

# Oklahoma Law Review

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Volume 71 | Number 1

*Symposium: Falsehoods, Fake News, and the First Amendment*

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2018

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### Recommended Citation

Sonja R. West, *Suing the President for First Amendment Violations*, 71 OKLA. L. REV. 321 (2018).

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## SUING THE PRESIDENT FOR FIRST AMENDMENT VIOLATIONS

SONJA R. WEST\*

During a rally last fall, President Donald Trump took the surprising step of launching an attack on NFL players who were participating in the “Take a Knee” protests of racial injustice and police brutality.<sup>1</sup> The team owners, he suggested, should respond to the protests by saying, “Get that son of a bitch off the field right now. Out! He’s fired. He’s fired!”<sup>2</sup> The next day, President Trump followed up that the players should stand for the anthem or “YOU’RE FIRED. Find something else to do!”<sup>3</sup> His tirade continued for days and included telling the NFL that it “should change [its] policy” allowing the protests,<sup>4</sup> “must respect” his opinion that the protests were offensive,<sup>5</sup> and should “[f]ire or suspend” the players.<sup>6</sup> He also called for a public boycott of NFL games until the players were removed.<sup>7</sup> The following week, the NFL’s ratings dropped by four percent.<sup>8</sup> By spring, the NFL had announced a new policy of fining teams if their players kneel during the anthem.<sup>9</sup>

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1. Bryan Armen Graham, *Donald Trump Blasts NFL Anthem Protesters: ‘Get That Son of a Bitch off the Field’*, GUARDIAN (Sept. 23, 2017, 6:43 PM EDT), <https://www.theguardian.com/sport/2017/sep/22/donald-trump-nfl-national-anthem-protests>.

2. *Id.*

3. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 23, 2017, 11:11 AM), <https://twitter.com/realdonaldtrump/status/911654184918880260?lang=en>; Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 23, 2017, 11:18 AM), <https://twitter.com/realDonaldTrump/status/911655987857281024>.

4. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 3:25 PM), <https://twitter.com/realdonaldtrump/status/912080538755846144?refsrc=email&s=11>.

5. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 25, 2017, 4:39 AM), <https://twitter.com/realdonaldtrump/status/91228028224525312?refsrc=email&s=11>.

6. Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 24, 2017, 3:44 AM), <https://twitter.com/realDonaldTrump/status/911904261553950720>.

7. *See id.*

8. Mike Snider, *Are NFL Player Protests ‘Massively, Massively’ Hurting TV Ratings?*, USA TODAY (Sept. 26, 2017, 8:05 PM), <https://www.usatoday.com/story/money/business/2017/09/26/nfl-player-protests-hurting-ratings/703619001/>.

9. Erik Ortiz, *New NFL Policy: Teams to Be Fined if Players Kneel During Anthem*, NBC NEWS (May 23, 2018, 12:05 PM), <https://www.nbcnews.com/news/us-news/nfl-announces-new-national-anthem-policy-fines-teams-if-players-n876816>.

Two weeks before the President's attacks on the NFL, ESPN reporter Jemele Hill found herself in the spotlight after she criticized the President in a series of tweets, including one in which she called him a "white supremacist."<sup>10</sup> White House Press Secretary Sarah Huckabee Sanders called the remarks "outrageous" and "a fireable offense."<sup>11</sup> President Trump later demanded and received an apology from Hill, who was suspended from her job for two weeks.<sup>12</sup>

On any given day, it seems, the President of the United States can be found attacking the press and others because of their speech. And his attacks are not limited to mere public denouncements or calls for private action. He also—implicitly and, at times, overtly—has threatened the use of government power to punish speakers (particularly news organizations) that displease him. Consider, for example, his repeated targeting of the *Washington Post*, a newspaper that he has labeled "fake news"<sup>13</sup> and accused of publishing "false and angry"<sup>14</sup> coverage of him. On multiple occasions, President Trump has linked the newspaper to the online retail company Amazon through the two companies' shared owner, Jeff Bezos (often referring to the paper as the "Amazon Washington Post").<sup>15</sup> During the campaign, he threatened that if he won the presidency, Amazon was "going to have such problems."<sup>16</sup> And, indeed, after becoming President, Trump suggested that Congress look into Amazon's taxes<sup>17</sup> and personally

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10. Jemele Hill (@jemelehill), TWITTER (Sept. 11, 2017, 4:54 PM), <https://twitter.com/jemelehill/status/907391978194849793>

11. David Nakamura, *White House: ESPN's Jemele Hill Should Be Fired for Calling Trump a 'White Supremacist'*, WASH. POST (Sept. 13, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/09/13/white-house-espns-jemele-hill-should-be-fired-for-calling-trump-a-white-supremacist/?utm\\_term=.cb534e4d60a3](https://www.washingtonpost.com/news/post-politics/wp/2017/09/13/white-house-espns-jemele-hill-should-be-fired-for-calling-trump-a-white-supremacist/?utm_term=.cb534e4d60a3).

12. See Donald J. Trump (@realDonaldTrump), TWITTER (Sept. 15, 2017, 4:20 AM), <https://twitter.com/realDonaldTrump/status/908651641943003136>.

13. Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 19, 2017, 7:07 AM), <https://twitter.com/realdonaldtrump/status/943135588496093190>.

14. Donald J. Trump (@realDonaldTrump), TWITTER (Jan. 28, 2017, 5:08 AM), <https://twitter.com/realdonaldtrump/status/825329757646618624>.

15. Donald J. Trump (@realDonaldTrump), TWITTER (July 24, 2017, 7:23 PM), <https://twitter.com/realdonaldtrump/status/889672374458646528>.

16. Tim Stenovec, *Donald Trump Just Said if He's Elected President Amazon Will Have Problems*, BUS. INSIDER (Feb. 26, 2016, 5:14 PM), <http://www.businessinsider.com/donald-trump-says-amazon-will-have-such-problems-2016-2> [http://perma.cc/VZ3T-AFXR].

17. See Conor Gaffey, *Donald Trump vs. Amazon: All the Times the President and Jeff Bezos Have Called Each Other Out*, NEWSWEEK (July 25, 2017, 7:34 AM), <http://>

urged the United States Postmaster General to double the delivery rates it charges the company.<sup>18</sup>

President Trump likewise has hinted that he would use the powers of his office against cable and broadcast news organizations. He has called repeatedly for the government to “look into”<sup>19</sup> and “challenge” the FCC-granted licenses of the broadcast television networks.<sup>20</sup> President Trump made it clear, moreover, that he was calling for government investigation because of the content of the stations’ news coverage, which he deemed “partisan, distorted and fake”<sup>21</sup> and “bad for country.”<sup>22</sup> When asked about these statements at a press conference, he replied, “It is frankly disgusting the way the press is able to write whatever they want to write . . . . And people should look into it.”<sup>23</sup>

Another of the President’s favorite targets is CNN. He has persistently blasted the cable news organization for its coverage of him, calling it “fake

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[www.newsweek.com/donald-trump-vs-amazon-jeff-bezos-641506](http://www.newsweek.com/donald-trump-vs-amazon-jeff-bezos-641506) [http://perma.cc/NG3A-UNVC].

18. See Michael D. Shear, *Trump, Having Denounced Amazon’s Shipping Deal, Orders Review of Postal Service*, N.Y. TIMES (Apr. 12, 2018), [https://www.washingtonpost.com/business/economy/trump-personally-pushed-postmaster-general-to-double-rates-on-amazon-other-firms/2018/05/18/2b6438d2-5931-11e8-858f-12becb4d6067\\_story.html?utm\\_term=.ce6b86fc6456](https://www.washingtonpost.com/business/economy/trump-personally-pushed-postmaster-general-to-double-rates-on-amazon-other-firms/2018/05/18/2b6438d2-5931-11e8-858f-12becb4d6067_story.html?utm_term=.ce6b86fc6456); see also Donald J. Trump (@realDonaldTrump), TWITTER (Dec. 29, 2017, 5:04 AM), <https://twitter.com/realdonaldtrump/status/946728546633953285>.

19. Noah Bierman & Brian Bennett, *Trump Threatens Networks, Saying It’s ‘Disgusting the Way the Press Is Able to Write Whatever They Want’*, L.A. TIMES (Oct. 11, 2017, 3:55 PM), <http://www.latimes.com/politics/la-na-pol-trump-press-20171011-story.html> [http://perma.cc/B533-HWX8]; Jenna Johnson, *Trump Suggests Senate Intelligence Committee Investigate Media Companies*, WASH. POST (Oct. 5, 2017), [https://www.washingtonpost.com/news/post-politics/wp/2017/10/05/trump-suggests-senate-intelligence-committee-investigate-media-companies/?utm\\_term=.c53bdaedc60e](https://www.washingtonpost.com/news/post-politics/wp/2017/10/05/trump-suggests-senate-intelligence-committee-investigate-media-companies/?utm_term=.c53bdaedc60e) [http://perma.cc/75D8-4DHL].

20. David Shephardson, *Trump Suggests Challenging TV Network Licenses over ‘Fake News’*, REUTERS (Oct. 11, 2017, 9:12 AM), <https://www.reuters.com/article/us-usa-trump-media/trump-suggests-challenging-tv-network-licenses-over-fake-news-idUSKBN1CG1WB> [http://perma.cc/BQ8F-TV9U].

21. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 5:09 PM), <https://twitter.com/realdonaldtrump/status/918267396493922304?lang=en>.

22. Donald J. Trump (@realDonaldTrump), TWITTER (Oct. 11, 2017, 6:55 AM), <https://twitter.com/realdonaldtrump/status/918112884630093825>.

23. David Nakamura, *Trump Escalates Threats Against Press, Calls News Coverage ‘Frankly Disgusting’*, WASH. POST (Oct. 11, 2017), [https://www.washingtonpost.com/politics/trump-escalates-threats-against-press-calls-news-coverage-frankly-disgusting/2017/10/11/32996dba-ae9c-11e7-9e58-e6288544af98\\_story.html?utm\\_term=.af31e30aee09](https://www.washingtonpost.com/politics/trump-escalates-threats-against-press-calls-news-coverage-frankly-disgusting/2017/10/11/32996dba-ae9c-11e7-9e58-e6288544af98_story.html?utm_term=.af31e30aee09).

news”<sup>24</sup> and “garbage,”<sup>25</sup> and has tweeted memes depicting him attacking a figure with the CNN logo.<sup>26</sup> Late in his campaign, President Trump began to focus on a proposed merger between AT&T and Time Warner, which would include the sale of CNN. He told the audience at a campaign rally that this was “a deal we will not approve in my administration.”<sup>27</sup> Sure enough, after taking office, the Department of Justice’s Antitrust Division filed a lawsuit to block the merger, despite earlier reports that the department had conditionally approved the sale.<sup>28</sup>

President Trump’s habit of attacking, threatening, or punishing the press and other individuals whose speech he dislikes has caught the attention of First Amendment scholars and lawyers. His actions inevitably raise the question: Do any of these individuals or organizations (or any future ones)

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24. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (June 27, 2017, 5:30 AM), <https://twitter.com/realdonaldtrump/status/879678356450676736> (“Fake News CNN is looking at big management changes now that they got caught falsely pushing their phony Russian stories. Ratings way down!”); Donald J. Trump (@realDonaldTrump), TWITTER (Feb. 17, 2017, 1:48 PM), <https://twitter.com/realdonaldtrump/status/832708293516632065> (“The FAKE NEWS media (failing @nytimes, @NBCNews, @ABC, @CBS, @CNN) is not my enemy, it is the enemy of the American People!”).

25. See, e.g., Donald J. Trump (@realDonaldTrump), TWITTER (July 1, 2017, 6:12 AM), <https://twitter.com/realdonaldtrump/status/881138485905772549> (“I am extremely pleased to see that @CNN has finally been exposed as #FakeNews and garbage journalism. It’s about time!”).

26. See Michael M. Grynbaum, *Trump Tweets a Video of Him Wrestling ‘CNN’ to the Ground*, N.Y. TIMES (July 2, 2017), <https://www.nytimes.com/2017/07/02/business/media/trump-wrestling-video-cnn-twitter.html>; Jack Moore, *After Charlottesville Attack, Trump Retweets Meme of Train Running over CNN*, NEWSWEEK (Aug. 15, 2017, 8:37 AM), <http://www.newsweek.com/after-charlottesville-attack-trump-retweets-meme-train-running-over-cnn-650910>; Amy B. Wang, *Trump Retweets Image Depicting CNN Squashed Beneath His Shoe*, WASH. POST (Dec. 24, 2017), [https://www.washingtonpost.com/news/the-fix/wp/2017/12/24/trump-retweets-image-depicting-cnn-squashed-beneath-his-shoe/?utm\\_term=.9dcef82a1837](https://www.washingtonpost.com/news/the-fix/wp/2017/12/24/trump-retweets-image-depicting-cnn-squashed-beneath-his-shoe/?utm_term=.9dcef82a1837).

27. See Brian Stelter, *Donald Trump Rips into Possible AT&T-Time Warner Deal*, CNN (Oct. 22, 2016, 4:05 PM), <http://money.cnn.com/2016/10/22/media/donald-trump-att-time-warner/index.html>.

28. Jim Rutenberg, *In AT&T Deal, Government Action Catches Up with Trump Rhetoric*, N.Y. TIMES (Nov. 8, 2017), <https://www.nytimes.com/2017/11/08/business/att-time-warner-cnn-trump.html>; Amol Sharma, *Snag in Media Merger Stirs Tensions over Trump-CNN Feud*, WALL ST. J. (Nov. 10, 2017, 5:52 PM), <https://www.wsj.com/articles/snag-in-media-merger-stirs-tensions-over-trump-cnn-feud-1510354324>. The Trump administration’s attempt to prevent the merger was ultimately unsuccessful. See Cecelia Kang et al., *AT&T Wins Approval for \$85.4 Billion Time Warner Deal in Defeat for Justice Dept.*, N.Y. TIMES (June 12, 2018), <https://www.nytimes.com/2018/06/12/business/dealbook/att-time-warner-ruling-antitrust-case.html>.

have a viable claim against the President for violating their First Amendment rights? One lawsuit, in fact, has already been filed against President Trump, alleging that he violated the free speech rights of certain Twitter users by blocking them from being able to read or comment on his “@realDonaldTrump” account.<sup>29</sup> Remarkably, in response to the lawsuit, the Department of Justice actually stipulated that the President blocks the users personally and that he does so because they criticize him or his policies.<sup>30</sup>

This type of norm-breaking behavior coming from the President is unprecedented.<sup>31</sup> While other Presidents certainly have had their disagreements with the press and other critics, they rarely expressed them so publicly and virtually never attempted such blatant, content-based retaliation. The harms caused by such actions are immense and may include monetary, reputational, and emotional damages for the individuals directly involved as well as the potential widespread chilling of speech for everyone else.

Chief Justice John Marshall told us in *Marbury v. Madison* that for every legal right there is a remedy.<sup>32</sup> He also declared that the President of the United States is not above the law.<sup>33</sup> Considering that the United States has the strongest constitutional protections for free expression in the world and that First Amendment protection for “core political speech” is “at its

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29. Tom McCarthy, *Blocked by Trump on Twitter – Now Crusaders Take Their Case to Court*, GUARDIAN (Mar. 7, 2018, 6:00 PM), <https://www.theguardian.com/us-news/2018/mar/07/trump-twitter-first-amendment-legal-case>.

30. Joint Stipulation of Facts at 20, Knight First Amendment Inst. v. Trump, No. 17-cv-5205 (S.D.N.Y. Sept. 25, 2017), <https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2017.09.25%20Stipulation.pdf>. In the interest of full disclosure, I am a signatory to the First Amendment Legal Scholars’ *Amici Curiae* Brief in Support of the Plaintiffs’ Motion for Summary Judgment in this case. See Brief of *Amici Curiae* First Amendment Legal Scholars in Support of Plaintiffs’ Motion for Summary Judgment, Knight First Amendment Inst. v. Trump, No. 17-cv-5205 (S.D.N.Y. Nov. 6, 2017), <https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2017.11.06%20Amicus%20Brief%20-%20First%20Amendment%20Scholars.pdf>.

31. See Ronnell Andersen Jones & Sonja R. West, *The Fragility of the Free American Press*, 112 NW. U. L. REV. 567, 568 (2017).

32. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803) (stating that the “very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury”).

33. *Id.* at 149 (stating that the President “is a high officer, but he is not above law”).

zenith,”<sup>34</sup> one might think that the ability to sue the President for violation of the First Amendment would be relatively settled.

The answer, however, is not quite that straightforward. Due to several unique qualities about the First Amendment and the presidency, it is not entirely clear if or how citizens can hold the President responsible for violating their expressive rights. In this Essay, I explore some of the potential obstacles that face a person or organization bringing a First Amendment lawsuit against the President.<sup>35</sup> In Part I, I consider whether the President can violate the First Amendment at all; in Part II, I discuss if or how a plaintiff might recover for that violation. Part III then suggests a few possible approaches to this problem that could help clarify and secure the rights of all Americans to seek justice—even against the President—if their freedoms of speech and press are violated.

### *I. The President Shall Not Abridge*

The initial question in considering a lawsuit against the President for a First Amendment violation is whether the First Amendment actually applies to the President. To most Americans—indeed, even to most legal scholars<sup>36</sup>—this might seem to be a pedantic, if not downright bizarre, question. Yet the assertion that the First Amendment applies to actions of the President stands on less stable legal grounds than we tend to think.

The text of the First Amendment begins with these five words: “Congress shall make no law.”<sup>37</sup> It then, of course, goes on to list a number of constitutional rights, including the command that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>38</sup> It is not difficult to see the issue here: the First Amendment does not mention the President.

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34. *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 186–87 (1999) (quotation marks omitted).

35. This Essay does not address additional issues that may arise in such a lawsuit including those of state action or standing. *See, e.g.*, Leah Litman, *State Action Doctrine Under an Autocrat*, TAKE CARE (Sept. 26, 2017), <https://takecareblog.com/blog/state-action-doctrine-under-an-autocrat>.

36. *See* Mark P. Denbeaux, *The First Word of the First Amendment*, 80 NW. U. L. REV. 1156, 1156 (1986) (discussing that he and “many constitutional and first amendment scholars had overlooked” the fact that the text of the First Amendment applies only to Congress).

37. U.S. CONST. amend. I.

38. *Id.*

And for a vocal minority of legal scholars, this is a serious problem.<sup>39</sup> In 1986, Professor Mark P. Denbeaux was the first to take in-depth, scholarly note of this issue in his article *The First Word of the First Amendment*.<sup>40</sup> Focusing on whether the First Amendment could prevent judicial prior restraints on speech, Professor Denbeaux concluded that the proposition that the First Amendment extends beyond Congress “rest[s] on a shaky foundation.”<sup>41</sup> Other scholars have reached a similar conclusion, stating that “the First Amendment applies, by its terms, to Congress and not to the President or the courts”<sup>42</sup> and that such a reading “is as textually certain as is anything in the Constitution.”<sup>43</sup> While a relatively small group, proponents of the strict textualist reading of the First Amendment are quite adamant. Professor Nicolas Quinn Rosenkranz, for example, has referred to the collective decision to look away from the word “Congress” at the beginning of the First Amendment as “hysterical blindness” and argued that “conventional wisdom . . . willfully ignores the subject of the First Amendment,” while courts and scholars treat the word “as if it were an inkblot.”<sup>44</sup>

These scholars contend that ascertaining the First Amendment’s scope is straightforward, the result of elementary grammar rules. They claim that because “Congress” is the amendment’s subject, the subsequent verbal phrase, “shall not make any law,” must describe Congress, and Congress alone.<sup>45</sup> They point out, moreover, that the Supreme Court has noted this subject-verb relationship. The Court first invalidated an act of Congress as a First Amendment violation in the 1965 case *Lamont v. Postmaster General*.<sup>46</sup> In that case, the Court explicitly noted that “Congress—

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39. Daniel J. Hemel, *Executive Action and the First Amendment’s First Word*, 40 PEPP. L. REV. 601, 601 (2013) (discussing how “the grammatical subject of the First Amendment has finally gained attention from constitutional scholars, especially those of a textualist orientation”).

40. Denbeaux, *supra* note 36, at 1156.

41. *Id.* at 1220.

42. Jay S. Bybee, *Common Ground: Robert Jackson, Antonin Scalia, and a Power Theory of the First Amendment*, 75 TUL. L. REV. 251, 326 (2000).

43. GARY LAWSON & GUY SEIDMAN, *THE CONSTITUTION OF EMPIRE: TERRITORIAL EXPANSION AND AMERICAN LEGAL HISTORY* 42–43 (2004) (“That fact may be out of step with modern sensibilities, but it is a fact nonetheless.”).

44. Nicholas Quinn Rosenkranz, *The Subjects of the Constitution*, 62 STAN. L. REV. 1209, 1250, 1253, 1255 (2010) (“The first question of First Amendment judicial review must be: who has violated the First Amendment? And as a matter of text and grammar, there is only one possible answer: ‘Congress.’”).

45. *See, e.g., id.* at 1254.

46. 381 U.S. 301 (1965).

expressly restrained by the First Amendment from ‘abridging’ freedom of speech—is the actor.”<sup>47</sup> These scholars likewise note that while other amendments that do not reference a particular branch provide general protection from the federal government, the express mention of Congress binds the First Amendment exclusively to the legislature.<sup>48</sup>

The history of the amendment, these scholars argue, provides more support for this interpretation. In his extensive historical examination of the drafting of the First Amendment, Professor Denbeaux notes that the word “Congress” was added to the amendment protecting free speech during the editing process and argues that James Madison, the “Father of the Bill of Rights,” would not have been so reckless as to include the word accidentally.<sup>49</sup>

The most common response of courts and legal scholars to the Congress-only arguments has been silence.<sup>50</sup> And the few who have addressed the question have essentially dismissed it with little more than an academic wave of the hand.<sup>51</sup> According to Professor Denbeaux, the typical response to this question from constitutional scholars is that the use of the word “Congress” was merely “an unaccountable slip of the pen by the Founding Fathers, and that no meaning could be attached to it.”<sup>52</sup> In fact, as Professors Curtis Bradley and Neil Siegel observed, most constitutional interpreters do not view the language of the First Amendment as even ambiguous; rather they interpret it as “clearly mean[ing] the opposite of what it literally seems to say.”<sup>53</sup>

Yet the federal courts have accepted that the First Amendment applies beyond Congress and includes the judiciary. In *New York Times Co. v. United States*, for example, the Supreme Court held that a federal court violated the First Amendment when it issued an injunction prohibiting a newspaper from publishing articles based on the classified Pentagon

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47. *Id.* at 306.

48. Rosenkranz, *supra* note 44, at 1253.

49. See Denbeaux, *supra* note 36, at 1171.

50. See Rosenkranz, *supra* note 44, at 1253 (noting that “with very few exceptions, scholars have largely ignored the unique subject of the First Amendment”).

51. See Denbeaux, *supra* note 36, at 1156; see also Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation*, 108 HARV. L. REV. 1221, 1240 n.60 (1995) (raising the question but noting simply that the First Amendment “has been understood to restrict the executive and judicial branches as well”).

52. Denbeaux, *supra* note 36, at 1156.

53. Curtis A. Bradley & Neil S. Siegel, *Constructed Constraint and the Constitutional Text*, 64 DUKE L.J. 1213, 1247 (2015).

Papers.<sup>54</sup> More recently, in *Citizens United v. Federal Election Commission*, the Court noted simply that “[c]ourts, too, are bound by the First Amendment.”<sup>55</sup>

At times, the Supreme Court also has applied the First Amendment to executive branch officers. All of these cases, however, involved lower executive positions<sup>56</sup> and local executive departments.<sup>57</sup> For example, in *Pickering v. Board of Education*, the Court held that a school board violated the First Amendment’s free speech clause when a public school teacher was fired for writing a letter to the editor complaining about the board’s decision not to increase school taxes and the board’s allocation of funds to athletics instead of academics.<sup>58</sup> In other cases, the application of the First Amendment can be tied in some way to congressional action. Many cases involving executive agencies can be explained as involving interpretation of a congressional statute and, therefore, trigger the First Amendment’s limitations on Congress.<sup>59</sup>

The question of whether the First Amendment applies directly to the President, meanwhile, remains officially unresolved.<sup>60</sup> In some instances, the Supreme Court has appeared to accept that it does but has decided the case on other grounds such as standing.<sup>61</sup> Often, moreover, other government actors are involved.<sup>62</sup>

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54. 403 U.S. 713, 714 (1971).

55. 558 U.S. 310, 326 (2010); *see also* *Carroll v. President & Comm’rs of Princess Anne*, 393 U.S. 175, 185 (1968) (holding that a ten-day injunction with no notice was incompatible with the First Amendment).

56. *See, e.g.,* *Lyng v. Nw. Indian Cemetery Protective Ass’n*, 485 U.S. 439 (1988) (applying the First Amendment to a dispute between Native Americans and the U.S. Forest Service).

57. *See, e.g.,* *Thomas v. Review Bd. of Ind. Emp’t Sec. Div.*, 450 U.S. 707 (1981) (holding that a state’s withholding of unemployment benefits violated the First Amendment’s free exercise clause).

58. 391 U.S. 563, 568 (1968).

59. *See* Hemel, *supra* note 39, at 610 (discussing the Supreme Court case *FCC v. Fox Television Stations (Fox I)*, 556 U.S. 502 (2009) and *FCC v. Fox Television Stations (Fox II)*, 132 S. Ct. 2307 (2012) and arguing that the underlying dispute was ultimately about a congressional statute “[a]nd since it is the Act itself that establishes this situation, it is the Act—and thus, Congress—that violates the text of the First Amendment”).

60. Research for this Essay found no case in which the Supreme Court explicitly applied the First Amendment to the President directly.

61. *See, e.g.,* *Hein v. Freedom from Religion Found. Inc.*, 551 U.S. 587 (2007) (holding that taxpayers did not have standing to bring an Establishment Clause challenge to a faith-based initiative created by President George W. Bush).

62. In the Twitter case, for example, the district court held that the blocking of Twitter users from President Trump’s @realDonaldTrump Twitter account violated the First

Without a doubt, proponents of the Congress-only view of the First Amendment remain in the minority among courts and constitutional scholars. But the arguments supporting this reading of the First Amendment are hardly trivial and have been only lightly debated. Even critics of this view have acknowledged that it is “original, ingenious, and bracing.”<sup>63</sup> Most importantly, because the Court has been known to make exceptions for the President that it does not make for other federal (and even other executive branch) officers,<sup>64</sup> it is possible that the Court might conclude that the President should have similar protections from First Amendment liability. Thus, until the Supreme Court provides clear guidance on this matter, the questions could continue.

## *II. For Every Right, There “Might Be” a Remedy*

Even assuming the First Amendment does apply to the actions of the President, challengers could face additional obstacles. A constitutional right is, of course, of little use if it cannot secure a remedy.<sup>65</sup> Yet the courts have often been reluctant to apply the typical remedies of First Amendment litigation to the President.

### *A. Damages*

Individuals who have had their First Amendment rights violated by government actors typically turn to civil suits for damages as a remedy. As the Supreme Court has recognized, “Historically, damages have been regarded as the ordinary remedy for an invasion of personal interests in liberty.”<sup>66</sup> Yet unlike the issue of whether the First Amendment applies to the President, the question of whether the courts will force the President to pay damages if he engages in even the most blatant types of First

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Amendment. But the court did not distinguish between the actions of the President and those of White House Director of Social Media Daniel Scavino, who was also a defendant in the case. *See, e.g.*, Memorandum and Order at 25, *Knight First Amendment Inst. v. Trump*, No. 17-cv-5205 (S.D.N.Y. May 23, 2018) <https://knightcolumbia.org/sites/default/files/content/Cases/Wikimedia/2018.05.23%20Order%20on%20motions%20for%20summary%20judgment.pdf> (“[W]e conclude that the control that the President and Scavino exercise over the account and certain of its features is governmental in nature.”).

63. Richard H. Fallon, Jr., *Appraising the Significance of the Subjects and Objects of the Constitution: A Case Study in Textual and Historical Revisionism*, 16 U. PA. J. CONST. L. 453, 458 (2013).

64. *See infra* Section II.A.

65. Without a judicial remedy, moreover, the plaintiffs would also lack constitutional standing to bring their case. U.S. CONST. art. 3, § 2, cl. 1.

66. *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388, 395 (1971).

Amendment violation is settled—they will not. Any attempt to seek damages from the President most likely will be quickly dismissed, because the Supreme Court has stated that the President enjoys absolute immunity from liability for civil damages arising out of his official conduct.

The Court addressed this issue in the 1982 case *Nixon v. Fitzgerald*,<sup>67</sup> which involved a First Amendment claim by a former Air Force management analyst who alleged he was fired in retaliation for his truthful testimony to Congress.<sup>68</sup> He brought his suit against then-President Richard Nixon, among others, after Nixon stated at a news conference that he personally had approved the termination of the plaintiff (although the White House press secretary later claimed that the President misspoke).<sup>69</sup> But in a five-to-four decision, the Court dismissed the case and declared that the President enjoys absolute immunity from such suits by virtue of his position.<sup>70</sup> This immunity, moreover, extends to the “‘outer perimeter’ of his official responsibility.”<sup>71</sup>

Perhaps even more striking than the breadth of the holding in *Nixon v. Fitzgerald* is the Court’s reasoning, which embraces a strong view of presidential exceptionalism.<sup>72</sup> In reaching its conclusion, the Court emphasized several ways that the President is different than other government actors—even other executive officers like cabinet members or governors.<sup>73</sup> The President, the Court stated, holds “supervisory and policy responsibilities of utmost discretion and sensitivity”<sup>74</sup> in a wide range of areas and makes the “most sensitive and far-reaching decisions entrusted to any official under our constitutional system.”<sup>75</sup> Because no other executive officeholder is comparable, the Court explained, other executive officers’ lack of absolute immunity should not inform the extent of presidential immunity.<sup>76</sup> Rather, the “singular importance” of the President’s responsibilities requires that he not be forced to expend energy, attention, and resources on private lawsuits.<sup>77</sup> The Court, moreover, worried that

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67. 457 U.S. 731, 734 (1982).

68. *Id.* at 736.

69. *Id.* at 737.

70. *Id.* at 749.

71. *Id.* at 756.

72. *Id.* at 749 (stating the President holds a “unique position in the constitutional scheme”).

73. *Id.* at 750, 752.

74. *Id.* at 750.

75. *Id.* at 752.

76. *Id.* at 751.

77. *Id.*

saddling the President with this level of potential vulnerability “frequently could distract a President from his public duties, to the detriment of not only the President and his office but also the Nation that the Presidency was designed to serve.”<sup>78</sup>

The Court also explained that the President requires absolute immunity from civil damages because of the “sheer prominence” of the office.<sup>79</sup> The President’s visibility to the public makes him “an easily identifiable target for . . . civil damages.”<sup>80</sup> Writing in concurrence, Chief Justice Warren Burger agreed, warning that, without immunity, private litigation “would inevitably subject Presidential actions to undue judicial scrutiny as well as subject the President to harassment.”<sup>81</sup>

Finally, the Court stated that the constitutional principles of separation of powers favored presidential privilege.<sup>82</sup> Before a federal court may exercise jurisdiction over the President, the Court explained, it must “balance the constitutional weight of the interest to be served against the dangers of intrusion on the authority and functions of the Executive Branch.”<sup>83</sup> There are only two situations, the Court suggested, in which it had exercised jurisdiction over the President: situations concerning broad public interests<sup>84</sup> or criminal prosecutions.<sup>85</sup> A “merely private suit for damages based on the President’s official acts,” the Court held, did not meet this high bar.<sup>86</sup> Again, Chief Justice Burger agreed, stating that although individuals may have been actually injured, “the need to prevent large-scale invasion of the Executive function by the Judiciary far outweighs the need to vindicate the private claims.”<sup>87</sup>

Despite cutting off individuals’ ability to seek damages against the President for constitutional violations, the Court assured us that its holding does not leave us without remedy against presidential wrongdoing.<sup>88</sup> Other formal and informal avenues remain, it stated, such as impeachment, press scrutiny, congressional oversight, reelection pressure, the President’s

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78. *Id.* at 753.

79. *Id.* at 752.

80. *Id.* at 753.

81. *Id.* at 762 (Burger, C.J., concurring).

82. *Id.* at 753 (majority opinion).

83. *Id.* at 754.

84. *Id.* (citing *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952)).

85. *Id.* (citing *United States v. Nixon*, 418 U.S. 683 (1974)).

86. *Id.*

87. *Id.* at 762 (Burger, C.J., concurring).

88. *Id.* at 757 (majority opinion).

incentive “to maintain prestige,” and “a President’s traditional concern for his historical stature.”<sup>89</sup>

Fifteen years later, however, the Court revisited the issue of civil suits against the President in *Clinton v. Jones*.<sup>90</sup> In that case, Paula Jones sued then-President Bill Clinton and raised a variety of claims arising out of alleged acts of sexual harassment that occurred before he became President.<sup>91</sup> Clinton claimed immunity under *Fitzgerald*, but a unanimous Court disagreed.<sup>92</sup> The President, the Justices stated, was not immune from suits based on events occurring before he was in office, because they are “beyond the scope of any action taken in an official capacity.”<sup>93</sup>

But the *Jones* case is likely of little help for a plaintiff raising free speech or free press claims. In order to show a First Amendment violation, such a plaintiff would need to prove state action and, thus, argue that the President was acting in his capacity as a government actor. This showing would seem to be in direct conflict with an effort to show that the President was not acting within the outer limits of his official capacity and thus was not immune.

Other government actors enjoy immunity from civil damages in select situations, but the scope of the President’s immunity appears to stand alone in its breadth. By emphasizing the uniqueness of the President’s duties and vulnerability, the Court has made clear that the bar for maintaining a civil suit against the President is formidable. Concerns about violating the separation of powers, moreover, also give the Court pause about imposing judgment on our chief executive.

#### *B. Injunctions and Declaratory Judgments*

With civil damages off the table, First Amendment plaintiffs are left with virtually no other option than to seek injunctive relief. In the lawsuit challenging President Trump’s practice of blocking critical Twitter users, for example, the plaintiffs have asked the court for a declaration that the President’s blocking of them from his Twitter account is unconstitutional and an injunction mandating that he unblock their accounts and refrain from

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89. *Id.*

90. 520 U.S. 681 (1997).

91. *Id.* at 685.

92. *Id.* at 696.

93. *Id.* at 694.

doing so again in the future.<sup>94</sup> Once again, however, we find ourselves with a question of courts' power over the presidency that remains unresolved.

In the Twitter case, the Department of Justice argued to the district court that the plaintiffs' case is nonjusticiable because the federal courts lack the power to enjoin the President.<sup>95</sup> For support, the Department relied on the 150-year-old Supreme Court case *Mississippi v. Johnson*, in which the state of Mississippi challenged a series of statutes known as the Military Reconstruction Act that would have imposed military rule on the Confederate states until they allowed black men to vote and ratified the Fourteenth Amendment.<sup>96</sup> The lawsuit sought an injunction prohibiting then-President Andrew Johnson from executing and enforcing the Act. But the Court refused to grant injunctive relief, stating that it had "no jurisdiction of a bill to enjoin the President in the performance of his official duties; and that no such bill ought to be received by us."<sup>97</sup> While the Court conceded that it could force the President to comply with "ministerial" duties in which there was "no room for the exercise of judgment," it stated that "general principles . . . forbid judicial interference with the exercise of Executive discretion."<sup>98</sup>

The Department further argued that the Court reaffirmed this general principle in the 1992 case *Franklin v. Massachusetts*.<sup>99</sup> Speaking for a plurality of four Justices, Justice O'Connor questioned whether the district court in that case had the power to issue an injunction against the President.<sup>100</sup> While acknowledging that the Court might have the power to enjoin the President regarding a "purely 'ministerial' duty" and may issue a subpoena in an ongoing criminal investigation, Justice O'Connor stated that "in general" it could not issue an injunction against the President in matters pertaining to his official duties.<sup>101</sup> Such an order would be "extraordinary," she wrote, and "should . . . raise[] judicial eyebrows."<sup>102</sup> Ultimately,

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94. Complaint at 25, *Knight First Amendment Inst. v. Trump*, No. 17-cv-5205 (S.D.N.Y. July 11, 2017) <https://assets.documentcloud.org/documents/3892179/2017-07-11-Knight-Institute-Trump-Twitter.pdf>.

95. Memorandum of Law in Support of Motion for Summary Judgment, *Knight First Amendment Inst. v. Trump*, No. 17-cv-5205 (S.D.N.Y. Oct. 13, 2017), [https://knightcolumbia.org/sites/default/files/content/Knight\\_v\\_Trupp\\_WH\\_opening\\_brief.pdf](https://knightcolumbia.org/sites/default/files/content/Knight_v_Trupp_WH_opening_brief.pdf).

96. 71 U.S. (1 Wall.) 475, 475 (1867).

97. *Id.* at 501.

98. *Id.* at 499.

99. 505 U.S. 788 (1992).

100. *Id.* at 802.

101. *Id.* at 802–03.

102. *Id.* at 802.

however, she held that the issue could be resolved without reaching this question.<sup>103</sup> Meanwhile, Justice Scalia, who did not join Justice O'Connor's plurality, wrote separately to state explicitly that the Court did not have the power to issue injunctive relief against the President.<sup>104</sup> Such an order, he suggested, would be "incompatible with his constitutional position that he be compelled personally to defend his executive actions before a court."<sup>105</sup>

The debate, however, continues. A group of federal court scholars weighed in as amici curiae in the Twitter case and argued that the government was misreading *Mississippi v. Johnson*.<sup>106</sup> That case, they contended, "did not hold what the Government is arguing now—that there is something unique about the President as a litigant that requires complete judicial abdication."<sup>107</sup> Instead, the scholars stated, courts and commentators today understand *Johnson* to be one of series of rulings that set the stage for what we now refer to as the political question doctrine.<sup>108</sup>

Both sides, moreover, supported their arguments by pointing to cases in which federal courts either have issued<sup>109</sup> or have refused to issue<sup>110</sup> declaratory relief against the President. In a blog post discussing the Twitter case, Professor Stephen Vladeck (who was a signatory to the Federal Courts Scholars' brief<sup>111</sup>) suggested that the question of whether the courts can enjoin the President "may well depend upon the specific facts of each

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103. *Id.* at 803.

104. *Id.* at 826 (Scalia, J., concurring in part and concurring in the judgment).

105. *Id.* at 827.

106. Brief for Federal Courts Scholars as *Amici Curiae* Supporting Plaintiffs at 2, Knight First Amendment Inst. v. Trump, No. 17-cv-5205 (S.D.N.Y. Nov. 6, 2017), <https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/2017.11.06%20Amicus%20Brief%20-%20Federal%20Courts%20Scholars.pdf>.

107. *Id.*

108. *Id.*

109. See Brief for Federal Courts Scholars as *Amici Curiae* Supporting Plaintiffs, *supra* note 106, at 8–11.

110. See Plaintiffs' Reply Memorandum of Law in Support of Plaintiffs' Cross-Motion for Summary Judgment at 10 n.5, Knight First Amendment Inst. v. Trump, No. 17-cv-5205 (S.D.N.Y. Dec. 1, 2017), <https://knightcolumbia.org/sites/default/files/content/Cases/Twitter/ECF%20No.%2056%20-%20Pls.%20SJ%20Reply%20Br.pdf>; Memorandum of Law in Support of Motion for Summary Judgment at 9, Knight First Amendment Inst. v. Trump, No. 17-cv-5205 (Oct. 13, 2017), [https://knightcolumbia.org/sites/default/files/content/Knight\\_v\\_Tump\\_WH\\_opening\\_brief.pdf](https://knightcolumbia.org/sites/default/files/content/Knight_v_Tump_WH_opening_brief.pdf).

111. Brief for Federal Courts Scholars as *Amici Curiae* Supporting Plaintiffs, *supra* note 106.

individual dispute.”<sup>112</sup> An appropriate case for injunctive relief, he stated, would be one “in which all of the equitable factors militate in favor of such relief, in which no subordinate can be enjoined to produce the same result, and in which the dispute is otherwise justiciable.”<sup>113</sup>

The district court in the Twitter case ruled against President Trump,<sup>114</sup> and the government is appealing.<sup>115</sup> In her ruling, Judge Naomi Reice Buchwald rejected the Department of Justice’s argument that the courts lack any power to enjoin the President and suggested that a court order requiring the President to unblock individual Twitter users would have only “minimal” effect on his executive prerogatives.<sup>116</sup> She stated that “we find entirely unpersuasive the Government’s parade of horrors regarding the judicial interference in executive affairs presented by an injunction directing the President to comply with constitutional restrictions.”<sup>117</sup> Nonetheless, she did not issue an injunction and, instead, concluded that declaratory relief would be sufficient.<sup>118</sup>

If enjoining the President does involve a balancing approach of sorts, the question then becomes how that balance tips in cases involving violations of individual First Amendment rights. In *Fitzgerald*, the Court stated that it needed to balance the constitutional interest against the potential impact of a court order on the work of the President.<sup>119</sup> For when judicial action against the President would serve “broad public interests,” the Court explained, such action does not violate the separation of powers but helps maintain the “proper balance” between the branches.<sup>120</sup> Because the Court was concerned about the “personal vulnerability” of the President to damage suits, it is possible that the Court would consider claims for

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112. Steve Vladeck, *Do Federal Courts Lack the Power to Directly Enjoin the President?*, JUST SECURITY (Aug. 14, 2017), <https://www.justsecurity.org/44201/federal-courts-lack-power-enjoin-president/>.

113. *Id.*

114. *See* Memorandum and Order, *supra* note 62, at 1.

115. *See* Notice of Appeal, Knight First Amendment Inst. v. Trump, No. 17-cv-5205 (S.D.N.Y. June 4, 2018), <https://knightcolumbia.org/sites/default/files/content/Trump%20-%20ECF%20No.%2073%20-%20Defs.%20Notice%20of%20Appeal.pdf>

116. *See* Memorandum and Order, *supra* note 62, at 70.

117. *See id.* at 72.

118. The plaintiffs in the case have reported that they were unblocked from the @realDonaldTrump account soon after the court’s ruling. Nick Jack Pappas (@Pappiness), TWITTER (June 4, 2018, 9:20 PM), <https://twitter.com/Pappiness/status/100385402343359360>.

119. *Nixon v. Fitzgerald*, 457 U.S. 731, 754 (1982).

120. *Id.*

injunctive relief to be less burdensome on the executive function. Then again, the fact that *Fitzgerald* itself involved an allegation of a free speech violation might suggest that such First Amendment claims do not, in the eyes of the Court, serve sufficiently broad public interests.

### *III. Securing the Right to Sue*

Nothing in the preceding discussion is meant to suggest that the President is—or should be—immune from lawsuits alleging First Amendment violations. To the contrary, it is entirely unacceptable for the President to be allowed to violate individuals' free speech and free press rights. The harms to both the speakers involved and the public at large are deeply concerning. A President who is free to use the power of his pulpit and his office to censor, silence, and chill critical speech violates our most basic principles of free expression.

Until recently, however, the tacit pressures of political norms have managed to keep these harms largely in check. The problem, of course, is that violating longstanding norms and traditions appears to be one of President Trump's favorite pastimes. Indeed, he has shown little concern for our country's traditions of an uninhibited and robust public debate.

Thus, the ability of private individuals and groups to stand up to the President in the face of First Amendment violations is just one of several ways in which President Trump is putting our Constitution through a legal stress test. Luckily, while the path for suing the President for First Amendment violation is, in many ways, uncharted, the strongest arguments are on the side of the speakers.

In this Part, I conclude by offering a few thoughts on how to best secure the rights of free expression through a careful drafting of claims, constitutional interpretation, reliance on precedent, and possible legislative action.

#### *A. Constitutional Workarounds*

It is entirely possible that the issue of whether the First Amendment even applies to the President will end not with a bang but a whimper. The strict-textualist argument remains a fringe theory and is rarely mentioned, let alone thoroughly analyzed. The courts have applied the amendment to the judiciary and to lower executive actors with little to no discussion of the textual issue. The Court may do the same with the presidency and simply enforce the First Amendment against the President without fanfare. In fact, the Court recently signaled that it might take such a path when it agreed to hear a challenge to the latest version of President Trump's "travel ban"

against several predominantly Muslim countries. In its order granting certiorari, the Court specifically asked the parties to address whether the executive order violates the Establishment Clause. Throughout the briefing and oral argument, moreover, neither the Court nor the Department of Justice raised the strict-textualist argument.<sup>121</sup> Ultimately, the Court held that the executive order did not violate the First Amendment.<sup>122</sup> In doing so, it concluded that a variety of statements President Trump made, which the plaintiffs argued showed that there was religious animus behind the order, were not relevant.<sup>123</sup> Instead, the Court stated that judicial deference to the executive was required.<sup>124</sup>

If the Congress-only argument is raised, the blueprint for rebutting it can be found in a rare judicial analysis of the issue by then-Judge Michael McConnell of the Tenth Circuit Court of Appeals in the 2006 case *Shrum v. City of Coweta*.<sup>125</sup> In that case, which involved a First Amendment challenge against a city police chief, the Tenth Circuit concluded that the amendment does apply to executive action.<sup>126</sup> Although the inclusion of the word “Congress” at the beginning of the First Amendment was intentional, the court stated, the drafters did not mean to allow the other two branches to interfere with free speech.<sup>127</sup> The court instead suggested that the framers of the First Amendment included the language about Congress for two reasons: “[T]o limit the reach of the First Amendment . . . to the federal government, and to set forth these freedoms as a freestanding Bill of Rights, separate from the main body of the constitutional document.”<sup>128</sup>

The court linked the amendment’s wording to an early version of the religious liberty draft amendment, which originally read, “no religion shall be established by law, nor shall the equal rights of conscience be infringed.”<sup>129</sup> According to the court, ambiguous wording scared a representative from Connecticut, who sought to ensure the survival of his

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121. Amy Howe, *Justices to Review Travel Ban Challenge*, SCOTUS BLOG (Jan. 19, 2018, 3:53 PM), <http://www.scotusblog.com/2018/01/justices-review-travel-ban-challenge/>.

122. *Trump v. Hawaii*, No. 17-965, slip op. at 38 (U.S. June 26, 2018) (Roberts, C.J.).

123. *Id.* at 13.

124. *Id.* at 31. Furthermore, the lawsuit also was brought against other lower executive actors. Thus, even if the Court had ruled the other way, it potentially could have avoided addressing the question of enjoining the President.

125. 449 F.3d 1132 (10th Cir. 2006).

126. *Id.* at 1140.

127. *Id.* at 1142.

128. *Id.* at 1141.

129. *Id.* at 1142.

state's compulsory taxation in support of an official church.<sup>130</sup> In response to the congressman's expressed concern that federal lawsuits would hinder Connecticut's longstanding establishment of religion, the drafting committee added the words "Congress shall make no law" to the proposed amendment.<sup>131</sup>

Professor Denbeaux and others have characterized this response as a means of ensuring that federal courts could rule in favor of an established religion if the state law was ever challenged.<sup>132</sup> But the Tenth Circuit was not convinced; instead, it asserted that the framers intended to remove any doubt as to the First Amendment's inapplicability to state governments.<sup>133</sup> Professor Akhil Amar agrees that the amendment was designed to limit the federal government but not the states, arguing that only Congress was prohibited from making a law because only Congress had been granted lawmaking powers.<sup>134</sup>

The court's opinion also highlighted how the legislature interpreted the language less than half a century later. A mere four and a half decades after the passage of the Bill of Rights, the Senate "roundly rejected" and "ridicule[d]" a suggestion made by Senator Gabriel Moore that the First Amendment applied only to laws passed by Congress because of the Amendment's plain language.<sup>135</sup> Professor Eugene Volokh, moreover, later identified three cases from the same time period in which federal courts appeared to consider themselves bound by the First Amendment.<sup>136</sup> Of course, a committed textualist might dismiss both the Tenth Circuit and Professor Denbeaux's findings and "say that the plain meaning of the First Amendment trumps, whether or not the plain meaning comports with what the drafters had in mind."<sup>137</sup>

Even if the strict-textualist approach to the First Amendment gains unexpected traction, though, another constitutional provision might

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130. *Id.*

131. *Id.*

132. Denbeaux, *supra* note 36, at 1169.

133. *Shrum*, 449 F.3d at 1142.

134. AKHIL REED AMAR, *AMERICA'S CONSTITUTION: A BIOGRAPHY* 319 (2005) ("By turning Article I's 'Congress shall . . . make all Laws' language into 'Congress shall make no law' phraseology, the First Amendment underscored that Congress lacked authority under the necessary-and-proper clause, or any other Article I enumeration, to censor expression in the states.").

135. *Shrum*, 449 F.3d at 1142.

136. Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 257–58 (2010).

137. Hemel, *supra* note 39, at 604.

accomplish the same goal—the Fifth Amendment’s Due Process Clause. There is no question that executive branch officials cannot deprive any person “of life, liberty, or property, without due process of law.” Therefore, “if the First Amendment forbids the making of ‘law’ that infringes the freedom of speech,” the Tenth Circuit explained, “and the Due Process Clause forbids the executive from taking away liberties except pursuant to ‘law,’ it follows that the First Amendment protects against executive as well as legislative abridgement.”<sup>138</sup> Others agree that it is a substantive due process violation when the President violates the First Amendment. Professor Daniel Hemel, for example, suggests that many cases alleging that the executive branch has violated the First Amendment should be recast as due process violations.<sup>139</sup> But, he states, “the practical result is the same in either event.”<sup>140</sup>

The Due Process Clause might also provide a route to trace the First Amendment violation back to Congress. Professor Hemel suggests that many First Amendment violations by executive actors are rooted in a power bestowed by statute.<sup>141</sup> Thus, as Professor David Strauss described the argument, “If Congress has authorized the President to abridge the freedom of speech, then Congress has violated the First Amendment.”<sup>142</sup> In the case of President Trump, however, this approach is unlikely to help, because his questionable acts tend to occur as part of his independent speech.

Most likely, plaintiffs will need to do nothing more than rely on the longstanding and widely held conviction that the First Amendment includes the President. This interpretation is so strongly recognized, several scholars have argued, that it is built “in the fabric of the law.”<sup>143</sup> The Congress-only idea, according to Professor Jack Balkin, simply does not make sense “either at the time of the founding or today.”<sup>144</sup> And any other conclusion, Professor Strauss argued, “would require a radical revision of several well-established doctrines.”<sup>145</sup>

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138. *Shrum*, 449 F.3d at 1143.

139. Hemel, *supra* note 39, at 605.

140. *Id.*

141. *Id.*

142. David A. Strauss, *Foreword: Does the Constitution Mean What It Says?*, 129 HARV. L. REV. 1, 32 (2015).

143. *Id.* at 61.

144. JACK M. BALKIN, *LIVING ORIGINALISM* 205 (2011).

145. Strauss, *supra* note 142, at 34 n.181.

Nonetheless, given the uncertainty that exists, the safest move would be for plaintiffs to include both a First Amendment claim and a Fifth Amendment due process claim.

### *B. Rethinking Precedent*

While the strict-textualist reading of the First Amendment may be a distant threat, the issue of finding a remedy against the President is, perhaps, less remote. Indeed, the Department of Justice raised the lack-of-remedy argument in the Twitter case.<sup>146</sup> At first blush, the Department's argument appears strong. The Court was quite clear in *Nixon v. Fitzgerald* that monetary damages were not available in matters related to the President's official acts.<sup>147</sup> And in *Mississippi v. Johnson*, the Court stated that courts lack jurisdiction "to enjoin the President in the performance of his official duties."<sup>148</sup>

A closer examination of precedent on this issue, however, reveals that the Court's holdings and analysis in these cases is more nuanced than the Department suggests. As the federal courts scholars explain in their brief, contrary to what the Department suggests, the *Johnson* case does not support a broad rule prohibiting the courts from enjoining the President.<sup>149</sup> Rather, the decision as it is widely understood reflects "the hesitance of the judiciary to wade into a significant interbranch dispute in the fragile aftermath of the Civil War"<sup>150</sup> and "cannot be divorced from its historical context."<sup>151</sup>

What the Court's precedents suggest, the scholars argue, is not a rule of blanket presidential immunity from injunctions, but simply a reminder to the courts to proceed thoughtfully.<sup>152</sup> The power of the courts to enjoin the President "is rarely exercised for reasons grounded in judicial prudence and comity—respect for the office of the Presidency demands it."<sup>153</sup>

Practically, moreover, it often makes sense for such cases to be brought against defendants other than the President if possible.<sup>154</sup> But the Court in

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146. Vladeck, *supra* note 112.

147. 457 U.S. 731, 754 (1982).

148. 71 U.S. 475, 501 (1867).

149. Brief for Federal Courts Scholars as *Amici Curiae* Supporting Plaintiffs, *supra* note 106.

150. *Id.* at 2.

151. *Id.* at 3.

152. *Id.*

153. *Id.* at 1.

154. See Jonathan R. Siegel, *Suing the President: Nonstatutory Review Revisited*, 97 COLUM. L. REV. 1612, 1686 (1997) (discussing the practice of nonstatutory review).

*Clinton v. Jones* affirmed that “it is settled law that the separation-of-powers doctrine does not bar every exercise of jurisdiction over the President of the United States.”<sup>155</sup> And as the federal courts scholars stated, “[T]he fact that courts should proceed cautiously before exercising equitable power over the President directly does not mean that courts lack such power, or that they may not exercise it in an appropriate case in which no other means exist to enforce federal law.”<sup>156</sup>

The potential First Amendment claims against President Trump arguably are just the types of “appropriate cases” the scholars describe. The President often has acted alone and, thus, there may be no subordinate officer involved. Therefore, only the President can provide an effective remedy.

Even in the context of civil damages, the Court’s reasoning in *Nixon v. Fitzgerald* supporting the wisdom of expansive presidential immunity is proving to be flawed. The Court in *Fitzgerald* assured us that shielding the President from civil lawsuits “will not leave the Nation without sufficient protection against misconduct on the part of the Chief Executive.”<sup>157</sup> Yet several of the Court’s suggested checks on the President’s behavior now sound dubious.

The Court, for example, suggested that the people have the ability (through their elected representatives) to impeach the President.<sup>158</sup> But the threat of impeachment is extreme and seems unlikely to be utilized by Congress or to deter the President. The Court also proposed that more informal checks offer sufficient protection. These include the “constant scrutiny” of the press and “vigilant oversight” by Congress. The Court also relies on the President’s desire to win reelection and “maintain prestige,” as well as “a President’s traditional concern for his historical stature.”<sup>159</sup> In the Court’s view, these checks will apply with greater force to the President than to other government officials.<sup>160</sup>

Yet these types of protections against presidential misconduct work on the assumption that the President will follow constitutional and political norms—the exact kind of norms President Trump blatantly disregards. The current climate exposes just how insufficient such soft pressures are when

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155. 520 U.S. 681, 705 (1997) (quoting *Nixon v. Fitzgerald*, 457 U.S. 731, 753–54 (1982)).

156. Brief for Federal Courts Scholars as *Amici Curiae* Supporting Plaintiffs, *supra* note 106, at 2.

157. *Fitzgerald*, 457 U.S. at 757.

158. *Id.*

159. *Id.*

160. *Id.*

faced with a President determined to use the full power of his office to silence critics.

Perhaps most importantly, the Court in *Fitzgerald* failed to consider the unique importance of protecting expressive rights from presidential abuse. Instead, the Court declared broad presidential immunity that would apply to all types of private claims for damages.<sup>161</sup> But relying on political checks to protect expressive rights is especially problematic. Political checks, by their nature, are contingent upon the existence of an informed populace and a public debate that is “uninhibited, robust, and wide-open.”<sup>162</sup> This public debate, moreover, might include “vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.”<sup>163</sup> Likewise, a free press “plays a unique role as a check on government abuse”<sup>164</sup> and “will often serve as an important restraint on government.”<sup>165</sup> If the President is free to stifle, censor, or chill free speech and a free press, the political process becomes a less effective safeguard.

To the *Fitzgerald* Court, the President’s immense power and responsibilities increased the need to protect him from civil suits. Yet the opposite is true when it comes violations of expressive rights. The President’s unparalleled power and ability to make exceedingly important decisions about national security, economic policy, military action, and social matters is exactly why he should not be free to stifle his critics. As the Court explained in the 1977 case *Butz v. Economou*, in which it rejected absolute immunity for all federal officials exercising discretion,

[Absolute immunity for] the greater power of such officials affords a greater potential for a regime of lawless conduct. Extensive Government operations offer opportunities for unconstitutional action on a massive scale. In situations of abuse, an action for damages against the responsible official can be an important means of vindicating constitutional guarantees.<sup>166</sup>

If the Court remains concerned about the potential financial burden of suits for monetary damages against the President, it could instead award only nominal damages. Nominal damages, as Professor Helen Norton has

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161. *Id.*

162. *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

163. *Id.*

164. *Leathers v. Medlock*, 499 U.S. 439, 447 (1991).

165. *Minneapolis Star & Tribune Co. v. Minn. Comm’r of Revenue*, 460 U.S. 575, 585 (1983).

166. 438 U.S. 478, 506 (1978).

explained, “can serve both expressive and deterrent functions.”<sup>167</sup> In the context of suits against state actors, for example, the Court has observed that awards of nominal damages can show that “the law recognizes the importance to organized society that those rights be scrupulously observed.”<sup>168</sup>

### C. Congressional Statute

Finally, perhaps the most effective way to secure the right to sue the President for First Amendment violations would be for Congress to speak up. Congress could pass a statute that provides a vehicle for suits seeking recovery against the President for First Amendment violations arising out of his official conduct.

Congressionally created causes of action against government actors for constitutional violations are, of course, common. The most prominent arise out of section 1983 of the Civil Rights Act of 1871,<sup>169</sup> which allows individuals to sue state and local officials for monetary damages when their constitutional rights are violated. Congress has never passed a federal counterpart to section 1983, however, and instead plaintiffs who wish to sue federal officers for constitutional violations usually must rely on a theory articulated by the Court in the 1971 case *Bivens v. Six Unknown Federal Narcotics Agents*.<sup>170</sup> In *Bivens*, the Court inferred a cause of action for monetary damages against a federal official if no other federal action provided a remedy.<sup>171</sup> *Bivens*, however, involved a Fourth Amendment violation, and the Court has never held that *Bivens* extends to First Amendment claims.<sup>172</sup> Even if it did, moreover, the Court’s decision in *Nixon v. Fitzgerald* would appear to prevent such suits against the President.

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167. Helen Norton, *Remedies and The Government’s Constitutionally Harmful Speech*, 9 CONLAWNOW 49, 61 (2018); see also JAMES PFANDER, CONSTITUTIONAL TORTS AND THE WAR ON TERROR xviii (2017) (“[T]he federal courts should focus on the narrow (but supremely important) task of evaluating the legality of official conduct.”).

168. *Cary v. Piphus*, 435 U.S. 247, 266 (1978).

169. 42 U.S.C. § 1983 (2012) (“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . .”).

170. 403 U.S. 388 (1971).

171. *Id.* at 397.

172. *Reichle v. Howards*, 566 U.S. 658, 663 (2012).

But if Congress provided an explicit statutory cause of action, this could change. The *Fitzgerald* Court specifically left open the question of whether the President would have immunity “if Congress expressly had created a damages action against the President of the United States.”<sup>173</sup> Instead, the Court concluded, “our holding today need only be that the President is absolutely immune from civil damages liability for his official acts in the absence of explicit affirmative action by Congress.”<sup>174</sup>

This hesitation to infer a cause of action against the President without clear guidance from Congress is consistent with other areas of law. When considering the scope of the Administrative Procedure Act, for example, the Court was reluctant to assume that the Act applied to the President without “an express statement by Congress.”<sup>175</sup> As the Court explained, “Out of respect for the separation of powers and the unique constitutional position of the President, we find that textual silence is not enough to subject the President to the provisions of the APA.”<sup>176</sup>

It is possible that an explicit statement from Congress would still not resolve the Court’s separation of powers concerns,<sup>177</sup> but the Court’s approach to *Bivens* claims has shown that it is primarily concerned with the separation of powers between the judicial and the legislative branches—not the executive.<sup>178</sup> Congress should, therefore, make it clear that it is unacceptable for the President of the United States to violate First Amendment rights.

### Conclusion

The freedoms of speech and press protected by the First Amendment are among our most cherished constitutional liberties. They function, moreover, as an important structural check on our most powerful government actors. There is, of course, no single government actor in the United States who is more powerful than the President, making the right to comment on or

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173. *Nixon v. Fitzgerald*, 457 U.S. 731, 784 n.27 (1982).

174. *Id.*

175. *Franklin v. Massachusetts*, 505 U.S. 788, 800–01 (1992).

176. *Id.*

177. *See Fitzgerald*, 457 U.S. at 792 (White, J. dissenting) (“We are never told, however, how or why congressional action could make a difference. It is not apparent that any of the propositions relied upon by the majority to immunize the President would not apply equally to such a statutory cause of action; nor does the majority indicate what new principles would operate to undercut those propositions.”).

178. *See Anya Bernstein, Congressional Will and the Role of the Executive in Bivens Actions: What Is Special About Special Factors?*, 45 IND. L. REV. 719, 722 (2012).

criticize him and his policies all the more vital. Yet without an effective way to sue the President for First Amendment violations, he would be free to silence and intimidate critics. Political checks, moreover, have proven ineffective and leave individual plaintiffs without a remedy for their personal harms. When considering First Amendment lawsuits against the President, the courts should take into account the potential damage to our public debate if the President cannot be held accountable for violating the expressive rights of the people.