

January 25, 2026

*This piece is part of The Onion Madder Archives*

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## **Lawful Speech Versus "Free Speech": Anticipated Objections and Responses**

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### **1. "Preventive restraint is necessary to address risk before harm occurs."**

Response:

The Constitution draws a deliberate distinction between risk and illegality. Preventive intervention is permitted where conduct presents an imminent threat-such as stalking, direct harassment, or credible threats-but the law does not authorize suppression of public speech based on speculation about future harm.

Empirically, early speech restraint often increases harm rather than mitigating it. Broad, pre-adjudication orders incentivize false or strategic claims, distort public understanding, and generate grievance narratives that escalate rather than resolve conflict.

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### **2. "Speech itself can be harm."**

Response:

Speech is not harm under constitutional doctrine. Where speech causes legally cognizable injury, remedies already exist-most notably defamation and harassment actions-which require proof, process, and tailored relief.

Redefining "harm" to include emotional distress caused by public speech collapses constitutional categories and converts protected expression into regulable conduct. The First Amendment does not permit this substitution.

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### **3. "Judges need flexibility to manage escalating disputes."**

Response:

Judges do not need expanded discretion; they need institutional support. The rule of law depends on predictable standards, not ad hoc flexibility driven by docket pressure or emotional triage.

When courts rely on discretionary speech suppression to manage workload or conflict escalation, they are compensating for systemic deficiencies rather than applying the law as intended. Structural strain cannot justify constitutional shortcuts.

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### **4. "Harassment law already balances speech and safety."**

Response:

Harassment law is designed to regulate conduct, not to serve as a mechanism for reputational control or narrative management. Harassment restrains unwanted contact, stalking behavior, and coercive intrusion—not public discussion of disputed facts.

An HRO is not a tool for reputational cleanup. When used as such, it exceeds its lawful purpose and infringes protected speech.

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## **5. "Persistent or repetitive speech becomes harassment."**

Response:

Repetition does not transform protected speech into unlawful conduct. The Constitution protects persistence precisely because power resists scrutiny.

If repetition were sufficient to remove protection, civil-rights advocacy, investigative journalism, and whistleblowing would all become vulnerable to suppression. The First Amendment does not recognize a "too much speech" exception.

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## **6. "Bad intent should matter."**

Response:

The Constitution protects speech despite bad motives, not because of good ones. There is no intent-based exception to the First Amendment.

Allowing motive to determine legality collapses viewpoint neutrality and invites selective enforcement. Courts may not punish speech because they disapprove of why it was said.

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## **7. "This framework protects defamation."**

Response:

Defamation law already provides remedies—but only after proof. That requirement is not a flaw; it is a constitutional safeguard.

This framework does not protect false speech. It protects the process by which falsity is lawfully determined.

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## **8. "False speech causes irreversible harm."**

Response:

This is precisely why truth determination matters. Harm in speech disputes is often reciprocal, and pre-adjudication suppression freezes disputes rather than resolving them.

Silencing one party before adjudication confers institutional advantage on the first filer and risks entrenching false narratives rather than correcting them.

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## **9. "The internet changes the constitutional analysis."**

Response:

The medium does not alter constitutional structure. If anything, the scale and persistence of online speech heighten the need for procedural rigor, narrow remedies, and post-adjudication enforcement.

There is no digital exception to the First Amendment.

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## **10. "People cannot escape online speech."**

Response:

Public speech does not become regulable merely because it is difficult to avoid. The Constitution's captive-audience doctrine is narrow and context-specific; it does not apply to public platforms.

The law cannot treat individual distress as a basis for suppressing public expression without eliminating the distinction between private intrusion and public discourse.

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## **11. "Adjudication takes too long."**

Response:

Adjudication does take time. That burden is a feature of the rule of law, not a defect.

Systemic delay is a failure of institutional capacity, not a justification for bypassing constitutional process-particularly in speech cases, where error carries extraordinary consequences.

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## **12. "Judges require broad discretion."**

Response:

Judicial discretion already exists within expansive bounds, reinforced by judicial immunity. What the Constitution restricts is not discretion *per se*, but unbounded discretion that replaces law with personal judgment.

The rule of law exists to constrain even well-intentioned authority.

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## **13. "The first filer is the victim."**

Response:

The first person to enter a dispute is not necessarily the victim. Repeat abusers often understand and exploit this dynamic.

A lawful system must preserve space for justice on all sides of a dispute, not reward whoever reaches the courthouse first with narrative control.

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#### **14. "This argument is academic and detached from real harm."**

Response:

This claim is incorrect. The framework articulated here arises from lived consequences of procedural failure.

Constitutional structure exists precisely because real-world disputes are messy, emotionally charged, and prone to abuse. Abandoning process worsens harm rather than alleviating it.

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#### **15. "There are no workable alternatives."**

Response:

Alternatives already exist in current law and continue to evolve appropriately:

- conduct-focused protective orders
- narrowly tailored injunctions after adjudication
- defamation remedies
- criminal enforcement where warranted

The problem is not the absence of tools, but the misuse of broad ones. Without strict definitions and limits, disputes devolve into endless conflict over meaning rather than resolution through law.

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## Summary

The Constitution does not promise comfort, speed, or emotional satisfaction. It promises restraint, process, and legitimacy.

When courts abandon those commitments in the name of protection, they do not prevent harm-they redistribute it arbitrarily.

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## Resources Used In This Article

- [Overbroad Injunctions Against Speech \(Especially in Libel and Harassment Cases\) - Eugene Volokh](#)
- [Strategic Analysis of Dissent and Self-Censorship - Joshua J. Daymude, Robert Axelrod, Stephanie Forrest](#)
- [The Federal Cyberstalking Statute, Content Discrimination and the First Amendment - James Weinstein](#)
- [Free Speech Supreme Court Cases - Justia](#)