

**NEW YORK UNIVERSITY
ANNUAL SURVEY OF
AMERICAN LAW**

**VOLUME 82
ISSUE 2**

NEW YORK UNIVERSITY SCHOOL OF LAW

ARTHUR T. VANDERBILT HALL

Washington Square

New York City

New York University Annual Survey of American Law
is in its eighty-fourth year of publication.

L.C. Cat. Card No.: 46-30523
ISSN 0066-4413
All Rights Reserved

New York University Annual Survey of American Law is published biannually at 110 West 3rd Street, New York, New York 10012. Subscription price: \$30.00 per year (plus \$4.00 for foreign mailing). Single issues are available at \$16.00 per issue (plus \$1.00 for foreign mailing). For regular subscriptions or single issues, contact the Annual Survey editorial office. Back issues may be ordered directly from William S. Hein & Co., Inc., by mail (2350 North Forest Rd., Getzville, NY 14068), phone (800-828-7571), fax (716-883-8100), or email (order@wshein.com). Back issues are also available in PDF format through HeinOnline (<http://heinonline.org>).

All works copyright © 2026 by the author, except when otherwise expressly indicated. For permission to reprint an article or any portion thereof, please address your written request to the *New York University Annual Survey of American Law*.

Copyright: Except as otherwise provided, the author of each article in this issue has granted permission for copies of that article to be made for classroom use, provided that: (1) copies are distributed to students at or below cost; (2) the author and journal are identified on each copy; and (3) proper notice of copyright is affixed to each copy.

Manuscripts: The Annual Survey invites the submission of unsolicited manuscripts. Text and citations should conform to the 21st edition of *The Bluebook: A Uniform System of Citation*. Please enclose an envelope with return postage if you would like your manuscript returned after consideration.

Editorial Office: 110 West 3rd Street, New York, N.Y. 10012

(212) 998-6540

(212) 995-4032 Fax

<http://www.annualsurveyofamericanlaw.org>



*For what avail the plough or sail
Or land or life, if freedom fail?*
EMERSON

**NEW YORK UNIVERSITY
ANNUAL SURVEY OF AMERICAN LAW
2025-2026 BOARD OF EDITORS**

Editor-in-Chief
TOELLA PLIAKAS

Managing Editors
SCOTT BAKER
ELIZABETH CHO
SIBUSISIWE DLANGALALA
JEREMY EAGAN KERN
IAN MUNDY-JACKSON
MAX A. PALEY

Executive Articles Editors
SARAH FIELD
ANDY GABLER
LYDIA HILL
ELIZABETH MARCINKOWSKI
LEOR ROSEN
CARTER SMITH

Notes Editors
ELLA PALLEMBERG
CAYLIE TUERACK

Senior Articles Editor
MILAN SANI

Development Editors
GRANT GEBETSBERGER
CHUDI IKPEAZU
BENJAMIN KLAFTER
ELLEN STOLER

Inclusivity Editor
KATRINA HERNANDEZ

Online Editor
SCOTT ABRAMOWITZ

Articles Editors
MATTHEW FOURACRE
SOPHIA GRIFFTH-GORGATI

AIDAN ARASASINGHAM
ILANA COHEN
ELIZABETH COFFIE
ANDREW COSTELLA
SHRIYA CHITALE
ANNA FIGHERA
HANNAH GELBER
SAMANTHA GORDON
SAMUEL HARRISON
HANNAH HUDES

Staff Editors
SOOBEAN JO
MAX KESSLER
AMY KIM
AUDREY MOVIE KIM
SAMANTHA KRITZER
ZOE LEE
ALAINA MCGOWEN
SOPHIA MYSAK
PATRICK O'BRIEN
NOAH PERCY

LUKE PICHINI
VICTORIA SANSONE
LANGLEY SEIBERT
TALIA SHEMONY
ERICKA SHIN
ADAM TOBIN
GABRIELA TORRES
ROBBIE WERDIGER
KIA WITT
LINCOLN ZALESKI

SUMMARY OF CONTENTS

ARTICLES

- NAVIGATING RULE 65(d)(2) POST-*HAVENS V. JAMES*:
A QUIET BATTLEGROUND IN DEFINING THE CONTOURS
OF JUDICIAL POWER
Cosimo L. Fabrizio 213
- JUDGMENT HOLDERS IN SOVEREIGN DEBT RESTRUCTURINGS
W. Mark C. Weidemaier & F. Andrew Hessick 243

NOTES

- THE TWO BATTLEFIELDS OF COPYRIGHT'S LEVELS OF
GENERALITY ANALYSIS: SUBSTANTIAL SIMILARITY AND
FAIR USE
Ella Pallenberg 279
- SECTION 230 AT A CROSSROADS:
SURVIVAL REQUIRES REFORM
Sarah Rosenberg 309

NAVIGATING RULE 65(d)(2) POST-HAVENS V. JAMES: A QUIET BATTLEGROUNDS IN DEFINING THE CONTOURS OF JUDICIAL POWER

COSIMO L. FABRIZIO*

Can a person be bound by a court's order even though they were not named in it? If so, under what circumstances? Federal Rule of Civil Procedure 65(d) ("Rule 65") provides for judicial orders to have binding effect on the following parties when they have received adequate notice of an injunction: "(A) the parties; (B) the parties' officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B)." In Havens v. James, the Second Circuit held that a district court's injunction could not prohibit an anti-abortion protestor from engaging in protest activity because he was not named in the court's order, nor was he acting in concert or participation with a named party. Havens surfaced several points of tension for courts when assessing whether a non-named party acted in "active concert or participation" with an explicitly enjoined party, pursuant to Rule 65. The sources of tension present in Havens, and potential resolutions to this tension, are the subject of this Article.

This piece contributes to existing literature through its discussion of Havens and its deployment of the Supreme Court's aiding-and-abetting framework provided in Twitter, Inc. v. Taamneh. Informed by an examination of the underlying legal traditions at tension in Havens and a survey of Rule 65(d) case law, the piece offers a two-step approach for courts to navigate Rule 65(d) inquiries that considers (1) whether the non-party's participation satisfies the elements of civil aiding-and-abetting liability, and (2) whether

* Associate, Wachtell, Lipton, Rosen & Katz, incoming Law Clerk to the Honorable Judge Barrington D. Parker Jr., United States Court of Appeals for the Second Circuit. I am grateful to Professor Martha Minow (former Dean of Harvard Law School) for her supervision and guidance, and to the Honorable Raymond J. Lohier, Jr., United States Court of Appeals for the Second Circuit, for his encouragement and introduction to this case while I was a summer intern in his chambers. I also thank Professor Glenn Cohen (Assistant Dean at Harvard Law School) for reviewing an early draft and offering substantive feedback incorporated into the piece; Professor Caley Petrucci (Assistant Professor of Law at the University of San Diego School of Law) for detailed edits to an advanced draft; and Adam Murphy (Clinical Adjunct Professor in Federal Appellate Law at New York University School of Law) for helpful conversations about the project. Finally, I am thankful for the editorial board and staff of the N.Y.U. Annual Survey of American Law for their diligent review and thoughtful edits.

a substantial public interest is implicated. Drawing upon desegregation-era case law, the piece argues that courts must adjust the breadth of their Rule 65(d) interpretations as a function of the nature and strength of the government and public interest underlying an injunction. The piece concludes by proposing an amendment to Rule 65(d) to codify this interpretive guidance.

TABLE OF CONTENTS

I. Introduction	215
II. Paradigmatic Case Study: <i>Havens v. James</i>	216
III. Distilling Interpretive Guidance from Rule 65's History and Competing Legal Traditions.	220
A. Rule 65's Third-Party Circumvention Mitigation Function Draws from the Legal Tradition of Aiding-and-Abetting Liability.	220
B. Traditional Due Process Considerations Constrain Rule 65's Effect	222
C. Rule 65 Embraces a Legal Tradition of Promoting Efficiency and Fairness Through Resource Conservation, Similar to Doctrines of Preclusion.	225
IV. Rule 65 Doctrinal Survey	227
A. Courts Have Embraced Several Modes of Analysis to Guide Their Rule 65 Non-Party Inquiries.	227
1. Courts Sometimes Embrace a Structural Analysis and Consider Whether a Non-Party's Independence Is Compromised by the Nature of Their Relationship with the Enjoined Party	227
2. Courts Have Also Engaged in a Functional Analysis That Mirrors an Aiding-and-Abetting Analysis and Considers the Actual Interaction Between Parties	230
3. Courts Have Also Employed a Flexible Purposivist Analysis That Accounts for the Underlying Public Interest Protected by the Injunction	232
B. Doctrinal Survey Reveals Irregularity and Unresolved Uncertainty in Rule 65(d)'s Application.	233
V. Crafting a Framework to Guide Rule 65(d) Inquiries	235
A. Courts Should Use the Elements of Civil Aiding-and-Abetting Liability to Evaluate a Non-Party's Participation, Including the Substantiality Requirement Set Forth in <i>Twitter, Inc. v. Taamneh</i>	236
1. Courts Should Interpret Rule 65(d) to Invoke an Aiding-and-Abetting Analysis.	236
2. Courts Should Adopt the Substantiality Requirement Set Forth in <i>Twitter, Inc. v. Taamneh</i>	238

B. Courts Should Also Evaluate the Risk of Undefined
Parties Disrupting the Injunction 239

C. Congress Should Amend Rule 65 to Codify Interpretive
Guidance 241

VI. Conclusion 242

I.
INTRODUCTION

Can a person be bound by a court’s order even though they were not named in it? If so, under what circumstances? Subsection (d) of Federal Rule of Civil Procedure 65 (“Rule 65”) provides for judicial orders to have binding effect on the following parties when they have received adequate notice of an injunction: “(A) the parties; (B) the parties’ officers, agents, servants, employees, and attorneys; and (C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).”¹ In *Havens v. James*, the Second Circuit held that a district court’s injunction could not prohibit an anti-abortion protestor from engaging in protest activity because he was not named in the court’s order, nor was he acting in concert or participation with a named party.² *Havens* surfaced several points of tension for courts when assessing whether a non-named party acted in “active concert or participation” with an explicitly enjoined party, pursuant to Rule 65. *Havens* highlights enduring questions about the reach of Rule 65 and the circumstances under which courts may bind non-parties to their orders. This Article explores those tensions, situates them within recent discourse over judicial power, and proposes a framework for resolving them.

This piece contributes to existing literature³ through its discussion of *Havens* and its deployment of the Supreme Court’s aiding-and-abetting framework provided in *Twitter, Inc. v. Taamneh*.⁴ Part II begins by providing an overview of *Havens*. Part III continues

1. FED. R. CIV. P. 65(d)(2).
2. 76 F.4th 103, 123 (2d Cir. 2023).
3. The limited writing on Rule 65(d) typically surveys recent applications of the Rule without providing substantive analysis on the Rule’s effect or issues with the current application of the Rule, let alone suggesting any potential solutions. See, e.g., C. C. Marvel, Annotation, *Who, Under Federal Rule 65(d) and State Counterparts, Are Persons “In Active Concert or Participation” with Parties to Action so as to Be Bound by Order Granting an Injunction*, 97 A.L.R.2d 490 § 2 (1964) (surveying and summarizing relevant case law); Ronald I. Mirvis, Annotation, *Who, Under Rule 65(d) of Federal Rules of Civil Procedure, Are Persons “In Active Concert or Participation” with Parties to Action so as to Be Bound by Order Granting Injunction*, 61 A.L.R. Fed. 482 § 2 (1983) (same).
4. 598 U.S. 471, 504 (2023).

with a discussion of Rule 65's history and the competing legal traditions underlying the Rule. Part IV surveys Rule 65 case law to illustrate when courts have found non-parties sufficiently in "active concert or participation." Guided by Rule 1, which calls for the Federal Rules of Civil Procedure (FRCP) to be construed to "secure . . . just, speedy, and inexpensive determination[s],"⁵ Part V then proposes a framework to guide courts in their Rule 65(d) analysis. Specifically, Part V argues that courts should approach Rule 65(d) with a two-step inquiry: (1) whether the non-party's participation satisfies the elements of civil aiding-and-abetting liability, and (2) whether a substantial public interest is implicated. Part V also appeals to Congress to codify this interpretive guidance by amending Rule 65(d) such that the Rule's use of "active concert or participation" is clarified to be an invocation of aiding-and-abetting liability, subject to the multifactor substantiality framework set forth in *Twitter*. Part VI concludes with a brief summary of the paper's key points.

II.

PARADIGMATIC CASE STUDY: *HAVENS V. JAMES*

Havens arises out of a nearly thirty-year-long clash between advocates of reproductive health facilities and anti-abortion protestors. In 1990, a group of health-care providers filed suit in the Western District of New York claiming several anti-abortion organizations and individuals had violated the constitutional rights of their patients.⁶ The lawsuit alleged that the anti-abortion defendants had violated several state laws and engaged in a conspiracy to deny abortion-seeking women equal protection under federal law.⁷ In 1992, the district court granted the plaintiffs' request for a preliminary injunction and prohibited the defendants from demonstrating within fifteen feet of facilities operated by the plaintiffs, among other limitations.⁸

5. FED. R. CIV. P. 1.

6. *Pro-Choice Network of W.N.Y. v. Project Rescue W.N.Y.*, 799 F. Supp. 1417, 1422 (W.D.N.Y. 1992), *aff'd in part, rev'd in part sub nom.*, *Pro-Choice Network of W.N.Y. v. Schenck*, 67 F.3d 359 (2d Cir. 1994), *vacated in part*, 67 F.3d 377 (2d Cir. 1995) (en banc), *aff'd in part, rev'd in part*, 519 U.S. 357 (1997).

7. *Id.* ("The remaining six causes of action assert claims based on New York State law. They include: (1) violation of N.Y.Civ.Rights Law § 40-c, and N.Y.Exec.Law § 296; (2) tortious interference with business; (3) trespass; (4) intentional infliction of emotional harm; (5) tortious harassment; and (6) false imprisonment.").

8. *Id.* at 1440. The injunction also prevented the use of amplified sounds that would interfere with "the rights of anyone not in violation of this Order." *Id.* at 1440-41.

Two years later, in 1994, in response to “escalating violence and intolerance at [reproductive] health care facilities nationwide,”⁹ Congress enacted the Freedom of Access to Clinic Entrances Act of 1994 (FACE).¹⁰ Notwithstanding the 1992 injunction or the federal FACE legislation, anti-abortion protests persisted in western New York.¹¹

By the fall of 1998, protests had escalated significantly, prompting additional litigation. When anti-abortion organizers began planning large-scale demonstrations at abortion-providing facilities in Buffalo and Rochester—deemed “Operation Save America”—New York’s Attorney General and several reproductive health providers filed for injunctive relief on multiple grounds, including alleged violations of FACE.¹² The district court granted the plaintiffs’ request and enjoined a new group of anti-abortion defendants with a stricter order than previously imposed.¹³ Among the parties named in the injunction was Mary Melfi, who is referred to as Mary Jost in subsequent litigation.¹⁴ In 2005, this preliminary injunction “was converted into a permanent injunction,” which is referred to hereinafter as the “Arcara Injunction.”¹⁵ In relevant part, the Arcara Injunction prohibited defendants from “entering the public sidewalk within fifteen feet of the entrance of any abortion clinic in the Western District of New York and from aiding and abetting others to do the same.”¹⁶

The facts of *Havens* arise against this background. In 2017, Jim Havens engaged in anti-abortion protesting outside a Planned Parenthood facility in Rochester, New York.¹⁷ Soon thereafter, he formed the ROC Love Will End Abortion association (ROC) to encourage others to do the same.¹⁸ He was subsequently informed by Planned Parenthood staff, and city and state officials, that the

9. See N.Y. PENAL LAW § 240.70 cmt. (McKinney 1999).

10. Freedom of Access to Clinic Entrances Act of 1994, Pub. L. No. 103–259, 108 Stat. 694 (codified at 18 U.S.C. § 248). In 1999, the New York Legislature enacted the Clinic Access and Anti-Stalking Act, which mirrored FACE and broadly prohibited interference with the administration of abortion services and enabled claimants to pursue both criminal penalties and civil remedies. See N.Y. PENAL LAW § 240.70 cmt. (describing the impact of the New York law and characterizing it as “virtually a verbatim copy of the federal FACE”).

11. Spitzer *ex rel.* New York v. Operation Rescue Nat’l, 273 F.3d 184, 191 (2d Cir. 2001).

12. *Id.*

13. *Id.* at 192.

14. Havens v. James, 76 F.4th 103, 108 (2d Cir. 2023).

15. *Id.*

16. *Id.* at 107.

17. *Id.*

18. *Id.*

Arcara Injunction barred him and his ROC associates from entering the fifteen-foot “buffer zone.”¹⁹ In response, Havens sought a declaration that he was not subject to the terms of the Arcara Injunction and a preliminary injunction to prevent city and state officials from enforcing the Arcara Injunction against him.²⁰

Finding Havens bound by the Arcara Injunction under FRCP 65(d), the District Court for the Western District of New York dismissed his complaint with prejudice and denied his request for a preliminary injunction.²¹ As part of its Rule 65(d) analysis,²² the court determined that Havens was sufficiently put on notice of the Arcara Injunction when a Planned Parenthood security guard warned him that his conduct violated the order.²³ The district court then considered whether Havens had acted in concert and participation with named parties to the Arcara Injunction, including Mary Jost.²⁴ The court determined that Havens had (1) held training sessions for his ROC association at a facility run by Jost, the Focus Pregnancy Help Center; (2) benefited from his protest activities being promoted by Jost’s websites; and (3) received ROC recruitment support from Jost, who solicited anti-abortion participants for Havens’s organization.²⁵

On appeal, the Second Circuit reconsidered whether Havens was bound by the Arcara Injunction.²⁶ The court clarified that, pursuant to Rule 65(d), a non-named party to an injunction—here, Havens—is only bound by the injunction if they are found to have acted in active concert or participation with a named party—here,

19. *Id.* at 109.

20. *Id.* at 110.

21. *Havens v. James*, 435 F. Supp. 3d 494, 505, 509 (W.D.N.Y. 2020), *rev’d and vacated*, 76 F.4th 103 (2d Cir. 2023).

22. The court did not attempt to treat Havens as an agent under prong B of Rule 65(d)(2). *See id.* at 503–04 (eschewing any analysis that viewed Havens as an agent of the named enjoined parties); *see also* Reply Brief for Plaintiff-Appellant at 23, *Havens*, 76 F.4th 103 (No. 20-0664-cv) (“[T]he Complaint expressly denies the existence of an agency relationship between Plaintiffs and the named defendants and there are no facts alleged which would support a finding, as a matter of law, of an agency relationship.”).

23. *Havens*, 435 F. Supp. 3d at 505.

24. *Id.* at 501, 505.

25. *Id.* at 505. *But see* Reply Brief for Plaintiff-Appellant at 10 n.2, *Havens*, 76 F.4th 103 (No. 20-0664-cv) (“In its analysis, the District Court stated that the named defendants ‘solicit[ed] membership’ for ROC. . . . There is no basis in the record for that conclusion. Even if Paragraph 43 could be reasonably construed as an allegation of the truthfulness of the facts reported to Havens by the newspaper reporter, there is no way to interpret Paragraph 43 or any other allegation in the Complaint as asserting that the named defendants recruited members for ROC, which is not even a membership organization.” (alteration in original) (citation omitted)).

26. *Havens*, 76 F.4th at 107–08.

Jost.²⁷ Ultimately, the Second Circuit reversed the district court's dismissal of Havens's complaint.²⁸ Writing for the majority, Judge Steven Menashi concluded that the facts considered by the district court were insufficient to conclude Havens had acted in active concert or participation with Jost.²⁹ Since Havens was also not a named party to the Arcara Injunction, the court reasoned that its terms could not bind him under Rule 65.³⁰ Though the majority acknowledged Havens had been aided by Jost, it found no evidence to support the notion "that Havens accepted her assistance 'for the benefit of, or to assist,' Jost in violating the injunction"³¹ and clarified that "Rule 65(d) does not permit Havens to be held in contempt for being aided and abetted."³² The court expressed a concern that, if applied too liberally, Rule 65(d) might expand injunctive power such that courts could "'make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law' and who have 'had no day in court.'"³³

Judge Raymond Lohier dissented. In agreement with the district court, Judge Lohier reasoned that "under any fair reading of the complaint now before us, Havens and Jost were 'coordinat[ing] [their] activities' . . . to enable Jost to do through Havens what she could not do directly: cross the buffer zone and encourage others to do the same."³⁴ Judge Lohier argued that Havens's motive was an irrelevant consideration, evidenced by aiding-and-abetting law. There, civil liability does not require a showing that the aider and abettor intended to benefit the principal, nor does criminal conspiracy law require a

27. *Id.* at 108, 111.

28. *Id.* at 121.

29. *See id.* at 118 (rejecting the State's theory of aiding-and-abetting liability and holding that, even if this theory were viable, the alleged facts were insufficient to establish aiding and abetting).

30. *Id.* at 123.

31. *Id.* at 121 (quoting *Arista Recs., LLC v. Tkach*, 122 F. Supp. 3d 32, 36 (S.D.N.Y. 2015); *see also Havens*, 76 F.4th at 112 ("Every injunction issued by a district court automatically forbids others . . . from assisting in a violation of the injunction." (alteration in original) (quoting *NML Cap., Ltd. v. Republic of Argentina*, 727 F.3d 230, 243 (2d Cir. 2013))).

32. *Havens*, 76 F.4th at 119.

33. *See id.* at 116 (citation omitted) (first quoting *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13 (1945); and then quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930)).

34. *Id.* at 124–25 (Lohier, J., dissenting) (quoting *Roe v. Operation Rescue*, 54 F.3d 133, 140 (3d Cir. 1995)).

showing of intent once it is established that parties willfully entered into a joint enterprise for an unlawful purpose.³⁵

The court's disagreement in *Havens* illustrates the tension between Rule 65(d)'s function and its competing legal traditions. The majority's concern for judicial overreach invokes our long-standing tradition of ensuring individuals have an opportunity to be heard, or *their day in court*, in pursuit of fair process. Judge Lohier's dissent seeks to preserve the integrity of judicial orders by preventing third party circumvention. Part III will explore these competing legal traditions to better contextualize their deployment in the wide range of judicial approaches detailed in Part IV.

III.

DISTILLING INTERPRETIVE GUIDANCE FROM RULE 65'S HISTORY AND COMPETING LEGAL TRADITIONS

Since the FRCP were first codified by Congress in 1937, Rule 65 has been amended seven times.³⁶ Only the 2007 amendments, however, concerned Rule 65(d),³⁷ and those amendments provided only minor clarifications.³⁸ Given Rule 65's limited legislative history, this Part distills interpretive guidance from the legal traditions underlying Rule 65(d). This Part explores the legal traditions underlying Rule 65(d)'s purpose—circumvention mitigation and resource management—and those which give rise to its due process constraint.

A. *Rule 65's Third-Party Circumvention Mitigation Function Draws from the Legal Tradition of Aiding-and-Abetting Liability*

As the Supreme Court explained in *Regal Knitwear Co. v. NLRB*, Rule 65(d) draws upon the common-law doctrine that an injunction not only binds named parties but also those who have a legal relationship or share an interest with the named parties, are represented

35. See *id.* at 126, 128–29 (Lohier, J., dissenting) (summarizing prior decisions that did not consider intent).

36. 11A WRIGHT & MILLER'S FEDERAL PRACTICE & PROCEDURE § 2941 (3d. ed. 2026).

37. *Id.*

38. See FED. R. CIV. P. 65 advisory committee's note to 2007 amendment ("Rule 65(d)(2) clarifies two ambiguities in former Rule 65(d). The former rule was adapted from former 28 U.S.C. § 363, but omitted a comma that made clear the common doctrine that a party must have actual notice of an injunction in order to be bound by it. Amended Rule 65(d) restores the meaning of the earlier statute . . .").

by the named parties, or are otherwise subject to their control.³⁹ Extending the effect of judicial orders to non-named parties ensures that “defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors.”⁴⁰ Judge Lohier echoed Rule 65’s function as a mitigant to third-party injunction nullification when he suggested that applying Rule 65(d) too sparingly could “undermine the authority of federal district courts to enforce their injunctive decrees. . . .”⁴¹

Yet, the early history of Rule 65 does not speak to a concern for the circumvention of judicial orders. Before the FRCP, plaintiffs seeking equitable relief—which was distinct from legal relief at the time—had their claims governed by special federal equity rules.⁴² Rule 65’s predecessor, Equity Rule 73, bears some substantive similarities to the current Rule.⁴³ For instance, the Equity Rule permitted courts to enjoin only those parties who had received adequate notice unless immediate and irreparable harm would result from delay.⁴⁴ But Equity Rule 73 did not stipulate if or when an injunction could bind a non-named party.⁴⁵

Instead, Rule 65(d)’s circumvention-mitigation function finds a better anchor in the tradition of aiding-and-abetting liability. Rooted in ancient criminal law,⁴⁶ the doctrine of aiding and abetting allows courts to extend liability beyond the primary wrongdoer to a culpable third party.⁴⁷ Congress passed 18 U.S.C. § 2 in 1909 to codify aiding-and-abetting liability’s extension to federal crimes, which the Supreme Court interpreted to mean that “those who provide knowing aid to persons committing federal crimes, with the intent to facilitate the crime, are themselves committing a crime.”⁴⁸

In *Central Bank of Denver*, the Supreme Court explained that criminal aiding and abetting has an analog in tort’s “concert of

39. 324 U.S. 9, 14 (1945).

40. *Id.*

41. *Havens v. James*, 76 F.4th 103, 130 (2d Cir. 2023) (Lohier, J., dissenting).

42. *See id.* at 111–12, 112 n.9 (majority opinion) (noting that after the fusion of law and equity by the FRCP, Rule 65(d) did not alter basic equity practice).

43. *See Cathey v. Norfolk & W. Ry. Co.*, 228 F. 26, 29 (4th Cir. 1915) (providing the text of Equity Rule 73).

44. *See id.*; *see also* Wallace R. Lane, *Federal Equity Rules*, 35 HARV. L. REV. 276, 297 (1922) (discussing the application of Equity Rule 73).

45. *Cathey*, 228 F. at 29.

46. *See* *Cent. Bank of Denv., N.A. v. First Interstate Bank of Denv.*, 511 U.S. 164, 181 (1994) (“Aiding and abetting is an ancient criminal law doctrine.”).

47. *See id.* (discussing the extension of third-party liability under the aiding-and-abetting doctrine).

48. *Id.*

action principle.”⁴⁹ The *Second Restatement of Torts* defined concert of action as an “act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result[,]” although “[t]he agreement need not be expressed in words and may be implied and understood to exist from the conduct itself.”⁵⁰ Central to this liability regime is the idea that parties ought to bear “liability for the acts of the others,” which stems from the common law theory of “mutual agency of each to act for the others, which made all liable for the tortious acts of any one.”⁵¹

B. Traditional Due Process Considerations Constrain Rule 65’s Effect

Notwithstanding the judicial tradition of “in concert” liability in tort and criminal law, the doctrine has long been “uncertain in application.”⁵² Part of the uncertainty of applying “in concert” liability is a product of courts necessarily having to balance competing traditions. Though enforceability is a key concern for the judiciary, it is still subject to the constraint of due process. The belief that everyone is entitled to have their day in court is enshrined in our Constitution⁵³ and “part of our deep-rooted historic tradition.”⁵⁴ Indeed, courts will not enforce injunctions that punish the conduct of individuals who “act independently and whose rights have not been adjudged according to law.”⁵⁵

Relatedly, our due process tradition has generally required notice as a necessary condition of fair process.⁵⁶ Hence, Rule 65(d)(2)

49. *Id.*

50. RESTATEMENT (SECOND) OF TORTS § 876 cmt. a (A.L.I. 1979).

51. *Id.*

52. *Cent. Bank of Denv.*, 511 U.S. at 181 (“Indeed, in some States, it is still unclear whether there is aiding and abetting tort liability of the kind set forth in § 876(b) of the Restatement”).

53. The Fifth and Fourteenth Amendments’ procedural due process requirements ensure that the government employs adequate procedures before depriving an individual of a property or liberty interest. The Supreme Court has interpreted adequate procedures to, at a minimum, require that deprivations “be preceded by notice and opportunity for hearing appropriate to the nature of the case.” *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 313 (1950).

54. *Havens v. James*, 76 F.4th 103, 111 (2d Cir. 2023) (quoting *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996)).

55. *Chase Nat’l Bank v. City of Norwalk*, 291 U.S. 431, 436–37 (1934); *see also Herrlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975) (asserting that “no man shall be subject to judicial sanction without the opportunity for a hearing on the merits of the claim against him.”).

56. Courts have distinguished notice in the context of injunctive relief—which definitionally applies to a small subset of the population—from legislative actions taken by Congress, which would apply broadly. *See, e.g., United States v. Robinson*,

requires that non-named parties receive adequate notice prior to being subjected to a court order pursuant to Rule 65.⁵⁷ Sensitive to due process considerations, some courts have declined to hold non-parties liable for violating an injunction when the alleged aiding and abetting occurred before the injunction was issued.⁵⁸ They have reasoned that a non-party could not have had actual notice of the injunction before it was issued, and therefore Rule 65(d)(2) was not satisfied.⁵⁹ Where a party does have notice that continuing with its pre-injunction conduct assists a named party in violating an injunction, however, courts have found that they have a duty not to continue in that course of conduct.⁶⁰

In addition to securing the rights of individuals, due process provides a vital check on the power of the judiciary. Courts of equity have always been courts of limited power, such that they “cannot lawfully enjoin the world at large,”⁶¹ and the Supreme Court has cautioned against federal courts attempting to regulate the conduct of individuals beyond those which they can properly restrain.⁶²

83 F.4th 868, 873 (11th Cir. 2023) (“A court’s injunction may require a person to do or refrain from doing a particular act. . . . But unlike a congressionally enacted statute, which can apply to everyone, an injunction generally applies to only those over whom the court has jurisdiction in the proceedings leading to the injunction, and only to the extent that the injunction gives notice to them.” (citing 1 HOWARD C. JOYCE, A TREATISE ON THE LAW RELATING TO INJUNCTIONS § 1, at 2–3 (1909))).

57. See FED. R. CIV. P. 65(d)(2) (clarifying that only those parties “who receive actual notice” of an injunction are bound by its terms).

58. See, e.g., *Blockowicz v. Williams*, 630 F.3d 563, 568 (7th Cir. 2010) (rejecting aiding and abetting liability where the act, signing a contract, occurred before the injunction was issued); see also *Herrlein*, 526 F.2d at 254–55 (“The cases holding successors in interest liable for violating injunctions against their predecessor in interest have only so held when the transfer was undertaken after the time the injunction order was imposed or the proscribed act was committed.”).

59. See, e.g., *Blockowicz*, 630 F.3d at 568 (“Actions that aid and abet in violating the injunction must occur after the injunction is imposed for the purposes of Rule 65(d)(2)(C), and certainly after the wrongdoing that led to the injunction occurred. This requirement is apparent from Rule 65(d)(2)’s text, which requires that nonparties have ‘actual notice’ of the injunction. A non-party who engages in conduct before an injunction is imposed cannot have ‘actual notice’ of the injunction at the time of their relevant conduct.”).

60. See, e.g., *S. Cent. Bell Tel. Co. v. Constant, Inc.*, 304 F. Supp. 732, 736 (E.D. La. 1969), *aff’d*, 437 F.2d 1207 (5th Cir. 1971) (“South Central Bell had the means to prevent its equipment from being used to violate the injunction, and its failure to do so would, at the very least, have amounted to a passive participation in the violation.”).

61. *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930).

62. See *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 17 (1945) (Stone, J., dissenting) (“It is no part of the function of the [NLRB] or of courts to make unwarranted threats against suitors or innocent third persons.”).

In his dissent from the Court's ruling in *Regal Knitwear*, Justice Harlan Stone described an exercise of judicial authority over individuals not subject to a court's command—those who have yet to have their day in court—as an abuse of judicial authority.⁶³

Implied in this tradition of judicial constraint is an antipathy for vague or overbroad injunctions. *International Longshoremen's Ass'n, Local 1291 v. Philadelphia Marine Trade Ass'n*⁶⁴ illustrates the relationship between overly broad injunctions and the fear of judicial overreach. In the 1960s, a collective bargaining agreement between the petitioner union, representing longshoremen, and the respondent, an association of employers in the Port of Philadelphia, gave rise to a series of strikes on the Philadelphia waterfront and subsequent legal proceedings.⁶⁵ In response to an ambiguous order from the district court, the lawyer for the longshoremen's union, Mr. Freedman, attempted to clarify the order's effect in an exchange with the court:

Mr. Freedman: Well, what does it mean, Your Honor?

The Court: That you will have to determine, what it means.

Mr. Freedman: Well, I am asking. I have to give my client advice and I don't know what it means. I am asking Your Honor to tell me what it means. It doesn't—

The Court: You handled the case. You know about it. . . .

Mr. Freedman: I am telling you very frankly now I don't know what this order means, this proposed order. It says, 'Enforcement of the award.' Now, just what does it mean? . . . The arbitration . . . involved an interpretation of the contract under a specific set of facts. Now, how do you enforce it? That case is over and done with. These are new cases. Your Honor is changing the contract of the parties when you foreclose them from going to arbitration on this point again.

The Court: The Court has acted. This is the order.

Mr. Freedman: Well, won't Your Honor tell me what it means?

The Court: You read the English language and I do. . . .

Mr. Freedman: I know, but Your Honor is leaving me in the sky. I don't know what to say to my client. . . .

The Court: The hearing is closed.⁶⁶

63. *Id.* ("To me it seems no less a misuse of authority for a court, as well as for the Labor Board itself, to threaten those who are not subject to its command.").

64. 389 U.S. 64 (1967).

65. *Id.* at 65–69.

66. *Id.* at 70–71 (first, second, and third alterations in original) (internal quotes omitted).

The district judge's refusal to clarify the injunction exacerbated the unfairness to the union as they were left with no means of deciphering what conduct was prohibited by the order. The Supreme Court clarified that the obscurity of the underlying injunction also implicates concerns of judicial overreach, stating that "[judicial contempt power] is founded upon a decree too vague to be understood, it can be a deadly [weapon]."⁶⁷

The issue of notice in *International Longshoremen's Ass'n* appears a far cry from that raised in *Havens*. Havens understood the conduct prohibited by the Arcara Injunction but sought to clarify whether he was subject to its terms.⁶⁸ These fairness considerations, particularly the right to *have one's day in court*, seem ill-fitted under such circumstances, particularly when the non-party not only had their day in court but initiated the lawsuit to clarify their rights.

C. Rule 65 Embraces a Legal Tradition of Promoting Efficiency and Fairness Through Resource Conservation, Similar to Doctrines of Preclusion

An additional fairness consideration concerns resource conservation. Concerns for judicial efficiency and fairness are deeply rooted in our legal tradition and codified by Rule 1's call for interpretations that produce "just, speedy, and inexpensive determination[s]."⁶⁹

Fairness considerations, tied to resource management, are well developed in doctrines of preclusion. Like Rule 65, claim preclusion (*res judicata*) and issue preclusion (*collateral estoppel*) are premised on the notion that court orders generally only bind parties to a litigation.⁷⁰ Though there are exceptions to this rule, courts take a "constrained approach to nonparty preclusion[.]"⁷¹ However, an exception has long been made in instances where "there is 'privity' between a party to the second case and a party who is bound by an earlier judgment."⁷² The Supreme Court has reasoned that a non-party's right to their day in court can be bypassed when there is sufficient overlapping of interests to constitute privity with a named party because their "interests [are being] adequately represented by someone with the same interests who is a party."⁷³ This substitute

67. *Id.* at 76.

68. *See Havens v. James*, 76 F.4th 103, 107 (2d Cir. 2023).

69. FED. R. CIV. P. 1.

70. *See Smith v. Bayer Corp.*, 564 U.S. 299, 312 (2011) ("A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions.").

71. *Taylor v. Sturgell*, 553 U.S. 880, 898 (2008).

72. *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996).

73. *Id.* at 798 (quoting *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989)).

representation regime allows courts to prudently “conserve judicial resources.”⁷⁴

Though non-party preclusion was limited in the past to traditional privity considerations, with special rules for derivative liability, the privity test has evolved significantly.⁷⁵ Courts now often “look directly to the reasons for holding a person bound by a judgment” and consider, for instance, whether non-parties “assume[d] a de facto role as an actual party.”⁷⁶ The question of privity is “essentially a matter of fact, to be determined by looking for that measure of ‘practical control’ that makes it fair to impose preclusion.”⁷⁷ This principle was well-illustrated in *Del Mar Avionics v. Quinton Instruments Co.*⁷⁸ After a court determined that the defendant manufacturer had substantial control over an initial infringement action such that it should be covered by the initial action’s injunction, a court subsequently observed (in the plaintiff’s second action for damages) that “[w]hether a non-party controlled the earlier litigation is a question of fact for the trial court.”⁷⁹ The court precluded further litigation on the question of liability, as the manufacturer was bound by the initial action’s factual determination.⁸⁰

74. *Allen v. McCurry*, 449 U.S. 90, 94 (1980). The Supreme Court has identified other policy benefits to binding non-named parties, similar to Rule 65(d), including “reliev[ing] parties of the cost and vexation of multiple lawsuits, . . . preventing inconsistent decisions, [and] encourag[ing] reliance on adjudication.” *Id.*

75. See 18A WRIGHT & MILLER’S FEDERAL PRACTICE & PROCEDURE § 4448 (3d. ed. 2025) (“Under traditional rules of the not-so-distant past, it was said that the principle of mutuality conferred the preclusion benefits of a favorable judgment only on persons who would have been bound by an unfavorable judgment, apart from special rules for derivative liability relationships. The traditional rules have changed substantially. Both the privity label and the mutuality rule are losing their former capacity to deter functional analysis.”).

76. *Id.*

77. *Id.* § 4451 (footnotes omitted) (“Preclusion is fair so long as the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party.”).

78. 645 F.2d 832 (9th Cir. 1981).

79. *Id.* at 834–35.

80. *Id.* at 835.

IV.

RULE 65 DOCTRINAL SURVEY

A. *Courts Have Embraced Several Modes of Analysis to Guide Their Rule 65 Non-Party Inquiries*

Though the aforementioned legal traditions and judicial policies offer useful context, their flexibility and inherent indeterminacy contribute to Rule 65(d)'s irregular application as a fact-specific inquiry.⁸¹ A survey of Rule 65(d) case law similarly leaves many questions unanswered but provides some necessary insight. When the underlying judicial order was proper, courts have offered a variety of analytical approaches to justify binding non-parties pursuant to Rule 65(d). The following survey categorizes cases by their approach to Rule 65(d) inquiries. These analytical modes—*structural*, *functional*, and *purposivist*—are distinguished for the sake of descriptive clarity but are not necessarily mutually exclusive, nor collectively exhaustive.

1. Courts Sometimes Embrace a Structural Analysis and Consider Whether a Non-Party's Independence Is Compromised by the Nature of Their Relationship with the Enjoined Party

Though Rule 65(d) inquiries most often engage in a functional mode of analysis, observing the actual interaction between the named and unnamed party, courts sometimes engage in an inquiry that appears more structurally motivated. In the structural mode of analysis, courts scrutinize an inherent feature of the relationship between parties. Structural considerations are frequently implicated in matters concerning corporate actors or other entities. For instance, in *Golden State Bottling Co. v. NLRB*, the Supreme Court considered whether an order arising out of Golden State's labor law violation could extend to its successor entity, All American.⁸² The NLRB (National Labor Relations Board) deemed All American, the bona fide purchaser of Golden State, a successor in interest and held it liable for reinstating a discharged union employee with backpay.⁸³ The Court held that a bona fide purchaser, acquiring the business with knowledge of the unremedied unfair labor practice, could be

81. *Contrast* *Eli Lilly & Co. v. Gottstein*, 617 F.3d 186, 194–95 (2d Cir. 2010) (using a fact-specific aiding-and-abetting analysis to determine whether the non-party was in active concert of participation with a named party), *with* *Crane Boom Life Guard Co. v. Saf-T-Boom Corp.*, 362 F.2d 317, 322 (8th Cir. 1966) (using a fact-specific privity analysis to determine whether the nonparty was in active concert of participation with a named party).

82. 414 U.S. 168, 171 (1973).

83. *Id.* at 171–72.

considered in “privity with its predecessor for the purposes of Rule 65(d).”⁸⁴ The core of the Court’s reasoning was rooted in the issue of structural independence. The Court stated that “[t]he tie between the offending employer and the bona fide purchaser of the business, supplied by a Board finding of a continuing business enterprise, establishes the requisite relationship of dependence.”⁸⁵

The issue of independence is frequently central to structural Rule 65 tests: Courts want to ensure that a non-named party is not, by a force inherent to the nature of the parties’ relationship, subjected to the domination of a named party. The Supreme Court clarified this concern in *Regal Knitwear Co. v. NLRB*, where it considered a cease-and-desist order issued by the NLRB.⁸⁶ In relevant part, the order included a provision enjoining Regal’s “officers, agents, successors, and assigns[.]”⁸⁷ At the time, there was a circuit split regarding the permissibility of enjoining the “successors and assigns” of a named party.⁸⁸ The Supreme Court implied that injunctions, like NLRB orders, “are binding upon successors and assigns who operate as merely a disguised continuance of the old employer.”⁸⁹

The *Regal* Court’s “disguised continuance” notion reappears in other cases as a “substantially intertwined” inquiry. Substantially intertwined inquiries observe the extent to which the structure and operations of the enjoined and independent entity are entangled and similarly seek to root out facially independent entities that exist only to facilitate injunction circumvention. Evidence of substantially intertwined entities might “includ[e] the shared occupation of office space, payment of employee expenses between the non-party and enjoined party, considerable control by the enjoined party over the non-party’s operations, and other substantial interconnections[.]”⁹⁰ In *Marshall v. Blasters, Drillrunners, & Miners Union, Local 29*,⁹¹ the district court considered an injunction that was issued “to prevent Local 29 and ‘all those in active concert or participation

84. *Id.* at 180.

85. *Id.*

86. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 10 (1945).

87. *Id.*

88. *See id.* at 10–11 (describing how some, but not all, circuits enforced orders with provisions that demanded “successors and assigns” to cease and desist).

89. *See id.* at 14 (describing injunctions to restrain violation of the Fair Labor Standards Act as analogous to NLRB orders). However, the Court clarified that not all successors will face Rule 65 liability. Rather, “whether one brings himself in contempt as a ‘successor or assign’ depends on an appraisal of his relations and behavior.” *Id.* at 15.

90. *In re Sledziejowski*, 533 B.R. 408, 424 (Bankr. S.D.N.Y. 2015).

91. No. 78 Civ. 4619, 1980 WL 2150 (S.D.N.Y. Apr. 14, 1980).

with them’ from intimidating witnesses” and ensure that the union restored two witnesses to their former bookkeeper positions.⁹² The court observed substantial interconnections between Local 29 and its purportedly independent Pension, Welfare and Vacation Funds (the Funds)—including joint office space and shared trustees that received payments from the Funds—which it found sufficiently demonstrated that Local 29 had “considerable control over the daily operations of the Funds.”⁹³ In turn, the court found that in refusing to rehire the bookkeepers, the Funds had acted in concert with the Union.⁹⁴

The district court in *John Wiley & Sons v. Book Dog Books, LLC* expressed similar concerns regarding intertwined operations of a named party and a facially independent entity.⁹⁵ There, the court considered the deeply integrated relationship between the various entities within Philip Smyres’s textbook distribution enterprise—some of which were named parties—and Matasa Agila Holdings, which was not a party to the suit.⁹⁶ Smyres exercised ownership and control over most of the entities subject to the injunction.⁹⁷ Each contributed to his textbook distribution enterprise, but he exercised no such control over Matasa Holdings.⁹⁸ Although Smyres did not own Matasa, evidence revealed that it handled back-end operations for Smyres’s textbook business, worked out of Smyres’s warehouse, lacked any employees of its own, and appeared to be managed by Smyres.⁹⁹ The court found this sufficient evidence that Matasa was acting in concert with Smyres.¹⁰⁰

As evidenced by the preceding cases, courts will uniformly apply an injunction to a non-party entity when its independence is compromised. However, deciphering the true independence of an entity can be difficult, even when typical signs—like a substantial overlap in personnel—would suggest the independent entity is merely a disguise of the enjoined party. In *Vuitton et Fils S. A. v. Carousel Handbags*, for instance, after Carousel, a handbag seller, was enjoined “from selling sham Vuitton leather goods[,]” its proprietor was accused of selling counterfeit bags through an independent storefront with

92. *Id.* at *1.

93. *Id.* at *1–3.

94. *Id.* at *4.

95. *See* 327 F. Supp. 3d 606, 638 (S.D.N.Y. 2018).

96. *Id.*

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.*

his brothers.¹⁰¹ Despite knowledge that Carousel's proprietor and his brothers owned the independent storefront, the court struggled to "ascertain the relationship between the two stores" and was ultimately unable to determine if the brothers had "aided and abetted Carousel" or were otherwise legally identifiable with that store, requiring the district court to resolve the question as to each brother in an evidentiary hearing on remand.¹⁰²

While the structural mode of analysis is a useful framework for Rule 65(d) inquiries involving non-individual entities, these structural inquiries are not without their issues. For example, some courts have narrowed Rule 65(d) during a structural analysis by placing undue weight on the "disguise" inquiry. This issue is illustrated in *Reliance Insurance Co. v. Mast Construction Co.*, where Reliance, a general insurance company, secured a temporary restraining order to prevent Mast, a construction company, from transferring funds and other assets of the named defendants after Mast failed to provide Reliance with sufficient assurance of its ability to complete bonded projects and pay project-related obligations.¹⁰³ Notwithstanding the court order, Mast created new accounts at First Security and proceeded to transfer funds.¹⁰⁴ The court determined that First Security had assisted Mast in executing fund withdrawals and transfers, thereby contravening the restraining order, which Mast would otherwise not have been able to complete.¹⁰⁵ Notably, the Tenth Circuit embraced a broader interpretation of Rule 65 than the district court, asserting that the "active concert or participation" exception goes beyond scenarios of "alter ego, collusion, or identity of interest."¹⁰⁶ The court clarified that Rule 65 encompasses situations where a non-party aids or abets a named defendant in violating the court order.¹⁰⁷

2. Courts Have Also Engaged in a Functional Analysis That Mirrors an Aiding-and-Abetting Analysis and Considers the Actual Interaction Between Parties

Though a court's finding of structural issues may suffice to implicate Rule 65(d) liability, clearing structural or independent actor concerns does not free one from Rule 65(d) liability. When the relationship between parties yields no structural concerns,

101. 592 F.2d 126, 128 (2d Cir. 1979).

102. *Id.* at 130.

103. 84 F.3d 372, 373 (10th Cir. 1996).

104. *Id.* at 374.

105. *Id.* at 377.

106. *Id.*

107. *Id.*

Rule 65(d) inquiries trend towards a functional mode of analysis where courts observe the actual interaction between the named and non-named parties. In practice, the operation of a functional Rule 65(d) analysis often mirrors an aiding-and-abetting analysis. For example, in *Eli Lilly & Co. v. Gottstein*, David Egilman, the plaintiff's expert witness, contacted James Gottstein, an Alaskan attorney not covered by the court's protective order (a discovery order arising under Rule 26(c)), seeking assistance in disseminating litigation documents related to an Eli Lilly drug, Zyprexa.¹⁰⁸ When the district court found that Gottstein aided and abetted Egilman in violating the protective order and enjoined him, Gottstein argued on appeal that courts cannot enjoin non-parties to enforce Rule 26 protective orders because the Rule does not textually provide for enjoining those in active concert or participation with a party.¹⁰⁹ The court of appeals rejected this argument and determined that Rule 26 did not prohibit courts from enjoining non-parties, reading it in tandem with Rule 65 to ensure district courts could enforce their protective orders.¹¹⁰ As part of this analysis, the court considered "whether aiding and abetting the breach of a protective order gives the issuing court jurisdiction over the nonparty aider and abettor to enjoin him from continuing those actions."¹¹¹ There was no issue of disguise or domination present. The court determined that Egilman and Gottstein shared a common plan to violate the court-issued protective order and distribute Eli Lilly's confidential material.¹¹² Evidence revealed that Egilman indicated to Gottstein that he possessed confidential Eli Lilly documents related to Zyprexa and sought Gottstein's assistance with disseminating the confidential documents in violation of a protective order.¹¹³ The court observed that Gottstein actively participated in and furthered Egilman's goal of disseminating the confidential information by issuing subpoenas on Eli Lilly, sharing emails, burning DVD copies of Eli Lilly's data, and sending packages containing Eli Lilly's data to his associates.¹¹⁴ Consequently, the court

108. 617 F.3d 186, 190 (2d Cir. 2010).

109. *See id.* at 189, 195 ("Gottstein distinguishes orders created under Rule 26(c) from Rule 65 injunctions and points out that, while Rule 65 textually allows third-party aiders and abettors to be enjoined, Rule 26 does not.").

110. *Id.* at 195 ("[A] protective order might be thought of as a form of injunction in this particular setting, in which case reading Rules 26 and 65 together would obviously foreclose Gottstein's argument.").

111. *Id.* at 186–95.

112. *Id.* at 192.

113. *In re Zyprexa Injunction*, 474 F. Supp. 2d 385, 400–01 (E.D.N.Y. 2007), *aff'd sub nom.*, *Eli Lilly & Co.*, 617 F.3d 186.

114. *Eli Lilly & Co.*, 617 F.3d at 195–196.

concluded that Gottstein had aided and abetted Egilman's violation of the protective order, and thus enjoining him from violating the protective order was appropriate.¹¹⁵ The court was unable to deploy a structural analysis given there was no formally structured relation between the parties.

3. Courts Have Also Employed a Flexible Purposivist Analysis
That Accounts for the Underlying Public Interest Protected
by the Injunction

Still, there are some Rule 65(d) inquiries that lend themselves neither to a straightforward functional analysis, like the aiding-and-abetting framework utilized in *Eli Lilly*, nor to a structural analysis. Cases arising out of desegregation efforts in the mid-1900s—where injunctions were employed to prevent a potentially large group of non-parties from engaging in a restricted activity—have utilized a more flexible purposivist analysis. For instance, in *Lance v. Plummer*, plaintiffs secured an injunction against the owners and operators of restaurants and motels in Saint Augustine, Florida, the Knights of the Ku Klux Klan, and various other individuals and entities to prevent their interference with Black Americans' use of public facilities and accommodations.¹¹⁶ The court reviewed the case of a volunteer deputy sheriff who interfered with compliance of the order.¹¹⁷ The officer was revealed to have cursed obscenities at multiple Black Americans and, on at least one occasion, pursued a Black American seeking to make use of an accommodation.¹¹⁸ The court found the officer's use of offensive language and intimidating behavior after receiving notice of the injunction was sufficient to conclude that he was acting in concert with named defendants and warranted him being formally added as a defendant and held in contempt for violating the injunction.¹¹⁹ Had the *Lance* court relied on a strict structural Rule 65(d) analysis that required a domination of interests, or a functional one that required a showing of explicit coordination between named and non-named parties, it's unclear that the aggravator in *Lance* would have been bound without additional litigation, if at all.

Cases like *Lance*—where an injunction's effect can be disrupted by any member of a large class of non-parties engaging in discrete, prohibited conduct—pose a unique challenge for courts. To account for

115. *Id.*

116. 353 F.2d 585, 587–88 (5th Cir. 1965).

117. *Id.* at 587–89.

118. *Id.* at 588–89.

119. *Id.* at 589–91.

the quasi in rem nature of desegregation injunctions (alluding to the Fifth Circuit's description in the following case), courts have sometimes embraced a broader purposivist mode of analysis. Consider *United States v. Hall*, where the Fifth Circuit considered whether the conduct of a non-named individual, Eric Hall, could be regulated by an injunction that limited the public's access to a school experiencing racial unrest during desegregation.¹²⁰ Hall had previously attempted to disrupt the school system's regular operation through student boycotts and other measures, and after the order was issued he entered school grounds with the stated intention of violating it.¹²¹ Notwithstanding him being a non-party, Hall's actions were found to jeopardize the effect of the court's injunction by perpetuating racial disorder within the school system.¹²² The court notably clarified that "[s]chool orders are, like in rem orders, particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties."¹²³ The court continued that "[i]n such cases, as in voting rights cases, courts must have the power to issue orders similar to that issued in this case, tailored to the exigencies of the situation and directed to protecting the court's judgment."¹²⁴ The *Hall* court's analysis is neither functional nor structural per the classification scheme set forth above. Instead, the significant public interest at issue in the injunction seems to have motivated the court to treat any disruption of the order's intended desegregation effect to constitute a violation, even those caused by the non-named party.

B. Doctrinal Survey Reveals Irregularity and Unresolved Uncertainty in Rule 65(d)'s Application

Notwithstanding *Hall*, courts appear uncertain on whether, and if so, to what extent, the nature of the public interest protected by an injunction should have any bearing on their Rule 65(d) inquiry. In *Walling v. James V. Reuter, Inc.*, the Supreme Court emphasized

120. 472 F.2d 261, 263–64 (5th Cir. 1972).

121. *Id.*

122. *See id.* at 265 (“[T]he activities of persons contributing to racial disorder at Ribault imperiled the court’s fundamental power to make a binding adjudication between the parties properly before it.”).

123. *Id.* at 266–267 (“Literally read, Rule 65(d) would forbid the issuance of in rem injunctions. . . . But courts have continued to issue in rem injunctions notwithstanding Rule 65(d), since they possessed the power to do so at common law and since Rule 65(d) was intended to embody rather than to limit their common law powers.” (citation omitted)).

124. *Id.* at 266.

the broad enforceability of an injunction arising from violations of section 17 of the Fair Labor Standards Act, extending not only to the corporation, its agents, and officers, but also to "individuals associated with it in the conduct of business."¹²⁵ Critically, the Court asserted that these principles could be applied more extensively in cases representing the public interest, as opposed to situations involving purely private interests.¹²⁶ The *Hall* court appeared similarly motivated by the public interest value of desegregation efforts.¹²⁷ However, in *Havens*, neither the majority, nor Judge Lohier in his dissent, appear to have considered their Rule 65(d) inquiry as a function of a public interest at stake.

Further, there are instances where courts have directly conflicting approaches to Rule 65(d) inquiries. For example, some courts emphasize that Rule 65 cannot hold non-named parties liable for violating an injunction when the named party has not committed a violation.¹²⁸ The rationale relied on by these courts is that a non-named party's liability requires that the named party have some involvement in the contempt. Thus, if the named party has not violated the injunction, a non-named party cannot be held liable, whether or not they have otherwise acted in concert with the named party.¹²⁹ This perspective is well-illustrated in *Herrlein v. Kanakis*, which emphasized that the absence of a violation by a named party precludes finding a non-named party liable as an aider or abettor.¹³⁰ However, *EF Cultural Travel BV v. Zefer Corp.* presents a contrasting

125. 321 U.S. 671, 672, 674 (1994).

126. *Id.* at 674-75 (citing *Virginian Ry. Co. v. Sys. Fed'n No. 40*, 300 U.S. 515, 552 (1937)).

127. *Hall*, 472 F.2d at 266 ("As this Court is well aware, school desegregation orders often strongly excite community passions. School orders are, like in rem orders, particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties. In such cases, as in voting rights cases, courts must have the power to issue orders similar to that issued in this case, tailored to the exigencies of the situation and directed to protecting the court's judgment. The peculiar problems posed by school cases have required courts to exercise broad and flexible remedial powers.").

128. *See Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) ("[T]he only occasion when a person not a party may be punished, is when he has helped to bring about, not merely what the decree has forbidden, because it may have gone too far, but what it has power to forbid, an act of a party."); *see also* *United Pharmacal Corp. v. United States*, 306 F.2d 515, 517-18 (1st Cir. 1962) (agreeing with Judge Learned Hand's holding in *Alemite*).

129. *See Alemite Mfg. Corp.*, 42 F.2d at 833 ("[I]f the defendant is not involved in the contempt, the employee cannot be . . .").

130. *See* 526 F.2d. 252, 254 (7th Cir. 1975) ("Since neither Kanakis nor Teklad was found in violation of the order, Mogul cannot be held liable as an aider or abettor of the named parties in violating the injunction.").

approach. Here, a travel company, EF, brought an action against a competitor and the maker of a “scraper” software program, Zefer, that collected pricing information from the travel company’s public website and provided it to the competitor.¹³¹ The competitor then used this pricing data to undercut EF’s prices.¹³² The district court issued a preliminary injunction against the competitor and all persons acting in concert or participation with it, and Zefer argued on appeal that it was improperly enjoined.¹³³ On appeal, the court found that while an independent preliminary injunction against Zefer would not have been supported, “[t]here is no reason why Zefer should be freer than any other third party who was never in this litigation to assist EF to violate the injunction against it or to do so on EF’s behalf or at its direction. . . . [T]hat is all that is forbidden.”¹³⁴

Further, as previously mentioned, whether a non-party maintaining the status quo through inaction constitutes “acting in concert” has received conflicting treatment among the courts. *Blockowicz v. Williams* suggests that merely maintaining the status quo without actively participating in violating the injunction does not render a non-party liable.¹³⁵ Yet this perspective contrasts with *South Central Bell Telephone Co. v. Constant, Inc.*, which implied that a non-party’s failure to alter the status quo to prevent violation of an injunction could be construed as acting in concert with an enjoined party.¹³⁶

V.

CRAFTING A FRAMEWORK TO GUIDE RULE 65(d) INQUIRIES

Though several modes of legal reasoning have emerged in Rule 65(d) case law, judges still retain unbounded discretion under the rules. Put most favorably, great judicial discretion empowers judges to best respond to the unique circumstances present in any given case. Indeed, Rule 65(d) must afford judges some discretion:

131. EF Cultural Travel BV v. Zefer Corp., 318 F.3d 58, 59–61 (1st Cir. 2003).

132. *Id.* at 60.

133. *Id.* at 60–61.

134. *Id.* at 63.

135. See *Blockowicz v. Williams*, 630 F.3d 563, 568 (7th Cir. 2010) (“[M]ere inactivity is simply inadequate to render [parties] aiders and abettors in violating the injunction.”).

136. See *S. Cent. Bell Tel. Co. v. Constant, Inc.*, 304 F. Supp. 732, 736 (E.D. La. 1969), *aff’d*, 437 F.2d 1207 (5th Cir. 1971) (“As soon as South Central Bell was apprised of the fact that its subscriber, Constant, was . . . violating the injunction . . . it had a duty not to act in any way in concert with Constant to effectuate or perpetuate the violation. South Central Bell had the means to prevent its equipment from being used to violate the injunction, and its failure to do so would, at the very least, have amounted to a passive participation in the violation.”).

It's hard to imagine how the rule's primary function of curtailing third-party injunction circumvention could be fulfilled without some flexibility. Yet, unbounded discretion has its drawbacks. Currently, the judiciary's treatment of Rule 65(d)'s fact-specific inquiry appears eerily similar to a "we know it when we see it" test. Absent interpretive guidance, let alone a clear analytical framework, unbounded discretion results in unpredictable Rule 65(d) applications. This uncertainty risks notice and fairness problems, threatening the due process tradition at the heart of the rule.

To achieve more predictable Rule 65(d) applications while maintaining judicial flexibility and fidelity to the rule's function, Congress should amend the FRCP to require a two-step inquiry under Rule 65(d). Under this proposed amendment, courts would consider: (1) whether the non-party's participation satisfies the elements of civil aiding-and-abetting liability, and (2) whether a substantial public interest is implicated.

A. Courts Should Use the Elements of Civil Aiding-and-Abetting Liability to Evaluate a Non-Party's Participation, Including the Substantiality Requirement Set Forth in Twitter, Inc. v. Taamneh

1. Courts Should Interpret Rule 65(d) to Invoke an Aiding-and-Abetting Analysis

As discussed in Part III, Rule 65(d)'s "active concert or participation" language mirrors the use of "active concert" in civil liability contexts. Indeed, courts have frequently approached Rule 65(d) inquiries with a functional analysis that mirrors an aiding-and-abetting liability analysis.¹³⁷ Even the *Havens* majority interpreted Rule 65(d)'s "active concert or participation" language

137. See, e.g., *NBA Props., Inc. v. Gold*, 895 F.2d 30, 33 (1st Cir. 1990) ("The courts have interpreted the language in question ('active concert or participation with') as requiring that a person either be 'legally identified with' a party in the case or 'aid and abet' the party to violate a decree." (first citing *G. & C. Merriam Co. v. Webster Dictionary Co.*, 639 F.2d 29, 35 (1st Cir. 1980); then citing *United Pharmacal Corp. v. United States*, 306 F.2d 515, 517 (1st Cir. 1962); and then citing *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930))); see also *Blockowicz*, 630 F.3d at 567 ("[A] person is in 'active concert or participation' with an enjoined party, and thus bound by the injunction, if 'he aids or abets an enjoined party in violating [the] injunction'" (second alteration in original) (quoting *Nat'l Spiritual Assembly of Bahá'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Bahá'is of U.S., Inc.*, 628 F.3d 837, 848 (7th Cir. 2010))); *Reliance Ins. Co. v. Mast Constr. Co.*, 84 F.3d 372, 377 (10th Cir. 1996) ("[T]he exception encompasses those situations where a nonparty with actual notice aids or abets a named defendant or his privy in violating the order.").

to mean “aids and abets.”¹³⁸ However, “the rules for determining aiding and abetting liability are unclear,” notwithstanding the need for “certainty and predictability” in this area of law.¹³⁹ Thankfully, the Supreme Court’s opinion in *Twitter, Inc. v. Taamneh* offers relevant new guidance.¹⁴⁰

In *Twitter*, the Supreme Court considered whether secondary civil liability extends to social media platforms when bad actors like the Islamic State of Iraq and Syria (ISIS) leverage the platform to recruit, fundraise, and spread propaganda.¹⁴¹ The Court asserted that “the essence of aiding and abetting[] [involves] participation in another’s wrongdoing that is both significant and culpable enough to justify attributing the principal wrongdoing to the aider and abettor.”¹⁴² The Court interpreted the phrase “aids and abets” as referring to a “conscious, voluntary, and culpable participation in another’s wrongdoing.”¹⁴³ Though few courts would likely take issue with the *Twitter* Court’s broad presentation of aiding and abetting, they might unduly limit its effect in practice. Notably lacking from the Supreme Court’s description of aiding and abetting is a motivation requirement. In *Havens*, the majority interpreted aiding and abetting to require that the aider and abettor act “for the benefit of, or to assist, a named party in violating the injunction.”¹⁴⁴ The *Twitter* standard would only require that Havens, in fact, participated in the prohibited sidewalk counseling in a conscious, voluntary, and culpable fashion. In light of *Twitter*’s framing, the motivation requirement imposed by the *Havens* court appears to unnecessarily constrain the essence of aiding-and-abetting liability. Courts should not only interpret Rule 65(d) to invoke aiding and abetting but also refrain from unduly narrowing the Rule’s effect.

138. See *Havens v. James*, 76 F.4th 103, 116 (2d Cir. 2023) (“A nonparty acts ‘in active concert or participation’ if the nonparty aids and abets an enjoined party’s violation of the injunction. . . .”).

139. *Cent. Bank of Denv., N.A. v. First Interstate Bank of Denv.*, 511 U.S. 164, 188 (1994) (quoting *Pinter v. Dahl*, 486 U.S. 622, 652 (1988)).

140. 598 U.S. 471 (2023).

141. *Id.* at 481–84.

142. *Id.* at 504.

143. *Id.* at 493. Though the Court acknowledged some “nuances may establish daylight between the rules for aiding and abetting in criminal and tort law,” it saw it appropriate to articulate general aiding and abetting principles. *Id.*

144. *Havens v. James*, 76 F.4th 103, 108 (2d Cir. 2023).

2. Courts Should Adopt the Substantiality Requirement Set Forth in
Twitter, Inc. v. Taamneh

When considering the nature of participation between non-named and enjoined parties, courts should also read a substantiality requirement into their Rule 65(d) analysis. In *Twitter*, the Supreme Court explained that, at common law, aiding-and-abetting liability relied on several contextual considerations.¹⁴⁵ The Court then reviewed six factors to guide its analysis of whether a defendant's assistance was substantial:

- (1) "the nature of the act assisted," (2) the "amount of assistance" provided, (3) whether the defendant was "present at the time" of the principal tort, (4) the defendant's "relation to the tortious actor," (5) the "defendant's state of mind," and (6) the "duration of the assistance" given.¹⁴⁶

Courts should incorporate a similar multifactor substantiality test in their Rule 65(d) analyses. Under the status quo, judges have complete discretion to not only interpret facts as they see fit, but also to select which facts are worthy of consideration. The substantiality test provides a structure to guide Rule 65(d) inquiries and orient litigation around a better-defined criterion. Applying the six-factor substantiality framework to *Havens*, a court could determine that Havens (1) actively encouraged others to protest in the restricted "buffer zone" near a Planned Parenthood facility; (2) provided substantial assistance integral to the violation of the Arcara Injunction by organizing training sessions, promoting protest activities, and recruiting members for ROC; (3) was physically present at the scene of the wrongdoing, where he actively encouraged others to protest in the restricted area; (4) had a direct relation to Jost and other parties named in the Arcara Injunction; and (5) acted in an intentional and purposeful manner, evidenced by him founding the ROC and providing legal counsel for enjoined parties; even though (6) Havens was not engaged in sidewalk counseling for an extended period of time.

145. *Twitter*, 598 U.S. at 486.

146. *Id.* (quoting *Halberstam v. Welch*, 705 F.2d 472, 488 (D.C. Cir. 1983)). The Court emphasized that these "elements and factors should not be taken as inflexible codes; rather, they should be understood in light of the common law and applied as a framework designed to hold defendants liable when they consciously and culpably 'participate[d] in' a tortious act in such a way as to help 'make it succeed.'" *Id.* at 497 (alterations in original) (quoting *Nye & Nissen v. United States*, 336 U.S. 613, 619 (1949)).

Integrating the *Twitter* substantiality framework into Rule 65(d) inquiries will certainly not rid them of substantive disagreement: the *Havens* majority may very well contest each point presented above. Nevertheless, by enumerating the relevant considerations, the substantiality test would at the very least help organize disagreements amongst judges, in addition to providing non-parties better notice on their potential Rule 65(d) liability.

*B. Courts Should Also Evaluate the Risk of Undefined Parties
Disrupting the Injunction*

Though it would entail a more significant innovation than the first prong, courts should continue to a second prong in Rule 65 inquiries that considers the risk of undefined parties disrupting the injunction by considering the public interest at stake. A survey of Rule 65(d) jurisprudence reveals that the nature of the harm at issue, and its effect on these interests, is seldom considered by courts explicitly. To that end, neither the majority nor dissent in *Havens* addressed the nature of the harm prevented by the Arcara Injunction. The *Havens* court seemed to believe that Rule 65(d) determinations hinge on considerations of federal court power, not subject matter.¹⁴⁷ Yet Judge Lohier clearly expressed his concern that federal courts are able to ensure their orders are complied with and vindicate their orders when they are not.¹⁴⁸ The *Havens* majority would likely agree with that sentiment. However, the risk of judicial power being subverted by undefined party disruption is often a function of the subject matter at issue.

As discussed earlier, some courts have considered the public harm, and accompanying risk of non-party disruption, underlying the injunction when engaging in a Rule 65(d) inquiry. In *Walling v. James V. Reuter, Inc.*, the Supreme Court noted that the principle of enjoining a non-party “may be applied in fuller measure in furtherance of the public interest . . . than if only private interests were involved.”¹⁴⁹ In that vein, not all courts were subject-matter agnostic when considering Rule 65(d) inquiries in the context of desegregation and voting rights.¹⁵⁰ Injunctive relief in these instances—where

147. See 76 F.4th at 122 (“A court ‘cannot lawfully enjoin the world at large’” (quoting *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930))).

148. See *id.* at 130 (Lohier, J., dissenting).

149. See 321 U.S. 671, 674–75 (citing *Virginian Ry. Co. v. Sys. Fed’n No. 40*, 300 U.S. 515, 552 (1937)).

150. *Contrast* *United States v. Hall*, 472 F.2d 261, 266 (5th Cir. 1972) (“[S]chool desegregation orders often strongly excite community passions. . . . In such cases, as in voting rights cases, courts must have the power to issue orders similar to that

the government and public interest is high—can often be distinguished from other categories previously discussed because public opinion is uniquely polarized on these issues such that the injunctions are “particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties.”¹⁵¹ These unique threats to judicial power have previously required that courts “exercise broad and flexible remedial powers.”¹⁵² Though some might argue that these considerations extend beyond the scope of Rule 65(d), the Rule is “a codification rather than a limitation of courts’ common-law powers, [which] cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment.”¹⁵³

As the public profile of a matter increases, so too does the risk of undefined third parties disrupting an injunction. And as the risk of unidentified non-party disruption increases, courts should wield Rule 65(d) to fuller effect to secure the enforceability of their injunctions. Courts should also be wary of a two-sided judicial legitimacy concern. Clearly, judicial legitimacy is threatened where court orders are not obeyed. But legitimacy is also endangered when an injunction fails to capture the appropriate universe of actors and activities due to narrowness and thus fails to secure the intended relief.

Finally, as the risk of undefined parties disrupting an injunction increases, so does the expected litigation cost required for an individual to secure their rights. Though it should not be a direct consideration, a court’s mindfulness to the nature of the harm at issue might also help them be indirectly mindful to the burdens of injunction-enforcing litigation. This piece does not go so far as to suggest that courts should explicitly consider the nature of parties in a manner akin to the familiar sensitivity for repeat players versus one-shot plaintiffs.¹⁵⁴

issued in this case, tailored to the exigencies of the situation and directed to protecting the court’s judgment.”), *with* *Thaxton v. Vaughan*, 321 F.2d 474, 478–79 (4th Cir. 1963) (declining to extend an order against the mayor to restrain the practice of racial segregation in public facilities of Lynchburg, Virginia, to City Council members).

151. *Hall*, 472 F.2d at 266.

152. *Id.*; *see also* *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 27 (1971) (explaining that fashioning temporary school desegregation policies was not beyond the “broad remedial powers of a court”).

153. *Hall*, 472 F.2d at 267.

154. *See* Marc Galanter, *Why the “Haves” Come Out Ahead: Speculations on the Limits of Legal Change*, in *IN LITIGATION: DO THE “HAVES” STILL COME OUT AHEAD?* 13–17 (Herbert M. Kritzer & Susan S. Silbey eds., 2003) (describing how repeat players

Yet, one would be right to question under what circumstances the government or public interest is sufficient to receive consideration and how to prevent courts from overweighing the public interest. While there is no determinative solution to these issues, consider the following. In 1997, the Supreme Court assessed the arguments of several anti-abortion protestors from Western New York who claimed a buffer zone violated their constitutionally-protected speech rights.¹⁵⁵ In evaluating the governmental interests supporting the injunction, the Court emphasized concerns such as “ensuring public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman’s freedom to seek pregnancy-related services[.]”¹⁵⁶ These interests were deemed significant enough to warrant an injunction to secure unimpeded physical access to clinics.¹⁵⁷ Importantly, this injunction follows the enactment of the federal FACE legislation, as previously discussed.¹⁵⁸ When a legislative body passes responsive legislation to protect a specific interest, and the Supreme Court then clarifies the strength and validity of that governmental interest, surely that interest is sufficient for a court’s consideration.

C. Congress Should Amend Rule 65 to Codify Interpretive Guidance

While the proposed two-step inquiry will not cure all uncertainty or tension in Rule 65(d)’s future applications, the considerations presented above may provide a path toward a more predictive and just Rule. To achieve the maximum clarity-inducing effect of the proposed inquiry, the aforementioned considerations are consolidated and provided below in a proposed amendment, to be included in Rule 65’s advisory committee notes.

To promote greater consistency in Rule 65(d)’s application to non-parties, this amendment clarifies the purpose of Rule 65(d)(2) and provides a framework to guide its application in adherence to its stated purpose.

Rule 65(d)(2) was enacted to ensure the full effect of judicial orders. The Rule draws upon our nation’s legal tradition of preventing the circumvention and subversion of law through the

often have structural advantages in litigation over one-shot plaintiffs). However, courts might consider the benefit this approach could have in promoting a more practically equitable Rule 65(d).

155. *Schenck v. Pro-Choice Network of W.N.Y.*, 519 U.S. 357, 361–62 (1997).

156. *Id.* at 376 (footnote omitted).

157. *Id.*

158. *See supra* notes 10–13 and accompanying text.

acts of a third party. Non-parties in Rule 65(d)(2) inquiries are similarly situated to third parties in the context of aiding-and-abetting analysis. In turn, courts should interpret Rule 65(d)(2) to invoke an aiding-and-abetting analysis and incorporate a substantiality requirement into their analysis, pursuant to the Supreme Court's decision in *Twitter, Inc. v. Taamneh*.

Congress recognizes that Rule 65(d) must retain some flexibility to fulfill its function. Since this Rule was enacted by Congress to ensure the enforceability of the nation's laws, and thus to advance the pursuit of the public's interest, courts should consider relevant governmental interests in their Rule 65(d)(2) analysis. Where substantial public interests are implicated, courts should place a hand on the scale in favor of finding sufficient participation for Rule 65(d) purposes to mitigate the risk of non-parties subverting the effect of judicial power or congressional legislation.

This amendment does not create new sanctions, nor does it restrict the scope of existing rules.

VI. CONCLUSION

Just outcomes depend on just processes. In turn, this paper offers a framework to assist judges in their Rule 65(d) inquiries. Rule 65(d) is a potentially powerful mechanism by which courts can secure the full effect of injunctive relief. However, the current state of Rule 65(d) inquiries as unguided, fact-specific determinations poses a threat to this justice-promoting function. The two-step inquiry proposed in this piece provides courts with a path toward giving full effect to Rule 65(d) while balancing the competing legal traditions underlying the Rule. By interpreting Rule 65(d)'s "active concert or participation" to invoke the essence of aiding-and-abetting liability, and employing the substantiality framework set forth in *Twitter*, courts can promote uniformity in Rule 65(d)'s application and improve notice to non-parties. By also considering the government and public interests implicated, courts can maintain the flexibility necessary to give full effect to injunctive relief when it matters most. Doing so might have a second-order benefit of promoting fairness to claimants who may otherwise be subject to heightened expected litigation costs. This piece is not intended to offer a comprehensive solution to all of Rule 65(d)'s woes but rather a path toward more predictable and just Rule 65(d) jurisprudence.

JUDGMENT HOLDERS IN SOVEREIGN DEBT RESTRUCTURINGS

W. MARK C. WEIDEMAIER & F. ANDREW HESSICK*

Sovereign bond restructurings depend on collective voting mechanisms called Collective Action Clauses (CACs) in bond contracts. CACs let a bondholder supermajority modify the bond and bind dissenters to the outcome. But what if dissenters can avoid being bound by rushing to court and getting a judgment? Existing analyses suggest that the legal doctrine of merger and bar might cause the CAC to “merge” into a court’s judgment, effectively allowing judgment holders to escape the restructuring. Other bondholders would be unable to stop judgment holders from enforcing their judgments. Policymakers have long worried that this risk might undermine the contractual architecture for restructuring sovereign debt obligations. That concern also has prompted the U.S. and other governments to intervene in extraordinary ways in recent sovereign debt litigation.

We consider whether a judgment indeed has this effect. We begin by dispensing with the doctrine of merger and bar, which is largely irrelevant, and instead focus attention on two issues. First, we explain that a modification vote under the CAC does not purport to affect the previously-entered judgment of a federal court and generally should not be seen as a basis for judicial intervention granting relief from the judgment. To that extent, observers are right to worry that judgment creditors will escape the effect of a sovereign debt restructuring. However, we also explain that, while they cannot modify a court’s judgment, a bondholder majority or supermajority can still modify the bond to impair a judgment holder’s ability to enforce a judgment. Using Venezuelan sovereign debt as an example, we illustrate how this might work and highlight legal risks. We conclude that, if judgment holders pose a risk (and they often do not), the existing contractual architecture includes tools for dealing with that risk.

* Ralph M. Stockton, Jr. Distinguished Professor and Judge John J. Parker Distinguished Professor of Law, respectively, at the University of North Carolina School of Law. We thank discussants and workshop participants at the Princeton Sovereign Finance Lab and at Brooklyn Law School. We also have benefitted from comments by Robin Effron, Anna Gelpern, Mitu Gulati, David Hoffman, Ted Janger, and by numerous readers who practice law in the field or work on sovereign debt matters at multilateral financial institutions.

TABLE OF CONTENTS

I. Introduction	244
II. Using the Right Doctrine to Answer the Right Question.	248
A. The Misplaced Emphasis on “Merger and Bar”	249
B. Modifications Affect Contracts, Not Judgments	256
1. A Restructuring Vote Has No Effect on a Court’s Judgment	256
2. Courts May, but Generally Should Not, Enforce Agreements to Modify Judgments	262
III. Modifying the Bond to Impair Judgment Enforceability.	267
A. Removing the Waiver of Sovereign Immunity from Execution	268
B. Adding Sharing Clauses and Other New Provisions.	272
C. Legal Uncertainties.	273
IV. Conclusion	276

I.

INTRODUCTION

Sovereign nations cannot file for bankruptcy and cannot force creditors to grant debt relief.¹ Instead, a sovereign that cannot pay its debts must persuade creditors voluntarily to reduce their claims.² The typical sales pitch is that a voluntary debt restructuring will make everyone better off: By deferring or reducing claims, creditors allow the sovereign to invest in its people and domestic institutions, and these investments will fuel economic growth and ultimately let the sovereign resume debt service sooner and pay creditors more than it could absent the restructuring.

If the pitch persuades, the sovereign’s creditors should agree, at least in principle. The well-known difficulty is in coordinating their response. Even when a restructuring makes creditors better off collectively, individuals have the incentive to defect. A restructuring frees up resources, and the defector may hope to persuade or coerce

1. See Anna Gelpern, *Bankruptcy, Backwards: The Problem of Quasi-Sovereign Debt*, 121 YALE L.J. 888, 890 (2012) (“[T]here is no bankruptcy regime for nation-states”); William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 3 (2004) (“Whereas private debt defaults lead to bankruptcy, sovereign debt defaults lead to informal, often lengthy standstills. . . . [F]or the most part, payment resumption requires that creditors come to the negotiating table to rewrite the defaulted debt contracts.”).

2. See Lee Buchheit et al., *The Restructuring Process*, in SOVEREIGN DEBT: A GUIDE FOR ECONOMISTS AND PRACTITIONERS 329, 329–30 (S. Ali Abbas, Alex Pienkowski & Kenneth Rogoff eds., 2020) (“A sovereign’s debt can never be legally discharged in bankruptcy; debt relief can only be obtained with the creditors’ consent.”).

the sovereign to divert some of these now-available resources to pay it in full at the expense of other creditors. Anticipating such defections, creditors otherwise inclined to participate in the restructuring may balk, fearing their sacrifices will only fund larger payments to other creditors. This dynamic may complicate and delay debt relief, potentially leaving everyone worse off.³

Sovereigns typically borrow by issuing bonds. Bond contracts are designed to mitigate the risks posed by holdout creditors.⁴ The primary contractual tool is the Collective Action Clause (CAC), which lets an investor majority or supermajority modify the sovereign's payment and other important obligations in a vote that binds dissenters.⁵ By allowing creditors to approve a restructuring proposal without risk of defection, CACs mitigate "the overarching challenge [of] ensuring that . . . restructurings are not disrupted and delayed through actions not in the interest of creditors as a whole."⁶

One way that an investor might seek to avoid this collective voting mechanism is by filing a lawsuit and getting a judgment. After winning a judgment, the investor may argue it is exempt from the bond contract's collective voting mechanism. It is free to enforce that judgment and recover 100% of the bond's principal, plus interest, even if a supermajority of its fellow investors votes to reduce the bond issuer's payment obligations. In effect, the argument goes,

3. See Barry Eichengreen, *Restructuring Sovereign Debt*, 17 J. ECON. PERSPS. 75, 77–78 (2003) (explaining how information and coordination problems cause individual creditors to hold out in restructuring, which imposes substantial costs on lenders and sovereign borrowers).

4. This coordination problem and a potential contract reform solution occupied thinking and practice in sovereign debt markets for many years. See generally W. Mark C. Weidemaier & Mitu Gulati, *A People's History of Collective Action Clauses*, 54 VA. J. INT'L L. 51 (2013) (examining a century of bond contract clauses designed to remedy bondholder coordination problems as a historical backdrop to early twenty-first century debates between proponents of Collective Action Clauses and sovereign bankruptcy schemes).

5. See *id.* at 53 ("Collective Action Clauses (CACs) . . . allow[] for collectively binding restructuring decisions. . . . [C]ollective *modification* clause[s] . . . allow[] a defined percentage of bondholders to accept a restructuring proposal in a way that will bind the entire group. . . . [C]ollective *acceleration* clause[s] . . . prevent[] individual bondholders from demanding full payment after a default and instead require[] a minimum bondholder vote to approve such a demand.") (emphasis in original) (footnotes omitted); see also Anna Gelpern & Mitu Gulati, *Public Symbol in Private Contract: A Case Study*, 84 WASH. U. L. REV. 1627, 1639–42 (2006) (describing introduction of CACs and examining the shift from unanimous to majority modification provisions in bonds governed by New York law).

6. IMF, *THE INTERNATIONAL ARCHITECTURE FOR RESOLVING SOVEREIGN DEBT INVOLVING PRIVATE-SECTOR CREDITORS—RECENT DEVELOPMENTS, CHALLENGES, AND REFORM OPTIONS* 29–30 (2020) [hereinafter IMF, INTERNATIONAL ARCHITECTURE].

the judgment confers immunity from the risk of a subsequent debt restructuring.⁷

Although courts have not addressed whether a judgment protects against a debt restructuring,⁸ the possibility that investors might obtain such immunity has concerned public officials. The IMF warns that, if a judgment does confer immunity, “the contractual framework for addressing collective action problems could be seriously weakened.”⁹ In ongoing debt crises, such as those in Venezuela and Sri Lanka, creditors have in fact filed lawsuits to avoid the effect of anticipated restructurings.¹⁰ These lawsuits have concerned official sector actors enough to prompt extraordinary interventions by the governments of the United States and other countries, which have asked for litigation to be stayed to allow the conclusion of restructuring talks before any judgments are entered.¹¹ According to the U.S.

7. See *infra* notes 19–20 and accompanying text.

8. IMF, *International Architecture*, *supra* note 6, at 31–32 (explaining that the argument that bondholders who obtain judgment would no longer be affected by a CAC under the doctrine of merger has not been tested in courts).

9. *Id.* at 32. See also Anne O. Krueger & Sean Hagan, *Sovereign Workouts: An IMF Perspective*, 6 CHI. J. INT’L L. 203, 215 n.26 (2005) (suggesting that one benefit of a statutory bankruptcy regime for sovereigns is that such a regime, unlike CACs, “would bind judgment creditors: those creditors whose claims are no longer subject to the provisions of the underlying contract by virtue of the fact that they had received a judgment against the sovereign from a court of competent jurisdiction”); Sean Hagan, *Designing a Legal Framework to Restructure Sovereign Debt*, 36 GEO. J. INT’L L. 299, 323–24 (2005) (noting argument that the “reverse side” of the doctrine of merger in New York would render a judgment creditor “immune from any amendments that are affected with respect to any contractual claims”).

10. Claimants litigating against Venezuela have taken the position that a judgment offers protection from “compulsory restructuring of their debt[.]” Reply Memorandum of Law in Support of Plaintiffs’ Consolidated Motion for Summary Judgment and in Opposition to Venezuela’s Cross-Motion to Stay at 6, *Casa Express Corp. v. Bolivarian Republic of Venezuela*, 492 F. Supp. 3d 222 (S.D.N.Y. 2020) (No. 18 Civ. 11940). A commercial creditor litigating against Sri Lanka was understood to be seeking similar protection. *Cf. Hamilton Rsr. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-cv-5199, 2023 WL 7180683, at *2–4 (S.D.N.Y. Nov. 1, 2023) (noting that commercial creditor plaintiff “has not participated, and does not wish to participate, in Sri Lanka’s restructuring negotiations” and that denying a stay of proceedings “would encourage a ‘rush-to-the-courthouse’ by private creditors holding Sri Lanka’s sovereign debt in an attempt to secure priority”).

11. See Statement of Interest of the United States of America at 1–2, *Hamilton Rsr. Bank*, 2023 WL 7180683 (No. 22 Civ. 5199) (“The United States submits this Statement of Interest in support of Sri Lanka’s motion for a six-month stay. . . . U.S. policy interests favor an orderly and consensual sovereign debt restructuring process. . . .”); Brief for France and the United Kingdom as Members of the Paris Club as *Amicus Curiae* in Support of the Republic of Sri Lanka’s Petition for a Motion to Stay Proceedings at 1, *Hamilton Rsr. Bank*, 2023 WL 7180683 (No. 22 Civ. 5199) (“Both France and the UK support Sri Lanka’s request for a temporary stay of

government, letting a subset of investors “jump the queue” could undercut “efforts to seek economic and humanitarian improvements . . . and . . . the ability of future emerging market debt restructurings to achieve broad consensual participation.”¹²

In this Article, we consider whether a judgment indeed immunizes the judgment-holder against a debt restructuring approved by its fellow investors. We limit our discussion to the effect of a judgment issued by a federal court in the United States, but this is not much of a limitation, both because most litigation to enforce international sovereign bonds takes place in U.S. federal courts and because the effect of a judgment tends not to vary by jurisdiction.¹³

Existing analyses of this issue focus on the legal doctrine of merger and bar. As we will explain, that emphasis is misplaced. Instead, we focus attention on two questions, each of which has a relatively clear answer. The first question is whether a modification vote conducted pursuant to the CAC also modifies a previously entered judgment of a federal court. The answer is that it does not. The judgment is unaffected by the restructuring vote, and the judgment creditor may enforce the judgment even if this allows it to recover more than the issuer is obliged to pay restructuring participants. We suspect that existing analyses have focused on this first question and have therefore taken for granted the risks judgment creditors pose (at least in theory) to restructuring negotiations.

But the first question is less important than one might suppose. The second, more important, question is this: Can restructuring participants modify the bond in ways that will impair a judgment creditor’s ability to enforce the judgment? Despite some legal uncertainties, we think the answer to this question is “yes.” A judgment

proceedings . . .”). An additional concern is that, when bond investors opt out of a debt restructuring, the effect is to shift costs onto taxpayers in wealthy countries. *Id.* at 6 (“From the official bilateral creditors’ point of view, a holdout implies that their taxpayers bear the costs while enabling other creditors to receive full or comparatively superior reimbursement.”).

12. Statement of Interest of the United States of America, *supra* note 11, at 19–20. See also Lee Buchheit & Mitu Gulati, *Why the US *Should* Care About Sovereign Creditor Lawsuits*, FIN. TIMES (Nov. 1, 2023), <https://www.ft.com/content/57a2fa5b-bc68-4049-992c-e5920fce4a34> [<https://perma.cc/U5SF-6AUK>] (referencing the Statement of Interest and its principle of treating creditors the same).

13. See, e.g., 49 C.J.S. *Judgments* § 1 (2026) (gathering citations across jurisdictions adhering to a common understanding of “judgment”); see also HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 261 (2d ed. 1902) (“No principle of law is more firmly settled than that the judgment of a court of competent jurisdiction, so long as it stands in full force and unreversed, cannot be impeached in any collateral proceeding on account of mere errors or irregularities, not going to the jurisdiction.”).

creditor's right to enforce a judgment depends, in key respects, on the terms of the underlying contract. And in many cases, restructuring participants will be able to modify these terms while leaving the judgment itself intact. Assuming the sovereign's restructuring proposal enjoys broad creditor support, the mechanics of implementing these solutions are relatively straightforward. Although the risk is not zero, the existing contractual architecture gives restructuring participants tools to mitigate the risk of holdout judgment creditors, at least in some cases.¹⁴

This Article proceeds as follows. Part II shifts attention away from the doctrine of merger and bar, which does not provide a useful framework for analyzing the effect of a restructuring vote on a judgment. As Part II explains, the CAC in a sovereign bond survives the entry of judgment and continues to bind any investor, including any judgment holder, that still holds the bond. Nevertheless, a modification approved under the CAC neither alters a federal court judgment nor ordinarily provides a basis for judicial relief from that judgment. Part III then addresses the more consequential issue: whether, even if the judgment itself remains intact, restructuring participants can modify the underlying bond in ways that impair a judgment holder's ability to enforce it. Part III also explores the contractual tools available to creditor majorities as well as the legal uncertainties surrounding their use.

II. USING THE RIGHT DOCTRINE TO ANSWER THE RIGHT QUESTION

Restructuring negotiations often follow an extended period of debt distress, and it takes time to organize a vote under the CAC.¹⁵ There may be time for creditors to rush to the courthouse to obtain

14. The exceptions will involve cases where the sovereign remains in default for a very long time before restructuring. In such cases, it is possible that a large proportion of bond creditors will obtain judgments, making it effectively impossible for the remaining creditors to achieve the voting threshold required by the CAC. Venezuela is the prime candidate. But even in the Venezuelan context, relatively few creditors have sought to obtain judgments. See Patrick Bolton, Mitu Gulati & Ugo Panizza, *Sovereign Debt Puzzles*, 15 ANN. REV. FIN. ECON. 239, 255 (2023) (“[T]hroughout multiple recent crises—Argentina, Venezuela, Lebanon—dispersed creditors appeared to refrain from pulling the trigger and filing suit. If anything, creditors seem reluctant to take the step of filing suit.”).

15. See *id.* at 253–54 (2023) (“[C]ountries often appear to unduly delay debt restructuring Delayed defaults are then a form of second-best solution in an international financial architecture that lacks an efficient statutory mechanism for dealing with sovereign defaults.”).

judgments, yet such a rush rarely materializes. Few creditors have the appetite for the difficult and time-consuming process of enforcing a judgment against a foreign state. Creditors who do obtain a judgment risk seeing the judgment's real value shrink relative to the underlying bond claim if the judgment carries a lower interest rate.¹⁶ This leaves two plausible scenarios in which a sovereign's debt distress might prompt bondholders to convert bond claims into court judgments. In the first, a lone investor (or small group) believes that claims excluded from the restructuring will be paid more than creditors who participate in the restructuring.¹⁷ In the second, the sovereign's debt restructuring is so delayed that an expiring statute of limitations on the defaults prompts investors to sue.¹⁸ In these scenarios, it is possible that a subset of bond creditors might sue and obtain judgments. If this happens, do these creditors insulate themselves from a subsequent restructuring?

A. *The Misplaced Emphasis on "Merger and Bar"*

Early discussions of the risk posed by judgment creditors linked that risk to the legal doctrine of "merger and bar." As explained in a 2004 IMF paper:

At least under U.S. and English laws, the parties' legal obligations under an accelerated bond contract are extinguished by a court

16. This is because a bondholder who converts a bond claim into a judgment thereafter earns interest at the federal post-judgment rate, set by 28 U.S.C. § 1961, at a rate equal to the short-term borrowing costs of the U.S. government, rather than at the rate specified in the bond. As the metaphorical "risk free" borrower, the U.S. government's borrowing costs typically will be lower than those of the sovereign issuer of the bond. If the bond continues to accrue interest after default and the federal funds rate is lower than the interest due under the bond, a court judgment shrinks rapidly in value relative to the corresponding claim under the bond. *See, e.g.,* Gregory Makoff & W. Mark C. Weidemaier, *Mass Sovereign Debt Litigation: A Computer-Assisted Analysis of the Argentina Bond Litigation in the U.S. Federal Courts 2002–2016*, 56 U.C. DAVIS L. REV. 1233, 1256 tbl. 1 (2023) (demonstrating that the judgment's value in relation to the claim is smaller the earlier the judgment is entered).

17. Although the motives for the lawsuit are unclear, this may explain the litigation in *Hamilton Rsrv. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-cv-5199, 2023 WL 7180683 (S.D.N.Y. Nov. 1, 2023).

18. Venezuela is the example here, where a wave of litigation has so far been prevented only by a tolling agreement reached by the government and a large group of creditors. *See, e.g.,* Nicolle Yapur, *Venezuela Creditors Back Legal Extension for Defaulted Bonds*, BLOOMBERG (Aug. 17, 2023), <https://news.bloomberglaw.com/capital-markets/venezuela-creditors-back-legal-extension-for-defaulted-bonds> [https://perma.cc/9FRS-QH8D] (reporting on approval from creditors holding more than \$11 billion of Venezuelan debt).

judgment on liability. Consequently, the debtor's obligation to pay . . . becomes "merged" in the judgment. In turn, a judgment creditor obtains the right to enforce its judgment through the judicial enforcement mechanisms, as opposed to reliance on the extant contractual terms. This doctrine implies that a creditor who obtains a judgment on an accelerated claim is removed from the contractual limitations on its claim. Thus, in principle, such judgment creditors would be insulated from the reach of contractual clauses and, particularly, they could not be subjected to majority restructuring provisions and exit consents. However, the application of the doctrine of merger in this context has not been tested.¹⁹

The argument, in other words, is that, because of the doctrine of merger and bar, a judgment on an accelerated bond contract abrogates legal obligations under that contract, including the provisions relating to restructuring, and leaves the parties subject only to the terms of the judgment. Similar assertions reappear in more recent IMF reports discussing the risks posed by judgment creditors.²⁰

The argument laid out in this passage tends to obscure more than illuminate.²¹ It is undoubtedly correct insofar as a judgment creditor indeed may enforce its judgment notwithstanding a vote to restructure the bond's payment terms.²² But the reason is not "merger and bar." The ancient doctrine of "merger and bar," long ago absorbed in the federal system by the doctrine of claim preclusion, says that a final judgment on a claim precludes the plaintiff from bringing a second action asserting the same claim.²³

19. IMF LEGAL DEPARTMENT, RECENT DEVELOPMENTS IN SOVEREIGN DEBT LITIGATION AND IMPLICATIONS FOR DEBT RESTRUCTURING AND DEBT RELIEF PROCESSES, ¶ 43, SM/04/98 (Mar. 24, 2004) [hereinafter IMF, 2004 REPORT] (footnotes omitted).

20. See IMF, INTERNATIONAL ARCHITECTURE, *supra* note 6, at 31 n.48 ("This means that the parties' legal obligations under an accelerated bond are extinguished by a court judgment on liability—the debtor's obligation to repay principal and interest becomes merged in the judgment, and the creditor obtains the right to enforce its judgment through the judicial enforcement mechanisms, as opposed to relying on the contractual terms.").

21. To be clear, the authors of the passage mean to describe but not endorse the argument.

22. See discussion *infra* Section II.B.1.

23. Merger precludes the subsequent action when the plaintiff prevailed in the first action while bar applies when the defendant was victorious in the earlier action. *United States v. Ryan*, 810 F.2d 650, 654 (7th Cir. 1987) (defining merger and bar). Today the doctrine's relevance in federal court is confined to how it informs claim preclusion. See, e.g., *Migra v. Warren City Sch. Dist. Bd. of Educ.*, 465 U.S. 75, 77 n.1 (1984) ("Claim preclusion . . . encompasses the law of merger and bar."); *NML Cap.*,

Under merger and bar, a judgment does not extinguish all legal obligations under a contract.²⁴ The doctrine holds only that the judgment bars the plaintiff from filing another lawsuit asserting the same “claim,” a term now defined to include all rights and remedies with respect to the transaction that prompted the original cause of action.²⁵ The obvious example is the creditor who wins a judgment for non-payment of an accelerated bond; the creditor cannot file a second lawsuit against the same defendant for non-payment of the bond but instead must seek to enforce the original judgment.²⁶ But the judgment does not extinguish *all* legal obligations under the contract. For example, the creditor may file a new lawsuit asserting claims that were not available at the time of the first lawsuit, as well as suits against entities who were not parties in the original action.²⁷

Moreover, the IMF passage invites confusion by implying that a judgment renders contract provisions irrelevant. For instance, the passage says that the judgment creditor “obtains the right to enforce its judgment through the judicial enforcement mechanisms, as opposed to reliance on the extant contractual terms”; is “removed from contractual limitations on its claim”; and is “insulated from the reach of contractual clauses”²⁸ None of these assertions is correct. It is true that a defendant who loses cannot resist enforcement of the judgment on the basis of “defenses he might have interposed, or did interpose, in the first action.”²⁹ But a judgment on a contract claim does not automatically extinguish the entire contract between the parties. Many provisions in bond contracts are intended to continue

Ltd. v. Banco Cent. de la Republica Argentina, 652 F.3d 172, 185 (2d Cir. 2011) (referring to merger and bar as “terminology of the common law that federal courts have supposedly retired”).

24. *See* 50 C.J.S. *Judgments* § 918 (2026) (“On the entry of a judgment in favor of the plaintiff, the plaintiff cannot maintain a subsequent action on the original cause or claim, but may maintain a different cause of action even based on the same transaction or contract.”); *In re Davis*, 809 F. App’x 415, 416 (9th Cir. 2020) (“[O]nly ‘the particular cause or causes of action on the contract are merged into the judgment, not the contract itself,’ so merger ‘does not bar a different cause of action . . . on the same contract.’”) (quoting *Gietzen v. Covenant RE Mgmt.*, 253 Cal. Rptr. 3d 97, 100 (Cal. Ct. App. 2019)).

25. RESTATEMENT (SECOND) OF JUDGMENTS §§ 18, 24 (AM. L. INST. 1982). In the past, the same claim was often defined to be the precise same cause of action. *Id.* § 24 cmt. a.

26. *Id.* § 18. Again, this is better understood as an example of the doctrine of claim preclusion, rather than merger and bar.

27. *See* *Exp.-Imp. Bank of the Republic of China v. Grenada*, No. 13-cv-1450, 2013 WL 4414875, at *2–3 (S.D.N.Y. Aug. 19, 2013) (holding that *res judicata* does not bar a second action based on facts not present in the first action).

28. IMF, 2004 REPORT, *supra* note 19, at ¶ 43.

29. RESTATEMENT (SECOND) OF JUDGMENTS § 18(2) (AM. L. INST. 1982).

operating post-judgment. To take an obvious example, consider the waiver of the sovereign's immunity from execution—a standard feature of international sovereign bonds today.³⁰ This clause necessarily must operate post-judgment; a writ of execution is the primary means of enforcing a money judgment.³¹ The judgment-holder will rely on the waiver of execution immunity in seeking to attach and force an execution sale of sovereign assets.³² Likewise, bond provisions that assure the equal ranking of bondholders have been interpreted to survive the entry of judgment.³³

Some legal authorities do include broad statements to the effect that the parties' entire contract merges with a court's judgment.³⁴ But it is important to read these statements in context. What "merges" into the judgment is the underlying *claim*, not the entire contract.³⁵

30. See W. Mark C. Weidemaier, *Sovereign Immunity and Sovereign Debt*, 2014 U. ILL. L. REV. 67, 88 fig. 1 (2014) (illustrating the rise in the use of this boilerplate contract term); W. Mark C. Weidemaier & Mitu Gulati, *Market Practice and the Evolution of Foreign Sovereign Immunity*, 43 LAW & SOC. INQUIRY 496, 509 fig. 4 (2018) (illustrating how common execution immunity waivers have become over the past few decades).

31. See FED. R. CIV. P. 69(a)(1) ("A money judgment is enforced by a writ of execution, unless the court directs otherwise.").

32. A judgment creditor may need to characterize itself as a holder of the bond in order to benefit from the waiver of execution immunity. See, e.g., REPUBLIC OF EGYPT, PROSPECTUS 36 (Oct. 2, 2020) (on file with N.Y.U. Ann. Surv. Am. L.) (waiving immunity "for the benefit of holders of Notes"); cf. *Ex Parte* Application of Plaintiff at 9, 20, NML Cap., Ltd. v. Spaceport Sys. Int'l, L.P., No. 11-cv-03507, 2011 WL 13262661 (C.D. Cal. Apr. 25, 2011) (seeking execution on property subject to prior judgment and claiming waiver of execution immunity as a "holder of beneficial interests in bonds issued by the Republic of Argentina").

33. See *Exp.-Imp. Bank of the Republic of China v. Grenada*, No. 13-cv-1450, 2013 WL 4414875, at *3–4 (S.D.N.Y. Aug. 19, 2013) (reasoning why a claim on a bond's *pari passu* provision should survive the entry of judgment).

34. See, e.g., 30 WILLISTON ON CONTRACTS § 76:50 (4th ed. 2025) ("The general rule is, that by a judgment at law or decree in chancery, the contract or instrument upon which the proceeding is based becomes entirely merged in the judgment." (quoting *Doerr v. Schmitt*, 31 N.E.2d 971, 972 (Ill. 1941))); *In re Olick*, 221 B.R. 146, 152 (Bankr. E.D. Pa. 1998) ("In a contract action, the contract itself is held to merge with the judgment, thereby depriving a plaintiff from ever again being able to assert claims based on the terms and provisions of the contractual instrument.").

35. E.g., *Gietzen v. Covenant RE Mgmt.*, 253 Cal. Rptr. 3d 97, 100 (Ct. App. 2019) ("[T]he rule would be better stated that the particular cause or causes of action on the contract are merged into the judgment, not the contract itself."); see *Kenny v. Kenny Indus.*, 976 N.E.2d 1040, 1045 (Ill. App. Ct. 2012) (noting that the merger doctrine "applies only 'to causes of action to bar relitigation of the same cause'" and not where "the defendant's complaint does not seek to attack the judgment itself, but rather attempts to enforce its separate rights under the contract" (quoting *Stein v. Spainhour*, 553 N.E.2d 73, 76 (Ill. App. Ct. 1990))); see also *Orix Credit Alliance, Inc. v. Horten*, 965 F. Supp. 481, 485 (S.D.N.Y. 1997) ("[[P]laintiff's] original claim is extinguished and rights upon judgment are substituted for it." (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 18 cmt. a (AM. L. INST. 1982)));

There also are cases in which courts (in our view, unhelpfully) use the doctrine of merger effectively as a default rule of construction—that is, as establishing a presumption that a particular contract provision does not survive the entry of judgment. For instance, there are cases invoking merger to hold that a judgment accrues interest at the rate specified by law rather than at the contractual rate and that a mortgagor's obligation to pay taxes and insurance premiums does not survive a foreclosure judgment.³⁶ Like other default rules of construction, the merger doctrine, when used in this way, does not apply when the contract says otherwise.³⁷

To our knowledge, these are the only “merger and bar” cases that even arguably support the argument that a judgment creditor “is removed from the contractual limitations on its claim.”³⁸ In theory, a judgment creditor might invoke them to argue that, unless the bond's text says otherwise, courts should presume the CAC does not survive the entry of judgment and, therefore, that any modification pursuant to the CAC does not affect bonds held by the judgment creditor. Both in concept and in its particulars, however, this argument makes little sense.

Conceptually, it is unhelpful to invoke the doctrine of “merger and bar” to identify a rule of construction in this context. Rules of construction apply only if the contract has nothing to say on the subject. The analysis must start with the contract's text. Only in the absence of relevant text will the court have to select an appropriate rule of construction.³⁹ To do so, it will need to ask a series of

30 WILLISTON ON CONTRACTS, *supra* note 34, § 76:52 (“[A]ll the essential consequences of the merger of the plaintiff's right in a judgment are also necessary consequences of an application of the principles of res judicata.”).

36. See *FCS Advisors, Inc. v. Fair Finance Co.*, 605 F.3d 144, 148 (2d Cir. 2010) (holding that choice of law clause designating New York law did not require application of New York's post-judgment interest rate instead of federal post-judgment interest rate applicable by default); *Jack Henry & Assocs. v. BSC, Inc.*, 753 F. Supp. 2d 665, 670–71 (E.D. Ky. 2010) (holding that interest rate provision in contract was not specific enough to require application of contract interest rate post-judgment); *In re Presque Isle Apartments*, 112 B.R. 744, 747 (Bankr. W.D. Pa. 1990) (“[T]he legal rate of interest applies unless the documents evidence a clear intent to continue the contractual rate of interest post-judgment.”); *In re Stendardo*, 991 F.2d 1089, 1095–97 (3d Cir. 1993) (holding that mortgagor's obligation to pay taxes and insurance premiums did not persist after foreclosure judgment).

37. See, e.g., *In re Stendardo*, 991 F.2d at 1095 (“Parties to a mortgage may rely upon a particular provision post-judgment if the mortgage clearly evidences their intent to preserve the effectiveness of that provision post-judgment.”).

38. IMF, 2004 REPORT, *supra* note 19, ¶ 43.

39. See *R/S Assocs. v. N.Y. Job Dev. Auth.*, 771 N.E.2d 240, 242 (N.Y. 2002) (“Unless the court finds ambiguity, the rules governing the interpretation of ambiguous contracts do not come into play . . .” (citations omitted)).

very pragmatic questions. Would a proposed rule of construction advance or undermine reasonable commercial expectations in this market?⁴⁰ Would it be consistent with broader considerations of the public interest?⁴¹ The court's fundamental objective will be to identify a rule that is reasonable under the circumstances, and this cannot be done by incanting metaphors like "a contract merges into a judgment."⁴²

More important, there is no general rule of construction providing that contract provisions do not operate post-judgment. A judgment resolves only whether a contract has been breached and prescribes a remedy. That determination settles the obligations of the parties to the contract, but it does not cancel other provisions in the contract.⁴³ To the contrary, courts routinely presume that provisions related to dispute resolution and choice of law survive termination of the contract.⁴⁴ These cases typically do not involve

40. See generally Gregory Klass, *Boilerplate and Party Intent*, 82 L. & CONTEMP. PROBS. 105, 121–25 (2019) (discussing usage of boilerplate language and standard rules of construction within insurance and derivatives, two markets that "significantly benefit from uniformity of terms").

41. See generally *id.* at 125–30 (comparing effects of plain meaning rule and *contra proferentem* doctrine in insurance contracts as pertains to both drafters and insured).

42. See RESTATEMENT (SECOND) OF CONTRACTS § 204 cmt. d (AM. L. INST. 1981) ("[W]here there is in fact no agreement, the court should supply a term which comports with community standards of fairness and policy . . .").

43. See *Gietzen v. Covenant RE Mgmt.*, 253 Cal. Rptr. 3d 97, 100 (Cal. Ct. App. 2019) ("[T]he rule would be better stated that the particular cause or causes of action on the contract are merged into the judgment, not the contract itself."):

44. See, e.g., *Nolde Bros., Inc. v. Local No. 358, Bakery & Confectionery Workers Union*, 430 U.S. 243, 252–54 (1977) (presuming that an arbitration agreement survives termination of a contract); *Shivkov v. Artex Risk Sols., Inc.*, 974 F.3d 1051, 1062 (9th Cir. 2020) (holding that the omission of an arbitration clause from "the survival clause is insufficient to expressly negate the presumption in favor of post-termination arbitration or clearly imply that the parties intended for their arbitration obligations to terminate with the Agreements"); *Huffman v. Hilltop Cos.*, 747 F.3d 391, 394–95 (6th Cir. 2014) (holding that an arbitration clause survived contract termination despite being omitted from a contract's survival clause, which identified clauses that "shall survive the expiration or earlier termination of this Agreement"); *U.S. Smoke & Fire Curtain, LLC v. Bradley Lomas Electrolok, Ltd.*, 612 F. App'x 671, 672–73 (4th Cir. 2015) ("Generally, dispute-resolution provisions, such as forum-selection clauses, are enforceable beyond the expiration of the contract if they are otherwise applicable to the disputed issue and the parties have not agreed otherwise." (citations omitted)); *Warren Bros. Co. v. Cardi Corp.*, 471 F.2d 1304, 1309 (1st Cir. 1973) (rejecting argument that an arbitration clause did not apply to disputes arising after completion of work under a construction contract); 13 CORBIN ON CONTRACTS § 67.2 (rev. ed. 2003) ("Although termination and cancellation of an agreement extinguish future obligations of both parties to the

disputes over whether the provision operates post-judgment, but their reasoning extends to that context. They reason that the objectives the parties hoped to achieve by designating the law or forum in the contract remain relevant after the affirmative obligations in the contract terminate. For example, parties who include an arbitration clause in their contract presumptively do so because they have “confidence in the arbitration process” and wish to benefit from the arbitrator’s “presumed special competence.”⁴⁵ The desire to realize these benefits “does not terminate with the contract,” and it therefore makes sense to presume the arbitration clause (or the choice of forum clause, or the choice of law clause) remains in effect.⁴⁶

Thus, there is no generally applicable presumption, whether labeled a consequence of “merger and bar” or a default rule of construction, that a contract’s provisions cease to operate after the contract terminates. Courts sometimes presume contract terms survive termination, sometimes presume the opposite, and in all cases defer to the contract’s text. To the extent the opposing presumptions can be linked to an underlying principle, it is that contract provisions that are “structural (e.g., relating to remedies and the resolution of disputes)” presumptively survive termination, while provisions creating substantive obligations presumptively do not.⁴⁷ Because disputes often arise after termination of the contract, it makes sense to presume that parties expect clauses that govern the resolution of such disputes to survive contract termination as well.⁴⁸ As we explain below, the CAC in a sovereign bond is most reasonably viewed as a “structural” provision that survives termination of the

agreement, neither termination nor cancellation affect those terms that relate to the settlement of disputes or choice of law or forum selection clauses.”).

45. *Nolde Bros.*, 430 U.S. at 254.

46. *Id.*

47. *Silverpop Sys., Inc. v. Leading Mkt. Techs., Inc.*, 641 F. App’x 849, 857 (11th Cir. 2016). *See also* *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208 (1991) (“[S]tructural provisions relating to remedies and dispute resolution—for example, an arbitration provision—may in some cases survive in order to enforce duties arising under the contract. . . . [This] is similar to the rule of contract interpretation which might apply to arbitration provisions of other commercial contracts. We presume as a matter of contract interpretation that the parties did not intend a pivotal dispute resolution provision to terminate for all purposes upon the expiration of the agreement.” (footnote omitted)).

48. *Nolde Bros.*, 430 U.S. at 254 (explaining that the parties’ presumed “confidence in the arbitration process . . . does not terminate with the contract” and that a contrary presumption, which would lead to “the alternative remedy of a lawsuit[,] is the very remedy the arbitration clause was designed to avoid.”).

contract.⁴⁹ As we will also explain, there are sound textual arguments that a sovereign bond's CAC continues to operate post-judgment.⁵⁰

Two key implications follow. First, when a holder of a sovereign bond sues and obtains a judgment, the holder remains bound by any contract provisions that survive entry of judgment. The surviving provisions include those that the parties intended to survive (as that intent is expressed in the contract's text) as well as those "structural" provisions that survive by presumption. Second, any of these surviving provisions may be modified in a vote conducted pursuant to the CAC.

B. Modifications Affect Contracts, Not Judgments

Before elaborating on those arguments, some further clarification is in order. The core concern expressed in the IMF report quoted above, and raised by other official actors, is that a judgment holder will escape the effect of a restructuring vote.⁵¹ In considering that risk, it is tempting to conflate several questions that are best kept separate. One is whether a vote to modify a sovereign bond also modifies or alters a federal court judgment previously entered in a bondholder's favor. It does not. A second question is whether a modification vote under the CAC—roughly akin to a post-judgment settlement—could justify the court (never the parties!) in modifying or vacating its judgment. Perhaps, but rarely, and the restructuring vote would not be a very good reason to provide such relief. Finally, one might ask whether restructuring participants can modify a sovereign bond in ways that leave the judgment intact but impair the judgment-holder's ability or incentive to enforce the judgment. Subject to some constraints, they can.

1. A Restructuring Vote Has No Effect on a Court's Judgment

For two reasons, a modification vote conducted pursuant to a sovereign bond's CAC will have no effect on a previously entered judgment. First, by their own terms, CACs do not even purport to have such an effect. Second, and more fundamentally, even if they tried to exercise it, contracting parties do not have the power to modify judgments.

49. *Infra* Section III.A.

50. *Id.*

51. *See supra* notes 19–20.

a. CACs Do Not Purport to Reach Judgments

Assume that a supermajority of bondholders votes to reduce the outstanding principal amount due under the bonds by 50 percent. What could it mean to posit that this vote would also affect a court's judgment? First and foremost, one would have to argue that the text of the CAC manifests the intent to produce such an outcome. But existing CACs do nothing of the sort.

The text of a typical CAC makes clear that a duly approved modification binds all holders, including those who have already reduced their claims under the bond to judgments. It typically provides that a modification is "conclusive and binding on all holders," or something to that effect, whether or not a given holder participated in the vote, supported the modification, or anything else.⁵² Thus, if a vote satisfies the requisite voting threshold, a judgment creditor who continues to hold the bond will be affected by the modification.

But the modification is *to the bond*, not to the judgment or to the creditor's right to enforce it. A typical CAC says something like this, with our emphasis:

Upon the affirmative vote of holders of not less than X% in aggregate principal amount of the Bonds, the issuer may *modify, amend, or supplement the terms of the Bonds*; provided, however, that no such action may, without the consent of holders of X+Y% in aggregate principal amount of the Bonds, reduce the principal amount of any Bond.⁵³

52. See, e.g., Republic of Argentina, Prospectus, at 218 (Filed Pursuant to Rule 424(b)(3)) (Mar. 14, 2017), <https://www.sec.gov/Archives/edgar/data/914021/000119312517081458/d314222d424b3.htm> [<https://perma.cc/Q87Z-AER3>] (modifications "will be conclusive and binding on all holders of the relevant series of debt securities . . . whether or not they have given such consent or approval, and on all future holders of those debt securities"); GOVERNMENT OF BARBADOS, LISTING PARTICULARS 95 (Dec. 18, 2019) (on file with the N.Y.U. Annual Survey of American Law) (modifications "will be conclusive and binding on all Holders of the Bonds whether or not they have given such consent, and on all future Holders of the Bonds"); REPUBLIC OF LITHUANIA, OFFERING CIRCULAR 43 (Feb. 5, 2024), <https://finmin.lrv.lt/media/viesa/saugykla/2024/2/kFCvkA2IPC4.pdf> [<https://perma.cc/S39J-UW6C>] (modification "will be binding on all such Holders, whether or not the Holder was present or represented at the meeting, voted for or against the resolution or signed the written resolution").

53. See, e.g., BOLIVARIAN REPUBLIC OF VENEZUELA, LISTING MEMORANDUM 20 (Oct. 23, 2009), https://data.cbonds.info/emissions/11672/Prospectus_Venezuela_2019_2024.pdf [<https://perma.cc/9PQJ-5GAM>] ("[W]ith the written consent of the owners of not less than 66%% in aggregate principal amount of such Series of the Bonds then Outstanding . . . the Republic and the Fiscal Agent . . . may modify, amend or supplement the terms of such Series of the Bonds . . . and the holders of such Series of the Bonds may make, take or give any request, demand,

Many CACs also make clear that holders can vote to take actions “with respect to the [b]onds[,]” such as giving notice, waiving rights, or directing the fiscal agent or trustee to act.⁵⁴

No plausible reading of such language extends restructuring votes to judgments. A judgment is not a bond or a contract, nor is it a term of a bond or a contract.⁵⁵ It is an entirely separate thing, a decision representing a “court[’s] . . . final determination of the rights and obligations of the parties in a case.”⁵⁶ A judgment is a judicial decree entered by the government entitling the judgment-holder to invoke the coercive legal machinery of the state. And while the standard CAC template lets a creditor majority modify the contract over the objection of dissenters, it does not purport to have any effect on such a decree. It follows that, in any attempt to modify a judgment, the judgment creditor can rightfully deny ever having consented to such a modification.⁵⁷

authorization, direction, notice, consent, waiver or other action provided hereby or by the Fiscal Agency Agreement to be made, given or taken by the holders of such Series of the Bonds; provided, however, that no such action may, without the consent or affirmative vote, in person or by proxy thereunto duly authorized in writing, of the holders of not less than 75% in aggregate principal amount of such Series of the Bonds then Outstanding, [modify any payment or other key provision.]”).

54. *Id.* at 22. See also Republic of Chile, Prospectus Supplement, at 7 (Filed Pursuant to Rule 424(b)(3)) (June 27, 2023), https://www.sec.gov/Archives/edgar/data/19957/000110465923075660/tm2319570d8_424b2.htm [<https://perma.cc/4V6L-37VR>] (“The holders may generally approve any proposal by Chile to modify or take action with respect to the indenture or the terms of the debt securities . . .”).

55. See discussion *infra* Section II.B.1.b (noting that “[c]ourts equated judgments with contracts as a legal fiction to explain why parties could bring actions to enforce judgments,” and even then, courts “did not actually treat judgments as contracts”).

56. *Judgment*, BLACK’S LAW DICTIONARY (12th ed. 2024); see also William Baude, *The Judgment Power*, 96 GEO. L.J. 1807, 1826 (2008) (“[J]udgments . . . authoritatively settle disputes between the parties.”). The judgment holder thereafter gains the right to enforce the judgment, including by filing a separate action on the judgment. See, e.g., N.Y. C.P.L.R. 5303(b) (McKinney 2021) (providing for recognition of foreign country judgment by filing an action on the judgment among other methods).

57. It is often said that arbitration awards become part of the parties’ contract. That formulation is common in the context of labor arbitration. See, e.g., *Ethyl Corp. v. United Steelworkers*, 768 F.2d 180, 184–86 (7th Cir. 1985) (noting that “the refusal to comply with an arbitrator’s award becomes a breach of contract” and “[t]he arbitrator may not modify the contract unless authorized to do so”); Theodore J. St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 MICH. L. REV. 1137, 1160–61 (1977) (finding that an arbitrator’s award becomes part of the collective bargaining agreement). But it is equally true in other arbitration contexts. See, e.g., *George Watts & Son, Inc. v. Tiffany & Co.*, 248 F.3d 577, 580 (7th Cir. 2001) (likening arbitral awards to settlements); *Zelle v. Chicago & N.W.R. Co.*, 65 N.W.2d 583, 590 (Minn. 1954) (“An arbitration award . . .

b. Parties Cannot Vacate or Modify Court Judgments Directly

Even if CACs purported to allow parties to vacate or modify court judgments, that grant of power would be ineffective. A judgment represents the exercise of the judicial power of the United States.⁵⁸ That power is reserved to the Supreme Court and to any lower courts created by Congress.⁵⁹ It cannot be exercised by others.

The judicial power is the authority to decide cases dispositively.⁶⁰ The judgment is the legally operative tool that courts use to exercise that power.⁶¹ A judgment has the force of law for the parties.⁶² For example, Henry Campbell Black stated in his treatise on judgments that a judgment “establishes an indisputable obligation and confers upon the successful party the right to issue execution or other process of the court for its enforcement.”⁶³ Other historical treatises offer a similar definition.⁶⁴

would for all purposes under the arbitration provisions thereof be read into the original agreement”); Paul F. Kirgis, *Arbitration, Bankruptcy, and Public Policy: A Contractarian Analysis*, 17 AM. BANKR. INST. L. REV. 503, 535 (2009) (noting that an arbitration award “is thus not the equivalent of a judgment” but is “instead, the equivalent of a contract term that must be enforced unless some legal rule renders it unenforceable”). It is an interesting question, then, whether a vote under the CAC could directly affect an arbitration award entered in favor of a bondholder. But regardless of the answer, the modification would not reach any judgment obtained by the creditor in proceedings to confirm or enforce the arbitration award.

58. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 219 (1995) (“[A] ‘judicial Power’ is one to render dispositive judgments.” (quoting Frank H. Easterbrook, *Presidential Review*, 40 CASE W. RES. L. REV. 905, 926 (1989))); F. Andrew Hessick, *Consenting to Adjudication Outside the Article III Courts*, 71 VAND. L. REV. 715, 720–21 (2018) (explaining the history of the judicial power to render dispositive judgments).

59. U.S. CONST. art. III, § 1.

60. *Plaut*, 514 U.S. at 219 (“[A] ‘judicial Power’ is one to render dispositive judgments.” (quoting Easterbrook, *supra* note 58, at 926)); see also Hessick, *supra* note 58, at 720 (tracing this understanding of the judicial power to the founding era).

61. See *Plaut*, 514 U.S. at 219 (“[A] ‘judicial Power’ is one to render dispositive judgments.” (quoting Easterbrook, *Presidential Review*, *supra* note 58, at 926)); Edward A. Hartnett, *A Matter of Judgment, Not a Matter of Opinion*, 74 N.Y.U. L. REV. 123, 126 (1999) (“The operative legal act performed by a court is the entry of a judgment . . .”).

62. HENRY CAMPBELL BLACK, A TREATISE ON THE LAW OF JUDGMENTS § 1 (2d ed. 1902) (“[A] judgment, as the culmination of the action, declares the existence of the right, recognizes the commission of the injury, or negatives the allegation of one or the other.”).

63. *Id.* § 4.

64. See, e.g., ABRAHAM CLARK FREEMAN, A TREATISE OF THE LAW OF JUDGMENTS § 1, at 2 (Edward W. Tuttle ed., 5th ed. 1925) (“[A judgment] finally terminates the disputes and adjusts the adverse interests of mankind.”).

Judgments differ from opinions, which provide a rationale for the judgment.⁶⁵ But the judgment's authority depends on its source, not its rationale.⁶⁶ Opinions apply to everyone, and anyone—including parties to the judgment that produced the opinion—can argue that the theory espoused in an opinion should be limited or reconsidered.⁶⁷ Not so with judgments.⁶⁸ Judgments conclusively establish rights and obligations, and they impose the relief that the lawsuit seeks.⁶⁹ A prevailing plaintiff armed with a judgment may seize chattels, obtain a lien, or attach property, and, in the case of an injunction, file a motion for contempt.

The core characteristic of a judgment—what makes a judgment authoritative—is that it cannot be modified except by another exercise of judicial power. The Supreme Court has recognized this principle since its earliest days. In 1792 in *Hayburn's Case*, Chief Justice Jay and Justices Iredell, Cushing, Wilson, and Blair stated that executive officials could not review judicial judgments.⁷⁰ Almost two centuries later, in *Plaut v. Spendthrift Farm*, the Supreme Court invoked the same principle to hold that Congress cannot direct courts to reopen final judgments.⁷¹ These cases rest on the basic proposition that only the judiciary can revise judgments issued by a court.

65. Hartnett, *supra* note 61, at 126 (“The operative legal act performed by a court is the entry of a judgment; an opinion is simply an explanation of reasons for that judgment.”). An opinion is not part of the judgment and is not necessary to the exercise of judicial power. See FREEMAN, *supra* note 64, § 2, at 5 (“The reasons announced by the court to sustain its decision . . . constitute no part of the judgment.”); see also *id.* § 98 (“Ordinarily it is no proper part of a judgment at law to make provision for its enforcement . . .”).

66. As Chief Justice Marshall observed, even if a “judgment” is “erroneous . . . , it is a judgment, and, until reversed, cannot be disregarded.” *Kempe's Lessee v. Kennedy*, 9 U.S. (5 Cranch) 173, 186 (1809). Cf. *Christmas v. Russell*, 72 U.S. (5 Wall.) 290, 302 (1866) (“Where the jurisdiction has attached the judgment is conclusive for all purposes, and is not open to any inquiry upon the merits.”).

67. Cf. *Hubbard v. United States*, 514 U.S. 695, 711–15 (1995) (discussing role of *stare decisis* and grounds for departing from precedent).

68. See *Richards v. Jefferson Cnty.*, 517 U.S. 793, 798 (1996) (noting the “general consensus” that judgments in personam ordinarily bind only the parties to the litigation).

69. The Constitution does not define the “judicial Power,” but it is clear that, at its core, the judicial power refers to the power to provide remedies for legal wrongs, to determine the facts of, and apply the law to, particular cases, and to render dispositive judgments in those cases. See Hessick, *supra* note 58, at 719–22 (detailing historical aspects of Article III judicial power).

70. *Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792).

71. See *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218–19 (1995) (“The record of history shows that the Framers crafted this charter of the judicial department with an expressed understanding that it gives the Federal Judiciary the power, not merely to rule on cases, but to *decide* them By retroactively commanding

Although the Court's decisions have focused on the inability of other branches of government to modify judgments, the underlying principle—that no one outside the judiciary can modify a judgment issued through the judicial power—applies equally to individuals. That principle precludes the parties to a judgment from modifying it. John Jay observed this point in Federalist 64, stating “judgments” issued by courts “are as valid and as binding on all persons whom they concern, as the laws passed by our legislature”⁷² Thus, even if all the parties to a judgment agree that it should be modified, they have no ability to do so. The judgment's authority does not depend on their acquiescence.⁷³ In the main, parties may *prevent* a court from rendering a judgment by settling a dispute and mooted the case.⁷⁴

the federal courts to reopen final judgments, Congress has violated this fundamental principle.”). Before ratification, some state legislatures had the power to vacate judicial judgments. See *Bank Markazi v. Peterson*, 578 U.S. 212, 240 (2016) (Roberts, C.J., dissenting) (referencing the independent State of Vermont legislature which “stay[ed] and vacat[ed] judgments, suspend[ed] lawsuits, [and] resolv[ed] property disputes”). Preventing this practice in the federal system was a major reason for the independent judiciary established in Article III of the Constitution. See EDWARD S. CORWIN, *THE DOCTRINE OF JUDICIAL REVIEW* 42 (1914) (describing how when the Philadelphia Convention vested the judicial authority and supremacy to a federal judiciary, it was with the “expressed . . . intention of excluding Congress from the business of law-interpreting altogether” and to give “the Constitution the character of supreme law within the individual States enforceable by the several State judiciaries”); John F. Manning, Response, *Deriving Rules of Statutory Interpretation from the Constitution*, 101 COLUM. L. REV. 1648, 1663 (2001) (“Article III, in large measure, reflects a reaction against the practice [of legislative interference with] state courts.”). The fear was that combining the legislative and judicial power in a single body could lead to tyranny. See CORWIN, *supra*, at 36–37 (“[A]s both Madison and Jefferson put the matter later, legislative power was the *vortex* into which all other powers tended to be drawn.”). But even when those states did allow legislative override, the parties themselves could not overturn or modify the judgment. They had to ask the legislature to do so.

72. THE FEDERALIST No. 64 (John Jay); see also *Acheson Hotels, LLC v. Laufer*, 601 U.S. 1, 17 (2023) (Jackson, J., concurring in the judgment) (“We do not consider a court’s judgment to be any less binding on the parties simply because there is not an appeal; appeal or not, lower court rulings are still law.”); *Gamble v. United States*, 587 U.S. 678, 719 n.5 (2019) (Thomas, J., concurring) (“Of course, consistent with the nature of the ‘judicial Power,’ the federal courts’ judgments bind all parties to the case, including Government officials and agencies.”); *East Carolina Lumber Co. v. West*, 102 S.E.2d 248, 249 (N.C. 1958) (holding under state law that “[a]n erroneous or irregular judgment binds the parties thereto until corrected in a proper manner”).

73. Baude, *supra* note 56, at 1814 (describing the judgment power as “the power to bind those who disagree with [the court]”).

74. See *Yunker v. Allianceone Receivables Mgmt., Inc.*, 701 F.3d 369, 372 (11th Cir. 2012) (“As a general principle, settlement between the parties in litigation renders the case moot.”); see also *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 77

But once a court renders a judgment, it becomes law, and the parties cannot overturn or modify it.⁷⁵ The inability of the parties to modify a judgment distinguishes it from other methods of resolving disputes, including contractual settlements.

It is true that some old authorities described judgments as contracts. A typical example is the statement by a New York court in the 1920s that “[a] judgment . . . is but a contract.”⁷⁶ The theory was that a judgment establishes a legal obligation, and a promise to pay was implied where such an obligation existed.⁷⁷ On this view, one might think that the parties can modify a judgment just as they can any other contract.

But judgments are not contracts.⁷⁸ Courts equated judgments with contracts as a legal fiction to explain why parties could bring actions to enforce judgments, reasoning that the action to recover on a judgment was effectively a contract action.⁷⁹ Even these courts, however, did not actually treat judgments as contracts. Among other things, they did not leave judgments up for renegotiation. As one New York court stated after describing a judgment as a contract, a “judgment stands as a conclusive declaration” of rights, and “forever settles the plaintiff’s claim.”⁸⁰

2. Courts May, but Generally Should Not, Enforce Agreements to Modify Judgments

Thus, parties cannot directly modify or vacate a judgment and cannot compel a court to do so either. In rare cases, however, post-judgment events can justify a court in granting relief from a judgment. Litigants who reach a settlement after the entry of judgment sometimes point to the settlement as a basis for such relief, asking the court to vacate the judgment or revise it to reflect the

(2013) (stating that a claim for damages “remains live until it is settled” or otherwise resolved).

75. Although parties cannot modify a judgment by settlement, a court has the power to do so. *See infra* Section II.B.2.

76. *Markle v. Osborne*, 201 N.Y.S. 7, 8 (App. Div. 1923).

77. *See Louisiana ex rel. Folsom v. Mayor of New Orleans*, 109 U.S. 285, 288 (1883) (explaining this contractual theory).

78. *See, e.g., McCoun v. N.Y. Cent. & Hudson River R.R.*, 50 N.Y. 176, 180 (1872) (“Even a judgment founded upon contract is no contract for *judicium redditur in invitum*.”).

79. *See, e.g., Folsom*, 109 U.S. at 288.

80. *Crane v. Crane*, 19 N.Y.S. 691, 693 (N.Y. City Ct. 1892).

terms of their new agreement.⁸¹ This is perhaps the closest analogy to what might happen after a modification vote takes place under the CAC. The bond issuer might point to this post-judgment development as a basis for vacating or modifying a judgment entered in favor of a non-participating bondholder.⁸² But we think courts generally should deny such requests.

As an initial matter, the fact that parties to a lawsuit have reached a post-judgment settlement is not a very good basis for granting relief from the judgment. This is especially true when the settlement is proffered as a basis for vacatur. Judicial actions are expensive. The public bears that cost, both through taxes to support the judiciary and by serving as jurors in particular cases. The classic justification for state-subsidized dispute resolution is that it produces public goods such as precedent.⁸³ If a post-judgment settlement results in vacatur, it allows the parties to capture the benefits of state-subsidized adjudication while eliminating the public goods that justify the subsidy in the first place. Vacatur also increases litigation costs by compromising the judgment's preclusive effect and raising the prospect of additional litigation.⁸⁴ Accordingly, revisiting judgments is limited to exceptional circumstances, such as to prevent a miscarriage of justice. The federal rules capture these principles, permitting courts to vacate or modify judgments only for limited reasons, as when the

81. See U.S. Bancorp Mortg. Co. v. Bonner Mall P'ship, 513 U.S. 18, 29 (1994) (rejecting petitioner's argument that functional settlement in Chapter 11 case justified appellate court's vacatur of lower court judgments). See also *Clarke v. Castro*, No. 10-cv-6330, 2013 WL 686680, at *3 (S.D.N.Y. Feb. 26, 2013) (rejecting parties' motion to vacate despite settlement agreement premised on vacatur).

82. We have never seen a CAC whose text, in our view, can be reasonably interpreted to require this result. That is, no CAC we have ever seen purports to modify an investor's rights as judgment holder, as opposed to its rights as bondholder. The analogy is therefore imperfect, since the modification vote under the CAC does not produce a "settlement" that reduces the amount the litigating bondholder is owed on the judgment.

83. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 242, 248 (1979) (discussing how the "precedent-creating function of adjudication . . . may invite public intervention in the judicial-services market" and the "public-good character of precedent").

84. The entry of judgment precludes a losing party from relitigating in another case an issue resolved by the judgment. Issue preclusion conserves judicial resources, a benefit that is lost when a judgment is vacated because of a settlement. See *Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("[Preclusion doctrines] relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication.").

judgment is the product of fraud or there are other “extraordinary” circumstances.⁸⁵

Relying on reasons of this sort, the Supreme Court held in *Bonner Mall* that “mootness by reason of settlement does not justify vacatur of a judgment under review.”⁸⁶ Although the Court left open the possibility that “exceptional circumstances” might justify vacatur, it made clear that “those exceptional circumstances do not include the mere fact that the settlement agreement provides for vacatur.”⁸⁷ Following this guidance, lower courts generally have refused to reopen or vacate judgments based on a settlement.⁸⁸ A few courts have held that vacatur is appropriate where, for instance, vacatur is a necessary condition for the parties to reach a settlement, or where vacatur was necessary to prevent a windfall recovery.⁸⁹

We are skeptical of these lower court decisions. Vacatur of a judgment wastes public resources and eliminates public goods.⁹⁰ That litigants believe it necessary to impose such costs on the public

85. See FED. R. CIV. P. 60(b) (listing these circumstances); *Gonzalez v. Crosby*, 545 U.S. 524, 535 (2005) (“[O]ur cases have required a movant seeking relief under Rule 60(b)(6) to show ‘extraordinary circumstances’ justifying the reopening of a final judgment.”).

86. *Bonner Mall*, 513 U.S. at 29.

87. *Id.*

88. See, e.g., *Doe v. Gonzales*, 449 F.3d 415, 420–21 (2d Cir. 2006) (denying vacatur of district court ruling because “[j]udicial precedents are presumptively correct and valuable to the legal community as a whole” (alteration in original) (quoting *U.S. Bancorp.*, 513 U.S. at 26)); *ATSI Commc’ns, Inc. v. Shaar Fund, Ltd.*, 547 F.3d 109, 113 (2d Cir. 2008) (same, where “despite the possibility that the parties’ settlement efforts may fail as a result,” denial of vacatur promotes the public interest “in preserving judicial precedent”); *Austin v. Ford*, 181 F.R.D. 283, 286 (S.D.N.Y. 1998) (denying vacatur despite parties’ argument that vacatur “will not have any impact on the development of decisional law” because the “public interest in finality of judgment in this case controls”).

89. See *Major League Baseball Props., Inc. v. Pac. Trading Cards, Inc.*, 150 F.3d 149, 152 (2d Cir. 1998) (finding exceptional circumstances were present, in part because “vacatur of the district court’s order and opinion was a necessary condition of settlement”); *Doe v. Hreib*, 384 F. Supp. 3d 137, 139 (D. Mass. 2019) (granting vacatur where court had encouraged settlement after signaling that it would grant remittitur of jury verdict and where denial of vacatur would “grant [plaintiff] a windfall” and “incentivize plaintiffs . . . to settle strategically post-judgment to avoid remittitur of an unduly large jury verdict”).

90. See *Bonner Mall*, 513 U.S. at 26 (“Judicial precedents are presumptively correct and valuable to the legal community as a whole. They are not merely the property of private litigants and should stand unless a court concludes that the public interest would be served by a vacatur.” (quoting *Izumi Seimitsu Kogyo Kabushiki Kaisha v. U.S. Philips Corp.*, 510 U.S. 27, 40 (1993) (Stevens, J., dissenting))).

as a condition of their settlement strikes us as an argument against rather than for vacatur.⁹¹

In any event, these cases provide no support for the argument that a successful modification vote under the CAC should result in the vacatur of judgments entered in favor of that subset of investors who opted to sue rather than negotiate. The successful modification vote would show, if any proof were needed, that the sovereign could effectuate a debt restructuring even without vacatur of any outstanding judgments against it.

If a bond issuer restructures its payment obligations to bondholders under the CAC, its best argument might be that the restructuring constitutes an “extraordinary circumstance” that justifies modifying, not vacating, the judgment under Federal Rule of Civil Procedure 60(b)(6).⁹² For instance, it might ask the court to reduce the amount of the judgment to match, in net present value terms, the issuer’s financial obligations to restructuring participants. Such a modification, it might argue, would not raise the same concerns as a request for vacatur, because the precedential and preclusive effect

91. This is not to suggest that modification of a judgment based on a contract is *never* warranted. In some circumstances, a contract may change circumstances in a way that makes it unjust or inequitable to maintain the original judgment. One situation is if a party claims the ability to enforce a judgment after a contract satisfies that judgment. Failure to recognize satisfaction is a ground for modifying a judgment. A judgment entitles the prevailing party to only one recovery. If the prevailing party fails to acknowledge that the other party has paid off a judgment, a court may modify the judgment to reduce the defendant’s liability by the amount of payment. See FED. R. CIV. P. 60(b)(5) (describing this ground for relief from a judgment). The modification prevents the plaintiff from going to another jurisdiction to seek a second recovery. The same principles apply to satisfaction by contract. For example, a contract providing for the reduction to \$100 of a \$200 judgment in favor of the plaintiff constitutes partial satisfaction of the judgment. If the plaintiff continues to insist that the defendant owes the full \$200 despite the contract, the court should reduce the judgment by \$100.

92. See *BLOM Bank SAL v. Honickman*, 605 U.S. 204, 210 (2025) (“Relief under Rule 60(b)(6) requires extraordinary circumstances.”). Notably, FED. R. CIV. P. 60(b)(5) would not be applicable because it permits the court to grant relief from a judgment when “applying it prospectively is no longer equitable[,]” and money judgments do not operate prospectively. See, e.g., *Stokors S.A. v. Morrison*, 147 F.3d 759, 762 (8th Cir. 1998) (“Rule 60(b)(5)’s equitable leg cannot be used to relieve a party from a money judgment”); *DeWeerth v. Baldinger*, 38 F.3d 1266, 1275 (2d Cir. 1994) (“[J]udgments involving injunctions have prospective application, while money judgments do not.”) (citation and internal quotations omitted); *Marshall v. Bd. of Educ.*, 575 F.2d 417, 425 (3d Cir. 1978) (“[Rule 60(b)(5)] empowers a court to modify a judgment only if it is prospective, or executory.”) (citation and internal quotations omitted); *Fed. Trade Comm’n v. Hewitt*, 68 F.4th 461, 467 (9th Cir. 2023) (“[Such] a money judgment does not have prospective application’ for purposes of Rule 60(b)(5)” (quoting *Stokors*, 147 F.3d at 762)).

of the judgment would remain intact.⁹³ Indeed, the issuer might argue, modification in this context would leave intact the public goods created by litigation while generating additional public goods to improve the functioning of sovereign debt markets.

The logic of this argument will be familiar to anyone exposed to debates about the role of collective voting mechanisms in sovereign debt restructurings.⁹⁴ There is a strong public interest in orderly restructuring, predicated on a system in which creditors are treated equally. CACs play a crucial role in this system by preventing defectors from undermining or derailing a restructuring that benefits the sovereign and its creditors as a group. By modifying the judgment to conform to the terms of the restructuring, the court would be limiting incentives to defect, filling a gap in this system.

We think a court should reject this argument out of hand. There is nothing unforeseeable or extraordinary about a scenario in which some creditors race to the courthouse ahead of a restructuring.⁹⁵ It is precisely what one would expect to happen in the absence of a formal bankruptcy regime. A creditor's race to the courthouse, in other words, is a predictable feature of the existing legal landscape. To grant vacatur or modification on such a basis would undermine the finality of judgments and dilute the strict "extraordinary circumstances" standard. Motions for relief under Federal Rule of Civil Procedure 60(b)(6), unlike motions under some other parts of the Rule, can be filed at any time.⁹⁶ Creditors could never be confident in their rights. Moreover, it proves too much to suggest that courts should vacate judgments to maintain parity among creditors. The argument implies that courts should use their inherent powers to

93. The judgment's preclusive effect arguably may be impaired even if a court simply modifies rather than vacates it, at least to the extent the modification implies that the judgment rests on the contract instead of on the issues necessarily resolved in the original action.

94. See Weidemaier & Gulati, *supra* note 4, at 57 ("Once CACs were incorporated into sovereign bonds, private lenders would be more likely to participate in a sovereign debt restructuring. This trend would reduce the need for official intervention and give private lenders an incentive to lend more prudently."); see also Gelpern & Gulati, *supra* note 5, at 1709–15 (summarizing contract theory of desirability of CACs for sovereigns and creditors).

95. See, e.g., *Hamilton Rsr. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-cv-5199, 2023 WL 7180683, at *4 (S.D.N.Y. Nov. 1, 2023) (granting a stay of proceedings out of concern that to do otherwise "would encourage a 'rush-to-the-courthouse' by private creditors holding Sri Lanka's sovereign debt in an attempt to secure priority").

96. Compare FED. R. CIV. P. 60(b)(6) (containing no time requirement), with FED. R. CIV. P. 60(c)(1) (motions under Rule 60(b) must be made "in a reasonable time" and within one year if under 60(b)(1)–(3)).

conjure a system of bankruptcy from thin air. This would be an extraordinary assertion of judicial power. Finally, the argument for modification relies on a bootstrapping logic that effectively treats a successful modification vote as sufficient to prove that it would be inequitable to allow a litigating creditor to enforce its judgment. But the inequity is not so obvious. In at least some cases, the creditor's lawsuit and resulting judgment, and the threat of others like it, may provide additional incentive to get a restructuring deal done.

III. MODIFYING THE BOND TO IMPAIR JUDGMENT ENFORCEABILITY

Although a modification to a sovereign bond has no effect on a court judgment and generally is not a basis for granting a request to vacate or modify the judgment, the toolkit is not empty. It is common for creditors who participate in a restructuring to worry that other creditors will get better treatment. On occasion, they insist on contractual protections against this risk, such as "most favored creditor" clauses in which the sovereign promises to extend to them the terms of any better deal it offers to non-participating creditors.⁹⁷ Such clauses prevent the sovereign from voluntarily paying the full amount of an outstanding judgment. Of course, a judgment creditor does not need the sovereign to pay voluntarily; it can try to collect on the judgment by attaching sovereign assets. Typically, its odds of success will be low.⁹⁸ But if attachment does pose a serious threat, and this bothers restructuring participants, they can use the CAC to impair the judgment holder's rights. This power is not absolute, and there are legal uncertainties, but we think that restructuring participants have significant power to defang judgment creditors.

An example will help illustrate how restructuring participants might try to limit the power of judgment creditors, as well as the areas of legal uncertainty implicated by any such attempt. We will use Venezuela, a country desperately in need of a debt restructuring.

97. See DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, INVITATION AND CONSENT SOLICITATION MEMORANDUM 121 (Nov. 25, 2024) (providing that, so long as restructured debt remains outstanding, Sri Lanka "shall not enter into any agreement or arrangement to pay . . . or otherwise restructure . . . [on more favorable terms] unless the Republic offers such more favourable terms" to restructuring participants).

98. See Makoff & Weidemaier, *supra* note 16, at 1251–52 & 1256 tbl. 1 (discussing difficulties in attaching sovereign assets and detailing higher financial returns to creditors who delay as long as possible before reducing claims against a foreign sovereign to judgment).

Suppose an investor holding a position too small to block a restructuring vote obtains a court judgment on its claim.⁹⁹ This appears to describe litigation by a number of holders of Venezuelan debt. For instance, several investment funds organized under the law of the Cayman Islands, apparently, hold around \$209.5 million in face value of a Venezuelan bond issued in 2009 with a total face value of roughly \$2.5 billion.¹⁰⁰ These entities sued and received judgment for certain missed payments.¹⁰¹ The bonds' CAC allows holders of two-thirds in aggregate principal amount of the bonds to modify most bond provisions. More important terms, including those related to payment, require holders of at least three-quarters in aggregate principal amount to vote in favor.¹⁰² Assume that, in an eventual Venezuelan debt restructuring, the country reasonably fears that it cannot restructure this bond unless it assures other bondholders that it will not give a better deal to entities that raced to the courthouse and obtained judgments. What options might it pursue?¹⁰³

A. Removing the Waiver of Sovereign Immunity from Execution

An outstanding judgment is of little value unless it can be enforced, and the ability to enforce the judgment depends, in important ways, on the provisions of the bond contract. Most notably,

99. Of course, a judgment creditor with a sufficient stake may be able to veto any modification limiting its ability to collect on the judgment. That veto power stems from the CAC itself, not from the judgment obtained by the creditor.

100. Complaint at 4, *Pharo Gaia Fund, Ltd. v. Bolivarian Republic of Venezuela*, 2021 WL 2168916 (S.D.N.Y. May 27, 2021) (No. 19 Civ. 3123), Dkt. No. 1-1 (alleging plaintiff funds own a beneficial interest in \$114 million and \$95.5 million of Venezuela's 7.75% 2019 Bonds, respectively); *BOLIVARIAN REPUBLIC OF VENEZUELA*, *supra* note 53, at 12 ("The Bonds will[] be issued in an aggregate principal amount of U.S.\$2,495,963,000 in respect of the Bonds due 2019. . . .").

101. *See Pharo Gaia Fund, Ltd. v. Bolivarian Republic of Venezuela*, No. 19-cv-3123, 2025 WL 1284787, at *1 (S.D.N.Y. May 1, 2025) (describing this case history).

102. *See BOLIVARIAN REPUBLIC OF VENEZUELA*, *supra* note 53, at 20 ("[N]o such action may, without the consent or affirmative vote, in person or by proxy thereunto duly authorized in writing, of the holders of not less than 75% in aggregate principal amount of such Series of the Bonds then Outstanding [modify any payment or other key provision] . . .").

103. We are using the litigation brought by these funds as an example only. In these specific cases, after unsuccessfully seeking to enforce the judgments, the plaintiffs successfully moved to vacate the judgments and voluntarily dismissed their claims. *See Pharo Gaia Fund, Ltd. v. Petróleos de Venezuela, S.A.*, No. 23-cv-10071, 2025 WL 1380685, at *3-4 (S.D.N.Y. May 12, 2025) (vacating judgments and voluntarily dismissing claims without prejudice); *Pharo Gaia Fund, Ltd. v. Bolivarian Republic of Venezuela*, No. 20-cv-8497, 2025 WL 1268864, at *3 (S.D.N.Y. May 1, 2025) (same); *Pharo Gaia*, 2025 WL 1284787, at *3 (same).

without the provision in the bond contract waiving the sovereign's immunity from execution, a judgment creditor will find it nearly impossible to find non-immune assets against which it can satisfy its claim.¹⁰⁴ For this reason, judgment creditors often continue to hold the bond post-judgment.¹⁰⁵

If judgment creditors are viewed as a potential threat to a restructuring, restructuring participants could tender their old (non-performing) bonds for new ones, in the process voting to modify the old bonds by removing the sovereign's waiver of immunity from execution.¹⁰⁶ The modification would significantly limit the judgment creditor's ability to enforce the judgment, at least in the United States.¹⁰⁷ This is because U.S. law limits a judgment creditor's enforcement rights against a sovereign borrower.¹⁰⁸ Without a waiver of execution immunity, the judgment creditor may attach an asset used for a commercial activity in the United States only when the asset "is or was used for the commercial activity upon which the claim is based."¹⁰⁹ Because an attached asset will rarely if ever have been "used for" the commercial activity of bond issuance, this latter requirement will prove nearly impossible to satisfy.¹¹⁰ By contrast,

104. See Weidemaier, *supra* note 30, at 87 (explaining that absent a waiver of immunity from execution, bondholders could seize only commercial assets used for the bond issuance, which "may have been a null set.").

105. See, e.g., *NML Cap., Ltd. v. Republic of Argentina*, 680 F.3d 254, 255–56, 260 (2d Cir. 2012) (affirming post-judgment restraining orders against account owned by state instrumentality for plaintiffs who continued to hold non-performing bonds).

106. Under the 2024 Venezuelan bonds, this modification would require the approval "of the holders of not less than 75% in aggregate principal amount" of the bond series. *BOLIVARIAN REPUBLIC OF VENEZUELA*, *supra* note 53, at 20. Of course, restructuring participants would want the new bonds to include robust enforcement provisions. We presume that any judgment creditor who remained a holder would be eligible to participate in this exchange and that participants would have to tender old bonds and also agree not to attempt to enforce any outstanding judgment.

107. Other jurisdictions do not have this requirement of a nexus between the attached asset and the underlying commercial activity that produced the claim. Removing the waiver of execution immunity will do less to impair the judgment creditor's enforcement rights outside the United States.

108. Under U.S. law, these limits are set by the Foreign Sovereign Immunities Act of 1976 (FSIA), Pub. L. No. 94-583, 90 Stat. 2891 (codified as amended at 28 U.S.C. §§ 1330, 1602–1611). The FSIA provides that a foreign state's property in the United States is generally immune from attachment or execution unless an enumerated exception applies. 28 U.S.C. §§ 1609, 1610(a). The most relevant exceptions in this context are an explicit contractual waiver of execution immunity or the presence of an asset that "is or was used for the commercial activity upon which the claim is based[.]" 28 U.S.C. § 1610(a)(1)–(2).

109. 28 U.S.C. § 1610(a)(2).

110. See Weidemaier, *supra* note 30, at 87 (describing this "null set").

when the bond includes a waiver of execution immunity, the creditor need not show any link between the asset and the issuance of bonds; all it must show is that the asset itself is “used for a commercial activity in the United States.”¹¹¹ Because many assets are at least plausibly used for commercial activities, the waiver gives the creditor substantial freedom to disrupt the sovereign’s access to goods and services in the United States.

Thus, removing this waiver would significantly defang judgment creditors. Perhaps more important, the threat that restructuring participants might approve such a modification might deter minority holders from filing lawsuits in the first place. Can restructuring participants exercise this power? There are legal uncertainties, but on balance we think the better answer is that they can.

The answer begins with the bond contract. As noted, there is little question that the provision waiving the sovereign’s immunity from execution survives the entry of judgment.¹¹² The CAC in the holder’s bond also should remain operative. This result follows both from the text of the bond and, in cases where the text is silent, from selecting an appropriate rule of construction. It follows that a vote pursuant to the CAC may modify or amend the waiver of sovereign immunity.

The text of most sovereign bonds—every bond that we have seen, in fact—reveals the apparent intent to have the CAC operate post-judgment. For instance, the CAC in the 2024 Venezuela bond permits a two-thirds supermajority of bondholders to modify most bond provisions, and a three-quarters supermajority to modify payment and other key provisions, specifying that the modification will affect the “Series of the Bonds.”¹¹³ These defined terms refer to any bond issued pursuant to the relevant fiscal agency agreement and having the same maturity date (and presumably the same International Securities Identification Number).¹¹⁴ Bonds held by holders that have reduced their claim to judgment are within this definition.

Indeed, such holders would appear to have the right to vote on any restructuring proposal. Voting rights under the CAC typically extend to holders of “outstanding” bonds. When that term is defined, the definition typically includes holders who have obtained

111. 28 U.S.C. § 1610(a)(1).

112. See *supra* notes 30–32 and accompanying text.

113. BOLIVARIAN REPUBLIC OF VENEZUELA, *supra* note 53, at 20.

114. *Id.* at title page.

judgments.¹¹⁵ Again, the 2024 Venezuela bond is an example (and is typical of many other bonds). It extends voting rights to holders of Outstanding bonds, defined in the underlying Fiscal Agency Agreement to include:

[A]ny Note authenticated and delivered pursuant to this Agreement . . . *except* [as relevant here] . . . Notes that . . . “have become due and payable at maturity or otherwise and with respect to which monies sufficient to pay the principal thereof (and premium, if any) and any interest thereon shall have been made available to the Fiscal Agent”¹¹⁶

Even in cases where a judgment creditor has accelerated the bond—i.e., made it due and payable for reasons other than maturity—the issuer will not have provided the Fiscal Agent or other relevant financial intermediary with the funds to pay the creditor in full. Thus, the creditor’s bond will remain outstanding and the creditor will be entitled to vote.¹¹⁷ The unavoidable implication is that the CAC remains operative in the judgment creditor’s bonds.

Second, even if the text of the bond contract were silent, the appropriate rule of construction is to presume the CAC remains operative. We do not know of legal authorities addressing this precise question, but the result follows from the principle that courts are to presume that “structural” provisions survive termination while substantive obligations do not.¹¹⁸ The CAC is not structural in the same sense as provisions designating a forum or specifying a

115. Not all bonds define the term “outstanding,” but there is no reason to view silence on the definition as evidence that the parties intended a different outcome.

116. BOLIVARIAN REPUBLIC OF VENEZUELA, FISCAL AGENCY AGREEMENT 26 (July 25, 2001), <https://www.sec.gov/Archives/edgar/data/103198/000095013304000157/w93437exv99w8.htm> [<https://perma.cc/6TGW-DF9D>].

117. *See also* DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, OFFERING CIRCULAR 133 (July 17, 2012) (on file with the N.Y.U. Annual Survey of American Law) (“‘Outstanding’ means any Bond authenticated and delivered pursuant to the Indenture . . . except . . . (2) Bonds which have . . . become due and payable at maturity or otherwise and with respect to which monies sufficient to pay the principal thereof (and, premium, if any) and any interest thereon shall have been made available to the Trustee . . .”).

118. *See* *Liton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 208 n.3 (1991) (collecting cases in support of proposition that structural provisions relating to remedies and dispute resolution “may in some cases survive in order to enforce duties arising under [a terminated collective bargaining agreement] . . . similar to the rule of contract interpretation which might apply to arbitration provisions of other commercial contracts”); *Silverpop Sys., Inc. v. Leading Mkt. Techs., Inc.*, 641 F. App’x 849, 857 (11th Cir. 2016) (“While contractual obligations may expire upon the termination of a contract, provisions that are structural . . . may survive that termination.”).

governing law—it does not relate to “remedies [or] the resolution of disputes”¹¹⁹—but it does establish procedures, unrelated to the bond’s substantive obligations, for collectively modifying the contract. As with other structural provisions, the parties’ reasons for including the CAC remain relevant after the contract terminates. CACs use collective voting to mitigate the risk that a dissenting minority will block or delay a debt restructuring by seeking a “better deal for itself.”¹²⁰ That objective does not disappear—in fact, it is heightened—when potential dissenters race to the courthouse ahead of their fellow creditors. Thus, both the contract’s text and the background rule of construction support the argument that restructuring participants may modify or remove the sovereign immunity waiver in a judgment creditor’s bonds.

B. *Adding Sharing Clauses and Other New Provisions*

In theory, even more aggressive modifications are possible. For instance, restructuring participants might modify bonds to add a clause requiring judgment creditors to share the proceeds of any recovery pro rata or perhaps even prohibiting recovery on a judgment.¹²¹ Such a clause would remove much of the incentive to enforce the judgment.¹²² At present, we raise this only as an option. It is an aggressive use of the modification power that many sovereigns and investors would hesitate (rightly, we think) to use. But the important point is that changes of these sorts are possible. Again, the CAC remains operative in bonds held by judgment creditors. And the CAC in many sovereign bonds expressly authorizes votes not only to “modify” or “amend” but to “supplement” the terms of the bond.¹²³

119. *Id.*

120. Weidemaier & Gulati, *supra* note 4, at 53.

121. See Laura Alfaro, *Sovereign Debt Restructuring: Evaluating the Impact of the Argentina Ruling*, 5 HARV. BUS. L. REV. 47, 67 (2015) (footnote omitted) (“The inclusion of sharing clauses . . . makes bond instruments significantly less attractive for creditors that would have otherwise chosen to litigate against a sovereign debtor. This is because sharing clauses distribute any potential gains from litigation across all creditors, while the costs of such litigation are borne exclusively by the litigating creditors.”).

122. See Bratton & Gulati, *supra* note 1, at 46 (“As a practical matter, the sharing clause removes the incentive for individual bondholders to sue unilaterally in the hope of receiving an earlier and larger payment than that received by other members of the group.”).

123. See, e.g., DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA, *supra* note 117, at 132 (“The Issuer and the Trustee may modify, amend, supplement or waive the terms of the Bonds or, insofar as respects the Bonds, the Indenture in any way, other than a modification, amendment, supplement or waiver constituting a Reserved

Even in contexts where courts are skeptical of or outright hostile to provisions allowing for the modification of a contract—such as cases involving unilateral amendment provisions in consumer finance contracts—such language is interpreted to allow the addition of new terms to the contract.¹²⁴

C. *Legal Uncertainties*

At least in principle, both New York and English law—the two key laws governing international sovereign bonds—impose some limits on the ability of bond issuers and bondholder majorities to coercively limit minority rights in the restructuring context.¹²⁵ A judgment creditor might argue that the issuer or its fellow bondholders violated the implied duty of good faith and fair dealing in

Matter”); BOLIVARIAN REPUBLIC OF VENEZUELA, LISTING MEMORANDUM 22 (Nov. 29, 2007) (describing how “a meeting of holders of Bonds may be called . . . [to] give or take any request . . . provided by the Fiscal Agency Agreement or the Bonds to be made, given or taken by holders of Bonds or to modify, amend, or supplement the terms of the Bonds or the Fiscal Agency Agreement as provided in the Bonds”); GOVERNMENT OF JAMAICA, PROSPECTUS SUPPLEMENT 9–10 (Mar. 2, 2007) (noting how “Jamaica and the fiscal agent may, without the vote or consent of any holder of any series of the debt securities, amend the Fiscal Agency Agreement or the debt securities to . . . cure any ambiguity or correct or supplement any defective provision”); REPUBLIC OF CHILE, PROSPECTUS SUPPLEMENT 9 (Jan. 21, 2020) (“[H]olders may approve, by vote or consent through one of three modification methods, any modification, amendment, supplement or waiver proposed by Chile that would do any of the following”).

124. See *Rudolph v. Wright Patt Credit Union*, 175 N.E.3d 636, 646 (Ohio Ct. App. 2021) (upholding lower court’s decision ordering the case to arbitration after it determined that “while the 2015 agreement lacked an arbitration clause, Rudolph did agree that ‘[e]xcept as prohibited by applicable law,’ [the credit union] could ‘change the terms of this Agreement and the other Account Documents at any time’”) (first alteration in original). But see *Pruett v. WESTconsin Credit Union*, 998 N.W.2d 529, 538–46 (Wis. Ct. App. 2023) (holding that “according to the plain meaning of the change-of-terms provision in the Agreement, the parties agreed that [the credit union] was authorized to ‘make different,’ ‘replace,’ or modify the terms that existed already in ‘this Agreement’” but not “‘add new terms’”).

125. See *Assénagon Asset Mgmt. S.A. v. Irish Bank Resol. Corp.* [2012] EWHC (Ch) 2090, [86] (Eng.) (holding an exit consent unlawful under English law because “oppression of a minority is of the essence of exit consents of this kind, and it is precisely that at which the principles restraining the abusive exercise of powers to bind minorities are aimed”); *Hackettstown Nat’l Bank v. D.G. Yuengling Brewing Co.*, 74 F. 110, 114 (2d Cir. 1896) (applying New York law and reversing a directed verdict for the defendant where there was a question of whether the majority compelled the minority bondholders to sell their bonds in good faith). See also *Katz v. Oak Indus.*, 508 A.2d 873, 880 (Del. Ch. 1986) (holding that a coercive exchange is “wrongful,” or legally problematic, where it violates the implied duty of good faith and fair dealing).

conducting the restructuring. Or it might accuse other bondholders of tortiously interfering with its bond contract with the issuer. These arguments cannot be assessed in the abstract; we would need more context about the specific restructuring techniques used by the sovereign. However, we can offer some preliminary thoughts on how seriously courts are likely to take such arguments.

A bondholder who participates in a restructuring might violate the implied covenant of good faith and fair dealing with regard to other bondholders by taking action that “has the effect of destroying or injuring the right of the other party to receive the fruits of the contract, or to violate the party’s presumed intentions or reasonable expectations.”¹²⁶ But the implied covenant cannot be used to impose obligations that are inconsistent with the contract’s express terms.¹²⁷ We would not go so far as to say that there is no legal risk in retroactively amending or eliminating contract rights related to enforcement.¹²⁸ In general, however, courts have been willing to tolerate a relatively high degree of coercion in the context of debt exchanges, recognizing that some level of coercion is inherent in

126. *Tirreme Energy Holdings, Inc. v. Innogy Renewables US LLC*, 706 F. Supp. 3d 409, 431 (S.D.N.Y. 2023), *aff’d*, No. 24-159-cv, 2025 WL 1374732 (2d Cir. May 13, 2025) (quoting *Spinelli v. Nat’l Football League*, 903 F.3d 185, 205 (2d Cir. 2018) (explaining the parameters of a covenant of good faith and fair dealing under New York law)).

127. *See, e.g., Geren v. Quantum Chem. Corp.*, 832 F. Supp. 728, 733 (S.D.N.Y. 1993) (finding that incurrence of substantial debt to fund a dividend did not breach the implied covenant of good faith when the indenture did not explicitly restrict the amount of debt the issuer could incur nor contain any express prohibition on similar transactions); *In re Solutia, Inc.*, No. 03-17949, 2007 WL 1302609, at *9, *13 (Bankr. S.D.N.Y. May 1, 2007) (holding that the debtor “did not breach any contractual duty to the Noteholders by entering into a new loan agreement that deliberately de-securitized the Notes” when the indenture “[did] not contain an explicit provision prohibiting” the transaction); *Metro. Life Ins. Co. v. RJR Nabisco, Inc.*, 716 F. Supp. 1504, 1517 (S.D.N.Y. 1989) (declining to find violation of implied covenant in leveraged buyout where no express covenant in the indenture restricted incurrence of new debt). *See also Hartford Fire Ins. Co. v. Federated Dep’t Stores, Inc.*, 723 F. Supp. 976, 991–92 (S.D.N.Y. 1989) (rejecting argument that indenture permitted some mergers but not the leveraged buyout that in fact occurred, where express terms of indenture suggested no such distinction).

128. *Cf. Audax Credit Opportunities Offshore Ltd. v. TMK Hawk Parent, Corp.*, No. 565123/2020, 2021 WL 3671541, at *7 (N.Y. Sup. Ct. Aug. 16, 2021) (“The parties have not cited, and the Court has not found, any case in which a no-action provision was strategically deployed in the manner alleged here—by a subset of lenders, without notice or consent, as part of a larger scheme to breach and then exit the agreement. The amended no-action provisions were, according to Plaintiffs, purpose-built to prevent *these Plaintiffs* from suing *these Defendants* in connection with *this transaction*—a preemptive self-pardon, of sorts. Subtle this was not.” (emphasis in original)).

such transactions.¹²⁹ The question is whether the exchange is “wrongfully coercive.”¹³⁰ Courts have emphasized that wrongful coercion arises when the methods employed violate the reasonable expectations of the parties or contravene the terms of the debt instrument. For instance, if a court determines that the contract would have expressly prohibited the sovereign’s restructuring methods had the parties contemplated the issue *ex ante*, the coercion may be deemed wrongful.¹³¹

Judged by that standard, it is not obviously wrongful to conduct a debt exchange in which participants vote to remove the sovereign immunity waiver in bonds held by non-participating creditors (whether or not these creditors have obtained judgments). Sovereign bonds generally do not impose *any* substantive limits on modification votes. An investor’s protection is procedural—the right to vote—and if it does not have a position large enough to block a modification under the relevant voting standard, it knows that its contractual rights may change in unspecified ways. Because judgment creditors may choose to retain their bonds and will retain the right to vote if they do, there is no reason to view them any differently. Moreover, while the right to vote cannot, by itself, justify literally *any* degree of coercion, courts should have greater tolerance for coercive techniques in the context of sovereign debt restructurings, because

129. See William W. Bratton & Adam J. Levitin, *The New Bond Workouts*, 166 U. PA. L. REV. 1597, 1620–21 (2018) (showing that courts have recognized the coercive nature of debt exchange transactions but, assuming that the parties have sufficient freedom to bargain, declined to find it legally problematic where no express contractual term is violated); Keegan S. Drake, *The Fall and Rise of the Exit Consent*, 63 DUKE L.J. 1589, 1603 (2014) (citing the leading court opinion on exit consents that “coercion must be characterized in some negative way” and “legal analysis should begin with the adverb modifying ‘coercive’”); HAYK KUPELYANTS, SOVEREIGN DEFAULTS BEFORE DOMESTIC COURTS 209 (2018) (ebook) (“The restructuring process may on occasions be characterised by the use of coercive and expropriatory measures.”).

130. See *Katz*, 508 A.2d at 879–80 (“[S]ome ‘coercion’ . . . is legally unproblematic. . . . For the word to have much meaning for purposes of legal analysis, it is necessary in each case that a normative judgment be attached to the concept (‘inappropriately coercive’ or ‘wrongfully coercive’, [sic] etc.).”); see also *RJR Nabisco*, 716 F. Supp. at 1517 (declining to read into a bond indenture an implied covenant against leveraged buyout).

131. Cf. *Katz*, 508 A.2d at 880 (“[T]he appropriate legal test [for wrongful coercion] is not difficult to deduce. It is this: is it clear from what was expressly agreed upon that the parties who negotiated the express terms of the contract would have agreed to proscribe the act later complained of as a breach of the implied covenant of good faith—had they thought to negotiate with respect to that matter.”).

sovereigns do not have the fallback option of bankruptcy.¹³² Courts must still ensure that the restructuring process adheres to principles of fairness and good faith, but judgment creditors are not entitled to special treatment unless they can demonstrate that the restructuring process was fundamentally unfair or violated their substantive rights.

We do not know of cases in which courts have confronted bond modifications that removed a judgment creditor's rights to enforce its judgment. But we see no good reason why a creditor should get more protection post-judgment than it would get pre-judgment. Such a rule would only reward creditors who raced to the courthouse. On the other hand, we acknowledge that courts typically do not like to see their judgments go unenforced. Thus, we suspect the larger challenge a sovereign issuer will face is to persuade a reviewing court that its use of the CAC was necessary to accomplish a restructuring that benefitted bondholders as a group.¹³³ That task will be easier if the restructuring enjoys the support of a large majority of creditors and if the sovereign's restructuring techniques do not appear unduly coercive in other respects. If the sovereign can credibly argue that it has the good faith backing of a large majority of bondholders and that the judgment creditor is simply attempting to exploit concessions by other creditors to get a better deal for itself, it should be on relatively firm footing. The same is true for restructuring participants who vote in favor of a proposal that takes enforcement rights away from non-participants.

IV. CONCLUSION

Ultimately, concerns about the ability of judgment creditors to escape the effect of a restructuring may be overstated. As of now, there are relatively few examples of creditors using this tactic. If a handful of judgment creditors position themselves to receive a disproportionate payment, the simplest course of action may be to pay them in full. Even if litigation continues to increase in frequency, relatively few lawsuits should reach judgment before a restructuring concludes. In the Southern District of New York, the median time from filing to disposition of civil cases that proceed to the pretrial

132. See Lee C. Buchheit & G. Mitu Gulati, *Exit Consents in Sovereign Bond Exchanges*, 48 UCLA L. REV. 59, 66–67 (2000) (explaining that sovereigns do not have the option of bankruptcy as a means of achieving restructuring of their debts).

133. Cf. *Faitoute Iron & Steel Co. v. City of Asbury Park*, 316 U.S. 502, 515 (1942) (upholding municipal debt-restructuring plan that bound dissenting creditors as “worked out with . . . due regard to the interests of all the creditors” and as improving creditor recoveries in the aggregate).

stage (as by summary judgment, the method by which sovereign debt disputes often are resolved) and are terminated by court action is roughly 13.7 months.¹³⁴ Despite their relative simplicity, sovereign debt cases can take longer, and often judges bend over backward to accommodate foreign states.¹³⁵ And recent developments, such as the stay entered in an investor's lawsuit against Sri Lanka, suggest that federal judges may be willing to delay entry of judgment when it appears that restructuring negotiations are on track.¹³⁶ In short, there often will be ample time for the sovereign to put together enough support to trigger the CAC. If one or two holdouts get judgments, the world will not end if they are paid in full.

In rare cases, however, litigation by holdouts may pose more serious problems.¹³⁷ Where these holdouts have large positions, they are immune to traditional restructuring methods whether or not they have court judgments. Most favored creditor clauses can offer restructuring participants some assurance that holdouts will not extract a better deal, but the clauses cannot offer complete protection.¹³⁸ The question is what to do about holdouts who, unable

134. UNITED STATES COURTS, TABLE C-5 – Median Time Intervals From Filing to Disposition of Civil Cases Terminated, by District and Method of Disposition (2026), <https://www.uscourts.gov/data-news/data-tables/2025/12/31/statistical-tables-federal-judiciary/c-5> [<https://perma.cc/9HG9-U4ZA>] (last visited July 22, 2026) (stating the median time interval in the Southern District of New York for termination of a civil case during or after pretrial was 13.7 months during the twelve-month period ending December 31, 2025).

135. For instance, the complaint in *Casa Express Corp. v. Venezuela* was filed December 18, 2018, and final judgment was entered September 30, 2020, in circumstances where no restructuring was on the horizon. See 492 F. Supp. 3d 222 (S.D.N.Y. 2020). The *Hamilton Reserve Bank* case against Sri Lanka had been pending nearly 17 months when the judge entered the stay to allow restructuring talks to continue. See *Hamilton Rsr. Bank Ltd. v. Democratic Socialist Republic of Sri Lanka*, No. 22-cv-5199, 2023 WL 7180683, at *3 (S.D.N.Y. Nov. 1, 2023) (“Hamilton initiated this action on June 21, 2022.”).

136. See *Hamilton Rsr. Bank*, 2023 WL 7180683, at *6 (“Sri Lanka has made significant progress in negotiating a debt restructuring and seeks a defined stay that generally aligns with the expected timetable for resolution of negotiations.”).

137. Venezuela is the obvious example here (although the country has largely managed to avoid a wave of litigation by bond creditors). Even in the Venezuelan context, however, any problem obtaining broad bondholder participation in a restructuring would largely result from weak contractual modification provisions that do not provide for aggregated voting. In other words, the problem would result from the fact that many investors have veto positions, not from the fact that many investors have judgments.

138. See Makoff & Weidemaier, *supra* note 16, at 1297 tbl. 8 (estimating recoveries by various creditors that did not participate in Argentina's 2005 and 2010 restructurings, all of which recovered more than restructuring participants after the most favored creditor provisions in Argentina's restructuring expired).

to block a restructuring vote, seek to escape restructuring by racing to judgment. Creditors who take this route can rest assured that their judgments will remain intact despite the restructuring vote. Whether they will be able to enforce those judgments is another matter entirely.

THE TWO BATTLEFIELDS OF COPYRIGHT'S LEVELS OF GENERALITY ANALYSIS: SUBSTANTIAL SIMILARITY AND FAIR USE

ELLA PALLENBERG*

TABLE OF CONTENTS

I. Introduction	280
II. Defining the Levels of Generality Problem.	281
A. Defining the Levels of Generality Analysis in Terms of Constitutional Law	281
B. Applying Constitutional Law's Levels of Generality Analysis to Copyright Law	282
C. The Levels of Generality in Copyright's Substantial Similarity Analysis	285
III. Substantial Similarity and Levels of Generality.	289
A. Literature.	289
B. Visual Art.	291
1. Typical Visual Art Cases.	291
2. Visual Art Stemming from Nature	292
3. Fabric Design Works Stemming from the Public Domain.	294
C. Software.	295
IV. Consequences and Solutions	298
V. Predictions for Fair Use's Levels of Generality Problem	302
A. The Purpose and Character of the Use.	302
B. Market Effects	305
VI. Conclusion	307

* J.D., New York University School of Law, 2026; B.A., University of California, Berkeley, 2021. Thank you to Professor Christopher Jon Sprigman for his feedback on early drafts, and sparking the idea for this paper by teaching such insightful Copyright courses. Thank you to my wonderful friends and editors on *N.Y.U. Annual Survey of American Law*. Finally, thank you to my friends and family for supporting me throughout law school.

I. INTRODUCTION

While judges are experts in statutory interpretation, fitting statutes to the peculiarities of people's lived experiences is often a great deal harder than it may seem. When analyzing the individual fact patterns of each case, judges must decide how broadly or narrowly to interpret the literal text of the law. This conundrum is known as the levels of generality problem.¹

Although legal scholarship most commonly associates this problem with constitutional law,² the difficulties in selecting a level of generality are not unique to analyzing fundamental rights. Judges face the same dilemma in intellectual property cases when determining the scope of protection. In 1930, Judge Learned Hand coherently articulated this problem in the copyright context when analyzing the similarities between a play and a movie: "Upon any work . . . a great number of patterns of increasing generality will fit equally well, as more and more of the incident is left out. . . . [B]ut there is a point in this series of abstractions where they are no longer protected"³ This insight demonstrates the line-drawing issue in copyright law when separating out an unprotectable idea from the protectable expression of a work.⁴

This Note will dive deeper into the levels of generality problem in copyright law. The first Part will discuss concepts important to grasping the levels of generality problem broadly, as well as specifically in the copyright context. Part II will examine the ways courts use the analytical framework of levels of generality to decide substantial similarity inquiries across a handful of media. Through an analysis of substantial similarity decisions in literature, visual arts, and software, this section will demonstrate that the levels of generality problem poses greater inconsistencies for non-literature media. Next, Part III will discuss policy implications, consequences, and possible solutions to these inconsistencies. The final Part will make a prediction regarding fair use as the future frontier of copyright's levels of generality problem.

1. See Thomas A. Bird, Note: *Challenging the Levels of Generality Problem: How Obergefell v. Hodges Created a New Methodology for Defining Rights*, 19 N.Y.U. J. LEGIS. & PUB. POL'Y 579, 580 (2016).

2. See John F. Basiak, Jr., *Inconsistent Levels of Generality in the Characterization of Unenumerated Fundamental Rights*, 16 U. FLA. J.L. & PUB. POL'Y 401, 403 (2005) (noting that the Supreme Court must characterize the legal issue at a certain level of generality when analyzing fundamental rights).

3. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 121 (2d Cir. 1930).

4. See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13D.13[A] (rev. ed. 2025).

II.

DEFINING THE LEVELS OF GENERALITY PROBLEM

A. *Defining the Levels of Generality Analysis in Terms of Constitutional Law*

The levels of generality problem is frequently linked with constitutional law and questions over unenumerated fundamental rights. There is a significant amount of legal scholarship about this line-drawing problem, which provides a helpful comparison to copy-right law.

In 1986, the Supreme Court decided *Bowers v. Hardwick*, which illustrates the important and outcome-determinative nature of favorably framing the question presented.⁵ Justice Byron White, writing for the majority, decided that the issue presented was whether the Constitution confers a fundamental right for homosexuals to engage in sodomy.⁶ This is quite a low level of generality for a question that relies on very detailed, fact-specific inquiries. Justice Blackmun on the other hand, argued in dissent that the case was actually about the much broader, more general right to be left alone.⁷ While the Justices were looking at the same exact facts, they came to wildly different conclusions regarding the constitutionality of Hardwick's behavior because of the level of generality each selected.⁸

In another seminal case, *Michael H. v. Gerald D.*, Justice Antonin Scalia proposed a solution to the levels of generality question.⁹ In denying parental rights to a man who claimed to be the biological father of a child born to a woman married to another man, Justice Scalia defined the question of the case very narrowly, as "whether the relationship between persons in the situation of Michael and Victoria has been treated as a protected family unit under the historic practices of our society, or whether on any other basis it has been accorded special protection."¹⁰ Supposedly, Justice Scalia believed he had discovered a "value-neutral" solution to the levels

5. 478 U.S. 186 (1986); see also Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1066 (1990) (remarking that the majority's narrow framing of the right drove the outcome and that the dissent's broader framing would have changed the answer).

6. Tribe & Dorf, *supra* note 5, at 1065 (quoting *Bowers*, 478 U.S. at 190).

7. *Id.* (quoting *Bowers*, 478 U.S. at 199 (Blackmun, J., dissenting)).

8. See *id.*

9. See Basiak, *supra* note 2, at 414 (citing *Michael H. v. Gerald D.*, 491 U.S. 110, 124 (1989)) ("Justice Scalia, for the first time, explained his methodology and distinguished it from the broadly worded methodology of the Court's more liberal members.").

10. *Michael H.*, 491 U.S. at 124.

of generality problem by identifying the most specific level at which one could recognize a relevant tradition and looking into whether that behavior was historically protected.¹¹ By binding the Court “to an identifiable tradition,” Scalia believed he could curb judicial activism and avoid “arbitrary decisionmaking.”¹² He maintained that this method was value-neutral and sidestepped judges’ temptations to use political and social preferences when making their decisions.¹³

Justice Scalia’s most-specific-level theory has been criticized by scholars of constitutional law.¹⁴ Critics argue that it thinly disguises the “importation of values” and poses serious practical problems.¹⁵ It requires judges to identify the most specific level of generality that recognizes a relevant tradition and then evaluate “what has been traditionally and historically protected.”¹⁶ These tasks are quixotic, idealistic yet impractical, as there is no *ex ante* way to police how diligently a judge may research or how broadly or narrowly a judge defines the relevant tradition. This method also filters each analysis through the individual judge’s personal prejudices, philosophy, beliefs, and subjective analysis of history, which creates a situation rife with opportunity to stick value-laden analysis into a decision.¹⁷

B. Applying Constitutional Law’s Levels of Generality Analysis to Copyright Law

Applying Justice Scalia’s supposedly value-neutral method to the copyright context would be unworkable because using the most specific level of generality at which there has been historical protection would stunt progress and creativity. For the most obvious example, one need only look as far as *Burrow-Giles Lithographic Co. v. Sarony*, which considered whether a photograph was the writing of an author under the Intellectual Property Clause.¹⁸ There, since recognizing the copyrightability of photographs was completely

11. Tribe & Dorf, *supra* note 5, at 1058 (quoting *Michael H.*, 491 U.S. at 127 n.6).

12. Basiak, *supra* note 2, at 415 (quoting *Michael H.*, 491 U.S. at 127 n.6).

13. *Id.*

14. See, e.g., Edward Gary Spitko, *A Critique of Justice Antonin Scalia’s Approach to Fundamental Rights Adjudication*, 1990 DUKE L.J. 1337, 1344–46 (1990) (concluding that Justice Scalia’s approach in *Michael H.* is fundamentally flawed and lacks constitutional justification), Tribe & Dorf, *supra* note 5.

15. See Basiak, *supra* note 2, at 426–30 (arguing that Scalia’s approach asks judges to make difficult evaluations of history that inevitably collapse into subjectivity and fail to fulfill the purpose of the Fourteenth Amendment).

16. *Id.* at 427.

17. See *id.* at 427.

18. 111 U.S. 53, 56 (1884).

unprecedented,¹⁹ Scalia would have found no historical precedent protecting photographs as copyrightable art. Not only was the copyrightability of photographs unprecedented, but it was also deeply troubling to many artists at the time who believed the camera was doing all the work, replacing the creativity of the human author. Photographers were viewed as operating a machine, not as creating art.²⁰ Despite its technological novelty, the *Burrow-Giles* Justices recognized photography as worthy of protection,²¹ opening the door for centuries of creativity in the field and promoting progress in sciences and useful arts.²² Therefore, while Justice Scalia may have been right to worry about tempting judges to infuse social and political preferences into the law, it may not be such a bad thing in copyright.

By restricting the level of generality to the most specific level at which we find a relevant historic tradition, we stunt progress and entrench bias toward old art norms. This outcome would be directly contrary to the goals of the Intellectual Property Clause, which explicitly encourages progress in the arts and sciences.²³ Art norms are constantly evolving. What was once considered utilitarian, ugly, or machine-made can be transformed into high art that critics and the art market alike uphold as the next best thing.²⁴ Copyright

19. See 1 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 2A.02 n.20 (rev. ed. 2025) (dating protection for photographic works to a 1908 revision of the Berne Convention for the Protection of Literary and Artistic Works).

20. Justin Hughes, *The Photographer's Copyright — Photograph as Art, Photograph as Database*, 25 HARV. J.L. & TECH. 339, 343 (2012).

21. *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884).

22. See Ryan Phelan, *The Curious Case of Burrow-Giles Lithographic (an 1884 U.S. Supreme Court decision involving “new” camera technology), and how it could help Shape Today's thinking on Artificial Intelligence (AI) Inventorship*, PATENTNEXT (Aug. 30, 2022), <https://www.patentnext.com/2022/08/the-curious-case-of-burrow-giles-lithographic-an-1884-u-s-supreme-court-decision-involving-new-camera-technology-and-how-it-could-help-shape-todays-thinking-on-artificial/> [<https://perma.cc/9J47-YUDQ>] (discussing how the *Burrow-Giles* court's conception of authorship allowed for photos to be copyrighted and leaves room for the possibility of the copyrightability of AI art).

23. U.S. CONST. art. I, § 8, cl. 8; see also NIMMER & NIMMER, *supra* note 19, § 1.03 (deeming the “introductory phrase” of the Intellectual Property Clause, “To promote the Progress of Science and useful Arts,” “explanatory of the purpose of copyright.”).

24. “What constitutes art” is a long running debate, both in the art and legal worlds. For example, today, works created by artificial intelligence are often denounced by critics as ugly, uncreative, and not even art; however, Refik Anadol's “Unsupervised” captures audiences daily at the Museum of Modern Art. See Travis Diehl, *MoMA's Daydream of Progress*, N.Y. TIMES, (Dec. 15, 2022) <https://www.nytimes.com/2022/12/15/arts/design/refik-anadol-unsupervised-moma-review.html> [<https://perma.cc/BV8F-MUN4>] (describing Anadol's A.I.-generated art and providing insight into the decision to depict it at the MoMA). The legal definition

is an incentive-based law.²⁵ If copyright protection does not evolve and shift alongside art norms, authors²⁶ will not have the economic incentives to create outside-the-box, unique works.

However, criticism of a very specific level of generality must come with the balancing observation that selecting only the broadest level of generality also poses problems. For instance, if Justice Blackmun's characterization of the issue in *Bowers* as "the right to be left alone"²⁷ was taken to the extreme, Justices could constitutionally protect all kinds of problematic behaviors occurring in private.²⁸ Applying a blanket high level of generality gives judges significant amounts of discretion which they might use to act as quasi-judicial legislators, breaking down the separation of powers that is fundamental to our government.²⁹ Therefore, the only solution is to use a more middling, case-by-case approach. While more tedious and difficult, it is fairer and truer to each individual scenario. Luckily, copyright is well ahead of Justice Scalia on that principle; as the Second Circuit Court of Appeals recognized in 1960, decisions of substantial similarity, and the decisions regarding levels of generality inherent within them, must be made on an ad hoc, case-by-case basis.³⁰

of art has also changed significantly throughout history. *Contrast* United States v. Perry, 146 U.S. 71, 74–75 (1892) (setting forth a rigid four-class hierarchy defining fine art separately from minor objects of art, objects of art, and useful objects), *and* United States v. Olivotti & Co., 7 Ct. Cust. 46, 48 (App. 1916) (requiring a beautiful imitation of nature, that is distinctly not the work of a craftsman, to fit the legal definition of art), *with* Brancusi v. United States, 1928 Cust. Ct. LEXIS 3, at *7–8 (1928) (considering the changing art norms in which the exponents of the new school of art "attempt[ed] to portray abstract ideas rather than to imitate natural objects" as a basis for expanding the definition of art).

25. See *Copyright Basics*, U.S. PAT. & TRADEMARK OFF., <https://www.uspto.gov/ip-policy/copyright-policy/copyright-basics> [<https://perma.cc/9FYU-VNAG>] (last visited Feb. 24, 2026) ("[C]opyright provides economic incentives to create new works and to make them available in the marketplace."); Sony Corp. of Am. v. Universal City Studios, Inc., 464 U.S. 417, 450 (1984).

26. As defined in the Intellectual Property Clause of the Constitution, the term "author" refers broadly to all creators of original expression, not just writers of literary works. See Definitions, U.S. COPYRIGHT OFFICE, <https://www.copyright.gov/help/faq-definitions.html> [<https://perma.cc/CL9P-7A5Z>].

27. *Bowers* v. Hardwick, 478 U.S. 186, 199 (1986) (Blackmun, H., dissenting) (quoting *Olmstead v. United States*, 277 U.S. 438, 478 (1928) (Brandeis, L., dissenting)).

28. See Basiak, *supra* note 2, at 424 ("Taken to its logical extreme, Justice Blackmun's characterization would hold as a constitutional guarantee the right to build a crystal methamphetamine lab in a person's basement.").

29. See *id.* at 426.

30. See *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960).

C. *The Levels of Generality in Copyright's Substantial Similarity Analysis*

In an infringement action, the plaintiff must prove that the defendant copied protected expression from the copyrighted work. This breaks down into two pieces: (1) copying in fact and (2) copying in law.³¹ Together, these pieces make up the infringement analysis.³² Copying in fact is a simple question of whether the defendant actually had access to and used the plaintiff's work while creating their own.³³ Copying in law asks the more consequential question of whether the copying was substantial enough and took enough protected material to be actionable.³⁴ Standards of substantial similarity emanate entirely from lower court decisions, as neither Congress nor the Supreme Court have defined this term.³⁵

While the substantial similarity analysis is used to decide whether one work is infringing on another, it is also the place where the levels of generality question is most prevalent and problematic in copyright law. There are a few crucial copyright concepts of concern when making this determination of substantial similarity. While there are multiple discordant substantial similarity tests,³⁶ at their core, they all look for whether the secondary work has copied enough protected expression to be infringing.³⁷ As codified in 17 U.S.C. § 102, ideas cannot be protected, but expressions of those ideas are.³⁸ Therefore, the "idea-expression dichotomy" is at the heart of this inquiry.³⁹

As simple as it sounds, there is an inherent levels of generality problem here. Here is an illustration of the idea-expression dichotomy and levels of generality problem using a scholar's analysis of the example of *Harry Potter*. If someone wrote another book and J.K. Rowling claimed it infringes on her copyright, a judge would need to

31. See NIMMER & NIMMER, *supra* note 4, § 13D.10.

32. *Id.*

33. See *id.*

34. See *id.*

35. *Id.*; see also Amy B. Cohen, *Masking Copyright Decisionmaking: The Meaninglessness of Substantial Similarity*, 20 U.C. DAVIS L. REV. 719, 720 (1987) ("Under current copyright law . . . neither Congress nor the courts have articulated the substantive basis used to determine if one work infringes the copyright in another.").

36. See John W.L. Ogilvie, *Defining Computer Program Parts Under Learned Hand's Abstractions Test in Software Copyright Infringement Cases*, 91 MICH. L. REV. 526, 526-7 (1992).

37. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1118-19 (9th Cir. 2018) (using a two-part "extrinsic" and "intrinsic" test to determine whether the defendant copied enough of the plaintiff's protectable expression such that the works were substantially similar).

38. 17 U.S.C. § 102.

39. See NIMMER & NIMMER, *supra* note 4, § 13D.13[A].

decide where *Harry Potter*'s idea meets its expression. Is *Harry Potter* a children's book about a wizard boy whose parents were murdered by an evil wizard and who attends a magical school with his best friends, a redheaded boy and a nerdy girl?⁴⁰ Or might *Harry Potter* just be a story about a wizard child going to a magical school?⁴¹ The levels of generality problem for the judge lies in deciding how narrowly or broadly to interpret the idea versus the expression. Giving J.K. Rowling a monopoly over any book about a boy wizard who goes to magic school is much more financially powerful than giving her a monopoly over the narrower storyline. Copyright attempts to balance the financial and creative incentives by only protecting expression, allowing free use of ideas. Importantly, an "idea" in copyright is a legal conclusion, not a natural fact.⁴² Copyright calls anything an "idea" which, if protected, might be too expansive, precluding other authors from creating.⁴³ Drawing that line, and thus deciding on a level of generality, is therefore more an art than a science.

When choosing a level of generality at which to assess substantial similarity, the court must consider the merger doctrine and the *scènes à faire* doctrine. Both doctrines significantly limit the scope of copyright protection. The merger doctrine affords no protection to expression that merges with the idea being expressed.⁴⁴ Typically, this occurs when the idea is incapable of being expressed in more than a few ways.⁴⁵ Similarly, when expression merges with facts, processes, laws, systems, or utilitarian elements, it cannot be protected by copyright.⁴⁶ This impacts the levels of generality analysis because the court must select a lower, more narrow level than the merged expression. For example, when thinking about the artwork

40. See Tun-Jen Chiang, *The Paradox of IP*, 30 HARV. J. L. & TECH. 9, 14 (2017).

41. *Id.*

42. *Id.* at 15 (quoting Jane C. Ginsburg, *No "Sweat"? Copyright and Other Protection of Works of Information After Feist v. Rural Tel.*, 92 COLUM. L. REV. 338, 346 (1992)).

43. *Id.* (quoting Ginsburg, *supra* note 43, at 346).

44. When there is only one form of expression or only a limited number of ways to express an idea or system, allowing copyright protection would exhaust all possibilities of future use. The limited number of ways to express the idea indicates that the idea has merged with the expression itself and protecting the expression would effectively provide protection for the idea. See Pamela Samuelson, *Reconceptualizing Copyright's Merger Doctrine*, 63 J. COPYRIGHT SOC'Y U.S.A. 417, 417 (2016).

45. *Id.* This concept is exemplified in *Baker v. Selden*, where a plaintiff wrote and copyrighted a book explaining a system of bookkeeping. 101 U.S. 99, 100–01 (1879). The plaintiff claimed infringement when the defendant then wrote a book with slight alterations to that bookkeeping system. *Id.* The Court found no protection over the actual system because its idea could only be expressed through this system. See *id.* at 102, 107.

46. See Samuelson, *supra* note 45, at 438–39.

*Comedian*⁴⁷ by Maurizio Cattelan, commonly known as the banana duct-taped to a wall, there are exceptionally few choices and meaningfully different ways of expressing the idea of a banana duct-taped to a wall. Therefore, the expression has completely merged with the idea, and there is no level of generality at which a judge could point to any protected expression.

The core of *scènes à faire*, on the other hand, asks whether the elements in common between two works are indispensable due to the genre or subject at issue.⁴⁸ Sometimes elements might necessarily flow from the common theme between the works, in which case, they cannot be monopolized.⁴⁹ For example, since it would be almost impossible to make a movie set in 1930s Germany without a scene in a beer hall, that creative decision is not protected by copyright.⁵⁰ Both of these doctrines help judges figure out where the line is between protectable expression and unprotectable ideas. That line represents the level of generality when analyzing a work under a substantial similarity test.

Three tests routinely dominate the analysis judges use to draw the line between protected expression and an unprotected idea. The first is Judge Hand's abstractions test. This test came about in 1930 when he decided *Nichols v. Universal Pictures Corp.*⁵¹ In essence, Judge Hand suggests that as you describe the work with less and less specificity, there is a point at which protection ends.⁵² For example, at the highest level of generality between the two works in *Nichols*, they are both romantic comedies that showcase the quarrels between Jewish and Irish families due to the marriage between their children, eventually ending with the birth of grandchildren and reconciliation between the families.⁵³ The similarities, however, end there; the specific plot elements, characters, and sequence of events are unique. Therefore, in holding for the defendant, Judge Hand found that the only "copied" parts were unprotected ideas rather than protected

47. *Comedian*, ENCYC. BRITANNICA, <https://www.britannica.com/topic/Comedian-by-Cattelan> [<https://perma.cc/HWF7-7ZX5>].

48. See Samuelson, *supra* note 45, at 448.

49. See Scott B. Cherrin, *Part II: Television Series & Motion Pictures: Copyright Protection of Fictional Characters & Plots*, 1 DET. COLL. L. ENT. & SPORTS L.F. 55, 71 (1994).

50. See *Hoehling v. Universal City Studios, Inc.*, 618 F.2d 972, 979 (2d Cir. 1980).

51. 45 F.2d 119, 121 (2d Cir. 1930).

52. See *id.* ("[T]here is a point in this series of abstractions where they are no longer protected, since otherwise the playwright could prevent the use of his 'ideas,' to which, apart from their expression, his property is never extended.").

53. *Id.* at 122.

expressions.⁵⁴ This so-called “test,” however, is often criticized for failing to provide any real criteria for measuring the point at which a work crosses the line from idea to expression.⁵⁵

Professor Zechariah Chafee attempted to refine Learned Hand’s method by suggesting that “the line does lie somewhere between the author’s idea and the precise form in which he wrote it down . . . protection covers the ‘pattern’ of the work,” or “the sequence of events and the development of the interplay of characters.”⁵⁶ In essence, substantial similarity exists when there is a combination of “similarities of treatment, details, scenes, events and characterization.”⁵⁷ Even if similarities between any one of these elements would be trivial on its own, the combination of these gives weight to a claim of infringement by substantial similarity.⁵⁸ This is called the pattern test.⁵⁹ When applying the patterns test to two classics, *Romeo and Juliet* and *West Side Story*, readers can see that the interplay between the characters and sequence of events are nearly identical. Both begin with a girl and boy from hostile groups who meet at a dance and eventually acknowledge their love, causing the hostile groups to fight and kill an important character on each side.⁶⁰ The couple is separated and eventually the male lead dies.⁶¹ Based on the patterns test, these would be substantially similar.

While these tests are both geared toward literature, the court of appeals in *Computer Associates International v. Altai* translated them into the software context to create the abstraction-filtration-comparison test.⁶² Step one, “abstraction,” requires identifying each discrete element of the program, often including object code, source code, system architecture, and the program’s purpose.⁶³ Step two, “filtration,” requires sifting through the abstractions to separate

54. See *id.* (holding that the challenged similarities between the themes and characters in a movie and a preexisting play related only to general ideas and were too abstract to constitute copyright infringement).

55. See NIMMER & NIMMER, *supra* note 4, § 13D.13[B] (highlighting criticism from Judge Easterbrook and an alternative suggestion from Professor Zechariah Chafee).

56. Zechariah Chafee, Jr., *Reflections on the Law of Copyright: I*, 45 COLUM. L. REV. 503, 513–14 (1945).

57. *Reyher v. Child’s Television Workshop*, 533 F.2d 87, 91 (2d Cir. 1976).

58. NIMMER & NIMMER, *supra* note 4, § 13D.13[B].

59. *Id.*

60. *Id.* § 13D.13[C].

61. *Id.*

62. 982 F.2d 693 (2d Cir. 1992).

63. See Ogilvie, *supra* note 36, at 547–48.

out the protected from unprotected elements.⁶⁴ This is where facts, merged expression, scènes à faire, ideas, and processes get filtered out.⁶⁵ Finally, in step three, “comparison,” the trier of fact compares protectable elements of the works to determine whether there is substantial similarity.⁶⁶

III.

SUBSTANTIAL SIMILARITY AND LEVELS OF GENERALITY

A. Literature

Since the abstractions and patterns tests were designed with literature in mind, they work fairly well in that context. The non-literal levels of abstraction in written works are essentially agreed upon—elements such as genre and scène à faire are at the high end, and the specific plots and storylines are at the low end.⁶⁷

In *Giangrasso v. CBS*, the plaintiff complained about similarities between their promotional radio play script, “WHY-53,” and the defendant’s TV episode of “WKRP Cincinnati.”⁶⁸ The court used a combination of the abstractions and patterns tests to find they are similar at the highest level of generality.⁶⁹ Both are comedies about a radio station’s staff who are interrupted by a robber with a gun.⁷⁰ However, the court used a lower level of generality to find the works are not substantially similar.⁷¹ The WKRP episode involves a hijacking during an episode where the hijacking is not for money but furthers the plot about the out-of-work radio host desperate to publicize himself.⁷² Furthermore, the disc jockey is acutely aware of the situation and sympathizes with the hijacker, helping him escape the police.⁷³ In WHY-53, the host is also live on air but is completely oblivious to the fact that he is being held up, speaking to the robber as if this were a typical interview.⁷⁴ Comparing the works shows

64. INTELLECTUAL PROPERTY COUNSELING & LITIGATION § 3.09[1][d] (Lester Horwitz & Ethan Horwitz, eds., 2025).

65. *Id.*

66. *Id.*

67. Dennis W. K. Khong, *Copyright Doctrines, Abstraction and Court Error*, 3 REV. L. & ECON. 715, 721 (2007).

68. *Giangrasso v. CBS, Inc.*, 534 F. Supp. 472, 473–74 (E.D.N.Y. 1982).

69. *See id.* at 476, 478 (describing high-level similarities among the works).

70. *Id.* at 476.

71. *See id.* (delving into the “handling, scenes, details and characterization used by plaintiffs and defendants in their works” to deny substantial similarity).

72. *Id.* at 477.

73. *Id.*

74. *Id.*

their similarities only exist at levels of abstraction too high to permit any wrongful appropriation claim to move forward because the patterns of the plot sequence and interplay of characters are entirely different.⁷⁵

In contrast, the California Supreme Court in *Golding v. R.K.O.* affirmed a jury judgment of substantial similarity.⁷⁶ At the highest level of generality, both dramas at issue took place on a boat where one person aboard suspects the captain of murder.⁷⁷ At a lower level of generality, the captain's psychological sufferings and adversarial relationship with his accuser are the "dramatic core" of both plots, where the captain's emotions shuffle between feeling definite that nobody will find out to feeling hyper-suspicious of being uncovered.⁷⁸ While there are superficial differences, including the setting of a cruise ship versus a freight ship and the background characters being cruise passengers versus crew members, these differences do not impact the nucleus of the plot.⁷⁹ The dissent suggested that the similarities are attributable to using common themes and plots in the public domain, but the majority found the plot sequences and interplay between characters to be similar enough to affirm the jury verdict of substantial similarity.⁸⁰

While the *Golding* and *Giangrasso* courts reached different conclusions, both used low levels of generality to determine substantial similarity. In cases involving literature, it is typically easier to select a level of generality to analyze for two reasons. First, literature is easier to analyze from a substantial similarity standpoint because there are words explaining plot and character interplay. Second, the different levels of generality are clearly defined; whereas themes are too broad, and individual words are too narrow, plot is the "Goldilocks" level of generality to assess substantial similarity. In contrast, the line between unprotected idea and protected expression is much harder to find in other media. The following sections will look deeper into the level of generality selections in the media of both visual art and software, though the implications are applicable to other media as well.

75. See *id.* at 476, 478 (applying pattern principles of event sequence and interplay of characters to find no substantial similarity).

76. *Golding v. R.K.O. Pictures, Inc.*, 221 P.2d 95, 96, 100–01 (Cal. 1950).

77. *Id.* at 96.

78. *Id.* at 96–97.

79. See *id.* (explaining the plaintiff's characterization of the characters and setting in each work as superficial variations on the same "dramatic core").

80. See *id.* at 101 (Traynor, J., dissenting); *id.* at 100–01 (majority opinion).

B. Visual Art

Without a script, how might judges know what constitutes the idea of a work? Courts are perplexed by this question and apply varying levels of generality on a case-by-case basis. Even Judge Hand noted that in relation to visual works, the test is more intangible.⁸¹ There is no designated way to go about this question, leading to inconsistent results. For example, while the *Boisson v. Banian, Ltd.* court used a low level of generality to find two quilts substantially similar,⁸² the *Rentmeester v. Nike, Inc.* court used a high level of generality to find two Michael Jordan photos not substantially similar.⁸³ Both of these are well-reasoned, close cases, neither of which is necessarily wrong in its analysis. The following subsection analyzes patterns arising in the way judges decide to choose a level of generality in a nonexhaustive sampling of varieties of visual art cases.

1. Typical Visual Art Cases

In *Steinberg v. Columbia Pictures Industries*,⁸⁴ the court used a low level of generality to find the visual artworks in question substantially similar. At the broadest level, both works are aerial views of a few blocks of New York City.⁸⁵ At a medium level of generality, both contain detailed foregrounds of New York City.⁸⁶ While moving towards expression, this is still an uncopyrightable idea because there are so many different ways to conceptualize it. Therefore, the court went lower to find substantial similarities in the expression of foreground construction of four New York City blocks (including two avenues and a two-way cross street) using similar color schemes, long shadows, building shapes, streetlights, and lettering.⁸⁷

Analogously, the *Mannion v. Coors Brewing Co.* court found that reasonable jurors could find substantial similarities between Mannion's photo and Coors Light's advertisement.⁸⁸ Coors claimed

81. *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (explaining that infringement determinations are "of necessity vague").

82. *Boisson v. Banian, Ltd.*, 273 F.3d 262, 273–74 (2d Cir. 2001) (analyzing substantial similarity on an element-by-element basis where unique shapes, patterns, colors, and texture indicated infringement).

83. *See Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1122–23 (9th Cir. 2018) (holding that the general differences in "selection and arrangement of elements" forestalled a finding of infringement).

84. 663 F. Supp. 706, 710 (S.D.N.Y. 1987).

85. *Id.* at 712.

86. *Id.* at 710, 712.

87. *Id.* at 712–13.

88. *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 463 (S.D.N.Y. 2005).

their advertisement only shared the “generalized idea and concept of a young African American man wearing a white t-shirt and a large amount of jewelry.”⁸⁹ However, the court found the defendant’s characterization of the similarities too broad, finding other similarities in angle, pose, cloudy-sky background, composition, arrangement of the jewelry, and lighting.⁹⁰ While there are many ways to photograph a black man in a white t-shirt and jewelry, at a low level of generality, the specific choices made by Coors were clearly a replication of Mannion’s expression. Though judges are not explicitly tying their decisions to the range of artistic choices available, the common thread in this case and others like it⁹¹ is that judges tend to choose a level of generality based on where the artist had room to make the most artistic choices.

2. Visual Art Stemming from Nature

Works that realistically depict natural subjects are an interesting subset of visual art because there is a much smaller range of artistic choices to be made given the constraints of trying to replicate a plant, animal, or natural scenery. Therefore, the test must be slightly tweaked to accommodate for the reality being represented. Whereas it would be easy to know when someone copies an abstract depiction of a bird, it is quite hard to know when someone copies a scientific rendition of one.⁹²

In *Franklin Mint Corp. v. National Wildlife Art Exchange, Inc.*, the artist produced two paintings of cardinals sitting on branches.⁹³ This idea cannot be copyrighted. Moving down a level of generality, the court of appeals described these paintings “depict[ing] two cardinals in profile, a male and a female perched one above the other on apple tree branches in blossom.”⁹⁴ Despite these being choices

89. *Id.* at 455.

90. *See id.* at 462–63 (cataloguing similarities).

91. *See, e.g.*, *Gross v. Seligman*, 212 F. 930, 931 (2d Cir. 1914) (“The one thing, viz., the exercise of artistic talent, which made the first photographic picture a subject of copyright, has been used not to produce another picture, but to duplicate the original.”); *Kaplan v. Stock Mkt. Photo Agency, Inc.*, 133 F. Supp. 2d 317, 323 (S.D.N.Y. 2001) (noting that copyright protection for photographs does not extend to the subject, but rather to the photographer’s original conception of the subject); *Rogers v. Koons*, 960 F.2d 301, 308 (2d Cir. 1992) (“What is protected is the original or unique way that an author expresses those ideas, concepts, principles or processes.”).

92. *See Franklin Mint Corp. v. Nat’l Wildlife Art Exch., Inc.*, 575 F.2d 62, 65 (3d Cir. 1978).

93. *Id.* at 66.

94. *Id.*

of expression—the artist could instead decide to paint the birds perched next to one another, facing front, or on a different type of tree—the court goes further into the details to find the paintings not substantially similar because the artist made those choices to convey the most realistic version of a cardinal sitting on an apple tree branch.⁹⁵ The court suggested the “color, body attitude, position of the birds and linear effect” are different: “In one, the attitude of the male is calm; in the other, he is agitated with his beak open.”⁹⁶ It also suggested variances in “the plumage of the birds, the foliage, and the general composition of the works.”⁹⁷

Comparably, the court looked to granular details in *First American Artificial Flowers v. Joseph Markovits, Inc.*,⁹⁸ examining plastic tea roses.⁹⁹ The court disregarded similarities that “follow nature,” instead noting the creative choices the artist did make, including differences in position of leaves on the stem, petal colors, shape and position of thorns, and “the distinctiveness of the veins [of the leaves].”¹⁰⁰

By drawing the idea-expression line at the specific “distinctive curls of particular tendrils” of a jellyfish,¹⁰¹ “the proportion, form, contour, configuration, and conformation” of a cocker spaniel statue,¹⁰² and the “pose, posture, and facial expression” of a concrete deer,¹⁰³ courts regularly use the lowest level of generality in works imitating nature. While consistent in applying a low level of generality, courts are far from consistent in what they determine counts as expression. Whereas pose was uncopyrightable in *Rentmeester* and *F.W. Woolworth*,¹⁰⁴ pose was explicitly considered a substantial

95. See *id.* at 66–67 (affirming the district court’s determination that “although some of the same source materials were used in all three paintings, similarity between the works necessarily reflected the common theme or subject and each painting was a separate artistic effort”).

96. *Id.* at 66.

97. *Id.*

98. 342 F. Supp. 178, 186–87 (S.D.N.Y. 1972).

99. *Id.*

100. *Id.* at 186–87; see also Morgan M. Stoddard, Comment, *Mother Nature as Muse: Copyright Protection for Works of Art and Photographs Inspired by, Based on, or Depicting Nature*, 86 N.C. L. REV. 572, 589 (2008) (“Comparing the two roses more closely, the court found a ‘pattern of differences’ sufficient to negate the inference of copying.”) (quoting *First Am. Artificial Flowers*, 342 F. Supp. at 186–87).

101. *Satava v. Lowry*, 323 F.3d 805, 812 (9th Cir. 2003).

102. *F.W. Woolworth Co. v. Contemp. Arts, Inc.*, 193 F.2d 162, 164 (1st Cir. 1951), *aff’d* 344 U.S. 228 (1952).

103. *Concrete Mach. Co. v. Classic Lawn Ornaments, Inc.*, 843 F.2d 600, 607 (1st Cir. 1988).

104. *Rentmeester v. Nike, Inc.*, 883 F.3d 1111, 1119 (9th Cir. 2018); *F.W. Woolworth Co.*, 193 F.2d at 164.

similarity factor in *Concrete Machinery*.¹⁰⁵ Similarly, judges sometimes even acknowledge these differences would not be discernible by the ordinary observer, as the *F.W. Woolworth* opinion stated that the protectable elements are “too subtle for appreciation by anyone but a fancier.”¹⁰⁶ Therefore, given that the substantial similarity test is meant to judge whether there is substantial similarity between the works in the eyes of an ordinary observer, looking at too low a level of generality contravenes the entire purpose of the inquiry.¹⁰⁷

3. Fabric Design Works Stemming from the Public Domain

Notably, courts typically use higher levels of generality in fact patterns revolving around fabric designs stemming from the public domain. In *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, the court used a very high level of generality to determine the defendant’s fabric was substantially similar to the plaintiff’s Byzantium design.¹⁰⁸ While it analyzed the designs at a low level of generality and found the colors, scrolls, arches, symbols, and distribution of those patterns were distinctly not identical, the court nevertheless decided the case by using a high level of generality, ultimately holding that the compilation of color and general forms made the aesthetic appeal of the designs the same.¹⁰⁹

In much the same fashion, the court in *Soptra Fabrics Corp. v. Stafford Knitting Mills, Inc.*, analyzed geometric design of two fabrics at a low level of generality but ultimately decided the case at a high one.¹¹⁰ When looking closely, the judges found the defendant’s “crescents are titled,” their scalloping “less gracefully treated,” and their designs generally “more discreet” than the plaintiffs.¹¹¹ Since the differences found under “courtroom scrutiny” faded away when viewed from a couple feet back, however, the court found protected elements at a high level of generality.¹¹²

105. *Concrete Mach. Co.*, 843 F.2d at 607.

106. *F.W. Woolworth Co.*, 193 F.2d at 164.

107. *But see* Cohen, *supra* note 36, at 732 (arguing that the ordinary observer test’s “ambiguity” leaves courts “to determine infringement on an unpredictable, impressionistic basis”).

108. *See* *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960) (“[T]he ordinary observer, unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.”).

109. *Id.*

110. *See* 490 F.2d 1092, 1094 (2d Cir. 1974) (“[A]lthough small differences between the designs might be found to exist under courtroom scrutiny, those differences fade away within a few feet or absent sharp scrutiny.”).

111. *Id.* at 1093.

112. *Id.* at 1094.

Similarly, in *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, the plaintiff copyrighted their argyle plaid fabric pattern and accused the defendant of unlawful copying.¹¹³ The district court found no substantial similarity because the differences in the works “would be apparent to a furniture manufacturer, or . . . a consumer seriously contemplating purchase of a couch covered with one or another of the fabrics.”¹¹⁴ But while a furniture maker or consumer seriously considering purchasing the fabric would likely look quite meticulously at the fine details, the Second Circuit used a higher level of generality. The court applied the ordinary observer test, which asks whether the ordinary observer, “unless he set out to detect the disparities, would be disposed to overlook them, and regard their aesthetic appeal as the same.”¹¹⁵ In fabric design cases, the coordination and arrangement of elements within specific spatial configurations is often enough to find substantial similarity despite clear differences at the more granular levels.¹¹⁶

In the visual art context, courts seem to make levels of generality decisions based on what they find to be reasonable similarities in light of the artistic choices available to the work being created. From a policy perspective, it makes sense not to grant a monopoly on works that simply reflect reality. However, that dramatically changes in fabric design cases, where courts have seemingly provided much greater protections to the original artist. When deciding cases at high levels of generality, courts are privileging whoever arranged designs first. Since the copyright statute gives minimal guidance on how to approach these decisions,¹¹⁷ judges are trying to intuit their way around the idea-expression dichotomy. In the process, they are privileging earlier creators in certain art forms more than others, with greater protections under the law for those privileged works.

C. Software

“A computer program is often viewed as a collection of different parts, just as a book or play is seen as an amalgamation of plot,

113. 558 F.2d 1090, 1091–92 (2d Cir. 1977).

114. See *id.* at 1093 (quoting *Novelty Textile Mills, Inc. v. Joan Fabrics Corp.*, 425 F. Supp. 1008, 1012 (S.D.N.Y. 1977)).

115. See *id.* at 1093 (quoting *Peter Pan Fabrics, Inc. v. Martin Weiner Corp.*, 274 F.2d 487, 489 (2d Cir. 1960)).

116. See, e.g., *Hamil Am., Inc. v. GFI*, 193 F.3d 92, 103 (2d Cir. 1999) (finding substantial similarity where defendant duplicated the selection, coordination, and arrangement of floral elements in a fabric pattern despite differences in detail).

117. 17 U.S.C. § 102 (offering no objective minimum level of originality required for protection under the statute).

characters, and other familiar parts.”¹¹⁸ Since computer programs are considered literary works,¹¹⁹ one might assume that courts are able to faithfully apply the substantial similarity analysis using a consistent level of generality. However, drawing the line between protected and unprotected material in the software context is even more uncertain than in visual art cases. In part, this is because courts disagree over both the threshold question as to what the different levels of abstraction even are, and where to place the line between unprotected idea and protected expression.¹²⁰ Consequently, application of the abstraction-filtration-comparison test is prone to inconsistency.¹²¹

Before *Altai*, *Whelan Associates v. Jaslow Dental Laboratory, Inc.* decided “the purpose or function” of the work was its idea, and anything unnecessary to that purpose or function was expression.¹²² Benefits like consistency and stability stem from a bright-line rule like this. However, critics argue this test is “poorly adapted to the abstractions test” because it fails to differentiate between levels of abstraction within a program’s structure, sequence, and organization (SSO)¹²³ and that it fixes the level of generality analysis at too high a level.¹²⁴ While some courts attempted to refine the *Whelan* strategy by adding further layers into the SSO category,¹²⁵ most abandoned it altogether, instead following the *Altai* method, whether implicitly or explicitly.¹²⁶

The *Altai* court translated Judge Hand’s abstractions test to the software context, explaining its strategy for distilling idea from

118. Ogilvie, *supra* note 36, at 526.

119. *Apple Comput., Inc. v. Franklin Comput. Corp.*, 714 F.2d 1240, 1249 (3d Cir. 1983) (holding that a computer program in object or source code is a copyrightable “literary work” under 17 U.S.C. § 101).

120. *See* Ogilvie, *supra* note 36, at 527 (“Unfortunately, some courts classify certain program parts as ideas while others classify the same parts as expression . . .”).

121. *See id.*

122. 797 F.2d 1222, 1236 (3d Cir. 1986).

123. Ogilvie, *supra* note 36, at 554.

124. *See* William H. Wright, Comment, *Litigation as a Mechanism for Inefficiency in Software Copyright Law*, 39 UCLA L. REV. 397, 418 (1991) (arguing that a high level of abstraction “is a substantial barrier to a new competitor entering a marketplace”).

125. *See, e.g., Healthcare Affiliated Servs., Inc. v. Lippany*, 701 F. Supp. 1142, 1150 (W.D. Pa. 1988) (adding a layer of abstraction called “methodologies” between purpose and SSO and finding no evidence methodologies constituted more than an idea); Ogilvie, *supra* note 36, at 555 (describing different attempts by courts to refine the *Whelan* strategy).

126. *See* Mark L. Gordon, *Copying to Compete: The Tension Between Copyright Protection & Antitrust Policy in Recent Non-Literal Computer Program Copyright Infringement Cases*, 15 J. MARSHALL J. COMPUT. & INFO. L. 171, 181-87 (1996) (collecting cases).

expression in three steps.¹²⁷ The first step, abstraction, isolates each level from its ultimate purpose.¹²⁸ The isolated levels dissected from the program parts often include abstract data types, system architecture, and algorithms, but they are not solidly agreed upon or defined.¹²⁹ Scholars do agree that purpose is an idea and code is an expression, but the other abstraction levels are left unsettled.¹³⁰ The next step, filtration, requires examining each isolated level to determine if it is an idea or an expression, or whether it was “dictated by efficiency, by external factors, and taken from the public domain.”¹³¹ Again, courts routinely disagree about these factors. For example, in *Oracle America, Inc. v. Google Inc.*, although the district court held that 37 Java API packages, including the SSO, were not protectable, the court of appeals reversed.¹³² Lastly, the third step involves comparing the protectable elements between the two works.¹³³

In *Altai*, the Second Circuit agreed with the district court’s characterizations of the levels of abstractions in ascending order from “object code, to source code, to parameter lists, to services required, to general outline.”¹³⁴ After filtering out the elements dictated by efficiency, elements dictated by external factors, and elements taken from the public domain, the Second Circuit also agreed with the decision to analyze substantial similarity at the level of generality of parameter lists and macros, finding no substantial similarity when comparing what was left of the programs.¹³⁵ However, even the *Altai* court did not prescribe their version of the different levels of abstractions nor their level of generality selected, suggesting that the facts of a different case “might require that a district court draw a more particularized blueprint of a program’s overall structure.”¹³⁶

Despite reasoned analysis regarding the copyrightability of each of these levels, courts habitually make contrasting decisions,

127. See *Comput. Assocs. Int’l v. Altai*, 982 F.2d 693, 706–12 (2d Cir. 1992) (outlining an “Abstraction-Filtration-Comparison” substantial similarity test for computer program structure).

128. *Computer Assocs. Int’l*, 982 F.2d at 706.

129. See Ogilvie, *supra* note 36, at 542 n.73 (listing different ways courts have defined the levels of abstraction in computer programs); see also Jon O. Newman, *New Lyrics for an Old Melody: The Idea/Expression Dichotomy in the Computer Age*, 17 CARDOZO ARTS & ENT. L.J. 691, 700–01 (1999) (discussing the difficulty of organizing even a simple computer program into “a hierarchy of abstractions”).

130. See Ogilvie, *supra* note 36, at 563.

131. NIMMER & NIMMER, *supra* note 4, § 13D.37[B][2].

132. 750 F.3d 1339, 1348 (Fed. Cir. 2014).

133. See NIMMER & NIMMER, *supra* note 4, § 13D.37[E].

134. *Comput. Assocs. Int’l v. Altai*, 982 F.2d 693, 714 (2d Cir. 1992).

135. See *id.* at 714–15.

136. *Id.* at 714.

using incompatible reasoning and methodology, because there is no stable, complete, or manageable set of abstraction parts in accord with both programming conventions and existing law.¹³⁷ Unlike literature, computer programs are “not easily reduced to a hierarchy of abstractions.”¹³⁸ These inconsistencies result from judicial lack of knowledge about computer program functionality, lack of persistent definitions of each level of abstraction, and the way courts have attempted to fit the square peg of the idea-expression distinction into the round hole of software.¹³⁹ With all these obstacles in the way, choosing a level of generality is an inconsistent and unpredictable venture for software cases.

IV. CONSEQUENCES AND SOLUTIONS

This Note thus far has analyzed why and how courts choose different levels of generality in the substantial similarity analysis for three media of work. But we should also look to the bigger question of why it's important to care about selecting the right level of generality. Copyright's idea-expression analysis imperfectly attempts to balance the property interests of authors against the interests of the public in free-flowing information and creativity.¹⁴⁰ Both over-protecting and under-protecting works can stunt and disincentivize creativity. The Ninth Circuit even acknowledged that one of the guiding considerations in drawing the idea-expression line is the preservation of the balance of interests based on the judge's evaluation of the societal benefits each option presents.¹⁴¹ For fairness's sake, we should be concerned about the lack of consistency and clear-cut guidelines by which courts are making these decisions.

Since the idea-expression dichotomy arose in the literary context, it works in a more consistent manner in that space. But the

137. See Ogilvie, *supra* note 37, at 560; see also *Lotus Dev. Corp. v. Paperback Software Int'l.*, 740 F. Supp. 37, 63–68 (D. Mass. 1990) (examining menu SSO); *Broderbund Software, Inc. v. Unison World, Inc.*, 648 F. Supp. 1127, 1134, 1137 (N.D. Cal. 1986) (examining structure, sequence, and layout of audiovisual display).

138. Newman, *supra* note 129, at 700.

139. See *id.* at 700–02 (discussing the need for “terms appropriate to the subject matter,” a recognition of “what is relevant in applying the idea-expression dichotomy to computer programs,” and “the help of knowledgeable experts”).

140. See Richard H. Jones, *The Myth of the Idea/Expression Dichotomy in Copyright Law*, 10 PACE L. REV. 551, 561–63 (1990) (discussing the underlying justifications for this “imprecise tool” (quoting *Steinberg v. Columbia Pictures Indus.*, 663 F. Supp. 706, 712 (S.D.N.Y. 1987))).

141. *Herbert Rosenthal Jewelry Corp. v. Kalpakian*, 446 F.2d 738, 742 (9th Cir. 1971).

dichotomy breaks down in other media.¹⁴² The resulting inconsistency in selecting a generality level for the idea-expression line can curtail the free flow of speech and creativity. The idea-expression line is only a product of litigation, with no *ex ante* process for deciding what is protected.¹⁴³ Therefore, artists face uncertainty and unpredictability, which may create a chilling effect.¹⁴⁴ When they do choose to create, they can become embroiled in lawsuits, which often result in subjective value judgments about what the “idea” behind a work is.¹⁴⁵ Judge Lewis A. Kaplan’s *Mannion* opinion captured this consequence perfectly when he suggested that little is gained by distinguishing idea from expression in visual art because “the line itself is meaningless” when the conceptual categories do not fit the subject matter.¹⁴⁶ While it makes sense to talk about the idea of a literary work, it is much harder to capture the idea of visual art or software because each observer may have a different and equally valid interpretation.¹⁴⁷

Judge Hand preemptively struck back at any criticism of his test, suggesting that although wherever the line is drawn “will seem arbitrary,” “that is no excuse for not drawing it.”¹⁴⁸ However, there may be ways to make this line-drawing exercise more seamless for non-literature media. First, this Note suggests more fully embracing the levels of generality structure in substantial similarity analysis. While courts sometimes speak in terms of levels of generality, they do so inconsistently and arbitrarily. More routinely employing this structure of parsing through the levels of abstraction, identifying the level at which protection is afforded, and then explaining why that level was selected would be a net benefit to copyright’s overall jurisprudence because it gives authors and their lawyers a much more nuanced understanding of why a work is or is not infringing.

142. See *Mannion v. Coors Brewing Co.*, 377 F. Supp. 2d 444, 455–59 (S.D.N.Y. 2005) (discussing the difficulty of bifurcating between ideas and expressions in visual arts and other non-verbal media).

143. Molly Shaffer Van Houweling, *The Freedom to Extract in Copyright Law*, 103 N.C. L. REV. 445, 453 (2025).

144. See 5 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 19E.04[B] (rev. ed. 2025).

145. See Amy B. Cohen, *Copyright Law and the Myth of Objectivity: The Idea-Expression Dichotomy and the Inevitability of Artistic Value Judgments*, 66 IND. L.J. 175, 230 (1990) (arguing that the idea-expression dichotomy often boils down to “a determination of what is considered meritorious in a given work, based on particular judges’ assessments of the artistic value”).

146. *Mannion*, 377 F. Supp. 2d at 458.

147. See *id.* at 458.

148. *Nichols v. Universal Pictures Corp.*, 45 F.2d 119, 122 (2d Cir. 1930).

Second, these difficult line-drawing decisions may become easier if courts use vocabulary more tailored to the medium of work at issue.¹⁴⁹ Courts already do this to some extent. For example, in music cases, there is rarely discussion of a musical “idea” being expressed.¹⁵⁰ Software cases in particular would benefit from using more tailored terms, given that computer programs are expressive and communicative in ways inherently different from art or literature.

Finally, another solution could be setting guidelines for what level of generality is best suited for different media. If Congress provided statutory guidance for what courts should try to better protect, judges may have an easier time making consistent decisions. These guidelines would reflect the policy considerations and preferences of what the democratic body prefers to protect. For example, we may want to generally use a higher level of generality for software to protect those who create totally new, creative, and productive programs.¹⁵¹ Or, we might prefer a low level of generality for visual arts depicting elements from nature so as to incentivize more creation of works based on nature. The possibilities are endless, and they are explicitly value judgments by our leaders based on both their priorities and the priorities of their voters. Making these value judgments at the congressional level, instead of in every single substantial similarity case, would lead to a more harmonious body of case law with consistency and fairness for authors.

As a counterargument, while Justice Scalia may have been right to worry about the temptations of judicial activism in the fundamental rights context, it may not be such a bad thing in the copyright context. Reasonable scholars could contend that fundamental constitutional rights should not be subject to judges’ personal preferences, but there may actually be a benefit to infusing current cultural, political, and social preferences into copyright case

149. See *Mannion*, 377 F. Supp. 2d at 458–59 (suggesting courts use different vocabulary to evaluate copyright infringement as appropriate in various artistic contexts (citing *Newman*, *supra* note 129, at 697)).

150. *Newman*, *supra* note 129, at 700; see also *Skidmore v. Led Zeppelin*, 952 F.3d 1051, 1070 (9th Cir. 2020) (associating ideas in music with themes, common musical elements, or building blocks of music); *Gray v. Perry*, No. 2:15-CV-05642, 2020 U.S. Dist. LEXIS 46313, at *5 (C.D. Cal. Mar. 16, 2020) (citing *Swirsky v. Carey*, 376 F.3d 841, 850 (9th Cir. 2004) (“[W]hen certain commonplace expressions are indispensable and naturally associated with the treatment of a given idea, those expressions are treated like ideas and therefore not protected by copyright.”)).

151. Cf. *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913, 956 (2005) (Breyer, J., concurring) (recognizing that this decision reflects a tradeoff of values between encouraging more technological innovation versus more stringently protecting authors’ copyright monopolies).

law. Given the art market's rapid changes and the ad hoc nature of substantial similarity decisions, allowing judges more discretion might better align and intertwine the copyright regime with the art market's norms and trends. For example, much of postmodern and contemporary art rely heavily on copying, which would be substantially similar.¹⁵² Allowing copyright to bend at the will of the art market through ad hoc judicial implementations of art market norms might promote progress and create efficiency gains greater than consistency and uniformity would.¹⁵³ However, this method depends on judicial knowledge of art, which is highly problematic.¹⁵⁴ It is also significantly more applicable to visual art than other forms of copyrightable material. Therefore, allowing wide judicial discretion could actually give rise to even greater uncertainty in substantial similarity litigation.

Realistically, if Congress does not act, courts will need to look to the common threads in substantial similarity cases across media. When selecting a level of generality, courts should choose a level based on the range of creative choices available to an author, and they should explain their choice when writing opinions. Whereas the choices are endless in photos and literature, the range of expressive choice is sharply curtailed in software and visual art depicting natural subjects. When dealing with infinite creative options, courts can be more skeptical of high-level similarities, but they should not punish authors who did not have a choice to copy given the medium they are working in. Once courts have chosen a level in each medium, they should uniformly stick to those levels to give authors more certainty and predictability in infringement litigation.

152. See Amy Adler, *Why Art Does Not Need Copyright*, 86 GEO. WASH. L. REV. 313, 352–55 (2018) (discussing how copying has become “both the subject of contemporary art and its technique”).

153. See *id.* at 342 (arguing that the art market’s “norm of authenticity” already polices detrimental copying of an artist’s first sale of a work, “rendering copyright law superfluous”).

154. See, e.g., *Andy Warhol Found. for the Visual Arts, Inc. v. Goldsmith*, 598 U.S. 508, 574–75 (2023) (Kagan, J., dissenting) (“There is precious little evidence in today’s opinion that the majority has actually looked at these images, much less that it has engaged with expert views of their aesthetics and meaning. . . . [T]he majority plants itself firmly in the ‘I could paint that’ school of art criticism.”).

V.
PREDICTIONS FOR FAIR USE'S
LEVELS OF GENERALITY PROBLEM

It would not be possible to discuss the state of the levels of generality analysis in copyright without discussing fair use. Fair use operates as an affirmative defense which excuses liability for what would be infringement in circumstances which balance out the interests of the copyright holder with those of the broader public for reasons like education, personal use, criticism, parody, scholarship, news, etc.¹⁵⁵ The court must consider four facets of the infringing use in order to excuse liability. First, courts look at the purpose and character of the use. This factor includes analysis on how the party is using the copyrighted work, whether it is for a noncommercial purpose, and whether the use is transformative from the original copyrighted work.¹⁵⁶ Second, the court considers the nature of the copyrighted work, including whether the work is published, factual, or highly creative.¹⁵⁷ Third, the court will account for the amount and substantiality of the portion of the original work used in relation to the work as a whole.¹⁵⁸ Last, courts analyze whether the unlicensed use harms the market for the original work by acting as a substitute.¹⁵⁹

Outside of substantial similarity, the final part of this paper predicts that the fair use defense will become the next battleground where major levels of generality problems will be fought in copyright due to the Supreme Court's *Andy Warhol Foundation for the Visual Arts v. Goldsmith* decision.¹⁶⁰ That decision affirmed the Second Circuit's holding that Andy Warhol's *Orange Prince* was not a fair use of Lynn Goldsmith's Prince portrait when used to illustrate a magazine article about the musician Prince.¹⁶¹ This decision heavily implicated the importance of a levels of generality analysis within two of the fair use factors: factors one and four.

A. *The Purpose and Character of the Use*

The *Warhol* Court found the first factor of the fair use inquiry to be whether a work was transformative, meaning it did not "merely

155. 17 U.S.C. § 107; Nimmer & Nimmer, *supra* note 4, § 13F.04[B].

156. *U.S. Copyright Office Fair Use Index*, U.S. COPYRIGHT OFF. (Aug. 2025), <https://www.copyright.gov/fair-use/> [<https://perma.cc/7ETM-KMUS>].

157. *Id.*

158. *Id.*

159. *Id.*

160. 598 U.S. 508 (2023).

161. *Id.* at 515–16, 519–20.

supersede[.]” the original piece, but rather added something new with a “further purpose or different character.”¹⁶² It means “altering the first with new expression, meaning, or message.”¹⁶³ But in the end, the key consideration was not about a different meaning or message, but whether the specific use had a similar purpose to the original.¹⁶⁴

Looking narrowly into the use was a substantial deviation from previous fair use cases which typically considered whether the work itself was fair, instead of its distinct use.¹⁶⁵ That departure greatly elevated the consequences of determining the purpose. For example, in the lower courts Goldsmith argued that hers and Warhol’s works had the same purpose by virtue of both being visual works.¹⁶⁶ At that extremely high level of generality, the fair use defense might have been obliterated, threatening artistic borrowing within similar media.¹⁶⁷ Putting this into perspective, in *Campbell v. Acuff-Rose Music, Inc.*, the works at issue were both songs.¹⁶⁸ At a high level of generality, both authors Roy Orbison and 2 Live Crew created songs with the purpose of telling a story and expressing emotion about love and desire through music and lyrics.¹⁶⁹ At this extremely high generality level, the first factor would favor the original creator, Orbison. However, at a narrower level of generality, the purpose of the songs could not have been more different. Orbison’s song tells the romantic story of a “man whose fantasy comes true,” while 2 Live Crew’s purpose is to express a crass demand for sex and relief from paternal responsibility.¹⁷⁰ While the *Campbell* Court exemplified a very traditional use of a low level of generality,¹⁷¹ the *Warhol* Court went even further. After much back and forth, the *Warhol* justices took an even narrower approach and found that the purposes of both works were to illustrate magazine articles about Prince.¹⁷²

162. *Id.* at 509.

163. See Amy Adler, *Roundtable on Warhol v. Goldsmith*, 94 GREY ROOM 20, 22 (2024) (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 579 (1994)).

164. *Id.* at 22–24.

165. *Id.* at 24.

166. *Id.* at 33.

167. *Id.*

168. *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 572 (1994).

169. *Id.* at 582–83.

170. *Id.* at 583.

171. Andy Warhol Found. for the Visual Arts, 598 U.S. 508, 571 (2023) (Kagan, J., dissenting) (naming *Campbell* the “primary case on the topic” of the first factor of the fair use inquiry).

172. Adler, *supra* note 163, at 24.

The oral argument transcripts demonstrate the Justices' uncertainty about choosing a level of generality. One of Justice Elena Kagan's most salient points in her dissent demands explanation for the majority's failure to explain why they selected the level of generality for purpose at illustrating a magazine about Prince.¹⁷³ The Warhol lawyers conceded that there is a level of generality at which the purpose was to illustrate an article about Prince but asked the Justices to look even more narrowly into the contents of the article.¹⁷⁴ The article, titled "Purple Fame," was about Prince's emerging celebrity icon status.¹⁷⁵ The AWF lawyers suggested *Orange Prince's* purpose was to illustrate an article specific to Prince's celebrity status, given Warhol's intended message about the dehumanization of celebrity.¹⁷⁶ Whereas Goldsmith's photo might illustrate any article about Prince's life, Warhol's purpose was more specific to illustrating a perspective on the pop era of celebrity. Not only did the Court not select AWF's preferred level, but they also did not clearly identify why they chose their selected level.¹⁷⁷

In the next wave of fair use litigation, the interpretive battle over choosing the level of generality to define purpose will be highly consequential. After the *Warhol* decision, in the 2024 case *Philpot v. Independent Journal Review* (IJR), an online news site's use of the plaintiff's photo of the singer Ted Nugent was held to share the same purpose as the plaintiff's based on a *Warhol*-like analysis.¹⁷⁸ The judges found that the plaintiff originally took the copyrighted photo to take a portrait of Nugent, and IJR used the photo to "depict" the musician.¹⁷⁹ Had they gone to an even lower level of generality, like the AWF lawyers sought, it may have been relevant that the article was not at all about Nugent, as it was titled "15 Signs Your Daddy Was a Conservative" and listed enjoying Nugent's music as one of many signs.¹⁸⁰ However, the Fourth Circuit stayed true to the *Warhol* Court's

173. *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 577–80 (Kagan, J., dissenting).

174. See Transcript of Oral Argument at 20–28, *Andy Warhol Found. for the Visual Arts*, 598 U.S. 508 (No. 21-869).

175. *Id.* at 21.

176. *Id.*

177. *Id.* at 21–28; *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 526 ("As portraits of Prince used to depict Prince in magazine stories about Prince, the original photograph and AWF's copying use of it share substantially the same purpose.").

178. See 92 F.4th 252, 258 (4th Cir. 2024) (describing the "purpose and character of the use" analysis (quoting *Andy Warhol Found. for the Visual Arts*, 598 U.S. at 527–33)).

179. *Id.* at 258.

180. *Id.* at 256.

level of generality, and likewise offered no clear explanation of that choice.¹⁸¹

Larson v. Perry also followed *Warhol*'s analytical footsteps but led to the opposite result.¹⁸² The plaintiff, Sonya Larson, claimed defendant Dawn Perry infringed on her letter posted to Facebook about a kidney donation, which Perry incorporated into an original short story.¹⁸³ When selecting a level of generality at which to analyze the work, the judge "took its analysis down to the very end of the contextual chain, starting with the medium of the work . . . but ending with the broader framework in which the work ultimately appeared."¹⁸⁴ At a high level—akin to calling the purpose of Warhol's and Goldsmith's works "portraits"—the two letters were used to share motivations for donating a kidney to the recipient.¹⁸⁵ The court found that the more accurate level to judge purpose was at the level akin to illustrating magazine stories about Prince. At that specific level, the judge found the plaintiff's letter's purpose to be informing friends and family about her kidney donation, while the defendant's use was to introduce a new character to the narrative.¹⁸⁶ Since the purpose at that specific level of generality was different, the first factor weighed in favor of the defendant's fair use defense.¹⁸⁷

B. Market Effects

Justice Kagan's *Warhol* dissent also critiques the majority's conflation of the purpose and substitution inquiries. Since the majority concluded that the works have the purpose of operating in the same market, Justice Kagan argued that it follows that Warhol's work has a detrimental effect on Goldsmith's market.¹⁸⁸ The key question for this and future cases will now be determining whether the defendant's work is likely to compete with a plaintiff's work for that particular use, thus acting as a market substitute. But this is still a value judgment that courts have to make.

181. *Id.* at 260 ("Philpot took the Photo to identify Nugent. IJR used the Photo for precisely the same reason: to depict 'The Nuge.'").

182. *See* *Larson v. Perry*, 693 F. Supp. 3d 59, 79, 83 (D. Mass. 2023).

183. *See id.* at 67.

184. *See id.* at 79 (using the same language to describe the Supreme Court's analysis in the *Warhol* opinion).

185. *See id.*

186. *Id.* at 79–80.

187. *Id.* at 78–80.

188. *See* *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 578 (2023) (Kagan, J., dissenting).

Applying antitrust principles to define substitution presents yet another framing question subject to the levels of generality problem.¹⁸⁹ This problem is easily exemplified by the classic Coca-Cola example.¹⁹⁰ Imagine you are thirsty and find a corner store to buy a drink. You go to the cooler section and see both Coca-Cola and milk.¹⁹¹ You prefer Coke, but the price is higher. If you decide to purchase the milk, has it become a market substitute for Coke?¹⁹² Both are beverages sold at the corner store with the purpose of quenching the customer's thirst.¹⁹³ However, most consumers would say they aren't really substitutes.¹⁹⁴

Similarly, many artists would suggest works are never substitutable. AWF made this argument when they asserted there was a specific reason the magazine editors chose *Orange Prince* over Goldsmith's photo; Warhol's purported purpose was to show the dehumanizing effect of celebrity as applied to Prince,¹⁹⁵ whereas Goldsmith's goal was to depict Prince.¹⁹⁶ Therefore, according to AWF, they could not be substitutes since the magazine editors chose Warhol's work of fine art over Goldsmith's regular photograph for this magazine article in part based on Warhol's intended meaning.¹⁹⁷ However, there is likely some price increase of Warhol's work at which the magazine editors would have switched to Goldsmith's.¹⁹⁸ Deciding if substitution occurs at a 5%, 10%, 20% or further price increase is just another example of the levels of generality problem at work.¹⁹⁹

189. See Christopher Jon Sprigman, *Copyright, Meet Antitrust: The Supreme Court's Warhol Decision and the Rise of Competition Analysis in Fair Use*, 134 YALE L.J. F. 298, 312 (2025) (noting that antitrust law "draw[s] a line between those that are 'in' and those that are 'out' of the sphere of competition").

190. *Id.* at 311.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.*

195. See Transcript of Oral Argument at 34, *Andy Warhol Found. for the Visual Arts*, 598 U.S. 508 (No. 21-869) (counsel for AWF stated that the picture's "meaning or message was about the dehumanizing effects of celebrity as applied to Prince").

196. *Andy Warhol Found. for the Visual Arts v. Goldsmith*, 598 U.S. 508, 526 (2023).

197. See Transcript of Oral Argument at 18, *Andy Warhol Found. for the Visual Arts*, 598 U.S. 508 (No. 21-869) ("[T]he Warhol work did not compete as a market substitute at Factor 4 with the Goldsmith photograph and this is really a Factor 1 case.").

198. *Cf. id.* at 50 ("[Y]ou'd look at the price to see whether there were market substitutes [and] you'd see that Warhol's works, even at the licensing as opposed to the . . . original works[] were selling for a lot more.").

199. Explicitly importing antitrust principles to define the market of a work might be beneficial to fair use's fourth factor. See Sprigman, *supra* note 189, at 312–16

VI. CONCLUSION

Without clear congressional guidance on how to make these levels of generality decisions, and without explicit use of the levels of generality framework by judges, there will be even less consistency in judicial decisions of copyright infringement. The uncertainty in fair use and the substantial similarity context means creators are more likely to face unexpected liability since there is no *ex ante* way to know what will be deemed infringement and what will not. This uncertainty will also make litigation even less desirable and might lead to a chilling effect in what and when artists decide to create.²⁰⁰ Or, risk-averse creators will seek licenses more frequently, even when not needed. This will give power to licensors who know the doctrine's ambiguity scares creators into thinking they need a license.²⁰¹ Even if an author believes they have a good case at both the substantial similarity and fair use stages, the price of being wrong can be prohibitively high, possibly including statutory damages, disgorgement of profits, and attorney's fees that are significantly higher than the license would have cost.²⁰² This will disincentivize new creativity, stifling progress, because, as commonly stated in intellectual property discussions, "[a] dwarf standing on the shoulders of a giant can see farther than the giant himself."²⁰³ Our Founding Fathers agreed that incentivizing progress is a worthwhile investment which benefits the public.²⁰⁴ While deciding substantial similarity and fair use on a case-by-case basis is necessary, Congress needs to step in and provide some guidelines to judges for even application of the law.

(describing how "[a]ntitrust assesses the substitutability of particular products or services principally as part of the task of defining relevant antitrust markets").

200. See PATRICIA AUFDERHEIDE ET AL., COPYRIGHT, PERMISSIONS, AND FAIR USE AMONG VISUAL ARTISTS AND THE ACADEMIC AND MUSEUM VISUAL ARTS COMMUNITIES: AN ISSUES REPORT 8–9 (2014), <https://www.collegeart.org/pdf/FairUseIssuesReport.pdf> [<https://perma.cc/9S5Y-L3C6>] (describing self-censorship by artists based on apprehension about fair use law).

201. See James Gibson, *Risk Aversion and Rights Accretion in Intellectual Property Law*, 116 YALE L.J. 882, 887 (2007) (explaining how uncertainty of doctrine creates risk aversion among creators).

202. *Id.* at 890.

203. Chafee, *supra* note 56, at 511.

204. See U.S. CONST. art. 1, § 8, cl. 8 (granting Congress the power to "promote the Progress of Science and useful Arts" by granting special rights to "Authors and Inventors" for their works).

SECTION 230 AT A CROSSROADS: SURVIVAL REQUIRES REFORM

SARAH ROSENBERG*

TABLE OF CONTENTS

I. Introduction	310
II. <i>Stratton Oakmont</i> and Section 230: The Evolution of the Law	312
A. Traditional Defamation Law	312
B. Defamation Law and the Internet: Are Platforms Speakers, Publishers, or Neither?	314
C. Congressional Intervention Carved Out Special Status for Internet Providers in Section 230.	315
III. Section 230: Repeal or Reform?	317
A. The Modern Problems with Section 230.	317
B. Project 2025's Articulated Policy Reforms for Section 230	320
IV. Content Moderation: What Is It, How Does It Differ Among Platforms, and Why Is It Required for Social Media Companies to Be Profitable?	327
A. Meta	328
1. Content Moderation	328
2. Algorithmic Promotion of Content	330
B. X (Formerly Known as Twitter)	332
C. Reddit	335
V. The Future of Platform Defamation Liability.	337
A. Alternative Paths Forward	339
VI. The Most Important Path Forward Is Not Choosing Which Proposal of Reform Is Best, but Ensuring That Section 230 Is Meaningfully Reformed and Not Repealed	341

* J.D., New York University School of Law, 2025; B.A., Barnard College, 2020. First and foremost, thank you to Prof. Kenji Yoshino for his feedback on early drafts, as well as organizing an insightful and comprehensive syllabus on the First Amendment and social media. Thank you to the editors on *N.Y.U. Annual Survey of American Law*, especially the Executive Board, who picked up the torch and continued nurturing scholarship, including my own. Finally, I am grateful to my friends and family who supported my law school journey, and especially for the friends who were on that journey with me.

I. INTRODUCTION

The 18th Amendment to the U.S. Constitution prohibited the “manufacture, sale, or transportation of intoxicating liquors” and completely transformed the alcohol industry in the United States.¹ Less than two decades later, Congress then reversed itself and repealed the 18th Amendment with the passage of the 21st Amendment, re-legalizing alcohol nationwide and completely changing the rules for the alcohol industry once more.² Today, Congress is poised to completely transform another industry that it had earlier protected: the Internet. Section 230, which currently grants social media platforms near-total immunity from liability for statements its users post, was passed in 1996 in order to “promote the continued development of the Internet . . . ; to preserve the vibrant and competitive free market that presently exists for the Internet . . . ; [and] to encourage the development of technologies which maximize user control over what information is received by [those] who use the Internet”³ In contrast to the 18th Amendment, which was passed to eliminate an industry in America, Section 230 was passed to protect one. Now, Congress is considering whether the Internet is still in need of that protection or if it should be revoked. A bipartisan coalition of senators, including Democratic Whip Dick Durbin and Republican Lindsay Graham, have introduced the Sunset Section 230 Act, which would repeal Section 230 two years from the day of the Act’s passage.⁴ Congress is not alone in calling for the reform of Section 230. In his third presidential candidacy, President Trump ran on a detailed policy platform that included, among other things,

1. U.S. CONST. amend. XVIII (repealed 1933).

2. U.S. CONST. amend. XXI.

3. 47 U.S.C. § 230(b) (1)–(3); *see also* PROJECT 2025 PRESIDENTIAL TRANSITION PROJECT, THE HERITAGE FOUND., MANDATE FOR LEADERSHIP: THE CONSERVATIVE PROMISE 848 (Paul Dans & Steven Groves eds., 2023) [hereinafter PROJECT 2025], https://static.heritage.org/project2025/2025_MandateForLeadership_FULL.pdf [<https://perma.cc/8T5H-UDXW>] (“As Justice Clarence Thomas has made clear, courts have construed Section 230 broadly to confer on some of the world’s largest companies a sweeping immunity that is found nowhere in the text of the statute.” (citing *Malwarebytes, Inc. v. Enigma Software*, 141 S.Ct. 13 (2020) (Thomas, J., statement respecting the denial of certiorari))).

4. Press Release, Dick Durbin, Sen., Durbin, Graham Introduce Bill to Sunset Section 230 Immunity for Tech Companies, Protect Americans Online (Dec. 18, 2025), <https://www.durbin.senate.gov/newsroom/press-releases/durbin-graham-introduce-bill-to-sunset-section-230-immunity-for-tech-companies-protect-americans-online> [<https://perma.cc/RJT4-4R3R>].

proposals to reform and even repeal Section 230. This policy platform was called “Project 2025.”

Authored by the conservative think tank The Heritage Foundation, Project 2025’s 900-plus-page manifesto laid out extensive policy goals and objectives for the anticipated Trump presidential transition and executive team.⁵ While the policy goals were never officially endorsed by Trump before election day, he has since endorsed the platform and indicated support for specific policy goals, most notably by appointing contributors to Project 2025 to positions in government.⁶ Project 2025’s goals are wide ranging: It advocates for a variety of dramatic policy shifts, from eliminating the Department of Education and the National Oceanographic and Atmospheric Administration to “unwinding policies and procedures . . . used to advance radical gender, racial, and equity initiatives . . . [and reversing the use of] the federal government’s resources to further the woke agenda”⁷ Of particular interest to this Note is Project 2025’s stance on Section 230—specifically, on its calls for the Federal Communications Commission (FCC) to “eliminate immunities that courts added to Section 230” and “support legislation that scraps Section 230’s current approach.”⁸

Even prior to the introduction of the Sunset Section 230 Act, Trump indicated his support of this policy position by tapping the author of the specific proposals around Section 230, Brendan Carr, as his pick to head up the FCC.⁹ Under the status quo of Section 230, social media platforms can shape the content posted on their platforms

5. PROJECT 2025, *supra* note 3, at 2–3.

6. Of particular impact has been the appointment of Russell Vought, one of the architects behind Project 2025, to head the White House Office of Management and Budget. *See generally* Andy Kroll, *The Shadow President*, PROPUBLICA (Oct. 17, 2025, at 06:00 ET), <https://www.propublica.org/article/russ-vought-trump-shadow-president-omb> [<https://perma.cc/YM9Z-MDLZ>] (labeling Vought the “Shadow President” over the extensive role he has played in the administration). *See also* Connor Greene, *Trump Is No Longer Denying Support for Project 2025: What to Know*, TIME (Oct. 3, 2025), <https://time.com/7323278/trump-project-2025-government-shutdown/> [<https://perma.cc/RM5L-EPBY>] (stating Trump has welcomed Project 2025 authors Russell Vought, Peter Navarro, and Brendan Carr to his Administration).

7. PROJECT 2025, *supra* note 3, at 60, 319, 664. Many of these proposals have since been enacted. *See Project 2025 Executive Action Tracker*, CTR. FOR PROGRESSIVE REFORM, <https://progressivereform.org/tracking-trump-2/project-2025-executive-action-tracker/> [<https://perma.cc/DW6R-9LY9>] (last visited Feb. 17, 2026) (tracking the Trump administration’s implementation of various Project 2025 proposals).

8. Brendan Carr, *Federal Communications Commission*, in PROJECT 2025, *supra* note 3, at 845, 847, 849.

9. *Id.*; Brendan Carr: Chairman, FED. COMM’NS COMM’N, <https://www.fcc.gov/about/leadership/brendan-carr> [<https://perma.cc/TX47-GW6D>] (last visited Feb. 10, 2026).

through content-moderation policies, algorithmic ordering, and penalizing users (including deplatforming) who violate these rules; Section 230 gives them a safe harbor to act as such without incurring liability for any defamatory content their users post.¹⁰ If Carr implements his proposed reforms and severely limits Section 230, or if Sunset Section 230 passes, social media platforms will have to accept the risk of litigation if they choose to engage in content moderation, algorithmic ordering, or any other form of “editorializing.” Without this immunity shield for platforms, what standard will the courts turn to in deciding liability—will platforms be considered publishers, distributors, or a new, third category? More importantly, are we headed toward a reckoning for social media and Internet platforms that could permanently change the industry? Or are there other off-ramps that can accomplish the Trump administration’s stated goals while preserving some form of immunity? In order to understand the magnitude of potential change that could follow from disturbing Section 230’s protections, we should first understand how social media platforms currently operate and how they utilize content-moderation, as well as analyze just how integral content-moderation is to the current business model. Ultimately, the end goal for both platforms and the government should be to find a path forward that allows platforms to retain some form of meaningful content moderation while avoiding onerous defamation litigation and liability.

In Part II of this Note, I provide a general overview of the history of defamation law and the Internet. In Part III, I survey some of the most common critiques of Section 230 and analyze Project 2025’s proposed reforms. In Part IV, I use the three case studies of Meta, X (formerly known as Twitter), and Reddit to demonstrate different methods of content moderation and illustrate how each would be affected by the reform or repeal of Section 230. In Part V, I provide a few alternative roadmaps for those who are serious about effective Section 230 reform. Finally, in Part V, I emphasize the impact of Section 230 and why repeal would be more detrimental than allowing the status quo to remain.

II.

STRATTON OAKMONT AND SECTION 230: THE EVOLUTION OF THE LAW

A. *Traditional Defamation Law*

“Defamation is a public communication that tends to injure the reputation of another” and includes both libel, or written

10. *Infra* Part IV.

statements, and slander, or spoken statements.¹¹ The Supreme Court has long held that defamatory speech is *not* protected under the Constitution.¹² Under the common law of defamation, liability was not limited to just the original speaker but also encompassed anyone who re-published a defamatory statement, either as a publisher or a distributor, under a strict liability regime.¹³ However, the Supreme Court has long since displaced this strict liability regime.¹⁴ Although decided in the context of obscenity, the Supreme Court held that depending on the nature of the speaker, plaintiffs may also need to prove that a re-publisher had knowledge of the contents of a publication prior to holding them liable.¹⁵ Effectively, depending on whether the re-publisher is a publisher or distributor of the defamatory content, plaintiff's must prove additional elements.¹⁶ Lower courts have clearly understood this holding to apply to defamation suits, and ground the "requirement that a distributor must have knowledge of the contents of a publication before liability can be imposed" in the First Amendment.¹⁷ Courts determine whether an intermediary is a publisher or a distributor based on the amount of editorial control they exercise, with newspapers traditionally classified as publishers.¹⁸ An individual who is defamed has two potential parties to bring suit against: the original speaker who defamed them or the medium containing the defamatory statement, with the second defendant often having much deeper pockets.¹⁹ Defamation law has evolved into a highly contextual, fact-specific doctrine over the course of the

11. Bonnie Docherty, *Defamation Law: Positive Jurisprudence*, 13 HARV. HUM. RTS. J. 263, 264 (2000).

12. *Beauharnais v. Illinois*, 343 U.S. 250, 266 (1952); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 340 (1973) ("[T]here is no constitutional value in false statements of fact.").

13. See Brent Skorup & Jennifer Huddleston, *The Erosion of Publisher Liability in American Law, Section 230, and the Future of Online Curation*, 72 OKLA. L. REV. 635, 639 (2020) (describing the old common law doctrine of strict liability toward defamation).

14. *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (adding a requirement of proof of "actual malice" for a public official to recover for a defamatory falsehood relating to their official conduct).

15. *Smith v. People of the State of California*, 361 U.S. 147, 153-55 (1959) (holding that a bookseller must have actual knowledge that a book contained obscenity in order to incur criminal liability).

16. See Skorup & Huddleston, *supra* note 13, at 639, 649-50 (noting how liability attaches differently to mere distributors than to those exercising more editorial control).

17. *Cubby, Inc. v. CompuServe, Inc.* 776 F.Supp. 135, 139 (S.D.N.Y. Oct. 29, 1991).

18. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 0031063/1994, 1995 WL 323710, at *3 (N.Y. Sup. Ct. May 24, 1995) ("[A] newspaper . . . is more than a passive receptacle or conduit for news, comment and advertising.").

19. See, e.g., *Gertz v. Welch*, 418 U.S. at 348-50 (discussing how juries may grant damages to plaintiffs who sue publishers and broadcasters).

past century, even before courts and plaintiffs attempted to slot the Internet and social media platforms into the doctrine.²⁰

B. Defamation Law and the Internet: Are Platforms Speakers, Publishers, or Neither?

Prior to the passage of the Communications Decency Act (which contains Section 230) in 1996, courts were beginning to grapple with the contours of defamation liability for Internet platforms.²¹ In *Stratton Oakmont, Inc. v. Prodigy Services Co.*, the New York Supreme Court for Nassau County decided that Internet service providers (“ISPs”) who hosted user-generated content were liable as publishers in a defamation suit because of the ISP’s material content-moderation policies.²²

The case involved Stratton Oakmont, a securities investment firm, and Prodigy, one of the four major ISPs that operated “computer bulletin board[s],” including one called “Money Talk.”²³ The dispute centered over whether Prodigy could be held liable for posts made by an unidentified user that claimed Stratton Oakmont committed criminal and fraudulent acts in its stock brokerage practice.²⁴ In determining that Prodigy was liable for the defamatory post, the court pointed to Prodigy’s “editorial control” and content-moderation policy as sufficient to characterize it as a publisher, not a distributor, under defamation doctrine.²⁵ The content-moderation policies themselves were modest, comprising only of guidelines governing user behavior, software screening programs that pre-screened and removed posts containing offensive language, and the use of “Board Leaders.”²⁶ The “Board Leaders” (who today would be called “moderators”) were charged with enforcing the guidelines and had the power to delete posts and send an explanation of how it violated content guidelines.²⁷ Despite Prodigy’s content-moderation policies falling well short of the actions of a traditional editor, the

20. See Skorup & Huddleston, *supra* note 13, at 649–50 (describing how courts reached divergent results in factually similar defamation cases).

21. Pub. L. No. 104-104, sec. 509, § 230, 110 Stat. 56, 137–39 (codified as amended at 47 U.S.C. § 230).

22. 1995 WL 323710, at *5.

23. *Id.* at *1.; see also TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 222 (2016) (describing how, in early 1990s, Prodigy was one of four major “online computer network” platforms hosting users).

24. *Stratton Oakmont*, 1995 WL 323710, at *1.

25. *Id.* at *1–4.

26. *Id.* at *2.

27. *Id.*

court found that these actions combined comprised sufficient “editorial control” to hold Prodigy (as well as one of its Board Leaders)²⁸ liable as a publisher.²⁹ The court treated Prodigy as if the “Money Talks” board had put out the libel itself, rather than hosting the content someone else uploaded; a role more akin to a distributor.³⁰ The court made clear that the finding of liability was premised on the existence of an active content-moderation policy, and the specific behavior that triggered a finding of publisher liability was the “active[] utiliz[ation of] technology and manpower to delete notes from . . . bulletin boards” as part of a “conscious choice[] to gain the benefits of editorial control”³¹ In direct response to this case, which seemed to penalize private companies who attempted to implement good-faith content-filtering policies in online spaces, and in order to protect the developing Internet, Congress passed Section 230 as an amendment to the Communications Decency Act.³² While Section 230 has spawned a complex judicial doctrine, its most important effect was to shield ISPs from facing defamation liability as a publisher of defamatory content posted by its users.

*C. Congressional Intervention Carved Out Special Status
for Internet Providers in Section 230*

Section 230, passed into law in 1996, reads: “No provider or user of an interactive computer service shall be treated as the publisher

28. “Agency is a legal relationship which results from the manifestation of consent of one person to allow another to act on his or her behalf and subject to his or her control, and consent by the other to so act.” *Id.* at *14 (first citing *Maurillo v. Park Slope U-Haul*, 606 N.Y.S.2d 243 (N.Y. App. Div. 1993); and then citing RESTATEMENT (SECOND) OF AGENCY § 1). Despite a written agreement between Prodigy and its Board Leaders explicitly disclaiming an agency relationship, the court found that “at least for the limited purpose of monitoring and editing the . . . computer bulletin Board, [Prodigy] directed and controlled [the Board Leader’s] actions. . . . [The Board Leader] acted as [Prodigy]’s agent.” *Id.* at *6–7.

29. *Id.* at *4.

30. *See id.* at *3–5 (“[Prodigy] is clearly making decisions as to content, and such decisions constitute editorial control. . . . Based on the foregoing, this Court is compelled to conclude that . . . [Prodigy] is a publisher rather than a distributor” (citations omitted)).

31. *Id.* at *4.

32. *See* Danielle Keats Citron & Benjamin Wittes, *The Internet Will Not Break: Denying Bad Samaritans § 230 Immunity*, 86 FORDHAM L. REV. 401, 404–05 (2017) (“When the CDA addressed private actors, as it did in § 230, it was not to give them impunity for helping third parties abuse each other. Rather, it sought ‘to encourage telecommunications and information service providers to deploy new technologies and policies’ to block or filter offensive material.” (quoting S. REP. NO. 104-23, at 59 (1995))).

or speaker of any information provided by another information content provider. . . . [Additionally, n]o provider or user of an interactive computer service shall be held liable on account of . . . any action voluntarily taken in good faith to restrict access to . . . material that the provider or user considers to be obscene, lewd, lascivious, filthy, excessively violent, harassing, or otherwise objectionable, whether or not such material is constitutionally protected.”³³ Section 230 has two main effects: ISPs cannot be treated as publishers or speakers of the content that their users post, and those that engage in good-faith content moderation will not face liability because of their affirmative content-moderation policies. The law was written as an explicit veto of *Stratton Oakmont*, which held that traditional content moderation, including automated screening programs and human deletion, constituted editorial control sufficient to classify an ISP as a publisher.³⁴ In rejecting the *Stratton Oakmont* standard, Congress determined that merely acting with editorial control—which *Stratton Oakmont* had defined as the existence or enforcement of content-moderation policies—was not enough to find an ISP liable as a publisher in a defamation suit.³⁵ Early cases were clear: No matter how involved an ISP was in soliciting users to post specific categories of content that they hosted, Section 230 shielded them from defamation liability.³⁶ Essentially, Congress carved out a new and special status for ISPs. Unlike newspapers or traditional media, ISPs cannot be held “liable for their failure to edit, withhold or restrict access to offensive material disseminated through their medium.”³⁷

33. 47 U.S.C. § 230(c)(1)–(2).

34. VALERIE C. BRANNON & ERIC N. HOLMES, CONG. RSCH. SERV., R46751, SECTION 230: AN OVERVIEW 6–7 (2024) (first citing 141 CONG. REC. H8469 (daily ed. Aug. 4, 1995) (statement of Rep. Christopher Cox); and then citing *Stratton Oakmont*, 1995 WL 323710, at *2–3).

35. See *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 331 (4th Cir. 1997) (“§ 230 responded to a New York state court decision, *Stratton Oakmont, Inc. v. Prodigy Servs. Co.* . . . Congress enacted § 230 to remove the disincentives to self regulation [sic] created by the *Stratton Oakmont* decision . . . Fearing that the specter of liability would therefore deter service providers from blocking and screening offensive material, Congress enacted § 230’s broad immunity ‘to remove disincentives for the development and utilization of blocking and filtering technologies . . .’” (quoting 47 U.S.C. § 230(b)(4))).

36. See *Blumenthal v. Drudge*, 992 F. Supp 44, 50–51 (D.D.C. 1998) (holding that Section 230 immunized AOL from defamation liability for the allegations contained in “The Drudge Report,” despite AOL having licensed the newsletter).

37. *Id.* at 49.

III.

SECTION 230: REPEAL OR REFORM?

A. *The Modern Problems with Section 230*

Over decades of interpreting and applying Section 230, courts have expanded this statutory safe harbor to grant ISPs, a category which now includes social media platforms, immunity for any cause of action relating generally to their content-moderation activities.³⁸ Courts have broadly utilized Section 230 for its original purpose, which was to enable Internet providers to enact content-moderation policies without facing defamation suits as a publisher. However, Section 230 has also been used to bar liability in cases where the ISP had actual knowledge of defamatory content;³⁹ where it ratified and endorsed defamatory posts;⁴⁰ and where it had knowledge of user activity that constituted crimes other than defamation but allowed the user continued access to the platform.⁴¹ A cursory overview of litigation that invoked Section 230 over the last few decades clearly shows that the doctrine has evolved past its black letter law. Now, it essentially operates as a “get out of jail free” card for any activity that an ISP can classify as content moderation. So long as the ISPs themselves did not say the defamatory statement at issue, Section 230 is likely to shield them from liability in an American court.⁴² Several proposed judicial limitations to the doctrine, such as restricting its invocation to actual Good Samaritan acts (thus eliminating immunity for demonstrably bad faith acts)⁴³ and limiting its scope to claims arising only out of user-generated content have had

38. BRANNON & HOLMES, *supra* note 34, at 1.

39. *See Zeran*, 129 F.3d at 332–33 (interpreting Section 230 as foreclosing distributor liability as well as publisher liability, thus avoiding liability for actual knowledge of defamatory post). The court’s holding in *Zeran* expanded the scope of Section 230 beyond the plain text of the statute, which only specifies treating ISPs as a “publisher or speaker” and makes no mention of distributor liability. 47 U.S.C. § 230(c)(1).

40. *Jones v. Dirty World Ent. Recordings, LLC*, 755 F.3d 398, 415 (6th Cir. 2014) (setting the test for liability as the “material contribution measure of ‘development’” and rejecting an alternate adaption or ratification theory of liability).

41. *Herrick v. Grindr LLC*, No. 17-CV-932, 2017 WL 744605, at *1, *3–4 (S.D.N.Y. Feb. 24, 2017) (discussing plaintiff’s allegation that the online dating platform Grindr had knowledge of and did not address a user’s impersonation of another in order to share their personal identifying information with the goal of inducing sexual assault).

42. *See Citron & Wittes*, *supra* note 32, at 413–14 (providing examples of immunity created from a broad interpretation of Section 230).

43. This judicial limitation is based on an interpretation of 47 U.S.C. § 230(c), which titles its provisions as “[p]rotection for ‘Good Samaritan’ blocking and screening of offensive material.”

mixed success in courts.⁴⁴ These proposals have not, however, been adapted widely enough to limit the scope of the immunity shield nationwide.⁴⁵ Today, invoking Section 230 immunity allows an ISP to escape liability for behavior that a print newspaper could not.⁴⁶ Courts took Section 230's safe harbor, meant to enable online platforms' existence without fact-checking every user-generated post, and expanded its protections to create an overinclusive doctrine of broad immunity for ISPs.⁴⁷

Much of the doctrine that governs today evolved in response to specific concerns about the Internet in its infancy.⁴⁸ As the Internet has matured and grown beyond early concerns about longevity and profitability, legislators and judges' initial understanding of the incentives and logistics governing the Internet and social media platforms have not kept up with the times.⁴⁹ A recent example that received (somewhat unfair) media attention was questioning at oral

44. See Citron & Wittes, *supra* note 32, at 415–18 (contrasting the Ninth Circuit approach, which limits safe harbor to user-generated content, with recent decisions granting websites broad immunity from claims arising from such content).

45. See *id.* at 416 (“Sites like The Dirty and Backpage have successfully argued that § 230(c)(1) provides them with blanket immunity related to user-generated content.” (footnotes omitted)).

46. See *id.* at 412 (“[Section] 230 immunity has been invoked by giant companies engaged in enterprises that have little to do with free expression. . . . If those companies operated in physical space, they could not escape liability for failing to meet reasonable duties of care.”).

47. See *id.* at 406–12 (describing the expansion of Section 230 over the last 20 years, ultimately giving companies immunity that was not originally envisioned to be within the scope of Section 230 immunity).

48. See *id.* at 411–13. These concerns are generally acknowledged as threefold. First, Section 230 had the explicit goal of allowing Internet companies to enact good faith content-moderation policies, with the trade-off of government taking a step back. Second, in order to protect nascent internet companies from crippling defamation liability, an over-broad liability shield was crafted in order to provide the room needed for growth. Third and finally, Section 230 in its current form protects platforms from contending with a heckler's veto and allows for the dismissal of frivolous suits at the outset without much financial investment in order to do so.

49. See Tim Wu, *Is the First Amendment Obsolete?*, 117 MICH. L. REV. 547, 547 (2018) (arguing that “core assumptions that proceeded from the founding era of First Amendment jurisprudence . . . no longer hold” because of modern freedom of speech issues around attention scarcity and proposing several new options to protect channels of speech); Citron & Wittes, *supra* note 32, at 410, 419 (noting that “the courts are in near-unanimous agreement that [Section 230] conveys protection from liability far in excess of what we think constitutes reasonable public policy” and proposing legislative reform that would impose liability on platforms where their response to unlawful uses of their services is unreasonable); BRANNON & HOLMES, *supra* note 34, at 33 (summarizing proposed legislative reform to Section 230 and noting that bills either “encourage[e] sites to take down more harmful content, [or] encourage[e] sites to take down less lawful content”).

arguments by Justice Alito in the *NetChoice* cases.⁵⁰ While debating the appropriate analogy in caselaw for giant platforms such as YouTube, Justice Alito asked (to audience laughter), “[L]et’s say YouTube were a newspaper, how much would it weigh?”⁵¹ The question, while fair in its purpose of attempting to locate an appropriate analogue for the platform, still demonstrates a fundamental misunderstanding of the scope and capabilities of social media companies.⁵² The attempt to cabin Internet platforms into existing categories within defamation law instead of treating the industry as a new and unique area remains part of the fundamental problem that we face in attempting to regulate Internet platform liability. The fact remains that while YouTube and newspapers have several similarities in function and utility, the two forms are more dissimilar than similar.⁵³ The very function of YouTube is to host user-generated content that other users then interact with at a speed that would run dry every printing press worldwide.⁵⁴ The fundamentals behind each medium—that

50. See *Moody v. NetChoice, LLC*, 603 U.S. 707 (2024) (analyzing whether content-moderation laws in Florida and Texas were facially invalid under the First Amendment).

51. Transcript of Oral Argument at 29, *NetChoice, LLC v. Paxton*, 603 U.S. 707 (2024) (No. 22-555) (companion case to *Moody*).

52. The question Justice Alito asked was related to the larger debate over whether algorithmic content promotion was in any way comparable to the editorial practices of newspapers. Previously, dissenting in *Murthy v. Missouri*, Justice Alito said that social media sites are akin to newspapers and “purely private entities like newspapers are not subject to the First Amendment, and as a result, they may publish or decline to publish whatever they wish.” See *Murthy v. Missouri*, 603 U.S. 43, 78 (2024) (Alito, J., dissenting). He changed course later that term in the *NetChoice* decision, saying of the majority’s assertion that platforms are analogous to newspapers, “[m]aybe that is right—but maybe it is not.” *NetChoice*, 603 U.S. at 794 (Alito, J., concurring in the judgment). The debate centers over the mechanics of how algorithmic content promotion works and if a proper analogue is newspaper editorial decisions over which content to publish and not publish; in these two cases in the 2024 term, Justice Alito appears to endorse both sides of the debate.

53. See Philip Bump, *Here’s How Much a YouTube Newspaper Would Weigh*, *Justice Alito*, WASH. POST (Feb. 27, 2024, at 11:44 ET), <https://www.washingtonpost.com/politics/2024/02/27/heres-how-much-youtube-newspaper-would-weigh-justice-alito/> [<https://perma.cc/87ZR-K3LL>] (discussing the fundamental differences between YouTube and newspapers).

54. Over 720,000 hours of content are uploaded to YouTube daily. Maitrayee Dey, *How Many Videos Are on YouTube? Statistics and Facts, by Country, Demographics, Trends* (2025), ELECTROIQ (Oct. 20, 2025), <https://electroiq.com/stats/how-many-videos-are-on-youtube/> [<https://perma.cc/ZV4H-JAZX>]. By 2025, YouTube had 4.3 billion videos hosted on the platform. *Id.* As of 2024, 85% of U.S. adults say they have used YouTube, making it the most popular online platform in the United States. Claire Dannenbaum, *5 Facts About Americans and YouTube*, PEW RSCH. CTR. (Feb. 28, 2025), <https://www.pewresearch.org/>

newspapers and YouTube are each fighting to keep the attention of the reader or viewer as much as they can—is a significant through-line.⁵⁵ However, that is not a compelling reason to conceptualize the two as functioning as analogues when we consider legal issues in a defamation claim such as contribution, control, and dissemination.

An unfamiliarity with the Internet and various ISPs is not a problem unique to the judicial branch; recent legislative hearings, ostensibly to question Facebook CEO Mark Zuckerberg about user privacy on his social media platform, Meta (formerly Facebook), were derailed by members of Congress who lacked basic knowledge about how the platform functioned.⁵⁶ So long as our lead policymakers struggle to grasp the incentives inherent to and current abuses of the Internet and social media platforms, the status quo—the judicial expansion of Section 230—remains the law of the land. Without viable reform or an alternate path, we may well end up with the Trump administration’s (and Sunset Section 230’s) preferred path forward: wholesale repeal of Section 230.

B. Project 2025’s Articulated Policy Reforms for Section 230

There are many vocal proponents who have identified the problems with Section 230 and advocated for legislative reform. Among them are the Heritage Foundation, who dedicated part of their Project 2025 policy platform to proposing legislative reforms to Section 230. The author of this particular section, Brendan Carr, has since been designated as Chairperson of the Federal Communications Commission (FCC) for the Trump Administration.⁵⁷ Project 2025 articulates its policy goals for Section 230 reform within the context

short-reads/2025/02/28/5-facts-about-americans-and-youtube/ [https://perma.cc/EC3E-62EB].

55. See generally Wu, *supra* note 23 (detailing history of competition between attention-merchant firms).

56. See Emily Stewart, *Lawmakers Seem Confused About What Facebook Does — and How to Fix It*, Vox (Apr. 10, 2018, 19:50 ET), <https://www.vox.com/policy-and-politics/2018/4/10/17222062/mark-zuckerberg-testimony-graham-facebook-regulations> [https://perma.cc/BF94-XF7E] (discussing lawmakers’ confusion at a joint hearing about Facebook’s social media privacy and data use). Questions asked included, “How do you sustain a business model in which users don’t pay for your service?” (Senator Orrin Hatch), and whether Facebook could see emails sent on WhatsApp, also owned by Facebook (Senator Brian Schatz). *Id.* Facebook famously generates revenue off advertisements, and users on WhatsApp send encrypted texts, not emails. *Id.*

57. FED. COMM’NS COMM’N, *supra* note 9.

of promoting free speech and reining in big tech companies.⁵⁸ In particular, Project 2025 seems to take umbrage at the anticompetitive effects of having limited meaningful competitors that would offer consumers different speech markets.⁵⁹ Carr outlines two areas of reform to Section 230 that he argues would help create a “digital town square” that hosts all political viewpoints.⁶⁰ However, he includes a caveat that these reforms come from his perspective on the best path forward, not from broad consensus within the conservative movement.⁶¹ Indeed, the underlying logic of Section 230—that content-moderation decisions should be left to Internet platforms under the First Amendment—remains influential even among some contributors to Project 2025, and Carr’s proposals about a path forward are his own.⁶²

Carr’s first reform proposal advocates that the FCC should clarify the scope of Section 230’s protection. Specifically, for Section 230(c)(1), which prohibits treating platforms as publishers,⁶³ Carr proposes that the FCC provide guidance that this provision “does not apply broadly to every decision that a platform makes . . . [but] only when a platform does not remove information provided by someone else.”⁶⁴ Additionally, Carr thinks the FCC should clarify the scope of Section 230(c)(2) protections, the content-moderation shield, and those protections should only “apply to any covered platform’s decision to restrict access to material provided by someone

58. See Carr, *supra* note 8, at 847 (“The FCC has an important role to play in addressing . . . Big Tech and its attempts to drive diverse political viewpoints from the digital town square.”).

59. See *id.* (“These corporate behemoths are not merely exercising market power; they are abusing dominant positions. They are not simply prevailing in the free market; they are taking advantage of a landscape that has been skewed—in many cases by the government—to favor their business models over those of their competitors.”).

60. *Id.* at 847–49.

61. *Id.* at 850.

62. See *id.* at 850 (“There are some, including contributors to this chapter, who do not think that the FCC or Congress should act in a way that regulates the content-moderation decisions of private platforms. One of the main arguments that this group offers is that doing so would intrude—unlawfully in their view—on the First Amendment rights of corporations to exclude content from their private platforms.”); see also Note, *Section 230 as First Amendment Rule*, 131 HARV. L. R. 2027, 2027 (2018) (warning that without the protection of Section 230, websites would censor constitutionally protected speech to protect against potential defamation suits).

63. 47 U.S.C. § 230(c)(1) (“No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.”).

64. Carr, *supra* note 8, at 848.

else.”⁶⁵ Despite a recent shift in Supreme Court doctrine concerning deference given to administrative statutory interpretation,⁶⁶ Project 2025’s proposal that the FCC promulgate such an interpretation of Section 230 may be successful, as some Justices seem to be looking for a reason to chart a course away from the current interpretation of Section 230.⁶⁷ If this interpretation is accepted as legitimate by the courts, there are two immediate implications.

The most impactful result of this proposal would be the re-introduction of, at minimum, distributor liability for specific content-moderation activity by ISPs. This is not a new proposal; early cases dealing with Section 230 considered but ultimately rejected distributor liability.⁶⁸ Effectively, this would create an actual knowledge standard: “[D]istributors [are] . . . liable only when they knew (or constructively knew) that content was illegal.”⁶⁹ As platforms would now face liability if they had knowledge that the statement they were hosting was defamatory, ISPs’ decisions to either remove or keep up user-generated content would be consequential. This reform would address some of the more egregious cases within the doctrine, discussed earlier,⁷⁰ and bring online platform liability more in line with the liability incurred by corporations who operate in physical space.⁷¹ However, courts have previously resisted imposing distributor liability on platforms due to concerns over a heckler’s veto, that it would incentivize platforms to act overzealously and automatically take down all content reported as defamatory rather than risk defending their editorial decisions in court.⁷² Carr’s proposal in Project 2025

65. *Id.*

66. *See* Loper Bright Enters. v. Raimondo, 603 U.S. 369, 412–13 (2024) (striking down the decades-old “*Chevron* deference” standard and holding instead that “[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority,” even where the statute is ambiguous).

67. *See, e.g.,* Malwarebytes, Inc. v. Enigma Software Grp. USA, 141 S. Ct. 13, 17 (2020) (Thomas, J., statement respecting the denial of certiorari) (“[B]y construing § 230(c)(1) to protect *any* decision to edit or remove content, courts have curtailed the limits Congress placed on decisions to remove content.” (citations omitted) (first citing *Barnes v. Yahoo!, Inc.*, 570 F.3d 1096, 1105 (9th Cir. 2009); and then citing *e-ventures Worldwide, LLC v. Google, Inc.*, No. 14-cv-646-FtM-PAM-CM, 2017 WL 2210029, at *3 (M.D. Fla. Feb. 8, 2017))).

68. *See* *Zeran v. Am. Online, Inc.*, 129 F.3d 327, 332 (4th Cir. 1997) (finding that distributor liability is a subset of publisher liability and therefore foreclosed by Section 230).

69. *Malwarebytes, Inc.*, 141 S. Ct. at 14 (Thomas, J., statement respecting the denial of certiorari).

70. *See supra* Section I.B.

71. *See* Citron & Wittes, *supra* note 32, at 412.

72. *See Zeran*, 129 F.3d at 333 (“Because service providers would be subject to liability only for the publication of information, and not for its removal, they would

operates in the inverse (platforms face liability for taking down content), with the end result of inhibiting platforms from taking action against users who violate their terms of service and content-moderation policies.

The other proposed interpretation to Section 230(c)(2) would introduce a new continuum along which to determine liability. Instead of all content-moderation decisions falling under the immunity doctrine, only those decisions to leave up user-generated content would be protected; platforms would now face liability for deciding to restrict or take down user-generated content.⁷³ This is an odd line-drawing exercise that is most likely in response to the conservative complaint that social media companies are “censoring” conservative leaders and posts when removing content that violates user guidelines.⁷⁴ However, this reform would effectively destroy content moderation in its current form. As discussed in more detail in Section III, if platforms cannot enforce their user guidelines or create personalized, algorithm-driven platforms (which necessarily requires restricting some material to promote others), then social media platforms will struggle to protect the user experience and maintain and profitable product.

Carr’s second proposal outlined in Project 2025 is legislative reform to Section 230.⁷⁵ Carr identifies legislation similar to the content-moderation law at issue in the *NetChoice* cases, as well as legislation supporting “user control” of platforms, as the ideal path forward.⁷⁶ In *NetChoice*, states had passed laws that “restrict[ed] the ability of social media platforms to control whether and how third-party posts are presented to other users” and forbade ISPs from making content-moderation decisions based on the viewpoint of the content.⁷⁷ As evidenced by the Supreme Court’s ultimate rejection of these laws, there are difficulties in implementing both of these

have a natural incentive simply to remove messages upon notification, whether the contents were defamatory or not.”).

73. Carr, *supra* note 8, at 848.

74. See Press Release, U.S. House Comm. on Oversight & Government Reform, The Cover Up: Big Tech, the Swamp, and Mainstream Media Coordinated to Censor Americans’ Free Speech (Feb. 8, 2023), <https://oversight.house.gov/release/the-cover-up-big-tech-the-swamp-and-mainstream-media-coordinated-to-censor-americans-free-speech-%EF%BF%BC/> [https://perma.cc/77GP-R8BE] (quoting conservative members of Congress speaking about censorship of conservative news outlets during a committee hearing).

75. Carr, *supra* note 8, at 849.

76. See *id.* at 849 (defining user control as the ability to “empower consumers to choose their own content filters and fact checkers, if any”).

77. *Moody v. NetChoice, LLC*, 603 U.S. 707, 717, 721 (2024).

proposals. Setting aside the general state of gridlock in which Congress has operated for the last decade and the resulting difficulty in passing legislation,⁷⁸ a challenge that the Sunset Section 230 Act will also have to overcome, Carr's reforms are also likely to face serious opposition from Internet platforms. Additionally, as the Supreme Court affirmed in *NetChoice*, any regulation in this space would need to be compliant with First Amendment protections as "social-media platforms create expressive products," through their "choices about what third-party speech to display and how to display it."⁷⁹ Even without Section 230, there remains some as-of-yet unquantified level of First Amendment protection in social media itself as an expressive platform against both state law and individual lawsuits.⁸⁰ Social media companies have already shown they are willing to invest in a litigation strategy in order to assert their rights and block draconian content-moderation laws, such as the ones passed in Texas and Florida.⁸¹ Further, supporting "user control" of platforms, while an interesting idea in the abstract, would require serious investment by platforms into user opt-in options, features that platforms have historically opposed due to the cost of implementation.⁸²

78. See Moira Warburton, *Why Congress is Becoming Less Productive*, REUTERS (Mar. 12, 2024), <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/> <https://www.reuters.com/graphics/USA-CONGRESS/PRODUCTIVITY/egpbabmkwvq/> [<https://perma.cc/8U53-3Z66>] (noting the record low number of bills passed in 2023, the decrease in bipartisan ship, and the lengthening of mandatory bills with partisan policies).

79. *NetChoice*, 603 U.S. at 716.

80. See Note, *supra* note 58, at 2035–41 (describing how the Supreme Court has recognized First Amendment protection of social media, struck down laws restricting access to social media, and limited liability in defamation suits); see also *NetChoice*, 603 U.S. at 716 ("[S]ome platforms, in at least some functions, are indeed engaged in expression.").

81. See *NetChoice*, 603 U.S. at 720–21. The *NetChoice* Court noted that both Florida's and Texas's laws "contain content-moderation provisions, restricting covered platforms' choices about whether and how to display user-generated content to the public. And both include individualized-explanation provisions, requiring platforms to give reasons for particular content-moderation choices." *Id.* at 720. Texas's law specifically "prevents platforms from 'censor[ing]' a user or a user's expression based on viewpoint . . . cover[ing] any action to 'block, ban, remove, deplatform, demonetize, de-boost, restrict, deny equal access or visibility to, or otherwise discriminate against expression.' The statute also requires that 'concurrently with the removal' of user content, the platform shall 'notify the user' and 'explain the reason the content was removed.'" *Id.* at 721 (first alteration in original) (citations omitted).

82. See CHRIS JAY HOOFNAGLE, FEDERAL TRADE COMMISSION PRIVACY LAW AND POLICY 181–85 (2016) ("In opt-in, the consumer must take some affirmative action to accept a collection or use of data. This places the burden on the business to get

As discussed above, implementing Carr's proposed reforms to Section 230 or the Sunset Section 230 Act are both paths that face their own roadblocks. However, it is clear that the Trump administration intends on attempting Section 230 repeal, one way or another. Although Project 2025 advocates for reforming Section 230, its proposed changes would function less as a reform and more as a repeal, as companies would be forced to decide between drastically altering or even ending content moderation activities, or facing an unknown quantity of defamation lawsuits merely for hosting user-generated content.

In response to these calls for repeal, ISPs are left with no viable internal changes that could avoid this expanded liability while still preserving their product, social media platforms. ISPs cannot simply eliminate their content-moderation policies and expect to still be profitable; it would be near impossible for social media companies to maintain their current business model (namely, the sale of personal data and advertising) without engaging in some form of meaningful content moderation.⁸³ Social media companies are invested in regulating and removing certain kinds of speech—hate speech, incitements to violence, and pornographic content, to name a few—that harm the user experience and make their product less engaging and enjoyable.⁸⁴ This theory of profitability was confirmed when brands suspended their advertising on X (formerly Twitter) when their advertisements appeared alongside pro-Nazi content.⁸⁵

permission. In opt-out, the consumer must take action to object to data collection or use, thus placing the burden on the consumer to act.” (footnote omitted)).

83. See Trevor Wagener, *New Research: Hate Speech Hurts Social Media Sites, Brands, and the Digital Economy*, DISRUPTIVE COMPETITION PROJECT (Sep. 5, 2023), <https://project-disco.org/competition/new-research-hate-speech-hurts-social-media-sites-brands-and-the-digital-economy/> [<https://perma.cc/U3NF-HKAN>] (“[R]esearch results suggest that must-carry policies could impose significant economic costs on social media services, their advertisers, and the two-sided markets that underpin much of the digital economy.”).

84. Facebook itself has acknowledged that “[b]illions of people use Facebook and Instagram because they have good experiences – they don’t want to see hateful content, our advertisers don’t want to see it, and we don’t want to see it. There is no incentive for us to do anything but remove it.” Nick Clegg, *Facebook Does Not Benefit from Hate*, META (July 1, 2020), <https://about.fb.com/news/2020/07/facebook-does-not-benefit-from-hate/> [<https://perma.cc/Y2EP-238B>]. See also Simon van Zuylen-Wood, “Men Are Scum”: Inside Facebook’s War on Hate Speech, VANITY FAIR (Feb. 26, 2019), <https://www.vanityfair.com/news/2019/02/men-are-scum-inside-facebook-war-on-hate-speech> [<https://perma.cc/56VG-9NDD>] (discussing how the Facebook News feed attempts to maximize user’s engagement and that showing users content like hate speech actually alienates users).

85. Clare Duffy & Brian Fung, *Two Brands Suspend Advertising on X After Their Ads Appeared Next to Pro-Nazi Content*, CNN (Aug. 17, 2023, at 13:52 ET), <https://www.>

Separately, but just as impactful, Carr's proposal of having the FCC define Section 230's scope is particularly egregious from the point of view of social media companies, as the definition could change with every presidential election, leaving companies unable to promulgate stable rules around content moderation. Finally, changing the scope of Section 230's protection would have procedural as well as substantive effects, as it would extend the life of most lawsuits previously barred by Section 230 if social media companies can no longer move for dismissal immediately based on Section 230 immunity.⁸⁶ The effects of this procedural change would be disastrous, as it could result in social media companies still avoiding a finding of liability but having to invest exponentially more money to argue their case in court, as opposed to a dismissal at the first stage of litigation, to get the same result.

Separately, social media companies are global companies, and so far have managed a delicate balancing act to ensure that they are in compliance with local laws in all the regions they operate in.⁸⁷ However, the repeal of Section 230 immunity may place platforms between a rock and a hard place. In order to avoid defamation liability without Section 230, they cannot engage in meaningful content moderation such that they are considered publishers of user-generated content. Yet engaging in some form of content moderation is exactly what platforms are obligated to do in order to remain in compliance with the Digital Services Act ("DSA"). Adopted by the European Union in 2022, the DSA established legally binding obligations on platforms to safeguard the rights of their users, including in content moderation.⁸⁸ Thus, in order to maintain a global platform, companies will be forced to be non-compliant in at least one major region of the world. The only other alternative available in this scenario is to fracture the platform and fence users in geographically to provide

[cnn.com/2023/08/16/tech/x-ads-pro-nazi-account-brand-safety](https://www.cnn.com/2023/08/16/tech/x-ads-pro-nazi-account-brand-safety) [https://perma.cc/9AQE-ECH6].

86. *Fair Hous. Council of San Fernando Valley v. Roommates.com, LLC*, 521 F.3d 1157, 1162 (9th Cir. 2008) (conducting Section 230 immunity analysis at the motion to dismiss stage).

87. *See* ANU BRADFORD, *DIGITAL EMPIRES: THE GLOBAL BATTLE TO REGULATE TECHNOLOGY* 14–15 (2023) (“[Tech] companies often face conflicting demands from different governments, making it impossible for them to comply with all of those demands at the same time.”).

88. *See id.* at 116–18 (explaining that the Digital Services Act “lays out various due diligence obligations as well as procedural safeguards that platforms must abide by when moderating online content.”); Commission Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act), 2022 O.J. (L 277), art. 35.

an online environment tailored to their regional laws. If social media companies give in to one region, they will lose all leverage of having a global product. Consequently, companies will have no choice but to comply with every country's speech-specific regulations, resulting in multiple country-specific versions of social media platforms and removing the ability of people worldwide to communicate based on national borders. Social media platforms have thus far avoided this fate with one glaring exception: China.⁸⁹ If the United States and China, two of the biggest markets, are both fenced off from the rest of the world's social media connectivity, then the United States will, ironically, bring an end to our own decades-long project of advocating for a free, unfettered Internet as a tool to promote and entrench democracy worldwide.⁹⁰

IV.

CONTENT MODERATION: WHAT IS IT, HOW DOES IT DIFFER AMONG PLATFORMS, AND WHY IS IT REQUIRED FOR SOCIAL MEDIA COMPANIES TO BE PROFITABLE?

When Congress passed Section 230, and in applying the statute to cases, both the courts and the legislative branch have painted all ISPs with the same brush. However, in the Internet age, ISPs vary widely in form, function, and usage.⁹¹ Even among social media

89. BRADFORD, *supra* note 87, at 14, 77 (discussing how different companies, including Google, had made China-specific versions of their products).

90. *See id.* at 265–76 (discussing how the United States had designed its “internet freedom agenda” to “promote democracy, freedom, and other Western values as part of a larger US foreign policy agenda in the post-Cold War era”).

91. At the very basic level, different social media companies host different forms of media. YouTube and TikTok host video content primarily; Facebook, Instagram, Reddit and TikTok allow users to post text, photos, and videos. Examining another function of social media platforms, all platforms allow for other users to interact with the content they host, although platforms differ in the access a regular user would have to another's content (Facebook and Instagram allow for a user to control who interacts with their content; YouTube and TikTok do not have any sort of privacy filters; and Reddit sorts user-posted content by the broader forum users post in as opposed to a user congregating their content on ‘their’ profile or page). *See* Frida Ekholm, *How the Different Social Platforms Work*, CureMedia, <https://www.cure-media.com/how-the-different-social-platforms-work/> [<https://perma.cc/3ZHB-2VDY>]. The different functionalities of these platforms enable different forms and types of content to thrive on certain platforms over others. *See generally* Shelley Boulianne, Christian P. Hoffmann, & Michael Bossetta, *Social Media Platforms for Politics: A Comparison of Facebook, Instagram, Twitter, YouTube, Reddit, Snapchat, and WhatsApp*, 27 NEW MEDIA & SOC’Y 6006 (2024) (finding that across countries, there is continuity in which platforms users prefer to engage with and post political content on based on their political ideologies).

companies, which serve similar functions and operate with similar form, each platform has small but impactful differences in how they disseminate and enforce content-moderation policies.⁹² In considering the pros and cons of proposals for reforming Section 230, it is vital that policymakers have an understanding of how each of the major U.S. social media platforms enforce their content-moderation policies, create a product that is engaging to users, and identify what activities they engage in would constitute editorial control without Section 230's immunity shield. Especially as Project 2025 advocates carving out exceptions to Section 230 that would, in certain circumstances, treat social media platforms as publishers or incur liability specifically because of their content-moderation choices, it's vital to situate those reforms within the context of their broader impact. To give a small snapshot of the variety of models and the importance of content moderation, I will examine Meta, X (formerly known as Twitter), and Reddit, both to examine what mechanisms they utilize for content moderation and to illustrate how the platform uses it to create a more attractive product.

A. *Meta*

1. Content Moderation

Meta, the social media company comprising Facebook and Instagram, among others, has adopted comprehensive content-moderation policies as the company has grown and expanded.⁹³ In an attempt to tackle instances of hate speech, misinformation,

92. In a recent decision in an antitrust suit brought by the FTC, the District Court for the District of Columbia held that apps such as TikTok and YouTube are similar enough to Facebook to be considered direct market competitors. *FTC v. Meta Platforms, Inc.*, No. 20-3590, 2025 WL 3458822, at *1, *36–40 (D.D.C. Dec. 2, 2025) (“Because Facebook, Instagram, Snapchat, TikTok, and YouTube are all free, people often use all five apps, which pulls each one’s market share toward an uninformative tie. . . . The Court ultimately finds that YouTube and TikTok belong in the product market[.]”). However, testimony credited by the court from the companies themselves reveals an understanding of the different social media platforms as each offering a different user experience that varies in desirability to individual users. *Id.* at *37 (“Their executives’ testimony and ordinary-course documents reveal that they understand themselves to be competing for users’ time, not competing to get people to use their app at all.”). Underlying this assumption is the fact that some platforms explicitly serve a certain purpose (i.e. LinkedIn for professional networking, YouTube for hosting video content), while others are for general social and entertainment purposes.

93. See van Zuylen-Wood, *supra* note 84 (reviewing the development of Facebook’s Community Standards from a one-person operation to a 40-page comprehensive set of rules).

incitement of violence, and more issues that make the platform less attractive to both users and advertisers, Facebook has adopted a robust content-moderation policy, entitled Community Standards, which is enforced by a combination of algorithmic monitoring and human moderators.⁹⁴ If a post is taken down for violating the Community Standards, either by algorithm or by human moderator, users have the option of appealing the decision to the Meta Oversight Board, a quasi-independent, judicial-style decision-making body that can make binding decisions about content moderation (but with no specified enforcement mechanism).⁹⁵ On these grounds alone, without Section 230 in its current form, Facebook would likely face publisher liability for any defamatory content that is evaluated under the Community Standards.⁹⁶ To add on another layer, it is likely that without Section 230, Meta could face liability for defamatory content that the original user would escape, either because the user is posting anonymously⁹⁷ or because they are outside the bounds of the United States and thus not available to be haled into court under the doctrine of personal jurisdiction.⁹⁸ Ironically, without Section 230, Meta would have less incentive to protect its user privacy. While some suits would likely go after Meta for its deeper pockets, the platform may be able to avoid liability if the original speaker is identifiable and a plaintiff is able to sue them directly for damages.

If reforms to Section 230 remove Meta's immunity, it is undeniable that the incentives created by defamation liability would cause Meta to over-enforce its Community Standards, as well as aggressively prioritize the takedown of potentially defamatory posts. Failure to

94. Kate Klonick, *The New Governors: The People, Rules, and Processes Governing Online Speech*, 131 HARV. L. REV. 1598, 1635–47 (2018).

95. Evelyn Douek, *The Meta Oversight Board and the Empty Promise of Legitimacy*, 37 HARV. J.L. & TECH. 373, 383 (2024) (“Meta is not bound by any policy guidance the Board gives, nor is Meta bound to follow the Board’s advice in the cases it refers to the Board requesting a general policy advisory statement.”).

96. See, e.g., *Smith v. Ca.*, 361 U.S. at 152–54 (discussing the differing standards for liability against re-publishers of unprotected speech); *Gertz v. Welch*, 418 U.S. at 347 (holding that states can authorize defamation suits by private individuals against newspaper and radio organizations without requiring proof of actual malice).

97. See Taylor McCallman, Comment, *The Shadow in the Comments Section: Revealing Anonymous Online Users in the Social Media Age*, 41 CAMPBELL L. REV. 225, 227 (2019) (“The victims of anonymous defamation must jump through various legal hurdles to ascertain the identity of their abuser once they file a lawsuit.”).

98. See *International Shoe Co. v. Washington*, 326 U.S. 310 (1945) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1878)) (“Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant’s person. Hence his presence within the territorial jurisdiction of court was prerequisite to its rendition of a judgment personally binding him.”).

promptly take down a post once on notice that it may be defamatory (or worse, making the wrong call and allowing the post to remain up) could result in a court finding that Meta is liable under defamation law for significant financial amounts.⁹⁹ Ironically, although Carr and Project 2025 are advocating for greater freedom of speech with a reform of Section 230, cracking the immunity shield could lead platforms to react with a much more vigorous crackdown on all potentially defamatory posts in order to avoid any risk of liability. Platforms will either over-enforce to actively limit their risk of liability or eliminate their content-moderation policies wholesale. As discussed previously, not only would eliminating content-moderation policies risk making social media as a product unattractive to its users, it would restrict the control social media companies have over the content presented to users—control companies rely on in order to profit off advertising.¹⁰⁰

2. Algorithmic Promotion of Content

It is beyond the scope of this Note in both technology expertise and in depth of analysis to give a comprehensive overview of Meta's other main form of content moderation, its Feed (formerly 'News Feed').¹⁰¹ For this Note's purposes, the main method of user engagement analyzed will be the Facebook Feed. Crafted by an algorithm, users are presented with posts from users' "friends" and content that others have engaged in based on "predict[ions of] what [users are]

99. A comprehensive overview of defamation damages over 45 years of trials found that the small number of "internet awards . . . have tended to run higher than other recent awards in trials involving print or audio-visual media." MEDIA L. RES. CTR., MLRC 2025 REPORT ON TRIALS AND DAMAGES 2 (2025), <https://medialaw.org/wp-content/uploads/2025/03/2025-Bulletin-Issue-1-Trials-Damages.pdf> [<https://perma.cc/8KP7-C9EP>]. The report also notes the tendency of "risk-averse corporate defendants" to settle defamation cases "to avoid the uncertainty of jury awards, and in particular, avoid huge punitive damages awards." *Id.* at 5 (referencing companies' fear of an "existential threat of a company-killing massive award."). This fear is bolstered by the fact that, historically, plaintiffs prevail at trial more often than defendants, and "[m]edian [j]ury [a]wards [h]ave [i]ncreased [f]ive-[f]old [s]ince the 1980s." *Id.* at 7–9.

100. See Pinar Yildirim & Z. John Zhang, *How Social Media Firms Moderate Their Content*, KNOWLEDGE AT WHARTON (Jan. 24, 2022), <https://knowledge.wharton.upenn.edu/article/social-media-firms-moderate-content/> [<https://perma.cc/CM78-7QS7>] (explaining that "[s]ocial media platforms running on advertising revenue are more likely to conduct content moderation").

101. Mitchell Clark, *Facebook Rebrands News Feed After More than 15 Years*, VERGE (Feb. 15, 2022, at 18:27 UTC), <https://www.theverge.com/2022/2/15/22935080/facebook-meta-news-feed-renaming-branding-political-content-misinformation> [<https://perma.cc/85T6-ZTA4>].

most likely to be interested in or engage with.”¹⁰² Meta is protective of the algorithms that power the Feed and its internal decisions about which posts to push to users and which to de-prioritize, but it is open about the fact that it has invested in and utilizes an algorithm.¹⁰³

Without Section 230’s immunity shield, Meta could face liability separately for any post on a Feed even if they were not reviewed under Meta’s Community Guidelines policies.¹⁰⁴ The algorithm currently operates on a complex set of factors that ultimately decide which posts to put on a user’s feed and in what order to do so. If Meta could legally be classified as a publisher, this deliberate prioritization of some content at the expense of others looks very much like conscious editorializing, which *Stratton Oakmont* held was sufficient to find liability.¹⁰⁵ The odds that Meta could escape publisher liability because the actual editorial choices were delegated to an algorithm they trained and coded instead of a human moderator are very low.¹⁰⁶ This is a larger bucket of liability that would render Meta liable even in the absence of any Community Standards at all.¹⁰⁷ However, the algorithm governing the Feed is one of the most essential tools to Facebook’s continued success, and to some extent Instagram as well, as it incorporated posts outside of users’ friend

102. Akos Lada, Meihong Wang, & Tak Yan, *How Does News Feed Predict What You Want to See?*, META (Jan. 26, 2021), <https://about.fb.com/news/2021/01/how-does-news-feed-predict-what-you-want-to-see/> [<https://perma.cc/MW4J-ZFH4>].

103. See Will Oremus et al., *How Facebook Shapes Your Feed*, WASH. POST (Oct. 26, 2021, at 07:00 ET), <https://www.washingtonpost.com/technology/interactive/2021/how-facebook-algorithm-works/> [<https://perma.cc/CZM4-KPA9>].

104. Meta could face more than just expanded defamation liability for the operation of the Feed if Section 230 is repealed. It is feasible that users will have expanded theories of liability available to them under tort law, specifically in products liability, privacy, and intentional infliction of emotional distress, to name a few. See, e.g., *Doe v. Grindr Inc.*, 128 F.4th 1148, 1151 (9th Cir.) (affirming a holding that Section 230 barred Doe’s product liability claims because the claims “necessarily implicate Grindr’s role as a publisher of third-party content”).

105. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 0031063/1994, 1995 WL 323710, at *5 (N.Y. Sup. Ct. May 24, 1995) (“P[rodigy]’s conscious choice, to gain the benefits of editorial control, has opened it up to a greater liability . . .”).

106. See Oremus et al., *supra* note 103 (explaining that Meta uses a computer algorithm instead of a human moderator).

107. Some courts have begun considering whether the promotion of certain content algorithmically constitutes new speech on behalf of the platform, as opposed to re-publication of user’s speech. See *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) (holding that TikTok’s “compilations of others’ content via [an] expressive algorithm . . . amounts to first-party speech” on behalf of the social media company and therefore Section 230’s immunity shield does not apply). If content moderation is no longer a protected activity, the same logic underlying the holding in *Anderson v. TikTok* would become broadly applicable.

lists and drastically increased user engagement with the platform.¹⁰⁸ Any legal framework that leads to limitless liability based on the algorithm of the Feed will harm the platform's profitability and could even tip the profit-liability balance against Meta's continued operation in the United States.¹⁰⁹

B. X (Formerly Known as Twitter)

X has a content-moderation policy that it also enforces by use of algorithm and human content moderation, although content-moderation activity has greatly decreased since Elon Musk purchased the company.¹¹⁰ Similar to Meta, it is undeniable that X could face huge liability risks without Section 230 for a defamatory post hosted by the platform while maintaining active content-moderation policies. Ironically, Musk's current policy of under-moderation may even expose the platform to more liability than Meta, as X has taken a deliberate step back from deterring most kinds of speech, including hate speech and defamatory speech.¹¹¹ Likewise, X's use of an al-

108. See Jessi Hempel, *Everyone Hated News Feed. Then It Became Facebook's Most Important Product*, WIRED (Sep. 6, 2016, at 00:00 ET), <https://www.wired.com/2016/09/everyone-hated-news-feed-then-it-became-facebooks-most-important-product/> [https://perma.cc/QCF2-4W4P] ("News Feed . . . was the most significant invention in the history of the social web. It . . . caused more people to spend more time on Facebook."); see also Joanna Stern, *You Can Now View Your Instagram Feed in Chronological Order*, WASH. POST (Mar. 23, 2022, at 11:00 ET), <https://www.wsj.com/tech/personal-tech/instagram-feed-chronological-order-facebook-meta-11648042360> [https://perma.cc/7VUC-H3WX] (discussing criticism against Instagram over the ability of algorithms to "keep people, specifically kids, glued to their feeds").

109. Finding liability for the utilization of algorithmically promoted content would leave companies forced to choose between two risky options: (1) discontinue using algorithmic moderation, thus hurting their profits (potentially to a large degree), or (2) retain the use of algorithms and expose themselves to potentially catastrophic defamation liability for every piece of user-generated content hosted on the platform. See generally MEDIA L. RES. CTR., *supra* note 99, at 88 (showing that in seven Internet defamation trials from 2000–2024, the median award was \$2,525,000, with \$1,500,000 being the initial median punitive award). These numbers reflect only the number of cases that proceed to trial in spite of Section 230's protections. Internet awards so far have been by far the highest when compared against print and audio-visual media, in both an initial damages figure and in punitive damages. *Id.*

110. See Anisha Sircar, *X's Latest Content Findings Reveal Troubling Trends in AI Moderation*, FORBES (Oct. 18, 2024), <https://www.forbes.com/sites/anishasircar/2024/10/18/xs-latest-content-findings-reveal-troubling-trends-in-ai-moderation/> [https://perma.cc/FE86-NR92] (noting that between 2021 and 2024, although user reports increased by 1,830%, account suspensions grew only 300%).

111. In addition to changing content moderation policies, in one test case from Center for Countering Digital Hate, X failed to act on 99% of posts reported for

gorithm to suggest certain posts to users and curate any form of feed that is not chronological could permanently expose the platform to a new category of liability it was previously shielded from under Section 230.

X differs from Meta in that it utilizes crowdsourced content moderation alongside more traditional content moderation. Known as Community Notes, this feature “relies on the contributions of users to provide context to tweets” and appears below the post.¹¹² A unique aspect of the feature is that Community Notes are generated based on both user contributions and on group consensus.¹¹³ A note ultimately receives a status of “helpful,” “not helpful,” or “needs more reviews” based on an aggregate of contributors with different views.¹¹⁴ Although the program has had mixed success in identifying doctored or misleading content, over the course of the program’s roll-out, the quantity and balance of notes rated helpful has improved.¹¹⁵

This form of crowdsourced content moderation has interesting implications for defamation suits, as it involves actors who are not the platform or the platform’s employees coming together as a group and exercising editorial control over user-generated posts. The relationship between X and volunteer moderators is not contractual beyond the terms of service all users agree to nor does X give users editorial instruction about what to filter except to “add helpful context to posts.”¹¹⁶ One individual is not responsible for making an editorial decision, as the post is rated by X based on individual contributions

hate speech. X later sued the Center for Countering Digital Hate for misrepresenting user experience, which was dismissed. Regardless of any other policy change, failing to act on reports of speech that violates X’s policies harms the company’s risk mitigation strategies. Jonathan Stray, *What Are the Politics of a Platform? What the Data Says About Content Moderation on X*, TechPolicy.Press (Apr. 8, 2026), <https://www.techpolicy.press/what-are-the-politics-of-a-platform-what-the-data-says-about-content-moderation-on-x/> [https://perma.cc/PJ6N-8PRN] (providing an overview of the changes to X’s content moderation policies since Elon Musk acquired the company).

112. Valerie Wirtschafter & Sharanya Majumder, *Future Challenges for Online, Crowdsourced Content Moderation: Evidence from Twitter’s Community Notes*, J. ONLINE TR. & SAFETY, at 1 (Sep. 21, 2023), <https://www.tsjournal.org/index.php/jots/article/view/139/57> [https://perma.cc/3ELA-XUBL].

113. *Id.* at 3.

114. *Id.*

115. *Id.* at 2.

116. *Terms of Service – Consumer*, xAI (Nov. 4, 2025), <https://x.ai/legal/terms-of-service> [https://perma.cc/8Z8S-AGU3]; *Community Notes Guide*, X Community Notes, <https://communitynotes.x.com/guide/en/about/introduction> [https://perma.cc/69K9-EXGP] (providing an overview of the requirements to become a Contributor and discussing how “X doesn’t write, rate or moderate notes”).

but requires group consensus. It is feasible that, while X could face liability for other aspects of its content-moderation policy, Community Notes alone would not provide a basis for liability as a publisher in a defamation suit. Similarly, it does not seem likely that any individual contributor to a Community Note would be liable as a moderator. In the seminal pre-Section 230 case *Stratton Oakmont*, the moderator that reviewed the post in question was found to be in an agency relationship with Prodigy, as all users with moderator power signed a “Bulletin Board Leader Agreement,” despite the agreement itself disclaiming an employee or agency relationship.¹¹⁷ Here, there is no such agreement; all users have the ability to participate in the Community Notes program, and while users can unlock additional abilities in the program, the more they assist in generating community notes, this still appears to fail to rise to the level of an agency relationship.¹¹⁸

This distinction may prove meaningful only in an academic sense in a post-Section 230 world. The odds of a court even reaching Community Notes as evidence of content moderation sufficient to constitute editorial control are slim when considering the overwhelming content-moderation and algorithmic activity that platforms engage in in order to remain competitive in the market.¹¹⁹ However, to follow the hypothetical to its end, one of the only options platforms have left if they lose wholesale Section 230 immunity is to cease all content-moderation efforts to avoid liability. If a platform has no content-moderation policy and no feed presenting users with posts that are prioritized by algorithm, Community Notes may be one of the only forms of content moderation that are liability-proof.

117. *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 0031063/1994, 1995 WL 323710, at *6 (N.Y. Sup. Ct. May 24, 1995).

118. See Wirtschafter & Majumder, *supra* note 112, at 3 (describing how contributors can boost their “Rating Impact score” by rating the notes of others, eventually unlocking the ability to write notes themselves); *cf. supra* note 28 (describing the law of agency and how it applied in *Stratton Oakmont*).

119. See Surabhi Parida, *Evolution of Social Media Algorithms: The Invisible Hand Guiding Our Online Experience*, Re:so (Oct. 6, 2024), <https://resoinsights.com/insight/evolution-of-social-media-algorithms/> [<https://perma.cc/SK9L-FFV9>] (discussing why algorithms are essential to both the user experience and to businesses); see also Maria Alessandra Golino, *Algorithms in Social Media Platforms*, INST. FOR INTERNET & JUST Soc’y (Apr. 24, 2021), <https://www.internetjustsociety.org/algorithms-in-social-media-platforms> [<https://perma.cc/RPR5-3CMD>] (noting that social media platforms make part of their revenue by promoting certain pages through their algorithms, in exchange for payment from brands). For an overview of how social media algorithms work, see generally Arvind Narayanan, *Understanding Social Media Recommendation Algorithms*, Knight First Amendment Institute (Mar. 9, 2023), <https://knightcolumbia.org/content/understanding-social-media-recommendation-algorithms> [<https://perma.cc/GVP8-2ALW>].

By their very nature, notes are fully user-generated and impossible to impute to a single user. Unfortunately, if this is the full extent of content moderation available to social media platforms, Community Notes are unlikely to offer enough content moderation to save platforms from the type of speech that alienates users,¹²⁰ nor make any meaningful effort at providing users with recourse to address problematic posts other than bringing a civil suit.

C. *Reddit*

The third and final platform examined for potential liability, Reddit, utilizes a “primarily decentralized and hybrid approach to content moderation.”¹²¹ Reddit operates with two layers of content moderation. The first, implemented by employees of the company referred to as “admins,” enforces platform-wide content-moderation standards, such as a prohibition on content that incites violence or on child sexual assault material.¹²² The second layer of content moderation is run by users of the platform themselves, called “mods.”¹²³ Mods are volunteer users who moderate content posted by other users on subreddits (interest-based subpages) based both on Reddit’s rules and on additional rules created by the mods themselves.¹²⁴ Mods have a variety of powers: They can remove content, temporarily ban or mute other users from their subreddit, create substantive content policies for the subreddit, and utilize automated tools called “bots” to enforce some of their content-moderation policies.¹²⁵ This approach to content moderation has been lauded for its efficient use of corporate resources, engagement of users, and encouragement of self-policing; however, the success of the system relies on both the ability of Reddit to empower mods and having enough users willing to work for free as mods.¹²⁶

120. See van Zuylen-Wood, *supra* note 84 (describing Facebook’s content-moderation policies against hate speech); Wagener, *supra* note 78 (“[H]ate speech on social media is associated with a decline in consumer sentiment toward the social media site or app. . . . [A] substantial share of respondents said that hate speech made them like the social media sites less.”).

121. SPANDANA SINGH, EVERYTHING IN MODERATION: AN ANALYSIS OF HOW INTERNET PLATFORMS ARE USING ARTIFICIAL INTELLIGENCE TO MODERATE USER-GENERATED CONTENT 26 (2019), https://d1y8sb8igg2f8e.cloudfront.net/documents/Everything_in_Moderation_2019-07-15_142127_tq36vr4.pdf [<https://perma.cc/4QTB-M8S8>].

122. See *id.* at 26–27.

123. *Id.* at 26.

124. *Id.*

125. *Id.* at 26–27.

126. See *id.*; see also Wirtschafter & Majumder, *supra* note 112, at 1 (“[O]n average volunteer moderation teams across Reddit do over 450 hours of work a day, amounting to around \$3.4 million in free labor a year.”).

Reddit delegates meaningfully different power to admins and mods, but ultimately the platform has not innovated enough to avoid similar consequences as X and Meta if Section 230 is repealed. As is the case with Meta and X, if Reddit engages in meaningful content moderation to any degree, *Stratton Oakmont* suggests it would be liable for defamation under a theory of publisher liability.¹²⁷ However, Reddit, of all platforms, seems the best equipped to argue that the content moderation carried out by admins is not the equivalent of editorializing; instead, a better analogy may be that admins are serving as legal compliance officers. On a platform-wide level, Reddit admins engage only in content moderation for speech that is mostly illegal on its own merits, spam, and other disruptive behaviors.¹²⁸ This arrangement has only been successful because of the actions of the mods, who take on the bulk of creating and enforcing tailored content-moderation policies in their subreddits. The question then must become who is liable for the actions of the mods? Here, Reddit is left in a catch-22. On the one hand, mods are volunteer users who act without platform oversight, providing an escape hatch for Reddit. But if any mod could face legal liability for their volunteer efforts of content moderation, this would disincentivize moderation, and Reddit would have no mods left. On the other hand, mods only operate because Reddit authorizes them to do so, thereby implicating Reddit. Thus, any arguments Reddit could make to escape publisher or distributor liability would still result in the crumbling of its content-moderation infrastructure. Despite this precarious

127. It is important to distinguish the type of editorial control utilized in *Stratton Oakmont* from Reddit's policies as a whole. Nothing in *Stratton Oakmont* suggests that having a policy prohibiting child sexual abuse material, an illegal form of content, would constitute editorial control sufficient to make a platform a publisher. However, once platforms start regulating content and speech not based solely on its illegality but based on its undesirability (general calls to violence, obscene language, hate speech, etc.), we cross an invisible border into editorial control. See *Stratton Oakmont, Inc. v. Prodigy Servs. Co.*, No. 0031063/1994, 1995 WL 323710, at *4 (N.Y. Sup. Ct. May 24, 1995) ("By actively utilizing technology and manpower to delete notes from its computer bulletin boards on the basis of offensiveness and 'bad taste', for example, [Prodigy] is clearly making decisions as to content . . .").

128. See *Reddit Rules*, REDDIT, <https://redditinc.com/policies/reddit-rules> [https://perma.cc/5RWH-MYJ6] (last visited Feb. 19, 2026) (prohibiting speech that incites violence, instigates harassment, or encourages the sharing of sexual or abusive content involving minors); see also REDDIT, REDDIT'S AB 587 TERMS OF SERVICE REPORT H2 2024, <https://oag.ca.gov/sites/default/files/Reddit%2C%20Inc.%20-%20AB%20587%20Terms%20of%20Service%20Report%20%28H2%202024%29.pdf/Reddit%2C%20Inc.%20-%20AB%20587%20Terms%20of%20Service%20Report%20%28H2%202024%29.pdf> [https://perma.cc/69K8-4YQZ] (explaining Reddit's use of automated content-moderation tools).

balancing act, Reddit appears the best equipped to adapt to a world with a changed or repealed Section 230, as it is the platform whose users are most self-sufficient in curating and moderating their on-line spaces without direct platform oversight. It is reasonable to conclude that without Section 230 immunity, Reddit could take some notes from the Community Notes model at X and explore the limits of communal, as opposed to individual, user content moderation.

V.

THE FUTURE OF PLATFORM DEFAMATION LIABILITY

The world has changed since Section 230 was enacted in 1996. Congress originally enacted Section 230 in response to the *Stratton Oakmont* decision, which was understood at the time to indicate the direction in which the courts were moving.¹²⁹ If Project 2025 succeeds in its goal of destabilizing Section 230, or the Sunset Section 230 Act passes, there is no guarantee that courts (or even Congress) will continue to embrace traditional defamation law in determining liability for ISPs.¹³⁰ The last decade alone has seen radical changes in the Internet and in social media platforms;¹³¹ it seems unreasonable to assume that whichever actor ultimately does the bulk of doctrinal evolution, either the courts or the legislature, would not take that into account in deciding cases brought in the absence of Section 230 as we know it today.

One of the largest differences between the *Stratton Oakmont* context and the current day is the normative understanding of the Internet. In 1995, the Internet was a burgeoning industry that Congress moved affirmatively to protect with Section 230; social media platforms did not exist as we currently understand them but did exist in earlier formulations such as message boards and chatrooms.¹³² Today, the Internet has become an essential part of

129. See Skorup & Huddleston, *supra* note 13, at 650 (“Congress resolved [the] dilemma [created by *Stratton Oakmont*] in 1996 when it passed the Communications Decency Act.”).

130. See, e.g., *Berisha v. Lawson*, 141 S. Ct. 2424, 2429 (2021) (Gorsuch, J., dissenting from the denial of certiorari) (arguing the Court should re-evaluate defamation jurisprudence in light of the recent changes in the media and technology landscape).

131. See Esteban Ortiz-Ospina, *The Rise of Social Media*, Our World in Data (Sep. 18, 2019), <https://ourworldindata.org/rise-of-social-media/> [<https://perma.cc/URC8-CDKK>]; see also Jeffrey Standen, *Republication Liability on the Web*, 105 MARQ. L. REV. 669, 671–73 (2022).

132. See Citron & Wittes, *supra* note 32, at 403–06, 411 (“[C]ompanies [today] . . . are vastly larger, more powerful, and less vulnerable than were the nascent “online service providers” of two decades ago.”); see also, e.g., *Zeran v. Am. Online, Inc.*, 129

modern life. So too have social media platforms: legal commentators and judges have categorized platforms as everything from public forums to common carriers.¹³³ It would be hugely unpopular to outlaw social media platforms, even if implicitly through the imposition of impossible financial liability, and users may still illegally seek access even if platforms are forced to withdraw from the United States.¹³⁴

Additionally, today's courts face a different defamation landscape than courts did in 1995. The Supreme Court seems poised to reconsider standards for defamation in light of the technology revolution, with Justices Thomas and Gorsuch both indicating they would support the overturning of the seminal defamation case, *New York Times Co. v. Sullivan*, which established that public figures need to prove actual malice in order to establish publisher liability.¹³⁵ While Project 2025 itself is silent on the matter, associates and authors of the project have separately advocated for the overturning of *Sullivan*.¹³⁶ Complicating matters further, if platforms now face some form of defamation liability for user-generated content, courts will have to grapple with and make hard calls about where platforms fit under the current First Amendment landscape and decide if platforms also have affirmative rights or defenses without Section 230.¹³⁷ Even without ISPs becoming viable defendants for defamation suits, the doctrine seems to be on the cusp of a revolution. If courts are now forced to assimilate social media platforms into the existing

F.3d 327, 332–33 (4th Cir. 1997) (finding an early Internet message board protected as a publisher under Section 230).

133. See, e.g., Christopher S. Yoo, *What's In a Name? Common Carriage, Social Media, and the First Amendment*, 119 Nw. U. L. REV. ONLINE 49 (2024) (examining and rejecting attempts to classify social media companies as common carriers); Moody v. NetChoice, LLC, 603 U.S. 707, 767 (2024) (Alito, J., concurring in the judgment) (“As the Court has recognized, social-media platforms have become the ‘modern public square.’” (quoting *Packingham v. North Carolina*, 582 U.S. 98, 107 (2017))).

134. See BRADFORD, *supra* note 87, at 171 (discussing American WeChat users’ plans to use a VPN to access the app when it was banned in the United States).

135. See *Berisha*, 141 S. Ct. at 2424–25 (Thomas, J., dissenting from the denial of certiorari); *id.* at 2429–30 (Gorsuch, J., dissenting from the denial of certiorari).

136. E.g., Madeline Peltz, *Project 2025 Partner Blog Advocates for Overturning New York Times Co. v. Sullivan*, MEDIA MATTERS FOR AM. (Oct. 25, 2024, at 11:14 ET), <https://www.mediamatters.org/justice-civil-liberties/project-2025-partner-blog-advocates-overturning-new-york-times-co-v> [<https://perma.cc/2R8U-4DKW>].

137. See Kevin L. Kite, *Incremental Identities: Libel-Proof Plaintiffs, Substantial Truth, and the Future of the Incremental Harm Doctrine*, 73 N.Y.U. L. REV. 529, 530 (1998) (noting that the three defenses to a defamation suit are the substantial truth doctrine, the libel-proof plaintiff doctrine, and the incremental harm doctrine); Alex B. Long, *The Forgotten Role of Consent in Defamation and Employment Reference Cases*, 66 FLA. L. REV. 719, 721 (2014) (explaining that consent to disclosure of information is also a defense to a defamation suit).

framework for defamation liability, it seems unlikely that defamation doctrine can accommodate these new and unique situations without undergoing some foundational change.

A. *Alternative Paths Forward*

The effects on the Internet if companies no longer have the protection of Section 230 would be seismic enough that legislators and stakeholders should be invested in proffering other forms of reform as alternative paths forward. The options laid out in Project 2025 are not the only feasible reforms, nor are they the only reforms that would accomplish their stated goals. Numerous experts in privacy, antitrust, and civil rights law have put forth their own suggestions for reform, many of which address Project 2025's stated concerns about giving users more control over the content they receive, imposing transparency requirements on platforms, and providing an opportunity for users to appeal the restriction of their speech.¹³⁸ Some proposals for reform don't even require novel legislation but merely that Congress clarify what Section 230 requires of platforms in order for them to claim its protections. For example, Danielle Keats Citron and Benjamin Wittes argue that Section 230 should be limited only to platforms who can prove they were acting as Good Samaritans and were not intentionally benefitting from hosting defamatory material.¹³⁹ This interpretation would also address concerns about deplatforming based on political beliefs, as that would not qualify as an action taken in good faith.

138. See, e.g., Michael Daly Hawkins & Matthew J. Stanford, *Uproot or Upgrade? Revisiting Section 230 Immunity in the Digital Age*, U. CHI. L. REV. ONLINE <https://lawreview.uchicago.edu/online-archive/uproot-or-upgrade-revisiting-section-230-immunity-digital-age> [<https://perma.cc/V7L8-55MV>] (arguing for the reform of Section 230 as an affirmative defense to civil claims); Christian Sarceño Robles, *Section 230 is Not Broken: Why Most Proposed Section 230 Reforms Will Do More Harm Than Good, and How the Ninth Circuit Got it Right*, 16 FIU L. REV. 213, 214 (2021) (arguing that the country should follow the Ninth Circuit's approach and condition Section 230 immunity on a website not encouraging illegal content); Olivier Sylvain, *Intermediary Design Duties*, 50 CONN. L. REV. 203, 214 (2018) (arguing that Section 230 should not apply to providers who sell or exploit user data in secondary or ancillary markets); Mary Graw Leary, *The Failed Experiment of Section 230 of the Communications Decency Act: How It Facilitates Exploitation and How It Must Be Reformed*, 70 VILL. L. REV. 49, 49–50 (2025) (arguing Section 230 should be narrowed to restore it to its original purpose of safeguarding children); Bailey S. Barnes, Comment, *Software v. Software: How Section 230 of the Communications Decency Act Threatens to Undermine Antitrust Law*, 74 OKLA. L. REV. 433, 459–61 (2022) (arguing for an amendment to the Good Samaritan clause of Section 230 in order to hold software companies liable under antitrust laws).

139. Citron and Wittes, *supra* note 32, at 416–17.

If courts and the legislature are free to innovate, how could social media platforms slot into the defamation doctrine? The most restrictive option that still avoids continuing *Stratton Oakmont's* logic would involve assigning publisher liability for user-generated defamatory content if a platform controls the means of content moderation. This option strikes a compromise between the existing approaches and endorses user-controlled content-moderation policies such as the ones utilized by X and Reddit while penalizing companies like Meta that enforce their content-moderation policies wholly in-house. This approach would be most successful if it follows the current common wisdom and considers issues of content moderation separately from cases based on algorithmic recommendations.¹⁴⁰

If this option still imposes too much liability, a truly innovative solution would be to create a new category of “platform” liability for defamation claims that only imposes liability for posts that were directly regulated by content-moderation policies. This option is more deferential to the existing business practices of social media platforms and allows for the retention of unrelated policies (such as many platforms’ policies on obscene language, which flag all posts for removal) while only targeting policies that require some level of nuance, and thus a subjective decision, in implementation (such as policies against misinformation).¹⁴¹ Finally, an option that aligns most closely with existing defamation law would be to retain the existing categories of defamation liability but more clearly delineate what activities constitute editorial control and re-categorize platforms from acting as publishers to acting as distributors. This option would encourage the creation of a notice-and-takedown system, perhaps analogous to the DMCA (which governs online copyright violations), where platforms are shielded from monetary liability except

140. See, e.g., *Gonzalez v. Google LLC*, 598 U.S. 617, 621–22 (2023) (per curiam) (dismissing claims related to content moderation as barred by Section 230 while considering claims related to algorithmic promotion of content); *Anderson v. TikTok, Inc.*, 116 F.4th 180, 184 (3d Cir. 2024) (holding that algorithmic curation of content constitutes first-party speech).

141. For a related proposal that also engages in line-drawing based on characteristics of the user-generated content, see Daphne Keller’s proposal that platforms be prohibited from amplifying content through algorithms, at least above a certain level. Daphne Keller, *Amplification and Its Discontents: Why Regulating the Reach of Online Content Is Hard*, 1 J. FREE SPEECH L. 227, 254–70 (2021). Other, related proposals, such as on how to apply defamation principles to speakers on social media platforms, could also help shape a new approach toward platform defamation liability. See Hadley M. Dreibelbis, Note, *Social Media Defamation: A New Legal Frontier amid the Internet Wild West*, 16 DUKE J. CONST. L. & PUB. POL’Y 245, 269–70 (2021) (recommending courts apply traditional elements of defamation to social media platforms while still considering the context in which the speech was made).

in instances where they have actual knowledge of the post and its content from user reports.¹⁴² Ideally, a system could be created and implemented in a way that simply incentivizes platforms to regulate themselves and create their own internal systems in order to remain compliant with the law.

Any changes from the status quo toward Section 230 reform or repeal would impose liability on ISPs for behavior that is currently completely shielded from financial repercussions. On top of increasing their financial burden, social media platforms will have to bear the cost of uncertainty while cases wind their way through the court system. While courts are rational actors, there is no guarantee that cases of first impression may not end in a regime even more restrictive than *Stratton Oakmont*. This exercise in predicting the future, while all hypothetical, has proven at the very least that Project 2025's reforms, or repealing Section 230, is almost guaranteed to cause chaos for platforms in both the short and long term—chaos that is not likely to meaningfully expand individual citizens' ability to exercise free speech.

VI.

THE MOST IMPORTANT PATH FORWARD IS NOT CHOOSING WHICH PROPOSAL OF REFORM IS BEST, BUT ENSURING THAT SECTION 230 IS MEANINGFULLY REFORMED AND NOT REPEALED

Predictions about decisions concerning the ultimate fate of Section 230 are, by necessity, conjecture at this stage. However, Commissioner Carr (and his policies laid out in Project 2025) and the Sunset Section 230 Act pose a real and present threat that Section 230's doctrine of immunity will undergo significant reform or repeal in the next few years, thus permanently changing the operations of all social media platforms. There are good arguments to be made that both *Stratton Oakmont* and the current judicial interpretation of Section 230 comprise suboptimal methods of governing platform liability for user-generated content.¹⁴³ The answer to this dilemma

142. See *The Digital Millennium Copyright Act*, U.S. COPYRIGHT OFF. <https://www.copyright.gov/dmca/> [<https://perma.cc/8WQE-TL6B>] (last visited Feb. 18, 2026) (providing ISPs with safe harbor “in exchange for cooperating with copyright owners to expeditiously remove infringing content”).

143. See generally Danielle K. Citron & Benjamin Wittes, *The Problem Isn't Just Backpage: Revising Section 230 Immunity*, 2 GEO. L. TECH. REV. 453 (2018) (arguing that Section 230 immunity is too sweeping and should be conditioned on reasonable steps to address unlawful content); Hawkins & Stanford, *supra* note 138

should not be a full repeal of Section 230. Repeal of the liability shield could cause financial repercussions significant enough to force major social media companies to fracture their project regionally or stop offering access to the United States entirely. It is in all stakeholders' best interests, therefore, to work together on certain reforms that will preserve the functionality and appeal of social media platforms while addressing pervasive issues in the doctrine. After all, conservative voices will be as equally excluded from an online marketplace that is no longer functional as liberal and non-political voices. If social media platforms truly serve as the modern-day marketplace of ideas, then any legislative or judicial reform needs to ensure that the markets are not demolished and preserve the American model of free speech. While criticisms about Section 230 are many, varied, and often justified, social media platforms and the American Internet economy have structured itself around the immunity shield as a foundation of their business. A flawed, but with hope for reform, Section 230 is imminently preferable to no Section 230 at all.

(arguing that more expansive platform liability than Section 230 provides would involve better tradeoffs).

