusions of both Justices Ginsburg and Sotomayor that there was no need to create a new test in *Nieves* because *Mt. Healthy* already supplied the correct balancing and burden-shifting approach).

[288] *See supra* note 252 and accompanying text (addressing the concern of Justice Thomas that the qualification or exception to the general no-probable-cause requirement of the *Nieves* rules might harm law enforcement).

[289] *See supra* note 257 and accompanying text (addressing this concern expressed by Justice Gorsuch).

[290] *See supra* notes 57–58, 214–17 and accompanying text (addressing the concerns of Justices Ginsburg and Sotomayor about the roles of the press and the impact of the *Nieves* rule on journalists).

[291] *See supra* notes 57–58, 214–17 and accompanying text.

[292] Nieves v. Bartlett, 139 S. Ct. 1715, 1734 (2019) (Ginsburg, J., concurring in the judgment in part, dissenting in part).

[293] *Id.* at 1735.

[294] *Id.* at 1740 (Sotomayor, J., dissenting).

[295] Justice Gorsuch wrote:

The fact that the other Justices sidestepped directly addressing the Free Press Clause and the vital functions performed by journalists is sadly unsurprising. That is because *Nieves* fits within the current "trend toward less positive characterizations of the press by the Supreme Court."[296] *Nieves* certainly does not mark a return to what Professor RonNell Andersen Jones refers to as the glory-days era, from the 1960s through the early 1980s, when "the Court went out of its way to speak of the press and then offered effusively complimentary depictions of the media in its opinions."[297]

In short, *Nieves* offers a toe-dip-deep exploration into the current Court's beliefs about the roles the press plays in the United States as the tribunal enters the 2020s. In an arguably dire and perilous era for journalists,[298] champions of a free press—a Fourth Estate[299] unshackled from judicial concerns about shielding officers from time-consuming litigation[300]—surely would have been happier in *Nieves* with a fuller throated and a more unified articulation and defense of journalistic endeavors, particularly regarding how journalists play a vital role in checking abuse of police powers. *Nieves* thus likely leaves First Amendment advocates satisfied with neither the rule it creates nor the tepid defense of a free press that it uptakes. With this in mind, the Article now turns to the last of the trio of First Amendment–affecting cases it addresses, *Iancu v. Brunetti*.

> In our own time and place, criminal laws have grown so exuberantly and come to cover so much previously innocent conduct that almost anyone can be arrested for something. If the state could use these laws not for their intended purposes but to silence those who voice unpopular ideas, little would be left of our First Amendment liberties, and little would separate us from the tyrannies of the past or the malignant fiefdoms of our own age.

Id. at 1730 (Gorsuch, J., concurring in part, dissenting in part).

[296] RonNell Andersen Jones, *What the Supreme Court Thinks of the Press and Why It Matters*, 66 ALA. L. REV. 253, 268 (2014).

[297] *Id.* at 256.

[298] *Supra* note 189 and accompanying text (addressing attacks on the press and journalists).

[299] *See* Erin C. Carroll, *Protecting the Watchdog: Using the Freedom of Information Act to Preference the Press*, 2016 UTAH L. REV. 193, 200 (asserting that "since its inception, our democracy has relied on the press to act as a fourth estate—to be both a facilitator of the marketplace of ideas and a watchdog"); Patrick M. Garry, *Anonymous Sources, Libel Law, and the First Amendment*, 78 TEMP. L. REV. 579, 588 (2005) (observing that "the fourth estate model focused on the freedoms and activities of journalists, rather than on those of the public as a whole," and adding that under this model, "[j]ournalists would serve as agents of the public in checking an inherently abusive government" and "the press had to possess special rights to gather news").

[300] *See Nieves*, 139 S. Ct. at 1725 (worrying that a subjective approach to determining if an arrest was made in retaliation for exercising a First Amendment right "could land an officer in years of litigation" and "pose overwhelming litigation risks").

III. TO SAVE OR NOT TO SAVE? THAT IS A QUESTION THE COURT FACES AFTER *IANCU V. BRUNETTI*

As addressed earlier, the Court in *Brunetti* struck down part of a federal statute that allowed the U.S. Patent and Trademark Office to deny federal registration to immoral or scandalous marks.[301] The Justices, however, were anything but united in all parts of the decision. In fact, *Brunetti* spawned five opinions, including three that offered saving constructions to spare the bar on "scandalous" marks from unconstitutionality and one that suggested how Congress could better define that term should it go back to the legislative drafting board.[302]

This Part concentrates solely on the discord over statutory construction in *Brunetti* and, in particular, on the Justices' different conceptions about when and how it is appropriate to save from demise a statute that negatively affects free expression. This issue is of particular importance because the Court recently has been called upon to interpret the meaning of particular words or phrases in statutes affecting free-speech interests.[303]

Brunetti involved a facial challenge[304] to a federal statute that permitted the PTO to deny registration for marks consisting of "immoral . . . or scandalous matter."[305] All nine Justices agreed that the "immoral" facet of this statute was unconstitutional because it allowed the PTO to discriminate against viewpoints.[306] Six Justices also found that the term "scandalous" was unconstitutional due to its viewpoint-based nature.[307] However, three members of the Court—Roberts, Breyer, and Sotomayor—dissented

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[301] *Supra* notes 70–74 and accompanying text.

[302] *Supra* notes 73–74 and accompanying text.

[303] *See, e.g.*, Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1880–81 (2018) (pivoting on the meaning of the word "political" used in a state statute affecting apparel that could be worn inside polling places on election day); Expressions Hair Design v. Schneiderman, 137 S. Ct. 1144, 1149–50 (2017) (hinging partly on the meaning of the word "surcharge" used in a state statute, and deferring to the U.S. Court of Appeals for the Second Circuit's interpretation of that term).

[304] *See* Iancu v. Brunetti, 139 S. Ct. 2294, 2298 (2019) ("Brunetti then brought a facial challenge to the 'immoral or scandalous' bar in the Court of Appeals for the Federal Circuit."); *see id.* at 2308 (Sotomayor, J., concurring in part, dissenting in part) (remarking on "Erik Brunetti's facial challenge").

[305] 15 U.S.C. § 1052(a) (2012).

[306] *See Brunetti*, 139 S. Ct. at 2299 (concluding, that "the 'immoral or scandalous' criterion" of the federal statute "is viewpoint-based"); *id.* at 2303 (Roberts, C.J., concurring in part, dissenting in part) ("I agree with the majority that the 'immoral' portion of the provision is not susceptible of a narrowing construction that would eliminate its viewpoint bias."); *id.* at 2308 (Breyer, J., concurring in part, dissenting in part) ("I agree with the Court . . . that the bar on registering 'immoral' marks violates the First Amendment."); *id.* at 2309 (Sotomayor, J., concurring in part, dissenting in part) (opining, with regard to "the word 'immoral,' I agree with the majority that there is no tenable way to read it that would ameliorate the problem" of viewpoint discrimination, and adding that immoral "clearly connotes a preference for 'rectitude and morality' over its opposite").

[307] *Id.* at 2299–300 (majority opinion).

from that latter conclusion.[308] What justified their saving "scandalous" from an unconstitutional fate while the majority did not? To address that question, some historical context about statutory interpretation is helpful.

More than eighty-five years ago in *Crowell v. Benson*,[309] the Court expressed a fundamental tenet of statutory construction regarding federal laws. It wrote:

> When the validity of an act of the Congress is drawn into question, and even if a serious doubt of constitutionality is raised, it is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.[310]

Four years after *Crowell*, Justice Louis Brandeis famously identified this as one among "a series of rules under which [the Court] has avoided passing upon a large part of all the constitutional questions pressed upon it for decision."[311] The principle from *Crowell*, as reiterated by Brandeis, "is commonly referred to as the constitutional avoidance canon."[312] That is because it stands for the principle that "statutes should be construed in such a way as to avoid constitutional difficulties."[313] This is distinct from another facet of the avoidance canon, known as the last resort rule, under which courts should avoid constitutional issues if there is another way to resolve case.[314]

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[308] *See id.* at 2303 (Roberts, C.J., concurring in part, dissenting in part) (finding that "a narrowing construction is appropriate" for the term scandalous); *id.* at 2304 (Breyer, J., concurring in part, dissenting in part) (agreeing "with Justice Sotomayor that, for the reasons she gives, we should interpret the word 'scandalous' in the present statute to refer only to certain highly 'vulgar' or 'obscene' modes of expression"); *id.* at 2308 (Sotomayor, J., concurring in part, dissenting in part) (concluding that when it comes to the term "scandalous" in the statute, "a narrowing construction would save that duly enacted legislative text by rendering it a reasonable, viewpoint-neutral restriction on speech that is permissible in the context of a beneficial governmental initiative like the trademark-registration system").

[309] 285 U.S. 22 (1932).

[310] *Id.* at 62 (citation omitted).

[311] Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring); *see id.* at 348 (setting forth the principle from *Crowell*). The term "famously" is used in this textual sentence because Brandeis's concurrence in *Ashwander* "is among the great jurist's finest legal arguments—a 'crowning statement' of Brandeis's dedication to judicial restraint and dispassionate decisionmaking." Erik Grant Luna, *Of Gypsies, Juries and Judges: Constitutional Adjudication in Trial Courts*, 26 SW. U. L. REV. 303, 311 (1997).

[312] Gunnar P. Seaquist, *The Constitutional Avoidance Canon of Statutory Construction*, 71 ADVOC. 25, 26 (2015).

[313] Ernest A. Young, *Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review*, 78 TEX. L. REV. 1549, 1575 (2000).

[314] *See* Lisa A. Kloppenberg, *Avoiding Constitutional Questions*, 35 B.C. L. REV. 1003, 1004 (1994) ("The 'last resort rule' dictates that a federal court should refuse to rule on a constitutional issue if the case can be resolved on a nonconstitutional basis."); Michael L. Wells, *The*

Crowell's notion of whether an interpretation is "fairly possible"[315] amounts to a plausible-interpretation standard, allowing the Court to adopt a saving construction that avoids a constitutional problem when "choosing between competing plausible interpretations of a statutory text."[316] In brief, "courts should never invalidate a statute if a plausible alternative interpretation would sustain the law."[317] Plausibility, in turn, implies reasonableness.[318] And in facial challenges such as *Brunetti*, a limiting construction may be imposed "on a statute only if it is 'readily susceptible' to such a construction."[319] Additionally, the Court will not adopt a saving construction if that construction "is plainly contrary to the intent of Congress."[320]

Professor Anita Krishnakumar wrote in 2019 that the Court, early on under Chief Justice Roberts's leadership, developed a "reputation for aggressively using the avoidance canon to rewrite statutes in several controversial, high-profile cases."[321] She explained that the Roberts Court would do this by addressing "the constitutional infirmity at length and then would pivot and invoke the canon of constitutional avoidance to justify limiting the statute's reach or otherwise construing the relevant provision so as to avoid the constitutional difficulty—even if doing so required straining the statute's text."[322] Indeed, Neal Kumar Katyal and Thomas Schmidt

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"Order-of-Battle" in Constitutional Litigation, 60 SMU L. REV. 1539, 1547–52 (2007) (providing an overview of the last resort rule as one component of the constitutional avoidance canon).

A recent example of the Supreme Court using the last resort rule in a First Amendment case is *Elonis v. United States*, 135 S. Ct. 2001 (2015). The Court there resolved a case involving threats of violence on federal statutory grounds, thus allowing it to avoid the First Amendment issue. *See id.* at 2012 ("Given our disposition, it is not necessary to consider any First Amendment issues."). This comports with Justice Brandeis's articulation of last resort rule, as part of the avoidance canon, in *Ashwander*:

> The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . . Thus, if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.

Ashwander, 297 U.S. at 347.

[315] *Crowell*, 285 U.S. at 62.

[316] Clark v. Martinez, 543 U.S. 371, 381 (2005).

[317] John F. Manning, *The Nondelegation Doctrine as a Canon of Avoidance*, 2000 SUP. CT. REV. 223, 253.

[318] Hooper v. California, 155 U.S. 648, 657 (1895) ("The elementary rule is that every *reasonable* construction must be resorted to, in order to save a statute from unconstitutionality." (emphasis added)).

[319] Reno v. ACLU, 521 U.S. 844, 884 (1997).

[320] Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council, 485 U.S. 568, 575 (1988).

[321] Anita S. Krishnakumar, *Passive Avoidance*, 71 STAN. L. REV. 513, 517 (2019) (citations omitted).

[322] *Id.* at 516–17 (citations omitted).

wrote in 2015 that "[i]n the last few years, the Supreme Court has resolved some of the most divisive and consequential cases before it with the same maneuver: construing statutes to avoid constitutional difficulty."[323]

In *Brunetti*, however, the Court abandoned that tack. The government had argued that the ban on registering immoral or scandalous marks was subject to a limiting construction that would eliminate the problem of viewpoint discrimination.[324] Specifically, it asserted that the ban only targeted vulgar, lewd, sexually explicit, or profane modes of expressing ideas, regardless of the underlying viewpoints.[325] In other words, the ban could be construed narrowly to restrict only the manner in which a viewpoint is expressed—how it is expressed—not the substance of the viewpoint.[326]

In delivering the opinion of the Court, Justice Elena Kagan refused to adopt such a construction because, as she bluntly put it, "the statute says something markedly different."[327] More specifically, she rebuffed saving the statute because it was not ambiguous.[328] It thus did not afford the Court interpretative room to locate the government's construction lurking "in the statutory language."[329] In other words, the lack of ambiguity prohibited the majority from engaging in constitutional avoidance and finding within the statute the limited, saving meaning the government

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[323] Neal Kumar Katyal & Thomas P. Schmidt, *Active Avoidance: The Modern Supreme Court and Legal Change*, 128 HARV. L. REV. 2109, 2110 (2015).

[324] Iancu v. Brunetti, 139 S. Ct. 2294, 2301 (2019).

[325] *Id.*

[326] Perhaps one way to understand this potential mode-of-expression limiting construction is to consider *Cohen v. California*, 403 U.S. 15 (1971). The Court there protected a person's right to wear a jacket bearing the words "Fuck the Draft" in a Los Angeles courthouse as a means of expressing his disdain for the war in Vietnam and conscription. *See id.* at 16 ("The defendant testified that he wore the jacket knowing that the words were on the jacket as a means of informing the public of the depth of his feelings against the Vietnam War and the draft."). Viewpoint discrimination would have existed in *Cohen* if California had punished Paul Robert Cohen for expressing an anti-draft or anti-war viewpoint, such as "I object to the Draft." A vulgar mode-of-expression bar, on the other hand, would target only the way in which Cohen expressed his anti-draft viewpoint by using the word "fuck." As the author of this Article explained elsewhere before the Court ruled in *Brunetti*:

> "[F]uck" is what offended in *Cohen*, not Cohen's viewpoint about conscription. "Fuck" is not a viewpoint. It is not even a viewpoint about sex. It is, instead, a word that violates certain norms of civil discourse in polite society and thus gives offense to some people by its very utterance.

Clay Calvert, *Merging Offensive-Speech Cases with Viewpoint-Discrimination Principles: The Immediate Impact of* Matal v. Tam *on Two Strands of First Amendment Jurisprudence*, 27 WM. & MARY BILL RTS. J. 829, 836 (2019).

[327] *Brunetti*, 139 S. Ct. at 2301.

[328] *See id.* (noting that a saving construction is possible "only when ambiguity exists"); *see also* FCC v. Fox Television Stations, Inc., 556 U.S. 502, 516 (2009) ("The so-called canon of constitutional avoidance is an interpretive tool, counseling that *ambiguous statutory language* be construed to avoid serious constitutional doubts." (emphasis added) (citations omitted)).

[329] *Brunetti*, 139 S. Ct. at 2301.

sought.[330] Instead, the Court would need to rewrite the statute in order to adopt the government's limiting construction, and this was something the majority, citing precedent, was unwilling to do.[331] As Justice Kagan wrote, "To cut the statute off where the Government urges is not to interpret the statute Congress enacted, but to fashion a new one."[332] This implies a crucial dichotomy between interpreting and rewriting, with the former permitted when ambiguity exists and the latter barred when it does not.

Moreover, the majority was unwilling to perform what Kagan called "statutory surgery"[333] to save the term "scandalous" by carving it out and moving it away to safety while letting "immoral" suffer an unconstitutional fate. The reason for such disinclination, as Kagan explained, was that the term scandalous was "not 'ambiguous,'"[334] but, instead, was "just broad."[335] It was so broad, in fact, as to sweep up "both marks that offend by the ideas they convey and marks that offend by their mode of expression. And its coverage of the former means that it discriminates based on viewpoint."[336]

For the majority, then, there was a critical difference between statutory ambiguity, on the one hand, and statutory breadth, on the other. Ambiguity of meaning might have allowed the majority to save both the immoral and scandalous facets of the federal statute at issue in *Brunetti*.[337] The problem, at least for the majority, was that the meaning was unambiguous and, in turn, that it stretched far beyond the narrow interpretation the government sought, while not offering, by its terms, a mode-of-expression endpoint where the majority could constitutionally confine it.[338]

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[330] Indeed, the statutory language covered so much territory and was far too expansive for the Court to limit its reach. As Justice Kagan wrote:

> The "immoral or scandalous" bar stretches far beyond the Government's proposed construction. The statute as written does not draw the line at lewd, sexually explicit, or profane marks. Nor does it refer only to marks whose "mode of expression," independent of viewpoint, is particularly offensive. . . . It covers the universe of immoral or scandalous—or (to use some PTO synonyms) offensive or disreputable—material. Whether or not lewd or profane. Whether the scandal and immorality comes from mode or instead from viewpoint.

Id. at 2301–02 (internal citation omitted).

[331] *See id.* (quoting United States v. Stevens, 559 U.S. 460, 481 (2010) for the proposition that "[w]e will not rewrite a law to conform it to constitutional requirements").

[332] *Id.* at 2302.

[333] *Id.* at 2302 n.* (unnumbered footnote designated by an asterisk).

[334] *Id.*

[335] *Id.*

[336] *Id.* (emphasis omitted).

[337] *Cf.* Brian G. Slocum, *The Importance of Being Ambiguous: Substantive Canons, Stare Decisis, and the Central Role of Ambiguity Determinations in the Administrative State*, 69 MD. L. REV. 791, 799–803 (2010) (providing a discussion of the problems in defining the concept of "ambiguity" in the context of statutory interpretation).

[338] *Brunetti*, 139 S. Ct. at 2301 ("The statute as written does not draw the line at lewd,

In a nutshell, the *Brunetti* majority refused to proffer a saving construction for the bar on registering immoral or scandalous marks. In doing so, it delivered a clear victory for free speech, wiping away a statutory impediment for registration based upon a mark's content and, more specifically, an impediment that tolerated viewpoint discrimination.[339] Along with the Court's 2017 decision in *Matal v. Tam*[340] declaring unconstitutional a federal ban on registering disparaging marks,[341] the Court now has cleared a wide path toward registering seemingly all manners of marks that may cause offense.[342]

As noted earlier, however, three Justices—Roberts, Breyer, and Sotomayor—saw it quite differently. Driven by worries about a cultural and commercial landscape in which offensive marks (including racist ones) would run roughshod and amok,[343] the

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sexually explicit, or profane marks. Nor does it refer only to marks whose 'mode of expression,' independent of viewpoint, is particularly offensive.").

[339] As Justice Kagan encapsulated it, the immoral or scandalous provision "disfavors certain ideas." *Id.* at 2297. The provision, in turn, "is viewpoint-based." *Id.* at 2299.

[340] 137 S. Ct. 1744 (2017).

[341] *See* 15 U.S.C. § 1052(a) (2019) (allowing the PTO to deny registration to marks "which may disparage . . . persons, living or dead, institutions, beliefs, or national symbols").

[342] *Tam* centered on an Asian American band's efforts to register its name, The Slants, as a mark with the PTO. *Tam*, 137 S. Ct. at 1751. The PTO rebuffed that attempt, deeming the name disparaging to Asian Americans. *Id.* The band's leader, Simon Tam, readily acknowledged the negative connotations of the term, but stated that his band adopted the "moniker in order to 'reclaim' and 'take ownership' of stereotypes about people of Asian ethnicity." *Id.* at 1754. The Supreme Court, without dissent, struck down the disparagement clause, handing a victory to the band and Simon Tam. *Id.* at 1751. In delivering the Court's judgment, Justice Samuel Alito wrote that the disparagement clause "offends a bedrock First Amendment principle: Speech may not be banned on the ground that it expresses ideas that offend." *Id.* In a concurring opinion joined by Justices Ruth Bader Ginsburg, Sonia Sotomayor, and Elena Kagan, Justice Anthony Kennedy emphasized that the disparagement clause impermissibly allowed the government to engage in "viewpoint discrimination—a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny." *Id.* at 1765 (Kennedy, J., concurring in part, concurring in judgment). Ultimately, as Justice Kagan explained in *Brunetti*, "all Members of the Court [in *Tam*] agreed that the [disparagement] provision violated the First Amendment because it discriminated on the basis of viewpoint." *Brunetti*, 139 S. Ct. at 2297.

[343] Justice Sotomayor, for example, feared a "coming rush to register" what she predicted would be "marks containing the most vulgar, profane, or obscene words and images imaginable." *Brunetti*, 139 S. Ct. at 2308 (Sotomayor, J., concurring in part, dissenting in part). Additionally, she worried that "at least one particularly egregious racial epithet" would be registerable after *Brunetti*. *Id.* at 2311 n.5. Chief Justice Roberts was concerned about the government being associated with and giving "aid and comfort to those using obscene, vulgar, and profane modes of expression" via the benefits that come from federal trademark registration. *Id.* at 2303–04 (Roberts, C.J., concurring in part, dissenting in part). Justice Breyer fretted about the psychological and emotional impact of vulgar marks on consumers and children. *Id.* at 2307 (Breyer, J., concurring in part, dissenting in part). As he bluntly put it, "Just think about how you might react if you saw someone wearing a t-shirt or using a product emblazoned with an odious racial epithet." *Id.*

trio would have saved the scandalous provision, thus pushing back against the First Amendment's guarantee of free speech.[344] Justice Sotomayor voiced the most thorough discussion of why and how the bar on registering scandalous marks could be resuscitated. Her opinion thus is the focus here.

Justice Sotomayor's decision that the scandalous facet of the law could be saved hinged largely on three related and sequential meaning-based determinations. Specifically, Sotomayor reasoned:

(1) the meaning of "scandalous" was—in contrast to the majority's conclusion[345]—ambiguous, particularly regarding the type of offensiveness it targeted, thus opening the door for a possible saving construction;[346]
(2) Congress must have intended "scandalous" to mean something different from both "immoral" and "disparage" found nearby in the same statute,[347] rather than it being redundant or duplicative of those terms;[348] and
(3) the different meaning of offensiveness that Congress must have intended for "scandalous"—"marks that employ an offensive mode of expression"[349]—renders this part of the statute viewpoint neutral, unlike the constitutionally problematic viewpoint-based nature of "immoral" and "disparage," and thereby permissible in the regulatory context of trademark law.[350]

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[344] *See supra* note 308 and accompanying text (noting how these three Justices would have saved the "scandalous" provision).

[345] *See supra* notes 334–35 and accompanying text (noting the majority's determination that the meaning of scandalous was not ambiguous, just broad).

[346] Justice Sotomayor explained that "[t]he word "scandalous" on its own . . . is ambiguous: It can be read broadly (to cover both offensive ideas and offensive manners of expressing ideas), or it can be read narrowly (to cover only offensive modes of expression). That alone raises the possibility that a limiting construction might be appropriate." *Brunetti*, 139 S. Ct. at 2309 (Sotomayor, J., concurring in part, dissenting in part).

[347] 15 U.S.C. § 1052(a) (2019).

[348] In terms of the different meanings for these three terms, Justice Sotomayor wrote:

> With marks that are offensive because they are disparaging and marks that are offensive because they are immoral already covered, what work did Congress intend for "scandalous" to do? A logical answer is that Congress meant for "scandalous" to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea. The other two words cover marks that are offensive because of the ideas they express; the "scandalous" clause covers marks that are offensive because of the mode of expression, apart from any particular message or idea.

Brunetti, 139 S. Ct. at 2310.

[349] *Id.* at 2313.

[350] *See id.* ("Properly narrowed, 'scandalous' is a viewpoint-neutral form of content discrimination that is permissible in the kind of discretionary governmental program or limited forum typified by the trademark-registration system.").

Regarding the threshold ambiguity determination, Sotomayor invoked several dictionary definitions of scandalous to conclude that it could mean not only substantive ideas that cause offense, but also offensive modes of conveying ideas.[351] Those options, in turn, created definitional ambiguity: Should scandalous, as used by Congress, mean or encompass both of those possibilities or only one and, if only one, which one? For Justice Sotomayor, the statutory meaning was limited to only one possibility—scandalous meant offensive modes of expression, regardless of the ideas and views conveyed.[352] That had to be the meaning Congress intended because the terms "immoral" and "disparage," which appear in extremely close proximity to "scandalous" within the same statute,[353] address very different notions of offensiveness, and definitional duplicativeness (i.e., scandalous meaning the same thing as either immoral or disparage) would amount to Congress wasting words.[354]

Put differently, examination of the meaning of "immoral" and "disparage" led Justice Sotomayor to the limited, saving meaning of "scandalous."[355] Surely "scandalous" tapped into a different facet of the broader concept of offensiveness than the other two terms did because Congress must have intended it to mean something different.[356] She emphasized that the meaning of any one word generally cannot be determined by isolating it from others proximate to it—context, instead, is key[357]—and that, to the extent possible, statutory words should not be construed by courts as meaningless or duplicative of others.[358] She pointed out here that the statute in question actually interjected an unrelated word—"deceptive"—directly in between the words "immoral" and "scandalous,"[359] while also later mixing in "a lengthy series of other, unrelated concepts."[360] For Justice Sotomayor, this all suggested that "immoral" and "scandalous" "need not be interpreted as mutually reinforcing."[361] She went on to

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[351] *Id.* at 2309.

[352] *See id.* at 2310 (concluding that "the 'scandalous' clause covers marks that are offensive because of the mode of expression, apart from any particular message or idea").

[353] The three terms appearing within a span of a mere ten words. *See* 15 U.S.C. § 1052(a) (2019) (regulating "immoral, deceptive, or scandalous matter; or matter which may disparage").

[354] Specifically, "disparage" targets marks that cause offense by deriding "a particular person or group," while "immoral" marks are those that cause offense by "transgress[ing] widely held moral beliefs." *Brunetti*, 139 S. Ct. at 2310.

[355] *Supra* note 348 and accompanying text.

[356] *Brunetti*, 139 S. Ct. at 2310.

[357] *See id.* at 2309 ("It is foundational 'that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context.'" (quoting King v. St. Vincent's Hospital, 502 U.S. 215, 221 (1991))).

[358] *See id.* (asserting that "courts should, to the extent possible, read statutes so that 'no clause, sentence, or word shall be superfluous, void, or insignificant.'" (quoting TRW Inc. v. Andrews, 534 U.S. 19, 31 (2001))).

[359] *See* 15 U.S.C. § 1502(a) (2019) (allowing the PTO to deny registration for a mark that "consists of or comprises immoral, deceptive, or scandalous matter").

[360] *Brunetti*, 139 S. Ct. at 2310.

[361] *Id.* at 2311.

flesh out her offensive-mode-of-expression interpretation of scandalous by contending that it would cover "only those marks that are obscene, vulgar, or profane."[362]

What lessons are to be gleaned from the split in *Brunetti* regarding statutory construction and whether to save a statute affecting free speech? First, it appears that principles of statutory construction are so malleable that they can readily be manipulated to reach desired outcomes, almost as easily as the state action doctrine was manipulated by the opposing conservative and liberal blocs in *Halleck* to reach radically different ends affecting First Amendment interests.[363]

Consider the divide in *Brunetti* over the application of the crucial concept of ambiguity.[364] The majority concluded the statutory bar on scandalous marks was not ambiguous; it was, instead, simply broad.[365] Statutory ambiguity and breadth thus are distinct concepts for the majority, with the former being a necessary condition for interpreting a statute in a manner that avoids constitutional doubts.[366] In brief, because the term scandalous was unambiguous (albeit also broad), that facet of the statute could not be saved by the Court. The solution, as Justice Alito put in his concurrence, was for Congress—not the judiciary[367]—to pen "a more carefully focused statute that precludes the registration of marks containing vulgar terms that play no real part in the expression of ideas."[368]

In direct contrast, Justice Sotomayor concluded that the same provision was, in fact, ambiguous.[369] How so? Because, as Sotomayor wrote, it could "be read broadly (to cover both offensive ideas and offensive manners of expressing ideas), or it [could] be read narrowly (to cover only offensive modes of expression)."[370] That explanation, with its use of the term "read broadly," seemingly blurs the key dichotomy the majority drew between ambiguity and breadth. The majority, in fact, readily agreed that the scandalous provision "includes both marks that offend by the ideas they convey and marks that offend by their mode of expression,"[371] but for it, this simply made the statute broad, not ambiguous.[372]

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[362] *Id.* at 2318.

[363] *See supra* Part I (analyzing *Halleck*).

[364] Ambiguity is crucial because its existence is a necessary condition—a condition precedent—for the Court to exercise its power to construe a statute in a manner that avoids constitutional doubts. *See Brunetti*, 139 S. Ct. at 2301 (noting that the ability to interpret a statute in a way that avoids serious constitutional doubts occurs "only when ambiguity exists").

[365] *Id.* at 2302 n.* (unnumbered footnote designated by an asterisk). Justice Kagan added that "the 'immoral or scandalous' bar is substantially overbroad." *Id.* at 2302.

[366] *Supra* notes 334–35 and accompanying text.

[367] *See Brunetti*, 139 S. Ct. at 2303 (Alito, J., concurring) (reasoning that "we are not legislators and cannot substitute a new statute for the one now in force").

[368] *Id.*

[369] *Id.* at 2309 (Sotomayor, J. concurring in part, dissenting in part).

[370] *Id.*

[371] *Id.* at 2302, n.* (majority opinion) (emphasis omitted) (unnumbered footnote designated by an asterisk).

[372] *See id.* (concluding the scandalous bar "is just broad").

So, just as one bloc of Justices in *Halleck* found the existence of state action while another bloc did not, one group of Justices in *Brunetti* (led by Justice Sotomayor, with whom both Chief Justice Roberts[373] and Justice Breyer[374] agreed) found the presence of statutory ambiguity while another bloc (the six-Justice majority) did not. The fact that two groups of Justices can interpret the exact same word in counterposed ways that, in turn, lead to dramatically different First Amendment implications recalls an aphorism from the nation's high court nearly fifty years ago. In considering how people might view the phrase "fuck the draft," the Court in *Cohen v. California* wittily wrote that it is "often true that one man's vulgarity is another's lyric."[375] Perhaps it should now be said, after *Brunetti*, that one Justice's (Sotomayor's) conclusion of statutory ambiguity is another Justice's (Kagan's) conclusion of statutory breadth. More importantly, it is apparent that the Justices must now delineate a clear, agreed-upon test for ambiguity. Furthermore, they must carefully explain the critical (at least, for the majority) distinction between a statute being ambiguous and a statute being broad. In cases such as *Brunetti*, First Amendment rights lie in the balance.

A second aspect of statutory interpretation in First Amendment cases also must be clarified in light of *Brunetti*. If one assumes, arguendo, that the meaning of "scandalous" is ambiguous (as Justice Sotomayor found it was), then to what extent should the Justices be allowed to fathom the intent of legislators about that word's (in *Brunetti*, "scandalous") meaning from the fact that it is positioned statutorily adjacent to or nearby other words that also seemingly tap into a much larger concept (in *Brunetti*, the much larger concept being offensiveness, and the other key words being "immoral" and "disparage")? Justice Sotomayor's saving interpretation of the scandalous provision, after she initially found it ambiguous, largely pivoted on the following chain of logic:

(1) All three words—scandalous, immoral, and disparage—relate to (or are subsumed under) the macro concept of offensive speech;
(2) the macro concept of offensive speech has many different facets that might be regulated;
(3) the Court should give the benefit of the doubt to lawmakers that they intended each of the three words to tap into or sync up with a different facet of the macro concept of offensive speech rather than being redundant or duplicative in their regulatory effects;[376] and

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[373] *Id.* at 2303 (Roberts, C.J., concurring in part, dissenting in part) ("I agree with Justice Sotomayor that such a narrowing construction is appropriate in this context.").

[374] *Id.* at 2308 (Breyer, J., concurring in part, dissenting in part) ("Because Justice Sotomayor reaches the same conclusions, using roughly similar reasoning, I join her opinion insofar as it is consistent with the views set forth here.").

[375] 403 U.S. 15, 25 (1973).

[376] The first three steps are rooted in the following statement by Justice Sotomayor:

(4) the different facet of the macro concept of offensive speech into which the word in question (here, scandalous) taps allows that word to possess a definition that avoids the constitutional pitfalls of the other two words (in *Brunetti* and *Tam*, respectively, the words "immoral" and "disparage" were plagued by their viewpoint-discriminatory nature).[377]

Justice Sotomayor, in justifying her conclusion, cited the Court's decades-old precedential statement that a "cardinal principle of statutory construction is to save and not to destroy."[378] Her logic, however, has multiple steps that arguably stretch this principle, based upon assumptions about both legislative intent and words carrying precise, discrete meanings, to a breaking point. Furthermore, the potential implications for such logic on First Amendment jurisprudence are vast.

For example, imagine a statute that uses multiple words to regulate another macro-level form of speech that, like offensiveness,[379] generally is protected by the First Amendment: hate speech.[380] If a legislative body strategically added multiple words into a statute regulating hate speech, and if those words supposedly tapped into different facets of the macro-level concept of hate speech, then it might just be that the Court could determine that one of those many words permissibly regulated a niche aspect of hate speech not previously regulatable under the First Amendment.

> With marks that are offensive because they are disparaging and marks that are offensive because they are immoral already covered, what work did Congress intend for "scandalous" to do? A logical answer is that Congress meant for "scandalous" to target a third and distinct type of offensiveness: offensiveness in the mode of communication rather than the idea. The other two words cover marks that are offensive because of the ideas they express; the "scandalous" clause covers marks that are offensive because of the mode of expression, apart from any particular message or idea.

Brunetti, 139 S. Ct. at 2310 (Sotomayor, J., concurring in part, dissenting in part).

[377] *See supra* notes 306, 342 and accompanying text (addressing the respective conclusions in *Brunetti* and *Tam* that these two words permitted the PTO to engage in viewpoint discrimination).

[378] Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1, 30 (1937).

[379] *See* Matal v. Tam, 137 S. Ct. 1744, 1751 (2017) (calling it "a bedrock First Amendment principle" that "[s]peech may not be banned on the ground that it expresses ideas that offend"); *see also* Leslie Kendrick, *The Answers and the Questions in First Amendment Law*, *in* CHARLOTTESVILLE 2017: THE LEGACY OF RACE AND INEQUITY 70, 70–71 (Louis P. Nelson & Claudrena N. Harold eds., 2018) ("In America, hate speech is not a legal category. The First Amendment protects most speech on matters of public concern, even if that speech is racist, anti-Semitic, or otherwise counter to our nation's commitment to the fundamental equality of all people.").

[380] *See Tam*, 137 S. Ct. at 1764 ("Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express 'the thought that we hate.'" (quoting United States v. Schwimmer, 279 U.S. 644, 655 (1929))).

Put more colloquially, if one slices and dices a macro-level concept into small enough slivers of meaning by using a bevy of different words to describe it, then one of those slivers might just slide under the metaphorical radar of the First Amendment's protection of free expression. Such statutory construction, in other words, has the potential to spade new First Amendment ground.

In summary, the split over statutory construction in *Brunetti* carries troubling implications for First Amendment rights. Although the majority struck down both the immoral and scandalous aspects of the federal law at issue in the case, three Justices found sufficient ambiguity with the scandalous facet to save it. The question of when a statute is, indeed, ambiguous and when, instead, it is merely broad, is called into high relief by *Brunetti* and demands clarification.

CONCLUSION

This Article rendered vivid multiple disagreements among the Justices in a trio of First Amendment decisions delivered by the Supreme Court in 2019. As the Court enters the 2020s, First Amendment jurisprudence is profoundly plagued by, among other problems, ideological partisanship in cases such as *Halleck*.[381] The Justices now must rise above their apparent political leanings both to restore public confidence in the Court[382] and establish some semblance of doctrinal order in First Amendment law. In just two years, three five-to-four rulings affecting free speech—*Becerra*,[383] *Janus,*[384] and *Halleck*[385]—were divided consistently along perceived conservative and liberal lines. In the process, this shredded whatever illusion of judicial impartiality remains when free speech affects abortion,[386] unions,[387] and

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[381] *See supra* Part I (analyzing *Halleck*).

[382] *See supra* notes 33–38 and accompanying text (providing recent data regarding public perceptions of the Court).

[383] *Supra* note 30 and accompanying text.

[384] *Supra* note 31 and accompanying text.

[385] *See supra* Part I (analyzing *Halleck*).

[386] The outcome in *Becerra*, described earlier in footnote 30, was "consistent with [the] anti-abortion ideological leanings of the majority." Erwin Chemerinsky & Michele Goodwin, *Constitutional Gerrymandering Against Abortion Rights:* NIFLA v. Becerra, 94 N.Y.U. L. REV. 61, 66 (2019). The outcome has been described as being "primarily about five conservative Justices' hostility to abortion rights. The Court ignored legal precedent, failed to weigh the interests at stake in its decision, and applied a more demanding standard based on content of speech." *Id.*

[387] *See* Erwin Chemerinsky & Catherine L. Fisk, *Exaggerating the Effects of* Janus*: A Reply to Professors Baude and Volokh*, 132 HARV. L. REV. F. 42, 57 (2018) (remarking on the Court's "obvious hostility to public employee unions in *Janus*"); J. Maria Glover, *All Balls and No Strikes: The Roberts Court's Anti-Worker Activism*, 2019 J. DISP. RESOL. 129, 133 (2019) (asserting that in *Janus*, "the conservative members of the Court engaged in an aggressive interpretation of the right to free speech and expression embodied in the First Amendment in order to reduce employee access to collective action, diminish employee power at the

business entities.[388] While the Court, under Chief Justice Roberts, may be involved in First Amendment expansionism,[389] *Halleck* proves that the conservative Justices can dial back the reach of the First Amendment when its strictures might interfere with the decisions of a business entity engaged in a speech-based enterprise.

Nieves reveals two very different sorts of problems. First, in future cases like it that affect the press, more than just two Justices need to make a forceful case about the important roles that both professional and citizen journalists play in a democratic society.[390] After all, "the First Amendment preserves democracy, while the U.S. Supreme Court protects the First Amendment."[391] Without the Court's protection and support of the press as an institution specifically shielded by the First Amendment under the Press Clause, democracy is jeopardized, especially in an era when the press finds itself under attack by government officials and others.[392] Although the meaning of the Press Clause may be "elusive,"[393] the majority of the Justices in *Nieves* punted on a prime opportunity to clarify the importance of the journalistic endeavors that it should protect.

Second, *Nieves* provides a model example of how *not* to construct a federal rule affecting the press. As this Article explained, the Justices had multiple quarrels in fashioning a rule that supposedly defines the relationship between First Amendment–based retaliatory arrest claims filed under Section 1983 and the impact of a finding of probable cause to arrest under the Fourth Amendment.[394] The Article contended that the rifts in *Nieves* over its rule are substantially different from (and much more troublesome than) the division more than a half-century ago in *New York Times Co. v. Sullivan*, when the Court adopted another federal rule—actual malice—affecting speech and press rights in defamation law that has withstood the test of time.[395]

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bargaining table, and advance employer-based economic and (de)regulatory policy"); Zachary S. Price, *Symmetric Constitutionalism: An Essay on* Masterpiece Cakeshop *and the Post-Kennedy Supreme Court*, 70 HASTINGS L.J. 1273, 1298 (2019) (describing the Court's ruling in *Janus* as "a one-sided blow to the liberal coalition").

[388] *See supra* notes 178–79 and accompanying text (describing how *Halleck* can be perceived as protecting a business entity against the intrusive forces of big government that would have affected that entity had state action been found to exist).

[389] *See generally* Leslie Kendrick, *First Amendment Expansionism*, 56 WM. & MARY L. REV. 1199 (2015) (addressing both the meaning and examples of First Amendment expansionism).

[390] *See supra* notes 57–58, 214–17, 291–95 and accompanying text (describing how only two Justices in *Nieves*—Ruth Bader Ginsburg and Sonia Sotomayor—directly considered the impact of the rule created in that case on the press).

[391] Bruce Ledewitz, *Taking the Threat to Democracy Seriously*, 49 U. MEM. L. REV. 1305, 1327 (2019).

[392] *See supra* note 189 and accompanying text (addressing hostility toward the press today).

[393] JARED SCHROEDER, THE PRESS CLAUSE AND DIGITAL TECHNOLOGY'S FOURTH WAVE: MEDIA LAW AND THE SYMBIOTIC WEB 89 (2018).

[394] *See supra* Part II (analyzing *Nieves*).

[395] *See supra* notes 286–89 and accompanying text (summarizing concerns about the rule created in *Nieves*).

Finally, *Brunetti* exposes startling inconsistencies in statutory interpretation and construction when the First Amendment freedom of expression is at risk. Most notably, the Justices disagreed when it came to the threshold issue that determines whether or not a saving construction is even possible—namely, if a statute's meaning is ambiguous.[396] What ambiguity means and how it is different from statutory breadth must be better spelled out by the Court so that future rifts like that over the meaning of scandalous in *Brunetti* do not arise. As suggested above, the implications of the interpretative logic adopted by Justice Sotomayor could flow beyond the realm of offensive expression to hate speech.[397]

[396] *See supra* Part III (analyzing *Brunetti*).

[397] *See supra* notes 379–80 and accompanying text that immediately follows in that paragraph.