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Addiction and Liberty

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ADDICTION AND LIBERTY

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This Article explores the interaction between addiction and liberty and identifies a firm legal basis for recognition of a fundamental constitutional right to freedom from addiction. Government interferes with freedom from addiction when it causes addiction or restricts addiction treatment, and government may protect freedom from addiction through legislation empowering individuals against private actors' efforts to addict them without their consent. This Article motivates and tests the boundaries of this right through case studies of emergent threats to liberty made possible or exacerbated by new technologies and scientific understandings. These include certain state lottery programs, addiction treatment restrictions, and smartphone applications.

The right to freedom from addiction is supported by the nation's history and tradition. In addition to addressing emergent threats to the freedom of thought, the right links together longstanding aspects of constitutional law assumed to be sui generis*, including longstanding (until the 1970s) constitutional prohibitions on state lotteries, the exemption of gambling from direct First Amendment protection, and heightened state interests in controlling addictive drugs. The right to freedom from addiction is also an antisubordinating liberty because it connects the historically marginalized interests of people with substance use and gambling disorders with the increasingly mainstream movement to regulate big tech.*

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INTRODUCTION

Read this Article. I mean straight through, without checking your email or looking at your phone. If you wanted to, do you think you could? Have you even once this year spent an hour reading a paper or book without distraction?

If you are reading this in the early or mid-2020s, the odds are good that your answer is "no" because you have been conditioned to stop what you are doing every few minutes to look at your smartphone.[1] We live in an era of psychological domination in which profound, pervasive threats to liberty work not through physical constraint but through mental compulsion. This is indisputably, tragically true for the more than forty million Americans who suffer from compulsive gambling disorder, substance use disorder, or alcohol use disorder.[2] It is also

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1 *See* Trevor Wheelwright, *2022 Cell Phone Usage Statistics: How Obsessed Are We?*, REVIEWS.ORG (Jan. 24, 2022), https://www.reviews.org/mobile/cell-phone-addiction [https://perma.cc/L72N-YCCX] (finding that the average cell phone user checked their phone 344 times per day or "once every 4 minutes" and that 47% of them described themselves as "addicted" to their phones); *infra* notes 156–178 and accompanying text (collecting sources on intentional design of smart phone apps to condition compulsive use).

2 SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN., HIGHLIGHTS FOR THE 2020 NATIONAL SURVEY ON DRUG USE AND HEALTH 2, https://www.samhsa.gov/data/sites/default/files/2021-10/2020_NSDUH_Highlights.pdf [https://perma.cc/PA6V-F3CF] (last visited Nov. 27, 2022) (noting that, in 2020, 40.3 million Americans suffered from substance use disorder, including either alcohol or illicit drugs). SAMHSA does not track gambling addiction prevalence, but researchers estimate that between 0.42% and 4% of United States residents suffer from a

importantly true (albeit not as indisputably or as tragically) for that half of Americans who describe themselves as "addicted" to one or more technologies including social media and loot box video games.[3]

The Supreme Court has repeatedly described "freedom of thought" as a key aspect of the liberty that the U.S. Constitution is supposed to protect.[4] But unlike other aspects of liberty, like control over one's reputation[5] or the right to die,[6] courts have not yet constructed a doctrine to put the principle of freedom of thought into practice. Constitutional law doctrine and scholarship have instead assumed, with rare exception,[7] that the freedom of thought is intrinsically inviolable as a practical matter, rendering direct doctrinal protection unnecessary.[8]

What about the fact that external stimuli like nicotine or a slot machine's sensory stimuli and staggered, uncertain rewards can "trigger or accelerate" an addiction,[9] i.e., a persis-

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pathological gambling disorder. Donald W. Black & Martha Shaw, *The Epidemiology of Gambling Disorder*, *in* GAMBLING DISORDER 29, 29 (Andreas Heinz, Nina Romanczuk-Seiferth & Marc N. Potenza eds., 2019). For concerns that existing estimates may be conservative, see John Warren Kindt, *The Gambling Industry and Academic Research: Have Gambling Monies Tainted the Research Environment?*, 13 S. CAL. INTERDISC. L.J. 1, 43–44 (2003) (raising connections between research environment and industry influence).

3 Wheelwright, *supra* note 1.

4 *See infra* notes 33–43 and accompanying text (collecting sources).

5 *See* Paul v. Davis, 424 U.S. 693, 708–09 (1976) (articulating "stigma plus" test for deprivation of reputational liberty).

6 *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 281 (1990) (recognizing patient's liberty interest in rejecting life-sustaining treatment).

7 Nita Farahany and Marc Blitz have recognized emerging threats to "cognitive liberty," such as mind-reading technology, and have called for affirmative constitutional protection. Nita A. Farahany, *The Costs of Changing Our Minds*, 69 EMORY L.J. 75, 98–108 (2019) [hereinafter Farahany, *Costs of Changing*]; Nita A. Farahany, *Incriminating Thoughts*, 64 STAN. L. REV. 351, 406 (2012) [hereinafter Farahany, *Incriminating Thoughts*]; Marc Jonathan Blitz, *Freedom of Thought for the Extended Mind: Cognitive Enhancement and the Constitution*, 2010 WIS. L. REV. 1049, 1068–73. Their work is an indispensable building block for this Article but, as explained *infra* Part I, even Farahany and Blitz do not explore the interaction between addiction and liberty, instead focusing on other potential threats to freedom of thought.

8 *See* Jones v. Opelika, 316 U.S. 584, 618 (1942) (Murphy, J., dissenting) ("Freedom to think is absolute of its own nature; the most tyrannical government is powerless to control the inward workings of the mind."), *adopted as the Opinion of the Court on reh'g*, 319 U.S. 103 (1943); *infra* notes 55–57 (describing presumption of inviolability in legal scholarship and associated assumption of preference exogeneity in Twentieth-Century Synthesis).

9 NATASHA DOW SCHÜLL, ADDICTION BY DESIGN: MACHINE GAMBLING IN LAS VEGAS 16–17 (2012) ("[S]ome objects, by virtue of their unique pharmacologic or structural characteristics, are more likely than others to trigger or accelerate an addiction.").

tent, repetitive urge to engage in a harmful behavior?[10] Constitutional law doctrine and scholarship have heretofore ignored these possibilities altogether. Unfortunately for Americans' literal freedom of thought, government and private actors have not. Unconstitutional in most states throughout the nineteenth century and well into the twentieth, states implemented lotteries in the past several decades as a way to derive revenue, as it turns out, from their poorest residents.[11] Scholars and advocates explain that video gambling machines employed by state lotteries are built to take advantage of mental vulnerabilities in players revealed by psychological research into operant conditioning.[12] Others claim that big tech companies have built their business models around the same techniques.[13] Meanwhile, a range of actors, legal and illegal, have aggressively marketed increasingly potent addictive substances nationwide, such as nicotine, oxycodone, and fentanyl.[14] And although medicine has recently established a broad evidence base for addiction treatments that free patients from compulsion, such treatments are unavailable to many patients because of legal restrictions that reflect longstanding stigma surrounding mental illness.[15]

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10 There is significant variation in definitions of addiction, especially between medical and lay understandings of the "harm" that must be associated with a compulsive behavior to render it n "addiction." *See infra* note 263 (detailing that medicine has an objective understanding of harm that requires functional impairment, whereas an ordinary understanding has a subjective understanding on which any behavior that is contrary to a person's overall goals is sufficiently harmful). Nonetheless, as explained *infra*, variations in the meaning of addiction occur within a common consensus that addiction entails repetitive urges to engage in a harmful behavior. *See also infra* note 270 and accompanying text (raising but remaining agnostic on the question of whether courts implementing freedom from addiction could and should adopt the narrower, medicalized test in judging whether compulsive behavior is sufficiently harmful to constitute addiction).

11 *See generally* James Alm, Michael McKee & Mark Skidmore, *Fiscal Pressure, Tax Competition, and the Introduction of State Lotteries*, 46 NAT'L TAX J. 463 (1998) (discussing origins); Howard Ctr. for Investigative Journalism, *Mega Billions: The Great Lottery Wealth Transfer*, https://cnsmaryland.org/lottery/ [https://perma.cc/C4EW-ALBZ] (last visited Nov. 27, 2022) (listing a series of articles).

12 STOP PREDATORY GAMBLING, LIVING IN TRUTH: LOTTERIES WORSEN OPPORTUNITY, REDUCE MOBILITY OUT OF POVERTY AND DEEPEN BUDGET PROBLEMS 5 (2020) ("Lottery gambling games are designed to entice citizens to keep spending and losing, exploiting aspects of human psychology and inducing impulsive, irrational behavior." (citing SCHÜLL, *supra* note 9)).

13 *Infra* subpart II.C (describing addictive technology).

14 *E.g.*, SAM QUINONES, DREAMLAND: THE TRUE TALE OF AMERICA'S OPIATE EPIDEMIC 55, 124–27 (2015) (explaining entrepreneurial tactics of heroin dealers and Perdue pharmaceuticals).

15 *See infra* subpart II.B (describing treatments).

This Article is the first to explore the interaction between addiction and liberty. It illuminates this interaction and maps its dimensions with three case studies of threats to liberty that operate through addiction. This Article then analyzes the legal prospects for doctrinal recognition of these threats, sketches possible test cases, and assesses the normative desirability of constitutional protection. Its ultimate thesis is that constitutional law can and should, for three main reasons, recognize freedom from addiction as a fundamental liberty interest. Such recognition is necessary to address significant modern-day threats; recognition would be consistent with the rule of law; and recognition would advance the bedrock values of autonomy and antisubordination. In other words, this Article establishes that the "liberty" protected by the U.S. Constitution entails not only a right to freedom from bodily restraint but also a right to freedom from mental restraint, that is, a right to freedom from addiction.[16]

In application, the right to freedom from addiction manifests as a legal tool to protect Americans' freedom of thought in three domains. First, where government causes or exacerbates addiction in the population (as many states allegedly do through their lotteries), constitutional protection for freedom from addiction provides a basis for judicial scrutiny under the Fifth and Fourteenth Amendments. Second, where government restricts Americans' ability to free themselves from addiction (as many states allegedly do by restricting access to or prohibiting various forms of addiction treatment), constitutional protection for freedom from addiction forces it to justify such limitations. Third, where private actors cause or exacerbate addiction (as social media platforms and other new technologies allegedly do[17]), constitutional recognition of freedom from addiction does not provide a direct check, but it does bolster the case for a government interest justifying certain protective regulations as against First Amendment challenge.[18]

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16 This Article focuses on the interaction between addiction and the liberty protected by the Due Process Clause of the Fifth and Fourteenth Amendments. It raises, but does not explore, the possibility that addiction might implicate additional constitutional protections including the right to informed consent (insofar as government action that induces addiction causes a disease that includes physical, structural changes in the body) and freedom of speech (insofar as addiction entails compelled thoughts). *See infra* notes 202–205 and accompanying text.

17 *See infra* subpart II.C (describing addictive technology).

18 *See infra* subpart III.C (describing that the right to freedom from addiction would not be directly enforceable against private actors, but its recognition would bolster the case for the constitutionality of certain government regulations of such actors). Congress has begun to explore legislative responses to various harms

Advocates could (and should) press for freedom from addiction separately in each of these domains. They have a common interest in doing so because establishing the underlying liberty interest in any one of these domains would be an important precedent toward its establishment in the other domains.[19]

So long as constitutional law assumes that thought is inviolable, those concerned that government or private actors are today causing severe, unjustified harms by triggering addiction or restricting addiction treatment will not even have the opportunity to put their claims to the proof (and to be sure, such concerns raise questions of proof). Constitutional law, however, need not be so constrained. As this Article's doctrinal component explains, there is a firm legal basis to recognize a fundamental liberty interest in freedom from addiction.

Although the current Supreme Court's embrace of constitutional rights is inconsistent (as the Court itself recently acknowledged in *Dobbs v. Jackson Women's Health Organization*[20]), the right to freedom from addiction satisfies the restrictive test the Court articulated in *Washington v. Glucksberg* (and applied in *Dobbs*).[21] The right to freedom from addiction has a basis in history and tradition. Furthermore, the Supreme Court and lower courts have tended to look favor-

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associated with social media and new technologies. *E.g.*, Social Media Addiction Reduction Technology Act ("SMART Act"), S. 2314, 116th Cong. (2019); *Algorithms and Amplification: How Social Media Platforms' Design Choices Shape Our Discourse and Our Minds: Hearing Before the Subcomm. on Priv., Tech. & the L. of the H. Comm. on the Judiciary*, 117th Cong. (2021); *Optimizing for Engagement: Understanding the Use of Persuasive Technology on Internet Platforms*: *Hearing Before the Subcomm. on Commc'ns, Tech., Innovation & the Internet. of the S. Comm. on Com., Sci. & Transp.*, 116th Cong. (2019). Legal scholars studying such policy responses have noted that the U.S. Constitution threatens to act as a significant barrier to these reforms. *See* James Niels Rosenquist, Fiona M. Scott Morton & Samuel N. Weinstein, *Addictive Technology and Its Implications for Antitrust Enforcement*, 100 N.C. L. REV. 431, 441 (2022) (discussing how addictive technology alters market power and antitrust analyses); Kyle Langvardt, *Regulating Habit-Forming Technology*, 88 FORDHAM L. REV. 129, 152 (2019) (describing possible regulatory responses to addictive design but noting potential First Amendment obstacles). This Article ultimately articulates a pathway through which targeted aspects of legislation addressing addictive technology could overcome this barrier. *See infra* section III.C.3 (sketching a proposal).

19 *See infra* Part IV (discussing alignment of interests created by right to freedom from addiction).

20 142 S. Ct. 2228, 2262–63, 2263 n.48 (2022) (listing decisions vacillating as to constitutional protection for particular rights).

21 Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (detailing that when a court assesses a fundamental right, it looks to whether the right is "deeply rooted in this Nation's history and tradition" and can be defined with precision) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion)); *Dobbs*, 142 S. Ct. at 2242.

ably on novel constitutional arguments where, as here, what is "new" is not the right being asserted but, instead, the threats that now make necessary doctrinal protection of that right.[22] Moreover, the political valence of freedom from addiction, if any, is cross-cutting,[23] so the possibility that some judges' embrace of rights may depend on political considerations rather than (or in addition to) legal ones that bolster (rather than undermine) the prospects for judicial protection of the right to freedom from addiction.

This Article's proposed right to freedom from addiction is legally supportable, yet the Supreme Court's under-specified test for defining liberty interests may leave room for courts to reject this right, disregarding historical protections and leaving new threats unaddressed. For this right to have a future, social movements will need to pursue it and courts will need to be persuaded that recognition furthers underlying constitutional values. The two most fundamental constitutional values are liberty and equality, and the right to freedom from addiction advances both. This Article's normative component explains that freedom from addiction is what Kenji Yoshino calls an "antisubordination liberty,"[24] that is, by advancing liberty it also advances the value of antisubordination that many courts, advocates, and scholars see as central.[25] The most severe deprivations of liberty that work through addiction target subordinated groups whose interests are unlikely to be served in the political process.[26] (This is especially so for persons suffering from addiction, who typically lack economic resources that can be a key means of accessing and influencing policymakers, and are usually a prerequisite to impact litigation.) The fact that legislatures justify the harms to marginalized groups caused by

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22 *E.g.*, Carpenter v. United States, 138 S. Ct. 2206, 2214 (2018) ("As technology has enhanced the Government's capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to 'assure[ ] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.'" (quoting Kyllo v. United States, 533 U.S. 27, 34 (2001)).

23 *See infra* subpart III.D (discussing political considerations).

24 Kenji Yoshino, *A New Birth of Freedom?*: Obergefell v. Hodges, 129 HARV. L. REV. 147, 174 (2015) (drawing the concept of antisubordination liberty from Justice Kennedy's opinion in *Obergefell*).

25 United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938) (noting the need for heightened constitutional scrutiny of laws burdening discrete and insular minorities); Jack M. Balkin & Reva B. Siegel, *The American Civil Rights Tradition: Anticlassification or Antisubordination?*, 58 U. MIAMI L. REV. 9, 9 (2003) (describing the antisubordination tradition as arguing "that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups").

26 *Infra* Part IV.

state lotteries by citing the revenue lotteries raise for civic use illustrates this subordinating dynamic.

Further, the concept of freedom from addiction is antisubordinating as a category because it yokes the increasingly powerful, politically diverse interests of Americans concerned about technology addiction with the historically marginalized interests of Americans who suffer from mental illnesses. The concept of freedom from addiction thereby illustrates Professor Reva Siegel's insight that constitutional categories construct political interest groups (and vice versa)[27] and harnesses Professor Derrick Bell's insight that the interest of marginalized groups may only be advanced when they converge with the interests of the majority.[28] The right to freedom from addiction can serve as a point of convergence by aligning the interests of the increasingly mainstream, bipartisan movement to regulate addictive technology with the long-subordinated interests of people with substance use and gambling disorders. Every single person who is motivated to read this Article by their own experiences with compulsive technology use but who, thereby, learns something new about efforts to address the profound harms of gambling and substance use disorders will, by that very education, demonstrate this antisubordinating aspect of the right to freedom from addiction.

To develop the interaction between addiction and liberty this Article draws from four strands of legal scholarship—discrete and ordinarily siloed lines of inquiry focused on (1) constitutional rights, (2) the regulation of big tech, (3) substance use disorder, and (4) "cognitive liberty." This Article's contribution—that a right to freedom from addiction is legally justified and normatively desirable—weaves these strands together. It can, therefore, be framed differently from the perspective of each. From the perspective of constitutional rights, this Article presents a case for judicial protection of a previously unrecognized but longstanding right. This approach follows in the footsteps of prior scholarship—some ultimately successful in prompting doctrinal developments, some not—doing the same in other contexts.[29] From the perspective of scholarship ex-

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27 Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CALIF. L. REV. 1323, 1341 (2006) (describing the interplay of constitutional category and political advocacy in the process of "identity formation and deliberation").

28 Derrick A. Bell, Jr., Comment, Brown v. Board of Education *and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 523 (1980).

29 *E.g.*, I. Glenn Cohen, *The Constitution and the Rights Not to Procreate*, 60 STAN. L. REV. 1135, 1136–39 (2008) (discussing the right not to be a genetic

ploring constitutional paradigms for the regulation of big tech,[30] this Article presents a new constitutional approach to conceptualizing problems of "manipulation"[31]—premised on liberty, not privacy—based around the emerging insight that what is important and new about big tech is not just the *information* that companies obtain about users but the *control* they exert over their users' compulsions.[32] From the perspective of scholarship exploring obstacles to treatment for people with substance use disorder under the Controlled Substances Act and related state laws, it presents a new constitutional theory to overcome such obstacles that, unlike prior work, is not limited to the prison context.[33] And from the perspective of the nascent literature within law and neuroscience exploring cognitive liberty,[34] it describes a previously unaddressed threat to freedom of thought and provides a much-needed concrete basis for judicial protection.

Part I provides background. It explains that, although freedom of thought has long been recognized as a consensus con-

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parent), *cited in* Jessee v. Jessee, 866 S.E.2d 46, 51 n.9 (Va. Ct. App. 2021); Eugene Volokh, *The Commonplace Second Amendment*, 73 N.Y.U. L. REV. 793, 807–12 (1998) (describing the Second Amendment as having a prefatory clause, and operative clause containing an individual right to bear arms), *cited in* District of Columbia v. Heller, 554 U.S. 570, 577 (2008); Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 779–83 (1964) (reconceptualizing government entitlements as a form of property), *cited in* Goldberg v. Kelly, 397 U.S. 254, 261 (1970)).

30 *E.g.*, Jack M. Balkin, *Free Speech Is a Triangle*, 118 COLUM L. REV. 2011, 2012 (2018) (finding that the twentieth century conception of freedom of speech as the relationship between government and people "is increasingly outmoded and inadequate to protect free expression today").

31 *See infra* notes 321–328 and accompanying text (discussing the manipulation concept in law and technology scholarship).

32 Kyle Langvardt's excellent article focuses on regulatory responses to the control that emerging technologies have over their users' compulsions but does not explore the possibility that this control could implicate a constitutional liberty interest. *See* Langvardt, *supra* note 18, at 160–71. Luke Morgan's insightful treatment suggests that governments might have a compelling interest in addressing the addictive tendencies of new technologies. Luke Morgan, *Addiction and Expression*, 47 HASTINGS CONST. L.Q. 197, 226 (2020). The analysis of the interaction of addiction with liberty here provides an important foundation for this argument in the text of the U.S. Constitution. *See infra* subparts II.C & III.C.3. For cutting-edge treatments focusing on the antitrust implications of the control that new technologies offer, see Rosenquist, Scott Morton & Weinstein, *supra* note 18, at 465–84; Mason Marks, *Biosupremacy: Big Data, Antitrust, and Monopolistic Power Over Human Behavior*, 55 U.C. DAVIS L. REV. 513, 553–55, 572–75 (2021). On the application of gambling law to "loot box" videogames in light of their addictiveness, see Sheldon A. Evans, *Pandora's Loot Box*, 90 GEO. WASH. L. REV. 376, 381–86, 425–32 (2022).

33 *See* Leo Beletsky et al., *Fatal Re-Entry: Legal and Programmatic Opportunities to Curb Opioid Overdose Among Individuals Newly Released from Incarceration*, 7 NE. U. L.J. 155, 165–67 (2015).

34 *See infra* notes 58–62 and accompanying text (discussing sources).

stitutional liberty, the presumption that freedom of thought is inviolable in practice has prevented this principle from being reflected in independent doctrinal protection. Part II is descriptive. It demonstrates and maps the interaction between addiction and liberty through case studies of state lotteries, barriers to addiction treatment, and addictive technology. Part III focuses on doctrine. It derives a consensus definition of addiction from medical and lay understandings and assesses legal arguments for and against judicial recognition, concluding that the case for constitutional protection is firm. Part IV focuses on normative desirability. It explains that constitutional protection for freedom from addiction would desirably advance the autonomy and antisubordination values that judges, scholars, and advocates see as key justifications for constitutional protection. A brief conclusion summarizes this Article's contribution.

One point of methodological clarification before proceeding. This Article's thesis is that constitutional law *should* recognize freedom from addiction as a fundamental liberty interest, and it develops novel descriptive, legal, and normative arguments on that score. At the same time, the interaction between addiction, on the one hand, and the U.S. Constitution's protection of liberty, on the other, has not previously been explored in legal scholarship or caselaw. In addressing this topic for the first time, the author aspires to act as an honest broker, highlighting legal arguments whether they support or undermine the case for recognition. I hope, by doing so, to facilitate understanding and future dialogue on an increasingly important set of questions.

I
A FREEDOM WITHOUT FORM

Courts have long described freedom of thought as a fundamental aspect of the liberty safeguarded by the U.S. Constitution. Indeed, they position freedom of thought as a prerequisite to and justification for other constitutional protections, especially the freedom of speech. Consider these lofty, load-bearing pronouncements in Supreme Court majority opinions:

- Justice Cardozo, writing for the Court in *Palko v. Connecticut* in 1937: "[F]reedom of thought[ ] and speech . . . is the matrix, the indispensable condition, of

nearly every other form of freedom."[35] This point was key in the Court's application of the First Amendment to the states.[36]

- Justice Marshall, writing for the Court in *Stanley v. Georgia* in 1969: "Our whole constitutional heritage rebels at the thought of giving government the power to control men's minds."[37] This point was key in the Court's later rejection of a purported state interest in restricting depictions of child pornography.[38]
- Justice Kennedy, writing for the Court in *Ashcroft v. Free Speech Coalition* in 2002: "The right to think is the beginning of freedom, and speech must be protected from the government because speech is the beginning of thought."[39] This point was key in extending the holding in *Stanley* to reject the federal government's purported interest in restricting virtual child pornography.
- Justice Kennedy, writing for the Court in *Lawrence v. Texas* in 2003: "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[40] This point was important to the Court's holding that the Constitution's protection of liberty includes the formation of intimate relationships.[41]

Justices and judges in the federal courts have often quoted or echoed these statements.[42] Legal scholars, too, see the

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35 302 U.S. 319, 326–27 (1937) ("[T]he domain of liberty [applied to the states through incorporation via the Fourteenth Amendment] . . . has been enlarged . . . to include liberty of the mind as well as liberty of action.").

36 *Id.*

37 394 U.S. 557, 565 (1969).

38 *Id.* at 566 (States "cannot constitutionally premise legislation on the desirability of controlling a person's private thoughts."); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 253–54 (2002).

39 *Free Speech Coalition*, 535 U.S. at 253.

40 539 U.S. 558, 562 (2003).

41 *Id.* at 562, 574. The Supreme Court emphasized the continuing vitality of this holding in Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2277–78 ("Nothing in this opinion should be understood to cast doubt on precedents that do not concern abortion.").

42 *E.g.*, Kovacs v. Cooper, 336 U.S. 77, 97 (1949) (Frankfurter, J., concurring) ("[W]ithout freedom of thought there can be no free society."); Whitney v. California, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring) ("Those who won our independence believed . . . that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth . . . ."); Meriwether v. Hartop, 992 F.3d 492, 511 (6th Cir. 2021) (quoting *Whitney*, 274 U.S. at 375); Vaughn v. Lawrenceburg Power Sys., 269 F.3d 703, 717–19 (6th Cir. 2001) (collecting sources); Price v. Viking Penguin, Inc., 881 F.2d 1426, 1430 (8th Cir. 1989) (quoting *Whitney*, 274 U.S. at 374–75); Abrams v. Reno, 452 F. Supp. 1166, 1171–72 (S.D. Fla. 1978) (quoting *Whitney*, 274 U.S. at

freedom of thought as fundamental.[43]

This view in American law reflects a longstanding, broader consensus. Frederick Schauer explains that "acceptance [of freedom of thought] spans the diversity of philosophical perspectives."[44] John Stuart Mill, in his influential treatise, *On Liberty*, explained that "the appropriate region of human liberty[ ] . . . comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; [and] absolute freedom of opinion and sentiment on all subjects[.]"[45] The list of rights in the Universal Declaration of Human Rights also prominently features freedom of thought.[46]

Despite this consensus about the importance of freedom of thought in the American constitutional order (and beyond), in 2022, constitutional law has not yet defined the freedom of thought or developed an independent protection for it. Constitutional law theory describes the process by which a paper protection is conceptualized and given content through doctrinal specification as constitutional "construction."[47] For example, scholars long ago developed, and courts have by now adopted and refined, legal doctrines to enforce and delimit other constitutional protections including, as aspects of the "liberty" protected by the Fifth and Fourteenth Amendments of the U.S. Constitution, occupational liberty,[48] physical liberty,[49]

375–76); Kay v. White, 286 F. Supp. 684, 686 (E.D. La. 1968) (quoting *Whitney*, 274 U.S. at 375).

43 *See* Frederick Schauer, *Freedom of Thought?*, 37 SOC. PHIL. & POL'Y 72, 79 n.18–20 (2020) (collecting sources); Charles Fried, *Perfect Freedom, Perfect Justice*, 78 B.U. L. REV. 717, 735 (1998) ("[F]reedom of thought is the highest order freedom . . . .").

44 Schauer, *supra* note 43, at 72 ("[T]he philosophical literature takes freedom of thought as a virtue whose acceptance spans the diversity of philosophical perspectives.").

45 *See* JOHN STUART MILL, ON LIBERTY 21–22 (Elec. Book Co. 2000) (1859) (ebook). Mill also wrote that "[t]he liberty of expressing and publishing opinions" is "almost of as much importance as the liberty of thought itself." *Id.* at 22.

46 *See* G.A. Res. 217 (III) A, Universal Declaration of Human Rights, art. 18 (Dec. 10, 1948) ("Everyone has the right to freedom of thought, conscience and religion . . . .").

47 *See* Gillian E. Metzger, *Administrative Constitutionalism*, 91 TEX. L. REV. 1897, 1900 (2013) (describing the concept of "construction").

48 *E.g.*, Theodorou v. Tanner, 842 F. Supp. 326, 327 (N.D. Ill. 1994) ("[A] person's liberty of occupation is one of the liberties protected by the due process clause." (citation omitted)).

49 Vitek v. Jones, 445 U.S. 480, 492 (1980) ("'[A]mong the historic liberties' protected by the Due Process Clause is the 'right to be free from, and to obtain judicial relief for, unjustified intrusions on personal security.'" (quoting Ingraham v. Wright, 430 U.S. 651, 673 (1977))).

the right to travel,[50] reproductive liberty (though at this writing the extent of this liberty is in substantial doubt),[51] and reputational liberty.[52]

So understood, the freedom of thought remains under construction. Although the Supreme Court has relied on it in important cases, it has employed the freedom as a load-bearing point in developing doctrines directly protecting other interests, namely, those protecting expression and incorporating constitutional rights against the states.[53] The freedom of thought's role in constitutional law to date has thus been that of a supporting cast member, not a star. No court has attempted to articulate a concrete definition of the freedom of thought or the constitutional protection it entails.

The fact that courts have not yet constructed a doctrine to put the constitutional principle of freedom of thought into practice does not apparently reflect any doubt about its importance. Instead, constitutional law's failure to develop doctrinal protection for the freedom of thought reflects a longstanding, widespread assumption that our thoughts are beyond the reach of external restraint as a practical matter because "the most tyrannical government is powerless to control the inward workings of the mind."[54] Indeed, a leading conceptual framework in legal scholarship, the Twentieth-Century Synthesis problematized by the growing law and political economy move-

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50 *E.g.*, Saenz v. Roe, 526 U.S. 489, 498 (1999) (discussing right to travel).

51 *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (identifying the right to use contraception within marriage); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2242, 2280 (2022) (reversing *Roe v. Wade* and *Planned Parenthood v. Casey* and holding that there is no fundamental constitutional right to abortion, but emphasizing that the holding does not upset other precedents such as *Griswold*); *id.* at 2301 (Thomas, J., concurring) (arguing for the reversal of *Griswold*, among other precedents).

52 Doe v. U.S. Dep't of Just., 753 F.2d 1092, 1104 (D.C. Cir. 1985) (discussing "reputational liberty interest claim"); *see also id.* at 1105, 1108–09 (describing "stigma plus" test).

53 *See* Palko v. Connecticut, 302 U.S. 319, 326–27 (1937) (discussing incorporation); Stanley v. Georgia, 394 U.S. 557, 565 (1969) (incorporating freedom of speech).

54 Jones v. Opelika, 316 U.S. 584, 618 (1942) (Murphy, J., dissenting) *adopted as the Opinion of the Court on reh'g*, 319 U.S. 103 (1943); *see also id.* ("Freedom to think is absolute of its own nature . . . . "). *See generally* FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 93 (1982) ("[T]hought is intrinsically free . . . ."); Blitz, *supra* note 7, at 1051–52 (2010) (collecting sources); Lucas Swaine, *Freedom of Thought in Political History*, *in* 1 THE LAW AND ETHICS OF FREEDOM OF THOUGHT: NEUROSCIENCE, AUTONOMY, AND INDIVIDUAL RIGHTS 1, 15–16 (Marc Jonathan Blitz & Jan-Christoph Bublitz eds., 2021) [hereinafter LAW AND ETHICS OF FREEDOM OF THOUGHT] (describing assumption and collecting sources).

ment,[55] often presumes preference and bias exogeneity, obscuring the possibility that a person's thinking might be externally controlled.[56] As a result, legal scholarship today has a consensus language of incentives for describing interventions that alter behavior through external reward or punishment, but does not have such an established terminology for describing interventions that alter behavior by altering thoughts or thought patterns.[57]

On the assumption of preference and bias exogeneity, our thoughts are completely within our control so long as we keep them to ourselves and have access to a private space. On this assumption, protecting freedom of expression—protecting those thoughts we give utterance to—is sufficient to protect freedom of thought as well; we can even safely conflate thought with speech.

Nita Farahany and Marc Blitz have recently contested the presumption of inviolability, pointing to emerging threats to freedom of thought in directly taking up the question of independent protection for freedom of thought in the U.S. Constitution.[58] In a TED Talk and in multiple articles, Farahany calls

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55 *See* Jedediah Britton-Purdy, David Singh Grewal, Amy Kapczynski & K. Sabeel Rahman, *Building a Law-and-Political-Economy Framework: Beyond the Twentieth-Century Synthesis*, 129 YALE L.J. 1784, 1790–91, 1829–32 (2020) (describing the field of law-and-political-economy and Twentieth-Century Synthesis).

56 The conception of human thought at the foundation of the Twentieth-Century Synthesis is the rational actor of law and economics. *Id.* at 1793. This conception usually assumes preferences are "exogenous," i.e., that they are externally determined and not influenced by government actions or legal rules. *See* Gregory Scott Crespi, *The Endogeneity Problem in Cost-Benefit Analysis*, 8 GEO. J.L. & PUB. POL'Y 91, 96 (2010) (describing this assumption); Samuel Bowles, *Endogenous Preferences: The Cultural Consequences of Markets and Other Economic Institutions*, 36 J. ECON. LITERATURE 75, 102 (1998) (discussing how the preference exogeneity assumption distances from "paternalistic attempts at social engineering of the psyche"). That said, behavioral law and economics has updated the rational actor model by recognizing persistent biases that influence decision making. It has assumed that such biases are exogenous to law. Crespi, *supra*.

57 *Compare* Langvardt, *supra* note 18, at 141–45 (using the adjective "habit-forming" to describe products that have effects on individuals' underlying thoughts), *with* Rosenquist, Scott Morton & Weinstein, *supra* note 18, at 433 (using the phrase "addictive technology"). This failure connects to the popular conception, problematized by vulnerability theory, of an individual, autonomous agent as the subject of regulation, while questions about the formation of such autonomous individuals are left to the overlooked, marginalized domain of family law and care work. *See* Martha Albertson Fineman, *Vulnerability and Social Justice*, 53 VAL. U. L. REV. 341, 364–67 (2019) (problematizing the conception of autonomous, individual subject).

58 *See generally supra* note 7 and accompanying text (discussing Farahany and Blitz). An important and helpful additional exploration of these issues is also

attention to fast-paced developments in neurotechnology, including mind-reading devices and human-computer interfaces such as Elon Musk's "Neuralink."[59] She argues that a future in which these technological threats to the internal workings of the mind are widespread is fast approaching, and so law and ethics must develop "cognitive liberty" sooner rather than later.[60] Blitz's analysis, while wide-ranging, focuses on the potential for drugs or emerging technology to enhance or alter one's perception, arguing that laws restricting access to such "cognitive enhancement," such as laws prohibiting use of LSD, arguably violate a person's cognitive liberty.[61]

Threats to freedom of thought, like emerging "mind reading" technology and cognitive enhancement, are important, and Farahany's and Blitz's analyses are indispensable building blocks for thinking about the future of the freedom of thought. This topic, however, warrants further inquiry and grounding. For one thing, the viability of any doctrinal protection may depend on its susceptibility to claims of overbreadth or lack of legal foundation.[62] For another, these treatments do not address a key source of restraint on individuals' freedom of thought: addiction.

Absent from the mainstream assumption that thought is inviolable, and absent from the recent treatments of pioneers focused on emerging technologies, is any discussion of the phenomenon of addiction. This absence is notable because in ordi-

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developed in Gabriel S. Mendlow, *Why Is It Wrong to Punish Thought?*, 127 YALE L.J. 2342, 2359–66 (2018) (exploring theoretical basis for prohibition on punishing thought).

59 Nita Farahany, *When Technology Can Read Minds, How Will We Protect Our Privacy?*, TED (Nov. 27, 2018), https://www.ted.com/talks/nita_farahany_when_technology_can_read_minds_how_will_we_protect_our_privacy?language=EN [https://perma.cc/7347-YYYP]; *see* Farahany, *Costs of Changing*, *supra* note 7, at 100; Farahany, *Incriminating Thoughts*, *supra* note 7, at 368; Nita A. Farahany, *Searching Secrets*, 160 U. PA. L. REV. 1239, 1274–76 (2012); *Interfacing with the Brain*, NEURALINK, https://neuralink.com/approach/ [https://perma.cc/U6VT-MHBU] (last visited Feb. 6, 2023).

60 Farahany, *Costs of Changing*, *supra* note 7, at 98–108.

61 *See* Blitz, *supra* note 7, at 1075–78; Marc Jonathan Blitz, *Freedom of Thought and the Structure of American Constitutional Rights*, *in* LAW AND ETHICS OF FREEDOM OF THOUGHT, *supra* note 54, at 103, 106–09; *see also* Jan-Christoph Bublitz, *My Mind is Mine!? Cognitive Liberty as a Legal Concept*, *in* COGNITIVE ENHANCEMENT 233, 250–51 (Elisabeth Hildt & Andreas Francke eds., 2013) (outlining the scope of the right to cognitive liberty); *see generally* LAW AND ETHICS OF FREEDOM OF THOUGHT, *supra* note 54 (discussing cognitive liberty).

62 For example, in the majority opinion in *Dobbs*, Justice Alito points to the possibility that a theory of substantive due process could lead to constitutional protection for "fundamental rights to illicit drug use" as a reason to reject that theory. Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022).

nary discourse people do not talk about freedom of thought as if it were inviolable. Instead, people describe the experience of addiction in terms of personal autonomy, intrusive thoughts, and external control: "I have [an] addiction to [my] phone . . . like I feel [like] checking again and again and coming online very often."[63] "I can't sleep, eat, or walk w[ith]out thinking of the next time [I] can 'hit that flashdrive [(vaping pen)].'"[64] "I had like 17 months clean. So, like I saw my old dealer [at the convenience store] and about a million thoughts hit my head . . . . I couldn't fight 'em off. And like that ended up being like a 36 hour or $700 binge."[65] Indeed, as loved ones have fought the stigma and erasure surrounding addiction by writing openly of it in obituaries, they have often described the deceased as "finally free" from addiction.[66] And some even compare addiction to slavery.[67]

Market actors speak in similar terms, talking of getting users "hooked" on their goods.[68] Policymakers, too, have expressed concern about external actors exploiting psychological vulnerabilities to interfere with people's "freedom of thought" by "addicting" them to their products.[69] And, of course, the

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63 Sayma Jameel, Mohammad Ghazi Shahnawaz & Mark D. Griffiths, *Smartphone Addiction in Students: A Qualitative Examination of the Components Model of Addiction Using Face-to-Face Interviews*, 8 J. BEHAVIORAL ADDICTIONS 780, 789 (2019).

64 Michael S. Amato et al., *"It's Really Addictive and I'm Trapped:" A Qualitative Analysis of the Reasons for Quitting Vaping Among Treatment-Seeking Young People*, 112 ADDICTIVE BEHAVIORS 1, 4 (2021) ("I don't like the feeling of something taking full control over me. Like I have no freedom . . . .").

65 Adams L. Sibley et al., *"I Was Raised in Addiction": Constructions of the Self and the Other in Discourses of Addiction and Recovery*, 30 QUALITATIVE HEALTH RSCH. 2278, 2283 (2020).

66 *See* Google search results, <"finally free" addiction> (on file with author); *e.g.*, Ishani Desai, *Family Invites Community to Funeral for Son Who Died of Fentanyl Overdose*, BAKERSFIELD.COM (Jan. 27, 2022), https://www.bakersfield.com/news/family-invites-community-to-funeral-for-son-who-died-of-fentanyl-overdose/article_28182b02-7fe8-11ec-8521-9b304b11d6b6.html [https://perma.cc/7MV9-VZTJ] (describing the organization "Be Finally Free" founded by the family). *See generally* Kavya Rajesh, Tom J. Crijns & David Ring, *Themes in Published Obituaries of People Who Have Died of Opioid Overdose*, 37 J. ADDICTIVE DISEASES 151, 153 (2018) (analyzing a sample of three hundred obituaries). Such remembrances routinely describe the deceased as "finally free" from addiction.

67 Robert DuPont, the first Director of the National Institute on Drug Use and a former director of the White House Office of National Drug Control Policy, emphasizes the point by making it the title of his book. ROBERT L. DUPONT, CHEMICAL SLAVERY: UNDERSTANDING ADDICTION AND STOPPING THE DRUG EPIDEMIC vi (2018) ("You will not understand addiction unless you see clearly that addiction is modern, chemical slavery.").

68 *Infra* subpart II.C.

69 *See* Social Media Addiction Regulation Technology Act ("SMART" Act), S. 2314, 116th Cong. § 1 (2019).

assumption that freedom of thought is "inherent" or somehow guaranteed is disputed daily in addiction medicine, where intrusive thoughts to engage in behaviors contrary to a person's overall goals are a "cardinal symptom" of addiction.[70]

It is certainly possible to develop arguments that the phenomenon of addiction is not ultimately relevant to the freedom of thought, or at least not relevant to the U.S. Constitution. The parts that follow articulate and rebut several such arguments. These include the possibilities that addiction is not something that constitutionally-relevant actors can influence (Part II), that jurists who speak of "freedom of thought" and patients who speak of addiction taking away their "freedom" are speaking of different things (subpart III.A), that "addiction" is not a coherent enough concept to support constitutional protection (subpart III.B), and that constitutionalizing aspects of addiction policy would be normatively undesirable (Part IV). Given the prevalence of the connection between addiction and freedom of thought in ordinary understanding, business, policy, and medicine, however, it is hard to argue that addiction is so marginal a phenomenon that it does not even warrant sustained analysis. To the contrary, the remainder of this Article will develop the case that addiction should be central, not marginal, to our understanding of the future of liberty and the freedom of thought.

II
CASE STUDIES

Biological and environmental factors play a very important role in addiction.[71] A possible defense of law and legal scholarship's failure to grapple with the interaction between addiction and liberty, then, would be to argue that the U.S. Constitution regulates governments and (sometimes) private actors, not nature. Being struck by lightning deprives a person of life, but not in a constitutionally-relevant way. If external human inter-

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70 Christian Lüscher, Trevor W. Robbins & Barry J. Everitt, *The Transition to Compulsion in Addiction*, 21 NATURE REVS. NEUROSCIENCE 247, 247 (2020); *see also infra* notes 261–265 (collecting sources).

71 *See* AM. SOC'Y OF ADDICTION MED., PUBLIC POLICY STATEMENT: DEFINITION OF ADDICTION 2 (2011) ("Genetic factors account for about half of the likelihood that an individual will develop addiction."); Donald W. Black, Patrick O. Monahan, M'Hamed Temkit & Martha Shaw, *A Family Study of Pathological Gambling*, 141 PSYCHIATRY RSCH. 295, 295–96 (2006) (finding genetic determinants); C. Blanco, J. Myers & K. S. Kendler, *Gambling, Disordered Gambling and Their Association With Major Depression and Substance Use: A Web-Based Cohort and Twin-Sibling Study*, 42 PSYCH. MED. 497, 497 (2012) (noting common genetic determinants of gambling use disorder and substance use disorder).

vention does not play a role in addiction, then addiction would never give rise to a constitutional question, whether it interferes with freedom of thought or not. The premise of this argument is incorrect. External human intervention can play a role in addiction.

This Part rebuts the presumption of inviolability as a factual matter and, through three case studies, surveys ways that liberty and addiction interact. Each case study reflects an area in which scholars and advocates have developed powerful arguments connecting addiction to knowing intervention by governments and private actors. Subpart A discusses the role of state lotteries in addicting residents. Subpart B describes how restrictions on access to medication-assisted treatment for substance use disorder prevent patients from obtaining treatments to liberate themselves from addiction. Subpart C surveys dramatic claims that addictive technologies have "hooked" much of the country by employing psychological techniques developed in the gambling industry.

Each subpart describes a deprivation, then explains the constitutional questions that would flow from it if courts were to relax the presumption of inviolability. The three case studies illustrate different domains of constitutional protection, including protection from government intervention, protection from government restriction, and protection from private domination. The result is a roadmap of ways that constitutional claims alleging deprivation of liberty by way of addiction could manifest in specific doctrinal interventions under the First, Fifth, Thirteenth, and Fourteenth Amendments. The next Part will take up the legal basis for such intervention.

A. State Lottery

Those who think that the possibility of government-directed "mind control" is far-fetched or unrealistic should consider state lotteries. According to lottery reform advocates, lotteries in general, and the increasingly sophisticated programs and mechanics they employ in particular, take advantage of psychological vulnerabilities to develop compulsive users from whom they raise the bulk of their revenue.

At the time of the Fourteenth Amendment's ratification, two-thirds of state constitutions forbid government-run and private lotteries. As one example, the Minnesota Constitution provided that "[t]he legislature shall never authorize any form

of lottery . . . ."[72] These provisions were enacted throughout the 1800s in response to concerns that state lotteries fueled corruption and undermined the "character" of the population.[73] By the late 1800s, no state authorized a lottery.[74]

In 1963, almost 100 years after ratification of the Fourteenth Amendment, New Hampshire became the first state in the nation to relax its constitutional prohibition and institute a lottery.[75] The fact that New Hampshire pioneered the modern state lottery makes sense in this regard: the state does not have an income tax, and lottery was a way to raise revenue without taxing wealth.[76] This inspired a cascade of fiscally-motivated adoption in other states that began in the 1970s and carried through the 1980s and 1990s.[77] Today, a majority of states operate lotteries, and these lotteries increasingly employ video gambling machines (a modern-day evolution of slot machines) located in gas stations, taverns, and restaurants, as well as smartphone-based gambling applications (apps).[78] Lotteries bring billions of dollars into state budgets,[79] and these dollars mostly come from a small subset of players. According to some reports, upwards of 80% of state lottery revenues come from

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72 *See* Steven G. Calabresi & Sarah E. Agudo, *Individual Rights Under State Constitutions When the Fourteenth Amendment Was Ratified in 1868: What Rights Are Deeply Rooted in American History and Tradition?*, 87 TEX. L. REV. 7, 101 (2008) (describing lottery prohibitions in two-thirds of state constitutions).

73 *See, e.g.*, J. ROSS BROWNE, REPORT OF THE DEBATES OF THE CONVENTION OF CALIFORNIA, ON THE FORMATION OF THE STATE CONSTITUTION, IN SEPTEMBER AND OCTOBER, 1849, at 91 (1850) (statement of Rep. Hoppe) ("[Gambling] penetrates to the domestic circle . . . destroy[ing] the happiness of families, and fall[ing] with a particular weight upon the widow and the orphan."); *see also* John Dinan, *The State Constitutional Tradition and the Formation of Virtuous Citizens*, 72 TEMP. L. REV. 619, 650 (1999) (describing the role of corruption and "concern[ ] about the vices they fostered" in constitutional amendments); *id.* (collecting sources).

74 DAVID WEINSTEIN & LILLIAN DEITCH, THE IMPACT OF LEGALIZED GAMBLING: THE SOCIOECONOMIC CONSEQUENCES OF LOTTERIES AND OFF-TRACK BETTING 10–12, 14 (1974).

75 *Id.* at 14–15.

76 *Id.* at 15.

77 Alm, McKee & Skidmore, *supra* note 11, at 464 (two states adopted lotteries in 1960s, twelve in 1970s, and seventeen in 1980s); Donald W. Gribbin & Jonathan J. Bean, *Adoption of State Lotteries in the United States, With a Closer Look at Illinois*, 10 INDEP. REV. 351, 352 (2005).

78 Bryce Covert & Juan Madrid, *An Itch You Can't Scratch-Off*, TOPIC (Feb. 12, 2019), https://www.topic.com/an-itch-you-can-t-scratch-off [https://perma.cc/4MDD-XRZA].

79 *Lotteries, Casinos, Sports Betting, and Other Types of State-Sanctioned Gambling*, URB. INST. [hereinafter *Lotteries, Casinos*], https://www.urban.org/policy-centers/cross-center-initiatives/state-and-local-finance-initiative/state-and-local-backgrounders/lotteries-casinos-sports-betting-and-other-types-state-sanctioned-gambling [https://perma.cc/W27X-DA5K] (last visited Sept. 6, 2022) (showing $33 billion in revenue for state and local governments in 2019).

10% to 15% of players who do so heavily.[80] These heavy players do not reflect a cross section of society. Instead, the heavy lottery players who provide the bulk of state revenues disproportionately seem to come from low-income and historically marginalized populations.[81]

Many of the heavy players from whom lotteries draw the bulk of their revenues are addicted to gambling.[82] Readers are no doubt aware of the serious harms of gambling addiction that go far beyond the money players lose,[83] but it is worth highlighting one tragic example lest statistics obscure human costs. The case of a steel mill worker from Portland, Oregon, named Robert Hafemann, recounted by Bryce Covert and Juan Madrid based on interviews with his family, starkly illustrates how severe the effect of gambling addiction on players can be.

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80 Ron Stodghill & Ron Nixon, *For Schools, Lottery Payoffs Fall Short of Promises*, N.Y. TIMES (Oct. 7, 2007), https://www.nytimes.com/2007/10/07/business/07lotto.html [https://perma.cc/2WU3-6ZH9] (showing that 80% of lottery sales generally comes from 10–15% of players); Covert & Madrid, *supra* note 78 (same).

81 *See* Stodghill & Nixon, *supra* note 80; John W. Welte, Grace M. Barnes, Marie-Cecile O. Tidwell & William F. Wieczorek, *Predictors of Problem Gambling in the U.S.*, 33 J. GAMBLING STUD. 327, 335 (2017) (finding a heightened problem of gambling rates in disadvantaged neighborhoods); Kyle R. Caler, Jose Ricardo Vargas Garcia & Lia Nower, *Problem Gambling Among Ethnic Minorities: Results From an Epidemiological Study*, 7 ASIAN J. GAMBLING ISSUES & PUB. HEALTH 1, 1 (2017) ("Studies have consistently reported high rates of problem gambling among racial and ethnic minorities compared to Whites . . . ."); Rick Green, *Want False Hope With That Lottery Ticket?*, HARTFORD COURANT (July 3, 2009), https://www.courant.com/news/connecticut/hc-xpm-2009-07-03-poor-gamble-scratch-0703-story.html [https://perma.cc/M8HE-DHXH] (reporting conclusion of research compiled by Kopel Research Group for the Connecticut State Lottery, revealed in public records request, that "those with less education appear to be significantly more likely to have played the instant games, and to play them more frequently than those more educated.").

82 STOP PREDATORY GAMBLING, *supra* note 12, at 8–9.

83 If not, see, for example, Mark A. Gottlieb, Richard A. Daynard & Lissy C. Friedman, *Casinos: An Addiction Industry in the Mold of Tobacco and Opioid Drugs*, 2021 U. ILL. L. REV. 1711, 1725 (discussing social costs of gambling); Earl L. Grinols & David B. Mustard, *Does Problem Gambling Increase Crime?*, 2021 U. ILL. L. REV. 1745, 1767 n.111 (discussing ten social costs including crime, regulatory costs, social service costs, bankruptcy, illness, business and employment costs, family costs, abused dollars, social connections, and political costs); John Warren Kindt, *Bans on Sports Gambling and Lotteries Would Pump-Prime the U.S. Economic System in the New Age of Covid*, 2021 U. ILL. L. REV. 1771, 1771–74 (discussing the social waste caused by misdirection of CARES Act stimulus funds into lotteries); Sheila Simon, *A Stacked Deck: The Ethics of Making Laws About Gambling*, 2021 U. ILL. L. REV. 1795, 1796 (describing the impact of gambling on one family); John Warren Kindt & John K. Palchak, *Legalized Gambling's Destablization of U.S. Financial Institutions and the Banking Industry: Issues in Bankruptcy, Credit, and Social Norm Production*, 19 BANKR. DEVS. J. 21, 28–36 (2002) (collecting sources on relationship between gambling and consumer bankruptcy filings).

Hafemann began playing traditional lotteries after graduating from high school, winning a $600 jackpot at the age of 18.[84] He began using video lottery terminals when Oregon installed 7,200 of them in bars and restaurants across the state.[85] He played higher-and-higher stakes with increasing frequency, developing an addiction with which he struggled for years.[86] According to his family, Hafemann's addiction bankrupted him and destroyed his sense of self-worth. As he explained it to his mother, "I don't understand why I can't stop thinking about it. I can't turn my brain off."[87] One afternoon, Hafemann attempted to call a suicide hotline for people with gambling problems but transposed the numbers, so he was unable to get through. Instead, he called his parents to say he loved them, then ended his own life.[88] On his death certificate, his mother wrote "[s]uicide thanks to the Oregon state lottery."[89]

Hafemann's case is rare in his family's openness in sharing it, but it is not unusual.[90] As Stacey Tovino explains, "Individuals with gambling disorder have the highest rate of suicidal ideation and suicide attempt among individuals with substance use and other addictive disorders," with fifty percent experiencing suicidal ideation and twenty percent attempting suicide.[91] These are large numbers, especially when one considers that about two million Americans (and counting) are estimated to suffer from a gambling disorder.[92] Although the share of that population who developed an addiction playing lottery games is unknown, studies indicate that lottery is

84 Kate Taylor, *Losing the Gamble*, THE OREGONIAN (July 28, 1995), https://ssristories.org/man-commits-suicide-given-prozac-for-gambling-habit/ [https://perma.cc/QR2V-5T2A].

85 *Id.*

86 Covert & Madrid, *supra* note 78.

87 *Id.*

88 Taylor, *supra* note 84.

89 Covert & Madrid, *supra* note 78.

90 *See* Gottlieb, Daynard & Friedman, *supra* note 83, at 1724 (discussing sources).

91 Stacey A. Tovino, *Dying Fast: Suicide in Individuals with Gambling Disorder*, 10 ST. LOUIS U. J. HEALTH L. & POL'Y 159, 160 (2016) (collecting sources).

92 *See FAQ*, NAT'L COUNCIL ON PROBLEM GAMBLING, https://www.ncpgambling.org/help-treatment/faq/ [https://perma.cc/KNC7-T2XC] (last visited Nov. 29, 2022) ("2 million U.S. adults (1%) are estimated to meet the criteria for severe gambling problems in a given year."); Black & Shaw, *supra* note 2, at 29–30 (collecting sources).

among the most addictive forms of gambling,[93] and state lotteries are the only legal form of gambling in many states.[94]

The determinants of gambling addiction (or any addiction) are not yet fully understood, but it is clear today that addiction is a function of both personal factors (including genetics, mental health, wealth, and upbringing)[95] and external ones (including specific characteristics of the drugs or devices with which a person interacts and the circumstances of those interactions).[96] To take an analogy from the (by now) well-known topic of tobacco addiction, cigarettes are today more addictive and deadly than they were in 1964 because tobacco companies "use[ ] design features and chemical additives in the manufacturing process"[97] to more effectively, as Judge Kessler put it in *U.S. v. Phillip Morris*, "create and sustain addiction."[98]

Scholars and advocates have developed a strong case that lotteries in general and the video gambling devices and apps they employ in particular are, like cigarettes, designed in ways that create and sustain addiction. This understanding traces to psychologist B.F. Skinner's famous work on "operant conditioning," which has evolved into a well-established proposition in psychology and neuroscience that compulsive behaviors can be created through exposure over time to patterns of external stimuli providing "intermittent reinforcement" and "variable re-

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93 Nancy M. Petry, *A Comparison of Treatment-Seeking Pathological Gamblers Based on Preferred Gambling Activity*, 98 ADDICTION 645, 645 (2003); Agneta Johansson & K. Gunnar Götestam, *Gambling and Problematic Gambling With Money Among Norwegian Youth (12–18 Years)*, 57 NORDIC J. PSYCH. 317, 317 (2003).

94 *Lotteries, Casinos, supra* note 79 (noting that in 22 states, state lotteries are only legal form of gambling).

95 *See, e.g.*, *supra* note 71 (listing sources explaining the importance of genetic and environmental factors in cultivating addiction); Nabarun Dasgupta, Leo Beletsky & Daniel Ciccarone, *Opioid Crisis: No Easy Fix to Its Social and Economic Determinants*, 108 AM. J. PUB. HEALTH 182, 184 (2018) (discussing the root causes of the opioid epidemic).

96 *See, e.g.*, SCHÜLL, *supra* note 9, at 16 (discussing how external environments encourage gambling addiction); K. R. Barton et al., *The Effect of Losses Disguised as Wins and Near Misses in Electronic Gaming Machines: A Systematic Review*, 33 J. GAMBLING STUD. 1241, 1253–54 (2017) (finding a correlation between the amount of "near misses" generated by gambling machines and the time gamblers spend on those machines).

97 CAMPAIGN FOR TOBACCO-FREE KIDS, DESIGNED FOR ADDICTION: HOW THE TOBACCO INDUSTRY HAS MADE CIGARETTES MORE ADDICTIVE, MORE ATTRACTIVE TO KIDS AND EVEN MORE DEADLY 6 (2014), https://www.tobaccofreekids.org/assets/content/what_we_do/industry_watch/product_manipulation/2014_06_19_DesignedforAddiction_web.pdf [https://perma.cc/AYR9-7GDR].

98 United States v. Phillip Morris USA, Inc., 449 F. Supp. 2d 1, 309 (D.D.C. 2006).

ward."[99] Skinner fostered compulsive behavior in rats using a lever and food pellets (a "Skinner box"),[100] revealing that the most effective way to develop a compulsion in the rats was to vary the pattern of stimulus and size of the reward, making both the timing and volume of food release associated with the lever uncertain and unpredictable.[101] He went on to apply this insight to study the design of slot machines.[102] Scientists have further developed operant conditioning research to confirm Skinner's core insight and explore how altering the timing, frequency, and amount of rewards and providing a sense of control (even if illusory) can increase the effectiveness of conditioning.[103] Neuroscience, meanwhile, has explored underlying mechanisms, including the release of dopamine (a "feel good" neurotransmitter associated with reward) that, due to a pattern of stimulus, modifies dopamine receptors in a way that creates a sense of craving.[104]

In *Addiction by Design*, Natasha Schüll explains how, beginning in its early days and continuing through today, operant conditioning concepts have informed the gambling industry in its design of slot machines and other games.[105] Indeed, an entire branch of academic operant conditioning research grew up based on observation of industry practices and their effectiveness.[106] For example, video gambling machines are designed to create the illusion of "near misses," situations where the game appears to come one tick away from a jackpot. Doing

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99 *See* Aaron Drummond & James D. Sauer, *Video Game Loot Boxers are Psychologically Akin to Gambling*, 2 NATURE HUM. BEHAV. 530, 530 (2018) (citing references); ADAM GAZZALEY & LARRY D. ROSEN, THE DISTRACTED MIND: ANCIENT BRAINS IN A HIGH-TECH WORLD 169 (2016) (describing intermittent reinforcement and variable reward); SHARON BEGLEY, CAN'T JUST STOP: AN INVESTIGATION OF COMPULSIONS 103 (2017) (discussing variable and intermittent reinforcement).

100 *E.g.*, B.F. SKINNER, SCIENCE AND HUMAN BEHAVIOR 397 (1953) (comparing rat behavior to human gambling subjects).

101 GAZZALEY & ROSEN, *supra* note 99, at 169.

102 *E.g.*, SKINNER, *supra* note 100, at 397 (describing slot machine research).

103 *See* GAZZALEY & ROSEN, *supra* note 99, at 169.

104 José C. Perales et al., *Learning to Lose Control: A Process-Based Account of Behavioral Addiction*, 108 NEUROSCIENCE & BEHAV. REVS. 771, 773 (2020); NAT'L ACADS. OF SCI., ENG'G, AND MED., CONSENSUS STUDY REPORT: MEDICATIONS FOR OPIOID USE DISORDER SAVE LIVES 24 (2019) [hereinafter NAM REPORT], https://nap.nationalacademies.org/catalog/25310/medications-for-opioid-use-disorder-save-lives [https://perma.cc/BSB2-2SY6].

105 SCHÜLL, *supra* note 9, at 52–106 (describing design-focused efforts of industry); *id.* at 116 (describing dominance of video poker after casinos observed its effectiveness); *id.* at 144–46 (describing rise of personalized player tracking at casinos).

106 *See generally* Sue Fisher & Mark Griffiths, *Current Trends in Slot Machine Gambling: Research and Policy Issues*, 11 J. GAMBLING STUD. 239, 239–40 (1995) (describing the field of gambling research).

so "increases the probability that the individual will play the machine."[107] This technique easily translates to online and smartphone-based gambling apps, which offer new and potentially potent avenues for addictive design.

Lottery reform advocates allege that state lotteries knowingly or even intentionally utilize operant conditioning techniques—by distributing video gambling machines across their communities, by marketing gambling machines and apps, and in the design of the machines and apps they employ, such as vending machines selling scratch-off lottery tickets.[108] There is support for these concerns on a population level in studies finding an association between legalization of lottery gambling and overall rates of excessive gambling,[109] and on an individual level in studies finding an association between parents purchasing lottery tickets for children and gambling problems later in life.[110]

Advocates do not mince words in drawing the causal connections between state lotteries, gambling addiction, and harms including bankruptcy, suicide, and poverty. STOP Predatory Gambling asserts that states design their lottery games to "exploit[ ] aspects of human psychology and induc[e] impulsive, irrational behavior."[111] Moreover, states "concentrate lottery outlets in economically-distressed regions,"[112] "try[ ] to lure young people to gamble" with "cartoon-like imagery,"[113] and have setup "free-to-play" smartphone games with names like "Juicy Loot" and "Cats 'n' Dogs" to "get young people hooked."[114] John Oliver, in a segment for his HBO show *Last Week Tonight*, put it in similar terms: "Lottery can be extremely

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107 *See* K.R. Barton et al., *supra* note 96, at 1243–44 (quoting SKINNER, *supra* note 100) (describing the practice and its role in the addictiveness of gaming machines).

108 STOP PREDATORY GAMBLING, *supra* note 12, at 5.

109 *See* Lucia Grun & Paul McKeigue, *Prevalence of Excessive Gambling Before and After Introduction of a National Lottery in the United Kingdom: Another Example of Single Distribution Theory*, 95 ADDICTION 959, 959 (2000) (finding that the adoption of a national lottery in England produced a four-fold increase in the number of households gambling more than 10% of their income)

110 *See* Jennifer R. Felsher, Jeffrey L. Derevensky & Rina Gupta, *Parental Influences and Social Modelling of Youth Lottery Participation*, 13 J. CMTY. & APPLIED SOC. PSYCH. 361, 361 (2003).

111 STOP PREDATORY GAMBLING, *supra* note 12, at 5.

112 *Id.* at 10.

113 *Id.* at 15.

114 *Id.* at 16.

addictive," and the problem is getting worse as "states are actively expanding into even more addictive products."[115]

These are very serious allegations. If advocates' claims are true, then state lotteries are literally depriving residents of their liberty without their residents' knowledge,[116] taking their autonomy from them by knowingly exposing them to addictive games that employ intermittent reinforcement and variable reward to trigger or deepen compulsion in unwitting residents. Causing an addiction interferes with a person's autonomy in four ways: (1) by forcing her to think unwanted thoughts; (2) by distracting her from thinking about what she wants to think about; (3) in severe cases, by causing her to behave in ways she does not want to behave; and (4) by altering her brain structure and chemistry to do 1, 2, and 3.

To be sure, these claims about the effects of state lotteries raise questions of proof, especially questions of causation,[117] and, perhaps, consent.[118] But the essential, irreducible place for advocates to test those claims is in constitutional litigation asserting that the literal deprivation of liberty associated with state lotteries is also a constitutional one, and so a violation of the Fourteenth Amendment's restriction on deprivation of "life, liberty, or property, without due process of law."[119] The alleged effects of state lotteries on players' freedom of thought does not apparently implicate any other constitutional protection, and lotteries' ability to subordinate marginalized groups to generate

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115 Last Week Tonight, *The Lottery: Last Week Tonight with John Oliver (HBO)*, YOUTUBE (Nov. 10, 2014), https://www.youtube.com/watch?v=9PK-netuhHA [https://perma.cc/9TQD-EKQR].

116 Professor Blake Emerson explains that the core conception protected by the U.S. Constitution—at least as understood by the current Supreme Court—is "discretionary liberty." Blake Emerson, *Liberty and Democracy Through the Administrative State: A Critique of the Roberts Court's Political Theory*, 73 HASTINGS L.J. 371, 389 (2022); *see also* JOHN LOCKE, *The Second Treatise of Government*, *in* TWO TREATISES OF GOVERNMENT 265, 284 (Peter Laslett ed., 1960) (autonomy means a person's "Liberty to follow [her] own Will in all things"); THOMAS HOBBES, LEVIATHAN, OR THE MATTER, FORME, & POWER OF A COMMON-WEALTH ECCLESIASTICALL AND CIVILL 126 (Ian Shapiro ed., 2010) ("Liberty to do, or forbeare, according to his own discretion.").

117 Section III.C.1 discusses these questions in more detail and sketches a potential test case.

118 Just as a person may consent to many physical intrusions (such as surgery) that would be deprivations of liberty without consent, it is possible that, where present, informed consent could vitiate a freedom from addiction claim. *Cf.* Thomas S. Ulen, *A Behavioral Analysis of Gaming Regulation*, 2021 U. Ill. L. Rev. 1673, 1685–86, 1694–97 (discussing choice in relation to gambling). Further research could helpfully explore the viability and limits of this consent theory, which may prove important in practice in delimiting both what states must do to honor the freedom from addiction and the scope of protective regulation.

119 U.S. CONST. amend. XIV, § 1; U.S. CONST. amend. V.

revenue for general use creates a conflict of interest and reason to doubt states can be trusted to check abuses themselves.[120] Indeed, STOP Predatory Gambling has pushed its concerns with limited success in the political process and media but, while expressing a desire to litigate, openly expressed doubt about what legal vehicle, if any, might be available for their claims.[121]

Unless and until courts relax the presumption of inviolability and develop a doctrine directly protecting the freedom of thought from government infringement, advocates will not even be able to present their case—no matter how extreme the fact pattern or clear the effects of state action. The next Part develops such a doctrine and suggests test cases. First, however, it is worth considering other contexts in which addiction and liberty interact.

B. Medication-Assisted Treatment

While some deprivations operate through government action, many of the most profound intrusions on liberty operate through government restriction. To name a few familiar examples, the Supreme Court has invalidated, as unconstitutional deprivations, laws restricting contraception, sexual activity, marriage, home schooling, gun ownership, travel, free exercise of religion, and speech.[122]

Laws restricting access to medication-assisted treatment ("MAT") for opioid use disorder constitute an additional example of deprivation-by-restriction. According to advocates, these laws prevent people who suffer from life-threatening addictions to opioids from accessing medically proven treatments to free their minds from some of the effects of addiction. (Moreover, although the focus here is on opioids, laws restricting access to addiction treatments are far broader—the full implications of constitutional protection in this area are discussed *infra* section III.C.2.)

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120 *See infra* notes 390–395 and accompanying text (discussing subordination in state lotteries).

121 *See Predatory Gambling Liability Project*, STOP PREDATORY GAMBLING, https://www.stoppredatorygambling.org/predatory-gambling-liability-project/ [https://perma.cc/Q7XN-L8RF] (last visited Feb 18, 2022).

122 *See* Griswold v. Connecticut, 381 U.S. 479, 485–86 (1965) (contraception); Lawrence v. Texas, 539 U.S. 558, 578 (2003) (sexual activity); Loving v. Virginia, 388 U.S. 1, 12 (1967) (interracial marriage); Obergefell v. Hodges, 576 U.S. 644, 675 (2015) (same-sex marriage); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (home schooling); District of Columbia v. Heller, 554 U.S. 570, 635 (2008) (gun ownership); Kent v. Dulles, 357 U.S. 116, 125 (1958) (travel).

As background, medicine has come to explain substance use disorder (which includes drug or alcohol addiction), among other diagnosable mental illnesses, in the context of operant conditioning, in which the chemical stimulus (rather than a slot machine payoff) serves as the pleasurable "reward" that over time triggers changes in "brain structure and function."[123] (For a fuller discussion of medical understandings of addiction and how they relate to lay understandings, see *infra* subpart III.B.) Hence the oft-mistaken but important point that a baby cannot be born "addicted" to a drug or alcohol.[124] Even if born dependent on one or more substances so as to cause sometimes-severe symptoms of withdrawal, a baby cannot be born "addicted" because their brain will not have associated reward with stimulus.[125]

Employing these insights, modern medicine has developed and established a solid evidence base for treatments to relieve people with substance use disorder and alcohol use disorder from cravings and physical withdrawal symptoms.[126] Some of these treatments involve deliberate use of conditioning tactics through applied behavioral analysis and cognitive behavioral therapy to replace destructive thoughts with constructive ones.[127] But the most effective medical interventions for opioid use disorder mitigate or eliminate compulsions through pharmaceutical means.

MAT options target the behavior/reward pathway to curb cravings and limit withdrawal symptoms with manageable side effects.[128] A rough analogy is the way nicotine gum works to help the user quit smoking or vaping—the supply of nicotine curbs immediate cravings and the alternative action to access nicotine (chewing rather than inhalation) facilitates formation

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123 *See* NAM REPORT, *supra* note 104, at 23; Michael A. Bozarth, *Opiate Reinforcement Processes: Re-Assembling Multiple Mechanisms*, 89 ADDICTION 1425, 1425 (1994) ("Opiate reinforcement processes can be described within the context of operant conditioning theory.").

124 *Help for Babies Born Dependent on* Opioids, NAT'L INSTS. OF HEALTH, https://heal.nih.gov/news/stories/neonatal-opioid-withdrawal-syndromeon-opioids [https://perma.cc/B95D-H4Z6] (last updated Nov. 10, 2022) ("Babies aren't technically born 'addicted' to drugs, since they can't engage in compulsive drug seeking or continued use despite harmful consequences, hallmarks [sic] behaviors of an addiction disorder.").

125 *Id.*

126 NAM REPORT, *supra* note 104, at 5 ("Available evidence clearly supports the use of medications and the need to expand access to medications . . . .").

127 Medicare and State Health Care Programs: Fraud and Abuse, 85 Fed. Reg. 77,684, 77,791 (Dec. 2, 2020) (describing the contingency management approach).

128 NAM Report, *supra* note 104, at 5.

of that alternative reward pathway.[129] So, too, research in recent decades has established the effectiveness of pharmaceutical treatments for opioid use disorder that operate by binding to the same receptors as heroin or oxycontin, saving a person who suffers from those particular substance use disorders from the compulsion to seek out these drugs and often, thereby, saving their life.[130] MAT has been found not only to curb the cravings of opioid use disorder but to reduce the risk of fatal overdose by half.[131]

For the millions of Americans who currently suffer from opioid use disorder,[132] then, freedom of thought can depend on access to MAT.[133] Unfortunately, unlike medicines for other chronic diseases—from insulin for diabetes to ACE inhibitors for high blood pressure—federal and state law tightly restricts access to MAT. At the federal level, regulations issued by the Drug Enforcement Administration under the Controlled Substances Act to limit unlawful diversion can do so at the cost of tight restrictions on access; they forbid states from deciding that ordinary medical providers should be able to offer certain forms of MAT, limiting provision nationwide to a select group of specially-licensed providers operating under strict criteria.[134] In the case of methadone—a key treatment relied on by hundreds of thousands of Americans to curb cravings for both prescription opioids and heroin[135]—these federal regulations require many patients to travel to a registered and closely regulated "Opioid Treatment Program" (OTP) to obtain their medicine. Moreover, some states impose onerous restrictions

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129 *See* Ellen E. Jones, Kristen L. Jarman & Adam O. Goldstein, *Providing Nicotine Replacement Therapy in Focus Groups*, 2018 NICOTINE & TOBACCO RSCH. 399, 399 (2017) (collecting sources supporting the conclusion that nicotine replacement therapy "can reduce the desire to use cigarettes and ameliorate withdrawal symptoms").

130 NAM Report, *supra* note 104, at 5 (noting that "[l]arge systematic reviews and randomized controlled trials" demonstrate that "patients with OUD who receive [MAT] are less likely to die from overdose or other causes").

131 Marc R. Larochelle et al., *Medication for Opioid Use Disorder After Nonfatal Opioid Overdose and Association with Mortality: A Cohort Study*, 169 ANN. INTERNAL MED. 137, 138 (2018).

132 NAM Report, *supra* note 104, at 1 (describing estimates).

133 Although MAT is the gold standard for treatment, the best treatment for individual patients may vary from case to case. *Id.* at 5.

134 42 C.F.R. § 8.12; Corey S. Davis & Derek H. Carr, *Legal and Policy Changes Urgently Needed to Increase Access to Opioid Agonist Therapy in the United States*, 73 INT'L J. DRUG POL'Y 42, 46 (2019) (describing barriers).

135 John A. Furst, Nicholas J. Mynarski, Kenneth L. McCall & Brian J. Piper, *Pronounced Regional Disparities in the United States Methadone Distribution*, 56 ANNALS OF PHARMACOTHERAPY 271, 274 (2022) (showing 408,550 methadone patients in 2019).

above-and-beyond these federal requirements, making it harder to open and operate an OTP. As a result, there is a significant shortage of OTPs and, for many patients, the nearest clinic is many miles away.[136] Buprenorphine, another key MAT drug, can be prescribed only by a small subset of physicians who must apply for and be granted a federal waiver, which caps how many patients each waived physician may see.[137]

Limits on patients' ability to take home methadone exemplify these restrictions and their impact on access. Ordinarily, patients are required to take their medicine at the OTP itself, daily, though they may over time earn the right (awarded by the OTP) to a week or more of take-home doses.[138] Take-home restrictions deter prospective patients and, for existing patients, exacerbate the risk of relapse (because of skipped days when transportation is unavailable, the patient is too sick to travel to the OTP, or the patient has a work or care obligation that prevents them from coming to the OTP).[139] As one patient put it, "[I]t's like liquid handcuffs."[140]

A consensus report by the National Academies of Science, Engineering, and Medicine explains that, in large part due to these regulatory restrictions,[141] MAT is effectively unavailable for the vast majority of patients, especially in rural areas.[142] At most, one in five who could benefit from evidence-based mental health treatment receive it, and the real number may be closer

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136 Davis & Carr, *supra* note 134, at 43; *see* Matthew B. Lawrence, Federal Administrative Pathways to Promote Access to Quality Methadone Treatment 1–3 (Feb. 21, 2022) (unpublished manuscript) (on file with author).

137 NAM Report, *supra* note 104, at 119–20.

138 BRIDGET C.E. DOOLING & LAURA STANLEY, GW REGUL. STUD. CTR., EXTENDING PANDEMIC FLEXIBILITIES FOR OPIOID USE DISORDER TREATMENT: UNSUPERVISED USE OF OPIOID TREATMENT MEDICATIONS 5 (2021), https://regulatorystudies.columbian.gwu.edu/sites/g/files/zaxdzs4751/files/downloads/PEW_Opioids/GW%20Reg%20Studies_REPORT_Take-Home%20Supplies_BDooling%20and%20LStanley.pdf [https://perma.cc/BYQ4-4M96].

139 *See id.* at 6–7.

140 David Frank et al., *"It's Like 'Liquid Handcuffs': The Effects of Take-Home Dosing Policies on Methadone Maintenance Treatment (MMT) Patients' Lives*, 18 HARM REDUCTION J. 88, 91 (2021); *see also* Methadone Monday Working Grp., *Methadone Manifesto*, URB. SURVIVORS UNION, https://sway.office.com/UjvQx4ZNnXAYxhe7?ref=Link&mc_cid=9754583648&mc_eid=51fa67f051 [https://perma.cc/CZV9-RGFY] (last visited Sept. 6, 2022) (describing arbitrary access barriers).

141 The National Academies' consensus study report describes several interrelated reasons for this under-treatment problem, including stigma surrounding mental illness, the costs of health care in the United States, fragmentation in the health care system, and laws described above that actually restrict and penalize access to mental health care. NAM Report, *supra* note 104, at 110–26

142 *Id.* at 110, 120.

to one in ten.[143] Worse than receiving no treatment, lack of access to evidence-based treatment shunts many patients into costly but ineffective, non-evidence-based programs.[144] Legal scholars, meanwhile, describe many restrictions on MAT as unjustified and unnecessary, a byproduct of historical stigma and animus surrounding substance use disorder coupled with a failure of regulatory regimes to "catch up" to the growing evidence base for the effectiveness of MAT.[145] They also note that restrictions on MAT are most severe in areas where the affected population is predominantly Black.[146]

The effects of the nation's failure to treat the vast majority of people who suffer from substance use disorder are horrific. In 2021, 100,000 people died from substance use disorder, with opioids the leading cause of death.[147] Already this millennium, more than one million Americans have died, and another million will die in the next ten years if the current rate—which has been rising—merely holds steady.[148] The effect of the overdose epidemic, which (despite intense public focus on coronavirus) may be the deadliest of the decade and is on pace to be the deadliest of the century.[149] Even before COVID-19, the epidemic had joined with a rise in suicide rates to cause U.S. life expectancy rates to fall for three years running, with the most significant effects on marginalized groups.[150] And, of

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143 *Id.* at 19; P'SHIP TO END ADDICTION, ADDICTION MEDICINE: CLOSING THE GAP BETWEEN SCIENCE AND PRACTICE 10 (2012), https://drugfree.org/reports/addiction-medicine-closing-the-gap-between-science-and-practice/ [https://perma.cc/U4RE-B4HZ] (estimating that "about one in 10 people" receive treatment).

144 Katrice Bridges Copeland, *Liquid Gold*, 97 WASH. U. L. REV. 1451, 1482–88 (2020) (describing programs).

145 *E.g.*, Davis & Carr, *supra* note 134, at 43.

146 Alyssa Peterkin, Corey S. Davis, & Zoe Weinstein, *Permanent Methadone Treatment Reform Needed to Combat the Opioid Crisis and Structural Racism*, 16 J. ADDICTION MED. 127, 128 (2022) ("OTPs in the Southern US, a region with high population density of Black residents, frequently had more unsupported, nonevidence-based regulations when compared to other regions of the country.").

147 Press Release, Ctrs. for Disease Control and Prevention, Drug Overdose Deaths in the U.S. Top 100,000 Annually (Nov. 17, 2021), https://www.cdc.gov/nchs/pressroom/nchs_press_releases/2021/20211117.htm [https://perma.cc/6PP8-UMPB] (showing 100,306 overdose deaths between April 2020 and April 2021).

148 Brian Mann, *More Than a Million Americans Have Died from Overdoses During the Opioid Epidemic*, NPR (Dec. 30, 2021), https://www.npr.org/2021/12/30/1069062738/more-than-a-million-americans-have-died-from-overdoses-during-the-opioid-epidemi [https://perma.cc/ZHL5-9RMY] (showing that 932,364 people died between 1999–2020, and another 100,000 were expected to die in 2021).

149 *See id.*

150 Sam Harper, Corinne A. Riddell & Nicholas B. King, *Declining Life Expectancy in the United States: Missing the Trees for the Forest*, 42 ANN. REV. PUB.

course, the bracing numbers of overdose deaths barely scratch the surface of harms for drug addiction sufferers, their families, and their communities.[151]

If these claims are correct, then restrictions on MAT interfere with freedom of thought in a literal sense, by preventing people with opioid use disorder from accessing a good or service capable of liberating them from the cravings and withdrawals of addiction. If courts were to recognize addiction as an intrusion on liberty, this would make for a clear-cut constitutional claim under the Fourteenth Amendment. Courts have invalidated state restrictions on the manner of access to numerous other goods and services essential to fundamental liberties including contraception,[152] private education,[153] and guns.[154] Such lawsuits provide an opportunity not only for those alleging deprivations of their liberty to make out their claims, but also for states who believe their restrictions to be justified to offer their defense.

If, on the other hand, courts refuse to recognize that addiction implicates constitutionally-protected liberty interests, there will continue to be no direct judicial check on state or federal laws restricting access to MAT, no matter how unjustified or extreme. Indeed, an active public interest litigation movement has had recent success establishing a constitutional right to MAT in the prison context premised on the Eighth Amendment but, paradoxically, struggled to develop a theory to challenge analogous restrictions imposed outside the prison walls.[155] Recognizing that denying access to MAT is not only

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HEALTH 381, 382 (2021) (documenting falling rates and developing explanations); *id.* at 394 ("Black men lost the most years of life expectancy . . . chiefly due to increases in deaths from opioid overdoses and homicide . . . .").

151 *See, e.g.*, Matthew B. Lawrence, *Deputizing Family: Loved Ones as a Regulatory Tool in the "Drug War" and Beyond*, 11 NE. U. L. REV. 195, 215 (2019) (describing the social consequences of overdose deaths); Elizabeth Weeks & Paula Sanford, *Financial Impact of the Opioid Crisis on Local Government: Quantifying Costs for Litigation and Policymaking*, 67 KAN. L. REV. 1061, 1130 (2019) (arguing that overdose deaths create enormous costs for local governments, many of which are hard to quantify).

152 Eisenstadt v. Baird, 405 U.S. 438, 447 (1972) (scrutinizing state law limiting access to contraception).

153 Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (holding that state restrictions on private education violated the parents' fundamental liberty interest in deciding how to raise their child).

154 McDonald v. City of Chicago, 561 U.S. 742, 750 (2010) (holding that gun ownership is a fundamental liberty interest applicable to the states through the Fourteenth Amendment).

155 *E.g.*, Samuel Macomber, *The Right to Medication-Assisted Treatment in Jails and Prisons*, 51 U. MEM. L. Rev. 963, 983–85 (2021) (describing cases).

"cruel and unusual" but also interferes with non-incarcerated substance use disorder patients' *liberty* offers such a theory.

C. Addictive Technology

A third category of deprivations come at the hands of private rather than government actors. According to a chorus of authors in the popular press, technology companies have leveraged new design flexibilities made possible by the Internet and smartphones to "addict" Americans by the hundreds of millions, transforming all aspects of American life from dating to parenting to work to politics. Nir Eyal writes that "[t]he technologies we use have turned into compulsions, if not full-fledged addictions."[156] To Adam Alter we live in an "age of behavioral addiction" in which "early signs point to a crisis."[157] Siva Vaidhyanathan marshals evidence that "[w]e've not seen any operant-conditioning technology in widespread use among human beings work quite as well as Facebook,"[158] which "conditions us through instant, constant, low-level feedback,"[159] especially "likes." And Ronald Deibert develops the case that "social media are addiction machines"[160] that, among other harms, have created an "appetite for subversion," warping our democratic discourse toward ever-more extreme content.[161]

These authors' theories are dystopian, but there is evidence to support them. Approximately 47% of Americans self-report that they are "addicted" to their smartphones,[162] frequently interrupting what they are doing to access a favored app not just when reading but also while on dates,[163] parenting,[164] driving,[165] or even performing medical procedures.[166]

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156 NIR EYAL, HOOKED: HOW TO BUILD HABIT-FORMING PRODUCTS 1 (2014).

157 ADAM ALTER, IRRESISTIBLE: THE RISE OF ADDICTIVE TECHNOLOGY AND THE BUSINESS OF KEEPING US HOOKED 10 (2017).

158 SIVA VAIDHYANATHAN, ANTISOCIAL MEDIA: HOW FACEBOOK DISCONNECTS US AND UNDERMINES DEMOCRACY 39 (2018); *see also* Bill Davidow, *Exploiting the Neuroscience of Internet Addiction*, MEDIUM (July 18, 2012), https://medium.com/@Bill Davidow/exploiting-the-neuroscience-of-internet-addiction-64ac34cdb389 [https://perma.cc/5ZQE-3Y37] (making a similar point).

159 VAIDHYANATHAN, *supra* note 158, at 39.

160 RONALD J. DEIBERT, RESET: RECLAIMING THE INTERNET FOR CIVIL SOCIETY 97 (2020).

161 *Id.* at 34.

162 Wheelwright, *supra* note 1.

163 *Id.*

164 *See id.*

165 *Id.*; Erez Kita & Gil Luria, *The Mediating Role of Smartphone Addiction on the Relationship Between Personality and Young Drivers' Smartphone Use While Driving*, 59 TRANSP. RSCH. 203, 203 (2018).

166 Hüseyin Ulas Pinar, Omer Karaca, Rafi Dogan & Ümmü Mine Konuk, *Smartphone Use Habits of Anesthesia Providers During Anesthetized Patient Care:*

"[A]t any given time throughout the day, approximately 660,000 drivers are attempting to use their phones while behind the wheel of an automobile," and such use causes 1.6 million accidents and 390,000 injuries a year.[167] More generally, social media platforms including Facebook, TikTok, and Twitter have created an "attention economy," including new forms of "digital labor"[168] in which the "product"—the content—is often produced without pay by users seeking intermittent reinforcement and variable rewards (including "likes") built into the platform.[169] And multiple scientific fields are separately developing an evidence base on compulsive smartphone and technology use.[170] Indeed, in the latest edition psychologists and psychiatrists amended the DSM-5 to expand the category of behavioral addictions, and to reference Internet gaming addiction as a disorder.[171]

A growing cadre of former tech executives and workers give further credibility to these concerns. Former CEO of Google and chairman of Alphabet, Eric Schmidt, explains that "the current industry focus, which is around revenue, is in fact

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A Survey from Turkey, 16 BMC ANESTHESIOLOGY 88, 89, 91 (2016) ("93.7% of respondents used smartphones during anesthetized patient care" in operating rooms; 41% reported having seen such use by a colleague negatively impact care.).

167 *2022 Texting and Driving Accident Statistics*, EDGAR SNYDER & ASSOCS., https://www.edgarsnyder.com/car-accident/cause-of-accident/cell-phone/cell-phone-statistics.html [https://perma.cc/RGN6-YF2S] (last visited Feb. 17, 2022) (collecting studies).

168 *See generally* Amanda Parsons, *Tax's Digital Labor Dilemma*, 71 DUKE L.J. 1781, 1783–90 (2022) (discussing digital labor).

169 TIM WU, THE ATTENTION MERCHANTS: THE EPIC SCRAMBLE TO GET INSIDE OUR HEADS 6–7, 343 (2016).

170 The addictive effects of new technologies are discussed in research on communications, NICK COULDRY & ULISES A. MEJIAS, THE COSTS OF CONNECTION: HOW DATA IS COLONIZING HUMAN LIFE AND APPROPRIATING IT FOR CAPITALISM 110 (2019); data science, Travis Greene, David Martens & Galit Shmueli, *Barriers to Academic Data Science Research in the New Realm of Algorithmic Behaviour Modification by Digital Platforms*, 4 NATURE MACH. INTEL. 323, 325 (2022); neuroscience, Ronald J. Deibert, *The Road to Digital Unfreedom: Three Painful Truths About Social Media*, 30 J. DEM. 25, 29 (2019); psychology, Courtney Seiter, *The Psychology of Social Media: Why We Like, Comment, and Share Online*, BUFFER (Aug. 10, 2016), https://buffer.com/resources/psychology-of-social-media/ [https://perma.cc/63GH-W26W] (collecting sources); and medicine, Elias Aboujaoude, Lorrin M. Koran, Nona Gamel, Michael D. Large & Richard T. Serpe, *Potential Markers for Problematic Internet Use: A Telephone Survey of 2,513 Adults*, 11 CNS SPECTRUMS 750, 750–51 (2006) (finding pathological markers in 3.7% to 13% of users); Xuan-Lam Duong, Shu-Yi Liaw & Jean-Luc Pradel Mathurin Augustin, *How Has Internet Addiction Been Tracked Over the Last Decade? A Literature Review and 3C Paradigm for Future Research*, 11 INT'L J. PREVENTATIVE MED. 175, 176 (2020).

171 Nancy M. Petry, Florian Rehbein, Chih-Hung Ko & Charles P. O'Brien, *Internet Gaming Disorder in the DSM-5*, 17 CURRENT PSYCH. REP. 72, 72 (2015).

playing into the addiction capabilities of every human. . . . What happens with social media, is you essentially become [addicted]."[172] Former Facebook President Sean Parker explained that the "like" button was intended to provide "a little dopamine hit" and is "exactly the kind of thing that a hacker like myself would come up with, because you're exploiting a vulnerability in human psychology."[173] Former game programmer Jamie Madigan reports that intermittent reinforcement in video games is "incredibly effective at making people keep playing because of how the dopamine-based reward circuitry works."[174] The engineer who designed the "pull to refresh" now worries that "pull-to-refresh is addictive"; he has gone to various measures, with only partial success, to quit Twitter himself.[175] The inventor of the "like" button describes similar concerns—and has his assistant set parental controls on his phone.[176] Tristan Harris, a former Google product manager who has founded an advocacy group and developed a popular Netflix special ("The Social Dilemma") to raise awareness about technology's effect on mental health, put the problem bluntly in recent testimony to Congress: "social media platforms [ ] have rewired human civilization with addiction."[177]

In short, experts and insiders allege that social media and game companies have knowingly used technology to plant repetitive, unwanted thoughts in users' minds, without their knowledge or consent; indeed, without even the basic "warning: this product is addictive" that now appears on cigarette packages. The constitutional implications of this intrusion are not as straightforward as with state lotteries or MAT, because the direct protection against deprivation of liberty in the Four-

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172 Issie Lapowsky, *Eric Schmidt: Social Media Companies 'Maximize Outrage' for Revenue*, PROTOCOL (Jan. 6, 2022), https://www.protocol.com/bulletins/eric-schmidt-youtube-criticism [https://perma.cc/CD7R-JLV9].

173 *Olivia Solon, Ex-Facebook President Sean Parker: Site Made to Exploit Human 'Vulnerability,'* THE GUARDIAN (Nov. 9, 2017), https://www.theguardian.com/technology/2017/nov/09/facebook-sean-parker-vulnerability-brain-psychology [https://perma.cc/C79F-VCFB].

174 SHARON BEGLEY, CAN'T JUST STOP: AN INVESTIGATION OF COMPULSIONS 107 (2017) (quoting Madigan).

175 Paul Lewis, *'Our Minds Can Be Hijacked': The Tech Insiders Who Fear a Smartphone Dystopia*, THE GUARDIAN (Oct. 6, 2017), https://www.theguardian.com/technology/2017/oct/05/smartphone-addiction-silicon-valley-dystopia [https://perma.cc/4V3V-T8JF] (quoting Loren Brichter).

176 *Id.* (quoting Justin Rosenstein).

177 *Algorithms and Amplification: How Social Media Platforms' Design Choices Shape Our Discourse and Our Minds*, *Before the Subcomm. On Privacy, Tech., & the Law of the S. Comm. on the Judiciary*, 117th Cong. (2021) (statement of Tristan Harris, President & Co-Founder, Ctr. for Humane Tech.).

teenth and Fifth Amendments applies to state and federal governments, not private actors. Judicial recognition of the interaction between addictive technology and liberty could nonetheless be crucial, however, to the country's ability to respond to this emerging threat.

Policymakers are increasingly focused on developing and implementing reforms to address addictive technology, from warning requirements to direct prohibitions to standards of conduct, with multiple hearings in the U.S. Congress in recent years.[178] Moreover, whether legislators or regulators act or not, the tort system may be called on to play a role. In *Dawley v. Meta*, family members of a man who died of suicide recently sued Facebook and Snapchat for wrongful death, alleging they caused the "addiction" to the apps that led to his demise.[179] It is not hard to imagine related suits being brought by, *inter alia*, victims of auto accidents caused by phone-distracted drivers.[180] It is certainly possible to foresee such cases failing in the courts, just as every single one of the hundreds of injury and wrongful death claims against the tobacco industry brought between the 1950s and the early 1990s failed.[181] These failures, of course, preceded the availability of industry-concealed proof that only became available due to the persistence of plaintiffs' attorneys. Given the ultimate success of tobacco litigation—and, more recently, opioid litigation—it is also possible to foresee addiction-by-technology claims gaining traction.

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178 *E.g.*, *Algorithms and Amplification: How Social Media Platforms' Design Choices Shape Our Discourse and Our Minds*, *Before the Subcomm. On Privacy, Tech., & the Law of the S. Comm. on the Judiciary*, 117th Cong. (2021).

179 *See* Complaint at ¶ 1, Dawley v. Meta Platforms, Inc., No. 2:22-cv-00444 (E.D. Wisc. Apr. 11, 2022), ECF No. 1 ("This product liability action seeks to hold Defendants' products responsible . . . for the death by suicide of Christopher J. Dawley on January 4, 2015, caused by his addictive use of Defendants' unreasonably dangerous and defective social media products."); *id.* at ¶ 8 ("[E]ach of Defendants' products contain unique product features which are intended to and do encourage addiction . . . ."); Samantha Murphy Kelly, *Their Teenage Children Died by Suicide. Now These Families Want to Hold Social Media Companies Accountable*, CNN (Apr. 19, 2022), https://www.cnn.com/2022/04/19/tech/social-media-lawsuits-teen-suicide/index.html [https://perma.cc/Y9EG-GLT8].

180 The "Social Media Victims Law Center" is a pioneering firm seeking to spread information about "social media addiction" and encourage injured people to bring suit on behalf of themselves and their loved ones and develop new theories. *What Is Social Media Addiction?*, SOC. MEDIA VICTIMS L. CTR., https://socialmediavictims.org/social-media-addiction/ [https://perma.cc/3AC7-RDDB] (last visited Sept. 6, 2022).

181 *See* Nora Freeman Engstrom & Robert L. Rabin, *Pursuing Public Health Through Litigation: Lessons from Tobacco and Opioids*, 73 STAN. L. REV. 285, 295–99 (2021) (describing the first two waves of tobacco litigation).

Any such policy effort to check new technologies, whether it comes through legislation, regulation, or the common law, will surely trigger First Amendment scrutiny on the ground that computer code is speech.[182] Recognition of the liberty implications of addictive technology, however, bolsters the case for legal intervention despite the possibility of First Amendment protection, for four reasons.

First, courts have not yet resolved whether and how the First Amendment applies to social media platforms or other emerging technologies in the first place. Justice Thomas, for example, recently wrote a separate opinion from the Court's denial of *certiorari* in a case related to Twitter content management to note that this area "raise[s] interesting and important questions" and discusses possible frameworks.[183] The Supreme Court has resolved open doctrinal questions about the freedom of speech in favor of protecting freedom of thought,[184] so the interference with that freedom possible through addictive technology could provide a basis to err on the side of less protection for such technology, not more, in conceiving whether and how the First Amendment applies to addictive technology in the first instance.

Second, even insofar as the freedom of speech does protect addictive technologies, they could still be subject to regulation that satisfies a constitutionally-significant government interest (either the "substantial interest" of commercial speech doctrine or the "compelling interest" of strict scrutiny).[185] Proponents of regulation in this and related domains, however, are still working to fully articulate a substantial or compelling state interest that would not run afoul of free speech doctrine's longstanding skepticism for overly-paternalistic regulation.[186] Understand-

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182 Jack M. Balkin, *The First Amendment in the Second Gilded Age*, 66 BUFF. L. REV. 979, 982 (2018) ("The First Amendment . . . may be a potential obstacle to laws that try to regulate private infrastructure owners . . . ."); Langvardt, *supra* note 18, at 171 ("Even modest efforts to regulate addictive design will likely be challenged as infringements on free expression.").

183 Biden v. Knight First Amendment Inst. at Colum. Univ., 141 S. Ct. 1220, 1227 (2021) (Thomas, J., concurring).

184 *Supra* notes 35–43 and accompanying text (collecting cases).

185 *See* Langvardt, *supra* note 18, at 183–84 (discussing standards of review).

186 *E.g.*, Kyle Langvardt, *A New Deal for the Online Public Sphere*, 26 GEO. MASON L. REV. 341, 390 (2018) (working to articulate and ground a government interest that would support the regulation of social media platforms and algorithms); Micah L. Berman, *Manipulative Marketing and the First Amendment*, 103 GEO. L.J. 497, 543 (2015) (suggesting that protection of the public health could be considered a "substantial state interest[ ]" to justify bans on "manipulative marketing"). Free speech law is deeply skeptical of "paternalism," making the articulation of a sufficiently targeted compelling interest particularly essential in the

ing addiction as a deprivation of liberty answers this challenge, because liberty interests protected by the Due Process Clause are an important source of compelling state interests that can justify intrusion on other constitutionally-protected liberties.[187]

Third, and as elaborated upon *infra* subparts III.B and III.C, freedom from addiction offers a concrete and canalized basis for regulation of emerging technologies, a more focused alternative to other broader (and therefore from a free speech proponent's perspective, more objectionable) justifications. Courts asked to accept that state interests justify speech restrictions have shown particular suspicion of asserted interests that seem broad or difficult to cabin. In *Brown v. Entertainment Merchants Association*, for example, the Supreme Court rejected on freedom of speech grounds the state's effort to regulate violent video games.[188] It refused to accept the state's interest in discouraging violence as a justification in part out of concern that this justification could be used to regulate books, movies, and other forms of media.[189] Courts might have the same concern about accepting broader, more amorphous state interests as a justification for regulating emerging technologies. In contrast, focusing on the protection of liberty interests as a basis for regulation offers a concrete, targeted justification for regulation that could support only limited regulations focused on addictive design features.

Fourth, and most tentatively, in extreme cases Congress could even justify legislation regulating addictive technology as an exercise of its authority under Section 2 of the Thirteenth Amendment to "enforce . . . by appropriate legislation"[190] the Section 1 prohibition on "involuntary servitude."[191] This possibility is surely surprising to some readers, and it is important not to overstate its breadth or suggest a false equivalence. But

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First Amendment context. *See* Ronald J. Krotoszynski, Jr., *Free Speech Paternalism and Free Speech Exceptionalism: Pervasive Distrust of Government and the Contemporary First Amendment*, 76 OHIO ST. L.J. 659, 665 (2015) (describing anti-paternalist position).

187 *E.g.*, Hodgson v. Minnesota, 497 U.S. 417, 446–448 (1990) (stating that a parental "liberty interest" in the upbringing of a child would have been undermined by a minor obtaining an abortion without parental notice, justifying the state notice requirement); *see* Stephen E. Gottlieb, *Compelling Government Interests: An Essential But Unanalyzed Term in Constitutional Adjudication*, 68 B.U. L. Rev. 917, 939 (1988) (describing how the life, liberty, and property protections of the Due Process Clause are a source of compelling government interests).

188 564 U.S. 786, 805 (2011).

189 *Id.* at 800–02.

190 U.S. CONST. amend. XIII, § 2.

191 U.S. CONST. amend. XIII, § 1.

while the "primary purpose of the Amendment was to abolish the institution of African slavery . . . the Amendment was not limited to that purpose."[192] Courts have understood the Section 1 prohibition to forbid other forms of involuntary servitude, including debt peonage and sex trafficking, and scholars have argued for even more expansive application.[193] There is no telling if application of the amendment to addictive technology may come to be realistic in the coming years due to developments in technology or understanding of addiction. Moreover, the boundaries of Congress's Section 2 power to interpret and enforce the Section 1 ban are in part within the judgment of Congress.[194] Congress might conceivably develop an evidentiary basis for the exercise of this power today.[195]

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192 United States v. Kozminski, 487 U.S. 931, 942 (1988).

193 *Id.* ("While the general spirit of the phrase 'involuntary servitude' is easily comprehended, the exact range of conditions it prohibits is harder to define."); Bailey v. Alabama, 219 U.S. 219, 241 (1911) (stating "the essence of involuntary servitude" is "that control by which the personal service of one man is disposed of or coerced for another's benefit"); *see, e.g.*, Maria L. Ontiveros & Joshua R. Drexler, *The Thirteenth Amendment and Access to Education for Children of Undocumented Workers: A New Look at* Plyler v. Doe, 42 U. S.F. L. REV. 1045, 1047 (2008) (arguing that the Thirteenth Amendment applies to the institutionalized treatment of undocumented immigrant workers); Douglas L. Colbert, *Liberating the Thirteenth Amendment*, 30 HARV. C.R.-C.L. L. REV. 1, 49 (1995) (stating that scholars "acknowledg[e] the Thirteenth Amendment's usefulness in addressing many of today's critical race and human rights issues"); Akhil Reed Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to* DeShaney, 105 HARV. L. REV. 1359, 1359–60 (1992) (explaining how the Thirteenth Amendment applies to abused children); Andrew M. Koppelman, *Forced Labor: A Thirteenth Amendment Defense of Abortion*, 84 NW. U. L. REV. 480, 480–86 (1990) (positing that the Thirteenth Amendment forbids laws prohibiting abortion).

194 Civil Rights Cases, 109 U.S. 3, 20 (1883) ("[L]egislation may be necessary and proper to meet all the various cases and circumstances to be affected by it, and to prescribe proper modes of redress for its violation in letter or spirit."); ALEXANDER TSESIS, THE THIRTEENTH AMENDMENT AND AMERICAN FREEDOM: A LEGAL HISTORY 3 (2004) (describing the reach of the Thirteenth Amendment enforcement power, including statutes addressing trafficking). The fact that compulsion in these cases is psychological rather than physical would not necessarily preclude a court from deferring to a congressional judgment that there is truth to these perspectives—so long as the court recognized freedom from addiction as a cognizable liberty interest. *See Kozminski*, 487 U.S. at 944 (avoiding the question of whether the prohibition on involuntary servitude includes psychological coercion by holding that the statutory provision in question was limited to physical or legal threat).

195 Scholars have framed the content producing of TikTok, Twitter, Facebook, and other users as "digital labor" because users produce the content that is key to platforms' business model (and is consumed by other users). Parsons, *supra* note 168, at 1783–90. Insofar as this "labor" may be motivated by a compulsion knowingly triggered by the technology company in unwitting users, it is conceivable that Congress could develop an evidentiary basis for framing it as involuntary servitude. Such a perspective is consistent with some observers' arguments that these technologies can entail "digital slavery." *See* DEIBERT, *supra* note 160, at 19, 28, 107–110; *see also, e.g.*, Stephen Guise, *Facebook Addiction: Digital Slavery*

Alternatively, if the next twenty years bring technological changes as profound as the last twenty, then Congress might well come to regulate some as-yet-undeveloped addictive technology as a form of involuntary servitude in the future, even if such a theory does not prove viable today.

These lines of argument—that constitutional liberty interests offer a constitutional justification for regulation of addictive technology—have not previously been developed in legal scholarship, but it has appeared in legislation. The recently proposed Social Media Addiction Reduction Technology (SMART) Act is explicitly a response to social media "addiction."[196] The Act's findings and text evince an effort to insulate the measure against constitutional challenge by reference to the impact of addictive technology on the liberty of users. The measure is explicitly focused on "practices that exploit human psychology or brain physiology to substantially impede freedom of choice" and resulting "risks of [I]nternet addiction and psychological exploitation."[197] It includes findings that "[I]nternet companies design their platforms and services to exploit brain physiology and human psychology" and, that "[b]y exploiting psychological and physiological vulnerabilities, these design choices interfere with the free choice of users."[198] It would specifically regulate particular practices it finds to contribute to addiction, including "infinite scroll," "elimination of natural stopping points," "autoplay," and "badges and other awards linked to engagement."[199] In announcing the measure, its sponsor, Senator Josh Hawley, stated that "Big Tech has embraced addiction as a business model."[200]

The SMART Act is just one legislative proposal by one Senator, but it offers a novel constitutional theory that courts may

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and How to Handle Freedom, MINIHABITS (Jan. 16, 2018), https://minihabits.com/why-the-brain-cant-resist-facebook-digital-slavery-and-how-to-handle-freedom/ [https://perma.cc/56SP-J2Q7] (describing addition to Facebook). For longstanding, more general comparisons of addiction to slavery, see DUPONT, *supra* note 67, at vi; Dru Stevenson, *Effect of the National Security Paradigm on Criminal Law*, 22 STAN. L. & POL'Y REV. 129, 144 n.108 (2011) (collecting sources describing addiction to slavery).

196 S. 2314 § 1, 116th Cong. (2019).

197 *Id.* at preamble.

198 *Id.* at § 1(b)(2)–(3).

199 *Id.* § 3.

200 Josh Hawley (@HawleyMO), TWITTER (July 30, 2019), https://twitter.com/hawleymo/status/1156203526688841728 [https://perma.cc/VSR6-6CZ2] ("Big Tech has embraced addiction as a business model. Their 'innovation' isn't designed to create better products, but to capture attention by using psychological tricks that make it impossible to look away. Time to expect more & better from Silicon Valley.").

well be called upon to adjudicate—that addictive technologies deprive their users of liberty. If and when that happens, courts will be forced to confront the novel question of whether addiction really does interfere with liberty within the meaning of the U.S. Constitution—just as they will if and when advocates bring legal challenges to state lotteries or restrictions on mental health treatment. Let us now turn to how courts might answer that question.

III
FREEDOM FROM ADDICTION

Addiction is a real-world phenomenon that interferes with millions of Americans' literal freedom of thought.[201] Moreover, as just discussed, advocates and experts have developed serious arguments that government and private actors play a significant role in the spread of addiction. Will courts see such literal deprivations as legal ones, warranting constitutional protection?

This question implicates multiple actual or potential constitutional protections. Addiction is a disease that entails biological changes,[202] so causing addiction may implicate the constitutional right to informed consent recognized by the Supreme Court in *Cruzan v. Director, Missouri Department of Health*[203] (among other cases). Additionally, addiction follows a person into their most private spaces; as such, government action that causes addiction may implicate the freedom of speech as a form of compelled speech (or compelled thought).[204] And the cognitive liberty interests described by Professor Marc Blitz would, by protecting an individual's right to mental enhancement,[205] presumably also protect an individ-

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201 *See supra* note 2 (collecting sources on prevalence of addiction).

202 "Addiction affects neurotransmission and interactions within reward structures of the brain, including the nucleus accumbens, anterior cingulate cortex, basal forebrain and amygdala, such that motivational hierarchies are altered and addictive behaviors, which may or may not include alcohol and other drug use, supplant healthy, self-care related behaviors." AM. SOC'Y OF ADDICTION MED., DEFINITION OF ADDICTION 1 (2011) [hereinafter ASAM DEFINITION], https://www.asam.org/docs/default-source/public-policy-statements/1definition_of_addiction_long_4-11.pdf?sfvrsn=A8f64512_4 [https://perma.cc/8D9C-9RAZ].

203 497 U.S. 261, 277 (1990) (discussing the right to informed consent).

204 *Cf. infra* notes 339–345 (discussing the *Public Utility* case in which the Supreme Court narrowly rejected First and Fifth Amendment challenges to advertisements played on a public trolley based in part on reasoning that people surrender certain rights when traveling on a public conveyance).

205 *See supra* note 61 and accompanying text; *see also* Blitz, *supra* note 61, at 119, 121–24 (discussing possible constitutional bases for protection of freedom of thought more generally).

ual's ability to control the development of addiction if adopted by a court. Future scholarship could helpfully explore these or other possible legal bases for constitutional protection of rights related to addiction.

The focus here is on the direct interaction between addiction and liberty. Whether in the context of a legal controversy about state lotteries, access to MAT, addictive technology, or otherwise,[206] it is reasonable to expect that advocates will soon ask courts to recognize that addiction directly implicates the freedom of thought long recognized as a fundamental aspect of the liberty protected by the U.S. Constitution.[207] (Indeed, this Article hopes to stimulate such claims, and sketches possible test cases below.) Courts are bound by the rule of law,[208] so the most important (and perhaps the only) determinant of their resolution of such a case will be their understanding of the legal case for constitutional protection.

The Supreme Court noted in *Obergefell v. Hodges* that there is no "formula" for the "identification and protection of fundamental rights."[209] That said, in *Glucksberg* (and as reemphasized in *Dobbs*) the Supreme Court articulated "two primary features" of the analysis courts should employ: (1) courts should focus on "those fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition and implicit in the concept of ordered liberty"[210] and (2) courts should require "a careful description of the asserted fundamental liberty interest."[211] Courts often structure their analyses around these two steps,[212] even though the *Glucksberg* approach is known to be a restrictive one.[213]

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206 This Article describes other potential sources of controversy beyond this Article's case studies *infra* subpart III.C.

207 The primary vehicle for such protection would be challenges to specific government actions under the Fourteenth or Fifth Amendments, but such a claim could also arise if Congress invoked the Fourteenth or Thirteenth Amendments as a defense to a claim that government regulation of addictive products violated the First Amendment. *See supra* notes 182–205 and accompanying text (describing interaction).

208 *See* Tenessee Valley Auth. v. Hill, 437 U.S. 153, 194–95 (1978) (detailing that Justices are bound to decide what is legal, not what is right).

209 576 U.S. 644, 663–64 (2015) (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting)).

210 521 U.S. 702, 720–21 (1997) (citations omitted).

211 *Id.* at 721.

212 *See generally* Ronald Turner, *On Substantive Due Process and Discretionary Traditionalism*, 66 S.M.U. L. REV. 841 (2013) (collecting cases).

213 The *Glucksberg* approach is restrictive because its focus on history and tradition can entrench longstanding deprivations without room for fundamental interests to evolve. *Obergefell*, 576 U.S. at 671 (criticizing the test as unduly restrictive).

This Part follows the *Glucksberg* approach as well. Subpart A addresses history and tradition and subpart B addresses the question of definition. This analysis reveals that there is a strong argument for judicial recognition of a fundamental liberty interest in freedom from addiction that, depending upon its definition, would implicate some or all of the threats described in Part II. Acknowledging that the need for a coherent limiting principle against "slippery slope" arguments constitutes an implicit third factor in courts' analyses, subpart C discusses the scope and limits of this Article's proposed right to freedom from addiction.

A. History and Tradition

Significant aspects of the nation's history and tradition suggest that addiction implicates a fundamental liberty interest. Freedom of thought has repeatedly been described as fundamental by the Supreme Court.[214] Its statements on this score reflect a longstanding philosophical consensus.[215] Whether understood in medical terminology or through the personal narratives of people addicted to drugs, alcohol, and technology, addiction literally interferes with freedom of thought.

In order to avoid this argument, a court would have to hold that the "freedom of thought" long recognized by courts and commentators is actually narrower than it appears, and that it actually only protects some subset of thoughts that addiction does not implicate. In other words, courts would have to hold that the "feeling of something taking full control over me"[216] (felt by a teenager addicted to vaping) or the "thoughts . . . . I couldn't fight [ ] off"[217] (felt by a person in recovery from drug addiction) do not count.

There are two problems with this narrowing of freedom of thought to exclude some thoughts. First, it lacks any apparent basis in the nation's history and tradition. The presumption of inviolability has meant that specific formulations or conceptions of the freedom of thought are difficult to find, especially in caselaw.[218] To support the argument that the freedom of

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214 *Supra* notes 35–42 (collecting quotations).

215 *Supra* notes 43–45 (collecting sources).

216 Amato et al., *supra* note 64, at 4 (quoting a teenager enrolled in treatment for vaping addiction).

217 Sibley et al., *supra* note 65, at 2283 (quoting a person in recovery from substance use disorder).

218 *See generally* Schauer, *supra* note 43 (noting the lack of definition, let alone consensus definition, to give consent to principle of freedom of thought).

thought protected by the U.S. Constitution actually entails some narrow conception that addiction does not implicate, it would be necessary as a starting point to locate precedent for such a conception.

The second problem with the objection that the "freedom of thought" long acknowledged as fundamental to our constitutional order actually refers to some narrow-but-undefined category of thoughts unimpacted by addiction is that it is hard to even conceptualize such a category (let alone support such a conception by reference to history and tradition). The most plausible narrowed theory this author has encountered is that "freedom of thought" really means "freedom of belief," and, even more specifically, means something like "freedom to believe what one chooses about political topics." But: (1) the Supreme Court has invoked freedom of thought to defend a person's right to fantasize about sex acts[219]—a fact impossible to square with the theory that freedom of thought refers only to beliefs about political topics; and (2) advocates actually do allege that addiction interferes with a person's beliefs on political topics.[220]

What is new in the twenty-first century that necessitates dedicated constitutional protection now, after two and a half centuries, of a liberty interest in freedom from addiction is not the concept of freedom of thought. What is new is the established reality, made possible by scientific and technological advances, of external influence on addiction. The right is old, it is the threat that is new, both practically and empirically. As a practical matter, in prior eras, government and corporate actors simply lacked the knowledge (of psychology and neuroscience) and the technology (laboratories, smart phones, tablets, touchscreens, and computers), and the analyzed data they pro-

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219 *See* Stanley v. Georgia, 394 U.S. 557, 565–66 (1969) (rejecting state's assertion of the "right to protect the individual's mind from the effects of obscenity").

220 For example, technology addiction advocates claim that it drives a craving for emotionally-salient reading that leads to the consumption and development of ever-more extreme views. DEIBERT, *supra* note 160, at 34 (describing "appetite for subversion"); *see also id.* (describing how extreme, emotion-provoking content produces engagement, so that is what platforms promote); CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL Media 9–10 (2017) (connecting polarization to growth of social media). Indeed, scholars have argued for major changes to existing constitutional law doctrine in order to address such threats. Caroline Mala Corbin, *The Unconstitutionality of Government Propaganda*, 81 OHIO ST. L.J. 815, 873–75 (2020) (arguing for the revisitation of constitutional questions surrounding government propaganda to combat the spread of misinformation and polarization through social media). In the medical realm, too, it is well understood that addiction has significant, complex impacts on a person's emotions and perspectives. *See* ASAM DEFINITION, *supra* note 202, at 1–3.

duce, to develop many of the sophisticated means used today to target individuals and to cause, facilitate, or treat their addiction.[221] As an empirical matter, in prior eras, psychology and neuroscience had simply not developed an understanding of how addictions form and can be controlled.

There are, of course, certain exceptions to this, such as activities and products that have generally been understood to be addictive. But the history and tradition surrounding such specific activities and products further supports constitutional recognition, because they have been subject to distinctive constitutional treatment. Alcohol is such a product. Beginning with Benjamin Rush's influential tract rejecting the moral model of alcohol addiction in 1785, many Americans have seen alcohol addiction as a product of exposure.[222] And alcohol has long been subject to heavy regulation. The temperance movement itself, which began with Rush's tract and ultimately led to Prohibition more than a century later, reflected the fact that while Americans saw addiction as a disease of compulsion,[223] they believed it "could be cured . . . only by total abstinence from hard liquor."[224] Thus, the only way for government to remedy a person's "enslave[ment]"[225] was to forbid alcohol altogether and thereby force abstinence. Decades later, the Supreme Court held in *Robinson v. California* that a law criminalizing alcohol addiction was cruel and unusual punishment for purposes of the Eighth Amendment on the ground

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221 *See supra* subpart II.A (discussing operant conditioning research); subpart II.B (discussing developing evidence base for medication-assisted treatment); subpart II.C (describing emergence of addictive technology).

222 Rush, a founding father and leading medical thinker of his time, wrote an influential tract arguing that alcohol addiction is caused in part by consumption of alcohol. Paul Aaron & David Musto, *Temperance and Prohibition in America: A Historical Overview*, *in* ALCOHOL AND PUBLIC POLICY: BEYOND THE SHADOW OF PROHIBITION 127, 139 (Mark H. Moore & Dean R. Gerstein eds., 1981) (describing the influence of Rush's tract).

223 An important theme in the temperance movement was the concern that consumption of alcohol created a "new, artificial, unnecessary and dangerous appetite," *id.* at 144 (quoting JUSTIN EDWARDS, TEMPERANCE MANUAL 28–29 (1847)), "decoy[ing] men from themselves and from their self-control." *Id.* (quoting James Appleton). *See also id.* at 139 (explaining the origins of the temperance movement in Benjamin Rush's tract defending addiction model of alcoholism).

224 *Id.* at 139 (describing how the addiction model of alcoholism "became the central constructs for the temperance movement that began slowly in the early 1800s and burgeoned 20 years later").

225 *Id.* (quoting Rush's description: "spirits are anti-Federal . . . companions of all those vices calculated to dishonor and enslave our country").

that the development and experience of addiction to alcohol are beyond the control of the individual.[226]

Society has viewed drug addiction, too, as an extraordinary concern warranting extraordinary regulation. The Supreme Court has repeatedly embraced drug control as a substantial or even compelling interest that can justify restrictions of the freedom of speech.[227]

Tobacco has also been subject to extraordinary regulation since knowledge of its addictiveness became mainstream.[228] The product is taxed to discourage use, its sale to minors is prohibited, its use is forbidden in social gathering places, and its sale must be accompanied by warning labels intended to meaningfully inform potential users of its addictiveness.[229] Such restrictions have been upheld against constitutional challenge by courts citing society's strong interest not only in the health of smokers in general, but in protecting individuals from unwittingly becoming addicted in particular.[230]

Moving beyond addictive chemicals, gambling is the only behavior long recognized as addictive[231]—and gambling has also long been singled out for special constitutional treatment.

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226 370 U.S. 660, 667 (1962) (the Court incorporated the Eighth Amendment's prohibition on cruel and unusual punishment to the states under the Fourteenth Amendment).

227 Morse v. Frederick, 551 U.S. 393, 407 (2007) ("[D]eterring drug use by schoolchildren is an 'important—indeed, perhaps compelling' interest." (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 661 (1995)); *id.* at 407 (citing "physical, psychological, and addictive effects of drugs" as support for state interest); *Vernonia Sch. Dist. 47J*, 515 U.S. at 661 (upholding a policy that required student athletes to undergo random urinalysis drug testing in part because of the importance of deterring drug use by schoolchildren).

228 FDA v. Brown & Williamson Tobacco Corp., 529 U.S. 120, 137–39 (2000) (describing the history of federal legislation regulating tobacco).

229 *See* Joseph Carlson, *Striking Tobacco Out of Baseball: The Constitutionality of Smokeless Tobacco Bans at Sports Stadiums*, 67 DEPAUL L. REV. 793, 806–809 (2018) (surveying decisions upholding state authority to ban smoking in certain contexts); INST. OF MED. OF NAT'L ACADS., PUBLIC HEALTH IMPLICATIONS OF RAISING THE MINIMUM AGE OF LEGAL ACCESS TO TOBACCO PRODUCTS 17–19 (Richard J. Bonnie, Kathleen Stratton & Leslie Y. Kwan eds., 2015) (discussing such regulatory tools).

230 *See* Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 563 (6th Cir. 2012) (describing how *Philip Morris* upheld warning requirements because of the lack of awareness of "what it would be like to experience . . . addiction") (quoting United States v. Philip Morris USA Inc., 449 F. Supp. 2d 1, 578 (D.D.C. 2006)).

231 *See* Nancy M. Petry et al., *An Overview of and Rationale for Changes Proposed for Pathological Gambling in DSM-5*, 30 J. GAMBLING STUD. 493, 495 (2014) (explaining the decision to classify gambling disorder alongside alcohol and substance use disorders); Kathleen V. Wade, Note, *Challenging the Exclusion of Gambling Disorder as a Disability Under the Americans with Disabilities Act*, 64 DUKE L.J. 947, 960–63 (2015) (describing the history of the understanding of gambling disorder as behavioral addiction).

Courts, including the Supreme Court, have refused to apply the protections of the freedom of speech to the regulation of gambling activity itself, despite the expressive character of such activity and a strong anti-paternalism streak in the doctrine, holding that "gambling [ ] implicates no constitutionally protected right."[232] The previously-unexplained Constitution-free zone around gambling can best be understood via the connection between gambling and addiction, and addiction's interference with liberty.

Finally, at the time of the Fourteenth Amendment's ratification, the vast majority of state constitutions specifically forbade lotteries—whether private or state-run.[233] These prohibitions were motivated by concern for corruption and the effect of gambling on the "character" of players.[234] Indeed, in *Phalen v. Commonwealth of Virginia*, the Supreme Court described one such ban on state or private public lotteries as consistent with the state's power to regulate public nuisances. Specifically, it described the "wide-spread pestilence of lotteries" as a "nuisance" that "infests the whole community; it enters every dwelling; it reaches every class; it preys upon the hard earnings of the poor; it plunders the ignorant and simple."[235] Later, in *Champion v. Ames,* the Supreme Court extended this holding to support a federal ban on mail including lottery materials, finding the Commerce Clause gave Congress power to "provide that [ ] commerce shall not be polluted by the carrying of lottery tickets from one state to another."[236] As described in subpart II.A, state lottery bans remained in effect

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232 United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993) ("[Gambling] falls into a category of 'vice' activity that could be, and frequently has been, banned altogether."); Interactive Media Ent. & Gaming Ass'n v. Att'y Gen., 580 F.3d 113, 118 n.8 (3d Cir. 2009) (gambling "lacks any 'communicative element' sufficient to bring it within the ambit of the First Amendment." (quoting United States v. O'Brien, 391 U.S. 367, 376 (1968))). *See generally* Marisa E. Main, *Simply Irresistible: Neuromarketing and the Commercial Speech Doctrine*, 50 DUQ. L. REV. 605, 606–614 (2012) (surveying cases). The Supreme Court's decision holding that advertising to promote gambling activity is protected, see 44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484, 489 (1996), is not to the contrary. That decision rejected the "greater-includes-the-lesser" theory that a state may ban alcohol advertisements because its interest in temperance would justify an outright ban on alcohol, but it did not dispute the premise that the state's interest in temperance would justify such a ban (or dispute the premise of *Edge Broadcasting* that gambling activity itself does not implicate constitutional interests). *Id.* at 509–11.

233 *Supra* notes 72–81and accompanying text.

234 *Id.*

235 Phalen v. Virginia, 49 U.S. 163, 168 (1850).

236 Lottery Case, 188 U.S. 321, 356 (1903) (upholding the Anti-Lottery Act of 1895, § 1, 28 Stat. 963).

until states began to relax their constitutional restrictions on lottery in the latter portion of the twentieth century as a way to raise revenue without taxing wealth.[237] The federal ban on lottery materials in the mail remains in effect today.[238]

To be clear, the author has not conducted an independent, comprehensive analysis of the nation's history and traditions *vis a vis* addictive activities including alcohol, drugs, nicotine, and gambling. Moreover, there are vagaries about what sorts of historical precedent "count" in establishing a "tradition" whose applicability I do not explore here. But the precedents described above, drawn from secondary sources with reference to primary sources where possible, are offered to bolster the underlying point that addiction interferes with the long-venerated freedom of thought and to demonstrate that there are important historical examples of extraordinary constitutional treatment of addiction. Further historical analysis could offer additional grounding and nuance.[239]

Finally, it is fair to point out that courts have not yet explicitly connected the nation's extraordinary constitutional treatment of alcohol, drugs, nicotine, and gambling to the freedom of thought, or even to one another. Rather, courts have approached these particular threats at a very specific, granular level of generality, treating each as *sui generis*.[240] The viability of constitutional recognition of an overarching freedom from addiction capable of protecting against not only these *old* sources of addiction but also *new* and *emerging* sources will largely depend, then, on whether or not courts embrace a defi-

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237 *Supra* notes 72–81and accompanying text.

238 18 U.S.C. § 1302 (1994) ("Whoever knowingly deposits in the mail . . . [a]ny lottery ticket . . . [s]hall be fined . . . or imprisoned not more than two years . . . .").

239 Further research might theoretically yield evidence inconsistent with understanding a person's freedom from being addicted without their consent to be a fundamental liberty, as well. If, for example, further research revealed significant, uncontroversial examples of governments knowingly addicting their residents without their consent, such examples would undermine the basis of the right to freedom from addiction in the nation's history and tradition. Examples of governments allowing people to choose to engage in addictive activities or consume addictive substances such as those discussed in DAVID POZEN, THE CONSTITUTION OF THE WAR ON DRUGS (forthcoming 2023) do not do this because of the key element of choice. *See supra* note 118 (discussing the possibility that informed consent vitiates a freedom from an addiction claim, just as informed consent vitiates bodily integrity claims raised by surgery or physical restraint).

240 *E.g.*, United States v. Edge Broadcasting Co., 509 U.S. 418, 426 (1993) (describing the lack of constitutional protection for "gambling"); Morse v. Frederick, 551 U.S. 393, 407 (2007) (describing the state interest in "deterring drug use"); Disc. Tobacco City & Lottery, Inc. v. United States, 674 F.3d 509, 564 (6th Cir. 2012) (discussing the state interest in promoting knowledge of the addictiveness of tobacco).

nition of freedom of thought that abstracts away from particular and discrete historical threats to focus, instead, on the underlying liberty that they threaten through their common impact on the freedom of thought.

B. Definition

It is almost black letter constitutional law that the definition of a fundamental liberty interest—and in particular, the level of generality at which the right or interest is framed—is both highly discretionary and often "determinative."[241] The way an interest is conceptualized both focuses inquiry into history and tradition and determines which practices will or will not implicate the interest.[242] Yet, the Justices of the Supreme Court have not agreed upon any one methodology for choosing the level of generality on which to define a liberty interest.

Indeed, Justices of the Supreme Court do not even appear to agree about when to use the term "rights" and when to use the term "liberty interests" in this context, sometimes using both and sometimes using one or the other without explanation.[243] This Article employs the terminology employed by the

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241 *See* Washington v. Glucksberg, 521 U.S. 702, 769—770 (1997) (Souter, J., concurring) ("When identifying and assessing the competing interests of liberty and authority, for example, the breadth of expression that a litigant or a judge selects in stating the competing principles will have much to do with the outcome and may be dispositive."); Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 723 (D.C. Cir. 2007) (en banc) (Rogers, J., dissenting) (noting that the majority's artificially-constrained definition of the right determined questions asked and answered provided by its history and tradition analysis).

242 The split between the Eleventh Circuit and the Fifth Circuit about whether state laws regulating the sale of devices intended for use in sexual relations violates the Fourteenth Amendment or not illustrates how the definitional step can be determinative. The Eleventh Circuit defined the right based on the specific state intrusion—a "right to use sexual devices"—and concluded that such laws do not implicate a fundamental interest. Williams v. Att'y Gen. of Alabama, 378 F.3d 1232, 1242 (11th Cir. 2004). The Fifth Circuit defined the right based on the underlying liberty—a "right to engage in private intimate conduct"—and so concluded that such laws do implicate a fundamental interest. Reliable Consultants, Inc. v. Earle, 517 F.3d 738, 744 (5th Cir. 2008). *See also* Turner, *supra* note 212, at 887–90 (discussing cases).

243 *Glucksberg* uses both terms, without distinguishing them, even in articulating its test for "extending constitutional protection to an asserted right or liberty interest." *Glucksberg*, 521 U.S. at 720; *see also id.* at 720–21 (stating that the "Due Process Clause specially protects those fundamental *rights and liberties* which are, objectively, 'deeply rooted in this Nation's history and tradition'" (emphasis added) (quoting Moore v. East Cleveland, 431 U.S. 494, 503 (1977) (plurality opinion))); *id.* at 721 (requiring "'careful description' of the *asserted fundamental liberty interest*" (emphasis added) (citations omitted)). Other cases similarly alternate between these terms. *E.g.*, Planned Parenthood v. Casey, 505

Court in *Cruzan*, using the term "liberty interest" to describe an interest deemed fundamental (or not), and using the term "right" both as a matter of common parlance and to describe specific, derivative applications of that interest.[244]

Although the Supreme Court has not endorsed a single, consensus approach to defining liberty interests, Professors Laurence Tribe and Michael Dorf helpfully isolate two prevailing approaches courts take to doing so.[245] The first approach, articulated by Justice Scalia in *Michael H. v. Gerald D.*,[246] is to define an interest at the "most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified."[247] The second approach, employed by Justice Harlan's dissent in *Poe v. Ullman* and by Justice Kennedy's majority opinion in *Obergefell v. Hodges*, is to define a right or interest by "inferr[ing] unifying principles at a higher level of abstraction."[248] This inferential process involves "focusing at times upon rights instrumentally required if one is to enjoy those specified, and at times upon rights logically presupposed if those specified are to make sense."[249] Justice Harlan described this approach as a "rational continuum."[250]

Applied to the interaction between addiction and liberty, these two tests may yield different results—but they may not. The *Michael H* test could yield granular interests limited to specific historical sources of addiction; the rational continuum

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U.S. 833, 915 (1992) (Stevens, J., concurring in part and dissenting in part) (referring to the "right" to bodily integrity); *id.* (referring to the "liberty interest").

244 *See* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 277 (1990) ("This is the first case in which we have been squarely presented with the issue whether the United States Constitution grants what is in common parlance referred to as a 'right to die.'"); *id.* at 278 (discussing the "general liberty interest in refusing medical treatment" before turning to the question of whether the Constitution protects "right to die"); *id.* at 279 ("[D]etermining that a person has a 'liberty interest' under the Due Process Clause does not end the inquiry; 'whether respondent's constitutional rights have been violated must be determined by balancing his liberty interests against the relevant state interests.'" (quoting Youngberg v. Romeo, 457 U.S. 307, 321 (1982))).

245 *See generally* Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057, 1058–59 (1990) (contrasting the two approaches to the levels of generality problem); Thomas A. Bird, *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, 592–98 (2016) (describing definitional approaches).

246 491 U.S. 110 (1989) (plurality opinion).

247 *Id.* at 127 n.6.

248 Tribe & Dorf, *supra* note 245, at 1068.

249 *Id.*

250 Poe v. Ullman, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting).

approach would yield a broader interest in freedom from addiction that could be interfered with by new and old threats alike.

Specifically, courts following the *Michael H* approach would focus on particular challenged intrusions. For example, a court might ask if "state lotteries deprive players of their liberty" or if there is a "right to be free from state lottery." On this approach there would be reasonable arguments that addiction via state lotteries, addictive drugs, and perhaps alcohol would implicate such granular fundamental liberty interests, because history does evince specific concern about these particular causes of addiction. At the same time, however, a court employing this approach might refuse to find that restrictions on access to addiction treatment or new technologies implicate a fundamental liberty interest. Both are simply too "new" to have developed a historical record of protection.[251] (On the other hand, such a court might reject a granular, intrusion-focused definition in cases arising out of new practices in light of the lack of tradition one way or the other on these practices, instead turning to a higher level of abstraction and so backing into the rational continuum approach.)

For courts employing the rational continuum approach (or for courts applying the *Michael H* approach but finding insufficient evidence at the level of specific intrusions and so seeking a higher level of generality), the governing "test" lacks the precision, paint-by-numbers predictability of Justice Scalia's *Michael H* approach. Here, the Court has explained that "[t]he identification and protection of fundamental rights . . . 'has not been reduced to any formula.'"[252] "Rather, it requires courts to exercise reasoned judgment in identifying interests of the person so fundamental that the State must accord them its respect."[253]

The question of how to frame the liberty interest potentially implicated by lotteries, treatment restrictions, and addictive technologies proves that this "rational continuum" definitional approach, while slippery in theory, can be straightforward to apply in practice. No matter what variables one thinks ought to go into the definitional "formula," it makes sense to frame the inquiry as to whether any of these threats infringe on a funda-

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251 Although medication-assisted treatment is not altogether new, the evidence base for its effectiveness is new. *See supra* notes 126–131 and accompanying text (describing MAT).

252 Obergefell v. Hodges, 576 U.S. 644, 663–64 (2015) (quoting *Poe*, 367 U.S. at 542 (Harlan, J., dissenting)).

253 *Id.* at 664.

mental liberty interest around the phenomenon that they all share, i.e., the phenomenon of addiction.

A court would be well grounded in defining the liberty interest implicated by any (or all) of the restrictions discussed in Part II as *freedom from addiction*. "Freedom from addiction" means freedom from repetitive, intrusive thoughts to engage in harmful behaviors. The right to freedom from addiction is a facet of the freedom of thought and the freedom of the person, and is implicated by government or private actions that cause addiction or that interfere with a person's ability to free themselves from addiction. As a fundamental liberty interest defined at a somewhat specific but not altogether granular level of generality—and focused on the *effect* on the person rather than the *source* of the intrusion—freedom from addiction is analogous to the freedom from bodily restraint that is itself the source of constitutional limits on arrest and detention.[254] Indeed, freedom from addiction might also be thought of as freedom from *mental* restraint, because addiction literally restrains a person from thinking as she wishes.

It is difficult to think of a variable that courts might consider in framing the liberty interest implicated by the case studies developed in Part II about state lotteries, treatment restrictions, and addictive technologies that is not well served by focusing on "freedom from addiction." This framing is natural, coherent, manageable, objective, essential, historically grounded, adaptable, and rationalizes current doctrine. To elaborate:

Freedom from addiction is a natural concept. That is to say, like the concept of "marriage" around which Justice Kennedy defined the right recognized in *Obergefell*[255] and the concept of "suicide" around which Justice Rehnquist defined the right in *Glucksberg*,[256] the concept of "addiction" is not an artificial or strained construct created for purposes of doctrinal analysis. It is a pre-existing, important phenomenon with which almost everyone is familiar. Indeed, people speak of "freedom from addiction" routinely,[257] and even speak of "slav-

254 *E.g.*, Reno v. Flores, 507 U.S. 292, 302 (1993) (discussing freedom from bodily restraint); Youngberg v. Romeo, 457 U.S. 307, 316 (1982) (same).

255 576 U.S. at 665.

256 Washington v. Glucksberg, 521 U.S. 702, 723 (1997).

257 *See* Google Search Results (Jan. 22, 2022) (showing 174,000 results for "freedom from diabetes," 178,000 for "freedom from heart disease," 299,000 for "freedom from cancer," and 4,450,000 for "freedom from addiction"); Google Analytics Report, Jan. 22, 2022 (describing frequent hits for <freedom from addic-

ery" to addiction,[258] but they do not describe other ailments this way to nearly the same extent. By recognizing freedom from addiction, courts would not be inventing a new form of liberty. They would be recognizing an aspect of liberty with which people are already intimately familiar.

Freedom from addiction is also a coherent concept. True, technical definitions of "addiction" vary, especially between ordinary and medical understandings.[259] Moreover, as Nancy Campbell has described, technical understandings of the concept are shaped by, and shape, both its common meaning and its medical and legal import.[260] These complexities underscore the preceding point that addiction is a longstanding, elemental phenomenon and concept, one constitutional doctrine would be recognizing, not creating, by acknowledging its implications for liberty.

Despite these complexities, there is a broader commonality within which variation in understandings of addiction occur. Medical and lay definitions understand addiction as comprising three core elements: (1) a repetitive urge (aka a craving or

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tion> but insufficient hits for other queries to return results, including <freedom from diabetes>, <freedom from cancer>, and <freedom from heart disease>).

258 Flávia Machado Seidinger-Leibovitz, Celso Garcia Junior, Carla Maria Vieira, Luís Fernando Tófoli & Egberto Ribeiro Turato, *Slavery to Addiction as Meaning of Dropout in Eating Disorders: Psychological Aspects Among Women That Have Interrupted Treatment at a Specialized Service in Brazil*, 6 PSYCH. 788, 791–796 (2015).

259 Jesper Aagaard, *Beyond the Rhetoric of Tech Addiction: Why We Should Be Discussing Tech Habits Instead (and How)*, 20 PHENOMENOLOGY & COGNITIVE SCIS. 559, 559–60 (2021) (noting the difference between the ordinary meaning of "addiction" as the term is employed in popular press and the specialized, medical meaning of the term, and advocating for use of term "habit" to describe compulsions that medicine would not diagnose as disease); *see also* A. Morgan Cloud, III, *Cocaine, Demand, and Addiction: A Study of the Possible Convergence of Rational Theory and National Policy*, 42 VAND. L. REV. 725, 737–38 (1989) (discussing the "inherent difficulty of defining addiction"). *Cf.* BEGLEY, *supra* note 174, at 19 ("There isn't a clear line between an addiction like alcohol and a behavior [people] are very compelled to do, but I'd rather use the term compulsion for these behaviors." (quoting an interview with cognitive scientist Tom Stafford)). Indeed, the DSM-5 does not include a single definition of addiction but instead defines a litany of addictive disorders, AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013), and the American Society of Addiction Medicine's "definition of addiction" includes a "short definition" that is six sentences and a "long definition" that is six pages, *see* ASAM DEFINITION, *supra* note 202, at 1, 1–6.

260 NANCY D. CAMPBELL, DISCOVERING ADDICTION: THE SCIENCE AND POLITICS OF SUBSTANCE ABUSE RESEARCH 1–11 (2007); NANCY D. CAMPBELL, USING WOMEN: GENDER, DRUG POLICY, AND SOCIAL JUSTICE 21–24 (2000).

compulsion)[261] to (2) engage in a behavior[262] that (3) causes harm.[263] Moreover there is a uniformity as to the first element,

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261 Despite the numerous definitions for different diagnoses in addiction medicine, the "cardinal symptom" of addiction as a medical diagnosis is of a "compulsion" involving a behavior or substance. Lüscher, Robbins & Everitt, *supra* note 70, at 247, 249–52 (collecting sources); *see also* Morat Yücel et al., *A Transdiagnostic Dimensional Approach Towards a Neuropsychological Assessment for Addiction: An International Delphi Consensus Study*, 114 ADDICTION 1095, 1095–99 (2018) (reporting that, in a consensus study of 44 addiction experts, "[c]onsiderable evidence exists supporting compulsivity as a core feature of addiction"); ASAM DEFINITION, *supra* note 202, at 3 ("The profound drive or craving to use substances or engage in apparently rewarding behaviors . . . underscores the compulsive or avolitional aspect of this disease. This is the connection with 'powerlessness' over addiction . . . as is described in Step 1 of 12 Steps programs."); Perales et al., *supra* note 104, at 775 (describing "[t]he presence of compulsivity" as "necessary for a behavior to be considered addictive," based on review of literature). *But see* Nick Heather, *Is the Concept of Compulsion Useful in the Explanation or Description of Addictive Behavior and Experience?*, 6 ADDICTIVE BEHAVS. REPS. 15, 15–16 (2017) (dissenting a view emphasizing the power of individuals to resist compulsions—but not disputing their repetitiveness or intrusiveness). This notion of a repetitive urge or compulsion is central to the way people use the term "addiction" in common parlance, see, for example, *supra* notes 63–70, 257–258 and accompanying text, and the way dictionaries define it as well. *E.g.*, *Addiction*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("compulsive uncontrolled use"); *Addiction*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2019) ("compulsive need"); *Addiction*, OXFORD ENGLISH DICTIONARY (3d ed. 2010) ("fact or condition of being addicted"); *see also Addicted*, OXFORD ENGLISH DICTIONARY (3d ed. 2010) ("physically and mentally dependent").

262 *E.g.*, *Addict*, WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (2002) ("one who habitually uses"); *Addict*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2019) ("to devote or surrender (oneself) to something habitually or obsessively"); *Addicted*, OXFORD ENGLISH DICTIONARY (3d ed. 2010) ("physically and mentally dependent").

263 Medical definitions tend to describe the harm element objectively, as "physical or psychological harm," "severe emotional, mental, or physiological reactions," MOSBY'S MEDICAL DICTIONARY (8th ed. 2009), or especially "significant impairment in executive functioning," ASAM DEFINITION, *supra* note 202, at 3 ("In addiction there is a significant impairment in executive functioning, which manifests in problems with perception, learning, impulse control, compulsivity, and judgment."). Indeed, the specific diagnostic criteria for particular addictions in the DSM generally include compulsion along with various forms of harm. *E.g.*, *Alcohol Use Disorder: A Comparison Between DSM-IV and DSM-5*, NAT'L INST. ON ALCOHOL ABUSE & ALCOHOLISM (Apr. 2021), https://www.niaaa.nih.gov/publications/brochures-and-fact-sheets/alcohol-use-disorder-comparison-between-dsm [https://perma.cc/557Z-ZUNR]. Ordinary definitions, meanwhile, tend to describe the harm element subjectively, the craved activity must be "persistent compulsive use . . . known by the user to be harmful." *Addiction*, MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY (11th ed. 2019). This difference in approach to the harm element appears to be a driver of the difference between medical and lay definitions of addiction. It may also result from the fact that an individual may readily develop a subjective sense of internal conflict or unwanted thoughts that medicine could not describe or observe without first developing a consensus theory of the mind—which it has not done. One way to understand the established phenomenon of conflict between immediate urges and overall goals is through the "two system" explanation made famous in DANIEL KAHNEMAN, THINKING, FAST AND SLOW 20–21 (2011). There, Kahneman distinguishes between two thought

the compulsions that are the "signature of addiction"[264] and its "cardinal symptom."[265] The variation between and among medical and lay definitions of addiction, instead, primarily has to do with the third element—the nature and degree of harm associated with a compulsive behavior necessary to label it an addiction that animates the concept both in medicine and the public eye.[266] As an example of this variation as to the "harm" element, an individual who felt a repetitive urge to check social media even while parenting or driving despite her ongoing desire and efforts to quit might describe herself as "addicted," but medicine has not yet created diagnostic criteria for recognition of social media addiction as a disease and, if and when it does, those criteria will presumably require not only compulsion but also a showing of functional impairment that dangerous driving and distracted parenting may or may not satisfy.[267]

Freedom from addiction is a judicially manageable definition. As a natural phenomenon familiar to medicine and law, courts already have experience from tobacco litigation, opioids litigation, family law, mental disease-and-defect criminal law defenses, and statutory interpretation adjudicating whether a person has an addiction and whether particular products are foreseeably addictive. Proving causation in such cases is far from easy, but as discussed *infra* section III.C.4, to the extent that courts may worry that a right to freedom from addiction might prove too much, this difficulty in proving causation is a feature, not a bug.

Relatedly, freedom from addiction is an objective concept.[268] One challenge for operationalizing the freedom of thought generally is the inherent subjectivity of thought—unless and until "mind reading" technologies develop further, how

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processes, a fast and instinctive system I and a slow and deliberative system II. *Id.* On this understanding, a person's overall goals come from system II, and repetitive urges contrary to those goals come from system I.

264 Perales et al., *supra* note 104, at 774 ("[T]he *signature* of addiction is the increasing role that compulsivity plays in the activity that one becomes addicted to.").

265 Lüscher, Robbins & Everitt, *supra* note 70, at 247, 249–51 (collecting sources).

266 *See supra* note 263 (describing the subjective approach of common understanding and the objective approach of medicine); Daniel Kardefelt-Winther et al., *How Can We Conceptualize Behavioural Addiction Without Pathologizing Common Behaviours*, 112 ADDICTION 1709, 1711 (2017).

267 *Cf.* Kardefelt-Winther et al., *supra* note 266, at 1709–1711 (discussing possible conceptions).

268 *Cf.* Hawkins v. Freeman, 195 F.3d 732, 748 (4th Cir. 1999) (rejecting a proposed liberty interest in part because of its "amorphous, heavily subjective nature").

can a court tell what a person is thinking? A court, however, would not need to rely on subjective evidence to adjudicate freedom from addiction claims, because addiction entails repetitive thoughts to engage in harmful behavior. These can be shown by *inter alia*, evidence of patterns of behavior, increasing intensity of behavior, and unsuccessful efforts to allay (or "quit") a behavior.[269] Moreover, whether or not courts opted to adopt a medicalized understanding of the "harm" required to render a compulsion an addiction,[270] they could still rely on objective, medical evidence in assessing addiction and addictiveness in practice.

Freedom from addiction is also a prerequisite to the exercise of liberties specifically enumerated in the U.S. Constitution. As Dru Stevenson explains, for example, under federal law addiction is a key, per se barrier to ownership of a firearm,[271] so a state that causes someone to develop an addiction or prevents her from receiving treatment for her addiction directly prevents her from exercising her Second Amendment rights. This is not an isolated case. Addiction prevents a per-

269 *E.g.*, R.J. Reynolds Tobacco Co. v. Brown, 70 So.3d 707, 717 (Fla. Dist. Ct. App. 2011) (describing expert and lay testimony offered in support of a finding of the decedent's tobacco addiction sufficient for the jury to conclude that the decedent "was addicted to RJR cigarettes").

270 This Article does not take a position on whether or not the "harm" element of addiction should, for purposes of constitutional adjudication, require a showing of the severe harms tantamount to functional impairment necessary for medical diagnosis of addiction or instead should require merely a showing that a compulsion is contrary to a person's overall goals as contemplated by the colloquial meaning of the term. There are both legal and policy arguments in favor of such a limitation, including that the functional impairment required for a medical diagnosis of addiction conclusively establishes the interference with other fundamental rights discussed above, and that this limitation would completely cut off some over-breadth arguments discussed *infra*. That said, there are also downsides to medicalizing any right. *See* Craig Konnoth, *Medicalization and the New Civil Rights*, 72 STAN. L. REV. 1165, 1168–75 (2020) (discussing medicalization); Allison K. Hoffman, Response, *How Medicalization of Civil Rights Could Disappoint*, 72 STAN. L. REV. ONLINE 165, 166–169 (2020) (noting problems with medicalization, including *ex post* focus and under-inclusiveness). Medicalizing freedom from addiction—and so limiting the protection to those addictions recognized in the DSM—would yield an under-inclusive protection, evidencing Hoffman's concerns, because many government or private actions that intrude on freedom of thought may not do so to such a degree as to cause functional impairment. *See* SCHÜLL, *supra* note 9, at 16 ("[R]esearchers point out that it is misleading to measure the problem by counting only those individuals who fit definitions for 'pathological' or 'problem' gambler . . . ."). This question is relevant to this Article's case study of technology addiction and discussed in mapping a test case *infra*, but further study could usefully explore the legal and normative issues it raises.

271 Dru Stevenson, *The Complex Interplay Between the Controlled Substances Act and the Gun Control Act*, 18 OHIO ST. J. CRIM. L. 211, 215 (2020) (noting that more than 14,000 applicants for gun permits a year are denied for reasons related to drug use).

son from speaking, worshipping, or gathering as she wishes—because she is compelled to instead think about, if not perform, the behavior to which she is addicted. And addiction adversely interferes with a person's ability to parent as they wish (or at all),[272] to sculpt her relationships,[273] and, in extreme cases, to travel, hold a job, and pursue a career[274]—all liberties recognized by the Supreme Court as fundamental.[275]

Freedom from addiction is also historically grounded. This grounding, at multiple levels of generality, was discussed in the preceding part. In short, freedom from addiction derives from the freedom of thought that has long been acknowledged as a fundamental liberty interest protected by the U.S. Constitution. Simultaneously, those causes of addiction that were known historically were heavily regulated and subject to exceptional constitutional treatment. And it goes without saying that there are no examples of government openly causing addiction to serve as historical counterpoints, at least not until the recent return of state lotteries.

Freedom from addiction is also adaptable. This definition focuses on the *effect* of various intrusions (from lottery to alcohol to smartphones) on the person, rather than focusing on specific intrusions themselves. It is, therefore, capable of policing new threats that may emerge—new ways, not yet recognized, of interfering with peoples' liberty by causing them to develop addictions.[276] If the future holds widespread use of

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272 *E.g.*, Lindsay Mackay, Sarah Ickowicz, Kanna Hayashai & Ron Abrahams, *Rooming-in and Loss of Child Custody: Key Factors in Maternal Overdose Risk*, 115 ADDICTION 1786, 1786 (2020) (describing an interference of connection between mothers who suffer from addiction and newborns after birth associated with medical practices).

273 *E.g.*, Nazir S. Hawi & Maya Samaha, *Relationships Among Smartphone Addiction, Anxiety, and Family Relations*, 36 BEHAVIOUR & INFO. TECH. 1046, 1046 (2017) (collecting sources noting connection between family relationships and Internet addiction).

274 *See supra* note 261 (describing how a medical diagnosis of addiction largely hinges on the conclusion that compulsive behavior is so severe as to cause functional impairment).

275 *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (describing the "liberty of parents and guardians to direct the upbringing and education of children under their control"); Lawrence v. Texas, 539 U.S. 558, 574 (2003) (describing how the development of relationships involve the "most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy"); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (describing how the liberty guaranteed by the Due Process Clause "denotes not merely freedom from bodily restraint but also the right of the individual to . . . engage in any of the common occupations of life").

276 *See* Obergefell v. Hodges, 576 U.S. 644, 671–72 (2015) (endorsing an "informed understanding of how constitutional imperatives define a liberty that remains urgent in our own era").

Elon Musk's human-brain interfaces[277] or Mark Zuckerberg's meta-verse—and especially if governments ever decide to take advantage of such technologies—we will need constitutional categories capable of considering, rationalizing, and addressing as appropriate the threats they pose. A doctrine focused on impacts can do that; a doctrine focused on sources of impacts cannot.

Furthermore, recognizing freedom from addiction provides a coherent rationale for existing but previously unexplained doctrines. Courts have declined to apply First Amendment scrutiny to gambling regulation.[278] At the same time, the Court has described drug control as a substantial or even compelling interest.[279] These doctrines no longer need be understood as *sui generis*, because both can be understood as natural derivatives of the fundamental liberty interest in freedom from addiction.

Finally, freedom from addiction has clear, principled limits. Prior scholarship calling for independent protection of freedom of thought has offered broad definitions of cognitive liberty while simultaneously noting the need for further refinement and expressing doubt about judicial adoption due to the lack of a clear limiting principle.[280] Professor Frederick Schauer, for his part, has pointed to the absence of a specific definition of freedom of thought in questioning whether the principle really warrants independent protection.[281] As elaborated upon in the next subsection, freedom from addiction answers these concerns. Although important, its protection would be limited to three specific domains, and its application in those domains would be fully consistent with existing precedent.

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277 Adam Rogers, *Neuralink Is Impressive Tech, Wrapped in Musk Hype*, WIRED (Sept. 4, 2020), https://www.wired.com/story/neuralink-is-impressive-tech-wrapped-in-musk-hype/ [https://perma.cc/Q34F-7MSF] (describing technology).

278 *Supra* note 232.

279 Morse v. Frederick, 551 U.S. 393, 407 (2007) (citing "physical, psychological, and addictive effects of drugs" as support for the state interest); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 653–655 (1995).

280 Farahany, *Costs of Changing*, *supra* note 7, at 109 ("Our ability to change our brains . . . requires us to decide and define the boundaries of cognitive liberty and its implications for law . . . ."); Farahany, *Incriminating Thoughts*, *supra* note 7, at 406 ("Mental privacy is not sacrosanct under either the Fourth or Fifth Amendment . . . ."); *id.* (proposing legislation "to protect cognitive liberty"); Blitz, *supra* note 7, at 1111 (arguing that "it is highly unlikely courts will extend freedom of thought to cover" cognitive enhancement drugs and devices); *id.* at 1054 (describing the interest as "power to make autonomous choices about the shape of the self that perceives, learns, archives, and reimagines the world").

281 Schauer, *supra* note 43, at 75.

C. Scope

Judicial recognition of a fundamental liberty interest in freedom from addiction would yield new legal theories in three domains. Section 1 discusses government actions that contribute to addiction. Section 2 discusses government restrictions on addiction treatment. Section 3 discusses the regulation of addictive products, including addictive technologies. In order to help readers assess the immediate and long-term implications of and prospects for freedom from addiction, each section first introduces a legal theory in the abstract, then discusses potential areas where it might apply today, and ultimately sketches a specific test case.

Although important, these interventions would be limited by elements inherent in the concept of addiction. Historically-accepted practices, such as propaganda and advertising, would be untouched. Section 4 discusses these limits.

1. *Causing Addiction*

The first, most obvious implication of freedom from addiction is a proposition that feels obvious: the government cannot knowingly cause addiction, at least not without either a justification that satisfies constitutional scrutiny or the subjects' valid consent. In seeking to alter behavior there are many tools in government's toolkit—mandates, taxes, subsidies, and propaganda[282]—but addiction should not be one of them.

The possibility of government causing addiction is not merely the stuff of science fiction.[283] The author is aware of two current government practices that could be called into question under a regulation-by-addiction theory, that is, that arguably (1) contribute to or cause (2) the formation of repetitive thoughts (3) to engage in behavior (4) that is harmful.[284] The first is government entanglement with addictive technologies such as Facebook and Twitter.

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282 *See* Nat'l Fed'n of Indep. Bus. v. Sebelius, 567 U.S. 519, 573 (2012) (distinguishing the power to tax and spend from the power to compel); Corbin, *supra* note 220, at 821–25 (describing the government speech doctrine protecting propaganda from constitutional scrutiny).

283 *Cf.* ANTHONY BURGESS, A CLOCKWORK ORANGE (1962) (discussing a science fiction story of government conditioning).

284 *See supra* notes 231–270 (describing the elements of addiction). The discussion here is focused on mapping the possible outer limits of the right to freedom from addiction to address slippery slope concerns, so I assume above courts would adopt the broadest understanding of this right on which the "harm" element could be satisfied without a medical diagnosis of addiction including functional impairment. Were courts to adopt the narrower, medicalized sense of addiction, *see supra* note 270, much of the discussion above would be moot.

Some scholars have discussed the possibility that social media platforms are themselves "state actors" under the U.S. Constitution and so are directly subjected to the requirements of the Fourteenth Amendment.[285] Such a strong conclusion is not necessary to conclude that particular state actions are sufficiently entangled with platforms to give rise to a due process claim. Where, for example, public schools require students to use Facebook to participate in classroom exercises (already a controversial practice from a public health perspective[286]) students might invoke a "freedom from addiction" theory to challenge mandatory exposure to addictive design. If this seems outlandish, consider the swift lawsuits that would result if a school required students to smoke or vape—and consider the growing body of literature on the addictiveness of social media.[287] In the future, such claims could also be brought to challenge efforts by campaigns or agencies to work with platforms to influence political views or steer user behavior—a possibility that authors in the popular press worry is not remote.[288]

Second, and as elaborated upon in the case study in Part II, the lotteries that states relaxed their constitutional prohibitions to adopt in the latter portion of the twentieth century arguably constitute a form of government-induced addiction. Given their lopsided effects on the poor and historically marginalized communities and the country's long history of constitutional prohibition on their use,[289] such lotteries present a promising target for a test case establishing freedom from addiction as a fundamental liberty interest.

Assuming a court was open to finding freedom from addiction to be a fundamental liberty interest as a legal matter, the key factual question in an addiction-by-lottery case would be causation, that is, establishing that the state lottery was the

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285 *Compare* Jed Rubenfeld, *Are Facebook and Google State Actors?*, LAWFARE (Nov. 4, 2019), https://www.lawfareblog.com/are-facebook-and-google-state-actors [https://perma.cc/A2WL-FXN8] (describing a "powerful argument" that Google and Facebook are state actors), *with* Alan Z. Rozenshtein, *No, Facebook and Google Are Not State Actors*, LAWFARE (Nov. 12, 2019), https://www.lawfareblog.com/no-facebook-and-google-are-not-state-actors [https://perma.cc/6XV6-W864] (disputing this argument).

286 Antoine Van Den Beemt, Marieke Thurlings & Myrthe Willems, *Towards an Understanding of Social Media Use in the Classroom: A Literature Review*, 29 TECH., PEDAGOGY & EDUC. 35, 35–36 (2020) (discussing literature scrutinizing practices).

287 *Supra* subpart II.C.

288 VAIDHYANATHAN, *supra* note 158, at 150–63 (describing the "Cambridge Analytica" scandal).

289 *Supra* notes 72–81 and accompanying text.

actual cause of the plaintiff's (or plaintiffs') gambling addiction. This may not be hard to do. For example, the author lives in Georgia, where lottery is the only legal form of gambling. An Instagram influencer, "ATL Bucketlist" recently announced in a post her new sponsorship by the Georgia State Lottery, shared how much fun it is to play the lottery's app, "Cash Pop," and encouraged users to try it ("link in bio!").[290] The post appeared at the top of the author's Instagram feed one day—I can only speculate about the disturbing possibilities that the ad was targeted to me because of my frequent searches related to "gambling addiction" in writing this Article and that Georgia is paying Instagram to target its ads to those who the app's algorithms predict are vulnerable to addiction. (Discovery, in an appropriate case, would eliminate the speculation on these points.) An ideal plaintiff for impact litigation establishing freedom from addiction would be a resident of Georgia (or another state in which it is the only form of legal gambling) who could show (1) that they began playing after exposure to such an ad, (2) played more and more over time, (3) developed a gambling addiction diagnosed by a physician, and (4) tried to quit unsuccessfully (including, perhaps, repeatedly deleting and redownloading the app). All this could potentially be shown through lay and expert testimony along with credit card receipts and medical history.

Causation established, the state could be expected to argue that its lottery serves a compelling interest—perhaps its interest in raising revenue, and perhaps a public health and safety interest in offering state-run lottery as a way to protect users from even-more-dangerous (and potentially crime-creating) private lotteries. This would be a tall order for the state. The state's mere financial interest, given precedent, is an insufficient justification for interfering with a fundamental liberty interest, because there are many alternative means of raising state revenue that do not interfere with any such interest—especially taxation.[291]

As for the public health and safety argument that state lottery, though addictive, is less harmful than private equivalents, there may be something to this argument in the abstract, but the state would have to prove it in the specific case. Such an argument would be fact-intensive, meaning it would not stop a plaintiff from proceeding past a motion to

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290 *See* Screenshot of Atl_Bucketlist (Feb. 12, 2022) (on file with author).

291 Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 231 (1987) (holding that "raising revenue" is not compelling interest).

dismiss (in the context of which the court would be asked to endorse or reject the freedom from addiction theory as a matter of law while assuming the truth of the plaintiff's plausible allegations)[292] and into potentially game-changing discovery.[293] At that point, it would not be enough for the state to posit that its lottery might theoretically be justified by public health concerns; the state would need to show that its lottery was actually justified by such concerns in its operation and specifics. This defense would depend on the state, but the fact that states earn revenue based on lottery sales gives them a bias that may well prevent lofty public health rationales from being put into effect in practice.[294]

2. *Right to Addiction Treatment*

The second implication of the right to freedom from addiction is that the government may not impose undue burdens on access to addiction treatment, that is, it may not impose burdens on such treatment that are not narrowly tailored to furthering a compelling state interest. In short, the fundamental liberty interest in freedom from addiction gives rise to a derivative negative right to addiction treatment.[295]

Any state or federal requirement that, absent an adequate state interest, restricts access to addiction treatment would run afoul of this right, as long as advocates could establish that the restricted treatment in fact alleviates addiction. (Many purported addiction treatments lack such an evidence base.[296]) This would support enhanced judicial scrutiny of direct restrictions on access to medication assisted treatment such as those described in the case study in subpart II.B. It would also support enhanced scrutiny of more general restrictions on access to mental health treatment that indirectly limit access to addiction treatment. For example, state bar and medical licensure

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292 *See* Fed. R. Civ. P. 12(b)(6) (providing for a motion to dismiss for failure to state a claim on the merits); Bell Atl. Corp. v. Twombly, 550 U.S. 544, 556 (2007) (holding that the plaintiff's allegations, if plausible, must be assumed to be true at motion to dismiss stage).

293 *Cf.* Engstrom & Rabin, *supra* note 181, at 304 (developing a claim that could survive motion to dismiss in tobacco litigation proved "crucial" because "once discovery commenced, the companies' many secrets spilled out," including industry knowledge of addictiveness).

294 *See* Tumey v. Ohio, 273 U.S. 510, 523 (1927) (discussing that the risk of "pecuniary interest" may impede independence).

295 *See supra* notes 243–244 and accompanying text (describing the relationship between "right" and "interest").

296 *See* Copeland, *supra* note 144, at 1482–88 (describing the prevalence of drug treatment providers who do not employ evidence-based practices).

questions relating to mental health treatment might be subject to such challenge.[297] As with MAT, such restrictions on access to mental health treatment can be motivated by stigma, not evidence.[298]

A test case for this manifestation of freedom from addiction could incorporate the same arguments and theories successfully advanced by abortion rights activists in challenging laws restricting access to, rather than prohibiting, abortion (though in light of recent case law on abortion rights, advocates should analogize instead to state laws restricting gun rights or parental rights). In *Whole Women's Health v. Hellerstedt*;[299] *June Medical Services, LLC v. Russo*;[300] and *Planned Parenthood v. Casey*,[301] the Supreme Court found unconstitutional state laws restricting which providers could perform abortions or imposing waiting periods before patients could obtain abortions on the ground that such laws unduly burdened access to abortion. Similarly, addiction patients might challenge state or federal laws restricting which providers can offer MAT and imposing waiting periods before patients can obtain MAT for unduly burdening access to such treatment.

Success in a broad attack on federal methadone prescription restrictions would be difficult because the Substance Abuse and Mental Health Services Administration (SAMHSA) and the Drug Enforcement Administration (DEA) would surely argue that existing restrictions balance the health and wellbeing of patients with the risk of diversion (illegal use or sale) associated with allowing methadone patients to take their

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297 Applicants to the bar in many states are asked whether they have sought mental health treatment within the past five years. *See* Alyssa Dragnich, *Have You Ever . . . ?: How State Bar Association Inquiries into Mental Health Violate the Americans with Disabilities Act*, 80 BROOK. L. REV. 677, 677 (2015). Law students report declining to pursue treatment for mental illness due to these requirements. Jerome M. Organ, David B. Jaffe & Katherine M. Bender, *Suffering in Silence: The Survey of Law Student Well-Being and the Reluctance of Law Students to Seek Help for Substance Use and Mental Health Concerns*, 66 J. LEGAL EDUC. 116, 141 (2016). Would-be medical providers face analogous state-sanctioned impediments to mental health treatment. *See* James T.R. Jones, Carol S. North, Suzanne Vogel-Scibilia, Michael F. Myers & Richard R. Owen, *Medical Licensure Questions About Mental Illness and Compliance with the Americans with Disabilities Act*, 46 J. AM. ACAD. PSYCH. & L. 458, 459 (2018).

298 *Id.* (describing barriers connected to the stigma underlying the Controlled Substances Act).

299 579 U.S. 582, 591 (2016).

300 140 S. Ct. 2103, 2113 (2020).

301 505 U.S. 833, 898 (1992).

medicine home with them.[302] Although some experts disagree,[303] a court might well defer to the agencies' judgment.

A clearer path to establishing the freedom from addiction in a treatment restriction case involves more targeted litigation challenging state regulations that are much more stringent than is required by the federal government. For example, during the COVID-19 pandemic, the federal government relaxed federal regulatory limits on taking home methadone,[304] relieving many patients of the burden of daily visits to the clinic. The federal government is now planning to make these changes permanent based on a growing evidence base showing that relaxing the limits promoted health and well-being of patients.[305] But states have the option of imposing requirements more stringent than the federal government, and many continue to do so,[306] despite the evidence prompting federal policy change.

A suit challenging state restrictions that go above-and-beyond federal requirements would have a good chance at establishing a lack of justification, because the state's restrictions, by definition, exceed the balance struck by experts at the federal level.[307] Of course, weighing proof on this point might depend on whether courts employed strict scrutiny or opted for a more deferential test in light of the state's interest in regulating controlled substances. The primary challenge for such a suit, however, would be establishing that treatment restrictions implicate a constitutionally protected interest. Courts have refused to recognize a liberty interest in the ability to

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302 *E.g.*, Registration Requirements for Narcotic Treatment Programs with Mobile Components, 86 Fed. Reg. 33,861, 33,874 (June 28, 2021) (balancing the patient interest in access with the public interest in limiting diversion).

303 Davis & Carr, *supra* note 134, at 46 (characterizing restrictions on methadone and buprenorphine as unnecessary and based in stigma).

304 DOOLING & STANLEY, *supra* note 138, at 1.

305 Press Release, Dep't of Health & Hum. Servs., Statement of Regulatory Priorities for Fiscal Year 2022, at 6 (2022), https://www.reginfo.gov/public/jsp/eAgenda/StaticContent/202110/Statement_0900_HHS.pdf [https://perma.cc/UK87-TDQE] (describing HHS's plan to extend flexibilities).

306 *E.g.*, Terry DeMio, *COVID-19 Brought Easier Access to Methadone but Ohio's Ending it. Expert is Asking "Why?,"* CINCINNTI ENQUIRER (May 4, 2021), https://www.cincinnati.com/story/news/2021/05/04/experts-say-methadone-treatment-rules-relaxed-pandemic-should-stay-flexible-with-opioid-crisis/4859273001/ [https://perma.cc/Y2VF-2RRM] (explaining that methadone is strictly regulated in Ohio because of its potential to be illegally sold and misused).

307 *See Methadone Take-Home Flexibilities Extension Guidance*, SUBSTANCE ABUSE & MENTAL HEALTH SERVS. ADMIN. (Mar. 3, 2022), https://www.samhsa.gov/medication-assisted-treatment/statutes-regulations-guidelines/methadone-guidance [https://perma.cc/9G4G-3PRS] (noting that the relaxation of requirements had improved the access and quality of treatment with a few incidents of misuse).

access medicine *generally*, rejecting "right to try" or "right to use" suits involving experimental chemotherapy drugs.[308]

As this Article has revealed, addiction treatment implicates a different, more specific, and more deeply rooted liberty interest, one intertwined with the freedom of thought. By acknowledging this interest, a court could subject laws restricting access to addiction treatment to constitutional scrutiny without contradicting previous precedents regarding rights to access medicine more generally.

More than 400,000 people in the United States receive methadone treatment for opioid use disorder.[309] The ideal plaintiff for a case establishing a right to such treatment would be a patient in a major state that prohibits patients from taking their medicine home—even when permitted by federal law—and who lives a significant distance from their clinic. For example, Ohio refused to continue take-home flexibilities during the COVID-19 pandemic, and it features a "low geographic distribution of methadone treatment centers" so that "most people in rural areas of Ohio are essentially left without access."[310] A rural Ohio plaintiff who, nonetheless, obtains treatment daily by traveling to a distant clinic could establish, by their testimony, that of friends and family, and that of their medical providers: they suffer from substance use disorder and spent a substantial part of their life—at least a year—in active addiction to opioids, meaning they engaged in compulsive use despite harms to themselves, family, work, etc.[311] At the same time, the typical such patient could also demonstrate a dogged will to overcome their disease, proven not only by their efforts to enter recovery but also by their continuing efforts to maintain adherence to burdensome state requirements.[312] The patient's medical provider—and a host of experts—could testify to the importance of methadone in curbing cravings, maintaining

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308 Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 695 (D.C. Cir. 2007) (en banc) (refusing to recognize a liberty interest in access to experimental drugs).

309 Furst, Mynarski, McCall & Piper, *supra* note 135, at 274 (stating that there were 408,550 methadone patients in 2019).

310 MARK REMBERT, MICHAEL BETZ, BO FENG & MARK PARTRIDGE, OHIO ST. UNIV., TAKING MEASURE OF OHIO'S OPIOID CRISIS 15 (2017).

311 Establishing these facts is a prerequisite to eligibility for treatment under federal guidelines. *See* 42 C.F.R. § 8.12.

312 *See* David Gifford, Holly Harmon & Pamela Truscott, *Additional Barriers to Methadone Use in Hospitals and Skilled Nursing Facilities*, 180 JAMA INTERNAL MED. 615, 615 (2020).

recovery, and avoiding overdose death.[313] And the patient could explain in detail the burdensome time, energy, and effort that daily trips to the clinic require of them, and how that has contributed to relapse(s) or limited, incomplete, or ineffective treatment.

In short, such a methadone patient could present to the court the choice that onerous methadone take-home requirements force upon them as one between physical and mental restraint. To receive treatment, they could point out, they must daily surrender their freedom of movement, traveling to the methadone clinic and waiting there for the administration of treatment. Their only alternative to the daily surrendering of their physical liberty in this way, however, would be to forego the medicine that keeps them free from cravings and withdrawal. The issues so framed, a court could not escape a direct assessment of the legal question whether freedom from addiction is entitled to constitutional protection.

3. *Psychological Domination*

Fundamental liberty interests most directly influence and limit government action, but they also influence the development of constitutional law doctrine and justify regulation of private actors.[314] This is already evident when considering specific, historically acknowledged causes of addiction. Gambling has long been exempt from First Amendment protection, despite its expressive content.[315] It has also been either banned or closely regulated in every state, and state constitutions expressly prohibited the operation of lotteries for most of the nation's history.[316] Addictive drugs, too, have a long history of prohibition, and the Supreme Court has acknowledged the state's interest in regulating drugs to be a substantial or even compelling one.[317] The same is true of nicotine; courts have upheld prominent warning labels and sales restrictions intended to ensure consumers are informed about the risk of addiction before choosing to smoke.[318]

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313 Larochelle et al., *supra* note 131, at 138 (describing how methadone reduced the rate of overdose by half).

314 *Supra* notes 182–196 and accompanying text (discussing interaction).

315 *Supra* note 232 (collecting sources).

316 *Supra* notes 233–238 and accompanying text (describing historical regulation).

317 *E.g.*, Morse v. Frederick, 551 U.S. 393, 407 (2007) (finding that deterring drug use by schoolchildren is a substantial or even compelling state interest).

318 *See* Lorillard Tobacco Co. v. Reilly, 533 U.S. 525, 599 (2001) (Stevens, J., concurring) ("[F]ew interests are more 'compelling' than ensuring that minors do

Recognizing a fundamental liberty interest in freedom from addiction simply reconceptualizes the particular doctrines and practices applicable to specific addictive products not as *sui generis* exceptions but as manifestations of a broader, underlying and historically-protected interest. Doing so would not work any substantial changes with regard to long-established addictive products. Instead, the most important implications of freedom from addiction in the private sector would be for emerging technologies, such as smart phones, online games, and social media platforms.

As described in subpart II.C, harms associated with emerging technologies have already given rise to a mainstream reform movement. For example, the competition-focused bipartisan American Innovation and Choice Online Act passed out of committee in the Senate in 2021, a significant step that may indicate a possibility the bill will eventually pass into law in some form.[319] At the same time, courts have only begun to sculpt the doctrinal framework within which to assess inevitable First Amendment challenges to the regulation of new technologies or to isolate the state interests that might support regulation despite any constitutional limits.[320]

The proposed SMART Act is, to date, the only bill to specifically reference the addictiveness of new technologies as a reason for concern and as a justification for regulation. Even if they disagree with the specifics of that bill, legislators and scholars should look to freedom from addiction in crafting future reform legislation, both as a way to increase the likelihood such laws could survive constitutional challenge and to make them more effective.

Regarding legality, other scholars suggesting paths forward for courts with regard to new technologies have focused on the "big data" aspects of new technologies,[321] the power

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not become addicted to a dangerous drug before they are able to make a mature and informed decision as to the health risks associated with that substance.").

319 American Innovation and Choice Online Act, S. 2992, 117th Cong. (2021). The bill is focused on limiting platforms' ability to manipulate users or the user experience as a way to discourage competition. *See generally* Erika M. Douglas, *The New Antitrust/Data Privacy Law Interface*, 130 YALE L.J. F. 647, 647 (2021) (contrasting antitrust law and data privacy law over the past 25 years, as data privacy has become its own distinct area of legal doctrine).

320 Langvardt, *supra* note 18, at 182 ("[T]he likely state of the doctrine over the next decade or so is too fluid to speak with precision.").

321 *E.g.*, Kate Crawford & Jason Schultz, *Big Data and Due Process: Toward a Framework to Redress Predictive Privacy Harms*, 55 B.C. L. REV. 93, 109 (2014) (discussing "the power of Big Data analyses to evade or marginalize traditional privacy protections"); Shlomit Yanisky-Ravid & Sean K. Hallisey, *"Equality and Privacy by Design": A New Model of Artificial Intelligence Data Transparency via*

platforms have to moderate content themselves,[322] the breadth of the harms associated with social media platforms,[323] and platforms' ability to "manipulate" users by altering choice architecture and personalizing advertisements in real time.[324] These are important features worthy of attention, and indeed the "manipulation" category is broad enough to include addictive design features (though it also includes non-addictive choice architecture and personalized advertising). But others point out the difficulty of cabining any of these justifications for restriction on the freedom of speech,[325] and courts may well be very concerned about their potential breadth and principled limits.

The precision of freedom from addiction avoids these concerns about overbreadth. Protecting freedom from addiction is a precisely targeted justification for regulation in this space. As the next subsection elaborates, freedom from addiction does not justify broad ranging limits on social media or new technology—just restrictions focused on addictive design features or ensuring that consumers' choice to expose themselves to such features is meaningful and, perhaps, informed.[326]

Regarding effectiveness, focusing on protecting freedom from addiction has the comparative advantage of targeting root causes. Those concerned about the power that platforms wield have mostly focused on reforms to limit or structure their exer-

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Auditing, Certification, and Safe Harbor Regimes, 46 FORDHAM URB. L.J. 428, 439 (2019) ("The current explosion of AI applications would not have been possible without the advent of 'Big Data' and the ability of entities to collect massive amounts of information.").

322 *See* Balkin, *supra* note 30, at 2055 (problematizing "privatized bureaucracies that govern end users arbitrarily and without due process and transparency").

323 Lina M. Khan & David E. Pozen, *A Skeptical View of Information Fiduciaries*, 133 HARV. L. REV. 497, 526–27 (2019) (describing several categories of harms associated with online platforms).

324 Ryan Calo, *Digital Market Manipulation*, 82 GEO. WASH. L. REV. 995, 1003–1018 (2014) (describing such forms of "manipulation" in digital markets); Ramsi A. Woodcock, *The Obsolescence of Advertising in the Information Age*, 127 YALE L.J. 2270, 2306, 2308–19 (2018) (suggesting an outright ban on advertising, through antitrust law, to address its primarily "manipulative" modern-day intent to influence behavior rather than to inform).

325 *See* Nina I. Brown, *Regulatory Goldilocks: Finding the Just and Right Fit for Content Moderation on Social Platforms*, 8 TEX. A&M L. REV. 451, 474–75 (2021) (noting the difficulty in limiting reforms focused on the regulation of false or harmful speech); *cf.* Woodcock, *supra* note 324, at 2306–2328 (defending an outright ban on digital advertising).

326 *See supra* note 118 (noting that informed consent may vitiate a freedom from addiction claim).

cise of that power.[327] But cabining power wielded by private actors through external checks is very difficult. For example, scholars point out that effective *ex post* content moderation is impossible given the volume of speech on platforms.[328] It is better to target the underlying source of power than attempt to control its use, and advocates explain that the power of platforms arises not from any specific false or extreme content posted there but their tendency to develop in their users a craving for the content and rewards (likes, followers, engagement) they offer.[329] On this view, proposals for broad projects of content moderation that seek to control the spread of misinformation and radicalization on social media by targeting specific expressions will prove just as incomplete as similar "supply side" efforts to curb drug and alcohol addiction by prohibition.[330] Instead, achieving broader success may require also targeting the cause of the *demand*—the addictive design of the new technologies themselves.

This leaves many questions about *how* legislation protecting freedom from addiction should be structured. Is the approach taken in the SMART Act (which follows findings about addictive technologies with outright bans on particular features including the "like" button and infinite scroll) the right one?[331] Should reforms instead mandate warnings and prohibit practices that interfere with users' choice to avoid addictive features,[332] or create a standard of conduct rather than

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327 *E.g.*, Edward Lee, *Moderating Content Moderation: A Framework for Nonpartisanship in Online Governance*, 70 AM. U. L. REV. 913, 928 n.61 (2021) (collecting sources).

328 *See id.* at 1055–58 (noting the impossibility of designing any perfect system to structure content moderation).

329 DEIBERT, *supra* note 160, at 97.

330 *See* Evelyn Douek, *Governing Online Speech: From "Posts-as-Trumps" to Proportionality and Probability*, 121 COLUM. L. REV. 759, 792 (2021) (noting the sheer volume of content on social media platforms and concluding "[i]t is not just *hard* to get content moderation right at this scale; it is *impossible*").

331 S. 2314, 116th Cong., §§ 1, 3 (2019). For an argument that the SMART Act is overinclusive, see Larissa Sapone, *Moving Fast & Breaking Things: An Analysis of Social Media's Revolutionary Effects on Culture and its Impending Regulation*, 59 DUQ. L. REV. 362, 381–84 (2021) (describing criticisms).

332 For example, Twitter has increasingly restricted users' ability to choose a "chronological" feed rather than an "algorithmic" one. Chance Miller, *[Update: Being Fixed] Twitter Ditching 'Latest' Chronological Feed Option on the Web, Still Available on iOS for Now*, 9TO5MAC (June 29, 2021), https://9to5mac.com/2021/06/29/twitter-ditching-latest-chronological-feed-option-on-the-web-still-available-on-ios-for-now/ [https://perma.cc/F9FB-2M3Y]. On some theories of autonomy, an addiction that a person knowingly chooses to develop might not count as an interference with her freedom. *Cf.* Swaine, *Freedom of Thought in Political History*, *in* LAW AND ETHICS OF FREEDOM OF THOUGHT, *supra* note 54, at 13–18 (discussing ethical issues surrounding the question of whether a person can

specify particular practices as forbidden?[333] How can policymakers avoid the tragic mistakes made by alcohol prohibition and crackdowns of opioid prescriptions of failing to account for second-order effects on any people already suffering from addiction?[334] And perhaps most pivotal, while many Americans may describe themselves as "addicted" to their phones, is there evidence that a significant number suffer the functional impairment of activities of daily life that would be necessary to support that label if courts were to adopt a narrower, medicalized understanding of freedom from addiction?

These are important questions that could helpfully be explored in future scholarship. The takeaway here for scholars or policymakers is that connecting legislation affecting platforms or other addictive technologies to the protection of users' freedom from addiction would help that legislation to survive constitutional challenge. To set up the strongest test case, legislators developing such legislation should remain mindful that a court persuaded to recognize a liberty interest in freedom from addiction as a general matter will likely scrutinize the evidentiary basis for legislation and its tailoring of specific reforms.[335] Legislators should include in the legislative record (through hearings, committee reports, or legislative text as in the SMART Act) specific findings about the existence and harms of technology addiction, and draft enactments that connect such findings to the particular reforms adopted. (This is particularly true if Congress wishes to invoke its power under

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consent to modification of mental processes). Legislation banning addictive design features outright, without leaving users who had been informed of their addictiveness the ability to choose to interact with such features, would raise such questions. Legislation requiring warning labels or restricting design features that interfere with user choices to avoid addictive design features would not. Future scholarship further developing freedom from addiction could helpfully study this question.

333 Jack Balkin has recommended that platforms' control over data be regulated by applying fiduciary duties to their handling of users' information rather than specific rules of conduct. Jack M. Balkin, *Information Fiduciaries and the First Amendment*, 49 U.C. DAVIS L. REV. 1183, 1185–87 (2016). A similar approach might be applied to entities who market addictive products.

334 *See* Daniel Ciccarone, *No Moral Panic: Public Health Responses to Illicit Fentanyls*, 70 DEPAUL L. REV. 229, 234 (2021) ("There is an extensive critical literature on the societal outcomes of th[e] so-called war on drugs."); Leo Beletsky & Corey S. Davis, *Today's Fentanyl Crisis: Prohibition's Iron Law, Revisited*, 46 INT'L J. DRUG POL'Y 156, 157 (2017) ("The Iron Law of Prohibition helps to elucidate the folly of interdiction targeting a product with inelastic demand.").

335 *E.g.*, R.J. Reynolds Tobacco Co. v. FDA, 696 F.3d 1205, 1217 (D.C. Cir. 2012) (holding that even when a court applies intermediate scrutiny, the government bears the burden of proof in showing that regulation "directly advances the governmental interest asserted" and "is not more extensive than is necessary to serve that interest").

section two of the Thirteenth Amendment to regulate involuntary servitude.)[336]

4. *Limits*

Finally, whether courts would actually be willing to recognize a fundamental right to freedom from addiction—and the implications of it doing so—may well depend not only on what such recognition would change but on what it would leave alone. Judging from the analyses of the Supreme Court and courts of appeals, there is an unstated third element to the *Glucksberg* test. Courts are deeply concerned with the potential breadth of asserted rights. The Supreme Court and lower courts repeatedly consider "slippery slope" arguments and refuse to recognize interests that they worry would come to be invoked in ways that seem problematic, extreme, or uncontrollable.[337]

Importantly, the definition of addiction avoids three major slippery slopes. First, in questioning the concept of freedom of thought, Professor Schauer points out that external actors can and often do force thoughts upon us through visual and audio advertisements—billboards, commercials, and the like.[338] Based on this observation, one might wonder how an independent protection for freedom of thought can be constructed that would not prove too much, problematizing even routine attention-grabbing activities, including advertisements and much public speech. Would a doctrinal protection for freedom from addiction provoke a flood of lawsuits challenging everything

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336 Jones v. Alfred H. Mayer Co., 392 U.S. 409, 440 (1968) ("Surely Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and incidents of slavery, and the authority to translate that determination into effective legislation."); United States v. Hatch, 722 F.3d 1193, 1199 (10th Cir. 2013) (noting that *Jones* recognized the power of Congress to apply the Thirteenth Amendment "to private conduct"). Congress's Thirteenth Amendment power is a potent authority and its bounds untested. *Id.* at 1199–1200. But a court would likely look for, at minimum, a significant evidentiary record supporting Congress's conclusion that a particular platform or game actually constituted unpaid "digital labor" by virtue of its addictive properties. *Cf.* Parsons, *supra* note 168, at 1781 ("Customers and users increasingly serve . . . as 'digital laborers.'").

337 *E.g.*, Obergefell v. Hodges, 576 U.S. 644, 704–05 (2015) (Roberts, C. J., dissenting) (dissenting in part because "petitioners have not pointed to any" basis for refusing to extend right to marry to "polyamorous relationships"); Lawrence v. Texas, 539 U.S. 558, 601 (2003) (Scalia, J., dissenting) (dissenting partially because "[t]his reasoning leaves on pretty shaky grounds state laws limiting marriage to opposite-sex couples"); Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 708 (D.C. Cir. 2007) (en banc) (questioning whether the asserted right to access experimental drugs might be extended to force drug companies to provide experimental drugs).

338 Schauer, *supra* note 43, at 75–77.

from public service announcements to televised speeches by public officials as interfering with listeners' and viewers' cognitive liberty?

The question reflects concerns about over-broad conceptions of cognitive liberty from the standpoint of constitutional law. The Supreme Court squarely rejected, in *Public Utilities Commission of D.C. v. Pollak*, a claim by commuters that a radio station played through loudspeakers on a streetcar violated their freedom to, as Justice Douglas put it in dissent, "think as one chooses."[339] Justice Burton, writing for the majority, concluded that the Fifth Amendment did apply to the private streetcar company (through the state action doctrine) but held that whatever rights a person might have at home, "[t]he liberty of each individual in a public vehicle or public place is subject to reasonable limitations in relation to the rights of others."[340] Justice Black wrote a separate opinion explaining that he would have dissented if the streetcar had played political messages rather than music.[341] (Justice Frankfurter wrote a statement of his own recusing himself "as a victim of the practice in controversy.")[342]

The concept of addiction offers a principled basis for avoiding these implications, because it requires not just interference with thought in a broad sense but creation of (1) a repetitive thought, (2) to engage in a behavior, (3) that is harmful.[343] Justice Frankfurter's abstention in *Public Utilities Commission* illustrates that compelling attention to an objectionable song or advertisement may be contrary to one's overall goals, but attention-grabbing activities in public do not satisfy the other two elements.

Attention grabbing activities in public certainly force thoughts, but they do not ordinarily force *repetitive* thoughts. From the standpoint of the reasoning of the majority in *Public Utilities Commission*, the repetitive nature of addictions, once developed, means that a person cannot escape them—even by leaving a public setting and, indeed, even in that most-protected of private spaces, the home.[344] By contrast, one can

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339 343 U.S. 451, 468 (1952) (Douglas, J., dissenting).

340 *Id.* at 465.

341 *Id.* at 466.

342 *Id.* at 467.

343 *Supra* notes 259–270 and accompanying text (elaborating on definition).

344 *Cf.* Kyllo v. United States, 533 U.S. 27, 31 (2001) ("'At the very core' of the Fourth Amendment 'stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion.'" (quoting Silverman v. United States, 365 U.S. 505, 515 (1961))).

escape a radio station played on a bus or an advertising poster on the subway by exiting the bus or subway.

To be sure, although most attention-grabbing activities do not force repetitive thoughts, some do. Commercial jingles like the "1-877-KARS4KIDS" ads familiar to baseball fans or Applebee's infamous "baby back ribs" jingle are designed to get stuck in the head of the listener. So, too, visual advertisements can be designed successfully to develop durable associations between a product and a celebrity or concept in the mind of their subjects: like that between Samuel L. Jackson and Capital One, or McDonalds and Saweetie.[345] Governments sometimes utilize—or attempt to utilize—such techniques. "Got Milk?," "Pork: The Other White Meat," and "Where's the Beef?" are three famous examples.[346] The Federal Aviation Administration even developed its own catchy jingle.[347]

The fact that a jingle or slogans might create a repetitive thought, however, is not enough to create a problem from the standpoint of freedom from addiction, because an addiction is not just a repetitive thought, it is a repetitive thought to engage in a behavior. This is not an arbitrary limitation—it is an essential aspect of both lay and medical understanding.[348] It is also subject to a practical protection; government and private actors have much less reason to attempt to trigger repetitive thoughts that are unrelated to behavior because it is difficult for them to control action or raise revenue through such thoughts.

Eliminating public speech that does not trigger repetitive thoughts or trigger thoughts about behavior leaves a very small subset: advertising that interferes not only at the moment it is heard or seen but later, through repetitive thoughts that urge the subject to engage in some harmful behavior. It would be naïve to think that such advertising is not and will never be possible given the stimulating, immersive capabilities of new technologies. Indeed, some of the video gambling techniques described in Part II could be understood in this way, at least

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345 Rebecca Tushnet, *Gone in Sixty Milliseconds: Trademark Law and Cognitive Science*, 86 TEX. L. REV. 507, 525–28 (2008) (describing the use of advertising to create associations).

346 *See* Humane Soc'y of the U.S. v. Vilsack, 797 F.3d 4, 7 (D.C. Cir. 2015) (describing agricultural marketing campaigns).

347 Randy Buxton, *FAAanthem.wmv*, YOUTUBE (Dec. 6, 2011), https://www.youtube.com/watch?v=PW9pNrMRlto [https://perma.cc/MK7H-5QWU].

348 *Supra* notes 259–270 and accompanying text (elaborating on definition).

when a pattern of utterances over time is taken together.[349] These activities may well implicate freedom from addiction, but they should.

Second, freedom from addiction also avoids another slippery slope problem identified by Professor Schauer, namely, the line between impermissible interference with freedom of thought and permissible persuasion.[350] A persuasive argument can change a person's beliefs not just in the moment it is uttered but permanently.[351] From this premise, Professor Schauer asks what principled basis there is to treat more direct interference with mental processes differently from the everyday, and unquestionably constitutionally protected, form of "mind control" that is persuasion?[352]

Simply put, persuasion does not implicate freedom from addiction because persuasion changes a person's overall goals—it does not create a repetitive urge to act in a way harmful to the person. Chemical or technological interventions to change a person's overall goals may also implicate constitutional concerns, and there may be ways of operationalizing freedom of thought that would address those concerns without problematizing run-of-the-mill, well accepted means of persuasion. Future scholarship might explore these possibilities. This Article, and the concept of freedom from addiction, is focused on a different, narrower, more precise phenomenon: patterns of chemical, visual, and sensory stimuli that, over time, develop in the subject a repetitive urge to engage in a harmful behavior. Ordinary persuasion does not do this.

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This discussion has surely left important questions unanswered. The fast pace of technological development and scientific understanding related to addiction make the preceding predictions of where and how this right will give rise to legal intervention necessarily tentative. Additional "slippery slope" arguments may occur to some readers that warrant additional analysis by way of reassurance. Moreover, advocates pressing freedom from addiction claims would have to overcome chal-

349 SCHÜLL, *supra* note 9, at 26 (discussing how "casino managers and game manufacturers script gambling environments and technologies" to cultivate addiction).

350 Schauer, *supra* note 43, at 74–75.

351 *Id.*

352 *Id.*

lenges of proof and causation in any particular case, and their ability to do so may evolve with technology and knowledge, too.

Further scholarship specifically focusing on particular freedom from addiction claims (like the "right to addiction treatment" claim sketched above) or questions common to such claims (especially causation, consent, and remedy) would be valuable, as would scholarship critically interrogating the arguments here. Such scholarship could help establish constitutional protection for freedom from addiction, because courts' willingness to recognize a "new" right may depend to a significant extent on their certainty about the ramifications of doing so.[353]

D. Politics

A last note on the legal viability of freedom from addiction in political context. A skeptic might note that at this writing the Supreme Court has eliminated a federal constitutional basis for an asserted right to abortion,[354] and, so, doubt that the Court as presently constituted would be open to a "new" right. They might, therefore, doubt the value of freedom from addiction as a constitutional project, notwithstanding the arguments developed here. Such a view would be too pessimistic, for three reasons.

First, the fact pattern facing freedom of thought today—new and provable threats to an old right that necessitates new doctrinal protection—is one in which even judges ordinarily skeptical of novelty have shown an openness to doctrinal innovation. The "reasonable expectation of privacy" test was born of newly-emerged threats to informational privacy first documented and conceptualized by Samuel Warren and Louis Brandeis in their landmark article, "The Right to Privacy."[355] More

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353 *E.g.*, McCurdy v. Dodd, 352 F.3d 820, 829 (3d Cir. 2003) (refusing to recognize a parental liberty interest in visitation with adult children because doing so would extend the right "into [an] amorphous and open-ended area").

354 Josh Gerstein & Alexander Ward, *Supreme Court has Voted to Overturn Abortion Rights, Draft Opinion Shows*, POLITICO (May 3, 2022), https://www.politico.com/news/2022/05/02/supreme-court-abortion-draft-opinion-00029473 [https://perma.cc/27RT-TU6U]; Mary Ziegler, *The End of* Roe, THE ATLANTIC (Dec. 2, 2021), https://www.theatlantic.com/ideas/archive/2021/12/abortion-abortion-oral-argument-supreme-court/620874/ [https://perma.cc/9X9A-MQ59] (noting that questions at oral argument indicated the Supreme Court is likely to permit more restrictive regulation of abortion than allowed under prior precedents); Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2283–84 (2022) (overruling *Roe* and *Casey* and finding no constitutionally-protected right to abortion).

355 Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 195–96 (1890) (discussing the threat to the "right to be let alone" posed

recently the "mosaic theory" for locational privacy was a response to the development of GPS and cell phone technologies to track a person's movements cheaply and easily,[356] as was the Supreme Court's refusal to apply the "third party doctrine" to cellular site records.[357] As Justice Roberts put it for the majority in *Carpenter v. United States*, "[w]hen confronting new concerns wrought by digital technology, this Court has been careful not to uncritically extend existing precedents."[358] Indeed, in *Dobbs*, Justice Alito pointed to "new scientific learning" as a possible consideration in fundamental due process analysis (even as he rejected the possibility that such learning presently justifies a federal constitutionally-based abortion right).[359]

Second, even if a Justice or judge were motivated by political views rather than the law, the political valence of protecting freedom from addiction is not one-sided—as the scope of potential applications of such a right discussed above made clear. Even those who believe the current Supreme Court is politically motivated do not think it is opposed to all individual liberties—just that it favors "Republican" liberties (like gun rights and freedom of religion) and disfavors "Democratic" ones (like abortion).[360] Note, in this regard, that the senator who proposed legislation protecting "freedom of choice" from "addictive" speech is Republican Josh Hawley, a former clerk for Judge Michael McConnell and Chief Justice John Roberts, and whose most famous stance to date may be his objection to the certification of then-candidate Joe Biden's victory in the presidential race.[361] Note also that Justice Thomas wrote a separate opinion in the Court's denial of certiorari in *Biden v. Knight First*

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by advancing technology including newspapers, instant photos, mechanical devices, etc.); *see* Katz v. United States, 389 U.S. 347, 351 (1967) ("[T]he Fourth Amendment protects people, not places.").

356 United States v. Jones, 565 U.S. 400, 415–16 (2012) (Sotomayor, J., concurring) ("[B]ecause GPS monitoring is cheap in comparison to conventional surveillance techniques and, by design, proceeds surreptitiously, it evades the ordinary checks that constrain abusive law enforcement practices . . . .").

357 Carpenter v. United States, 138 S. Ct. 2206, 2221–22 (2018).

358 *Id.* at 2222.

359 Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2258 (2022).

360 *E.g.*, Greg Stohr, *Supreme Court's Conservatives Have Abortion, Guns, God on Agenda*, BLOOMBERG (Oct. 1, 2021), https://www.bloomberg.com/news/articles/2021-10-01/abortion-just-the-start-as-supreme-court-tackles-guns-religion [https://perma.cc/FL7T-Q6XR]; *cf.* Mark A. Lemley, *The Imperial Supreme Court*, 136 Harv. L. Rev. F. 97, 113 (2022) ("The Court's cases in the 2020s can't be explained by any of the normal power axes . . . . They centralize power in the Supreme Court . . . .").

361 Barbara Sprunt, *GOP Sen. Hawley will Object to Electoral College Certification*, NPR (Dec. 30, 2020), https://www.npr.org/sections/biden-transition-up-

Amendment Institute explaining his view that technological developments may necessitate new conceptions and protections relating to the regulation of platforms.[362] Indeed, as discussed *infra* Part IV, the fact that constitutional protection for freedom from addiction converges ordinarily-unrelated political interests makes it particularly attractive, including from an antisubordination perspective.[363]

Third, the right to freedom from addiction as a constitutional idea could prove powerful even if it were never adopted by a circuit or the Supreme Court. Just as politics can influence law, law can influence politics. Constitutional litigation is inextricably intertwined with popular constitutionalism, and even modest victories in federal court can powerfully fuel reform in the political branches.[364]

The "right to try" movement is one example (the "right to a livable climate" briefly recognized in *Juliana v. United States* may prove another).[365] In 2006, in *Abigail Alliance for Better Access to Developmental Drugs v. Von Eschenbach*, two judges on the D.C. Circuit endorsed the idea that cancer patients have a fundamental liberty interest in access to experimental drugs.[366] The rest of the D.C. Circuit, sitting *en banc*, disagreed, rejecting the proffered right—and the Supreme Court never took the case.[367] Nonetheless, the decision fueled a popular constitutional movement built around the idea of the "right to try." Within ten years, forty states had adopted "right

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dates/2020/12/30/951430323/gop-sen-hawley-will-object-to-electoral-college-certification [https://perma.cc/5B98-44FX].

362 141 S. Ct. 1220, 1227 (2021) (Thomas, J., concurring).

363 *Infra* Part IV.

364 *See* JACK M. BALKIN, CONSTITUTIONAL REDEMPTION: POLITICAL FAITH IN AN UNJUST WORLD 3–4 (2011) (describing the role of social movements in constitutional change); Jack M. Balkin & Reva B. Siegel, *Principles, Practices, and Social Movements*, 154 U. PA. L. REV. 927, 928–29 (2006) (describing how movements "challenge background understandings," thereby allowing principles to apply to new categories of practices).

365 In Juliana v. United States, 217 F. Supp. 3d 1224 (D. Or. 2016), a U.S. district court held that individuals have a fundamental liberty interest in a livable climate, allowing a suit challenging inaction on climate change by two dozen children to proceed. *Id.* at 1224. The decision was later reversed, Juliana v. United States, 947 F.3d 1159, 1165 (9th Cir. 2020), but scholars have observed that it nonetheless spurred further climate litigation and political organizing. Nathaniel Levy, Note, Juliana *and the Political Generativity of Climate Litigation*, 43 HARV. ENV'T L. REV. 479, 480–81 (2019).

366 445 F.3d 470, 484–86 (D.C. Cir. 2006), *rev'd en banc*, 495 F.3d 695 (D.C. Cir. 2007); LEWIS A. GROSSMAN, CHOOSE YOUR MEDICINE: FREEDOM OF THERAPEUTIC CHOICE IN AMERICA 3–4 (2021).

367 Abigail All. for Better Access to Developmental Drugs v. Von Eschenbach, 495 F.3d 695, 697 (D.C. Cir. 2007) (en banc), *cert. denied*, 552 U.S. 1159 (2008); GROSSMAN, *supra* note 366, at 4.

to try" laws, and Congress adopted the "Federal Right to Try" Act in 2017.[368] Following the same path, district court or appellate opinions recognizing freedom from addiction in cases about state lotteries, addiction treatment, or addictive technologies could help coalesce existing interest groups focused on these specific issues into a broader movement and spur critical attention on and funding for these groups causes.

IV
ADDICTION, LIBERTY, AND ANTISUBORDINATION

That the right to freedom from addiction is important and has a firm legal basis will hardly be enough to make it a reality. Courts confronting any of the test cases sketched in subpart III.C might reject constitutional protection and preserve the assumption that thought is inviolable as a legal fiction, if for no other reason than courts' frequent—albeit controversial—skepticism for novelty.[369] Moreover, as Professor Siegel and Professor Jack Balkin note, judicial recognition of new constitutional protections is ordinarily not the beginning of the process by which rights are constructed, but the culmination of it.[370] After a constitutional protection is conceived and refined, its ultimate endorsement by the judiciary depends in large part on whether social movements rally around it, both politically and legally.[371] This was true of the development of intermediate scrutiny for laws discriminating on the basis of sex,[372] the individualized right to bear arms,[373] locational privacy,[374] marriage equality,[375] and corporate free exercise.[376]

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368 Trickett Wendler, Frank Mongiello, Jordan McLinn, and Matthew Bellina Right to Try Act of 2017, Pub. L. No. 115-176, 132 Stat. 1372; GROSSMAN, *supra* note 366, at 197–98.

369 Leah M. Litman, *Debunking Antinovelty*, 66 DUKE L.J. 1407, 1407 (2017).

370 *See supra* note 364

371 *Id.*

372 Siegel, *supra* note 27, at 1323.

373 *See generally* Reva B. Siegel, *Dead or Alive: Originalism as Popular Constitutionalism in* Heller, 122 HARV. L. REV. 191, 191–92 (2008) (tracing social movements that conceptualized and advanced the individualized right to bear arms in the decades leading up to the Supreme Court's endorsement in *Heller*).

374 *See* Nicole A. Ozer, *Putting Online Privacy Above the Fold: Building a Social Movement and Creating Corporate Change*, 36 N.Y.U. REV. L. & SOC. CHANGE 215, 220 (2012).

375 Suzanne B. Goldberg, Obergefell *at the Intersection of Civil Rights and Social Movements*, 6 CALIF. L. REV. CIR. 157, 157 (2015) (describing how "civil rights and social movements for marriage equality helped give rise to a durable socio-political transformation").

376 *See* James D. Nelson, *Corporate Disestablishment*, 105 VA. L. REV. 595, 596 (2019) (describing the "corporate religion 'movement'").

The viability of the right to freedom from addiction depends critically, then, on whether courts, scholars, and advocates see constitutional recognition as desirable. This will largely depend, in turn, on whether protecting freedom from addiction furthers underlying constitutional values.[377]

Liberty itself is the primary value that many people believe the Constitution should be read to protect,[378] so the fact that recognizing a fundamental liberty interest in freedom from addiction would protect freedom of thought may be enough to conclude the normative inquiry for many readers. Liberty is not, however, the only normative value judges, scholars, and advocates see as relevant to decisions about which questions to constitutionalize and which to leave to the political branches.[379]

Indeed, some believe the United States has too much liberty, not too little; that even the idea of liberty forces an individualized worldview that undermines the country's ability to address inherently collective problems like COVID-19,[380] climate change,[381] and addiction itself.[382] There is, for example, a danger that focusing on an individual right to freedom from

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377 For some, the normative desirability of the right to freedom from addiction may turn on results in particular potential cases—how they feel about whether courts should scrutinize state lotteries, police government restrictions on addiction treatment, and carve a path through which government can permissibly regulate addictive technologies. But many believe that constitutional questions should turn on underlying values, not outcomes in any one particular case. Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 15 (1959) (articulating this argument).

378 *E.g.*, Rebecca L. Brown, *Separated Powers and Ordered Liberty*, 139 U. PA. L. REV. 1513, 1513–17 (1991).

379 *See* Matthew B. Lawrence, *Subordination and Separation of Powers*, 131 YALE L.J. 78, 93–94 (2021) (describing the values scholars and courts employ in analyzing structural constitutional questions, including liberty, accountability, expertise, and the rule of law).

380 *See* Aziza Ahmed & Jason Jackson, *Race, Risk, and Personal Responsibility in the Response to COVID-19*, 121 COLUM. L. REV. F. 47, 47 (2021) (explaining the connection between the personal responsibility approach to the health care and racial disparities in the COVID-19 pandemic); Lindsay F. Wiley, Elizabeth Y. McCuskey, Matthew B. Lawrence & Erin C. Fuse Brown, *Health Reform Reconstruction*, 55 U.C. DAVIS L. REV. 657, 684–90 (2021) (describing how individualism undermined the COVID-19 response).

381 *See* Daniel J. Chepaitis & Andrea K. Panagakis, *Individualism Submerged: Climate Change and the Perils of an Engineered Environment*, 28 UCLA J. ENV'T L. & POL'Y 291, 295 (2010) (noting the typical assumption that climate change implicates collective rather than individual interests).

382 Dasgupta, Beletsky & Ciccarone, *supra* note 95, at 184 (discussing the root causes of the opioid epidemic); *see also* Taleed El-Sabawi, *Defining the Opioid Epidemic: Congress, Pressure Groups, and Problem Definition*, 48 U. MEM. L. REV. 1357, 1364–68 (2018) (describing how the definition of a problem can determine solutions considered).

addiction would obscure upstream social determinants of addiction.[383] Such concerns may be outweighed by benefits when it comes to freedom from addiction. Conceiving of freedom from addiction as a constitutional right forces recognition that addiction is a disease that defies an individual's control—a counteracting, positive expressive implication. Moreover, beyond these expressive considerations, recognizing constitutional protection for freedom from addiction would carry the specific, concrete, legal benefits discussed in subpart III.C as well as the interest convergence benefits described above.

In any event, why should skeptics of individual liberty arguments support recognition of a constitutional right to freedom from addiction? For a plurality of courts, scholars, and policymakers who are skeptical of liberty arguments, the value of antisubordination most famously associated with footnote 4 of *United States v. Carolene Products Co.* is the most important determinant of the desirability of constitutional protection.[384] "Subordination" means "impos[ing] or reinforc[ing] the social and economic vulnerability of classes of persons."[385] Scholars see antisubordination as an important input for constitutional design both to advance the substantive goal of addressing subordination and to advance the process goal of ensuring government decision-making reflects good faith judgments rather than the raw exercise of power for power's sake.

Although antisubordination scholarship began by focusing on the Equal Protection Clause, scholars and advocates have been frustrated by courts' consistent adoption of an anticlassification approach to that clause and corresponding refusal to adopt an antisubordination approach.[386] As a result, a second wave of scholarship and advocacy focuses on other constitu-

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383 *See* Matthew B. Lawrence, *Against the "Safety Net,"* 72 FLA. L. REV. 49, 62–64 (2020) (raising this concern regarding the "safety net" metaphor for social programs).

384 304 U.S. 144, 152 n.4 (1938) (detailing that heightened constitutional scrutiny is warranted where a law burdens historically marginalized groups).

385 Darren Lenard Hutchinson, *Preventing Balkanization or Facilitating Racial Domination: A Critique of the New Equal Protection*, 22 VA. J. SOC. POL'Y & L. 1, 65 (2015) (citing Darren Lenard Hutchinson, *Not Without Political Power: Gays and Lesbians, Equal Protection, and the Suspect Class Doctrine*, 65 ALA. L. REV. 975, 1029 (2014)).

386 *E.g.*, Reva B. Siegel, *Equality Talk: Antisubordination and Anticlassification Values in Constitutional Struggles over* Brown, 117 HARV. L. REV. 1470, 1473 (2004) ("American equal protection law has expressed anticlassification, rather than antisubordination, commitments as it has developed over the past half-century.").

tional fronts in advancing antisubordination, including the Bill of Rights and separation of powers.[387]

The right to marry as described by Justice Kennedy in *Obergefell* is illustrative. There, Justice Kennedy noted the potential for "profound . . . synergy" between liberty and equality.[388] The Court's recognition of a fundamental liberty interest in marriage illustrated this synergy, because doing so simultaneously protected the liberty of individuals to marry and countered historical subordination of non-heterosexual relationships and people. Professor Kenji Yoshino, elaborating on the synergy between liberty and equality noted by Justice Kennedy, thus describes the right to marry as an "antisubordination liberty."[389]

Like the right to marry, the right to freedom from addiction is an antisubordination liberty. The right combats subordination of people with substance use and gambling disorders in two ways.

First, the right to freedom from addiction would limit the ability of actors in the political branches to cause, harness, or propagate addiction as a tool of subordination. When it comes to the most severe intrusions on freedom of thought discussed in this Article—gambling disorders, substance use disorders, and alcohol use disorders—the political process falls short because of who such addictions harm. Specifically, historically marginalized people and groups disproportionately bear the burdens of these addictions because they are targeted for addiction,[390] because they lack the insulation that comes with privilege and wealth,[391] and because addiction itself is a subordinated status that renders the victim vulnerable to exploita-

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387 *See, e.g.*, Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2121–23 (2018) (developing an antisubordinating approach to First Amendment); Lawrence, *supra* note 379, at 78 (discussing antisubordination and separation of powers).

388 Obergefell v. Hodges, 576 U.S. 644, 672–73 (2015).

389 Yoshino, *supra* note 24, at 173–74.

390 J. Pearce, K. Mason, R. Hiscock & P. Day, *A National Study of Neighborhood Access to Gambling Opportunities and Individual Gambling Behaviour*, 62 J. EPIDEMIOLOGY & CMTY. . HEALTH 862, 862 (2008) (noting the impact of the concentration of lottery gambling sites on neighborhood problem gambling rates).

391 *See* Emily R.D. Murphy, *Brains Without Money: Poverty as Disabling*, 54 CONN. L. REV. 699, 699 (2022); ASAM DEFINITION, *supra* note 202, at 2 ("Resiliencies the individual acquires (through parenting or later life experiences) can affect the extent to which genetic predispositions lead to the behavioral and other manifestations of addiction."); Declan T. Barry, Marvin A. Steinberg, Ran Wu & Marc N. Potenza, *Characteristics of Black and White Callers to a Gambling Helpline*, 59 PSYCHIATRIC SERVS. 1347, 1347 (2008) (explaining how education is a primary determinant of susceptibility to gambling addiction).

tion.[392] Further, these addictions deplete financial resources, so that afflicted individuals lack the financial capacity to access and influence decisionmakers.

States' use of lotteries as a source of revenue perfectly encapsulates this subordinating dynamic. Lotteries draw significant revenue from the heaviest players (people susceptible to gambling addiction) and, apparently due to the distribution of underlying risk factors (like poverty), there are significant racial disparities in gambling addiction rates.[393] For example, studies indicate Black men are five times as likely as White men to become problem gamblers.[394] Thus, understood to function as a tax, state lotteries are targeted based not on a person's wealth, or occupation, or some other reasoned basis that might justify asking some people to pay more—instead they are targeted based on a person's psychological vulnerability. Lotteries take money from people susceptible to gambling addiction, simply because of that vulnerability, to benefit the rest of us—and they cause addiction in the process. That is textbook subordination.

Constitutional protection would not eliminate the effects of subordination on policies related to addiction,[395] but it would mitigate them. The right to freedom from addiction would offer a judicial check on the most direct forms of state interference,

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392 *See* Dorothy E. Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419, 1419 (1991).

393 *See* Mayumi Okuda et al., *Gambling Disorder and Minority Populations: Prevalence and Risk Factors*, 3 CURRENT ADDICTION REPS. 280, 280 (2016); *see also* Rose Marie Buckelew, Betting on Black and White: Race and the Making of Problem Gambling iv (2015) (Ph.D. dissertation, Duke University), https://dukespace.lib.duke.edu/dspace/bitstream/handle/10161/9947/Buckelew_duke_0066D_12927.pdf?sequence=1&isAllowed=Y[https://perma.cc/A584-U98Y] ("Blacks are more likely than any other group to become problem gamblers . . . ."); *id.* at 14–20 (noting that disparities in problem gambling appear to have come about since 1970s—when state lotteries began to return and concentrate sales in poorer neighborhoods).

394 John W. Welte, William F. Wieczorek, Grace M. Barnes & Marie-Cecile O. Tidwell, *Multiple Risk Factors for Frequent and Problem Gambling: Individual, Social, and Ecological*, 26 J. APPLIED SOC. PSCYH. 1548, 1548–53, 1562 (2006); John Welte, Grace Barnes, William Wieczorek, Marie-Cecile Tidwell & John Parker, *Alcohol and Gambling Pathology Among U.S. Adults: Prevalence, Demographic Patterns and Comorbidity*, 62 J. STUD. ALCOHOL 706, 706–07 (2001); Buckelew, *supra* note 393, at 6 (collecting sources).

395 Constitutional protection would not do anything directly to address the country's longstanding failure to invest sufficiently in addiction treatment, because the rights protected by the due process clauses are negative, not positive. *See* Harris v. McRae, 448 U.S. 297, 297–99 (1980) (holding that a federal ban on funding for abortion services in Medicaid and other programs does not implicate the right to abortion).

whether motivated by revenue (like lotteries) or stigma (like some addiction treatment restrictions).

Freedom from addiction also advances antisubordination in a second way that could contribute to broader change through popular constitutionalism. The ubiquity of technology addiction has created the opportunity for the "interest convergence" between mainstream and marginalized groups. Critical race theorists have described such interest convergence as a prerequisite to antisubordinating constitutional change.

The concept of "addiction" captures two sets of interests today, demonstrating the wisdom of Professor Siegel's insight that constitutional categories construct social movement alignments (and *vice versa*).[396] First, of course, are the long-subordinated interests of people who suffer from drug, alcohol, and gambling addiction. Second, are the more recently created interests of people afflicted by technology addiction or concerned about its impacts on our democracy and society.[397]

These two interests each lack something they need to effectuate meaningful change. Advocates for reforming state lotteries and de-criminalizing addiction treatment point to acute deprivations that coincide with severe, visceral harms. But recognition of new constitutional protections is a political act, not just a legal one,[398] and these advocates need powerful, mainstream allies to support their claims and help destigmatize addiction. Meanwhile, advocates developing reforms targeted at the harms of "big tech" have a growing base of political support,[399] but they need a constitutional theory to canalize their theories and overcome First Amendment challenges.[400]

Freedom from addiction, as a constitutional category, aligns these two interests. It gives big tech reform advocates a crisp, limited constitutional basis for regulation, along with acute examples to motivate and crystallize their claims. It also provides a connection to historical practices long subject to special constitutional treatment (lotteries, gambling, and drug control) essential to doctrinal recognition. Further, it yokes

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396 Siegel, *supra* note 27, at 1341 (describing interplay).

397 *See supra* subpart II.C.

398 *Supra* note 364 and accompanying text.

399 *E.g.*, Emily Birnbaum, *Tech Giants Recruit Defenders Among Communities of Color*, POLITICO (Feb. 19, 2022), https://www.politico.com/news/2022/02/19/race-and-ethnicity-debate-complicates-tech-antitrust-fight-00009952 [https://perma.cc/P6Y9-M2ZZ] (describing bipartisan proposals); American Innovation and Choice Online Act, S. 2992, 117th Cong. (2022).

400 *Supra* notes 182–187 and accompanying text.

their litigation and reform interests to the historically weak interests of those suffering from gambling, substance use, and alcohol disorders, while constitutionalizing a narrative—that everyone is vulnerable to addiction—that is inherently destigmatizing. It does not require or suggest an equivalence between the harms or pathology of drug addiction, alcohol addiction, gambling addiction, and technology addiction (there is none). But it does create a common, legal interest between those interested in (and potentially affected by) all these forms of mental restraint.

Just as the opioid epidemic proved antisubordinating by showing that drug addiction impacts middle-class White people in the suburbs and small towns, not just poor Black people in the cities,[401] freedom from addiction can be antisubordinating by making addiction an "everyone" problem, not a "them" problem. In this way, the category lifts many boats—and has the potential to align a broad coalition of interests—where a more particularized, splintered doctrine would not.

From the perspective of those who prize antisubordination in the development of constitutional law as well as the perspective of those who lament the country's ongoing addiction policy failures, the emergence of addictive technologies thus offers a rare opportunity. Professor Derrick Bell famously predicted that meaningful constitutional change to advance the interests of Black people could come only at points of "interest convergence," that "the interest of [B]lacks . . . will be accommodated only when it converges with the interests of [W]hites."[402] The same appears true for the interests of the long-stigmatized populations of people suffering from substance use disorder and gambling disorder; that their interest will be accommodated only when it converges with the interest of "everyone else." These interests converge at the intersection of addiction and liberty.

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401 *See* Khiara M. Bridges, *Race, Pregnancy, and the Opioid Epidemic: White Privilege and the Criminalization of Opioid Use During Pregnancy*, 133 HARV. L. REV. 770, 773 nn. 8–10 (2020) (noting that while drug epidemics in the 1980s largely impacted Black people, the opioid epidemic largely impacted White people, though this is shifting in recent years).

402 Bell, Jr., *supra* note 28, at 522–23.

CONCLUSION

Repeatedly throughout history, constitutional law has, for long periods, turned a blind eye to the most profound, pervasive threats to Americans' liberty, including forced relocation,[403] slavery,[404] segregation,[405] and marital rape.[406] Constitutional law is today repeating this pattern when it comes to addiction. Constitutional law's assumption that freedom of thought is inviolable sets up indifferent doctrines that facilitate rather than curb psychological domination.

The thesis of this Article has been that this is a mistake—that constitutional law should play a lead role in the restoration and protection of Americans' freedom of thought by recognizing a right to freedom from addiction. This Article has shown that such a right is necessary through case studies of present-day deprivations of liberty that work through addiction, including state lotteries, restrictions on addiction treatment, and addictive technology. It has explained that there is a firm legal basis for such a right, which connects long-established constitutional doctrines specific to historical causes of addiction in order to address new and emerging threats. And it has shown that such a right is normatively desirable, not just to safeguard liberty but to advance antisubordination.

The future of the right to freedom from addiction depends on whether people think it is worth fighting for.[407] The legal argument in support of the right explored here will mean little unless academics, advocates, policymakers, and jurists further develop, advance, and endorse the right. I conclude, then, by asking the questions with which U.S. District Judge Young

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403 Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 766 (1992) (describing the forced march of the Cherokee Tribe from Georgia to Oklahoma, and the subsequent divestiture of land).

404 *E.g.*, Aaron Schwabach, *Thomas Jefferson, Slavery, and Slaves*, 33 T. JEFFERSON L. REV. 1, 51–52 (2010) (discussing slavery).

405 *E.g.*, Plessy v. Ferguson, 163 U.S. 537, 557 (1896) (Harlan, J., dissenting) ("The fundamental objection . . . to the statute [requiring Black people to sit in separate cars] is that it interferes with the personal freedom of citizens.").

406 *See* Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CALIF. L. REV. 1373, 1379 (2000) (describing state protection for marital rape).

407 Balkin & Siegel, *supra* note 364, at 928–29 (discussing the role of social movements in right recognition).

concluded a well-known opinion on legal stagnation as a barrier to addiction treatment, and so as a cause of needless suffering and death[408]:

> Does anyone care?
> Do you?

408 Andrews-Clarke v. Travelers Ins. Co., 984 F. Supp. 49, 65 (D. Mass. 1997).