

CONTRACTING AWAY THE FIRST AMENDMENT?: WHEN COURTS SHOULD INTERVENE IN NONDISCLOSURE AGREEMENTS

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INTRODUCTION

Donald Trump, Harvey Weinstein, the Catholic Church—what do the three have in common? All are powerful actors in the public eye. And all three have signed nondisclosure agreements that trade money for silence: contracts that pay individuals not to spread information that would likely severely damage these actors' reputations.¹ If a law required individuals to stay silent or incur large financial penalties, such a law would clearly violate the First Amendment's protection of free speech. But because these nondisclosure agreements are private contracts—willingly and voluntarily entered into by all parties—the State is not involved and thus the First Amendment plays no role, right?

Not necessarily. This Note will argue that courts need to intervene in private nondisclosure agreements to protect First Amendment rights.² Specifically, courts should require public officials and certain public figures to prove actual malice before they can recover for breach of a nondisclosure agreement formed solely to protect the individual's reputation from the consequences of his or her own bad conduct. While court intervention in nondisclosure agreements may initially appear to be a massive shake-up of existing contract law principles, this Note will show that the actual malice test provides a reasonable and necessary way to protect free speech on matters of public interest, while still accommodating privacy needs. This Note will first discuss the Court's prevailing approach to contract law³ and then explain why

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¹ See Jeannie Suk Gersen, *Trump's Affairs and the Future of the Nondisclosure Agreement*, NEW YORKER (Mar. 30, 2018), <https://www.newyorker.com/news/news-desk/trumps-affairs-and-the-future-of-the-nondisclosure-agreement> [<https://perma.cc/F4L6-GNVD>]; James Rufus Koren, *Weinstein Scandal Puts Nondisclosure Agreements in the Spotlight*, L.A. TIMES (Oct. 23, 2017, 11:13 AM), <http://www.latimes.com/business/la-fi-weinstein-nondisclosure-agreements-20171023-story.html> [<https://perma.cc/U5GZ-GCRJ>].

² See U.S. CONST. amend. I.

³ See discussion *infra* Part I.

a change in favor of court intervention is warranted.⁴ Next, this Note will lay out the proposed intervention test.⁵ Finally, it will address potential criticisms to the test.⁶

I. BACKGROUND: THE SUPREME COURT'S CURRENT APPROACH TO CONTRACT LAW

A. *The Court's General Approach: "Hands-Off"*

The Court's current approach to contract law⁷ is perhaps best described as "hands-off." The Court seeks to intervene in private contracts as little as possible, preferring to allow parties to be governed by their own agreements, as long as certain basic conditions are met.⁸ For example, the Court assumes a "presumption of contract validity"—as long as there was mutual assent and consideration during formation of the contract, the Court "will presume that a valid contract exists."⁹ This presumption of validity illustrates the modern policy of allowing private parties to have substantial latitude to enter into and make the terms of their private agreements¹⁰—as long as parties enter into the agreement voluntarily,¹¹ courts will enforce those agreements "regardless of the legal excuse advanced."¹² Even "parties who do not consciously consent to be subject to contractual duties nevertheless are bound so long as their conduct reasonably manifests assent."¹³ For example, courts regularly enforce even those contracts that require parties to waive their constitutional rights, as long as the parties waived those rights "voluntarily, intelligently, and knowingly."¹⁴

B. *The Court's Approach to Nondisclosure Agreements*

Like the Court's approach to contract law generally, its approach to nondisclosure agreements specifically is hands-off, favoring a presumption of validity even when

⁴ See discussion *infra* Part II.

⁵ See discussion *infra* Part II.

⁶ See discussion *infra* Section II.C.2.

⁷ See, e.g., G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 CALIF. L. REV. 431, 527–28 (1993).

⁸ See Danielle Kie Hart, *Contract Law Now—Reality Meets Legal Fictions*, 41 U. BALT. L. REV. 1, 15–16 (2011); Shell, *supra* note 7, at 527.

⁹ Hart, *supra* note 8, at 16.

¹⁰ See Shell, *supra* note 7, at 527.

¹¹ See Hart, *supra* note 8, at 14.

¹² *Id.* at 18.

¹³ Shell, *supra* note 7, at 440.

¹⁴ *D.H. Overmeyer Co. v. Frick Co.*, 405 U.S. 174, 187 (1972) (holding that when a company signed a promissory note containing a cognovit provision, that signature implied that the company had "voluntarily, intelligently, and knowingly" waived its due process right to notice); Wayne Klomp, Note, *Harmonizing the Law in Waiver of Fundamental Rights: Jury Waiver Provisions in Contracts*, 6 NEV. L.J. 545, 561 (2005).

constitutional rights are at stake.¹⁵ The Court demonstrated its approach to nondisclosure agreements in *Cohen v. Cowles Media Co.*¹⁶ Dan Cohen worked on a gubernatorial campaign and approached reporters from the *Pioneer Press* and *Star Tribune*, offering to give them documents related to that campaign.¹⁷ However, he would give the documents only on the condition that his identity remain confidential.¹⁸ The reporters promised to keep Cohen's name anonymous, and he turned over the documents.¹⁹ When the reporters published their stories, they disclosed Cohen as the source of the documents, and Cohen was subsequently fired from his position on the campaign.²⁰ Cohen sued the reporters for breach of contract.²¹

The Court noted that judicial enforcement of a confidentiality agreement constituted state action for purposes of the Fourteenth Amendment, and thus triggered the protections of the First Amendment.²² Nonetheless, the Court held that because Minnesota's promissory estoppel law was a "law of general applicability"—the law did "not target or single out the press"—the confidentiality agreement was enforceable despite its effect on the reporters' ability to speak.²³ In accordance with the Court's general view that parties ought to have substantial latitude to determine the terms of their own agreements, the Court stressed that here, any restrictions on the reporters' speech were "self-imposed,"²⁴ affirming the Court's hands-off approach to nondisclosure agreements.

C. *The Justifications Behind the Court's Current "Hands-Off" Approach*

The Court's hands-off approach to contracts reflects concern for a number of interests. First, the Court's approach reflects a "freedom of contract" policy²⁵—namely, that citizens in a free society should be able to freely enter into agreements of their choosing, generally unfettered by court interference.²⁶ Second, the hands-off approach to contract law belies an interest in the efficient administration of the judicial system.²⁷

¹⁵ See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 670–71 (1991); Shell, *supra* note 7, at 527.

¹⁶ *Cohen*, 501 U.S. 663.

¹⁷ *Id.* at 665.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.* at 666.

²¹ *Id.*

²² *Id.* at 668.

²³ *Id.* at 670.

²⁴ *Id.* at 671.

²⁵ See Mark Pettit, Jr., *Freedom, Freedom of Contract, and the "Rise and Fall,"* 79 B.U. L. REV. 263, 282–83, 282 n.76 (1999) (defining "freedom of contract" and a "right of exchange," free from "interference from others," according to English social commentator Herbert Spencer).

²⁶ *Id.* at 282–83.

²⁷ See Shell, *supra* note 7, at 438.

Transaction costs would arise from closer judicial scrutiny of contracts—parties would bring more cases and those cases would take longer to resolve.²⁸

A hands-off approach to nondisclosure agreements in particular serves several important interests as well. First, allowing parties to freely enter into nondisclosure agreements allows those parties to protect their privacy interests.²⁹ For example, women who faced sexual harassment while employed by a company may enter into a nondisclosure agreement with the company to ensure that the company remains silent.³⁰ Thus, the nondisclosure agreement empowers the woman to determine whether, and with whom, she will share this sensitive information, rather than leaving her at the mercy of her employer.³¹ Furthermore, allowing parties to protect their privacy can actually protect important speech.³² A robust nondisclosure agreement facilitates free exchange between the parties, thus encouraging speech that might otherwise be chilled by concerns about disclosure.³³

Second, a hands-off approach to nondisclosure agreements protects economic interests vital to today's business world.³⁴ Businesses are free to enter into binding nondisclosure agreements that penalize employees who leak trade secrets.³⁵ Because "U.S. businesses lose at least \$24 billion a year because of stolen trade secrets, most of it from the sale of secrets by employees to competitors," allowing parties to freely enter into nondisclosure agreements gives businesses an important tool to counter the threat of trade secret disclosure.³⁶ Nondisclosure agreements also enable businesses and individuals to prevent employees from disparaging their employers, thus protecting the business's or individual's reputation.³⁷ Reputational protection might not be possible if courts intervened in nondisclosure agreements that prohibit disparaging speech.³⁸

While several important interests are served by a hands-off approach to nondisclosure agreements, ultimately this Note will argue that, in some cases, courts should intervene in nondisclosure agreements. This Note will explain why the Court should intervene in such nondisclosure agreements despite the interests protected by

²⁸ *See id.*

²⁹ *See* Shira A. Scheindlin & Rosalind Fink, *Bar NDAs? Not So Fast Please!*, N.Y. L.J. (Apr. 3, 2018, 2:50 PM), <https://advance.lexis.com/search?crd=a3d5c284-66b4-4e94-83a8-be4dcd6b8dce&pdsearchterms=LNSDUID-ALM-NYLAWJ-glm45fjiid&pdbypasscitatordocs=False&pdmfid=1000516&pdisurlapi=true> [<https://perma.cc/7KVN-MJV7>].

³⁰ *See id.*

³¹ *See, e.g., id.*

³² *See* *Bartnicki v. Vopper*, 532 U.S. 514, 532–33 (2001).

³³ *See id.*

³⁴ *See* RICHARD STIM & STEPHEN FISHMAN, *NONDISCLOSURE AGREEMENTS: PROTECT YOUR TRADE SECRETS & MORE 1* (Mary Randolph ed., 2001).

³⁵ *See id.* at 1–2.

³⁶ *Id.* at 1.

³⁷ *See* Alan E. Garfield, *Promises of Silence: Contract Law and Freedom of Speech*, 83 CORNELL L. REV. 261, 272 (1998).

³⁸ *See id.* at 274–75.

a hands-off approach.³⁹ Furthermore, it will explain *how* the Court can intervene to prevent abuses of speech rights while still protecting freedom of contract, judicial efficiency, privacy, and economic interests.⁴⁰

II. ARGUMENT: WHY AND HOW THE COURT *SHOULD* INTERVENE IN NONDISCLOSURE AGREEMENTS TO PROTECT FIRST AMENDMENT RIGHTS

A. *Why Should the Court Intervene?*

1. The Court's Interventions in Other Areas of Private Law Demonstrate that the Court's "Hands-Off" Approach to Contracts Does Not Make Sense

Despite the Court's current hands-off contract law policy, it *has*, at times, intervened in private agreements to protect constitutional rights.⁴¹ The Court justifies that intervention on the grounds that court enforcement would constitute state action in contravention of the Constitution.⁴² For example, in *Shelley v. Kraemer*, the Court refused to enforce a restrictive covenant on the grounds that the agreement violated the Equal Protection Clause of the Fourteenth Amendment.⁴³ In that case, several white property owners had entered into an agreement preventing them from selling their land to African Americans.⁴⁴ When one property owner sold his land to an African-American family, other parties to the agreement brought suit to enforce the restrictive covenant and divest the family of title.⁴⁵

The Court held that judicial enforcement of the agreement would constitute state action in violation of the Fourteenth Amendment.⁴⁶ But for the enforcement of the state, through the Court, the agreement would have no legal effect: only court action could enforce the agreement and force the African-American family to vacate its home.⁴⁷ Therefore, court enforcement was, in effect, state implementation of a discriminatory law.⁴⁸ Such state action is forbidden by the Fourteenth Amendment.⁴⁹

Shelley demonstrates that the Court *is* willing to intervene in private law to protect constitutional rights when court enforcement of a private agreement constitutes state action.⁵⁰ However, court enforcement of a private agreement is *always* state action,

³⁹ See discussion *infra* Section II.A.

⁴⁰ See discussion *infra* Section II.B.

⁴¹ See Cody J. Jacobs, *The Second Amendment and Private Law*, 90 S. CAL. L. REV. 945, 948 (2017).

⁴² See, e.g., *Shelley v. Kraemer*, 334 U.S. 1, 19–20 (1948).

⁴³ *Id.* at 20.

⁴⁴ *Id.* at 4–5.

⁴⁵ *Id.* at 6.

⁴⁶ *Id.* at 20.

⁴⁷ *Id.* at 19–20.

⁴⁸ *Id.* at 20.

⁴⁹ *Id.*

⁵⁰ *Id.* at 19–20.

regardless of whether the case involves property rights, as in *Shelley*, or speech rights, as in a nondisclosure agreement.⁵¹ In private actions, “the level of state involvement is always the same: the court is enforcing the common-law right of one private individual against another. A court adjudicating a trespass claim that suppresses speech is . . . a state actor just as much as one adjudicating a libel claim that suppresses speech.”⁵²

In fact, the Court itself recognized in *Shelley* that court enforcement constitutes state action regardless of the specifics or nature of the suit.⁵³ Indeed, in *Cohen*, the Court held that court enforcement of a nondisclosure agreement *was* state action triggering constitutional protections, and yet it still allowed the newspaper to be punished for breach of confidentiality.⁵⁴ Therefore, the Court’s hands-off approach to contracts cannot be justified by the fact that contracts are private agreements, because whenever there is court enforcement, there is state action, regardless of whether the court enforces a private agreement or a state law.⁵⁵ The test for whether or not to intervene in private action, including nondisclosure agreements, therefore cannot be whether the court is acting as a state actor.

Neither can the intervention test be the *Cohen* majority’s “generally applicable laws” test.⁵⁶ Recall that the *Cohen* majority held that because Minnesota’s promissory estoppel law was “generally applicable,” the confidentiality agreement bound the reporters despite its chilling effect on their speech.⁵⁷ However, that holding ignores the fact that the Court has intervened in private law cases even though those cases involved generally applicable laws.⁵⁸ The *Cohen* dissent explained this inconsistency with regard to the case of *Hustler Magazine v. Falwell*.⁵⁹ In *Hustler*, a prominent minister sued the Magazine for intentional infliction of emotional distress.⁶⁰ The Court intervened, altering the existing intentional infliction of emotional distress legal standards because they raised free-speech concerns.⁶¹ As the *Cohen* dissent noted, the Court intervened in *Hustler* even though:

there was no doubt that Virginia’s tort of intentional infliction of emotional distress was a “law of general applicability” unrelated to the suppression of speech. Nonetheless, a unanimous Court

⁵¹ Jacobs, *supra* note 41, at 974.

⁵² *Id.*

⁵³ *Shelley*, 334 U.S. at 17 (“But the examples of state judicial action which have been held by this Court to violate the [Fourteenth] Amendment’s commands are not restricted to situations in which the judicial proceedings were found in some manner to be procedurally unfair.”).

⁵⁴ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 668–69 (1991).

⁵⁵ See Jacobs, *supra* note 41, at 974.

⁵⁶ See *Cohen*, 501 U.S. at 669.

⁵⁷ *Id.*

⁵⁸ See *id.* at 674–75.

⁵⁹ 485 U.S. 46 (1988); see *Cohen*, 501 U.S. at 674–76 (Blackmun, J., dissenting).

⁶⁰ *Hustler Magazine, Inc.*, 485 U.S. at 47–48.

⁶¹ *Id.* at 47–48, 56.

found that, when used to penalize the expression of opinion, the law was subject to the strictures of the First Amendment.⁶²

2. Voluntary Versus Involuntary, Public Versus Private—What Is Really Going On Here?

The dissent's observation reveals that the real basis of the *Cohen* majority's decision was *not* the fact that a generally applicable law was involved.⁶³ Instead, the real foundation of the Court's decision was its focus on contract as a consensual relationship.⁶⁴ For instance, the Court stated that "[t]he parties themselves . . . determine the scope of their legal obligations, and any restrictions that may be placed on the publication of truthful information are *self-imposed*."⁶⁵ Because the confidentiality agreement was a voluntary contract, the reporters had consented to give up their First Amendment rights.⁶⁶ In other words, the Supreme Court essentially held that courts should not intervene in contract cases.

Basing intervention decisions on the mere form of the cause of action, however, does not provide any better a test than the "state action" or "generally applicable law" tests. Such a test for intervention is overly formalistic, leading to false distinctions between tort, contract, and property law as a basis for First Amendment intervention.⁶⁷ For example, in theory, tort and contract law are separate and distinct: "tort duties . . . apply against the whole world, [while] contractual obligations extend only to the parties to a transaction."⁶⁸ But in practice, "the realms of tort, contract, and property are overlapping and indistinct. . . . [Thus] [c]urrent First Amendment theory lacks a compelling justification for why we treat tort rules differently from those sounding in property or contract."⁶⁹

Consider the example of a personal physician who discloses that the Chief Executive Officer (CEO) he treats has dementia and that it will compromise his ability to run his company.⁷⁰ The CEO could go the contract route and sue for breach of an implied contract of confidentiality, or he could sue for a breach of confidentiality tort.⁷¹ The physician claims that the First Amendment bars liability.⁷² The Court has intervened to protect First Amendment concerns in tort cases, but not contract cases.⁷³

⁶² *Cohen*, 501 U.S. at 675 (citation omitted).

⁶³ *See id.* at 675–76.

⁶⁴ *See id.*

⁶⁵ *Id.* at 671 (majority opinion) (emphasis added).

⁶⁶ *See id.*

⁶⁷ *See* Daniel J. Solove & Neil M. Richards, *Rethinking Free Speech and Civil Liability*, 109 COLUM. L. REV. 1650, 1653 (2009).

⁶⁸ *Id.* at 1666 (citation omitted).

⁶⁹ *Id.* at 1653, 1656.

⁷⁰ *Id.* at 1669.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *See* Jacobs, *supra* note 41, at 948.

Thus, the case could result in a different outcome depending on which theory is used, even though “the nature of the information involved is the same,” and “the basic theory upon which liability is premised is also largely the same—an express or implied assumption of a duty of confidentiality.”⁷⁴ The similarity between the contract and tort actions in these examples demonstrates that the Court’s distinctive approaches to the two actions are based on mere formalism, not any real, important differences.

Furthermore, the voluntary nature of contracts does not provide sufficient justification for the distinction between the Court’s approaches to tort and contract. Gary Peller’s article explains how voluntary versus involuntary characterizations of contract and tort duties are constructed, not necessarily reality.⁷⁵ “The modern understanding is that the categories of public and private [in other words, tort duties and contract duties] . . . constitute a *continuum*.”⁷⁶ In short, the line between what is public and private, voluntary duty and imposed duty, is blurry.⁷⁷ Yet contract and tort duties are described as black-and-white: They are either, in the case of contracts, “voluntary”—“made by people ‘who are entirely free to act’”⁷⁸—or, in the case of tort, imposed as a societal duty.⁷⁹ The CEO hypothetical, in which the doctor acquired both “voluntary” and “imposed” duties through the same actions, demonstrates the blurriness of the voluntary-involuntary legal fiction.⁸⁰

One could also make the argument that, by going out in society, a person impliedly consents—contracts, even—to act in a reasonable manner, as required by tort law.⁸¹ A person who chooses to exercise his autonomy by going out into the world and interacting with others enters into a “social contract.”⁸² His “autonomy is entitled to respect” from others, and likewise, he is also “obligated to respect the autonomy of other[s].”⁸³ Consequently, when he exercises his freedom in a way that harms another’s freedom—say, by negligently hitting that other with his car—he is liable to the other, pursuant to the social contract he entered into.⁸⁴ This explanation behind *why* tort liability exists suggests that all private law includes, in a sense, the voluntary consent of the parties. The “social contract”⁸⁵ theory of tort liability further

⁷⁴ Solove & Richards, *supra* note 67, at 1670.

⁷⁵ See Gary Peller, *The Metaphysics of American Law*, 73 CALIF. L. REV. 1151, 1198–99 (1985).

⁷⁶ *Id.* at 1198 (emphasis added).

⁷⁷ *See id.*

⁷⁸ *Id.* at 1199 (citation omitted).

⁷⁹ See Solove & Richards, *supra* note 67, at 1666 (explaining that “tort duties . . . apply against the whole world”).

⁸⁰ See *supra* notes 70–74 and accompanying text.

⁸¹ See generally Bailey Kuklin, *Public Requisites: Corrective, Retributive, and Distributive Justice*, 66 CLEV. ST. L. REV. 245 (2018) (discussing the norms governing society when a person’s “autonomous space” is invaded).

⁸² *Id.* at 247.

⁸³ *Id.* at 246.

⁸⁴ *See id.*

⁸⁵ *See id.* at 247.

shows that the voluntary-involuntary distinction between torts and contracts is artificial and does not provide a satisfactory basis for treating freedom of speech differently in tort and contract actions.

Courts' approaches to prior restraints further illustrate the shortcomings of a formalistic approach. The Supreme Court has held that, in tort law, "prior restraints . . . carry 'a heavy presumption against their constitutional validity.'"⁸⁶ The term "prior restraints" refers to "administrative and judicial orders forbidding certain communications" issued before those communications occur.⁸⁷ In tort cases, a plaintiff may seek an injunction forbidding a defendant from engaging in certain speech—in other words, the plaintiff may seek a prior restraint.⁸⁸ But the Court, concerned that important speech might be silenced, applies strict scrutiny to content-based prior restraints and lesser scrutiny to content-neutral prior restraints.⁸⁹

Yet, despite the Court's concern about prior restraints in the tort context, lower courts do uphold and enforce private agreements, such as nondisparagement agreements forbidding parties from engaging in certain speech, that are essentially forms of prior restraint.⁹⁰ The fact that a prior restraint is invoked through a tort action does not make a prior restraint invoked in a contract action any different—in both cases, a potential speaker is silenced.⁹¹ While a contract that imposes a prior restraint may involve the restrained speaker's consent, the speaker's earlier consent does not make that speaker's potential speech less important.⁹² The function of the prior restraint doctrine is to protect important free speech,⁹³ and therefore, given that function, whether a person once consented not to say something should not affect the application of the doctrine.

Furthermore, the fact that the Court *has* deviated from its typical rigid distinctions suggests those distinctions fail to really protect the constitutional interests at

⁸⁶ Jacobs, *supra* note 41, at 951 (citations omitted).

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *See, e.g., USA Techs., Inc. v. Tirpak*, No. 12-2399, 2012 WL 1889157, at *1 (E.D. Pa. May 24, 2012).

⁹¹ *See* Jacobs, *supra* note 41, at 951.

⁹² *See id.* at 954. Cody Jacobs explains that "where matters of purely private significance are at issue, First Amendment protections are often less rigorous' because such restrictions pose less of a 'threat to the free and robust debate of public issues.'" *Id.* (citation omitted). However, consenting to speech restriction within the context of a private agreement does not mean that the speech is more likely to be a matter of "purely private significance." *See id.* Indeed, as shown by the Clifford-Trump NDA, a private agreement may concern speech of great public significance. *See* Wilson R. Huhn, *The Trump/Clifford Non-Disclosure Agreement: Violation of Public Policy and the First Amendment*, JURIS MAG. (May 13, 2018), <http://sites.law.duq.edu/juris/2018-05/13/the-trump-clifford-non-disclosure-agreement-violation-of-public-policy-and-the-first-amendment/> [<https://perma.cc/YZZ4-QWPE>].

⁹³ *See* Jacobs, *supra* note 41, at 954 (stating that the doctrine of prior restraint "has been called 'the keystone of First Amendment law'").

stake. *Shelley* is a prime example. The Court's decision in *Shelley* suggests that it realized that adhering to its usual rigid, formalistic distinctions between voluntary, private contract law and involuntary, public government action would fail to protect the constitutionally protected priority of equality.⁹⁴ Specifically, the Court likely recognized that although the agreement was technically private, it would have potentially significant public effects—for instance, racist white people across the country might begin to frequently use similar agreements to exclude African Americans.⁹⁵ Therefore, in order to protect the constitutional interest in equality, the Court departed from its typical, strict distinction between private agreements and public law.⁹⁶ While the Court typically takes a hands-off approach to private agreements, allowing parties to bargain freely even when constitutional rights are at stake,⁹⁷ in *Shelley* the Court struck down the contract as unconstitutional.⁹⁸ The Court's deviation from its hands-off approach in order to protect constitutional values demonstrates the “inherent weakness of the distinction between public and private action.”⁹⁹

The Court's trespass cases¹⁰⁰ further show how formalistic distinctions between causes of action are not only premised upon problematic private-public, voluntary-involuntary distinctions, but also fail to adequately protect constitutional values. For example, in *Marsh v. Alabama*,¹⁰¹ the Court restricted private trespass actions in order to protect free speech.¹⁰² A Jehovah's Witness had distributed literature on property owned by a private company without the company's permission.¹⁰³ “[D]espite the [area's] status as private property,”¹⁰⁴ the Jehovah's Witness' conduct was protected because the property owner had opened up his property “for use by the public in general.”¹⁰⁵ Because the property was generally open to the public, the property essentially functioned as public property, and thus individuals could not be excluded or punished for their speech.¹⁰⁶ To allow so would violate those individuals' First Amendment rights.¹⁰⁷ In so holding, the Court departed from its typical private-public law

⁹⁴ See Mark D. Rosen, *Was Shelley v. Kraemer Incorrectly Decided? Some New Answers*, 95 CALIF. L. REV. 451, 470–71 (2007).

⁹⁵ See *id.* at 487 (explaining that the Court would likely predict that “[s]uch covenants could . . . deprive African Americans of the ‘same right . . . as is enjoyed by white citizens . . . to purchase . . . real property’”).

⁹⁶ See *id.* at 457–58.

⁹⁷ See discussion *supra* Section I.A.

⁹⁸ *Shelley v. Kraemer*, 334 U.S. 1, 20 (1948).

⁹⁹ Rosen, *supra* note 94, at 470.

¹⁰⁰ *Amalgamated Food Emps. Union Local 590 v. Logan Valley Plaza, Inc.*, 391 U.S. 308 (1968); *Marsh v. Alabama*, 326 U.S. 501 (1946).

¹⁰¹ *Marsh*, 326 U.S. 501.

¹⁰² Jacobs, *supra* note 41, at 957.

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* (quoting *Marsh*, 326 U.S. at 506).

¹⁰⁶ *Id.* at 958.

¹⁰⁷ *Id.* at 957.

distinction because, in the Court's view, that distinction failed to adequately protect the constitutional right to free speech.¹⁰⁸

3. The “Core-Constitutional-Right” Theory Explains the Court’s Intervention Decisions

The Court’s deviations from traditional distinctions and analysis in cases like *Shelley* and *Marsh* demonstrate the weaknesses of using formalistic distinctions between causes of action as a means of determining when to intervene in private law to protect constitutional rights. With formalistic distinctions off the table, what theory or explanation then explains when the Court *should* intervene? The “core-constitutional-right” theory answers how to distinguish when the Court should intervene in private law other than just through formalistic distinctions between tort, property, and contract law, or through the “state action” concept.¹⁰⁹ Specifically, the core-constitutional-right theory says that courts should be more willing to intervene in private law disputes when the private law action threatens the “central purpose” of a constitutional right.¹¹⁰

This explanation is actually already reflected in the Court’s own treatment of private law actions. For example, the core-constitutional-right theory explains why the Court has treated free-speech rights differently in the context of tort actions as compared to trespass actions.¹¹¹ The Court protects speech in the context of tort law by requiring a heightened standard to prove defamation for public officials and figures.¹¹² In contrast, in the context of property law the Court “has moved away” from using the First Amendment to limit the ability to use trespass actions to remove speakers from property.¹¹³ The distinction makes sense when viewed through the lens of the core-constitutional-right theory: “In defamation actions, the court specifically adjudicates whether the content of speech is liability-triggering, whereas in trespass actions, the court simply adjudicates where the speaker was located in order to determine liability.”¹¹⁴ In other words, defamation cases have the potential to require courts to punish speech based on its content—when the ability to speak one’s mind is typically strongly protected by the First Amendment.¹¹⁵ On the other hand, trespass

¹⁰⁸ *See id.* (“The Court held that, despite the town’s status as private property, the defendant’s conduct was nevertheless protected by the First Amendment.”) The Court eventually decided not to place constitutional limits on private property owners’ ability to restrict, through trespass actions, what messages individuals express on their property. *See* discussion *infra* Section II.A.3.

¹⁰⁹ Jacobs, *supra* note 41, at 968–76 (discussing how the “core right theory” works, as well as addressing some limitations and critiques).

¹¹⁰ *Id.* at 969.

¹¹¹ *Id.* at 969–70.

¹¹² *See, e.g., id.* at 949–50.

¹¹³ *Id.* at 969–70.

¹¹⁴ *Id.* at 970.

¹¹⁵ *See id.*

actions are “more analogous to ‘time, place, and manner’ restrictions on free speech.”¹¹⁶ And while the First Amendment strongly protects your ability to say *what* you want, it does not as strongly protect your ability to say it *whenever* and *wherever* you want.¹¹⁷ In other words, the Court treats defamation differently from trespass because defamation cases have greater implications for core aspects of the First Amendment.¹¹⁸

Speech about public officials and figures is the “core right” protected by the First Amendment.¹¹⁹ In *New York Times Co. v. Sullivan*, the Court stated that the core of the First Amendment is the protection of speech about “public issues.”¹²⁰ In fact, that speech is so important that it is “a fundamental principle of the American government,” “essential to the security of the Republic”—not merely a protected privilege, but actually a “political duty” of Americans.¹²¹ Ultimately the Court held that in order to protect the First Amendment’s core, public officials had to prove “actual malice” in order to prevail on a defamation claim, as otherwise core speech about public issues might be chilled.¹²²

The Court reiterated the core importance of speech concerning public issues in *Hustler Magazine, Inc. v. Falwell*, stating that “[a]t the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern.”¹²³ Again, the Court held that the core importance of speech justified imposing a higher standard on public officials, this time one seeking to prevail on a claim for intentional infliction of emotional distress.¹²⁴ Furthermore, in *Curtis Publishing Co. v. Butts*, the Court held that the importance of free discussion of issues of public concern also justified imposing a higher standard on public figures for proving libel.¹²⁵

Not only does the First Amendment protect the individual right to speak, the core of which is speech about public issues concerning public and political figures, the Amendment also protects the public’s right to know and receive information about matters of public concern.¹²⁶ The right, implicit in the right to speak, stretches back to *Meyer v. Nebraska*,¹²⁷ and has been upheld across a variety of contexts—even

¹¹⁶ *Id.*

¹¹⁷ *See id.* at 969–70.

¹¹⁸ *See id.* at 969.

¹¹⁹ *See id.*

¹²⁰ 376 U.S. 254, 270 (1964).

¹²¹ *Id.* at 269–70.

¹²² *See id.* at 283.

¹²³ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 50 (1988).

¹²⁴ *See id.* at 56.

¹²⁵ 388 U.S. 130, 154–55 (1967) (stating specifically that the public figure must show “highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers”).

¹²⁶ *See* Eric B. Easton, *Public Importance: Balancing Proprietary Interests and the Right to Know*, 21 CARDOZO ARTS & ENT. L.J. 139, 142 (2003).

¹²⁷ 262 U.S. 390 (1923) (striking down a statute prohibiting teaching a foreign language to children who had not completed eighth grade).

when the receivers are prisoners or students or the speech was mere commercial speech¹²⁸—demonstrating the importance of receiving information to making the right to speak meaningful. In fact, the Court even stated in *Bartnicki v. Vopper* that laws that restrict public access to information “implicate[] the core purposes of the First Amendment.”¹²⁹ The public’s interest in access to information about public issues makes speech concerning such issues doubly sacred under the First Amendment.¹³⁰

The core-constitutional-right theory suggests that, just as the Court has intervened in private law, such as in tort actions, to protect core free speech rights, courts *should* intervene in some nondisclosure agreements because nondisclosure agreements have the potential to implicate the very heart of the First Amendment. Take, for example, the alleged nondisclosure agreement between President Trump and Stormy Daniels.¹³¹ Daniels’s prohibited speech directly relates to matters of public concern—the conduct of our nation’s president, this country’s top public official.¹³² Indeed, if—as the Court has stated—speech “that is critical of those who hold public office” is the core of what the First Amendment protects,¹³³ it is hard to imagine a nondisclosure agreement that better exemplifies an agreement that restricts the core of fundamental speech.¹³⁴ Therefore, the Court ought to more closely scrutinize agreements that touch upon such vital speech, rather than simply dismissing such scrutiny on freedom of contract grounds.

The core-constitutional-right theory necessarily requires courts to make value judgments about what constitutes a core constitutional right and when to intervene to protect such a right.¹³⁵ While such value judgments might seem “off-putting,” making judgments about the core of constitutional rights has long been a part of constitutional jurisprudence.¹³⁶ Indeed, as discussed earlier, the Court’s deviations from formal distinctions between causes of actions, such as *Shelley*, and creation of special doctrines to protect speech, such as the actual malice test for defamation claims, suggest that consideration of how to protect core constitutional rights has always been the real driving force behind the Court’s decisions.¹³⁷

Furthermore, precedent reveals that what constitutes the core right of free speech is firmly settled: “At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of *public*

¹²⁸ See Easton, *supra* note 126, at 144, 153.

¹²⁹ 532 U.S. 514, 533–34 (2001).

¹³⁰ See, e.g., Easton, *supra* note 126, at 165.

¹³¹ See Huhn, *supra* note 92.

¹³² See Miles Parks, *Stormy Daniels Shares Graphic Details About Alleged Affair with President Trump*, NPR (Mar. 26, 2018, 2:45 PM), <https://www.npr.org/2018/03/25/596868354/stormy-daniels-shares-graphic-details-about-alleged-affair-with-trump> [<https://perma.cc/W8QX-2B8D>].

¹³³ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988).

¹³⁴ See Huhn, *supra* note 92.

¹³⁵ See Jacobs, *supra* note 41, at 968–69.

¹³⁶ *Id.*

¹³⁷ See discussion *supra* Section II.A.2.

interest and concern.”¹³⁸ The Court’s defamation decisions further show that speech about public officials and figures constitutes speech about matters of public interest and concern.¹³⁹ The Court’s settled definition of what constitutes the core of free speech—speech about public issues, officials, and figures—means that courts’ value judgments as to what constitutes core speech is limited today. Therefore, applying the constitutional right theory to justify court intervention in nondisclosure agreements does not mean that courts are suddenly going to go wild with unbounded discretion. Rather, court intervention to protect the speech about public officials and figures implicated in some nondisclosure agreements represents a consistent application of the Court’s previously established definition of, and protection of, core constitutional speech.

4. Court Intervention in NDAs Is in Line with Traditional Public Policy Intervention

“[T]raditional common law contract doctrine permits courts to refuse to enforce a fully bargained and otherwise valid agreement if enforcement would violate public policy.”¹⁴⁰ An agreement that is contrary to public policy commonly involves “attempted bargaining around some preordained assignment of rights provided by common law, statutory, or constitutional rules.”¹⁴¹ For example, courts will not enforce a liquidated damages clause that imposes a penalty for nonperformance of the contract because such clauses are against public policy.¹⁴² Courts will refuse to enforce liquidated damages clauses regardless of how much “bargaining, notice, or consent” the parties engaged in as the parties *cannot* waive or bargain around public policy rules.¹⁴³

Refusing to enforce nondisclosure agreements on First Amendment grounds fits neatly into courts’ long-established public policy interventions. Indeed, “Confidentiality agreements are no different than other contracts in that they may be held to be unenforceable as contrary to public policy. The difficulty is in determining public policy.”¹⁴⁴ Intervening in nondisclosure agreements on First Amendment grounds would just be another way to protect important public policies, rather than a radical departure from traditional contract law.¹⁴⁵ As mentioned, judges sometimes refuse to enforce agreements that attempt to skirt “common law, statutory, or *constitutional* rules” on public policy grounds.¹⁴⁶ Judges should likewise also consider First Amendment implications in contracts that touch upon free speech, rather than automatically

¹³⁸ *Hustler Magazine, Inc.*, 485 U.S. at 50 (emphasis added).

¹³⁹ *Id.* at 50; *Curtis Publ’g Co. v. Butts*, 388 U.S. 130, 154–55 (1967); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

¹⁴⁰ *Shell*, *supra* note 7, at 437 n.21.

¹⁴¹ *Id.* at 443.

¹⁴² *Id.* at 444.

¹⁴³ *Id.*

¹⁴⁴ Carol M. Bast, *At What Price Silence: Are Confidentiality Agreements Enforceable?*, 25 WM. MITCHELL L. REV. 627, 704–05 (1999) (citation omitted).

¹⁴⁵ *See* Garfield, *supra* note 37, at 266.

¹⁴⁶ *See* *Shell*, *supra* note 7, at 441 (emphasis added).

upholding them based on freedom to contract; such consideration of constitutional implications is a natural extension of ordinary public policy rules.¹⁴⁷

Furthermore, “public policies vary over time. As the interests of society change, courts are called upon to recognize new policies.”¹⁴⁸ Courts take into account the strength of the public policy weighed against enforcement, as well as the seriousness of the misconduct involved and the extent to which it was deliberate.¹⁴⁹ Additionally, in determining whether public policy requires courts to refuse to enforce an agreement, judges draw “not only on constitutions, statutes, and case precedent, but also on their own views of what *the public interest or morality requires*.”¹⁵⁰ Today, the interests of society suggest that courts should pay more attention to the First Amendment implications of nondisclosure agreements and act to protect threatened First Amendment rights.

For example, modern government officials have made unprecedented use of nondisclosure agreements in an attempt to shield those officials from disparagement.¹⁵¹ Specifically, during his campaign, then-Candidate Trump required his campaign workers to sign nondisclosure agreements binding in perpetuity.¹⁵² Once President Trump gained office, his administration reportedly tried to get his staff to sign similar agreements.¹⁵³ Furthermore, President Trump has made several nondisclosure agreements with women prohibiting them from speaking about affairs.¹⁵⁴ The President’s use of these agreements amounts to attempts to prevent the disclosure of information that might be extremely important for voters.¹⁵⁵ Recognizing that the novel use of nondisclosure agreements by public officials today threatens the public’s interest in free access to information on issues and officials of public concern, courts should intervene in nondisclosure agreements that prohibit such speech on public policy grounds.

¹⁴⁷ See Garfield, *supra* note 37, at 267.

¹⁴⁸ Shell, *supra* note 7, at 446.

¹⁴⁹ See RESTATEMENT (SECOND) OF CONTRACTS § 178(3) (AM. LAW INST. 1981).

¹⁵⁰ Shell, *supra* note 7, at 442 (emphasis added).

¹⁵¹ See, e.g., Josh Dawsey & Ashley Parker, ‘Everyone Signed One’: Trump Aggressive in Use of Nondisclosure Agreements, Even in Government, SFGATE (Aug. 13, 2018, 6:00 PM), <https://www.sfgate.com/news/article/Everyone-signed-one-Trump-aggressive-in-use-of-13153629.php> [<https://perma.cc/7DLT-7R8T>]; *Nondisclosure Agreements Are Rare in Government. Here’s Why*, PBS NEWSHOUR (Aug. 14, 2018, 6:35 PM), <https://www.pbs.org/news/hour/show/nondisclosure-agreements-are-rare-in-government-heres-why> [<https://perma.cc/N7F5-W5AG>] [hereinafter *Nondisclosure Agreements*] (“The courts have made it very clear over the last four decades that there is no legitimate interest in the government in prohibiting unclassified information from being disseminated. So, what the Trump administration did in bringing its corporate mentality, they’ve tried in some cases, apparently succeeded, in getting people to sign non-disclosure agreements.”).

¹⁵² *Nondisclosure Agreements*, *supra* note 151.

¹⁵³ *Id.*

¹⁵⁴ See Parks, *supra* note 132.

¹⁵⁵ See *Trump’s Alleged Affairs and GOP Voters*, NPR (Mar. 28, 2018, 5:03 AM), <https://www.npr.org/2018/03/28/597541676/trumps-alleged-affairs-and-gop-voters> [<https://perma.cc/3EEK-LU8U>].

In addition, recent revelations about the sheer extent of sexual mistreatment in the workplace (and the “elaborate cover up systems,” namely nondisclosure agreements used to protect harassers from scrutiny) also suggest courts should recognize a new public policy limiting the use of nondisclosure agreements.¹⁵⁶ Nondisclosure agreements made to shield harassers not only enable harmful workplace behavior, but also affect lawyers’ abilities to corroborate their clients’ cases and thus find justice for victims of sexual mistreatment.¹⁵⁷ Plus, nondisclosure agreements made to protect harassers are often one-sided, prohibiting only the complainant or victim from speaking and not the harasser.¹⁵⁸ This lopsided balance of power further harms victims while enabling harassers.¹⁵⁹ In sum, the misuse of nondisclosure agreements to protect harassers demonstrates that those agreements have real implications for the public interest, indicating that courts should seriously consider intervening in such agreements on public policy grounds.

5. The Court Has Had Different Approaches to Contract Law Throughout History¹⁶⁰—Showing that There Is Not One Single, “Correct” Way to Handle Contracts

The Court’s approach to contracts has changed dramatically over time.¹⁶¹ During the *Lochner* era, from 1910–1937, the Court “constitutionalized freedom of contract through the doctrine of economic substantive due process.”¹⁶² The era was the height of freedom of contract, as the Court struck down “both state and federal economic and labor legislation” that interfered with parties’ abilities to make contracts “on due process grounds.”¹⁶³ Yet, even in the notorious *Lochner* era, the Court still intervened in private contracts on public policy grounds—from “fee-sharing contracts between attorneys in bankruptcy proceedings,” to “contracts for legislative lobbying services.”¹⁶⁴ The Court dramatically shifted its approach in the Warren era of the 1950s and 60s.¹⁶⁵ Because of political pressure due to the Great Depression, the Court overruled *Lochner* in *West Coast Hotel Co. v. Parrish*,¹⁶⁶ thus opening the way for “highly deferential review of economic and contractual regulations.”¹⁶⁷

¹⁵⁶ See Ann Fromholz & Jeanette Laba, *#MeToo Challenges Confidentiality and Nondisclosure Agreements*, L.A. LAW., May 2018, at 12.

¹⁵⁷ *See id.* at 13.

¹⁵⁸ *Id.* at 12.

¹⁵⁹ *See id.* at 14.

¹⁶⁰ Shell, *supra* note 7, at 438–39.

¹⁶¹ *See id.* at 451.

¹⁶² *Id.* at 447.

¹⁶³ *Id.* at 448.

¹⁶⁴ *Id.* at 449.

¹⁶⁵ *Id.*

¹⁶⁶ 300 U.S. 379, 399 (1937).

¹⁶⁷ Shell, *supra* note 7, at 450.

Today, “the modern Court has made a sharp break with the past and elevated contract enforcement to the position of a preferred value in its jurisprudential order.”¹⁶⁸ In other words, the Court is more contract-friendly, rejecting “the notion that public policy defenses may be based on judicial preferences of any kind, moral or otherwise” and allowing parties to waive constitutional rights more freely than any prior period.¹⁶⁹

Two important points emerge from the historical evolution of the Court’s approach to contract law. First, the variation in the Court’s approaches over time refutes the idea that there is only one correct way to approach contract law.¹⁷⁰ Rather, the current infatuation with freedom of contract may reflect more the current ideology of Supreme Court justices and legal academics than the ultimate solution and approach for dealing with contracts.¹⁷¹ Second, the historical variation demonstrates how doctrines and analysis change to fit the times.¹⁷² For example, because of the intense pressures of the Great Depression, in *West Coast Hotel*, the Court abandoned its due process protection for contractual freedom, instead deferring to government legislation regulating business and contract.¹⁷³ Searching judicial scrutiny of government legislation intended to resolve the Great Depression could hamstring the government’s efforts; thus, the Court recognized that doctrine needed to change to make way for solutions to the challenges facing society at the time.¹⁷⁴ Likewise, the Court should now recognize that the emerging threats to free speech and safe workplaces posed by prevalent use of nondisclosure agreements calls for a new approach to contract law.¹⁷⁵

6. The Interests in Favor of Intervention in Nondisclosure Agreements Outweigh Those in Favor of Nonintervention

The nondisclosure agreements that this Note is concerned with are, as discussed, those that threaten the public’s access to important speech about public figures and cover up and enable misconduct.¹⁷⁶ Such nondisclosure agreements, like those concerning sexual affairs and sexual abuse allegations, are made for one purpose: to cover up one party’s bad conduct so that the party can avoid damage to its *reputation*.¹⁷⁷ In other words, powerful public figures use nondisclosure agreements as a tool to prevent speech that damages their reputations—even when that speech

¹⁶⁸ *Id.* at 452.

¹⁶⁹ *See id.*

¹⁷⁰ *See id.*

¹⁷¹ *See id.* at 433 (“[T]he author finds that the modern Court has shown more fidelity to an absolute principle of freedom to contract than the Courts that preceded it.”).

¹⁷² *See id.* at 436–37, 447.

¹⁷³ *Id.* at 449–50.

¹⁷⁴ *See id.*

¹⁷⁵ *See* discussion *supra* Section II.A.4.

¹⁷⁶ *See* discussion *supra* Section II.A.4.

¹⁷⁷ *See, e.g.,* Jan Frankel Schau, *Where Confidentiality and Transparency Collide: In Sexual Harassment Cases, Mediators Face a Modern-Day Dilemma*, ABA DISP. RESOL. MAG., Winter 2018, at 6, 7.

is true and important—without having to satisfy the usual demanding requirements of the actual malice test.¹⁷⁸ Precedent suggests that nondisclosure agreements should not enable parties to skirt the demands of defamation law in this way and that therefore intervention to prevent a loophole in the law is required.

For example, in *Cohen*, the Court drew attention to the fact that Cohen was not “attempting to use a promissory estoppel cause of action to avoid the strict requirements for establishing a libel or defamation claim.”¹⁷⁹ In a subsequent case, *Compuware Corp. v. Moody’s Investors Servs.*,¹⁸⁰ the Sixth Circuit interpreted the Court’s statement to mean that when a party claims a breach of confidentiality in order to avoid the requirements of a defamation claim, the actual malice standard *does* apply.¹⁸¹ In that case, a company, Compuware, asked Moody’s Investors Services to provide Compuware with a credit rating.¹⁸² However, when Moody’s published its rating for Compuware, Compuware was not happy with the rating and sued Moody’s for breach of contract.¹⁸³ The court, applying *Cohen*, found that the actual malice standard applied because the contract involved matters “central to the First Amendment” (e.g., free speech) and because Compuware complained “only of an injury to its reputation.”¹⁸⁴ Therefore, both *Compuware* and *Cohen* suggest that when the sole purpose of a breach of contract claim is to protect the reputation of a public figure or official, the First Amendment interest in protecting important speech trumps individuals’ reputational interests.¹⁸⁵ Thus, intervention to protect free speech is appropriate.

B. How Should the Court Intervene in Nondisclosure Agreements?

1. Which Test?: The “Actual Malice” Test

In tort cases, the Court has held that public officials and figures cannot recover for defamation or intentional infliction of emotional distress unless they prove the defendant had “actual malice.”¹⁸⁶ Specifically, the public plaintiff must show that the defendant’s speech “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.”¹⁸⁷ The Court should apply the actual malice test to nondisclosure agreements. In other words, a public official or public figure seeking

¹⁷⁸ See *Compuware Corp. v. Moody’s Inv’rs Servs., Inc.*, 499 F.3d 520, 533 (6th Cir. 2007) (discussing how a party to a confidentiality agreement uses that agreement solely to skirt the requirements of defamation law).

¹⁷⁹ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991).

¹⁸⁰ *Compuware*, 499 F.3d 520 (6th Cir. 2007).

¹⁸¹ *Id.* at 529–31.

¹⁸² *Id.* at 522.

¹⁸³ *Id.* at 523–24.

¹⁸⁴ *Id.* at 531–32.

¹⁸⁵ See *Cohen v. Cowles Media Co.*, 501 U.S. 663, 671 (1991); *Compuware*, 499 F.3d at 533.

¹⁸⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 56 (1988).

¹⁸⁷ *Id.*

to recover for the breach of a nondisclosure agreement would need to prove the breacher had actual malice.

2. Which Agreements?

Nondisclosure agreements can, as discussed, be formed for perfectly valid reasons, such as protecting a victim's privacy, protecting businesses from vindictive ex-employees, or protecting trade secrets.¹⁸⁸ However, nondisclosure agreements designed to skirt defamation principles and shield an individual from the consequences of his or her own bad conduct serve only the individual's reputational interests.¹⁸⁹ Therefore, the actual malice test should apply to those nondisclosure agreements designed to protect a public figure's reputation *solely* from the negative effects of his or her own conduct.

Courts can determine which nondisclosure agreements are formed for the purpose of protecting a person's reputation by asking and analyzing a few questions. First, *what* is the information covered under the agreement? If the agreement concerns information about the *conduct* of the party claiming a breach, the court can address the second question. Namely, what effect would disclosure have on the person's reputation? Finally, would a reasonable person believe reputational protection was the *sole* purpose for the agreement? These questions generally reveal whether the agreement was made solely to protect an individual's reputation from damage caused by his or her own actions; however, courts should be mindful of other asserted purposes of the agreement. Parties should not be able to weasel their way out of the actual malice test by asserting sham purposes. An example might be a public figure who states that his interest in a nondisclosure agreement preventing another from speaking about an affair or other misconduct is to protect his marriage. Perhaps the information will affect the figure's marriage, but that effect will likely be because the information reflects poorly on the figure—in other words, harms his reputation. Thus, tentatively, purposes that are ultimately rooted in avoiding negative consequences caused by a party's misconduct are sham purposes not entitled to any weight.

Requiring courts to scrutinize agreements and answer these questions may appear to invoke quite a bit of judicial discretion, and thus, uncertainty as well. However, courts already invoke judicial discretion in *enforcing* nondisparagement agreements.¹⁹⁰ Nondisparagement agreements require a party, for instance, not to “criticize, ridicule or make any statement which disparages or is derogatory of the other.”¹⁹¹ Some parties to nondisparagement agreements accused of violating those agreements argue that the agreements are too “indefinite” and ambiguous for a court to enforce them.¹⁹²

¹⁸⁸ See discussion *supra* Section I.C.

¹⁸⁹ See discussion *supra* Section II.A.6.

¹⁹⁰ See George L. Blum, Annotation, *Non-Disparagement or Gag Clause in Settlement Agreement*, 33 A.L.R. 7th Art. 7, 572–73 (2016).

¹⁹¹ *Id.* at 572.

¹⁹² Bruce A. Wessel, *Preliminary Injunctions Enforcing Contractual Nondisparagement Clauses*, 33 COMM. LAW. 20, 25 (2017).

After all, depending on the context, virtually “anything [one] might say . . . could be considered disparaging.”¹⁹³ Nonetheless, despite the open, rather vague language of nondisparagement agreements, courts have judged which statements are in fact disparaging.¹⁹⁴ In other words, courts have used their discretion to determine the reputational effect of nondisparagement agreements.

The proposed actual malice test simply asks courts to apply that same discretion to determine the effect of a breach of a nondisclosure agreement. Does the breach have a derogatory or disparaging effect on the party’s reputation? Just as parties to nondisparagement agreements may argue over whether or not speech was actually disparaging, here the parties may argue about the purposes of the agreement and effect of the breaching speech; ultimately, however, the decision is left to the court.¹⁹⁵ Furthermore, using a judicial determination of the effect of the breaching speech to decide whether the purpose of the agreement was to protect the party’s identity is preferable to looking at the party’s stated purpose. A party could easily twist the purpose of the agreement away from reputational protection and towards something else. For example, rather than claiming that the nondisclosure agreement with Stormy Daniels was designed to protect President Trump’s reputation, President Trump could claim that the agreement was meant to “save [his] marriage.”¹⁹⁶ Thus, basing intervention decisions on parties’ stated purpose(s), while perhaps simpler than the proposed judicial questions, would allow parties to again skirt the heightened requirements of defamation and other tort claims to suppress important speech.

Furthermore, the actual malice test should not apply to confidentiality agreements formed during litigation and discovery. Because discovery allows “wide-ranging inquiry into relevant, non-privileged information,” litigants often “obtain damaging information about an opposing party” during the course of litigation.¹⁹⁷ Accordingly, litigants often make confidentiality agreements to protect disclosure of damaging or embarrassing information obtained during litigation.¹⁹⁸ The actual malice test should not apply to such agreements, as they serve a useful role in helping to decrease the costs and time of litigation. Specifically, such agreements discourage parties from fishing for information that “has little or no relationship to the merits of the case” because the confidentiality agreements prevent the parties from revealing that information to use

¹⁹³ *Id.*

¹⁹⁴ *See, e.g., USA Techs., Inc. v. Tirpak*, No. 12-2399, 2012 WL 1889157, at *3–4 (E.D. Pa. May 24, 2012). While the parties disagreed on whether the statements at issue constituted disparaging remarks, the court decided that they were disparaging because they were “unfavorable remarks and criticisms.” *Id.*

¹⁹⁵ *See, e.g., id.*

¹⁹⁶ Charlie Savage & Kenneth P. Vogel, *The Legal Issues Raised by the Stormy Daniels Payment, Explained*, N.Y. TIMES (May 3, 2018), <https://nyti.ms/2FFPPcS>.

¹⁹⁷ Dustin B. Benham, *Tangled Incentives: Proportionality and the Market for Reputation Harm*, 90 TEMP. L. REV. 427, 428, 431–32 (2018).

¹⁹⁸ *Id.* at 428.

as leverage against their opponents.¹⁹⁹ Therefore, because the routine use of discovery nondisclosure agreements serves the valuable purpose of increasing litigation efficiency, rather than *solely* allowing wrongdoers to skirt defamation law, the actual malice test should not apply.

3. Defining “Public Figure”

There are three types of public figures.²⁰⁰ First, “all-purpose” public figures are those “who achieve such pervasive fame or notoriety [although that notoriety need not be nation or statewide] that they become public figures for all purposes and in all contexts.”²⁰¹ Courts may consider evidence such as statistical data on a person’s name recognition or evidence that others “alter or reevaluate their conduct in light of the plaintiff’s actions” in determining whether a plaintiff qualifies as an all-purpose public figure.²⁰² Second, while generally a person must have taken affirmative steps to attract public attention in order to be a public figure, if a defendant can prove by “clear evidence” that the person has become a “central figure in a significant public controversy,” and the matter in dispute has arisen in the context of that controversy, then that person may qualify as an “involuntary public figure.”²⁰³ Finally, a person may be a “limited purpose public figure”—someone who has “voluntarily inject[ed] [his or her self] into a particular public controversy and thereby become [a] public figure[] for a limited range of issues.”²⁰⁴

To ensure the protection of free speech about important public issues, while at the same time preventing judicial overreach into private agreements, the actual malice test should apply only to nondisclosure agreements formed by “all-purpose” and “involuntary” public figures (in addition to public officials). “All-purpose” and “involuntary” public figures feature in and affect matters of significant, widespread public interest, thereby posing the risk that the nondisclosure agreements that they form could suppress very important speech about public issues.²⁰⁵ In contrast, the limited significance of “limited purpose” public figures means that the nondisclosure agreements they form are much less likely to suppress information affecting important, far-reaching public issues.²⁰⁶ As such, the rationale behind applying the actual malice test to nondisclosure agreements, namely to ensure the public has access to core constitutional speech about public issues, applies much less strongly to nondisclosure agreements formed by “limited-purpose” public figures. Because the risk that important information will be suppressed is much lower, and to prevent the risk of too much

¹⁹⁹ *See id.* at 430–31.

²⁰⁰ *Wells v. Liddy*, 186 F.3d 505, 532 (4th Cir. 1999), *cert. denied*, 528 U.S. 1118 (2000); 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 141 (2019).

²⁰¹ *Wells*, 186 F.3d at 532.

²⁰² 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 141 (2019).

²⁰³ *Id.*

²⁰⁴ *Wells*, 186 F.3d at 532.

²⁰⁵ *See* 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 141 (2019).

²⁰⁶ *See id.*

judicial interference in private agreements, the actual malice test should not apply to “limited-purpose” public figure nondisclosure agreements.

C. Why the Actual Malice Test Is the Best Test for Intervention

1. Applying the Test Shows that the Test Protects Core Constitutional Speech While Still Allowing Nondisclosure Agreements to Perform the Important Function of Protecting Privacy, Economic Interests, and Freedom of Contract

A court applying the actual malice test to the facts of President Trump’s nondisclosure agreement with Stormy Daniels would not enforce that agreement. As President, Donald Trump is a public official.²⁰⁷ His status triggers the application of the rest of the questions of the test²⁰⁸: first, what information is covered under the agreement? The Trump-Daniels nondisclosure agreement covers information related to the sexual encounter the two had—in other words, the agreement covers the conduct of the party claiming a breach: President Trump.²⁰⁹ Because the agreement covers the conduct of the aggrieved, public-official party, the court moves on to the next question: what effect would disclosure have on President Trump’s reputation? Because society generally disfavors extramarital affairs, disclosure of the covered information could very well have a negative impact on President Trump’s reputation,²¹⁰ thereby triggering the final question: was reputational protection the sole purpose for forming the agreement? A reasonable person would likely answer in the affirmative; trying to come up with alternative purposes served by preventing disclosure of the information yields little fruit.

In contrast, a court applying the actual malice test to the facts of the nondisclosure agreement at issue in *Cohen* would enforce that agreement. The individual claiming breach was Cohen, an employee who worked on a gubernatorial candidate’s campaign.²¹¹ Given that gubernatorial candidates may affect state politics, and thus some range of public issues, Cohen *might* be characterized as a “limited-purpose” public figure.²¹² Even if Cohen did qualify as a “limited-purpose” public figure, however, the nondisclosure agreement actual malice test only applies to “all-purpose” and “involuntary public figures.”²¹³ Therefore, a court would decline to even apply the

²⁰⁷ Danny R. Veilleux, Annotation, *Who Is “Public Official” for the Purposes of Defamation Action*, 44 A.L.R. 5th 193, 222 (1996) (“[T]he United States Supreme Court in *Rosenblatt v. Baer* subsequently held that the ‘public official’ designation applies at the very least to those among the hierarchy of government employees who have, or appear to the public to have, substantial responsibility for or control over the conduct of governmental affairs.” (footnote omitted)).

²⁰⁸ See discussion *supra* Section II.B.2.

²⁰⁹ See Parks, *supra* note 132.

²¹⁰ See *Trump’s Alleged Affairs and GOP Voters*, *supra* note 155 (explaining that Trump’s alleged affairs could impact how voters feel about him).

²¹¹ *Cohen v. Cowles Media Co.*, 501 U.S. 663, 665–66 (1991).

²¹² See 53 C.J.S. *Libel and Slander; Injurious Falsehood* § 141 (2019).

²¹³ See discussion *supra* Section II.B.3.

actual malice test to Cohen's nondisclosure agreement, thus upholding the agreement and punishing the breaching party.

These applications show that the test achieves its purpose of protecting core constitutional speech about public issues concerning public officials or figures²¹⁴ while still being narrow enough to allow nondisclosure agreements to perform the important functions of protecting privacy, economic interests, and freedom of contract. Furthermore, another benefit of the actual malice test is that it enables important public speech to be protected without requiring the court to decide on a case-by-case basis if the prohibited speech is "core constitutional speech."²¹⁵ Such ad hoc evaluations of the nature of the speech could lead to "censorship" and "chill the free exchange of ideas."²¹⁶ Instead, the actual malice test is, in essence, a law of general application: speech about public officials and certain public figures is core constitutional speech, regardless of what particular judges may think.

When a court is in doubt as to whether the actual malice standard should prohibit enforcement of a nondisclosure agreement—as there are sure to be difficult cases, especially because whether someone qualifies as a "public figure" is not always clear—courts should fall back on the justifications behind the rule. In other words, courts should think about the importance of the speech to issues of public concern (for example, by considering the core-constitutional-right theory, as well as the public figure's degree of influence), public policy (for example, does the use of nondisclosure agreements contribute to public policy issues, such as enabling a culture of sexual harassment?), and what interests the nondisclosure agreement protects (for example, is the agreement just made to protect a powerful person's reputation?).

2. Addressing Potential Criticisms

Critics might be concerned that court intervention in nondisclosure agreements would invade people's privacy.²¹⁷ For instance, by refusing to enforce some nondisclosure agreements on free speech grounds, the Court could enable parties to those agreements to disclose private information. This concern is certainly valid; indeed, the Court has recognized that "[p]rivacy of communication is an important interest" that encourages "the uninhibited exchange of ideas and information among private parties."²¹⁸ In *Bartnicki v. Vopper*, however, the Court also held that "privacy concerns give way when balanced against the interest in publishing matters of public importance."²¹⁹

²¹⁴ See discussion *supra* Section II.A.3.

²¹⁵ Cf. Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203, 1207 (2008) (explaining that "speech about public persons must be both false and insincere . . . before it can be penalized" under the actual malice test).

²¹⁶ Erik Walker, Comment, *Defamation Law: Public Figures—Who Are They?*, 45 BAYLOR L. REV. 955, 959 (1993).

²¹⁷ See Garfield, *supra* note 37, at 275.

²¹⁸ *Bartnicki v. Vopper*, 532 U.S. 514, 532 (2001).

²¹⁹ *Id.* at 534.

In other words, while privacy is an important interest, the interest in free speech on matters of public importance may trump privacy concerns.²²⁰

Specifically, the Court in *Vopper* held that whether free speech interests trump privacy concerns is a decision that must be made in the “context of the instant case.”²²¹ For instance, in the context of *Vopper*, a case in which a statute made the disclosure of illegally intercepted communications a crime punishable by fine or imprisonment, free speech interests outweighed privacy interests.²²² The illegally intercepted speech in the case concerned a teachers’ union’s negotiations with a school, which the Court stated was a matter of “public importance.”²²³ Because the speech concerned a matter of public importance, the statute’s interest in protecting privacy was not sufficient to justify its punishment of the intercepted speech.²²⁴

Compared to the context of *Vopper*, the context and specifics of the nondisclosure agreements this Note addresses suggest that the privacy concerns are outweighed by the free speech interests implicated by these agreements. The Court in *Vopper* held that the speech concerned matters of important public interest, even though that speech only concerned a union’s bargaining with a single high school.²²⁵ Here, the nondisclosure agreements concern speech that has significance for the entire nation—in the case of President Trump’s agreement, speech about the conduct of our nation’s Chief Executive,²²⁶ and in the case of the Catholic Church’s nondisclosure agreements, speech about a religious institution that has members across the nation.²²⁷ Therefore, if the speech about a single high school in *Bartnicki* is important and public enough to topple privacy concerns,²²⁸ the speech in the nondisclosure agreements here is surely important enough to justify privacy intrusions.

Therefore, while staunch supporters of privacy may not be pleased, the Court’s own precedent suggests that the free speech enabled by not enforcing certain nondisclosure agreements warrants invading privacy. That being said, the proposed actual malice test does not necessarily open the door to all kind of privacy intrusions. For instance, because the actual malice test only applies to public officials and figures, “disclosures of trade secrets or domestic gossip and other matters of purely private concern” would continue to be protected by nondisclosure agreements.²²⁹ Furthermore, the narrowness of the proposed test also ensures that the vast majority of nondisclosure agreements would remain intact. The test *only* applies to public officials and figures

²²⁰ *Id.*

²²¹ *Id.* at 529 (quoting *Fla. Star v. B.J.F.*, 491 U.S. 524, 532–33).

²²² *Id.* at 534.

²²³ *Id.* at 518, 534.

²²⁴ *Id.* at 534.

²²⁵ *Id.* at 518.

²²⁶ See Parks, *supra* note 132.

²²⁷ See Ryan M. Philp, *Silence at Our Expense: Balancing Safety and Secrecy in Non-Disclosure Agreements*, 33 SETON HALL L. REV. 845, 845–47 (2003).

²²⁸ *Bartnicki*, 532 U.S. at 535.

²²⁹ *Id.* at 533.

who have formed nondisclosure agreements *solely* to protect their reputations from their own damning conduct—in other words, those who have formed nondisclosure agreements to skirt defamation law’s heightened requirements for public officials and figures.²³⁰ Additionally, because determining who qualifies as a public official or figure is sometimes difficult, judges should be conservative, only administering the actual malice test when it is clear that a party to the nondisclosure agreement is a public official or “all-purpose” or “involuntary” public figure.²³¹ The narrowness of the proposed test, as well as judicial conservatism, mean that the information of private persons and businesses trying to protect trade secrets—really anyone other than a public figure or official trying to shield his or her reputation from disparagement—will be protected by their nondisclosure agreements.

Critics might argue that the use of the actual malice test will allow courts to impose their personal value judgments—their discretion—on private agreements. However, those critics should keep in mind the reality that some degree of judicial discretion is an “inescapable aspect of legal decision-making.”²³² Indeed, the hands-off approach, the currently popular conception of contract law, itself reflects judicial values and opinions—specifically, the opinion that the value of complete freedom of contract should guide the judicial approach to contracts as much as possible. But is the value of complete freedom of contract really better than the value of protecting free speech?

Furthermore, while court intervention in nondisclosure agreements may be more difficult, requiring more complex judgments and analysis by courts rather than a simple rule upholding all voluntarily formed private agreements. The easiest path is not always the best path: “[j]ust because public policy is difficult to determine does not mean that the quest should be abandoned.”²³³ Also, the actual malice test really does *not* allow for much judicial discretion.²³⁴ A court need only decide whether the person is a public official or figure, and there are clear definitions from precedent guiding

²³⁰ See discussion *supra* Section II.A.6.

²³¹ See discussion *supra* Section II.B.3.

²³² See Richard L. Marcus, *Slouching Toward Discretion*, 78 NOTRE DAME L. REV. 1561, 1562 (2003); see also Keith Hawkins, *The Use of Legal Discretion: Perspectives from Law and Social Science*, in THE USES OF DISCRETION 11, 13 (1992) (Keith Hawkins ed., 1992) (“Discretion is heavily implicated in the use of rules: interpretive behaviour is involved in making sense of rules, and in making choices about the relevance and use of rules.”).

²³³ Bast, *supra* note 144, at 705.

²³⁴ See Susan M. Gilles, *Public Plaintiffs and Private Facts: Should the “Public Figure” Doctrine Be Transplanted into Privacy Law?*, 83 NEB. L. REV. 1204, 1233 (2005) (“The Court also offered a second reason for the adoption of the public figure test: it avoided the need for case-by-case balancing, and instead offered a definitional balancing approach. As the Court put it: ‘Because an *ad hoc* resolution of the competing interests at stake in each particular case is not feasible, we must lay down broad rules of general application.’ Thus in libel law, the public figure doctrine requires the Court to determine to which category a plaintiff belongs, and thereby, what level of fault the plaintiff must prove. It does not call for an individualized, multifactor balancing test, and indeed such a test was explicitly rejected by the Court.” (footnotes omitted) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 343–44 (1974))).

that determination.²³⁵ The determination then requires the court to answer a few more, relatively simple questions.²³⁶ In a sense, the actual malice test is quite similar to the hands-off approach to contracts: its initial adoption reflects a certain judicial preference or value, but once the approach is adopted, there's little room for judicial discretion.

Furthermore, even if the actual malice test *is* a discretionary standard,²³⁷ there are benefits to discretion. Judicial discretion can repair gaps and loopholes in the law. For example, the prevalent use of nondisclosure agreements to suppress evidence of sexual harassment in the workforce suggests the current hands-off approach to contract law allows for suppression of important speech.²³⁸ “Discretion can let the decision-maker do justice”²³⁹ by filling in this dangerous loophole. In fact, legislatures and courts sometimes purposely create discretionary rules and standards in recognition that “cases will arise in circumstances so varied, so complex, and so unpredictable that satisfactory rules that will accurately guide decision-makers to correct results in a sufficiently large number of cases cannot be written.”²⁴⁰ In other words, discretion is not necessarily the enemy—in fact, discretion may be an important solution to legal problems and loopholes. Certainly a blind preference for upholding private agreements is potentially worse than some thoughtful discretion!

Proponents of judicial efficiency may also find fault with the proposed actual malice test. A hands-off approach to contracts is, theoretically, simple—when a contract is breached, the breacher pays, period. Judicial intervention could potentially drag out contract litigation, leading to more cases and more expenses for plaintiffs and defendants.²⁴¹ However, such a view is overly simplistic and does not necessarily reflect reality. For instance, take the nondisclosure agreement between Stormy Daniels and President Trump. Daniels sued Trump in 2018, seeking a declaration that their agreement was void.²⁴² Specifically, Daniels argued that no agreement had been formed because Trump did not consent to the agreement and the proposed agreement had an

²³⁵ See discussion *supra* Section II.B.3.

²³⁶ See discussion *supra* Section II.B.2.

²³⁷ *But see Gertz*, 418 U.S. at 346. *Gertz* suggests that the Supreme Court does not think the actual malice test is actually a discretionary standard. In that case, the Court reaffirmed that a public figure is one who has assumed an influential role, rather than one who has not assumed such a role but whose reputation was injured by a defamatory falsehood related to an issue of public interest. *Id.* The Court rejected the “public interest” public figure test because it would require judges to “decide on an *ad hoc* basis” what constitutes a public interest. *Id.* In rejecting that test because it involved too much judicial discretion, the Court implied that the traditional public figure test is not discretionary. *Id.*

²³⁸ See Fromholz & Laba, *supra* note 156, at 13.

²³⁹ Carl E. Schneider, *Discretion and Rules: A Lawyer's View*, in *THE USES OF DISCRETION* 47, 61 (Keith Hawkins ed., 1992).

²⁴⁰ *Id.* at 62.

²⁴¹ Scheindlin & Fink, *supra* note 29.

²⁴² *Clifford v. Trump*, No. CV 18-02217 SJO (FFM), 2018 WL 3435419, at *2 (C.D. Cal. Apr. 27, 2018).

illegal purpose.²⁴³ Daniels also demanded a jury trial.²⁴⁴ In short, Daniels's suit demonstrates that breaches of nondisclosure agreements are not always simple and efficient affairs. Indeed, parties whose breaches expose them to substantial financial loss—in Daniels' case, as much as one million dollars per breach²⁴⁵—are likely to fight the agreement any way they can. If a First Amendment defense is unavailable, parties like Daniels will be able to find other legal theories to contest enforcement of the nondisclosure agreement. In fact, perhaps the actual malice test could make nondisclosure agreement proceedings *more* efficient. A court could first determine whether the actual malice test would preclude enforcement of a valid agreement. If so, the court has no need to address whether there was in fact an agreement or whether it was void on other grounds.

CONCLUSION

The Supreme Court has repeatedly reversed course. From the Court's varied approaches to contract law in the *Lochner* and Warren eras, to the Court's unique stances in *Shelley* and *Marsh*, the Court's perspectives on contracts and free speech have evolved as society has changed.²⁴⁶ Specifically, the Court has acted to achieve a balance between private freedom and protecting constitutional interests. Accordingly, the Court should now change its approach to nondisclosure agreements. While the Court typically takes a "hands-off" approach to private agreements, in today's age, such an approach significantly threatens access to extremely important speech. Powerfully situated wrongdoers are increasingly using nondisclosure agreements to protect their reputations from their own misconduct and exploiting a loophole in defamation law. Nondisclosure agreements may serve important purposes, from protecting privacy to protecting trade secrets, but their abuse robs society of speech about important public concerns—speech that, according to the Court, forms the very core of the First Amendment. Therefore, the Court should require a public figure who seeks to recover for a breach of a nondisclosure agreement formed solely to protect the figure's reputation from his own misconduct to satisfy the actual malice test. Applying the actual malice test will bring needed consistency to the Court's approach to actions seeking to recover for disparaging speech, maintain significant freedom of contract for private parties, and—most importantly—protect valuable free speech.

²⁴³ *Id.*

²⁴⁴ *Id.*

²⁴⁵ Vanessa Romo, *Stormy Daniels Files Suit, Claims NDA Invalid Because Trump Didn't Sign at the XXX*, NPR (Mar. 7, 2018, 10:17 AM), <https://www.npr.org/sections/thetwo-way/2018/03/07/591431710/stormy-daniels-files-suit-claims-nda-invalid-because-trump-didnt-sign-at-the-xxx> [<https://perma.cc/TPT2-KB49>].

²⁴⁶ See discussion *supra* Section II.A.5.