Maurer School of Law: Indiana University
Digital Repository @ Maurer Law

Indiana Law Journal

Volume 86 | Issue 1 Article 1

1-1-2011

# First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech

Lawrence Rosenthal
*Chapman University School of Law*

Follow this and additional works at: http://www.repository.law.indiana.edu/ilj

Part of the Constitutional Law Commons

Recommended Citation
Rosenthal, Lawrence (2011) "First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech," *Indiana Law Journal*: Vol. 86: Iss. 1, Article 1.
Available at: http://www.repository.law.indiana.edu/ilj/vol86/iss1/1

This Article is brought to you for free and open access by the Law School Journals at Digital Repository @ Maurer Law. It has been accepted for inclusion in Indiana Law Journal by an authorized administrator of Digital Repository @ Maurer Law. For more information, please contact wattn@indiana.edu.

LAW LIBRARY
INDIANA UNIVERSITY
Maurer School of Law
Bloomington

# First Amendment Investigations and the Inescapable Pragmatism of the Common Law of Free Speech†

LAWRENCE ROSENTHAL*

I. THE ELUSIVE ORIGINAL MEANING OF THE FIRST AMENDMENT .....9
A. THE FRAMING-ERA MEANING OF THE FIRST AMENDMENT.....13
B. ORIGINAL MEANING AND THE DEBATE OVER THE SEDITION ACT.....19
C. THE FIRST AMENDMENT'S MEANING IN THE RECONSTRUCTION ERA.....22
D. THE COMMON LAW OF FREE SPEECH .....26
II. FIRST AMENDMENT INVESTIGATIONS.....32
A. THE PROBLEM OF FIRST AMENDMENT INVESTIGATIONS .....33
B. THE DOCTRINAL BASIS FOR ASSESSING FIRST AMENDMENT INVESTIGATIONS THROUGH BALANCING.....41
C. THE PRAGMATIC CASE FOR BALANCING.....51
D. THE PRAGMATIC APPROACH TO FIRST AMENDMENT INVESTIGATIONS .....57
III. THE FREE TRADE IN IDEAS AS THE BALANCING METRIC IN FIRST AMENDMENT DOCTRINE.....60
A. CONTENT-NEUTRAL REGULATION AND THE FREE TRADE IN IDEAS.....62
B. CONTENT-BASED REGULATION AND FREE TRADE IN IDEAS .....67
C. THE ROLE OF AD HOC BALANCING IN FIRST AMENDMENT DOCTRINE .....73
CONCLUSION.....74

Ever since Justice Holmes opined that "[t]he most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic,"[1] debate has raged over what should be required for a challenged regulation of speech to survive First Amendment attack. The Supreme Court's approach has been anything but tidy. In one famous article, Geoffrey Stone identified seven different standards of review that the Court has used to evaluate laws that regulate speech or expression without reference to the content of the regulated speech, and three more for laws that are content-based.[2]

Scholars have struggled to explain our sprawling First Amendment doctrine—once described by Justice Stevens as "an elaborate mosaic of specific judicial decisions, characteristic of the common law process of case-by-case adjudication."[3] The position that has gained the most traction in recent scholarship has stressed the

---

† Copyright © 2011 Lawrence Rosenthal.

* Professor of Law, Chapman University School of Law. I am deeply indebted to Joseph Blocher, Jefferson Powell, Rodney Smolla, and my colleague Ron Rotunda for generously providing me with enormously helpful comments on earlier drafts. Many thanks are owed as well to Isa Lang, Matthew Price, and Ali Ostrander for highly capable research assistance.

1. Schenck v. United States, 249 U.S. 47, 52 (1919).

2. *See* Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 47–54 (1987). For more recent summaries of the rather elaborate structure of First Amendment doctrine, see JOHN E. NOWAK & RONALD D. ROTUNDA, CONSTITUTIONAL LAW § 16.1 (8th ed. 2010); 1 RODNEY A. SMOLLA, SMOLLA AND NIMMER ON FREEDOM OF SPEECH §§ 2:61–:72 (2009).

3. John Paul Stevens, *The Freedom of Speech*, 102 YALE L.J. 1293, 1300 (1993).

primacy of governmental motive—this school of thought argues that the constitutionality of a challenged regulation is effectively based on an assessment of the likelihood that the regulation reflects a governmental motive to burden disfavored speech or speakers.[4] Then-Professor Elena Kagan, one of the leading advocates of this purposivist view of First Amendment jurisprudence, put it this way: "First Amendment law, as developed by the Supreme Court over the past several decades, has as its primary, though unstated, object the discovery of improper governmental motives."[5]

To be sure, the Supreme Court has expressed doubt about making the constitutionality of legislation turn on the legislature's purpose in light of the hazards of determining the collective motivation of a legislature.[6] Purposivists argue, however, that the difficulties in ascertaining motive have led the Court to develop doctrines that utilize proxies for impermissible motive.[7] For example, the Court's use of strict scrutiny for laws directed at the content of speech is said to be based on the risk that content regulation reflects official hostility to disfavored content, coupled with the difficulties that inhere in requiring those seeking to vindicate First Amendment rights to prove illicit motivation.[8] Similarly, the insistence of First Amendment jurisprudence on adequate standards to cabin the discretion of officials who regulate speech is said to be based on a concern that

---

4. *See, e.g.*, Larry A. Alexander, *Trouble on Track Two: Incidental Regulations of Speech and Free Speech Theory*, 44 HASTINGS L.J. 921, 931–54 (1993); Lillian R. BeVier, *The First Amendment on the Tracks: Should Justice Breyer Be at the Switch?*, 89 MINN. L. REV. 1280, 1289–93 (2005); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. CHI. L. REV. 413, 443–505 (1996); Jed Rubenfeld, *The First Amendment's Purpose*, 53 STAN. L. REV. 767, 775–98 (2001); Srikanth Srinivasan, *Incidental Restrictions on Speech and the First Amendment: A Motive-Based Rationalization of the Supreme Court's Jurisprudence*, 12 CONST. COMMENT. 401, 415–20 (1995); David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U. CHI. L. REV. 190, 195–204 (1988); Susan H. Williams, *Content Discrimination and the First Amendment*, 139 U. PA. L. REV. 615, 624–35 (1991). Professor Stone, for his part, has emphasized the importance of governmental motive but considers it one of several central themes in First Amendment jurisprudence. *See* Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 227–33 (1983); Stone, *supra* note 2, at 54–57. The move toward purposivism in First Amendment scholarship seemingly has its origins in John Ely's seminal article on the role of governmental motive in constitutional law. *See* John Hart Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205, 1327–41 (1970).

5. Kagan, *supra* note 4, at 414.

6. *See* United States v. O'Brien, 391 U.S. 367, 382–86 (1968). Purposivists, though taking pains to note that they are not concerned with the intentions of individual legislators, generally refer to governmental "motive" and "purpose" interchangeably. *See, e.g.*, Kagan, *supra* note 4, at 414–16, 427–42; Rubenfeld, *supra* note 4, at 793–94, 826; Williams, *supra* note 4, at 697–702. It seems they have been convinced by Professor Ely that there is no meaningful distinction between legislative purpose and motive. *See* Ely, *supra* note 4, at 1217–21.

7. *See* Kagan, *supra* note 4, at 414; Rubenfeld, *supra* note 4, at 775–76.

8. *See, e.g.*, BeVier, *supra* note 4, at 1293–96; Kagan, *supra* note 4, at 438–72; Rubenfeld, *supra* note 4, at 785–87, 793; Stone, *supra* note 4, at 230–33; Strauss, *supra* note 4, at 192–95.

absent such standards, regulation will be infected by difficult-to-detect illicit motives.[9] Conversely, generally applicable laws that nevertheless impose burdens on expression are reviewed more deferentially because of the reduced likelihood that such broad-based laws are intended to harm only disfavored speech or speakers.[10] A jurisprudence based on these kinds of categorical judgments about the likelihood of an illicit governmental motive is thought to be preferable to one that endeavors to balance the costs and benefits of a challenged regulation of speech because the latter inquiry, it is said, cannot be performed in any principled way and would instead amount to an invitation for unbridled judicial activism.[11]

The only frontal attack to date on the purposivist account has come from perhaps the leading pragmatist of our day, Judge Richard Posner, who has argued that speech regulations should be assessed by consideration of their costs and benefits.[12] Judge Posner contends that many aspects of First Amendment doctrine, such as the Cold War–era Supreme Court's decisions upholding prohibitions on Communist advocacy, and more recent decisions upholding regulations on pornography, reflect a willingness to uphold regulations likely to be infected by official hostility to the speech at issue based on a pragmatic assessment of the harmful tendencies of such speech and its limited benefits.[13] Yet, the force of Judge Posner's argument, at least as a descriptive matter, is undercut by the Court's general unwillingness in recent decades to accept this type of "dangerous tendency" claim. For example, unlike the Cold War–era cases,[14] contemporary doctrine generally protects "dangerous tendency" speech—such as speech advocating violence or unlawful conduct—unless it is directed at producing imminent violence.[15] Obscenity doctrine as well seems to have evolved in a manner consistent with the purposivist account; the Court, for example, has held that determinations about whether sexually oriented expression lacks serious literary,

---

9. *See, e.g.*, Kagan, *supra* note 4, at 456–60; Strauss, *supra* note 4, at 196–97; Williams, *supra* note 4, at 703–04.

10. *See, e.g.*, Kagan, *supra* note 4, at 491–505; Rubenfeld, *supra* note 4, at 797; Srinivasan, *supra* note 4, at 415–18; Williams, *supra* note 4, at 722–28.

11. *See, e.g.*, Alexander, *supra* note 4, at 932–45; Rubenfeld, *supra* note 4, at 787–92.

12. *See* Richard A. Posner, *Pragmatism Versus Purposivism in First Amendment Analysis*, 54 STAN. L. REV. 737, 738–41 (2002).

13. *See id.* at 741–42. Barry McDonald has similarly called for pragmatic balancing in First Amendment analysis, but unlike Judge Posner, he is willing to concede that this approach is inconsistent with much of contemporary First Amendment doctrine, which seems to him to reflect an inquiry into governmental motive. *See* Barry P. McDonald, *Speech and Distrust: Rethinking the Content Approach to Protecting the Freedom of Expression*, 81 NOTRE DAME L. REV. 1347, 1393–426 (2006).

14. *E.g.*, Scales v. United States, 367 U.S. 203, 228–30 (1961); Dennis v. United States, 341 U.S. 494, 508–11 (1951) (plurality opinion); *id.* at 546–56 (Frankfurter, J., concurring); *id.* at 567–70 (Jackson, J., concurring).

15. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003); Ashcroft v. Free Speech Coal., 535 U.S. 234, 253 (2002); Texas v. Johnson, 491 U.S. 397, 409–10 (1989); NAACP v. Claiborne Hardware Co., 458 U.S. 886, 927–29 (1982); Hess v. Indiana, 414 U.S. 105, 108–09 (1973) (per curiam); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam).

artistic, political, or scientific value may not be based on community standards because of the risk that such evaluations will reflect hostility to unpopular views.[16]

Other scholars have offered what amount to quibbles.[17] Frederick Schauer, for example, has questioned the purposivist account by claiming that much

---

16. *See* Pope v. Illinois, 481 U.S. 497, 500–01 (1987). To be sure, the Court has tolerated regulation of sexually oriented expression when based on its secondary effects on the surrounding community, *see, e.g.*, City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–50 (1986), but purposivists claim that this doctrine reflects a reduced likelihood of improper motivation when the regulation is justified on the basis of secondary effects rather than the communicative effects of the regulated expression. *See* Kagan, *supra* note 4, at 483–91; Williams, *supra* note 4, at 630–35.

17. In the category of quibbles, John Fee has identified what he claims are a number of examples in which regulations reflecting a high likelihood of impermissible governmental motivation are nevertheless subjected to less exacting judicial scrutiny—the regulation of government-subsidized speech, the speech of public employees, and speech within specially created governmental fora; the regulation of mass media and political campaign finance; regulation protecting captive audiences from unwanted expression; and the regulation of what is thought to be low-value speech, such as defamation, pornography, and fighting words. *See* John Fee, *Speech Discrimination*, 85 B.U. L. REV. 1103, 1136–47 (2005). But these examples are not body blows to the purposivists. As for the first three categories, purposivists acknowledge that speech by the government itself or within public institutions represents a special case. *See, e.g.*, Kagan, *supra* note 4, at 432–33. The Court has explained that it permits regulation that disadvantages particular speakers or viewpoints in this line of cases "based on an interest in allowing governmental entities to perform their functions." Citizens United v. FEC, 130 S. Ct. 876, 899 (2010). Indeed, there is a growing recognition that public institutions must sometimes undertake to manage the content of speech within those institutions in order to achieve otherwise constitutionally permissible objectives. *See, e.g.*, ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 234–65 (1995); Lawrence Rosenthal, *The Emerging First Amendment Law of Managerial Prerogative*, 77 FORDHAM L. REV. 33, 85–93 (2008); Frederick Schauer, *Principles, Institutions, and the First Amendment*, 112 HARV. L. REV. 84, 106–18 (1998). As for mass media, purposivists note that the Court has tolerated regulation in this area only when it addresses bottlenecks that may reduce the overall quantity and diversity of speech, an approach that suggests no illicit motive. *See* Kagan, *supra* note 4, at 464–65; Rubenfeld, *supra* note 4, at 804 & n.80. As for campaign finance regulation, purposivists explain the Court's hostility toward regulations justified by limiting the influence of particular speakers in the political process as based on the threat of improper motive. *See* Kagan, *supra* note 4, at 464–72; Rubenfeld, *supra* note 4, at 802–07. Moreover, the Court has become increasingly hostile to such regulation, stressing that Congress cannot be trusted to devise regulation that may disadvantage particular speakers or viewpoints, such as those who may oppose incumbent officeholders. *See, e.g.*, *Citizens United*, 130 S. Ct. at 898–99, 904–05; Davis v. FEC, 128 S. Ct. 2759, 2773–74 (2008). As for judicial tolerance of regulation protecting captive audiences, purposivists argue that this doctrine merely reflects proper solicitude for the rights of listeners rather than an illicit motive. *See* Rubenfeld, *supra* note 4, at 830–31. In any event, this is a narrow doctrine, which generally has no application outside of the regulation of unwanted speech in an unwilling listener's home. *See* Frisby v. Schultz, 487 U.S. 474, 484–85 (1988); Erznoznik v. City of Jacksonville, 422 U.S. 205, 209–11 (1975); Spence v. Washington, 418 U.S. 405, 412 (1974) (per curiam); Cohen v. California, 403 U.S. 15, 21 (1971). As for so-called low-value speech, purposivists argue that with the possible exception of obscenity, these regulations, by fully protecting political speech and

uncontroversial regulation of speech as an aspect of unlawful conduct—as in laws against fraud or discrimination—reflects a governmental effort to punish disfavored messages.[18] Purposivists, however, have a powerful answer to this objection; as we have seen, they argue that laws of general applicability—such as generally applicable laws forbidding fraud or discrimination—present little danger of suppressing speech on any identifiable subjects and therefore create little risk that only those who address unpopular subjects will face regulation.[19]

Conversely, Eugene Volokh has quarreled with the purposivists' claim that generally applicable laws require no special First Amendment scrutiny, correctly observing that even generally applicable enactments, such as breach-of-the-peace or disorderly conduct laws, are subject to rigorous First Amendment scrutiny when their application turns on the content of speech.[20] The purposivists again have a powerful response; their view is that even generally applicable laws, such as breach-of-the-peace statutes, merit special scrutiny when they are not tied to reasonably clear noncommunicative harms because in such cases they facilitate enforcement against unpopular groups or views.[21] Beyond that, another flaw in Professor Volokh's position, at least as a descriptive matter, is reflected in his related argument that the First Amendment is offended by any regulation aimed at the communicative impact of speech, regardless of motive: "Speech restrictions that accomplish their ends by trying to stop people from persuading others are per se unconstitutional, regardless of whether they are narrowly tailored to a compelling interest (so long as the intent-imminence-likelihood threshold isn't

---

permitting no prohibition on the expression of any identifiable viewpoint, pose little danger of suppressing disfavored speech. *See, e.g.*, Kagan, *supra* note 4, at 472–81; Stone, *supra* note 4, at 242–44. They add that First Amendment doctrine rarely permits regulation of speech merely because it is thought to be of low value. *See, e.g.*, Rubenfeld, *supra* note 4, at 822–26. Even as to sexually oriented expression, First Amendment jurisprudence can be understood to concern itself with the threat of illicit motive; as we have seen, the Court's obscenity jurisprudence does not permit assessments of the social value of speech to be based on community standards because of a concern that this will disadvantage unpopular speech or speakers. *See supra* text accompanying note 16. And the Court has utilized strict scrutiny to evaluate prohibitions on such "low-value" but nonobscene speech by insisting that it be tailored to achieve a compelling governmental interest unrelated to the suppression of ideas. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 811–15 (2000); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126–27 (1989).

18. *See* Frederick Schauer, *The Aim and the Target in Free Speech Methodology*, 83 NW. U. L. REV. 562, 564–68 (1989); Frederick Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 278–79 (1981).

19. *See supra* text accompanying note 10. Conversely, laws of this type that apply only to particular speakers or messages are thought to offend the First Amendment because of the risk that they reflect government hostility toward disfavored messages. *See* R.A.V. v. City of St. Paul, 505 U.S. 377, 391–94 (1992).

20. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1287–93, 1301–03 (2005). The Supreme Court has recently confirmed the soundness of this observation. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2723–24 (2010).

21. *See, e.g.*, Kagan, *supra* note 4, at 461–64; Srinivasan, *supra* note 4, at 415–17; Williams, *supra* note 4, at 701–02.

crossed)."[22] Nevertheless, the view that any law aimed at the communicative effects of speech should be treated as suspect cannot explain large areas of doctrine, such as pornography, "fighting words," defamation, and commercial speech, where such regulation is permitted.[23] Indeed, Professor Volokh's view seems to have been decisively rejected only last Term, when the Court upheld a statutory prohibition on providing "material support" to a foreign terrorist organization as applied to support for a terrorist organization coming in the form of speech because of the critical national security interests advanced by the prohibition, despite the fact that the prohibition was necessarily based on the communicative effects of the speech at issue.[24]

The Supreme Court, for its part, has been less than consistent on the role of motive in First Amendment adjudication. Sometimes, the Court has acted consistently with the purposivist account. In striking down a statute that prohibited burning the American flag, for example, the Court wrote: "If there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."[25] Similarly, in striking down a hate crime ordinance even though it had been construed as proscribing only unprotected "fighting words," the Court wrote: "The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed."[26]

On other occasions, however, the Court has struck a different note. In the Term preceding the hate-crime case, for example, as the Court invalidated a state law requiring that funds paid to the author of a book or other work of art that describes a crime for which the author had been convicted be escrowed to ensure their availability to satisfy a judgment against the author, the Court denied that legislative motivation was at the core of First Amendment analysis:

> The Board next argues that discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to

---

22. Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U. PA. L. REV. 2417, 2454 (1996).

23. *See supra* text accompanying note 16; *see also* Kagan, *supra* note 4, at 435–37, 472–83. When discussing speech intended to persuade others to engage in illegal activities, the Court has more recently reiterated that some speech is treated as unprotected precisely because of its communicative effects:

> [O]ffers to give or receive what it is unlawful to possess have no social value and thus, like obscenity, enjoy no First Amendment protection. Many long established criminal proscriptions—such as laws against conspiracy, incitement, and solicitation—criminalize speech (commercial or not) that is intended to induce or commence illegal activities. Offers to provide or requests to obtain unlawful material, whether as part of a commercial exchange or not, are similarly undeserving of First Amendment protection.

United States v. Williams, 553 U.S. 285, 298 (2008) (citations omitted).

24. *See Humanitarian Law Project*, 130 S. Ct. at 2724–31.

25. United States v. Eichman, 496 U.S. 310, 319 (1990) (quoting Texas v. Johnson, 491 U.S. 397, 414 (1989)).

26. R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (citations omitted).

> suppress certain ideas. This assertion is incorrect; our cases have consistently held that "[i]llicit legislative intent is not the *sine qua non* of a violation of the First Amendment." . . . "We have long recognized that even regulations aimed at proper governmental concerns can restrict unduly the exercise of rights protected by the First Amendment."[27]

The Court later upheld a Colorado statute limiting the ability of protesters to approach patients outside of health care facilities on the basis of the state's interest in protecting patient privacy,[28] even though it was undisputed that the statute's enactment was primarily motivated by the activities of antiabortion protesters.[29] Apparently indifferent to the risk that the law reflected legislative hostility to the right-to-life message, the Court denied that "a statute is 'viewpoint based' simply because its enactment was motivated by the conduct of the partisans on one side of a debate."[30] Instead, the Court concluded that the statute was "content-neutral"

> for three independent reasons. First, it is not a "regulation of speech." Rather, it is a regulation of the places where some speech may occur. Second, it was not adopted "because of disagreement with the message it conveys." This conclusion is supported not just by the Colorado courts' interpretation of legislative history, but more importantly by the State Supreme Court's unequivocal holding that the statute's "restrictions apply equally to all demonstrators, regardless of viewpoint, and the statutory language makes no reference to the content of the speech." Third, the State's interests in protecting access and privacy, and providing the police with clear guidelines, are unrelated to the content of the demonstrators' speech.[31]

Thus, the Court seems to have focused on the operation of the challenged statute and not the threat of impermissible motivation. Still, purposivists might take comfort in the Court's emphasis on the statute's general applicability as minimizing the risk of discrimination against disfavored speech or speakers.

This article offers a challenge to the purposivist account. It begins, in Part I, by considering the claims of the purposivists in light of the original meaning of the First Amendment. Part I offers the first exploration in the scholarly literature of the original meaning of the First Amendment in light of the recent turn in scholarly and judicial thinking about originalist approaches to constitutional interpretation. Although there is something of a scholarly consensus that the intentions of those who framed the First Amendment are impossible to determine, in recent years originalist thinking about constitutional interpretation has made a dramatic move away from a jurisprudence based on the intentions of the framers or ratifiers and

---

27. Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 117 (1991) (citations omitted) (quoting Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 592 (1983)).

28. Hill v. Colorado, 530 U.S. 703, 716–18 (2000).

29. *Id.* at 715.

30. *Id.* at 724.

31. *Id.* at 719–20 (footnote omitted).

toward the original public meaning of constitutional text as the touchstone for constitutional interpretation. An inquiry into original public meaning offers a bit more clarity about the original meaning of the First Amendment than original-intention originalism was able to generate and provides reason to question the purposivist account.

Part II examines the purposivist account of First Amendment jurisprudence as it has evolved since the framing. Much as John Ely used a then-unresolved issue of First Amendment law to illustrate the structure of First Amendment doctrine,[32] Part II illustrates the role of governmental purpose in First Amendment doctrine by considering a yet-unresolved issue that has divided the lower courts and commentators—the extent to which the First Amendment constrains the ability of the government to undertake investigations on the basis of the protected speech of the investigation's target. Terrorism investigations, for example, can be triggered when the government becomes aware of political extremists as a consequence of their statements expressing approval of jihadist violence, or their attendance at events that condone such conduct, even though these activities are constitutionally protected under contemporary doctrine.[33] The purposivist account suggests these "First Amendment investigations" must clear the hurdle of strict scrutiny because, in the absence of sufficient standards to limit the discretion of investigators, they are unacceptably likely to be infected by governmental hostility toward the target's ideology. Indeed, history suggests that the risk that an impermissible motivation may accompany such investigations is quite real.

Yet, subjecting the government's decision to undertake an investigation to strict scrutiny is inconsistent with fundamental principles of First Amendment doctrine that suggest that the government's effort to learn more about those who may be plotting to break the law should not be equated to a legal prohibition on constitutionally protected speech. The use of strict scrutiny to assess the propriety of an investigation encounters potent pragmatic objections as well—it is often necessary to undertake an investigation without having any clear idea of what it will uncover; and because investigations do not pose the same threat to free speech as prohibitions, they should not require an equivalent justification. At least on any attractive and coherent account, the interaction between the First Amendment and criminal investigations involves an assessment of the justification for the investigation and the extent to which it inhibits constitutionally protected activity—precisely the kind of pragmatic balancing that the purposivists denounce.[34]

---

32. *See* John Hart Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

33. *See supra* text accompanying note 15.

34. Questions about what kind of justification is sufficient for regulating (or investigating) speech should be distinguished from questions about the justifications for constitutional protection for speech. Frederick Schauer has provided a helpful three-part typology of the arguments supporting constitutional protection for speech: first, arguments that claim protection for speech as an activity that is essential to the process of public deliberation necessary for a politically accountable democracy; second, arguments that claim protection for speech as an activity that is essential to the search for truth; and third, arguments that claim protection for speech as an activity that enables individuals to pursue an essential component of a widely shared conception of the good life. *See* FREDERICK

Finally, Part III considers the structure of First Amendment doctrine. Part III contends that current doctrine reflects the centrality of pragmatic balancing, with the concept of a free marketplace of ideas providing the essential metric to govern the balancing inquiry. Regulations likely to distort the marketplace of ideas impose particularly heavy costs to First Amendment values, thereby requiring particularly powerful justifications. To be sure, the purposivists are right that balancing can be dangerously indeterminate, but First Amendment doctrine handles this objection with a highly structured approach to balancing based on a series of categorical judgments about the likelihood that a challenged regulation will distort the marketplace of ideas.

Structured balancing, however, breaks down when it becomes difficult to assess the likelihood that challenged government conduct will distort the marketplace of ideas. A prime example of this problem is presented by First Amendment investigations, which can be performed in a responsible and discrete fashion unlikely to chill the exercise of First Amendment rights, or in an abusive and oppressive fashion. When it comes to First Amendment investigations, ad hoc balancing is the only tenable approach. Thus, in First Amendment jurisprudence, pragmatic balancing is inescapable.

## I. THE ELUSIVE ORIGINAL MEANING OF THE FIRST AMENDMENT

One plausible reaction to the purposivists' account of First Amendment doctrine is to change the subject. Some might say that by focusing on the structure of judge-made doctrine, purposivists ask the wrong question. The Constitution is, after all, written. One can argue that in light of the written character of the Constitution, the proper starting point for any problem of constitutional law is by reference to the meaning of the governing text, and the best way to understand a legal text is

---

SCHAUER, FREE SPEECH: A PHILOSOPHICAL INQUIRY 15–59 (1982). First Amendment doctrine largely accepts all three justifications; while the Court has long regarded speech about politics and government as at the core of the First Amendment, *see, e.g.*, N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269–71 (1963), nonpolitical speech capable of advancing truth or a conception of the good life has been protected as well:

> It is no doubt true that a central purpose of the First Amendment "was to protect the free discussion of governmental affairs." But our cases have never suggested that expression about philosophical, social, artistic, economic, literary, or ethical matters—to take a nonexhaustive list of labels—is not entitled to full First Amendment protection.

Abood v. Detroit Bd. of Educ., 431 U.S. 209, 231 (1977) (citations omitted) (quoting Buckley v. Valeo, 424 U.S. 1, 14 (1976)). Indeed, as we have seen, the Court has treated sexually oriented speech as protected as long as it has any type of serious literary, artistic, political, or scientific value, and has added that "a narrow, succinctly articulable message is not a condition of constitutional protection, which if confined to expressions conveying a 'particularized message' would never reach the unquestionably shielded painting of Jackson Pollock, music of Arnold Schoenberg, or Jabberwocky verse of Lewis Carroll." Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston, Inc., 515 U.S. 557, 569 (1995) (citation omitted). Still, as we will see, the fact that given expressive activity falls within an accepted justification for First Amendment protection does not mean it will receive such protection if there are sufficient countervailing interests in regulating or proscribing the activity.

originalist in character—by reference to its meaning at the time it was originally adopted.[35]

In the 1970s and 1980s, originalists usually took the position that the text of the Constitution should be interpreted with reference to the intentions of its framers.[36] This approach confronted enormous difficulties. First, because the process of adopting constitutional text is a collective one, the problems that inhere in an effort to determine collective intention of those involved in framing and ratification are great.[37] Second, the rules for interpreting texts that the framers and ratifiers would have understood as controlling in the eighteenth and nineteenth centuries suggested that they were to be interpreted according to the ordinarily understood meaning of their terms, without regard to anyone's subjective intentions.[38]

In the 1990s, however, originalists increasingly embraced the view that the Constitution should be construed according to its meaning as understood by the public in the framing era; this approach was said to avoid the difficulties in ascertaining subjective yet collective intentions while vindicating the Constitution's character as a legal text.[39]

---

35. *See, e.g.*, RANDY E. BARNETT, RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY 100–09 (2004); GREGORY BASSHAM, ORIGINAL INTENT AND THE CONSTITUTION: A PHILOSOPHICAL STUDY 92–94 (1992); MICHAEL J. PERRY, THE CONSTITUTION IN THE COURTS: LAW OR POLITICS 31–38 (1994); KEITH E. WHITTINGTON, CONSTITUTIONAL INTERPRETATION: TEXTUAL MEANING, ORIGINAL INTENT, AND JUDICIAL REVIEW 50–61 (1999); Richard S. Kay, *Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses*, 82 NW. U. L. REV. 226, 289–92 (1988).

36. *See, e.g.*, RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 363–72 (1977); Edwin Meese III, *Interpreting the Constitution*, *in* INTERPRETING THE CONSTITUTION: THE DEBATE OVER ORIGINAL INTENT 13 (Jack N. Rakove ed., 1990); Edwin Meese III, *Toward a Jurisprudence of Original Intent*, 11 HARV. J.L. & PUB. POL'Y 5 (1988).

37. *See, e.g.*, DANIEL A. FARBER & SUZANNA SHERRY, DESPERATELY SEEKING CERTAINTY: THE MISGUIDED QUEST FOR CONSTITUTIONAL FOUNDATIONS 14–25 (2002); LEONARD W. LEVY, ORIGINAL INTENT AND THE FRAMERS' CONSTITUTION 284–398 (1988); Robert W. Bennett, *Objectivity in Constitutional Law*, 132 U. PA. L. REV. 445, 456–74 (1984); Boris I. Bittker, *Interpreting the Constitution: Is the Intent of the Framers Controlling? If Not, What Is?*, 19 HARV. J.L. & PUB. POL'Y 9, 30–36 (1995); Paul Brest, *The Misconceived Quest for the Original Understanding*, 60 B.U. L. REV. 204, 209–22 (1980); Paul Finkelman, *The Constitution and the Intentions of the Framers: The Limits of Historical Analysis*, 50 U. PITT. L. REV. 349 (1989); Jack N. Rakove, *Fidelity Through History (Or to It)*, 65 FORDHAM L. REV. 1587 (1997); Marc V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 793–804 (1983).

38. *See, e.g.*, JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 340–65 (1996); Hans W. Baade, *"Original Intent" in Historical Perspective: Some Critical Glosses*, 69 TEX. L. REV. 1001, 1006–62 (1991); Finkelman, *supra* note 37, at 351–58; H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885, 948 (1985).

39. *See, e.g.*, BARNETT, *supra* note 35, at 92–117; PERRY, *supra* note 35, at 28–53; WHITTINGTON, *supra* note 35, at 160–212; Baade, *supra* note 38, at 1103–07; Jack M. Balkin, *Abortion and Original Meaning*, 24 CONST. COMMENT. 291, 295–307 (2007); Steven G. Calabresi & Saikrishna B. Prakash, *The President's Power to Execute the Laws*, 104

In the wake of this turn to original public meaning, originalism enjoyed quite a comeback. Thomas Colby has written that "[t]he new originalism, reconstructed in terms of original public meaning, is a theory on the rise."[40] Randy Barnett has claimed that among academics, originalism has become "the prevailing approach to constitutional interpretation."[41] James Ryan believes that "a compelling and popular alternative theory has yet to emerge from the academy or from sitting judges as a serious competitor to originalism."[42] In short, as Jamal Greene recently observed, "originalism continues to sell."[43]

Even the Supreme Court seems to have embraced public-meaning originalism. In *District of Columbia v. Heller*,[44] as it confronted the Second Amendment's right "to keep and bear Arms,"[45] the Court wrote:

> In interpreting this text, we are guided by the principle that "[t]he Constitution was written to be understood by the voters; its word and phrases were used in their normal and ordinary as distinguished from their technical meaning." Normal meaning may of course include an idiomatic meaning, but it excludes secret or technical meanings that

---

YALE L.J. 541, 550–59 (1994); Robert N. Clinton, *Original Understanding, Legal Realism, and the Interpretation of "This Constitution,"* 72 IOWA L. REV. 1177, 1186–259 (1987); Charles Fried, *Sonnet LXV and the "Black Ink" of the Framers' Intention*, 100 HARV. L. REV. 751, 756–60 (1987); Vasan Kesavan & Michael Stokes Paulsen, *The Interpretive Force of the Constitution's Secret Drafting History*, 91 GEO. L.J. 1113, 1127–48 (2003); Gary Lawson, *On Reading Recipes . . . and Constitutions*, 85 GEO. L.J. 1823, 1833–36 (1997); Michael W. McConnell, *The Importance of Humility in Judicial Review: A Comment on Ronald Dworkin's "Moral Reading" of the Constitution*, 65 FORDHAM L. REV. 1269, 1278–87 (1997); Ronald D. Rotunda, *Original Intent, the View of the Framers, and the Role of the Ratifiers*, 41 VAND. L. REV. 507, 512–14 (1988); Lawrence B. Solum, District of Columbia v. Heller *and Originalism*, 103 NW. U. L. REV. 923, 940–55 (2009); Saikrishna B. Prakash, *Unoriginalism's Law Without Meaning*, 15 CONST. COMMENT. 529, 541–45 (1998) (reviewing RAKOVE, *supra* note 38).

40. Thomas B. Colby, *The Federal Marriage Amendment and the False Promise of Originalism*, 108 COLUM. L. REV. 529, 532 (2008).

41. Randy E. Barnett, *An Originalism for Nonoriginalists*, 45 LOY. L. REV. 611, 613 (1999). For accounts of the turn toward originalism among legal scholars, see, for example, DENNIS J. GOLDFORD, THE AMERICAN CONSTITUTION AND THE DEBATE OVER ORIGINALISM 20–54 (2005); JOHNATHAN O'NEILL, ORIGINALISM IN AMERICAN LAW AND POLITICS: A CONSTITUTIONAL HISTORY 101–216 (2005). This is not to say that admiration for originalism is universal in the academy. For some of the more powerful attacks on the move toward original public meaning, see Mitchell N. Berman, *Originalism Is Bunk*, 84 N.Y.U. L. REV. 1 (2009); Stephen M. Griffin, *Rebooting Originalism*, 2008 U. ILL. L. REV. 1185; Larry Kramer, *Two (More) Problems with Originalism*, 31 HARV. J.L. & PUB. POL'Y 907 (2008).

42. James E. Ryan, *Does It Take A Theory? Originalism, Active Liberty, and Minimalism*, 58 STAN. L. REV. 1623, 1625 (2006) (reviewing STEPHEN BREYER, ACTIVE LIBERTY: INTERPRETING OUR DEMOCRATIC CONSTITUTION (2005); CASS R. SUNSTEIN, RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA (2005)).

43. Jamal Greene, *Selling Originalism*, 97 GEO. L.J. 657, 659 (2009).

44. 128 S. Ct. 2783 (2008).

45. "A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed." U.S. CONST. amend. II.

> would not have been known to ordinary citizens in the founding generation.[46]

Thus, constitutional adjudication should be based on an "examination of a variety of legal and other sources to determine *the public understanding* of a legal text."[47]

Accordingly, an originalist might dismiss efforts to determine the structure of the free speech doctrine articulated by the Supreme Court as beside the point; doctrine is properly dictated by the original meaning of the text itself: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . ."[48] Indeed, originalism seems to be gaining greater prominence in the Court's approach to free speech doctrine. In its recent decision in *United States v. Stevens*,[49] for example, the Court characterized the doctrinal limitations on the scope of First Amendment protection that it had recognized as consisting only of those categories of speech that have been historically considered to be without legal protection.[50] Thus, it may be that the key to First Amendment doctrine is to be found in history.

There has not yet been an assessment of the First Amendment's Speech and Press Clauses' original public meaning in the scholarly literature. Indeed, it turns out that the originalist approach to interpretation of the First Amendment is easier

---

46. *Heller*, 128 S. Ct. at 2788 (alteration in original) (citation omitted) (quoting United States v. Sprague, 282 U.S. 716, 731 (1931)).

47. *Id.* at 2805 (emphasis in original). Justice Scalia, the author of the opinion in *Heller*, is an avowed advocate of utilizing the original public meaning of the text in constitutional adjudication. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3, 38–41 (Amy Gutmann ed., 1997) [hereinafter A MATTER OF INTERPRETATION].

48. U.S. CONST. amend. I. This might be overstating the irrelevance of doctrine, however, even for originalists. It is true that some originalists largely reject nonoriginalist precedent. *See, e.g.*, Randy E. Barnett, *Trumping Precedent with Original Meaning: Not as Radical as It Sounds*, 22 CONST. COMMENT. 257, 262–69 (2005); Steven G. Calabresi, *Text vs. Precedent in Constitutional Law*, 31 HARV. J.L. & PUB. POL'Y 947 (2008); Michael Stokes Paulsen, *The Intrinsically Corrupting Influence of Precedent*, 22 CONST. COMMENT. 289 (2005). But others are more sympathetic to nonoriginalist precedent, at least in some circumstances. *See, e.g.*, Kurt T. Lash, *Originalism, Popular Sovereignty, and* Reverse *Stare Decisis*, 93 VA. L. REV. 1437, 1444–61 (2007); John O. McGinnis & Michael B. Rappaport, *Reconciling Originalism and Precedent*, 103 NW. U. L. REV. 803, 823–50 (2009); Henry Paul Monaghan, *Stare Decisis and Constitutional Adjudication*, 88 COLUM. L. REV. 723, 739–72 (1988); Antonin Scalia, *Response*, *in* A MATTER OF INTERPRETATION, *supra* note 47, at 129, 138–40; Lawrence B. Solum, *The Supreme Court in Bondage: Constitutional Stare Decisis, Legal Formalism, and the Future of Unenumerated Rights*, 9 U. PA. J. CONST. L. 155, 195–96 (2006); Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 436–79 (2006).

49. 130 S. Ct. 1577 (2010).

50. *Id.* at 1584–86. The matter is complicated, however, by the Court's acknowledgement that new categories of unprotected speech, such as child pornography, can be recognized when they are "intrinsically related" to unlawful conduct, *id.* at 1586, and the Court's willingness to leave open the possibility that some extreme depictions of animal cruelty might be unprotected despite the lack of historical support for such regulation, *id.* at 1592.

said than done. The historical evidence concerning the original meaning of the Speech and Press Clauses is frustratingly inconclusive, but an inquiry into original public meaning sheds at least some light on the character of the First Amendment.

### *A. The Framing-Era Meaning of the First Amendment*

The framing-era conception of freedom of speech and the press was anything but capacious, at least by contemporary standards. As *Blackstone's Commentaries* summarized the law:

> [W]here blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law . . . the *liberty of the press*, properly understood, is by no means infringed or violated. The liberty of the press is indeed essential to the nature of a free state: but this consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. Every freeman has an undoubted right to lay what sentiments he pleases before the public: to forbid this, is to destroy the freedom of the press: but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity. . . . [T]o punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion, the only solid foundations of civil liberty. Thus the will of the individuals is still left free; the abuse only of that free will is the object of legal punishment. Neither is any restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, destructive of the ends of society, is the crime which society corrects.[51]

On this view, the concept of free expression was quite limited; the freedom of the press consisted only of a prohibition against prior restraint without limitation on the ability of the law to impose after-the-fact punishment on any expression thought to be "of a pernicious tendency." Blackstone's account was enormously influential in colonial-era American law, which largely accepted this view of the power to punish expression thought to be harmful.[52]

Still the Blackstonian view was not uncontested. The problem with the Blackstonian conception, after all, is that it offers little meaningful protection since anything thought to be "of a pernicious tendency" may later lead to punishment.

---

51. 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *151–52 (emphasis in original). For a helpful summary of English law prior to the framing of the First Amendment, see 5 RONALD D. ROTUNDA & JOHN E. NOWAK, TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 20.3 (4th ed. 2009).

52. *See, e.g.*, 2 WILLIAM WINSLOW CROSSKEY, POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES 767–68 (1953); LEONARD W. LEVY, EMERGENCE OF A FREE PRESS 119–219 (1985); Thomas F. Carroll, *Freedom of Speech and of the Press in the Federalist Period; The Sedition Act*, 18 MICH. L. REV. 615, 627–37 (1919–20).

The rule against prior restraints precluded outright censorship, but a speaker wishing to avoid jail might engage in self-censorship that could be no less effective as a means of suppressing speech. This line of argument was not unknown in early America; a number of Blackstonian critics advanced it in the founding era.[53] This view seems to have had some resonance among the public at large; the 1735 seditious libel prosecution of John Peter Zenger for publishing attacks on a colonial governor resulted in an acquittal despite the judge's refusal to instruct the jury that truth was a defense to the charge.[54] The Zenger prosecution, moreover, provoked enormous criticism of the Blackstonian rule that truth was not a defense to libel and, indeed, of the concept of seditious libel itself.[55]

As a practical matter, the Zenger trial seems to have led to the demise of seditious libel in colonial America; the Zenger prosecution appears to have been the last of its kind in the colonies.[56] Moreover, as Lucas Powe has observed, although there was no indication that the law of seditious libel was formally repudiated in the years leading to the American Revolution, the prevalence of activity that amounted to seditious libel under Blackstonian standards among the increasingly rebellious colonists suggests that the concept of seditious libel may have been something of a dead letter by the framing of the First Amendment.[57] Still, the fact that the colonists had little objection to seditious libel when directed at a colonial government that they found increasingly oppressive did not mean that they would reject the concept when it came to a constitutional government that they themselves chose by free election. For such a government, established by a Constitution to which the people themselves had agreed, perhaps the Blackstonian conception would be thought appropriate.

The first ten amendments to the Constitution had their origins in the anti-Federalist attacks on the original Constitution's lack of a Bill of Rights, which appears to have persuaded leading federalists that the addition of such protections was a political necessity.[58] Constitutional recognition of freedom of the press, and,

---

53. *See, e.g.*, ZECHARIAH CHAFEE, JR., FREE SPEECH IN THE UNITED STATES 16–22 (Harvard Univ. Press 1954) (1941); MICHAEL KENT CURTIS, FREE SPEECH, "THE PEOPLE'S DARLING PRIVILEGE" 30–51 (2000); JAMES MORTON SMITH, FREEDOM'S FETTERS: THE ALIEN AND SEDITION LAWS AND AMERICAN CIVIL LIBERTIES 428–31 (1956); David A. Anderson, *The Origins of the Press Clause*, 30 UCLA L. REV. 455, 463–64, 486–94 (1983); William T. Mayton, *Seditious Libel and the Lost Guarantee of a Freedom of Expression*, 84 COLUM. L. REV. 91, 109–14 (1984); David M. Rabban, *The Ahistorical Historian: Leonard Levy on Freedom of Expression in Early American History*, 37 STAN. L. REV. 795, 802–11 (1985) (reviewing LEVY, *supra* note 52).

54. For a detailed account of the prosecution, see THE TRIAL OF PETER ZENGER (Vincent Buranelli ed., 1957).

55. *See, e.g.*, Paul Finkelman, *The Zenger Case: Prototype of a Political Trial*, *in* AMERICAN POLITICAL TRIALS 21, 36–42 (Michal R. Belknap ed., 1981).

56. *See* Harold L. Nelson, *Seditious Libel in Colonial America*, 3 AM. J. LEGAL HIST. 160, 167–71 (1959). Indeed, during the debates over what became the Sedition Act of 1798, Rep. Claiborne observed: "Prosecutions of this kind have very rarely happened; in some of the States, a cause of this kind had never been tried." 8 ANNALS OF CONG. 2135 (1798).

57. *See* LUCAS A. POWE, JR., THE FOURTH ESTATE AND THE CONSTITUTION: FREEDOM OF THE PRESS IN AMERICA 28–50 (1991).

58. For helpful accounts, see ROBERT A. GOLDWIN, FROM PARCHMENT TO POWER: HOW

to a lesser extent, freedom of speech, figured prominently in the debate over the original Constitution; seven state ratifying conventions had proposed constitutional amendments protecting freedom of the press, and four also proposed protection for freedom of speech.[59] Even so, the anti-Federalist arguments consisted of generalized demands for protection of the freedom of the press, with virtually no criticism of Blackstone's view on the scope of that protection.[60] As for freedom of speech, anti-Federalists said virtually nothing about it.[61] Indeed, at the time of the original Constitution's ratification, while the constitutions or laws of all thirteen states protected freedom of the press, only Pennsylvania and Vermont offered protection for freedom of speech as well.[62] Perhaps more important, no state had departed from Blackstone either by judicial decision or statute with respect to either freedom of speech or the press.[63]

The original proposal for the First Amendment's Speech and Press Clauses was presented by James Madison to the First Congress in broad terms: "The people shall not be deprived or abridged of their right to speak, to write, or to publish their sentiments; and the freedom of the press, as one of the great bulwarks of liberty, shall be inviolable."[64] Even if the proposal's reference to "the freedom of the press" were thought to be a reference to Blackstone's description of that same concept, the prior clause suggested broader protection, if only to avoid redundancy. Madison's language, however, did not survive. The House appointed a Committee of Eleven to consider this and Madison's other proposed constitutional amendments, and although no records of its deliberations survive, what emerged from the committee was something close to the final form of the Speech and Press Clauses: "The freedom of speech, and of the press, and the right of the people peaceably to

---

JAMES MADISON USED THE BILL OF RIGHTS TO SAVE THE CONSTITUTION 57–95 (1997); RICHARD LABUNSKI, JAMES MADISON AND THE STRUGGLE FOR THE BILL OF RIGHTS 120–77 (2006); and Paul Finkelman, *James Madison and the Bill of Rights: A Reluctant Paternity*, 1990 SUP. CT. REV. 301, 322–44.

59. *See* THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES AND ORIGINS 92–93 (Neil H. Cogan ed., 1997) [hereinafter THE COMPLETE BILL OF RIGHTS].

60. *See, e.g.*, LEVY, *supra* note 52, at 220–56. For the original materials, see THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 97–115. The closest to any criticism of the Blackstonian view is a complaint by Cincinnatus that the proposed constitution would permit Congress to subject the press to criminal liability. *See Reply to Wilson's Speech: "Cincinnatus"* [Arthur Lee] I, *reprinted in* I THE DEBATE ON THE CONSTITUTION 92, 93–95 (Bernard Bailyn ed., 1993).

61. *See* STEPHEN M. FELDMAN, FREE EXPRESSION AND DEMOCRACY IN AMERICA: A HISTORY 61–63 (2008). One comprehensive collection of anti-Federalist material, for example, contains only two passing references to freedom of speech, both from the Federal Farmer. *See Observations Leading to a Fair Examination of the System of Government Proposed by the Late Convention; and to Several Essential and Necessary Alterations in It. In a Number of Letters from a Federal Farmer to the Republican*, *in* 2 THE COMPLETE ANTI-FEDERALIST 214, 245 (Herbert J. Storing ed., 1981) (letter IV); *id.* at 323, 329–30 (letter XVI).

62. *See* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 93–96.

63. *See* David Jenkins, *The Sedition Act of 1798 and the Incorporation of Seditious Libel into First Amendment Jurisprudence*, 45 AM. J. LEGAL HIST. 154, 171–78 (2001).

64. Proposal by Madison in House, June 8, 1789, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 83.

assemble and consult for their common good, and to apply to the government for redress of grievances, shall not be infringed."[65] The use of the definite article at the beginning of this sentence hints at a reference to a preexisting legal concept, and given the state of framing-era law, the most likely suspect is Blackstone. This proposal passed the House with no discussion of the meaning of the Speech and Press Clauses.[66]

At the time, the Senate met in secret and kept a journal reflecting its actions in skeletal form.[67] The only action pertinent to the Speech and Press Clauses that was taken was to reject an amendment to qualify those clauses with the language, "[i]n as ample a manner as hath at any time been secured by the common law."[68] The Senate later added the "Congress shall make no law" formulation at the beginning of the amendment and conjoined the proposal with clauses protecting the free exercise of religion while prohibiting an establishment of religion.[69] After a conference committee agreed on the Senate version of the Speech and Press Clauses,[70] the proposed amendment passed both Houses and was sent to the states for ratification without further substantive discussion of the Speech or Press Clauses.[71] No record survives of the debates in the ratifying states, or of the public discussion of the proposed amendment.[72]

It is difficult to know what to make of these events. As we have seen, Madison's original draft seemed to lean away from Blackstone, but the Committee of Eleven's redraft seems to return closer to the traditional view. Still, the Senate seems to have rejected a proposal to track the common law which, as we have seen, had never repudiated Blackstone. That suggests that at least some in the Senate understood the House's formulation as potentially deviating from Blackstone—whether the proposal was understood as more or less speech-protective, however, is unclear. Yet, perhaps the Senate proposal was merely offered for clarification, and rejected as unnecessary. Drawing inferences from the failure to adopt an amendment, after all, is a perilous business.

Perhaps more important, because the public knew little of the Senate's closed deliberations, from the standpoint of original public meaning, what may have been the Senate's willingness to depart from the common law seems to have little

---

65. House Committee of Eleven Report, July 28, 1789, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 84.

66. *See id.* at 96–97.

67. *See* DAVID P. CURRIE, THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801, at 10 & nn.27 & 29 (1997).

68. Further Senate Consideration, Sept. 3, 1789, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 85.

69. Further Senate Consideration, Sept. 9, 1789, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 86.

70. Conference Committee Report, Sept. 24, 1789, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 89.

71. House Consideration of Conference Committee Report, Sept. 24 [25], 1789, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 89; Senate Consideration of Conference Committee Report, Sept. 24, 1789, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 90–91; Further Senate Consideration of Conference Committee Report, Sept. 25, 1789, *in* THE COMPLETE BILL OF RIGHTS, *supra* note 59, at 91–92.

72. *See, e.g.*, LEVY, *supra* note 52, at 267; Anderson, *supra* note 53, at 486.

interpretive significance. What may be more important from the standpoint of original public meaning is that Blackstone's conception of the freedom of press seemed to have been something of a dead letter since the Zenger case. For that reason, it is far from clear that the public would have understood the First Amendment's Speech and Press Clauses to have been Blackstonian in character. Moreover, whatever the Senate's reasons for rejecting the proposal that would have had the First Amendment track the common law—presumably a matter of concern to intentionalists but not for advocates of original public meaning—any textualist should find it hard to disregard the difference between the Seventh Amendment, which expressly references and preserves the common law right to a jury in civil cases,[73] and the First Amendment's far more uncertain reference to prevailing common law standards.[74]

Even more perplexing, especially from the standpoint of original public meaning, is the First Amendment's parallel protections for freedom of speech and freedom of the press. Blackstone's account, as we have seen, described "the liberty of the press."[75] The First Amendment's Press Clause might therefore be thought to codify Blackstone's account, but Blackstone did not describe "the freedom of speech," and it seems unlikely that this phrase had any generally accepted public meaning in the framing era. As David Anderson observed, "freedom of speech, unlike freedom of the press, had little history as an independent concept when the first amendment was framed."[76] Perhaps the two clauses were meant to do no more than apply the same legal regime to written and spoken words much as the law of

---

73. "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law." U.S. CONST. amend. VII.

74. David Anderson has drawn attention to the fact that the First Amendment's text contains no express qualification on the rights of free speech and a free press, unlike later state constitutional provisions that added the Blackstonian qualification that the press is responsible for the abuse of its freedom. *See* Anderson, *supra* note 53, at 488. It is hard to put too much weight on this observation, however, since framing-era state constitutions usually did not contain a similar qualification, and yet framing-era law followed Blackstone, as we have seen. Still, one such qualifier appeared in the Pennsylvania Constitution of 1790. *See id.* at 488 n.200.

75. 4 BLACKSTONE, *supra* note 51, at *151–52; *see supra* text accompanying note 51.

76. Anderson, *supra* note 53, at 487. The closest Blackstone came to describing "the freedom of speech" is in the discussion of the rights of members of Parliament:

> [I]t is declared by [statute] as one of the liberties of the people, "that the freedom of speech, and debates, and proceedings in parliament, ought not to be impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the king in person, by the speaker of the house of commons, at the opening of every new parliament.

1 BLACKSTONE, *supra* note 51, at *160. This suggests an absolute protection, far different than that ordinarily afforded to speech outside of Parliament. This concept is an unlikely explanation for the First Amendment's Speech Clause, since it already appeared as a protection for Members of Congress in the original Constitution. U.S. CONST. art. I, § 6. As we will see, in the framing era and in the nineteenth century, no one seemed to understand the Speech Clause as providing the kind of absolute protection afforded legislators.

defamation was divided into libel and slander, permitting civil or criminal liability for either oral or written defamatory statements without allowing a defense of truth.[77] This explanation for the separate Speech and Press Clauses, however, is far from clear. The concept of prior restraint had been used with respect to schemes for licensing or enjoining the publication of written material, not mere "speech."[78] Thus, it is uncertain whether it would have made sense to anyone to protect speech against prior restraint. If the Blackstonian rule against prior restraint had little apparent application to "speech," then the two-clause approach may have signaled a departure from Blackstone.

What does come clear, however, is the nearly complete lack of discussion of any alternative to the Blackstonian conception during the framing era. Even if the Blackstonian view had been rejected, it is quite unclear what the public could have understood had taken its place. Perhaps nothing except the sensibilities of American juries had replaced Blackstone; Akhil Amar, for example, has argued that the upshot of the Zenger acquittal was largely limited to a recognition that the consequence of a rule forbidding prior restraints was that speech could not be punished unless a jury could be persuaded to convict.[79] But, on this view, the First Amendment does little if any work not performed by the right to trial by jury. Some might find an account of the original meaning of the Speech and Press Clauses that pretty much drains them of independent meaning less than persuasive. In any event, given the paucity of surviving evidence about how the First Amendment was understood by the public during ratification, any inquiry into the original public meaning of the Speech and Press Clauses seems awfully difficult to undertake.[80] There is, however, one more source to consult.

---

77. *See* 3 BLACKSTONE, *supra* note 51, at *123–25 (slander); 4 *id.* at *150–51 (libel). Indeed, framing-era courts and commentators, although treating defamation actions as subject to review under the First Amendment, nevertheless held defamation to be unprotected. *See* Eugene Volokh, *Tort Liability and the Original Meaning of the Freedom of Speech, Press, and Petition*, 96 IOWA L. REV. 249, 253–57 (2010).

78. Although the rule against prior restraints was understood in the framing era to forbid both licensing requirements and injunctions against publication, this rule seems to have arisen exclusively in cases involving the publication of written material. *See* Stephen A. Siegel, *Injunctions for Defamation, Juries, and the Clarifying Lens of 1868*, 56 BUFF. L. REV. 655, 674–99 (2008).

79. *See* AKHIL REED AMAR, THE BILL OF RIGHTS: CREATION AND RECONSTRUCTION 23–24 (1998).

80. David Lange and Jefferson Powell, while not claiming to have undertaken a comprehensive analysis of the original public meaning of the First Amendment, have pointed to a handful of framing-era statements that seem to reject Blackstone's conception: Alexander Hamilton's comment in *The Federalist* opposing constitutional protection for freedom of the press on the ground that its meaning was uncertain; an exchange of correspondence between Chief Justice William Cushing of the Massachusetts Supreme Court and John Adams suggesting that Massachusetts's constitutional protection for "liberty of the press" required recognition of a defense of truth in defamation actions; and a letter of John Marshall, then in France in diplomatic negotiations, relying on the concept of freedom of the press to reject French suggestions that his government should repress anti-French publications as harmful to the public on the ground that such a suggestion was inconsistent with American conceptions of a free press. *See* DAVID L. LANGE & H. JEFFERSON POWELL,

*B. Original Meaning and the Debate over the Sedition Act*

There is an additional basis for insight into the framing-era meaning of the First Amendment—the events surrounding the Sedition Act of 1798.

The Sedition Act provided:

> [I]f any person shall write, print, utter or publish, or shall cause or procure to be written, printed, uttered or published, or shall knowingly and willingly assist or aid in writing, printing, uttering or publishing any false, scandalous and malicious writing or writings against the government of the United States, or either house of the Congress of the United States, or the President of the United States, with intent to defame the said government, or either house of the said Congress, or the said President, or to bring them, or either of them, into contempt or disrepute; or to excite against them, or either or any of them, the hatred of the good people of the United States, or to stir up sedition within the United States, or to excite any unlawful combinations therein, for opposing or resisting any law of the United States, or any act of the President of the United States, done in pursuance of any such law, or of the powers in him vested by the constitution of the United States, or to resist, oppose, or defeat any such law or act, or to aid, encourage or abet any hostile designs of any foreign nation against the United States, their people or government, then such person, being thereof convicted before any court of the United States having jurisdiction thereof, shall be punished by a fine not exceeding two thousand dollars, and by imprisonment not exceeding two years.[81]

On the one hand, the Act is notable for treating falsity as an aspect of seditious libel. As we have seen, Blackstone did not recognize truth as a defense to defamation;[82] but, it seems that by 1798, undiluted Blackstonism was too much for

---

NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT 203–08 (2009). While this is useful evidence, only Hamilton's statement was made in a public forum, and one might conclude that Hamilton's view was ultimately repudiated by the ratification of the First Amendment. As for the others, it is unclear how to weigh the importance of privately expressed sentiments as a matter of original public meaning when they are uncorroborated by evidence that reflects the general public's understanding. Even more important, none of these statements provides clarity about what conception might have been thought to have replaced Blackstone's beyond the apparent willingness of Cushing and Adams to recognize a defense of truth in defamation actions. Marshall's letter was closest to a general repudiation of the pernicious-tendency test in favor of something like absolute protection, but Lange and Powell acknowledge that "Marshall was not engaged in dispassionate constitutional analysis, and in addition he was writing under extreme time pressure. As a consequence the exact constitutional implications of his discussion of press freedom, a discussion which never explicitly invoked the First Amendment, are unclear." *Id.* at 207 (footnote omitted). One might add that from the standpoint of original public meaning, the fact that there is so little evidence of a similar understanding of the First Amendment to be found in the public record makes this evidence suspect.

81. An Act in Addition to the Act, Entitled "An Act for the Punishment of Certain Crimes Against the United States," ch. 74, § 2, 1 Stat. 596, 596–97 (1798).

82. *See supra* text accompanying notes 51, 55.

even the advocates of seditious libel to stomach.[83] On the other hand, the Act did pass, which might suggest that the First Amendment was understood to provide little if any protection from after-the-fact punishment of expression beyond, perhaps, a requirement that seditious libel be proven false—assuming that this was understood to be a constitutional requirement and not a matter of legislative grace.[84] Indeed, the federal courts uniformly rejected First Amendment attacks on the Sedition Act, relying on Blackstone's conception, although the rulings came from Federalist judges politically aligned with the sponsors of the Act.[85]

The Sedition Act provoked ferocious debate in and out of Congress. Supporters relied on Blackstone for the proposition that individuals were always answerable for seditious expression, while opponents, in addition to denying that the Constitution delegated power to Congress to punish seditious libel, claimed that inherent in a republican government was the right to criticize the government.[86] Madison, in his *Virginia Report*, denounced Blackstone's distinction between prior restraints and after-the-fact punishment,[87] and, although admitting his inability to identify "the proper boundary between the liberty and licentiousness of the press,"[88] Madison argued that representative governments "require a greater freedom of

---

83. The House agreed to an amendment making truth a defense without recorded debate. 8 ANNALS OF CONG. 2134 (1798). Indeed, section 3 of the Act seemed to make falsity an element of the offense, and section 3 guaranteed the admissibility of evidence of truth: "[I]f any person shall be prosecuted under this act, for the writing or publishing any libel aforesaid, it shall be lawful for the defendant, upon trial of the cause, to give in evidence in his defence, the truth of the matter contained in the publication charged as a libel." § 3, 1 Stat. at 597. Even so, Justice Chase interpreted the Act to place a burden of establishing truth "to the marrow" on the defendant. United States v. Cooper, 25 F. Cas. 631, 642–43 (C.C.D. Pa. 1800) (No. 14,865).

84. The Act passed in the House by a vote of 44 to 41. *See* 8 ANNALS OF CONG. 2171 (1798). The Act seems to have been less controversial in the Senate; although the Senate's debates were not recorded, the original version of the Act, without any defense of truth, passed by a vote of 18 to 6. *See* S. JOURNAL, 5th Cong., 2d Sess. 527–28 (1798). The Senate later agreed to the bill, as amended by the House, without recorded vote. *See id.* at 537–38.

85. *See, e.g.*, FELDMAN, *supra* note 61, at 86–89; GEOFFREY R. STONE, PERILOUS TIMES: FREE SPEECH IN WARTIME 68–69 (2004); Stewart Jay, *The Creation of the First Amendment Right to Free Expression: From the Eighteenth Century to the Mid-Twentieth Century*, 34 WM. MITCHELL L. REV. 773, 794–95, 799–800 (2008); Jenkins, *supra* note 63, at 189–96.

86. *See, e.g.*, WALTER BERNS, THE FIRST AMENDMENT AND THE FUTURE OF AMERICAN DEMOCRACY 86–119 (1970); CURTIS, *supra* note 53, at 58–79, 94–100; FELDMAN, *supra* note 61, at 80–86, 89–100; LANGE & POWELL, *supra* note 80, at 212–24; LEVY, *supra* note 52, at 297–324; SMITH, *supra* note 53, at 131–50; STONE, *supra* note 85, at 36–45; Jay, *supra* note 85, at 794–99; Jenkins, *supra* note 63, at 171–83; Mayton, *supra* note 53, at 121–28; Rabban, *supra* note 53, at 849–52. For a nearly contemporaneous account of the debate, see 2 ST. GEORGE TUCKER, TUCKER'S BLACKSTONE'S COMMENTARIES app. at 14–21 (1803). For statements in the House debates expressing views of the First Amendment inconsistent with Blackstone, see 8 ANNALS OF CONG. 2140–45 (1798) (Rep. Nicholas); *id.* at 2153–54 (Rep. Livingston); *id.* at 2160–61 (Rep. Gallatin). For statements in the House reflecting Blackstone, see *id.* at 2148 (Rep. Otis); *id.* at 2168–70 (Rep. Harper).

87. JAMES MADISON, THE VIRGINIA REPORT OF 1799–1800 (1800), *excerpted in* FREEDOM OF THE PRESS FROM ZENGER TO JEFFERSON 197, 214 (Leonard W. Levy ed., 1966).

88. *Id.*

animadversion than might be tolerated by the genius of such a government as that of Great Britain."[89] The Act's supporters had a rejoinder; one of the obligations of citizenship in a republic, in their view, was to refrain from obstructing elected officials in the discharge of their duties, and defamation was thought to involve a breach of that obligation.[90] To the extent that both sides of this debate can be said to reflect their own understanding of the original meaning of the First Amendment, it is not a stretch to say that this meaning was deeply contested.

As the Supreme Court later observed, after the Sedition Act expired following the election of 1800, newly elected President Jefferson pardoned those convicted under the Act and Congress later repaid the fines that had been imposed under it, leading the Court to conclude that the judgment of history was against the constitutionality of the Act.[91] It may be doubted, however, if the election of 1800 can be fairly characterized as a referendum on the constitutionality of the Sedition Act. More likely, the election turned on divisions within the ranks of the Federalists having nothing to do with the Act.[92] But even if the election of 1800 should be understood as a repudiation of Blackstonism, it is difficult to determine what conception of freedom of speech and of the press had replaced it.

As we have seen, Madison was unable to offer any clarity on the extent of the right of free expression. This inability was not uncommon. For example, the author of what the Supreme Court has called "the most important early American edition of Blackstone's Commentaries,"[93] St. George Tucker, denounced Blackstone's view, agreeing with Madison that republican government required broader protections, and yet he identified no clear boundary on First Amendment rights.[94] Indeed, it is far from clear that Tucker believed that republican governments must protect defamatory speech; Tucker approved of state-law remedies for defamation, and regarded the effect of the First Amendment simply as leaving these remedies in the hands of the states.[95] Jefferson had a similar understanding.[96] He even promoted

---

89. *Id.* at 215. For the classic judicial statement of the view that the republican form of government established in America necessitated a broader conception of freedom of speech, see Whitney v. California, 274 U.S. 357, 374–77 (1927) (Brandeis, J., concurring).

90. James P. Martin, *When Repression Is Democratic and Constitutional: The Federalist Theory of Representation and the Sedition Act of 1798*, 66 U. CHI. L. REV. 117, 169–76 (1999).

91. *See* N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1963). To similar effect, see Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

92. *See, e.g.*, JAMES GRANT, JOHN ADAMS: PARTY OF ONE 421–27 (2005); DAVID MCCULLOUGH, JOHN ADAMS 536–52 (2001); 2 PAGE SMITH, JOHN ADAMS 1038–59 (1962).

93. District of Columbia v. Heller, 128 S. Ct. 2783, 2799 (2008). On the influence of Tucker, see, for example, SAUL CORNELL, THE OTHER FOUNDERS: ANTI-FEDERALISM AND THE DISSENTING TRADITION IN AMERICA, 1788–1828, at 263–72 (1999); CRAIG EVAN KLAFTER, REASON OVER PRECEDENTS: ORIGINS OF AMERICAN LEGAL THOUGHT 38–47 (1993); and Davison M. Douglas, *Foreword: The Legacy of St. George Tucker*, 47 WM. & MARY L. REV. 1111 (2006).

94. *See* 2 TUCKER, *supra* note 86, at app. 11–14, 30.

95. *See id*. at app. 28–30.

96. Jefferson wrote:

> Nor does the opinion of the unconstitutionality and consequent nullity of that law [the Sedition Act] remove all restraint from the overwhelming torrent of

seditious libel prosecutions of his opponents during his administration in state courts, and in one instance even by means of a federal prosecution based on common law principles.[97] Thus, even if the Sedition Act controversy should be regarded as evidence of the demise of the Blackstonian conception for free speech and a free press for purposes of ascertaining the original public meaning of the First Amendment, it again is far from clear what conception of the founding generation had replaced it, other than perhaps the view that seditious libel should be left to the states. Indeed, another early commentator, even while attacking the constitutionality of the Sedition Act on the ground that it gave special rights to particular public officials, expressed the view that the law of seditious libel was consistent with the First Amendment.[98]

### *C. The First Amendment's Meaning in the Reconstruction Era*

It may be that the search for the First Amendment's original meaning should not be confined to framing-era evidence. In *Heller*, for example, in an effort to construe the Second Amendment, the Court examined evidence of the public's understanding of the Second Amendment throughout the nineteenth century.[99] Beyond that, the First Amendment became applicable to the states through the

---

> slander which is confounding all vice and virtue, all truth and falsehood in the US. The power to do that is fully possessed by the several state legislatures. It was reserved to them, and was denied to the general government, by the constitution according to our construction of it.

Letter from Thomas Jefferson to Abigail Adams (Sept. 11, 1804), *in* 1 THE ADAMS-JEFFERSON LETTERS: THE COMPLETE CORRESPONDENCE BETWEEN THOMAS JEFFERSON AND ABIGAIL AND JOHN ADAMS 279 (Lester J. Cappon ed., 1959). For an elaboration on Jefferson's views, see LEONARD W. LEVY, JEFFERSON AND CIVIL LIBERTIES: THE DARKER SIDE 46–48 (1963). The same view was stated by opponents of the Sedition Act in the House. *See* 8 ANNALS OF CONG. 2152 (1798) (Rep. Macon); *id.* at 2153 (Rep. Livingston); *id.* at 2163–64 (Rep. Gallatin).

97. *See* Paul Finkelman, *Thomas Jefferson, Original Intent, and the Shaping of American Law: Learning Constitutional Law from the Writings of Thomas Jefferson*, 62 N.Y.U. ANN. SURV. AM. L. 45, 77–80 (2006). In the federal prosecution, the Supreme Court eventually held that the federal courts have no common law power to punish crimes without considering any question under the First Amendment. *See* United States v. Hudson, 11 U.S. (7 Cranch) 32 (1814).

98. *See* JAMES SULLIVAN, A DISSERTATION UPON THE CONSTITUTIONAL FREEDOM OF THE PRESS IN THE UNITED STATES OF AMERICA 28–54 (1801). David Lange and Jefferson Powell have argued that the Sedition Act controversy should be regarded as a rejection of balancing in the First Amendment context because neither side of the debate spoke in terms of balancing. *See* LANGE & POWELL, *supra* note 80, at 222–23. This account may afford too much significance to a supposed omission; the failure of advocates of the Act to discuss balancing may reflect no more than an understanding that, under the common law, the balance had already been struck against speech amounting to seditious libel or otherwise having a bad tendency. The opposition to the Act may not have rejected balancing either; Tucker and Jefferson's advocacy of state-law remedies as properly accommodating the relevant governmental and societal interests suggests that the lack of discussion of balancing on the part of opponents of the Act may instead reflect the view that the balance was one appropriately struck by the states rather than the federal government.

99. District of Columbia v. Heller, 128 S. Ct. 2783, 2804–12 (2008).

Fourteenth Amendment,[100] ratified in 1868.[101] It may be that the public's understanding of the Speech and Press Clauses at the time they were made applicable to the states is the appropriate point for assessing the meaning of the Speech and Press Clauses on the view that 1868 was the time at which the nation recommitted to constitutional protection for free speech and a free press.[102] Indeed, by 1868 there were signs of evolution in the public's understanding of free speech and a free press.

Early in the nineteenth century, Blackstonism seemed alive and well. Despite the resolution of the Sedition Act controversy, the leading commentators in the first half of the nineteenth century hewed to Blackstone, explaining that the First Amendment preserved the common law and accordingly prohibited only prior restraints.[103] Justice Story, for example, wrote that the view that "this amendment was intended to secure to every citizen an absolute right to speak, or write, or print,

---

100. *See* Palko v. Connecticut, 302 U.S. 319, 323–25 (1937), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784 (1969). The question whether the Speech and Press Clauses were properly incorporated into the Fourteenth Amendment is a controversial one, on which there is a vast literature. For some of the leading originalist defenses of incorporation, see AMAR, *supra* note 79, at 163–239; 2 CROSSKEY, *supra* note 52, at 1089–95; MICHAEL KENT CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 57–91, 215–20 (1986); Bryan H. Wildenthal, *Nationalizing the Bill of Rights: Revisiting the Original Understanding of the Fourteenth Amendment in 1866–67*, 68 OHIO ST. L.J. 1509 (2007). For some of the leading attacks on the historical case for incorporation, see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 155–89 (2d ed. 1997); DONALD A. DRIPPS, ABOUT GUILT AND INNOCENCE: THE ORIGINS, DEVELOPMENT, AND FUTURE OF CONSTITUTIONAL CRIMINAL PROCEDURE 27–36 (2003); JACOBUS TENBROEK, EQUAL UNDER LAW 228–39 (1965); Donald Dripps, *Akhil Amar on Criminal Procedure and Constitutional Law: "Here I Go Down that Wrong Road Again,"* 74 N.C. L. REV. 1559, 1574–82 (1996); Charles Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Lawrence Rosenthal, *The New Originalism Meets the Fourteenth Amendment: Original Public Meaning and the Problem of Incorporation*, 18 J. CONTEMP. LEGAL ISSUES 361 (2009); George C. Thomas III, *The Riddle of the Fourteenth Amendment: A Response to Professor Wildenthal*, 68 OHIO ST. L.J. 1627 (2007). For present purposes, it is unnecessary to enter this debate. Given that the Supreme Court has concluded that the First Amendment should be considered protected against the states by the Fourteenth, the relevant question for the current project is whether evidence of the public's understanding of the First Amendment at the time of the Fourteenth Amendment's ratification aids in understanding the meaning of the First Amendment's Speech and Press Clauses.

101. *See* Proclamation No. 13, 15 Stat. 708, 710 (July 28, 1868).

102. *See* Siegel, *supra* note 78, at 658–63. Other scholars have advanced similar arguments with respect to different provisions in the first eight amendments. *See, e.g.*, AMAR, *supra* note 79, at 258–66 (Second Amendment); Kurt T. Lash, *The Second Adoption of the Establishment Clause: The Rise of the Nonestablishment Principle*, 27 ARIZ. ST. L.J. 1085, 1136–53 (1995) (First Amendment Establishment Clause); Michael B. Rappaport, *Originalism and Regulatory Takings: Why the Fifth Amendment May Not Protect Against Regulatory Takings, but the Fourteenth Amendment May*, 45 SAN DIEGO L. REV. 729, 743–57 (2008) (Fifth Amendment Takings Clause).

103. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 12–22 (1827); 3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES 731–33 (1833).

whatever he might please . . . is a supposition too wild to be indulged by any rational man."[104] Rejecting the view that the Blackstonian position was inconsistent with republican government, Story defended the criminalization of seditious libel under state law,[105] although he expressed no view about whether the federal government could prohibit seditious libel.[106]

Still, prior to the Civil War, there were unmistakable signs of movement from Blackstonism. Even Justice Story seems to have accepted that truth, at least in some circumstances, could be a defense to libel; he called the First Amendment "neither more nor less, than an expansion of the great doctrine, recently brought into operation in the law of libel, that every man shall be at liberty to publish what is true, with good motives and for justifiable ends."[107] Moreover, his agnosticism on the constitutionality of the Sedition Act does not appear to reflect the prevailing public understanding of the era; in 1840, Congress authorized the repayment of fines levied under the Sedition Act[108] on the ground that the Act was unconstitutional.[109] And, in the years leading to the Civil War and until the time of the Fourteenth Amendment's framing and ratification, there was increasing criticism in the North of efforts by the southern states to suppress progressive speech on the subject of race.[110]

Nevertheless, by the time of the Fourteenth Amendment's ratification, developments in First Amendment jurisprudence had not been dramatic. In his 1873 revision of Kent's *Commentaries on American Law*, Holmes had little to say about the First Amendment other than to note a trend toward permitting truth as a defense in defamation actions.[111] As for the Sedition Act, the treatise described it as "*declaratory*, and was intended to convey the sense of Congress, that in prosecutions of that kind it was the common right of the defendant to give the truth in evidence."[112] Throughout the nineteenth century, the bad-tendency test continued to predominate in thinking about the First Amendment, although it was understood to grant greater protection for expression on public affairs and matters of public concern.[113]

---

104. 3 STORY, *supra* note 103, at 731–32. He also observed that "[t]he doctrine laid down by Mr. Justice Blackstone, respecting the liberty of the press, has not been repudiated (so far as is known) by any solemn decision of any of the state courts, in respect to their own municipal jurisprudence." *Id.* at 741.

105. *Id.* at 732–33, 738–43.

106. *See id.* at 743.

107. *Id.* at 732–33.

108. *See, e.g.*, Act of July 4, 1840, ch. 45, 6 Stat. 802 (1840).

109. *See* CONG. GLOBE, 26TH CONG., 1ST SESS. 411 (1840).

110. *See, e.g.*, AMAR, *supra* note 79, at 234–42; CURTIS, *supra* note 53, at 241–99; FELDMAN, *supra* note 61, at 121–52; Jay, *supra* note 85, at 805–10.

111. *See* 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW *17–25 (O.W. Holmes, Jr. ed., 1873).

112. *Id.* at *24 (emphasis in original).

113. *See, e.g.*, DAVID M. RABBAN, FREE SPEECH IN ITS FORGOTTEN YEARS 177–210 (1999).

The leading treatise of the Reconstruction era was by Thomas Cooley, and the Supreme Court in *Heller* accurately described it as "massively popular."[114] Cooley unambiguously rejected the Blackstonian view of the First Amendment:

> [T]he mere exemption from previous restraints cannot be all that is secured by the constitutional provisions, inasmuch as of words to be uttered orally there can be no previous censorship, and the liberty of the press might be rendered a mockery and a delusion, and the phrase itself a byword if, while every man was at liberty to publish what he pleased, the public authorities might nevertheless punish him for harmless publications.[115]

Cooley also objected to the common law of seditious libel as inconsistent with republican government.[116] Yet, Cooley characterized truth as a defense to libel only "if published with good motives and for justifiable ends. Precisely what showing shall establish good motives and justifiable occasion must be settled by future decisions."[117] Indeed, Cooley seems to have thought that the First Amendment protected expression only "so long as it is not harmful in its character, when tested by such standards as the law affords."[118] Cooley seems to have believed that for sufficient reason, the legislature could authorize additional restrictions for reasons analogous to those thought sufficient to support liability under traditional common law standards:

> The constitutional freedom of speech and of the press must mean a freedom as broad as existed when the constitution which guarantees it was adopted, and it would not be in the power of the legislature to restrict it, except in those cases of publications injurious to private character, or public morals or safety, which come strictly within the reasons of civil or criminal liability at the common law, but where, nevertheless, the common law as we have adopted it failed to provide a remedy. It certainly could not be said that freedom of speech was violated by a law which should make imputing the want of chastity to a female actionable without proof of special damage; for the charge is one of grievous wrong, without any reason in public policy demanding protection to the communication, and the case is strictly analogous to many other cases where the common law made the party responsible

---

114. District of Columbia v. Heller, 128 S. Ct. 2783, 2811 (2008). On the influence of Cooley's treatise, see, for example, EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JURIDICAL CONCEPT 116–18 (1948); LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 628–29 (2d ed. 1985); CLYDE E. JACOBS, LAW WRITERS AND THE COURTS: THE INFLUENCE OF THOMAS M. COOLEY, CHRISTOPHER G. TIEDEMAN, AND JOHN F. DILLON UPON AMERICAN CONSTITUTIONAL LAW 27–32 (1954); BENJAMIN R. TWISS, LAWYERS AND THE CONSTITUTION: HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT 18–41 (1942).

115. THOMAS M. COOLEY, A TREATISE ON THE CONSTITUTIONAL LIMITATIONS WHICH REST UPON THE LEGISLATIVE POWER OF THE STATES OF THE AMERICAN UNION 421 (1868).

116. *See id.* at 426–29.

117. *Id.* at 464.

118. *Id.* at 422.

> for his false accusations. The constitutional provisions do not prevent the modification of the common-law rules of liability for libels and slanders, but they would not permit bringing new cases within those rules when they do not rest upon the same reasons.[119]

The Fourteenth Amendment ushered in no great change in the protection that state law offered for speech. For one thing, no discernable change in the scope of protection afforded expression in defamation actions under state law followed the ratification of the Fourteenth Amendment, suggesting that the First Amendment was not thought to have dramatic implications for state-law regulation of speech.[120] For another, as late as 1907, in an opinion by Justice Holmes, the Supreme Court characterized the First Amendment as simply a rule against prior restraint,[121] adding: "The preliminary freedom extends as well to the false as to the true; the subsequent punishment may extend as well to the true as to the false."[122] Yet, little more than a decade later, the Court had repudiated its previous embrace of Blackstone, in an opinion by the very same Justice Holmes.[123] There seems to have been more than a little uncertainty about the meaning of the First Amendment throughout the nineteenth and into the twentieth century.

### *D. The Common Law of Free Speech*

By now, it should be plain that the evidence regarding the original meaning of the Speech and Press Clauses is anything but easy to sort out.

As we have seen, the First Amendment's use of the definite article suggests that the Speech and Press Clauses refer to a preexisting legal concept. The only well-recognized framing-era account of the freedom of the press was Blackstone's. Yet, Blackstone's account seemed never to take root in America, and, in any event, even if an accurate account of the freedom of the press, may not have described the freedom of speech. Moreover, the First Amendment's reference to prevailing common law standards is far more indirect than the Seventh Amendment's.

The Sedition Act provided the first occasion in which there was serious public debate about the meaning of freedom of speech and freedom of the press. The debate over the Act was intense; there was anything but a consensus about the meaning of the First Amendment. Jefferson's victory might be thought a rejection of Blackstone, but it seems that neither he nor any other prominent critic of the Sedition Act took seriously the notion that seditious libel was inconsistent with republican government; and there was little evident disapproval of state-law seditious libel prosecutions in the wake of Jefferson's victory. Still, the trend toward the recognition of truth as a defense to defamation in the nineteenth century suggests that Blackstonian standards were never taken as authoritative, and if

---

119. *Id.* at 429–30.

120. *See* FELDMAN, *supra* note 61, at 150–79; Siegel, *supra* note 78, at 701–04. Professor Siegel adds, however, that by Reconstruction, courts had become more reluctant to grant injunctions against defamation. *See id.* at 705–26.

121. Patterson v. Colorado, 205 U.S. 454, 462 (1907).

122. *Id.*

123. *See* Schenck v. United States, 249 U.S. 47, 51–52 (1919).

Cooley's treatise is any indication, seditious libel was under serious assault still by the time of the Fourteenth Amendment's ratification. Yet, as late as 1907, the Supreme Court was repeating the Blackstonian formulation.

In the face of such deeply conflicting evidence, most scholars of the First Amendment have despaired of producing any coherent originalist account of the Speech and Press Clauses, at least when examining the question in terms of the intentions of the framers.[124] About the only originalist account to emerge came from Robert Bork, who, despite admitting that "[t]he framers seem to have had no coherent theory of free speech,"[125] argued in these pages that "[c]onstitutional protection should be accorded only to speech that is explicitly political" and that "within that category of speech we ordinarily call political, there should be no constitutional obstruction to laws making criminal any speech that advocates forcible overthrow of the government or the violation of any law."[126]

At the time he advanced his proposal, then-Professor Bork thought that the only legitimate methods of constitutional interpretation involved reliance on the intentions of the framers or inferring rights from the structure of the government established by the Constitution.[127] The matter looks rather different from the standpoint of original public meaning, however.[128] As we have seen, no framing-

---

124. *See, e.g.*, CHAFEE, *supra* note 53, at 16 ("The framers of the First Amendment make it plain that they regarded freedom of speech as very important. . . . But they say very little about its exact meaning."); LEVY, *supra* note 37, at 209–10 ("At the time of the drafting and ratification of the First Amendment, few among them [the framers] clearly understood what they meant by the free press clause, and we cannot know that those few represented a consensus."); POWE, *supra* note 57, at 23 ("[I]t is simply impossible to turn to discussions by the framers . . . for definitive answers on the scope of freedom of the press."); STONE, *supra* note 85, at 42 ("[T]he framers of the First Amendment . . . embraced a broad and largely undefined constitutional principle, not a concrete, well-settled legal doctrine."); DAVID A. STRAUSS, THE LIVING CONSTITUTION 52 (2010) ("[T]he actual views of the drafters and ratifiers of the First Amendment are in many ways unclear."); Lillian R. BeVier, *The First Amendment and Political Speech: An Inquiry into the Substance and Limits of Principle*, 30 STAN. L. REV. 299, 307 (1978) ("History tells us little . . . about the precise meaning contemplated by those who drafted the Bill of Rights."). This is not to say that scholars have found no value in originalist approaches to the First Amendment. Eugene Volokh, for example, has advanced an originalist argument that symbolic speech was treated identically to verbal or printed expression in framing-era law and on that basis has defended protection for symbolic speech, such as flag burning. *See* Eugene Volokh, *Symbolic Expression and the Original Meaning of the First Amendment*, 97 GEO. L.J. 1057, 1063–83 (2009). Yet, Professor Volokh acknowledges the limits of his inquiry; he admits that he cannot tell whether flag burning or other particular forms of symbolic speech would have been treated as protected in the framing era; and acknowledges that "[t]he original meaning of the First Amendment is in many ways hard to determine." *Id.* at 1083–84.

125. Robert H. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 22 (1971).

126. *Id.* at 20.

127. *See id.* at 17–20.

128. Bork later adopted reliance on original public meaning as the proper approach to constitutional adjudication, *see* ROBERT H. BORK, THE TEMPTING OF AMERICA: THE POLITICAL SEDUCTION OF THE LAW 143–51 (1990), yet he offered no evidence that his earlier views on the First Amendment were consistent with its original meaning, *see id.* at 333–35.

era source describes the freedom of the press or free speech in terms of political speech that stops short of advocating violence. Blackstone ruled out prior restraints in their totality—whether for political or nonpolitical writings—but thought liability could be imposed after publication even for political speech if it was defamatory or had some other "pernicious tendency."[129] Even though undiluted Blackstonism may well be inconsistent with the original meaning of the First Amendment, the bad-tendency test, as we have also seen, remained in vogue throughout the nineteenth century, and it offered nothing like absolute protection for political speech. Indeed, given the breadth of the bad-tendency test, it is innocuous speech, not political speech, that offers the best case for protection under framing-era standards. While there is some evidence that during the nineteenth century the concept of seditious libel fell into disrepute, this is far from an understanding of special constitutional protection for political speech.

In terms of original public meaning, Bork's view that advocacy of illegal conduct is without protection fares somewhat better—it seems a classic instance of punishing speech with a "pernicious tendency" in the Blackstonian tradition.[130] Yet, Blackstone's bad-tendency test is broad enough to sustain the Sedition Act itself—defamatory criticism directed at public officials surely could produce contempt, if not apathy, toward the political process of a type that might be thought undesirable in a republic. Indeed, we have seen that the Sedition Act was defended on these grounds.[131] Still, whatever one thinks about the constitutionality of the Sedition Act as an original matter, by the time of the ratification of the Fourteenth Amendment, its consistency with the general understanding of free speech and a free press was open to great doubt.

An originalist might argue that the evidence of the First Amendment's meaning—at least by the time of the Fourteenth Amendment's ratification—suggests no more than protection for the type of political speech that amounted to seditious libel, while otherwise preserving the bad-tendency test. This, after all, pretty much describes Cooley's account.[132] But even this overstates things. After all, truthful but defamatory speech might be thought to have a bad tendency—Blackstone certainly thought it advisable to avoid the social friction that could result from defamation of this character—yet the virtues and vices of at least some types of bad-tendency speech seem to have been rebalanced between the era of Blackstone and Cooley. Blackstone's "pernicious tendency" test, after all, reflects a balancing of competing interests; it is the "pernicious tendency" of defamatory and other types of actionable speech that justified limiting "[e]very freeman['s] . . . undoubted right to lay what sentiments he pleases before the public."[133] Yet, by

---

129. *See supra* text accompanying note 51.

130. *See supra* text accompanying notes 51–52. For a helpful discussion of the Blackstonian origins of the bad-tendency test, see RABBAN, *supra* note 113, at 132–37.

131. *See supra* text accompanying note 90.

132. *See supra* text accompanying notes 114–19.

133. 4 BLACKSTONE, *supra* note 51, at *151–52. David Lange and Jefferson Powell, in contrast, use Blackstone to support First Amendment absolutism by arguing that his approach was absolutist when it came to prior restraints, and therefore Blackstone should today be understood to have endorsed a conception that condemns any regime that amounts to a prohibition on what may lawfully be published. *See* LANGE & POWELL, *supra* note 80, at

1868, not all expression with a "pernicious tendency" was beyond the scope of permissible "freedom"—the emergence of the defense of truth in defamation actions makes that clear.

Thus, the 1868 meaning of free speech and a free press was somewhat different than protection for speech that had no "bad tendency"—or at least a stronger showing of bad tendency had become required to overcome the speaker's liberty interests. Indeed, Cooley's account quite explicitly recognized both the liberty interest in speaking and writing free from liability, and the countervailing interests that justified the imposition of liability, in some circumstances, for speech and writings.[134] Thus, the original meaning of the Speech and Press Clause reflected an effort to identify the bounds of "freedom" in terms of an assessment of competing interests.[135] From 1791 to 1868, however, the balance between those competing interests was not static. Indeed, the balance may have started moving as early as the Zenger trial and seems to have been still evolving at the time of the Fourteenth Amendment's ratification, at least if Cooley's uncertainty about the reach of the defense of truth in defamation actions is any indication.[136]

Thus, the difficulties in identifying the original meaning of the First Amendment are a function of the reality that the meaning of free speech and a free press was something of a moving target in the eighteenth and nineteenth centuries. The common law meaning, at least of a free press, had been inherited from Blackstone's England, but that concept never really took root in America. From the Zenger trial to the Sedition Act, there was a march away from Blackstone's standards for free speech and a free press in America—as the steady movement toward recognizing truth as a defense demonstrates. That is not to say that the public meaning of free speech and a free press was anything close to libertarian—the bad-tendency test

---

286–301. Yet, this understanding of Blackstone puts at naught all of the interests in regulating speech that Blackstone thought could justify after-the-fact punishment. This approach accordingly acknowledges the liberty interests recognized by Blackstone while ignoring the regulatory interests also found in his account that justify after-the-fact punishment. Equating Blackstone with First Amendment absolutism—at least outside of the context of prior restraints on publication—accordingly has little grounding in the original public meaning of the First Amendment which, as we have seen, accommodated any number of regulatory interests that were thought to justify after-the-fact punishment of speech.

134. *See supra* text accompanying notes 114–19.

135. The first great academic champion of free speech, Zechariah Chafee, while stressing the importance of free discussion in a republic, acknowledged the inevitability of balancing:

> One of the most important purposes of society and government is the discovery and spread of truth on subjects of general concern. This is possible only through absolutely unlimited discussion, for . . . once force is thrown into the argument, it becomes a matter of chance whether it is thrown on the false side or the true, and truth loses all its natural advantage in the contest. Nevertheless, there are other purposes of government, such as order, the training of the young, protection against external aggression. Unlimited discussion sometimes interferes with these purposes, which must then be balanced against freedom of speech, but freedom of speech ought to weigh very heavily in the scale.

CHAFEE, *supra* note 53, at 31. On Chafee's importance to the evolution of freedom of speech, see MARK A. GRABER, TRANSFORMING FREE SPEECH: THE AMBIGUOUS LEGACY OF CIVIL LIBERTARIANISM 122–64 (1991).

136. *See supra* text accompanying note 117.

was firmly established at the start of the twentieth century. Yet, it seems that even the bad-tendency test never fully described the American conception of free speech and a free press. Truthful but defamatory speech might have a bad tendency, yet there was steady movement toward protecting it.

If the concepts of a free speech and a free press were in flux, this was nothing unusual. As Bernadette Meyler has demonstrated, it was widely understood at the time of the framing that the common law had a dynamic, evolutionary, and frequently indeterminate character.[137] In this respect, the law of free speech and a free press was no exception. The evolving character of the balance between competing interests embodied in the concepts of "freedom of speech" and a "free press" meant that these concepts were understood to develop through the familiar common law process of reasoned elaboration—the same process that had produced significant changes in the law of defamation between the founding and 1868.

Indeed, when Justice Holmes opined in the *Schenck* case that First Amendment protection turns on "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent,"[138] he was similarly engaged in a kind of balance between speech and the government's interest in preventing "substantive evils." By the time of his dissent in the *Abrams* case, Holmes's balancing was more overt, and it led him to frame the test in a more demanding fashion:

> But as against dangers peculiar to war, as against others, the principle of the right to free speech is always the same. It is only the present danger of immediate evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned.[139]

Since *Abrams*, the Court has continued to recalibrate the balance between liberty and regulation and now requires an imminent threat of substantive evil to justify a prohibition of speech thought to advocate unlawful conduct.[140] Yet, long after the Court stopped referring to the "bad tendency" of speech, First Amendment jurisprudence continued to partake of balancing. The Court explained its evolution from a doctrine that permitted the government to prohibit the advocacy of violent conduct to one that permitted the state to prohibit advocacy of violence only when directed toward producing imminent violent conduct on the ground that the former poses a less serious threat: "[T]he mere abstract teaching . . . of the moral propriety or even moral necessity for a resort to force and violence, is not the same as preparing a group for violent action and steeling it to such action."[141] Thus, a

---

137. *See* Bernadette Meyler, *Towards a Common Law Originalism*, 59 STAN. L. REV. 551, 580–600 (2006).

138. Schenck v. United States, 249 U.S. 47, 52 (1919).

139. Abrams v. United States, 250 U.S. 616, 628 (1919) (Holmes, J., dissenting).

140. *See supra* text accompanying note 15.

141. Brandenburg v. Ohio, 395 U.S. 444, 448 (1969) (per curiam) (quoting Noto v. United States, 367 U.S. 290, 297–98 (1961) (ellipsis in original)). Melville Nimmer usefully suggested a distinction between "definitional balancing," which is used to determine which

process of assessing the liberty interest in free speech against the extent of the government's interest in regulating the speech remains at the core of free speech doctrine, even as the Court has come to demand more compelling governmental interests to justify content-based government regulation. This doctrinal evolution should be unsurprising; the value of free discussion and debate is surely more evident in today's America than in Blackstone's England, and the dangers of seditious speech more remote, producing a more speech-protective balance.[142] But once the original meaning of "the freedom of speech, and of the press" is understood to involve a balance between liberty and order, a jurisprudence that strikes that balance in light of the contemporary understanding of the relative importance of the competing interests is consistent with even an originalist understanding of the freedom of speech.

Indeed, no less an originalist than Robert Bork took just this view of the original public meaning of constitutional text. Bork explained that it was irrelevant, in his view, whether the framers of the Fourteenth Amendment intended to outlaw segregation inasmuch as the equality principle they placed in the text came to be understood as inconsistent with segregation.[143] In this approach to originalist interpretation, Judge Bork is joined by many contemporary advocates of original-public-meaning originalism, who observe that because it is the original meaning of constitutional text that is interpretively binding, not the intentions, motivations, or understandings of those who crafted or agreed to that text, originalism permits the

---

categories of speech will be protected, and "ad hoc" balancing, which weighs the competing interests of the litigants in the particular case. *See* Melville B. Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 941–48 (1968). A more recent survey of First Amendment law argues that instead of dichotomizing balancing as did Professor Nimmer, balancing in First Amendment jurisprudence should be understood to operate in three analytically distinct fashions: when deciding whether a given activity qualifies as "speech" eligible for constitutional protection; in classifying speech to determine the standard of scrutiny to be applied when assessing regulation of that type of speech; and in determining whether the speech will receive constitutional protection when the applicable standard of scrutiny is applied. *See* Joseph Blocher, *Categoricalism and Balancing in First and Second Amendment Analysis*, 84 N.Y.U. L. REV. 375, 384–98 (2009).

142. One scholar made the point this way:

> [T]he distinction between opposition to a regime and opposition to policies or leaders within a regime as the basis for a political party is so clear to us today that Washington's Farewell Address warning us "in the most solemn manner against the baneful effects of the spirit of party" seems almost quaint. Animadversion directed toward throwing the rascals out is now easier to distinguish from animadversion directed toward overthrowing the regime, and far easier to tolerate. And when this distinction is coupled with the realization that the regime is in a sense the people themselves, the place for a doctrine of seditious libel becomes more narrowly defined. Of course, the framers knew these things in the abstract, but they had to be proved as historical facts—and more significantly as historical possibilities—before they could supply a knowledgeable foundation for the expansion of free speech.

Stanley C. Brubaker, *Original Intent and Freedom of Speech and Press*, *in* THE BILL OF RIGHTS: ORIGINAL MEANING AND CURRENT UNDERSTANDING 82, 88–89 (Eugene W. Hickok, Jr. ed., 1991).

143. *See* BORK, *supra* note 128, at 81–83.

judge to apply principles embodied in constitutional text in light of contemporary understandings as to how the constitutional principle is best applied, rather than treating framing-era practice or understandings as to how text would be applied as binding.[144]

Thus, even in originalist terms, most likely the best understanding of the Speech and Press Clauses is that they were to create a common law of free speech and a free press in which competing interests would be put to the balance, rather than dictating particular outcomes to the process of balancing. In terms of original meaning, in short, the purposivist account of the First Amendment is suspect. Pragmatic balancing seems more consistent with the framing-era meaning of free speech and a free press.

## II. FIRST AMENDMENT INVESTIGATIONS

As we have seen, history suggests that the freedom of speech and of the press can be understood as reflecting a balance between liberty and order—this is the common law legacy of the bad-tendency test. On the purposivist account, however, something has fundamentally changed in First Amendment jurisprudence. It is not simply that we understand the balance between liberty and order differently today than in the framing era; instead, the purposivist account contends that the government's motive has become central to First Amendment jurisprudence. On the purposivist account, as we have seen, a sufficient likelihood of a governmental motive to suppress disfavored speech is reason enough to invalidate a challenged regulation.[145]

Although the purposivists have to date made no effort to square their position with original meaning, originalism may well not be fatal to their account of First Amendment doctrine. As we have seen, by the framing of the Fourteenth Amendment, a consensus was emerging that seditious libel was inconsistent with the First Amendment. Purposivists could argue that the hostility to seditious libel was ultimately rooted in the view that government may not suppress disfavored speech or speakers—the conceptual core of the purposivist account. On this view, purposivism simply reflects the natural evolution of a principle anchored in the original understanding of free speech, at least as of 1868. Thus, although, as we

---

144. *See, e.g.*, Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 CONST. COMMENT. 427, 486–99 (2007); Mark D. Greenberg & Harry Litman, *The Meaning of Original Meaning*, 86 GEO. L.J. 569, 591–617 (1998); Aileen Kavanagh, *Original Intention, Enacted Text, and Constitutional Interpretation*, 47 AM. J. JURIS. 255, 279–83 (2002); Lawrence Lessig, *Understanding Changed Readings: Fidelity and Theory*, 47 STAN. L. REV. 395, 410–43 (1995); Note, *Original Meaning and Its Limits*, 120 HARV. L. REV. 1279, 1292–1300 (2007). The Court took something of this approach in *Heller*, for example, when it acknowledged that citizens cannot keep heavy weapons "useful against modern-day bombers and tanks," and for that reason, that the Second Amendment could no longer serve the function intended by the framers of ensuring that a citizen militia can operate as an effective military force, yet the Court concluded that it is the textual recognition of the right to bear arms, not the framers' intentions or motivation for recognizing that right, that are interpretively binding. *See* District of Columbia v. Heller, 128 S. Ct. 2783, 2817 (2008).

145. *See supra* text accompanying notes 4–5.

have seen, there is a strong case to be made that a First Amendment jurisprudence that abjures balancing is inconsistent with original meaning; this objection may not be sufficient to doom the purposivist enterprise. The matter is surely not free from doubt; in the recent *Stevens* decision, for example, the Court denied that First Amendment protection "extend[s] only to categories of speech that survive an ad hoc balancing of relative social costs and benefits."[146] If the Court is correct that First Amendment jurisprudence reflects a categorical approach rather than balancing, then the purposivists may be onto something.

To assess the purposivist theory of the First Amendment, accordingly, a test case is in order. After all, in science, a theory gains acceptance if it makes testable predictions that are later borne out.[147] We should expect no less from theories about legal doctrine. The relationship between the First Amendment and the government's power to investigate potential lawbreaking provides just the kind of test case needed to assess the purposivists' claims.

### *A. The Problem of First Amendment Investigations*

Robert Watts was convicted of threatening the life of the President for saying at a public rally, "I have already received my draft classification as 1-A and I have got to report for my physical this Monday coming. I am not going. If they ever make me carry a rifle the first man I want to get in my sights is L.B.J."[148] The Court reversed his conviction, explaining that "a statute . . . which makes criminal a form of pure speech, must be interpreted with the commands of the First Amendment clearly in mind. What is a threat must be distinguished from what is constitutionally protected speech."[149] *Watts* has come to stand for the proposition that even speech that is reasonably understood to convey a threat retains constitutional protection unless it goes beyond the bounds of rhetorical hyperbole and reflects a serious intention to commit an act of unlawful violence.[150] Absent this kind of "true threat," speech advocating unlawful conduct or violence is protected unless a breach of the peace is imminent.[151]

Thus, under the First Amendment, Watts could not be punished for what he said about the President. To be sure, Watts's statement was not in the highest tradition of public discussion and debate, but as the Court observed, "[t]he language of the political arena . . . is often vituperative, abusive, and inexact."[152] Still, sometimes vituperative and abusive rhetoric is merely hyperbolic or inexact, but sometimes it may betray the speaker's intention to break the law. Had Watts subsequently killed the President, it is plain that his earlier statement, even though constitutionally protected when made, could be used as evidence of his criminal intent.[153] Without

---

146. United States v. Stevens, 130 S. Ct. 1577, 1585 (2010).

147. *See, e.g.*, Daubert v. Merrell Dow Pharm., Inc., 509 U.S. 579, 593 (1993).

148. Watts v. United States, 394 U.S. 705, 706 (1969) (per curiam).

149. *Id.* at 707.

150. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359–60 (2003); Rankin v. McPherson, 483 U.S. 378, 386–87 (1987).

151. *See supra* text accompanying note 15.

152. *Watts*, 394 U.S. at 708.

153. *See, e.g.*, Rumsfeld v. Forum for Acad. & Inst. Rights, Inc., 547 U.S. 47, 62 (2006)

the benefit of hindsight, however, it is impossible to know whether Watts was being hyperbolic.

Accordingly, a question unanswered by *Watts* is whether Watts's statement, though in itself protected by the First Amendment, could be the trigger for an investigation to determine whether Watts posed a genuine threat to the President.[154] Could Watts's statement, at a minimum, be placed in a law-enforcement database so that, if a serious attempt were subsequently made on the life of the President, his statement could be used as an investigative lead? Judge Posner, for one, thinks he knows the answer: "The FBI always has investigated people who advocate or threaten to commit serious violations of federal law, even if the violations are not imminent; and it always will."[155] As examples, he hypothesized "a new sect of religious fanatics [that] announced that unless Chicagoans renounce their sinful ways it may become necessary to poison the city's water supply, or a newly organized group of white supremacists [that] vowed to take revenge on Chicago for electing a black mayor," or "the leaders of a newly formed organization of Puerto Rican separatists [that] went around Chicago making speeches to the effect that, if the United States does not grant Puerto Rico independence soon, it will be necessary to begin terrorist activities on the mainland United States."[156] None of these instances of speech could be criminalized, but all of them, Judge Posner opined, warrant investigation so as not to "trifl[e] with the public safety."[157]

Judge Posner's examples identify the kind of statements that, though constitutionally protected, seem to merit some inquiry to determine if the speakers are likely to cross the line into criminal conspiracy. The justification for investigating constitutionally protected activity, however, is not based wholly on hypotheticals. In early January 2000, two of the participants in the September 11 terrorist attacks, Nawaf al Hazmi and Khalid el Mihdhar, were surveilled by intelligence agents in Kuala Lumpur, where intercepted communications had indicated that a meeting of an "operational cadre" of terrorists was to take place.[158]

---

(quoting Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)) ("[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.").

154. Indeed, *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886 (1982), suggests that sometimes the question whether speech was protected will turn on subsequent events:

> The lengthy addresses [on which damages liability had been premised] generally contained an impassioned plea for black citizens to unify, to support and respect each other, and to realize the political and economic power available to them. In the course of those pleas, strong language was used. If that language had been followed by acts of violence, a substantial question would be presented whether Evers could be held liable for the consequences of that unlawful conduct.

*Id.* at 928.

155. Alliance to End Repression v. City of Chicago, 742 F.2d 1002, 1014–15 (7th Cir. 1984) (en banc).

156. *Id.* at 1014.

157. *Id.*

158. NAT'L COMM'N ON TERRORIST ATTACKS UPON THE U.S., THE 9/11 COMMISSION REPORT: THE FINAL REPORT OF THE NATIONAL COMMISSION ON TERRORIST ATTACKS UPON THE UNITED STATES 181 (2004).

On January 8, surveillance teams reported that three suspected participants in the meetings had left Kuala Lumpur for Bangkok, including Mihdhar and another individual identified as "Alhazmi."[159] Several weeks later, CIA agents learned that on January 15, Hazmi had left Bangkok for Los Angeles.[160] In fact, Hazmi and Mihdhar flew to Los Angeles together on that date.[161] After they arrived in Los Angeles, Hazmi and Mihdhar spent time at the King Fahd Mosque in Culver City, one of the most prominent mosques in Southern California, where they made a number of acquaintances.[162] They may have been aided by an imam at the mosque, Fahad al Thumairy, who was well known for his adherence to a radical fundamentalist ideology.[163] Had counterterrorism agents commenced surveilling al Thumairy or the mosque after learning that suspected terrorists who might find the mosque or its imam ideologically congenial had arrived in Los Angeles, they might well have located the terrorists long before the attack, perhaps preventing it.[164] But, of course, such an investigation would have been triggered by al Thumairy's statements reflecting his sympathy with radical fundamentalist ideology, which are protected by the First Amendment.

Politically motivated terrorism provides a particularly vivid example of the case for intelligence-gathering investigations predicated upon expression that is protected by the First Amendment. Obtaining intelligence about impending attacks is critical, as the threat from terrorists who are willing to give their lives has made conventional forms of deterrence through after-the-fact punishment largely ineffective.[165] Indeed, since the September 11 attacks, the FBI has engaged in surveillance of mosques as part of its counterterrorism efforts.[166]

Yet another example involves Scott Roeder, the convicted killer of Dr. George Tiller, a provider of late-term abortions.[167] Several years earlier, Roeder had posted on the website of an antiabortion group a rather chilling admonition: "Tiller is the concentration camp 'Mengele' of our day and needs to be stopped before he and those who protect him bring judgment upon on our nation."[168] Roeder's posting likely enjoyed First Amendment protection; it seems to fall short of a true threat or

---

159. *Id.*

160. *Id.*

161. *Id.* at 181–82.

162. *Id.* at 216.

163. *Id.* at 216–17.

164. When Hazmi and Mihdhar moved to the San Diego area in February, they frequented the Islamic Center of San Diego and a number of other area mosques, where they made many acquaintances. *Id.* at 219–21. During their stay in San Diego, they contacted a number of flight instructors seeking to learn how to fly Boeing jets, which struck at least one instructor whom they consulted as indicating that they were either "joking or dreaming." *Id.* at 222.

165. *See, e.g.*, GREGORY F. TREVERTON, RAND CORP., INTELLIGENCE FOR AN AGE OF TERROR 36–39 (2009).

166. *See, e.g.*, Tom Lininger, *Sects, Lies, and Videotape: The Surveillance and Infiltration of Religious Groups*, 89 IOWA L. REV. 1201, 1228–31 (2004).

167. *See* Monica Davey, *Abortion Foe Is Found Guilty of First-Degree Murder in Doctor's Killing*, N.Y. TIMES, Jan. 30, 2010, at A12.

168. Susan Saulny & Monica Davey, *Seeking Clues on Suspect in Shooting of Doctor*, N.Y. TIMES, June 2, 2009, at A1, A14.

a call to imminent violence. Still, had the posting led investigators to interview Roeder, perhaps he would have been deterred. At a minimum, had the posting been monitored by law-enforcement officials and placed in an investigative file, it would have been useful as an investigative lead after the shooting.

The justification for collecting information about activities protected by the First Amendment, however, extends to cases far more prosaic than the plots of international terrorists or the murder of abortion providers. Consider a police department that wishes to videotape public demonstrations in order to improve training and tactics, to deter police misconduct or document it if it occurs, and to guard against false claims of police misconduct as well.[169] Videotaping under these circumstances involves collecting information about activities that are protected by the First Amendment since the videotaping will necessarily reflect the protected activities of demonstrators.

For its part, the U.S. Department of Justice takes the position that it is free to undertake investigations on the basis of expression that enjoys First Amendment protection. The guidelines governing the FBI's initiation of federal criminal investigations provide:

> A full investigation of a group or organization may be initiated . . . if there is an articulable factual basis for the investigation that reasonably indicates that the group or organization may have engaged or may be engaged in, or may have or may be engaged in planning or preparation or provision of support for . . . furthering political or social goals wholly or in part through activities that involve force or violence and a violation of federal criminal law . . . .[170]

This standard is well short of the requirement of imminent unlawful conduct or a true threat that lacks constitutional protection; indeed, the FBI has opined:

> Despite the high standard for prohibiting free speech or punishing those who engage in it, the law does not preclude FBI employees from observing and collecting any of the forms of protected speech and considering its content—as long as those activities are done for a valid

---

169. *See* Alliance to End Repression v. City of Chicago, Nos. 74 C 3268, 75 C 3295, 2000 WL 709485, at *2 (N.D. Ill. May 26, 2000) (declining to answer similar questions due to lack of ripeness).

170. OFFICE OF ATTORNEY GEN., U.S. DEP'T OF JUSTICE, THE ATTORNEY GENERAL'S GUIDELINES FOR DOMESTIC FBI OPERATIONS 23 (Sept. 29, 2008). The guidelines add: "These Guidelines do not authorize investigating or collecting or maintaining information on United States persons solely for the purpose of monitoring activities protected by the First Amendment or the lawful exercise of other rights secured by the Constitution or laws of the United States." *Id.* at 13. Accordingly, it appears that as long as there is some law-enforcement justification for an investigation, it is permitted even if it involves monitoring activities otherwise protected by the First Amendment. These guidelines represent an incremental relaxation of the standard for initiating an investigation. For a discussion of the evolution of the guidelines governing FBI investigations, see Allison Jones, Note, *The 2008 FBI Guidelines: Contradiction of Original Purpose*, 19 B.U. PUB. INT. L.J. 137, 139–50, 164–69 (2009).

> law enforcement or national security purpose and conducted in a manner that does not unduly infringe upon the ability of the speaker to deliver his or her message.[171]

Nevertheless, history reflects a serious risk of abuse in investigations based on the protected speech of the targets. In 1936, President Roosevelt first authorized the FBI to operate a domestic intelligence-gathering program targeting what were thought to be subversive activities.[172] The resulting program was wildly overbroad, investigating a wide variety of political activity with little apparent relationship to illegal activity, such as a decades-long investigation of the National Association for the Advancement of Colored People, and investigations of then-Senator Adlai Stevenson III, then-Representative Abner Mikva, and a host of critics of the FBI itself.[173] Indeed, groups and individuals were often targeted for investigation based

---

171. FBI, U.S. DEP'T OF JUSTICE, DOMESTIC INVESTIGATIONS AND OPERATIONS GUIDE 26 (Dec. 16, 2008). The Department of Justice has, however, placed some additional restrictions on the collection and dissemination of information about activity that is protected by the First Amendment. The regulations governing federally funded intelligence gathering under the Omnibus Crime Control and Safe Streets Act provide that a law-enforcement agency "shall collect and maintain criminal intelligence information concerning an individual only if there is reasonable suspicion that the individual is involved in criminal conduct or activity and the information is relevant to the criminal conduct or activity." 28 C.F.R. § 23.20(a) (2009). The regulations also provide that an agency

> shall not collect or maintain criminal intelligence information about the political, religious, or social views, associations, or activities of any individual or any group, association, corporation, business partnership, or other organization unless such information directly relates to criminal conduct or activity and there is reasonable suspicion that the subject of the information is or may be involved in criminal conduct or activity.

*Id*. § 23.20(b). "Reasonable suspicion" is defined as "a basis to believe that there is a reasonable possibility that an individual or organization is involved in a definable criminal activity or enterprise." *Id.* § 23.20(c). These regulations, however, appear to be based on a concern about the dissemination of information rather than its collection. In response to a comment that the reasonable-suspicion standard was unwarranted and that information need only be "necessary and relevant to an agency's lawful purpose," the Department of Justice "agreed that [while] the standard suggested is appropriate for investigative or other information files maintained for use by or within an agency, the potential for national dissemination of information in intelligence information systems, coupled with the lack of access by subjects to challenge the information, justifies the reasonable suspicion standard." Final Revision to the Office of Justice Programs, Criminal Intelligence Systems Operating Policies, 58 Fed. Reg. 48448, 48451 (Sept. 16, 1993) (to be codified at 28 C.F.R. pt. 23). For a helpful summary of the department's policies regarding investigative activities and the First Amendment, see OFFICE OF THE INSPECTOR GEN., U.S. DEP'T OF JUSTICE, A REVIEW OF THE FBI'S INVESTIGATIONS OF CERTAIN DOMESTIC ADVOCACY GROUPS 5–23 (Sept. 2010).

172. SENATE SELECT COMM. ON INTELLIGENCE ACTIVITIES WITHIN THE UNITED STATES, INTELLIGENCE ACTIVITIES AND THE RIGHTS OF AMERICANS: 1976 U.S. SENATE REPORT ON ILLEGAL WIRETAPS AND DOMESTIC SPYING BY THE FBI, CIA AND NSA 25 (Red & Black Publishers 2007) (1976).

173. *Id.* at 12–14.

on little more than their ideological sympathies.[174] The program included efforts to prevent individuals from joining left-wing organizations or participating in protest activities, by means such as sending letters rife with false allegations to the employers and spouses of protesters.[175] Efforts were made as well to intimidate Dr. Martin Luther King, Jr. by sending him a recording of an adulterous tryst in his motel room in an implicit threat to destroy his marriage.[176] Undercover agents infiltrated a variety of left-wing groups,[177] and infiltrators made a special effort to disrupt the protest activities of leftist groups during the Vietnam War.[178] For example, agents posing as protest organizers sent false instructions to protesters about planned events in an effort to produce chaos.[179]

In response to civil rights and Vietnam protests, local police departments also participated in efforts to discredit the protesters as communists.[180] Protests were photographed or filmed,[181] and the resulting pictures—accompanied by charges that the participants were subversives—were then provided to the House Internal Security Committee.[182] Photography and surveillance were conducted in an overt fashion in an effort to intimidate protesters.[183] Undercover infiltrators encouraged leftist groups to engage in illegal activities in the hope of discrediting them and developing a pretext for arrests.[184] Information of dubious reliability was leaked labeling protesters as communists or subversives.[185] Since the September 11 attacks, some of these tactics seem to have reemerged, as investigations have been launched targeting groups for no apparent reason other than their involvement in antiwar activities.[186]

---

174. *See id.* at 39–46, 52–62.

175. *See id.* at 14.

176. *See id.* at 15.

177. *Id.* at 125–27.

178. *See id.* at 66–67.

179. *See id.* at 13–14.

180. *See* FRANK DONNER, PROTECTORS OF PRIVILEGE: RED SQUADS AND POLICE REPRESSION IN URBAN AMERICA 65–67, 69–76 (1990).

181. *See id.* at 67–69.

182. *Id.* at 73–74.

183. *See id.* at 107, 162–65, 202–04, 260–61.

184. *See id.* at 111–12, 129–30, 164, 169, 173–80, 256.

185. *See id.* at 93–96, 138–41.

186. *See, e.g.*, ATHAN THEOHARIS, THE QUEST FOR ABSOLUTE SECURITY: THE FAILED RELATIONS AMONG U.S. INTELLIGENCE AGENCIES 253–58 (2007); *see also* Eric Lichtblau, *Documents Reveal Scope of U.S. Database on Antiwar Protests*, N.Y. TIMES, Oct. 13, 2006, at A18 ("A department spokesman said Thursday that the 'questionable data collection' [of antiwar demonstrators] had led to a tightening of military procedures to ensure that only information relevant to terrorism and other threats was collected."); *cf.* Charlie Savage & Scott Shane, *Intelligence Was Improperly Collected on American Citizens, Documents Show*, N.Y. TIMES, Dec. 17, 2009, at A29 (describing the release of documents concerning "cases in the last several years in which the [Department of Homeland Security's] intelligence office improperly collected information about American citizens or lawful United States residents"). In a recent report concerning FBI investigations of certain domestic groups engaged in activities protected by the First Amendment, the Department of Justice's Inspector General concluded that although the FBI had not targeted these groups because of

Lower courts have been anything but uniform in their approach to First Amendment claims attacking investigations that are based on the protected expression of the targets.[187] Most courts have held that such investigations require

---

their protected activities, some of the investigations were based on weak predication and involved unwarranted investigative tactics or were unreasonably prolonged. *See* OFFICE OF THE INSPECTOR GEN., *supra* note 171, at 186–88.

187. One might expect other constitutional provisions to come into play when it comes to constitutional regulation of investigations directed at expressive activities protected by the First Amendment—most obviously, the Fourth Amendment's prohibition on "unreasonable searches and seizures." U.S. CONST. amend. IV. Indeed, one line of cases holds that warrants authorizing the seizure of materials that enjoy First Amendment protection must adequately circumscribe the discretion of officers who execute the warrant in order to minimize the risk that a search or seizure will burden First Amendment rights. *See* Stanford v. Texas, 379 U.S. 476, 485–86 (1965) (warrant authorizing seizure of records relating to Communist Party); Marcus v. Search Warrant, 367 U.S. 717, 731–33 (1961) (warrant authorizing seizure of obscene materials). The Court has also held that the seizure of alleged obscene materials (to prevent their dissemination on the basis of probable cause) violates the Fourth Amendment because such a seizure prevents dissemination of materials not yet adjudicated obscene. *See* Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 62–67 (1989). These cases, however, have produced no general set of regulations governing search and seizure of expressive material; the Court also held that applications and warrants to search for and seize expressive materials for evidentiary purposes are governed by ordinary Fourth Amendment standards. *See* New York v. P.J. Video, Inc., 475 U.S. 868, 873–75 (1986) (warrant to seize obscene materials); Zurcher v. Stanford Daily, 436 U.S. 547, 563–67 (1978) (warrant to search newspaper for photos documenting illegal conduct at a demonstration).

The most important hurdle to Fourth Amendment regulation, however, is that most investigative conduct does not amount to a "search" or "seizure" subject to regulation under the Fourth Amendment. For example, an interview of the target of an investigation is not subject to Fourth Amendment regulation as long as the target's freedom to leave or otherwise terminate the encounter is not circumscribed. *See, e.g.*, United States v. Drayton, 536 U.S. 194, 200–06 (2002); Florida v. Bostick, 501 U.S. 429, 434–37 (1991). Nor is the Fourth Amendment implicated by surveillance of a suspect in public places even if enhanced by technological means. *See, e.g.*, Florida v. Riley, 488 U.S. 445, 448–50 (1989); United States v. Knotts, 460 U.S. 276, 282–85 (1983). Undercover officers are not engaged in a search or seizure when they interact with targets, even by accepting an invitation into a target's residence or place of business, and even if they record their conversations. *See* United States v. White, 401 U.S. 745, 748–54 (1971) (plurality opinion); Lopez v. United States, 373 U.S. 427, 438–39 (1963); On Lee v. United States, 343 U.S. 747, 749–51, 753–54 (1952). This rule is applicable even when undercover officers are investigating expressive activities such as the distribution of books or films. *See* Maryland v. Macon, 472 U.S. 463, 467–71 (1985). Nor is the Fourth Amendment implicated when investigators acquire information from third parties about the activities of the target; the Court reasons that there is no expectation of privacy with respect to information one discloses to third parties. *See* SEC v. Jerry T. O'Brien, Inc., 467 U.S. 735, 743 (1984); Smith v. Maryland, 442 U.S. 735, 743 (1976); United States v. Miller, 425 U.S. 435, 443 (1976). Some lower courts have recognized a constitutional right to privacy under the Due Process Clause that restricts the government's ability to require individuals to disclose sensitive personal information without adequate justification, *see, e.g.*, Nelson v. NASA, 530 F.3d 865, 877–81 (9th Cir. 2008), *cert. granted*, 130 S. Ct. 1755 (2010) (No. 09-530), a rule that produces some regulation. But this doctrine places no limitations on the government's ability to acquire such information from investigative targets voluntarily or from third parties.

no more than a good-faith or rational law-enforcement interest supporting the investigation,[188] while a handful have imposed various formulations of strict scrutiny on such investigations because of what is thought to be their chilling effect on the exercise of First Amendment rights.[189] Most scholars to address the issue have argued for some form of heightened judicial scrutiny of such First Amendment investigations because of their ability to chill the exercise of First Amendment rights.[190]

---

188. *See* United States v. Mayer, 503 F.3d 740, 748 (9th Cir. 2007); Anderson v. Davila, 125 F.3d 148, 160–63 (3d Cir. 1997); United States v. Aguilar, 883 F.2d 662, 696–705 (9th Cir. 1989); Alliance to End Repression v. City of Chicago, 742 F.2d 1007, 1014–16 (7th Cir. 1984) (en banc); Reporters Comm. for Freedom of the Press v. Am. Tel. & Tel. Co., 593 F.2d 1030, 1040–63 (D.C. Cir. 1978) (Wilkey, J.); *id.* at 1071–72 (Robinson, J., concurring in the judgment); Socialist Workers Party v. Attorney Gen., 510 F.2d 253, 256–57 (2d Cir. 1974) (per curiam); *see also* Tabbaa v. Chertoff, 509 F.3d 89, 102–03 (2d Cir. 2007) (holding that detention and search of citizens reentering the country after attending a conference on Islam abroad was not an impermissible burden on First Amendment associational rights in light of intelligence suggesting that the conference might have involved terrorists); *cf.* Alliance to End Repression v. City of Chicago, 237 F.3d 799, 800–02 (7th Cir. 2001) (opining that the First Amendment imposes no requirement that investigations of protected activities be based on reasonable suspicion of unlawful conduct); Handschu v. Special Servs. Div., 273 F. Supp. 2d 327, 342–43 (S.D.N.Y. 2003) (following *Alliance*). The reader should know that the author represented the City of Chicago in the 2001 *Alliance* case.

189. *See* Clark v. Library of Congress, 750 F.2d 89, 94–95 (D.C. Cir. 1984) (strict scrutiny); Local 491, Int'l Bhd. of Police Officers v. Gwinnett County, 510 F. Supp. 2d 1271, 1293–96 (N.D. Ga. 2007) (substantial relevance); Words of Faith Fellowship, Inc. v. Rutherford County Dep't of Soc. Servs., 329 F. Supp. 2d 675, 688–89 (W.D.N.C. 2004) (requiring content neutrality and narrow tailoring); Presbyterian Church (U.S.A.) v. United States, 752 F. Supp. 1505, 1513–16 (D. Ariz. 1990) (strict scrutiny); White v. Davis, 533 P.2d 222, 228–32 (Cal. 1975) (same); *see also* Doe v. Ashcroft, 334 F. Supp. 2d 471, 506–11 (S.D.N.Y. 2004) (exercising judicial review of National Security Letters that required disclosure of electronic communication transaction records), *vacated on other grounds sub nom.* Doe v. Gonzales, 449 F.3d 415, 418 (2d Cir. 2006); Tattered Cover, Inc. v. City of Thornton, 44 P.2d 1044, 1059 (Colo. 2002) (adversarial hearing required prior to execution of warrant to search bookstore) (applying Colorado Constitution).

190. *See, e.g.*, Linda E. Fisher, *Guilt by Expressive Association: Political Profiling, Surveillance, and the Privacy of Groups*, 46 ARIZ. L. REV. 621, 646–55 (2004); Matthew Lynch, *Closing the Orwellian Loophole: The Present Constitutionality of Big Brother and the Potential for a First Amendment Cure*, 5 FIRST AMEND. L. REV. 234, 288–99 (2007); Daniel J. Solove, *The First Amendment as Criminal Procedure*, 82 N.Y.U. L. REV. 112, 142–75 (2007); Katherine J. Strandburg, *Freedom of Association in a Networked World: First Amendment Regulation of Relational Surveillance*, 49 B.C. L. REV. 741, 786–97 (2008). Tom Lininger has also expressed similar concerns with respect to investigations of religious groups based on their beliefs and religious activities. *See* Lininger, *supra* note 166, at 1232–37. Without quite taking a position on the issue, Eugene Volokh has expressed skepticism that the potential chilling effect of investigations on First Amendment activities is a sufficient reason for circumscribing them. *See* Eugene Volokh, *Deterring Speech: When Is It "McCarthyism"? When Is It Proper?*, 93 CALIF. L. REV. 1413, 1442–49 (2005). Judge Posner, unsurprisingly, takes a clear position, arguing that the costs of terrorism and other serious crimes justify granting the government broad leeway to engage in intelligence

Whether the government can undertake an investigation based on the protected speech of the investigative target presents a classic case, on the purposivist account, for strict scrutiny. As we have seen, for the purposivists, when the government is free to impose special burdens on disfavored speech or speakers, the case for strict scrutiny is clearest.[191] The chilling effect of being targeted for investigation is surely the kind of special burden that the purposivist account argues cannot be placed on disfavored speech or speakers. To be sure, a purposivist could claim that there is little risk of improper motivation when the government merely investigates to determine whether there has been a violation of a generally applicable law, but history suggests that such a claim would be unrealistic. Indeed, we will see that First Amendment doctrine recognizes the type of chilling effect at stake in the First Amendment investigation as legally cognizable. Thus, absent a regime that places meaningful limits on the ability of investigators to target disfavored speech or speakers, the purposivist account requires strict judicial scrutiny of First Amendment investigations. Strict scrutiny, in turn, is a demanding test, requiring that the government demonstrate that its challenged conduct advances a compelling governmental interest through the least restrictive means.[192] Thus, the First Amendment investigation presents a good test of the purposivist account; this is one area in which the difference between the purposivists and the pragmatists is far more than academic.[193]

### *B. The Doctrinal Basis for Assessing First Amendment Investigations Through Balancing*

In *Wayte v. United States*,[194] the Supreme Court considered the constitutionality of the federal government's "passive enforcement" policy targeting for prosecution only those individuals who had advised the Selective Service of their failure to register for the draft.[195] The Court concluded that the policy involved no impermissible discrimination against those who protested the registration requirement—and therefore did not violate the equal protection component of the Fifth Amendment's Due Process Clause—reasoning that "[e]ven if the passive policy had a discriminatory effect, petitioner has not shown that the Government intended such a result. . . . [P]etitioner has not shown that the Government

---

gathering even though it may burden activities protected by the First Amendment. *See* RICHARD A. POSNER, LAW, PRAGMATISM, AND DEMOCRACY 301–02 (2003); RICHARD A. POSNER, PREVENTING SURPRISE ATTACKS: INTELLIGENCE REFORM IN THE WAKE OF 9/11, at 182–96 (2005).

191. *See supra* text accompanying notes 8–9.

192. *See, e.g.*, United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000); R.A.V. v. City of St. Paul, 505 U.S. 377, 395–96 (1992); Sable Commc'ns of Cal., Inc. v. FCC, 492 U.S. 115, 126 (1989). For an elaboration of the character of strict scrutiny in First Amendment jurisprudence, see 1 SMOLLA, *supra* note 2, §§ 4:2–:26; Volokh, *supra* note 22, at 2418–24.

193. The present discussion is limited to investigations occurring within the United States. More complicated issues arise with respect to the extraterritorial reach of the First Amendment. *See generally* Timothy Zick, *Territoriality and the First Amendment: Free Speech at—and Beyond—Our Borders*, 85 NOTRE DAME L. REV. 1543, 1579–98 (2010).

194. 470 U.S. 598 (1985).

195. *Id.* at 600–03.

prosecuted him *because of* his protest activities."[196] The Court also rejected a First Amendment defense on the ground that the passive enforcement policy imposed only an incidental burden on speech that was justified by the government's interest in enforcing the draft laws in a manner that "promoted prosecutorial efficiency," utilized "strong, perhaps conclusive evidence of the nonregistrant's intent not to comply," and was "an effective way to promote general deterrence, especially since failing to proceed against publicly known offenders would encourage others to violate the law."[197]

At first blush, *Wayte* seems inconsistent with the purposivist account of First Amendment doctrine. After all, any investigation of draft protesters involves a risk that the government will be especially keen to use its prosecutorial power to still the voices of especially disfavored speakers. Yet in *Wayte*, the Court imposed no form of heightened scrutiny to minimize the risk of an impermissible motive.[198] *Wayte* seems to hold that as long as the government can identify some non-censorial reasoning for launching an investigation triggered by the target's speech, the First Amendment imposes no restraints on such investigations—regardless of their potential for chilling protected expression. Surveillance of a mosque known for the radical views of its clergy and congregants, for example, would easily pass the *Wayte* test because the government could claim that its purpose was to identify suspected terrorists, not to chill the expression of radical Islamist views.[199]

---

196. *Id.* at 610 (emphasis in original).

197. *Id.* at 612–13.

198. Indeed, one advocate of purposivism, Geoffrey Stone, acknowledges that *Wayte* applies an undemanding form of scrutiny to prosecutive decisions. *See* Stone, *supra* note 2, at 50–51 & nn.18–19.

199. For a discussion along these lines of First Amendment objections to the use of National Security Letters requiring the production of potentially sensitive or confidential information about activities protected by the First Amendment in terrorist investigations, see Patrick G. Garlinger, Note, *Privacy, Free Speech, and the Patriot Act: First and Fourth Amendment Limits on National Security Letters*, 84 N.Y.U. L. REV. 1105, 1133–35 (2009). Similar reasoning would defeat an effort at erecting a defense under the First Amendment's protection for the free exercise of religion for investigations triggered by or directed at religiously motivated activities. Neutral laws of general applicability survive attack under the Free Exercise Clause even if they burden religious belief. *See* Emp't Div. v. Smith, 494 U.S. 872, 879, 890 (1990). A law lacks neutrality when it disadvantages conduct because it is religiously motivated, *see* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520, 532, 540–41 (1993), and it lacks general applicability when it imposes burdens only on conduct motivated by religious belief, *id.* at 543. One might question whether an investigation targeting a specific religious group on the basis of its religiously motivated practices or beliefs is a burden of general applicability, but the burden is traceable to a law of general applicability, and the Court has characterized investigations undertaken to determine if an otherwise generally applicable law has been violated as a burden stemming from a generally applicable law. *See* Branzburg v. Hayes, 408 U.S. 665, 682–91 (1972). Investigations undertaken to identify potential terrorists as part of a general program of counterterrorism would accordingly impose the type of neutral and generally applicable regulation that does not violate the Free Exercise Clause, even though, as the Court acknowledged in *Smith*,

> leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that

Purposivists, however, may be able to handle *Wayte*. They could point out that because *Wayte* involved a defense of selective prosecution, it considered a claim that could be made only by those who had violated a concededly valid law. As we have seen, purposivists generally acknowledge that laws of general applicability usually pose only limited threats to disfavored speech or speakers because the laws' reach is not limited to disfavored speech or speakers.[200] Investigations, in contrast, such as the surveillance at a radical mosque, can be initiated on the basis of the prosecutor's hostility to disfavored speech or speakers, and because investigations can scrutinize the activities of even those whose conduct is lawful, they impose special burdens on those who have broken no laws—generally applicable or otherwise.[201] It is this chilling effect of investigations predicated on the basis of constitutionally protected speech that is at the core of the objections to First Amendment investigations.[202]

The argument for circumscribing First Amendment investigations based on their potential chilling effects is a substantial one. First Amendment doctrine exhibits considerable concern about the manner in which government regulation may produce self-censorship of protected speech when a regulation creates a risk that even those engaged in protected expression may be sanctioned.[203] For example, laws that prohibit a substantial volume of protected speech may be challenged as overbroad even by a litigant whose own conduct was unprotected because of the chilling effect that such regulations may have on third parties who wish to engage in protected expression but may be inhibited by the existence of overbroad laws.[204] The Court has similarly condemned vague laws on the ground that their uncertain reach may chill protected expression.[205] The Court has also recognized a right to engage in anonymous speech to avoid the risk of self-censorship that may occur if

---

> unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself or in which judges weigh the social importance of all laws against the centrality of all religious beliefs.

494 U.S. at 890. Even Professor Lininger, who is a harsh critic of these investigations, concedes that they would likely survive attack under the Free Exercise Clause. *See* Lininger, *supra* note 166, at 1240–41.

200. *See supra* text accompanying note 10. In that vein, the Court in *Wayte* took pains to note that even vocal nonregistrant protesters could avoid prosecution by registering in response to the demand of the government. *See* 470 U.S. at 609–10.

201. For example, in an action brought by a church attacking what it regarded as an improper government investigation targeting the church and its membership, the church was able to demonstrate that attendance and donations declined as a result of the challenged investigation. *See* Presbyterian Church (U.S.A.) v. United States, 870 F.2d 518, 521–22 (9th Cir. 1989). Nevertheless, Daniel Solove is surely right that in the main, "[D]emanding empirical evidence of deterrence is impractical because it will often be impossible to produce." Solove, *supra* note 190, at 155.

202. *See supra* text accompanying notes 189–90.

203. *See, e.g.*, Frederick Schauer, *Fear, Risk and the First Amendment: Unraveling the "Chilling Effect,"* 58 B.U. L. REV. 685, 689–725 (1978).

204. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 118–20 (2003); Ashcroft v. Free Speech Coalition, 535 U.S. 234, 244, 255 (2002); Bd. of Airport Comm'rs of Los Angeles v. Jews for Jesus, Inc., 482 U.S. 569, 574–76 (1987).

205. *See, e.g.*, Reno v. ACLU, 521 U.S. 844, 872–74 (1997); Keyishian v. Bd. of Regents, 385 U.S. 589, 597–604 (1967); NAACP v. Button, 371 U.S. 415, 432–33 (1963).

those who wish to express unpopular views were required to identify themselves.[206] For this same reason it has held that organizations engaged in political or social advocacy cannot be compelled to disclose their membership.[207] The Court has similarly recognized a right of individuals not to be compelled to disclose their social or political associations or views,[208] and it has also held that individuals cannot be compelled to specifically request delivery of mail considered by the government to be communist propaganda because of the potential chilling effect of such a requirement.[209] The Court's First Amendment anti-retaliation doctrine is in the same vein; the Court has held that the government may not retaliate against an individual for exercising his First Amendment rights by withholding benefits because this too may inhibit the exercise of constitutional rights.[210]

These various First Amendment doctrines, however, all involve the imposition of some form of penalty on a speaker—the cases involve speakers who face sanctions if they engage in some form of protected expression or refuse to disclose information about their protected expression, or, at a minimum, face the loss of a benefit as the cost of exercising First Amendment rights. Investigations are different. If the investigation produces evidence that a speaker has violated an otherwise valid law, then the speaker will be prosecuted for unprotected conduct. Even if his or her speech triggered the investigation, *Wayte* makes plain that the First Amendment offers no defense. If the speaker violated no law, however, the investigation will result in no sanctions. To be sure, there is a risk that an investigation will wrongly produce an enforcement action against a speaker whose activities are protected, but if the substantive law being enforced is neither impermissibly overbroad, vague, nor otherwise invalid, then the risk of error in such a prosecution is not itself a basis for constitutional complaint. The risk of error that inheres in all litigation is not itself sufficient to support a First Amendment claim.[211]

---

206. *See, e.g.*, Watchtower Bible & Tract Soc'y of New York v. Vill. of Stratton, 536 U.S. 150, 166–67 (2002); Buckley v. Am. Const. Law Found., Inc., 525 U.S. 182, 197–200 (1999); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–43 (1995); Talley v. California, 362 U.S. 60, 64–65 (1960).

207. *See, e.g.*, Gibson v. Fla. Legislative Investigations Comm., 372 U.S. 539, 556–57 (1963); Bates v. City of Little Rock, 361 U.S. 516, 523–27 (1960); NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 460–63 (1958).

208. *See, e.g.*, Baird v. State Bar of Ariz., 401 U.S. 1, 7 (1971); Shelton v. Tucker, 364 U.S. 479, 485–90 (1960); Sweezy v. New Hampshire, 354 U.S. 234, 250–55 (1957).

209. *See* Lamont v. Postmaster Gen., 381 U.S. 301, 306–07 (1965).

210. *See, e.g.*, Crawford-El v. Britton, 523 U.S. 574, 588–89 & n.10 (1998); Perry v. Sindermann, 408 U.S. 593, 597–98 (1972).

211. The Court has made this point, for example, in the context of obscenity statutes:

> It may be true that the stiffer RICO penalties will provide an additional deterrent to those who might otherwise sell obscene materials; perhaps this means—as petitioner suggests—that some cautious booksellers will practice self-censorship and remove First Amendment protected materials from their shelves. But deterrence of the sale of obscene materials is a legitimate end of state antiobscenity laws, and our cases have long recognized the practical reality that "any form of criminal obscenity statute applicable to a bookseller will induce some tendency to self-censorship and have some inhibitory effect

It is far from clear that an investigation unaccompanied by compulsion exerted on the target or any other type of sanction or penalty constitutes an "abridgement" of the freedom of speech, or of the press. During the investigation, the speaker remains free to communicate with others even as the investigators attempt to learn more about the speaker's activities. The existence of the investigation may cause the target to engage in some form of self-censorship, but not because the government has exercised any coercive power other than the power to investigate. When an investigative target remains free to speak, and faces no sanction—not even the need to shoulder the costs of defending an enforcement action—it is far from clear that the First Amendment is offended.

Indeed, the distinction between regulations that attach sanctions to protected speech and mere investigations was central to the only case in which the Court considered First Amendment investigations. In *Laird v. Tatum*,[212] the plaintiffs challenged under the First Amendment "the Army's alleged 'surveillance of lawful and peaceful civilian political activity.'"[213] While acknowledging that it "ha[d] found in a number of cases that constitutional violations may arise from the deterrent, or 'chilling,' effect of governmental regulations that fall short of a direct prohibition against the exercise of First Amendment rights," the Court added, "in each of these cases, the challenged exercise of governmental power was regulatory, proscriptive, or compulsory in nature, and the complainant was either presently or prospectively subject to the regulations, proscriptions, or compulsions that he was challenging."[214] The Court accordingly framed the question before it as

> whether the jurisdiction of a federal court may be invoked by a complainant who alleges that the exercise of his First Amendment rights is being chilled by the mere existence, without more, of a governmental investigative and data-gathering activity that is alleged to be broader in scope than is reasonably necessary for the accomplishment of a valid governmental purpose.[215]

The Court held that the claim was nonjusticiable because it rested on no more than the plaintiffs' "perception of the system as inappropriate" or their "speculative apprehensiveness that the Army may at some future date misuse the information in some way that would cause direct harm to [plaintiffs]."[216]

The precise holding of *Laird* is narrow—the Court considered the alleged chilling effect of a program of intelligence gathering "without more."[217] The lower courts have accordingly read *Laird* to render nonjusticiable First Amendment attacks on an investigation when the plaintiff cannot prove that it was a target of an

---

> on the dissemination of material not obscene." The mere assertion of some possible self-censorship resulting from a statute is not enough to render an antiobscenity law unconstitutional under our precedents.

Fort Wayne Books, Inc. v. Indiana, 489 U.S. 46, 60 (1989) (citations omitted) (quoting Smith v. California, 361 U.S. 147, 154–55 (1959)).

212. 408 U.S. 1 (1972).
213. *Id.* at 2.
214. *Id.* at 11.
215. *Id.* at 10.
216. *Id.* at 13.
217. *Id.* at 10.

investigation,[218] but plaintiffs who can establish that they have actually been targeted for investigation are usually thought to have presented justiciable claims, at least when they also establish objective evidence of a chilling effect associated with the complained-of investigation or some other tangible consequence for the protected activities of the investigative target.[219] Nevertheless, *Laird*'s distinction between coercive regulation, proscription, or compulsion and mere investigation seems to hold no less significance for substantive First Amendment doctrine than justiciability.

Consider the First Amendment right to anonymous speech. It is settled that the First Amendment affords a right to distribute leaflets and other literature anonymously.[220] It is equally settled that leafleting cannot be prohibited as a means of preventing littering.[221] But neither of these doctrines goes so far as to prevent a police officer who observes anonymously distributed leaflets scattered on the sidewalk from interviewing witnesses who may have seen the littering take place in order to learn the identity of the littering leafleter who prefers anonymity.[222] As we have seen, the First Amendment does not permit the government to compel an individual to surrender anonymity; but if the government is able to determine the individual's identity by obtaining the cooperation of the investigation's target or

---

218. *See, e.g.*, ACLU v. NSA, 493 F.3d 644, 688–92 (6th Cir. 2007) (Gibbons, J., concurring); United Presbyterian Church v. Reagan, 738 F.2d 1375, 1378–81 (D.C. Cir. 1984); Amnesty Int'l U.S.A. v. McConnell, 646 F. Supp. 2d 633, 642–57 (S.D.N.Y. 2009); *see also* Fifth Ave. Peace Parade Comm. v. Gray, 480 F.2d 326, 330–33 (2d Cir. 1973) (suit attacking FBI's investigation into the size of the demonstration organized by the plaintiff was nonjusticiable).

219. *See, e.g.*, Anderson v. Davila, 125 F.3d 148, 160 (3d Cir. 1997); Smith v. Brady, 972 F.2d 1095, 1098 (9th Cir. 1992); Riggs v. City of Albuquerque, 916 F.2d 582, 584–85 (10th Cir. 1990); Presbyterian Church (U.S.A.) v. United States, 820 F.2d 518, 521–23 (9th Cir. 1989); Clark v. Library of Congress, 750 F.2d 89, 92–94 (D.C. Cir. 1984); Gandhi v. Police Dep't of Detroit, 747 F.2d 338, 349–50 (6th Cir. 1984); Ozonoff v. Berzak, 744 F.2d 224, 227–30 (D.C. Cir. 1984); Paton v. La Prado, 524 F.2d 862, 867–68 (3d Cir. 1975); Phila. Yearly Meeting of Religious Soc'y of Friends v. Tate, 519 F.2d 1335, 1338–39 (3d Cir. 1975); Jabara v. Kelly, 476 F. Supp. 561, 568 (E.D. Mich. 1979), *vacated on other grounds sub nom.* Jabara v. Webster, 691 F.2d 272 (6th Cir. 1982); Founding Church of Scientology v. FBI, 459 F. Supp. 748, 760 (D.D.C. 1978); Berlin Democratic Club v. Rumsfeld, 410 F. Supp. 144, 148–49 (D.D.C. 1976); Alliance to End Repression v. Rochford, 407 F. Supp. 115, 116–17 (N.D. Ill. 1975); Lowenstein v. Rooney, 401 F. Supp. 952, 958 (E.D.N.Y. 1975); Phila. Resistance v. Mitchell, 58 F.R.D. 139, 143 (E.D. Pa. 1972); Handschu v. Special Servs. Div., 349 F. Supp. 766, 769–71 (S.D.N.Y. 1972); *cf.* Meese v. Keene, 481 U.S. 465, 472–77 (1987) (supporting justiciability where requirement that distributor of foreign film comply with registration and disclosure requirements for "political propaganda" created sufficiently objective basis for a claim of chilling effect). For a more elaborate discussion of this point, see Scott Michelman, *Who Can Sue over Government Surveillance?*, 57 UCLA L. REV. 71 (2009).

220. *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–43 (1995); Talley v. California, 362 U.S. 60, 64–65 (1960).

221. *See* Schneider v. New Jersey, 308 U.S. 147, 162–63 (1939).

222. *Cf.* Arista Records, LLC v. Doe 3, 604 F.3d 110, 118–19 (2d Cir. 2010) (holding that the First Amendment grants no right to resist subpoena seeking to discover infringer's identity where anonymous speaker engaged in unprotected copyright infringement).

others, there is no First Amendment doctrine that declares such an investigation illegitimate. Albeit in the context of the Fourth Amendment's prohibition on unreasonable search and seizure, the Court has been quite clear on this point: "[W]hen an individual reveals private information to another, he assumes the risk that his confidant will reveal that information to the authorities."[223] Thus, if witnesses, or the leafleter himself, discloses to the investigator the identity of the littering leafleter, it is hard to understand how the First Amendment is offended. Under *Wayte*, an ensuing prosecution for littering would seem to be constitutionally unremarkable.

To be sure, the government's ability to compromise anonymity through an investigation may well have a chilling effect on speech, but the doctrine addressing claims of a "chill" associated with an investigation undertaken for an ostensibly proper law-enforcement purpose takes an intensely pragmatic approach quite inconsistent with the purposivists' focus on the risk of an illicit governmental motive. Even in contexts rife with a risk of improper motive, when the government is merely gathering information rather than imposing sanctions, the Court has carefully balanced the magnitude of the burden on speech against the governmental interests at stake, without evident concern about the risk of improper governmental motive, much less the use of strict scrutiny.

For example, in *Communist Party of the United States v. Subversive Activities Control Board*,[224] the Court considered an administrative order requiring the Communist Party to register as a subversive organization and disclose its membership and officers.[225] The Court rejected an argument that the First Amendment shielded the party unless the board found that it specifically intended to overthrow the government, noting that the Subversive Activities Control Act "is a regulatory, not a prohibitory statute."[226] Despite the cases recognizing a First Amendment right to engage in anonymous speech, the Court upheld the disclosure requirement in light of "the magnitude of the public interests which the registration and disclosure provisions are designed to protect and in the pertinence which registration and disclosure bear to the protection of those interests."[227] Thus, despite the risk of a governmental motive to harm a particularly disfavored speaker, the Court engaged in classic balancing—stressing that the law imposed no prohibition on protected expression and that it advanced particularly important governmental interests.

Similarly, in *Barenblatt v. United States*,[228] the Court rejected a witness's assertion of a First Amendment right to resist disclosing information about his membership in the Communist Party in a legislative investigation, explaining that cases involving prohibitions on protected associational activity were inapposite

---

223. United States v. Jacobsen, 466 U.S. 109, 117 (1984). For additional discussion of this point, see *supra* note 187.

224. 367 U.S. 1 (1961).

225. *Id.* at 4–22.

226. *Id.* at 56.

227. *Id.* at 93.

228. 360 U.S. 109 (1959).

because the case involved an investigation and not a prosecution.[229] The Court upheld the investigative demand by applying a balancing test.[230]

One might think the cases upholding investigations of persons or organizations thought to be subversive mere relics of the darkest days of the Cold War, but the same approach was taken decades later in *Meese v. Keene*.[231] The Court upheld a provision in the Foreign Agents Registration Act that required those who distribute foreign films identified by the State Department as "political propaganda" to register and disclose their business activities, their political activities, and the extent of the film's distribution.[232] The decision was based on three considerations: first, the requirements "d[id] nothing to place regulated expressive materials 'beyond the pale of legitimate discourse,'" but instead "simply required the disseminators of such material to make additional disclosures that would better enable the public to evaluate the import of the propaganda";[233] second, "the term 'political propaganda' . . . is a broad, neutral one rather than a pejorative one";[234] and third, Congress's use of that term "does not lead us to suspend the respect we normally owe to the Legislature's power to define the terms that it uses in legislation."[235] The Court reached this conclusion even though the term "political propaganda" was defined as advocacy of the views of a foreign country or political faction, or advocacy that promotes some form of instability or violence.[236] Thus, the Court considered what it regarded as a modest chilling effect imposed by the registration and disclosure requirements to be adequately justified—another instance of pragmatic balancing. Accordingly, in a context rife with a risk of discrimination against disfavored speakers or views—the kind of case in which the purposivists argue that strict scrutiny is required—the Court utilized nothing like the strict scrutiny test, and concluded that the limited burden imposed by the legislation was adequately justified.[237]

---

229. *See id.* at 130.
230. *Id.* at 126–34.
231. 481 U.S. 465 (1987).
232. *Id.* at 469–70.
233. *Id.* at 480.
234. *Id.* at 483 (footnote omitted).
235. *Id.* at 484.
236. *Id.* at 471–72 ("'The term "political propaganda" includes any oral, visual, graphic, written, pictorial, or other communication or expression by any person (1) which is reasonably adapted to, or which the person disseminating the same believes will, or which he intends to, prevail upon, indoctrinate, convert, induce, or in any other way influence a recipient or any section of the public within the United States with reference to the political or public interests, policies, or relations of a government or a foreign country or a foreign political party or with reference to the foreign policies of the United States or promote in the United States racial, religious, or social dissensions, or (2) which advocates, advises, instigates, or promotes any racial, social, political, or religious disorder, civil riot, or other conflict involving the use of force or violence in any other American republic or the overthrow of any government or political subdivision of any other American republic by any means involving the use of force or violence.'" (quoting 22 U.S.C. § 611(j) (1982))).
237. *Keene* is not the only example in which the Court has engaged in deferential review of compelled disclosure of confidential information after concluding that the inhibitory effect of the compelled disclosure was not likely to be great. *See, e.g.*, Univ. of Pa. v. EEOC,

Yet, the balance in these cases does not always favor the government. In cases involving legislative investigations in which there was less reason to believe that the disclosures demanded were likely to produce evidence of subversive or other unlawful activities, for example, the Court struck the balance in favor of a First Amendment right to resist disclosure.[238] In none of these cases did the subject of the investigation face any type of penalty or sanction (beyond the sanctions available if they failed to cooperate with the investigation); the chilling effect of the investigation itself was regarded as sufficient to invoke the protections of the First Amendment.

In *Bantam Books, Inc. v. Sullivan*,[239] similarly, the Court invalidated a statute empowering a state obscenity commission to notify distributors of material that it had found objectionable and potentially subject to prosecution under state obscenity laws on the ground that the statute created an unacceptable risk that distributors would engage in self-censorship with respect to material that had not been adjudicated to be obscene.[240] *Bantam Books* involved a far greater inhibitory threat than *Meese v. Keene*—the targeted films were put at a serious competitive disadvantage by the threat of criminal prosecution with little evident justification, since the state was free to bring obscenity prosecutions against the film distributors if it were serious about the films' illegality.

Thus, in cases in which the government imposes no prohibition or direct cost on the exercise of First Amendment rights, the Court will consider claims of "chilling effect," but only by balancing the degree of the inhibition against the governmental interests at stake—not by considering the risk of impermissible motivation, as the purposivists would have it. The difference between *Bantam Books* and *Meese v. Keene* or the Cold War cases does not seem to be based on the increased risk of a governmental motive to burden disfavored speakers, but instead on the potency of the inhibitory effect of the challenged law, coupled with the lack of a sufficient justification to warrant such a potentially powerful tool for chilling the exercise of First Amendment rights.

The Court's campaign finance disclosure cases reflect the same pattern. Despite the First Amendment interests in anonymity, the Court has upheld disclosure requirements for contributors to political campaigns in light of the government's interests in promoting political accountability by candidates, deterring corruption, and assisting law enforcement.[241] Yet, the Court has invalidated disclosure

---

493 U.S. 182, 195–202 (1990) (enforcing subpoena, in litigation alleging unlawful sex discrimination in tenure denial, that required the production of confidential peer review materials despite First Amendment protections for academic freedom); Herbert v. Lando, 441 U.S. 153, 172–75 (1979) (rejecting a constitutional privilege against inquiry into the editorial process in defamation litigation despite First Amendment protections for the press).

238. *See* DeGregory v. Attorney Gen. of N.H., 383 U.S. 825, 828–29 (1966) (legislative investigation into suspected subversive activities); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 550–58 (1963) (legislative investigation of civil rights organization); Bates v. City of Little Rock, 361 U.S. 516, 523–25 (1960) (same); NAACP v. Alabama *ex rel*. Patterson, 357 U.S. 449, 462–66 (1958) (same).

239. 372 U.S. 58 (1963).

240. *Id.* at 66–72.

241. *See* Citizens United v. FEC, 130 S. Ct. 876, 913–17 (2010); McConnell v. FEC, 540 U.S. 93, 194–99 (2003), *overruled in part on other grounds by Citizens United*, 130 S. Ct.

requirements as applied to a minor party on the ground that the governmental interests at stake were less compelling and the risk of harassment or intimidation of minor-party contributors much greater.[242]

Thus, the aforementioned cases involving the potential "chilling effect" of government actions that fall short of prohibiting or penalizing protected speech concern themselves with balancing the extent of the inhibition and its justification, not the government's motivation. Purposivism has no evident place here, and with good reason. A jurisprudence that concerns itself primarily with the government's motive, thereby equating a mere investigation of a politically unpopular group with an outright prohibition on its existence, seems an awfully poor approach for identifying "abridgements" of the freedom of speech. After all, a discrete and limited investigation, even if undertaken for entirely improper reasons, poses little risk of suppressing anything; indeed, its targets may be entirely unaware that the investigation has taken place. A focus on motive seems quite out of place in this context.

But perhaps the purposivists can handle even this objection. After all, the purposivists argue that the threat of improper motivation justifies only heightened scrutiny, not automatic acceptance of a First Amendment claim. Purposivists could argue that the balancing in this line of cases reflects precisely the kind of strict scrutiny that they advocate—even if the cases themselves do not use the lingo of strict scrutiny. Yet, it is unclear that this is a fair characterization of the cases. As we have seen, in cases arising in contexts with the kind of high risk of improper motivation in which the purposivists claim that strict scrutiny is required, the Court upheld regulations without much evidence of heightened scrutiny. In the Subversive Activities Control Act case, for example, the Court expressly deferred to congressional judgment,[243] as it did again in *Meese v. Keene*.[244] Thus, less severe restrictions on communicative liberty seem to draw less intensive scrutiny, regardless of the risk of improper governmental motive.

In any event, even if the balancing in chilling effect cases can be reconciled with the purposivist account, there are other objections to be considered—in particular, a pragmatic claim that strict scrutiny of First Amendment investigations is inherently unworkable and that such a standard compromises critical law-enforcement interests.

---

876; Buckley v. Valeo, 424 U.S. 1, 60–74 (1976) (per curiam); *cf.* Doe v. Reed, 130 S. Ct. 2811, 2818–21 (2010) (upholding on its face a statutory requirement of disclosure of the identities of those signing petitions seeking a referendum to overturn a state statute).

242. *See* Brown v. Socialist Workers '74 Campaign Comm., 459 U.S. 87, 91–101 (1982). The Court has also left open the possibility that the disclosure of the identities of those who have signed petitions seeking a referendum to overturn a state statute could run afoul of the First Amendment on a sufficient showing that disclosure would subject signatories to a serious threat of retaliation. *See Reed*, 130 S. Ct. at 2821.

243. *See* Communist Party of the United States v. Subversive Activities Control Bd., 367 U.S. 1, 94–97 (1961).

244. 481 U.S. 465, 484 (1987).

### *C. The Pragmatic Case for Balancing*

The difficulties in applying heightened scrutiny to investigative activities are reflected in the proposals of those who advocate First Amendment restrictions on such investigations. These commentators argue that some evidentiary threshold and procedural protections—such as probable cause or reasonable suspicion that a crime is underway and the use of the least restrictive means to investigate—should be required for investigations based on or directed at collecting information about expressive activities protected by the First Amendment.[245] In fact, powerful pragmatic considerations underlie the balancing test that we have seen provides a doctrinal basis for undertaking a constitutional assessment of First Amendment investigations, while simultaneously counseling against the commentators' proposals for more exacting forms of judicial review.

The probable-cause and reasonable-suspicion standards fit the investigative context poorly, if at all. Reasonable suspicion is the standard required by the Fourth Amendment's prohibition on unreasonable search and seizure when an investigator "seizes" an individual by depriving him of the freedom of movement.[246] Probable cause is the standard required to take an individual into custody for anything more than a brief period of investigative detention.[247] When there is no search or seizure, however, the Fourth Amendment does not limit investigative activities even when an investigation has focused on a particular suspect.[248] It is therefore far from clear that these probable-cause or reasonable-suspicion standards—crafted to be sensitive to the balance between liberty and order when the government effectively takes an individual into physical custody—have any place when investigators impose no direct restraint on liberty.

The practical objection to a probable-cause or reasonable-suspicion requirement for an investigation involving no "search" or "seizure" within the meaning of the Fourth Amendment should be plain: if the government is prohibited from initiating an investigation of an extremist group on the basis of its speech, its ability to

---

245. *See, e.g.*, Fisher, *supra* note 190, at 661–73 (requiring reasonable suspicion of criminal activity and use of the least restrictive means to investigate on the basis of protected activities); Lininger, *supra* note 166, at 1269–71 (requiring particularized suspicion of criminal activity); Lynch, *supra* note 190, at 299–300 (requiring probable cause to believe target has violated or is violating the law and the use of least restrictive means for investigation of protected activities in nonpublic settings); Solove, *supra* note 190, at 154–63 (requiring investigations that gather a substantial amount of information about protected activities to be narrowly tailored to achieve a substantial government interest, ordinarily requiring a warrant and probable cause); Strandburg, *supra* note 190, at 804–11 (requiring reasonable suspicion of criminal activity to investigate groups on the basis of protected activities and probable cause to investigate individuals); Eric Lardiere, Comment, *The Justiciability and Constitutionality of Political Intelligence Gathering*, 30 UCLA L. REV. 976, 1018–34 (1983) (requiring reasonable suspicion and least restrictive means).

246. *See, e.g.*, Hiibel v. Sixth Jud. Dist. Court of Nev., 542 U.S. 177, 185–89 (2004); Florida v. Royer, 460 U.S. 491, 498–99 (1983); United States v. Brignoni-Ponce, 422 U.S. 873, 880–82 (1975).

247. *See, e.g.*, Kaupp v. Texas, 538 U.S. 626, 629–30 (2003) (per curiam); Dunaway v. New York, 442 U.S. 200, 209–16 (1979).

248. *See supra* note 187.

develop the requisite probable cause or reasonable suspicion necessary to support more intrusive investigative techniques—such as search or seizure—will be greatly circumscribed. A mosque known for its advocacy of extreme forms of Islam may be a breeding ground for terrorists, but if investigators cannot conduct interviews or commence a surveillance to determine if known terrorists are gathering there, there is little chance that probable cause or reasonable suspicion will ever emerge—until it is too late.

After all, incipient terrorist organizations rarely advertise their intentions. If the authorities are forbidden to commence an investigation until they somehow stumble onto evidence amounting to probable cause or reasonable suspicion—the type of evidence that might pass muster under some form of heightened scrutiny—then investigations that uncover extremists groups as they cross the line from advocacy into criminality will be few and far between.[249] Fourth Amendment jurisprudence recognizes this point by limiting the probable-cause and reasonable-suspicion requirements to investigations sufficiently intrusive to be considered "searches" or "seizures." It is quite unclear that First Amendment jurisprudence should take a different approach.

A least-restrictive-means requirement is equally problematic. In Fourth Amendment jurisprudence, a least-restrictive-means requirement for investigations has been emphatically rejected on eminently pragmatic grounds: "[T]he logic of such elaborate less-restrictive alternative arguments could raise insuperable barriers to the exercise of virtually all search-and-seizure powers."[250] Again, it is unclear that this observation has any less potency in the First Amendment context.

These very considerations were at the root of the Supreme Court's decision in *Branzburg v. Hayes*.[251] In that case, reporters argued that—because of the

---

249. Judge Posner wrote, in ruling to modify a decree that required the Chicago Police Department to refrain from investigations of activities protected by the First Amendment absent reasonable suspicion:

> New groups of political extremists, believers in and advocates of violence, form daily around the world. If one forms in or migrates to Chicago, the decree renders the police helpless to do anything to protect the public against the day when the group decides to commit a terrorist act. Until the group goes beyond the advocacy of violence and begins preparatory actions that might create reasonable suspicion of imminent criminal activity, the hands of the police are tied. And if the police have been forbidden to investigate until then, if the investigation cannot begin until the group is well on its way toward the commission of terrorist acts, the investigation may come too late to prevent the acts or to identify the perpetrators. If police get wind that a group of people have begun meeting and discussing the desirability of committing acts of violence in pursuit of an ideological agenda, a due regard for the public safety counsels allowing the police department to monitor the statements of the group's members, to build a file, perhaps to plant an undercover agent.

Alliance to End Repression v. City of Chicago, 237 F.3d 799, 802 (7th Cir. 2001).

250. Bd. of Educ. of Indep. Sch. Dist. No. 92 v. Earls, 536 U.S. 822, 837 (2002) (quoting United States v. Martinez-Fuerte, 428 U.S. 543, 556 n.12 (1976)); *accord, e.g.*, Atwater v. City of Lago Vista, 532 U.S. 318, 350–51 (2001); Illinois v. Lafayette, 462 U.S. 640, 647 (1983).

251. 408 U.S. 665 (1972).

inhibitory effect that compelled disclosure would have on newsgathering—the First Amendment does not permit a grand jury to use its subpoena power to compel them to disclose confidential sources unless:

> sufficient grounds are shown for believing that the reporter possesses information relevant to a crime the grand jury is investigating, that the information the reporter has is unavailable from other sources, and that need for the information is sufficiently compelling to override the claimed invasion of First Amendment interests occasioned by its disclosure.[252]

Rejecting this claim, the Court stressed that the obligation to testify before a grand jury involved no prohibition or penalty on what the press may publish;[253] that the extent to which this obligation would inhibit journalists was highly speculative;[254] and that historically "the press has operated without constitutional protection for press informants, and the press has flourished."[255] The Court concluded that even assuming that

> an undetermined number of informants . . . will . . . refuse to talk to newsmen if they fear identification by a reporter in an official investigation, we cannot accept the argument that the public interest in possible future news about crime from undisclosed, unverified sources must take precedence over the public interest in pursuing and prosecuting those crimes reported to the press by informants and in thus deterring the commission of such crimes in the future.[256]

Surveying the governmental interests supporting an expansive investigative power, the Court observed that because the grand jury's "task is to inquire into the existence of possible criminal conduct . . . its investigative powers are necessarily broad."[257] Requiring a preliminary showing of necessity to hale a journalist before

---

252. *Id.* at 680.

253. As the Court explained:

> We do not question the significance of free speech, press, or assembly to the country's welfare. Nor is it suggested that news gathering does not qualify for First Amendment protection; without some protection for seeking out the news, freedom of the press could be eviscerated. But these cases involve no intrusions upon speech or assembly, no prior restraint or restriction on what the press may publish, and no express or implied command that the press publish what it prefers to withhold. No exaction or tax for the privilege of publishing, and no penalty, civil or criminal, related to the content of published material is at issue here. The use of confidential sources by the press is not forbidden or restricted; reporters remain free to seek news from any source by means within the law. No attempt is made to require the press to publish its sources of information or indiscriminately to disclose them on request.

*Id.* at 681–82.

254. *See id.* at 693–95.

255. *Id.* at 698–99.

256. *Id.* at 695.

257. *Id.* at 688. Thus, "[t]he investigative power of the grand jury is necessarily broad if

a grand jury, the Court concluded, was inconsistent with the grand jury's interest in examining all relevant evidence.[258] Moreover, "a constitutional newsman's privilege would present practical and conceptual difficulties of a high order."[259] The Court would be pressed to afford such a privilege to anyone claiming to be gathering information in order to engage in protected expression,[260] and a requirement that a subpoena advanced a compelling governmental interest would enmesh the courts in difficult decisions of law-enforcement policy beyond their expertise.[261] The Court added that "there is much force in the pragmatic view that the press has at its disposal powerful mechanisms of communication and is far from helpless to protect itself from harassment or substantial harm."[262] In any event,

> news gathering is not without its First Amendment protections, and grand jury investigations if instituted or conducted other than in good faith, would pose wholly different issues for resolution under the First Amendment. Official harassment of the press undertaken not for purposes of law enforcement but to disrupt a reporter's relationship with his news sources would have no justification.[263]

Thus, in a context in which the inhibitory effect of an investigation on protected expression was surely no less than the chilling effect of an investigation based on or directed at protected activities, the Court engaged in pragmatic balancing, while resisting strict scrutiny because of the many difficulties in determining what type of investigative activities can survive such scrutiny. Although *Branzburg* acknowledges a limit to the investigative power, this limit requires only a good-faith law investigative justification for a subpoena, or, under the standard proposed by Justice Powell in his concurring opinion, some legitimate law-enforcement justification for the subpoena.[264] This is a standard remarkably like that employed

---

its public responsibility is to be adequately discharged." *Id.* at 700 (citing Costello v. United States, 350 U.S. 359, 364 (1956)).

258. As the Court explained:

> The role of the grand jury as an important instrument of effective law enforcement necessarily includes an investigatory function with respect to determining whether a crime has been committed and who committed it. To this end it must call witnesses, in the manner best suited to perform its task. "When the grand jury is performing its investigatory function into a general problem area . . . society's interest is best served by a thorough and extensive investigation." A grand jury investigation "is not fully carried out until every available clue has been run down and all witnesses examined in every proper way to find if a crime has been committed." Such an investigation may be triggered by tips, rumors, evidence proffered by the prosecutor, or the personal knowledge of the grand jurors. It is only after the grand jury has examined the evidence that a determination of whether the proceeding will result in an indictment can be made.

*Id.* at 701–02 (citations omitted).

259. *Id.* at 703–04.

260. *Id.* at 704–05.

261. *Id.* at 705–06.

262. *Id.* at 706.

263. *Id.* at 707–08 (footnote omitted).

264. Although Justice Powell joined the opinion of the Court which, as we have seen,

by the courts that have rejected any form of heightened scrutiny for First

---

required only a good-faith investigative purpose while rejecting any form of heightened scrutiny or evidentiary showing to support a subpoena to a reporter, his separate opinion articulates the standard for resisting a subpoena somewhat differently:

> If a newsman believes that the grand jury investigation is not being conducted in good faith he is not without remedy. Indeed, if the newsman is called upon to give information bearing only a remote and tenuous relationship to the subject of the investigation, or if he has some other reason to believe that his testimony implicates confidential source relationships without a legitimate need of law enforcement, he will have access to the court on a motion to quash and an appropriate protective order may be entered.

*Id.* at 710 (Powell, J., concurring). The only advocate of First Amendment limitations on the investigative power to consider *Branzburg* is Professor Solove, who stresses Justice Powell's separate opinion, which provided the fifth vote for the majority's disposition of the case, as supporting the view that the First Amendment limits investigative authority. *See* Solove, *supra* note 190, at 150–51. Yet, Justice Powell did not require probable cause or any form of heightened scrutiny, and he placed the burden on the reporter to establish that a subpoena was unsupported by any legitimate law-enforcement purpose. This standard differs little if at all from the standard governing the enforceability of all grand jury subpoenas, which was developed in an opinion that cited *Branzburg* in support of the standard it adopted. *See* United States v. R. Enterprises, Inc., 498 U.S. 292, 299–302 (1991). The courts of appeals have consistently read *Branzburg* to reject any type of First Amendment defense to a grand jury subpoena supported by some legitimate law-enforcement purpose. *See, e.g.*, N.Y. Times Co. v. Gonzales, 459 F.3d 160, 172–74 (2d Cir. 2006); *In re* Grand Jury Subpoena, Judith Miller, 438 F.3d 1141, 1145–49 (D.C. Cir. 2006); *In re* Special Proceedings, 373 F.3d 37, 44–46 (1st Cir. 2004); Scarce v. United States (*In re* Grand Jury Proceedings), 5 F.3d 397, 399–402 (9th Cir. 1993); United States v. Long (*In re* Shain), 978 F.2d 850, 852–53 (4th Cir. 1992); Storer Commc'ns, Inc. v. Giovan (*In re* Grand Jury Proceedings), 810 F.2d 580, 583–86 (6th Cir. 1987). The Supreme Court has consistently cited *Branzburg* for the proposition that the press is obligated to comply with generally applicable legal obligations despite the burden that compliance places on newsgathering. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 669–71 (1991); Univ. of Pa. v. Equal Employment Opportunity Commission, 493 U.S. 182, 201 (1990); Arcara v. Cloud Books, Inc., 478 U.S. 697, 704 (1986); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 581 (1983); Pell v. Procunier, 417 U.S. 817, 833–35 (1974). To be sure, some lower courts have recognized a qualified reporter's privilege, albeit without specifically holding that the privilege is constitutionally compelled rather than simply a balancing process typically undertaken when assessing claims of common law privilege. *See, e.g.*, LaRouche v. Nat'l Broad. Co., 780 F.2d 1134, 1139 (4th Cir. 1986); United States v. Burke, 700 F.2d 70, 76–77 (2d Cir. 1983); Zerilli v. Smith, 656 F.2d 705, 710–15 (D.C. Cir. 1981); United States v. Cuthbertson, 630 F.2d 139, 147–48 (3d Cir. 1980); Miller v. Transamerican Press, Inc., 621 F.2d 721, 725–27 (5th Cir. 1980). The question of whether the public interest in facilitating vigorous reporting justifies a common law privilege is not of constitutional dimension and accordingly presents different considerations from the First Amendment issue addressed in *Branzburg*. *See, e.g.*, *In re Grand Jury Subpoena, Judith Miller*, 438 F.3d at 1166–72 (Tatel, J., concurring); McKevitt v. Pallasch, 339 F.3d 530, 531–32 (7th Cir. 2003). In any event, only four circuits have recognized even a qualified reporter's privilege in criminal cases, and that privilege rarely results in protection for reporters. *See* James Thomas Tucker & Stephen Wermiel, *Enacting a Reasonable Federal Shield Law: A Reply to Professors Clymer and Eliason*, 57 AM. U. L. REV. 1291, 1308–10 (2008); *see also* 3 SMOLLA, *supra* note 2, §§ 3.26, 3.26.50 (surveying decisions in the lower courts).

Amendment investigations.[265] More important for present purposes, this approach is wholly inconsistent with the purposivist account.

As we have seen, purposivists believe that strict scrutiny is warranted when enforcement officials exercise largely unchecked discretion because of the risk that they act on the basis of impermissible motives, coupled with the difficulties in requiring litigants to adduce proof of illicit motive.[266] These risks are fully present when prosecutors and grand juries exercise their discretion to subpoena reporters to testify before a grand jury. In *Branzburg*, for example, two of the consolidated cases involved stories suggesting that the incumbent prosecutor had failed to effectively control drug dealing in the area,[267] and two others involved reporters who had covered African American militants.[268] Prosecutors might readily be expected to subpoena reporters who are exposing government inefficiency or offering potentially sympathetic coverage to dissidents than for reporters engaged in more mainstream fare.

More generally, there surely is a natural temptation to believe that one's political opponents—especially those of the most extreme hues—are up to no good, and a concurrent temptation to use investigative resources in an effort to develop substance to one's suspicions. Those who would indulge these temptations are equally likely to be less than fully sensitive to the impact of such investigations on the ability of dissident groups to attract and retain support in the face of such scrutiny. From the point of view of the authorities in power, that kind of chilling effect may count as what an economist might call a second-order benefit of the investigation, not one of its costs. It is considerations of this character that are at the heart of the purposivist case for strict scrutiny; as we have seen, purposivists regard strict scrutiny as justified in order to relieve litigants of what is thought to be the unrealistic burden of adducing proof of actual motive.[269] Yet, under *Branzburg*, the risk of improper motive when the government elects to require reporters to disclose their sources produces nothing like strict scrutiny.

Indeed, one might argue that there is no justification for any First Amendment limitations on investigation. Given that investigative agencies operate in a world of limited resources, one might believe that there is little reason to believe that the authorities will undertake investigations without adequate justification. Fourth Amendment jurisprudence, however, rejects such a presumption of governmental efficiency and instead requires at least reasonable suspicion of criminal activity to undertake a seizure, as we have seen.[270] The rather extensive history of abusive investigations targeting political dissidents also cuts against the view that the government is unlikely to overreach in the exercise of its investigative powers.[271] And, as we have seen, there is ample reason to believe that investigative tactics will be influenced, consciously or unconsciously, by the hostility of elected officials to reporting inconsistent with their own political interests.

---

265. *See supra* text accompanying note 188.
266. *See supra* text accompanying notes 6–9.
267. *Branzburg*, 408 U.S. at 667–70.
268. *Id.* at 672–78.
269. *See supra* text accompanying notes 7–9.
270. *See supra* text accompanying note 246.
271. *See supra* text accompanying notes 172–86.

Yet, the pragmatic arguments against intrusive judicial oversight are overwhelming—if the government can undertake only those investigations it can demonstrate are likely to bear fruit, few if any investigations will begin until after a crime has already claimed its victims. It is surely rational for the government to undertake an investigation of speech that appears to condone violence, or of groups who have a track record of violence, not only to discover incipient plots, but to learn something of the structure and membership of potentially violent groups. That knowledge provides a useful source of investigative leads should a crime subsequently occur that could reasonably be attributed to a member of the group.

For example, some knowledge of the structure and membership of extreme anti-abortion groups would provide a useful source of investigative leads should a prominent abortionist subsequently be murdered; and law-enforcement officials might rationally decide to obtain those leads before anyone is murdered, rather than delay their investigation by developing these leads only after someone has died. Moreover, as we have seen, the argument for intelligence gathering is particularly powerful for politically motivated crimes less likely to be deterred by after-the-fact punishment, such as 9/11-style terrorism.[272] But although these forms of intelligence gathering might be rational, on the purposivist account, something more than mere rationality should be required when the government is able to impose special disabilities on disfavored speech or speakers. Nevertheless, the pragmatic objections to that view have carried the day in First Amendment jurisprudence. From *Wayte* to *Branzburg*, the Court has consistently held that any plausible law-enforcement justification for an investigation triggered by protected speech will be sufficient to stave off a challenge, despite the risk that dissenters will experience potent chilling effects on their First Amendment rights.

### *D. The Pragmatic Approach to First Amendment Investigations*

Thus, First Amendment doctrine provides little support for the view that an investigation directed at or initiated by protected expression must satisfy some form of heightened scrutiny. Neither does it suggest that the First Amendment is silent about such investigations. The degree of intrusion on First Amendment interests as well as the justification for the investigation must be considered.

A discrete investigation of which the target may be entirely unaware has little potential to chill protected speech beyond the type of general chilling effect created by the mere knowledge that the government engaged in such investigations—a chill considered nonjusticiable in *Laird*. Even if the subject learns of the investigation, it is far from clear that this knowledge will be sufficient to deter the subject from engaging in protected activities.[273] Indeed, in *Branzburg*, the Court was

---

272. *See supra* text accompanying notes 158–68.

273. For example, a survey of Muslim Americans after the attacks of September 11 concluded that although more than 70% of those surveyed believed that the government monitored their use of the Internet, 86.8% of respondents indicated that they had not changed their Internet behavior after September 11. *See* Dawinder S. Sidhu, *The Chilling Effect of Government Surveillance Programs on the Use of the Internet by Muslim-Americans*, 7 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 375, 390–91 (2007).

understandably reluctant to engage in this type of speculation.[274] Moreover, if the investigation has a plausible law-enforcement justification, a court will not attempt to assess its investigative merits because it is so difficult to know what an investigation will bring to light unless it is conducted. It is equally impracticable for courts to tolerate the delay that would inhere in permitting the parties to litigate every investigative proposal before it is executed, even putting aside the problems with alerting the target to the investigation in order to permit litigation of its propriety. Indulging what could be endless judicial second-guessing after the fact about whether some less restrictive investigative option could have been pursued seems no more attractive. Even a more modest probable-cause or reasonable suspicion requirement could be enormously problematic—it is unclear how the authorities will ever acquire probable cause or reasonable suspicion if investigations cannot be initiated on a lesser standard. Yet, absolute deference to investigative decision making is little more attractive; the kind of vindictive poison pen letters that cost people jobs and marriages as a consequence of the FBI's most egregious excesses should make for a strong case under the First Amendment. These tactics differ little from the kind of penalty for the assertion of First Amendment rights that the Supreme Court has condemned.

The First Amendment investigation provides a particularly good test for the purposivist account of the First Amendment because it disaggregates the threat of an improper governmental motive from the justification and repressive effects of challenged governmental activity. Investigations undertaken as a consequence of protected activity or directed at learning about protected activity involve all the risks of impermissible motive that the purposivists claim justify heightened scrutiny. Investigators have largely unfettered discretion in deciding whether and how to undertake an investigation and will likely be quicker to target political opponents than supporters for investigation. Yet, the only hint of heightened scrutiny in the case law occurs when there is an especially severe inhibitory effect lacking an evident justification, as in the minor-party campaign contribution disclosure or the state obscenity commission cases.[275] The risk of impermissible motive, without more, produces no trace of heightened scrutiny, and the "chilling effect" cases, as we have seen, utilize straightforward balancing of the individual and governmental interests at stake. Even when there is some significant risk of chilling effect—as the Court acknowledged in *Branzburg*—the justification for wide investigative powers will trump the uncertain chilling effect of an investigation that involves no actual prohibition or penalty on protected expression. The "chilling effect" cases in general, and the First Amendment investigation cases in particular, demonstrate that the risk of impermissible motivation does not displace pragmatic balancing in First Amendment adjudication.[276]

---

274. *See supra* text accompanying notes 251–53.

275. *See supra* text accompanying notes 237–38, 240.

276. One might argue that given the importance of expansive investigative powers, *Branzburg* should be understood as a strict scrutiny case in which the government had a compelling interest in pursuing investigations largely free of judicial scrutiny. For example, Charles Fried has argued that in assessing the government's interest in pursuing an investigation, it is proper to assess the totality of the governmental interest in pursuing wide-ranging investigations rather than confining the inquiry to the particular investigation at

Indeed, the First Amendment investigation provides a potent challenge not only to the purposivists, but also to any absolutist or categorical account of the First Amendment's protections. Although there are many different versions of First Amendment absolutism or categoricalism, the common feature of these accounts is that they reject balancing and insist that the First Amendment provides absolute protection for activities that are communicative in character.[277] Yet, when it comes to First Amendment investigations, balancing is inevitable; absolutists have no very good way to handle First Amendment investigations. An absolutist could prohibit all First Amendment investigations on the theory that communication that involves no effort at coercion or other types of interference with the rights of others is entitled to absolute protection, but a prohibition on investigation triggered by protected speech would disable the government from learning whether those engaged in protected speech that nevertheless suggests some potential for noncommunicative and hence unprotected evils—such as speech endorsing violence—are in fact working to bring just those evils about. Since it is quite settled that the First Amendment does not grant a right to use words as a means to organize for violence or otherwise to undertake unlawful conduct,[278] it is hard to understand why absolutism could demand that the government refrain from investigating to determine if an unprotected conspiracy is underway.

Justice Douglas's approach in *Branzburg* reflects the difficulties with First Amendment absolutism. In that case, he took the absolutist position that a reporter can never be compelled to appear before a grand jury except as a target of an investigation.[279] This would mean that a reporter could not be compelled to repeat as a witness before a grand jury the same matters contained in an already published account for which the reporter provided no assurances of confidentiality. Surely it is difficult to see how in such circumstances the reporter's testimony inhibits

---

issue. *See* Charles Fried, *Two Concepts of Interests: Some Reflections on the Supreme Court's Balancing Test*, 76 HARV. L. REV. 755, 765–70 (1963). Accordingly, one could argue that affording the grand jury wide-ranging investigative power is also the least restrictive alternative for achieving this compelling interest. Nevertheless, this approach is inconsistent with *Branzburg* itself, which rejects strict scrutiny. Moreover, it amounts to a claim that the government has a compelling interest in freeing itself from intrusive review under strict scrutiny, which surely puts the cart before the horse. Yet, even this understanding of *Branzburg* ultimately acknowledges the centrality of pragmatic balancing and rejects the purposivist claim that the risk of improper motivation requires heightened judicial review.

277. *See, e.g.*, C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 138–91 (1989); THOMAS I. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 16–20 (1970); LANGE & POWELL, *supra* note 80, at 269–83, 296–301; David L. Faigman, *Reconciling Individual Rights and Governmental Interests: Madisonian Principles Versus Supreme Court Practice*, 78 VA. L. REV. 1521, 1555–62 (1992); Fee, *supra* note 17, at 1157–69; Alexander Meiklejohn, *The First Amendment Is an Absolute*, 1961 SUP. CT. REV. 245, 255–63; Lawrence Byard Solum, *Freedom of Communicative Action: A Theory of the First Amendment Freedom of Speech*, 83 NW. U. L. REV. 54, 106–33 (1989). For what is perhaps the classic statement of First Amendment absolutism, see Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874–76 (1960).

278. *See, e.g.*, United States v. Stevens, 130 S. Ct. 1577, 1586 (2010); United States v. Williams, 553 U.S. 285, 297–98 (2008).

279. *See* Branzburg v. Hayes, 408 U.S. 665, 712–14 (1972) (Douglas, J., dissenting).

freedom of the press to any greater extent that any other generally applicable burden imposed on reporters or the press, such as the obligation to pay generally applicable taxes, to which the First Amendment interposes no objection.[280] Any other approach to a reporter's obligation to testify, however, requires a pragmatic balance between the chilling effect on newsgathering of the obligation to testify and the needs of law enforcement, even one that recognizes a qualified reporter's privilege to maintain the confidentiality of sources.[281]

Conversely, an absolutist could permit First Amendment investigations by denying that investigations have any sufficiently inhibitory effect to implicate the First Amendment. This approach, however, would permit the most odious abuses in this area, such as the poison pen letters directed to the employers or spouses of dissidents, which are likely as potent a means as any of suppressing dissent.[282] An absolutism that permits all First Amendment investigations is little more attractive than an absolutism that forbids them all.

A due respect for the constitutional protection for expression seems to require some effort to gauge the inhibitory effects of an investigation, but without wearing blinders to the need for responsible investigative techniques. Even for the absolutist, the First Amendment investigation seems inevitably to lead to pragmatic balancing.

## III. THE FREE TRADE IN IDEAS AS THE BALANCING METRIC IN FIRST AMENDMENT DOCTRINE

One should not be too quick to reject the purposivist account in its entirety. After all, with its many carefully calibrated standards of scrutiny, First Amendment doctrine is far more complex than a process of ad hoc weighing of costs and benefits.[283] What is more, the purposivists' attack on balancing has considerable force. As we have seen, purposivists deny that there is any principled basis for courts to "balance" free expression against countervailing government interests.[284] In this, they are part of a long tradition of First Amendment scholarship that decries balancing as an invitation to undisciplined judicial subjectivity.[285] As one of the

---

280. *See* Leathers v. Medlock, 499 U.S. 439, 444–50 (1991); Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 581 (1983).

281. *See Branzburg*, 408 U.S. at 739–43 (Stewart, J., dissenting).

282. *See supra* text accompanying note 175.

283. *See supra* text accompanying note 2.

284. *See supra* text accompanying note 11.

285. *See, e.g.*, BAKER, *supra* note 277, at 125–37; EMERSON, *supra* note 277, at 16, 167–68, 717–18; LANGE & POWELL, *supra* note 80, at 266–69; Laurent B. Frantz, *The First Amendment in the Balance*, 71 YALE L.J. 1424, 1432–50 (1962); Steven J. Heyman, *Righting the Balance: An Inquiry into the Foundations and Limits of Freedom of Expression*, 78 B.U. L. REV. 1275, 1305–12 (1998); Alexander Meiklejohn, *The Balancing of Self-Preservation Against Political Freedom*, 49 CALIF. L. REV. 4, 7–14 (1961); R. George Wright, *Pragmatism and Freedom of Speech*, 80 N.D. L. REV. 103, 133–38 (2004). For perhaps the canonical attack on balancing in constitutional law, see T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 972–1004 (1987).

leading scholars in this tradition has argued: "To resolve First Amendment questions, one cannot avoid making ideological judgments."[286]

In the face of these attacks, balancing looks less than satisfying—descriptively and normatively—as an account of First Amendment doctrine. Yet, balancing can offer an account of First Amendment doctrine that not only explains the structure of First Amendment doctrine, but is sensitive as well to the need for doctrinal rigor. While entirely ad hoc balancing is likely to prove unacceptably indeterminate, First Amendment doctrine has developed an approach for evaluating the pertinent interests that makes balancing structured and rigorous by looking at free speech much the way that economists look at markets.

Long before the birth of the law and economics movement, Justice Holmes characterized the First Amendment as protecting the "free trade in ideas."[287] The metaphor of the First Amendment preserving robust competition in a "marketplace of ideas" has since become a commonplace in First Amendment jurisprudence.[288] A correlative principle has been embraced as well: the Court tells us that the First Amendment protects the right to receive information no less than the right to communicate it.[289]

Thus, the First Amendment values more than the speaker's individual interest in communicating; the interests of listeners and the integrity of competition in the metaphorical marketplace of ideas are critical as well. If one thinks about free speech as a competitive market in which systemic interests are as important as the interests of individual speakers, then it becomes possible to develop a metric for assessing the impact of a challenged regulation on free speech interests.[290] Using

---

286. Eugene Volokh, *Pragmatism vs. Ideology in Free Speech Cases*, 99 NW. U. L. REV. 33, 34 (2004).

287. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

288. *See, e.g.*, Virginia v. Hicks, 539 U.S. 113, 119 (2003); Reno v. ACLU, 521 U.S. 844, 885 (1997); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 831 (1995); McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 341–42 (1995); United States v. Nat'l Treasury Emps. Union, 513 U.S. 454, 464–65 (1995); Texas v. Johnson, 491 U.S. 397, 418 (1989); Hustler Magazine, Inc. v. Falwell, 485 U.S. 46, 52 (1988); Members of the City Council v. Taxpayers for Vincent, 466 U.S. 789, 804 (1984); Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm'n, 447 U.S. 530, 537–38 (1980).

289. *See, e.g.*, Ashcroft v. Free Speech Coal., 535 U.S. 234, 245–46 (2002); *Reno*, 521 U.S. at 875; Bolger v. Youngs Drug Prods. Corp., 463 U.S. 60, 74–75 (1983); Lamont v. Postmaster Gen., 381 U.S. 301, 306–07 (1965); Butler v. Michigan, 352 U.S. 380, 383 (1957).

290. This conception of "free trade" in ideas accordingly can be seen as a means toward maximizing the ability of the "marketplace of ideas" to produce truth. *See, e.g.*, Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ."). In this vein, some argue that limiting regulatory authority over speech is likely to enhance social welfare by increasing the supply of socially useful speech. *See, e.g.*, ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 310–12 (2000); Albert Breton & Ronald Wintrobe, *Freedom of Speech vs. Efficient Regulation in the Marketplace for Ideas*, 17 J. ECON. BEHAV. & ORG. 217, 233–37 (1992); Daniel A. Farber, *Free Speech Without Romance: Public Choice and the First Amendment*, 105 HARV. L. REV. 554, 558–62 (1991). Others, however, contend that there are enormous difficulties in the assumption that a free market in

this metric, First Amendment jurisprudence balances the interest in an unfettered marketplace of ideas against the regulatory interests of the government in a reasonably predictable and structured fashion. Regulatory burdens imposed on all market participants may reduce the quantity of speech just as a generally applicable tax will reduce demand and hence output, but they are unlikely to have dramatic effects on competition within the marketplace of ideas. For that reason, they are generally upheld. Regulatory burdens with the potential to fall unequally on competitors, in contrast, can skew the market, and therefore pose a qualitatively different kind of problem for free trade in ideas.[291] Thus, the hospitality of First Amendment jurisprudence to generally applicable laws—as well as the suspicion directed at content or viewpoint-specific regulation—can be explained without need of the purposivist account.

### *A. Content-Neutral Regulation and the Free Trade in Ideas*

Consider at one end of the spectrum the kind of case in which the Court sees no First Amendment problem with a challenged regulation.

Generally applicable laws that prohibit conduct with no expressive significance are thought to raise no First Amendment problem, even if they impose costs on those engaged in protected speech. In *Arcara v. Cloud Books, Inc.*,[292] for example, the Court held that an injunction requiring the closure of a bookstore as a public nuisance based on repeated incidents of prostitution and other unlawful sexual activities on the premises required no First Amendment scrutiny because the "sexual activity carried on in this case manifests absolutely no element of protected expression."[293] The Court reasoned that when a regulation is not directed at expression, the First Amendment comes into play only when it is applied to "conduct with a significant expressive element . . . or where a statute based on a

---

expression will achieve optimal results. *See, e.g.*, BAKER, *supra* note 277, at 6–24; Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 16–49; Pierre J. Schlag, *An Attack on Categorical Approaches to Freedom of Speech*, 30 UCLA L. REV. 671, 726–30 (1983); David A. Strauss, *Rights and the System of Freedom of Expression*, 1993 U. CHI. LEGAL F. 197, 202–05. The usefulness of the concept of a free marketplace of ideas for First Amendment doctrine, however, does not depend on a consequentialist justification; indeed, the originator of the "free trade" metaphor, Justice Holmes, made this point quite clearly: "If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way." Gitlow v. New York, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). The conception of the marketplace of ideas that emerges from the Holmesian approach is accordingly what Professor Schauer has called a "negative" theory of the First Amendment, premised on a lack of confidence in the exercise of governmental power to regulate speech rather than confidence that unregulated speech can produce anything like an optimal result. *See* SCHAUER, *supra* note 34, at 80–86. For a useful elaboration on the Holmesian conception of constitutional protection for the marketplace of ideas, see Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 6–7, 14–22 (2008).

291. *See* Richard A. Posner, *Free Speech in an Economic Perspective*, 20 SUFFOLK U. L. REV. 1, 16–19 (1986).

292. 478 U.S. 697 (1986).

293. *Id.* at 705.

nonexpressive activity has the inevitable effect of singling out those engaged in expressive activity."[294] The Court accordingly treats generally applicable laws not targeted at expression as raising no First Amendment issue, even when applied to the press.[295]

Laws of this character pose little threat to free trade in ideas, while advancing unquestionably legitimate governmental interests. Generally applicable laws may increase the costs of speech for all market participants, but they have little potential to skew free trade in ideas in favor of particular market participants. For example, the Court has perceived no constitutional objection to a generally applicable law requiring building permits, even when applied to a newspaper seeking to build a new facility, since this type of generally applicable regulation is "rarely effective as a means of censorship."[296] Moreover, because the costs they impose are not triggered by expression—or even by conduct commonly associated with expression—they pose little risk that they will make the cost of expression unduly great. The bookstore owners in *Arcara*, for example, "remain[ed] free to sell the same materials at another location."[297] Thus, these laws usually pose no threat to the integrity of the marketplace of ideas sufficient to offset their justifications. To be sure, generally applicable laws that pose unusually potent burdens on all speakers—such as a generally applicable but confiscatory tax—might shut down the marketplace of ideas altogether, but the likelihood that a legislature could impose such a remarkably burdensome regulation on everyone and survive the next election is so slight that such cases, as a practical matter, never arise.[298]

Generally applicable laws are not immune from First Amendment challenge, however, when they are enforced in ways that can skew the marketplace of ideas.

---

294. *Id.* at 706–07.

295. *See, e.g.*, Cohen v. Cowles Media Co., 501 U.S. 663, 669–70 (1991).

296. City of Lakewood v. Plain Dealer Publ'g Co., 486 U.S. 750, 761 (1988).

297. 478 U.S. at 705 (footnote omitted); *see also* Alexander v. United States, 509 U.S. 544, 550–51, 552–53 (1993).

298. Presumably generally applicable but exceedingly harsh laws, such as a confiscatory tax that effectively halted "free trade in ideas," would invoke First Amendment scrutiny without need of a doctrine that demanded First Amendment review of every generally applicable law. One could reserve First Amendment scrutiny for unusually burdensome regulations without requiring it in garden-variety cases not likely to involve substantial repressive effects. In this respect, one is put in mind of yet another of Justice Holmes's famous dissents:

> It seems to me that the State Court was right. I should say plainly right, but for the effect of certain dicta of Chief Justice Marshall which culminated in or rather were founded upon his often quoted proposition that the power to tax is the power to destroy. In those days it was not recognized as it is today that most of the distinctions of the law are distinctions of degree. If the States had any power it was assumed that they had all power, and that the necessary alternative was to deny it altogether. But this Court which so often has defeated the attempt to tax in certain ways can defeat an attempt to discriminate or otherwise go too far without wholly abolishing the power to tax. The power to tax is not the power to destroy while this Court sits.

Panhandle Oil Co. v. Mississippi *ex rel.* Knox, 277 U.S. 218, 223 (1928) (Holmes, J., dissenting).

Under *Wayte*, if enforcement of a generally applicable law is targeted at disfavored speech or speakers, the First Amendment will provide a defense, as we have seen.[299] In cases of selective enforcement, the burden on the individual speaker does not differ, but the threat to the free trade in ideas is much greater, and the government's otherwise legitimate interest is compromised by its failure to enforce the law uniformly; this is what First Amendment jurisprudence characterizes as the problem of underinclusiveness.[300] In such cases, the balance tilts against the government, and the defense of selective prosecution is recognized. Yet, as we have also seen, when the government can identify a legitimate law-enforcement basis for its enforcement decisions, even if they disproportionately disadvantage those engaged in protected speech, the balance tips in the direction of the government.[301] Since selective prosecution cases involve only those who have engaged in unprotected conduct, it does not take much of a government interest to justify whatever skew in the marketplace of ideas that may result from prosecutive decisions—after all, speakers who want to avoid this kind of burden need only comply with the law.

There will be occasions, however, in which a generally applicable law is applied to activities with a significant expressive component, as when the statutory prohibition on burning a draft card was applied to an antiwar protest in *United States v. O'Brien*.[302] In this context, regulation directed at a "nonspeech element" will be upheld "if it furthers an important or substantial governmental interest . . . unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest."[303] This final requirement is undemanding; it does not require, for example, that the government select the least restrictive alternative but only that the regulation advance the government's interest more effectively than would be the case absent the regulation.[304]

The greater scrutiny of incidental burdens on speech by laws directed at activities with a significant expressive component is warranted by the greater risk that even generally applicable regulation will skew the marketplace of ideas by having a disproportionate impact on disfavored speech or speakers. After all, majoritarian institutions are less likely to enact regulations that burden the expressive activities of the majority than they are those of dissenters.[305] Thus, we see a modest increase in judicial scrutiny for incidental burdens on speech. Yet,

---

299. *See supra* text accompanying notes 194–97.

300. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 52 (1994); Fla. Star v. B.J.F., 491 U.S. 524, 540 (1989); Carey v. Brown, 447 U.S. 455, 465 (1980); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 793 (1978); Erznoznik v. City of Jacksonville, 422 U.S. 205, 213–14 (1975); Police Dep't of Chicago v. Mosley, 408 U.S. 92, 100 (1972).

301. *See supra* text accompanying notes 197, 223–35.

302. 391 U.S. 367 (1968).

303. *Id.* at 377; *accord, e.g.*, Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 661–62 (1994); United States v. Albertini, 472 U.S. 675, 687–88 (1985).

304. *See, e.g.*, Rumsfeld v. Forum for Academic & Institutional Rights, Inc., 547 U.S. 47, 67 (2006); *Turner Broad. Sys.*, 512 U.S. at 661–62; *Albertini*, 472 U.S. at 688–89.

305. As we have seen, the Court has acknowledged this point in its jurisprudence under the First Amendment's Free Exercise Clause. *See supra* note 199.

given that such regulation is not directed at expression and advances a speech-neutral interest, and given as well the difficulties in making an empirical judgment about the degree to which different speakers and viewpoints may be disproportionately disadvantaged by such regulations, scrutiny is modest. Again, speakers who wish to avoid the burden imposed by such regulations need only avoid engaging in the nonspeech activity that triggers the regulation. O'Brien, for example, remained free to denounce the draft; he was prohibited only from destroying his draft card. Still, the greater threat to free trade in ideas for those who are sanctioned for expressive activities or conduct associated with expression produces a greater measure of judicial inquiry to determine whether there is a sufficient cost to the marketplace of ideas to offset the legitimate governmental interests advanced by the challenged regulation.

Regulation of the time, place, and manner of speech involves a greater threat still to the marketplace of ideas, since the regulation is directed at a means of communication rather than some nonspeech element.[306] Such regulation is considered permissible if it is not based on the content of speech, is narrowly tailored to serve a significant government interest, and leaves open ample alternative channels of communication.[307] As with incidental restrictions, the narrow tailoring requirement does not require use of the least-speech-restrictive alternative but only regulation that advances the government's interest more effectively than would occur in its absence.[308]

This modest standard of scrutiny follows from the requirement of content-neutrality, which is framed to minimize the risk that the regulation is aimed at disfavored speech or speakers: "The principal inquiry in determining content neutrality, in speech cases generally and in time, place, or manner cases in particular, is whether the government has adopted a regulation of speech because of disagreement with the message it conveys."[309] The requirement of content-neutrality minimizes the likelihood that a regulation will place identifiable speakers or views at a disadvantage in the marketplace of ideas. Nevertheless, the concern that majoritarian institutions, even when regulating speech in a content-neutral manner, will be less sensitive to the interests of disfavored speakers justifies a greater measure of scrutiny; the regulation of the time, place, and manner of speech, unlike regulations that only incidentally burden speech, requires an inquiry

---

306. Regulations that trigger heightened scrutiny beyond the *O'Brien* standard, as Robert Post has suggested, are more accurately characterized as directed at a medium of expression, such as its time, place, or manner, whereas regulations not directed as a medium of expression that nevertheless burden speech—such as the prohibition on destroying a draft card—are properly thought to involve only incidental burdens on speech. *See* Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1250–60 (1995).

307. *See, e.g.*, Hill v. Colorado, 530 U.S. 703, 725–26 (2000); Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989); Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 293–94 (1984); Heffron v. Int'l Soc'y for Krishna Consciousness, 452 U.S. 640, 647–48 (1981).

308. *See, e.g.*, *Hill*, 530 U.S. at 725–30; *Ward*, 491 U.S. at 797–99.

309. *Hill*, 530 U.S. at 719 (quoting *Ward*, 491 U.S. at 791).

into the adequacy of alternative means of communication not called for under the *O'Brien* test.[310]

Finally, for a content-neutral regulation that entirely prohibits communication of a speaker's preferred message—such as the statutory prohibition on disclosure of unlawfully intercepted communications at issue in *Bartnicki v. Vopper*[311]—the Court engages in straightforward balancing by weighing the interest in communicating the information against the countervailing governmental interest in protecting the privacy of communications.[312] What the Court found decisive in that case was that the communications at issue involved contentious labor negotiations involving a public school district and a union, with union officials making veiled threats during the intercepted conversation.[313] In that context, the Court held that "privacy concerns give way when balanced against the interest in publishing matters of public importance."[314] Although the content-neutral statutory objective posed no inherent threat to skew the marketplace of ideas—and for that reason triggered no talk of strict scrutiny—as applied to a context in which the marketplace of ideas might be impoverished if deprived of information having particular public importance, the balance tipped in favor of communication. Thus, it was the public's interest in obtaining the information, not merely the speaker's interest in conveying it, that drove the decision.

The Court has taken a similar approach to defamation. While acknowledging that the governmental interest in protecting individual reputations is sufficiently content-neutral to support regulation, the Court has balanced this interest against the threat to the free marketplace of ideas posed by the potential chilling effect of civil liability for defamation.[315] For defamation involving public figures, the Court's concern about preserving a vibrant marketplace of ideas has led it to limit defamation liability to cases involving intentional falsehood or reckless disregard for truth, but when the plaintiff is not a public figure, even when the speech at issue involves matters of public concern, the Court deems the reputational interests at stake to be weightier and has concluded that proof of no more than negligence is sufficient to support liability, although presumed damages cannot be awarded without proof of knowing falsity or reckless disregard for truth.[316] In contrast, when the publication at issue addresses no matter of public concern, the Court deems the threat to the marketplace of ideas to be reduced, and for that reason has permitted an award of presumed damages without proof of knowing or reckless falsity.[317]

---

310. *See, e.g.*, City of Ladue v. Gilleo, 512 U.S. 43, 56 (1994).

311. 532 U.S. 514 (2001).

312. *See id.* at 526–32. Admittedly, the Court in *Bartnicki* is a bit opaque about the standard of scrutiny that it is applying. For a useful explication of the brand of intermediate scrutiny utilized in *Bartnicki*, see Rodney A. Smolla, *Information as Contraband: The First Amendment and Liability for Trafficking in Speech*, 96 NW. U. L. REV. 1099, 1117–25 (2002).

313. *Bartnicki*, 532 U.S. at 518–19.

314. *Id.* at 534.

315. *See, e.g.*, Gertz v. Robert Welch, Inc., 418 U.S. 323, 340–42 (1974).

316. *See* Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 772–75 (1986); *Gertz*, 418 U.S. at 344–50.

317. *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 757–61

Accordingly, in the realm of content-neutral regulation, judicial scrutiny reflects pragmatic balancing, but is far more structured than the kind of ad hoc process roundly condemned by the purposivists. Judicial scrutiny is proportional to the likelihood that a regulation will skew the marketplace of ideas. When that likelihood increases, greater weight is placed on the side of liberty, not because the individual speaker's interests in unfettered communication are greater, but because the interest in a vibrant marketplace of ideas is more directly implicated. This pattern becomes even clearer by examining regulations that are triggered by the content of speech.

### *B. Content-Based Regulation and Free Trade in Ideas*

There was a time when the Court proclaimed that the trigger for strict judicial scrutiny of a challenged regulation was when it is based on the content of speech.[318] This blanket condemnation of content regulation did not last. For one thing, as the Court ultimately acknowledged, many unprotected categories of speech are properly defined by reference to the content of expression, such as obscenity, defamation, and fighting words.[319] For another, the Court came to endorse a form of content discrimination in its forum jurisprudence; the Court held that when the government creates a forum in which private persons can engage in communicative activities, albeit for a limited purpose, the government may regulate the content of speech in that forum as long as the regulations are reasonable in light of the underlying purposes of the forum and not an effort to suppress identifiable viewpoints.[320] Beyond that, as we have seen, the Court's balancing jurisprudence is itself sensitive to content—the outcome in *Bartnicki* and the degree of protection granted defendants in defamation actions turn on the content of the speech at issue.[321] Thus, a categorical rule regarding content discrimination as inherently suspect proved to be unsupportable.[322] Eventually, the Court concluded that content discrimination is not impermissible "so long as the nature of the content discrimination is such that there is no realistic possibility that official suppression of ideas is afoot."[323]

---

(1985) (plurality opinion); *id.* at 764 (Burger, C.J., concurring in the judgment); *id.* at 774 (White, J., concurring in the judgment).

318. *See, e.g.*, Police Dep't of Chi. v. Mosley, 408 U.S. 92, 99–102 (1972); LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12–2 to 12–3 (2d ed. 1988).

319. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 358–59 (2003); R.A.V. v. City of St. Paul, 505 U.S. 377, 382–83 (1992).

320. *See, e.g.*, Ark. Educ. Television Comm'n v. Forbes, 523 U.S. 666, 677–78 (1998); Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, 505 U.S. 672, 678–79 (1992); United States v. Kokinda, 497 U.S. 720, 730 (1990) (plurality opinion); Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 807–13 (1985); Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 46 (1983).

321. *See supra* text accompanying notes 311–17.

322. For academic criticism of the rule against content discrimination, see, for example, MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 87–126 (1984); Daniel A. Farber, *Content Regulation and the First Amendment: A Revisionist View*, 68 GEO. L.J. 727, 731–47 (1980); and Paul H. Stephan III, *The First Amendment and Content Discrimination*, 68 VA. L. REV. 203, 207–31 (1982).

323. *R.A.V.*, 505 U.S. at 390; *accord, e.g.*, Davenport v. Wash. Educ. Ass'n, 551 U.S.

Ultimately, the Court came to regard discrimination against disfavored speakers, subjects, or viewpoints, as the most serious type of threat to First Amendment values.[324] Strict scrutiny is required for "content discrimination [that] 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'"[325] In contrast, the Court treats seemingly content-based regulation of establishments offering sexually oriented entertainment as a content-neutral regulation of the time, place, or manner of speech subject to intermediate scrutiny when justified by reference to the harmful "secondary effects" of such establishments on the surrounding community as long as it leaves open sufficient alternative avenues for sexually oriented expression.[326] Similarly, seemingly content-based regulation of solicitation near health care facilities is treated as a time, place, or manner regulation when justified by reference to patient privacy as long as ample alternative avenues for expression are preserved.[327] Thus, even regulation triggered by the content of expression is subject to less demanding scrutiny when it is unlikely to unduly skew the marketplace of ideas because it advances a content-neutral governmental interest while permitting sufficient alternative methods of communication. In such cases, the threat to the integrity of the marketplace of ideas is limited—as in the time, place, or manner cases. It is when the government subjects identifiable speakers or viewpoints to regulatory burdens not imposed on others that a threat to the integrity of competition that judicial scrutiny becomes more demanding. In such cases, under the balancing metric discussed here, concerns about preserving the integrity of competition in the marketplace of ideas become more urgent.

Consider, for example, the difference between a content-neutral ban on residential picketing of the type that the Court is likely to uphold as a reasonable regulation of the time, place, or manner of speech,[328] and a discretionary system of permitting picketing upon payment of a fee set by local law-enforcement officials to recoup regulatory costs that the Court would be likely to treat as content-based and therefore subject to strict scrutiny because of the risk that the fee would be higher for unpopular speakers that might draw hostile audiences.[329] From the standpoint of an individual speaker unable to engage in his preferred mode of

---

177, 188–89 (2007).

324. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 898–99 (2010); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 828–29 (1995); *R.A.V.*, 505 U.S. at 392–93. Still, *Rosenberger* cautions that sometimes restrictions based on content, subject matter, or speaker can be proxies for viewpoint discrimination. 515 U.S. at 830–32.

325. *R.A.V.*, 505 U.S. at 387 (citation omitted) (quoting Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 116 (1991)); *accord, e.g.*, *Davenport*, 551 U.S. at 188. This was essentially the view put forward in some of the most powerful defenses offered of the rule against content discrimination. *See, e.g.*, Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 26–36 (1975); Stone, *supra* note 4, at 217–27; Geoffrey R. Stone, *Restrictions of Speech Because of Its Content: The Peculiar Case of Subject-Matter Restrictions*, 46 U. CHI. L. REV. 81, 101–03 (1978).

326. *See* City of L.A. v. Alameda Books, Inc., 535 U.S. 425, 433–42 (2002) (plurality opinion); City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 46–55 (1986).

327. *See* Hill v. Colorado, 530 U.S. 703, 719–30 (2000).

328. *See* Frisby v. Schultz, 487 U.S. 474, 481–88 (1988).

329. *See* Forsyth Cnty. v. Nationalist Movement, 505 U.S. 123, 133–36 (1992).

expression, it is far from clear which regulation is more odious. The ban on residential picketing may deprive the speaker of what he regards as an essential opportunity to confront an ideological opponent,[330] whereas the permit fee may involve a quite modest financial burden.[331] For the individual speakers subject to these regulations, the difference in their impact may not be great, but from the standpoint of the marketplace of ideas, the cost of content-based regulation with a potential to skew free trade in ideas is much higher. Content-neutral regulation, as we have seen, is generally structured to minimize the possibility that it will distort the marketplace of ideas in any systemic fashion. In contrast, an effective tax on unpopular speakers could create a significant skew in the marketplace of ideas. Accordingly, First Amendment doctrine requires much more rigorous justification for regulation of this character in light of its greater threat to First Amendment values.

To be sure, at first blush, the Court's skeptical treatment of regulation that harms disfavored speakers or viewpoints might seem to support the purposivist account. Nevertheless, as we have seen, the Court has emphasized that a censorial governmental motive is not required for strict scrutiny.[332] More fundamentally, the Court's emphasis on protecting identifiable speakers or viewpoints from disadvantageous regulation is consistent with balancing. Content regulation demands strict scrutiny when it threatens to skew the marketplace of ideas because in that context the systemic interests in free speech are at their height.

Nevertheless, there are times when First Amendment jurisprudence seems to abjure balancing. For example, the Court has held that the government cannot suppress expression as a means of avoiding giving offense to others,[333] promoting ideological unity,[334] or equalizing influence in the political process.[335] The Court has similarly held that the government cannot prevent adults from having access to nonobscene sexually oriented expression in order to protect children because "'[r]egardless of the strength of the government's interest' in protecting children, '[t]he level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox.'"[336] More generally, the Court tells us that "[t]he point of the First Amendment is that majority preferences must be expressed in

---

330. In *Frisby*, for example, the challenge to an anti-picketing ordinance was brought by litigants who wished to engage in orderly and peaceful picketing consistent with applicable laws governing noise and obstruction of public ways outside the home of a physician who performed abortions at facilities in nearby communities. *See* 487 U.S. at 476.

331. In *Forsyth County*, for example, the fee demanded was only $100. *See* 505 U.S. at 127.

332. *See supra* text accompanying note 27.

333. *See, e.g.*, United States v. Playboy Entm't Grp., 529 U.S. 803, 813 (2000); Texas v. Johnson, 491 U.S. 397, 408–09 (1989).

334. *See, e.g.*, United States v. Eichman, 496 U.S. 310, 315–18 (1990); *Johnson*, 491 U.S. at 410–20.

335. *See, e.g.*, Davis v. FEC, 128 S. Ct. 2759, 2773–74 (2008); Buckley v. Valeo, 424 U.S. 1, 48–49 (1976) (per curiam).

336. Reno v. ACLU, 521 U.S. 844, 875 (1997) (quoting Bolger v. Youngs Drugs Prods. Co., 463 U.S. 60, 74–75 (1983)) (second alteration in original)).

some fashion other than silencing speech on the basis of its content,"[337] and, thus, the government cannot "handicap the expression of particular ideas."[338] These statements have the flavor of First Amendment absolutism, not balancing.

Still, the seemingly absolutist elements of First Amendment doctrine, on inspection, turn out to be rather less absolutist than they might first appear. In each case in which the Court rejected a governmental interest as illegitimate and unworthy of balancing, the government effectively asserted an interest in skewing the marketplace of ideas. If the promotion of ideological unity were considered a legitimate governmental interest, for example, then First Amendment balancing would be emptied of content—the government could always undermine free trade of ideas by asserting its own interest in refashioning competitive balance in the market. The ability of sexually oriented expression to compete in the marketplace of ideas would be similarly circumscribed if only material fit for minors could be distributed. Beyond that, even these seeming absolutes can give way to balancing when a sufficiently compelling governmental interest comes into play that is not itself premised on an interest in altering competitive balance among competing ideologies.

For example, even though the Court sometimes says that the government cannot handicap the expression of particular ideas, we have seen that when the threat of violence becomes imminent, First Amendment protection ends even for those who advocate violent change to the existing social or political order.[339] First Amendment jurisprudence also permits the government to prohibit membership in an organization that advocates the violent overthrow of the government as long as each individual subject to the prohibition has a specific intent to achieve the violent overthrow of the government even when there is no imminent threat of violence.[340] Offers or conspiracies to engage in illegal activity are also unprotected even absent an imminent threat of illegal conduct.[341] These seem to be classic cases of content, indeed even viewpoint regulation—as well as regulation justified by the communicative or persuasive effects of the proscribed speech—but they are supported by unusually powerful governmental interests. The specific intent requirement, accompanied by judicial review to ensure that the evidence establishes that the defendant's speech has gone beyond a mere statement of belief into the realm of advocacy of action, is thought to provide sufficient protection of the individual interest in free speech. Whatever the threat to the marketplace of ideas posed by these regulations, given the government's conceded ability to prohibit the objective that inheres in such speech, there is simply too much danger in such speech to warrant constitutional protection. Similarly, even though the government cannot ordinarily prohibit speech on the ground that it will offend others, that protection is also at an end when violence becomes imminent,[342] or when the

---

337. R.A.V. v. City of St. Paul, 505 U.S. 377, 392 (1992).

338. *Id.* at 394.

339. *See supra* text accompanying note 15.

340. *See* Noto v. United States, 367 U.S. 290, 297–99 (1961); Scales v. United States, 367 U.S. 203, 228–29 (1961); Yates v. United States, 354 U.S. 298, 312–27 (1957), *overruled in part on other grounds by* Burks v. United States, 437 U.S. 1 (1978).

341. *See, e.g.*, United States v. Williams, 553 U.S. 285, 297–98 (2008).

342. *See* Feiner v. New York, 340 U.S. 315, 320–21 (1951).

speaker utilizes the kind of "fighting words" that are likely to provoke violence.[343] In such cases, again, unusually powerful governmental interests come into play, and what seems like an absolute gives way to pragmatic balancing.

Indeed, recently the Court upheld a content-based and even viewpoint-based regulation of speech under strict scrutiny, concluding that the statutory prohibition on providing "material support" to a foreign terrorist organization was valid even when applied to support for a terrorist organization coming in the form of speech because of the critical national security interests advanced by the prohibition.[344] At the same time, the Court stressed that the statute did not proscribe speech except when it was "coordinated with or under the direction of a designated foreign terrorist organization," thereby, "[m]ost importantly, avoid[ing] any restriction on independent advocacy, or indeed any activities not directed to, coordinated with, or controlled by foreign terrorist groups."[345] Independent advocacy, of course, implicates weightier liberty interests, and presumably for that reason the Court views its restriction as more problematic. The Court's willingness to uphold a statutory prohibition quite likely to be applied to disfavored speech or speakers—at least when particularly powerful liberty interests are not at stake—demonstrates that First Amendment jurisprudence is at its core about balancing and not categorical protection.[346]

---

343. *See, e.g.*, Virginia v. Black, 538 U.S. 343, 359 (2003); Texas v. Johnson, 491 U.S. 397, 409 (1989).

344. *See* Holder v. Humanitarian Law Project, 130 S. Ct. 2705, 2724–31 (2010). The Court did not expressly utilize the term "strict scrutiny," but stated:

> The law here may be described as directed at conduct . . . but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message. As we explained in *Texas v. Johnson*: "If the [Government's] regulation is not related to expression, then the less stringent standard we announced in *United States v. O'Brien* for regulations of noncommunicative conduct controls. If it is, then we are outside of *O'Brien*'s test, and we must [apply] a more demanding standard."

*Id.* at 2724 (alterations in original) (quoting Texas v. Johnson, 491 U.S. 397, 403 (1989)). In *Texas v. Johnson*, in turn, after rejecting the applicability of the *O'Brien* test to the flag-burning statute at issue, *see* 491 U.S. at 403–11, the Court explained that "Johnson's political expression was restricted because of the content of the message he conveyed. We must therefore subject the State's asserted interest . . . to 'the most exacting scrutiny.'" *Id.* at 412 (quoting Boos v. Barry, 485 U.S. 312, 321 (1988)).

345. *Humanitarian Law Project*, 130 S. Ct. at 2726, 2728.

346. A leading purposivist uses the imminence requirement in First Amendment jurisprudence, see *supra* text accompanying notes 15, 339, to support his argument against balancing on the ground that a regime of balancing would ban speech advocating violence on a showing that stops considerably short of imminence. *See* Rubenfeld, *supra* note 4, at 826–29. Yet, as we have seen, agreements, offers, or conspiracies to engage in illegal activity are unprotected even absent an imminent threat of illegal activity. *See supra* text accompanying notes 23, 341. Thus, speech advocating illegality that goes beyond mere statements of belief can be prohibited, at least when the speaker specifically intends to produce unlawful conduct. *Cf.* United States v. Williams, 553 U.S. 285, 298–99 (2008) ("To be sure, there remains an important distinction between a proposal to engage in illegal activity and the abstract advocacy of illegality. The Act before us does not prohibit advocacy of child pornography, but only offers to provide or requests to obtain it." (citations omitted)). Beyond

The First Amendment investigation reflects the same point. A First Amendment investigation is itself a form of content-based governmental action when the triggering event for an investigation is the content of expression—such as a speaker's advocacy of violence, albeit without a sufficient threat of imminent violence to render the advocacy unprotected. Yet, as we have seen, in cases such as *Branzburg* in which the Court has confronted First Amendment investigations, it has refused to impose strict scrutiny. These cases treat with investigations, not prohibitions, so the inhibitory effects on speech do not rise to the level of a prohibition, while the justification for recognizing a broad investigative power is compelling. Thus, pragmatic balancing explains why some government actions based on the content of speech, which may well disadvantage identifiable speakers or viewpoints, nevertheless do not trigger strict scrutiny.

Something similar can be observed in the Court's campaign finance jurisprudence—another type of content-based regulation. As we have seen, the Court has treated as illegitimate a governmental interest in regulating political speech as a means of equalizing influence in the political process.[347] Although this has led the Court to impose strict scrutiny on limitations on political speech, when it comes to limitations on contributions to political candidates, the Court has taken a different view, even though such regulation is no less content-based than an absolute prohibition on certain types of political expenditures. The Court has observed that the inhibition on speech is not so great when the government merely restricts the ability to give money to others rather than the ability to articulate one's own views and that the threat of corruption is greater for contributions than independent expenditures, and on that basis has applied a balancing test to contribution limitations that involves something less than strict scrutiny.[348] As we also have seen, the Court has taken a similar approach to campaign-finance

---

that, as we have seen, the Court has held that Congress may proscribe speech that offers material support to a foreign terrorist organization without requiring an imminent threat of violence or other unlawful conduct. Conversely, the requirement of an imminent threat of unlawful activity absent a properly supported finding of specific intent to produce unlawful activity reflects an effort to balance the likely chilling effects of a regime that afforded law-enforcement officials or courts substantial leeway to determine when speech is unacceptably likely to provoke violence or illegality:

> Strong and effective extemporaneous rhetoric cannot be nicely channeled in purely dulcet phrases. An advocate must be free to stimulate his audience with spontaneous and emotional appeals for unity and action in a common cause. When such appeals do not incite lawless action, they must be regarded as protected speech. To rule otherwise would ignore the "profound national commitment" that "debate on public issues should be uninhibited, robust, and wide-open."

NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1963)). For additional discussion of the potential chilling effects of criminalizing speech based on the speaker's purpose, see Eugene Volokh, *Crime-Facilitating Speech*, 57 STAN. L. REV. 1095, 1179–90 (2005).

347. *See supra* text accompanying note 335.

348. *See* Randall v. Sorrell, 548 U.S. 230, 246–49 (2006) (plurality opinion); McConnell v. FEC, 540 U.S. 93, 134–42 (2003), *overruled in part on other grounds by* Citizens United v. FEC, 130 S. Ct. 876 (2010); Nixon v. Shrink Mo. Gov't PAC, 528 U.S. 377, 386–89 (2000); Buckley v. Valeo, 424 U.S. 1, 23–38 (1976) (per curiam).

disclosure requirements, upholding them under a balancing test that endeavors to assess the degree to which they may exert a chilling effect disproportionate to their justification.[349] The rationale for this relatively lenient treatment is that disclosure requirements are thought to impose a less serious burden on liberty interests: "[D]isclosure requirements may burden the ability to speak, but they . . . do not prevent anyone from speaking."[350] This is yet another example of a challenged government restriction that creates an inhibition on speech less potent than an outright prohibition; and as a consequence the Court is more willing to engage in something approaching ad hoc balancing.

In short, the structure of judicial review of content-based regulation reflects a pragmatic balance. Given the cost to the marketplace of ideas of viewpoint-based regulation of expression—whether an intentional effort at censorship or an unintended result of content regulation likely to impose differential burdens on some speakers or viewpoints—strict scrutiny tilts the balance decisively toward free speech by requiring a showing that the challenged regulation is essential to an unusually important government interest. Still, strict scrutiny reflects a balancing process—it does not ignore the government's interests, but instead requires an especially clear showing before that interest will trump free-speech interests. When governmental action reflects a risk of censorial motive but stops short of an outright prohibition, however, even content-based governmental action does not trigger strict scrutiny.

### *C. The Role of Ad Hoc Balancing in First Amendment Doctrine*

The rather well-articulated structure of balancing in First Amendment doctrine weakens the objections to balancing. As we have seen, large swaths of First Amendment doctrine sharply circumscribe judicial discretion by developing a marketplace metric within which balancing occurs in a structured fashion.

To the preceding account of First Amendment doctrine as reflecting structured balancing, one might object that the structure of First Amendment doctrine is no less consistent with the pragmatic than the purposivist account. As we have seen, purposivists explain the heightened scrutiny afforded content-based regulation as reflecting the greater risk that such regulation reflects official hostility to disfavored speech or speakers.[351] Thus, the purposivist account likely is at least as satisfactory an explanation for the tiers of scrutiny found in First Amendment doctrine as the account offered above. Yet, the orderly looking spectrum of regulation described by the purposivists cannot accommodate the totality of First Amendment doctrine. The formal standards of scrutiny found in First Amendment doctrine involve

---

349. *See supra* text accompanying note 238. The applicable "standard [of scrutiny] 'requires a substantial relation between the disclosure requirement and a sufficiently important governmental interest.' To withstand this scrutiny, 'the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" Doe v. Reed, 130 S. Ct. 2811, 2818 (2010) (quoting *Citizens United*, 130 S. Ct. at 914; Davis v. FEC, 128 S. Ct. 2759, 2774 (2008) (citations and internal quotations omitted)).

350. *Doe*, 130 S. Ct. at 2818 (quoting *Citizens United*, 130 S. Ct. at 914) (alterations in original).

351. *See supra* text accompanying notes 4–11.

governmental prohibitions or sanctions. For that reason, their inhibitory effect can be assumed to be roughly constant, and the appropriate standard of review can therefore be based on the extent to which a challenged prohibition could be thought to skew free trade in ideas. In contrast, as we have seen, when it comes to governmental conduct that does not involve a prohibition but instead presents a "chilling effect," First Amendment doctrine seems to offer little more than ad hoc balancing that endeavors to compare the extent of the inhibition on speech to the governmental interests at stake. Ad hoc balancing is the order of the day regardless of the risk that the regulation at issue is premised on an improper governmental motive.

When the government imposes something less than a prohibition on free speech—such as in a First Amendment investigation—it seems impossible to reach an acceptable conclusion without considering the degree of inhibition imposed by the challenged practice as well as its justification. The regulation at issue in *Meese v. Keene*, for example, may be rife with the risk of improper motive, but its inhibitory effect was limited. The initiation of grand jury investigations may be similarly prone to improper motives, but the consequences of constraining the government's ability to investigate are unacceptable, and the inhibitory effect of an investigation, while perhaps greater than the mandated disclosures in *Meese v. Keene*, is limited as well. In this fashion, ad hoc First Amendment balancing seems inescapable, at least in contexts in which it is difficult to generalize about the extent to which a government practice is likely to inhibit free speech.

## CONCLUSION

One might think that the account of free speech doctrine advanced above suggests that First Amendment jurisprudence is about nothing other than pragmatic balancing. That conclusion, however, would overstate matters considerably.

First Amendment jurisprudence is not confined to pragmatic considerations; it is replete with all of the modalities found in Philip Bobbit's typology of constitutional arguments,[352] including historical,[353] ethical,[354] and structural argument.[355] Yet, these modalities of argument provide little basis for identifying the limits to First Amendment protection, as the First Amendment investigation makes plain. It is in identifying the limits of constitutional protection that pragmatic balancing becomes crucial.

---

352. *See* PHILIP BOBBIT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 3–103 (1982); PHILIP BOBBIT, CONSTITUTIONAL INTERPRETATION 11–22 (1991).

353. *See, e.g.*, *Citizens United*, 130 S. Ct. at 906; Minneapolis Star & Tribune Co. v. Minn. Comm'r of Revenue, 460 U.S. 575, 583–85 (1983); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 276 (1963); Talley v. California, 362 U.S. 60, 64–65 (1960); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713–15 (1931).

354. *See, e.g.*, Texas v. Johnson, 491 U.S. 397, 419 (1989); Cohen v. California, 403 U.S. 15, 24–25 (1971); W. Va. St. Bd. of Educ. v. Barnette, 319 U.S. 624, 638–42 (1943).

355. *See, e.g.*, Hustler Magazine v. Falwell, 485 U.S. 46, 50–51 (1988); Landmark Commc'ns, Inc. v. Virginia, 435 U.S. 829, 838–39 (1978); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765, 791–92 (1978); *N.Y. Times Co.*, 376 U.S. at 269–71; Stromberg v. California, 283 U.S. 359, 369 (1931).

Historical argument, as we have seen, provides little basis for assessing the extent of the First Amendment's protections because of the lack of clarity about the extent to which the bad-tendency test permitted government regulation of speech and the press in the framing era.[356] The problem with ethical and structural argument, in turn, is that they are by their nature absolutist—any speech within the scope of the ethical or structural principle thought to justify First Amendment protection is immune from regulation. Consider, for example, Robert Bork's view that political speech is entitled to First Amendment protection.[357] As we have seen, this is not much of an historical argument,[358] but it is a perfectly sound structural argument given the centrality of political speech to the republican form of government created by the Constitution.[359] Nevertheless, because it takes a categorical rather than a balancing approach to the First Amendment, the structural argument for protection of political speech provides absolute immunity from regulation within the protected category. On this view, for example, the government seemingly would be unable to conduct any investigation of those who advocate violence on political grounds because of the chilling effect that such an investigation might have on political speech—a view utterly at odds with both precedent and reason. Indeed, as we have seen, even the advocates of First Amendment restrictions on investigations refrain from such absolutism.[360] Yet, the only other option for a structuralist would be to decide that a mere chilling effect, unaccompanied by any type of sanction, does not amount to an "abridgement" of free speech. As we have seen, however, this position is no more consistent with precedent, and little more attractive, given the potential for truly abusive investigations to chill political dissent. Only pragmatic balancing can begin to provide a satisfactory account of the "chilling effect" problem. Any account of First

---

356. *See supra* Part I.D. A useful example is provided by the Court's recent decision invalidating statutory limitations on corporate-funded electioneering in *Citizens United*, 130 S. Ct. 876. In their separate opinions, Justice Scalia and Justice Stevens engaged in a lively debate about whether the framing-era suspicion of corporations provided relevant historical evidence of the original meaning of the First Amendment. *Compare id.* at 925–29 (Scalia, J., concurring) (arguing that there is no framing-era evidence supporting regulation based on the identity of the speaker), *with id.* at 948–52 (Stevens, J., dissenting) (arguing that in the framing era comprehensive regulation of corporations was thought warranted). Whatever one makes of this debate, however, given the breadth of regulatory power under the framing-era bad-tendency test and the ample evidence that Congress believed that corporate-funded electioneering had a corrupting effect, *see id.* at 961–68, it would seem easy to uphold the regulation at issue in *Citizens United* under the framing-era bad-tendency test except for the many difficulties, explored in Part I above, in determining whether the bad-tendency test, at least in its broadest formulations, should be considered binding as a matter of original public meaning.

357. *See supra* text accompanying note 125–26.

358. *See supra* text accompanying notes 127–28.

359. For leading structural accounts of the First Amendment along these lines, see, for example, JOHN HART ELY, DEMOCRACY AND DISTRUST 105–16 (1980); ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 1–27 (Lawbook Exchange 2000) (1948); Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. B. FOUND. RES. J. 521, 526–65.

360. *See supra* text accompanying note 242.

Amendment jurisprudence that ignores pragmatic balancing is, at best, seriously incomplete.

Interestingly, Judge Bork, one of the most rigorous originalists of our time,[361] eventually repudiated his position that the First Amendment protects only political speech, concluding that a rule protecting only political speech would be too easily circumvented, and conceding that much nonpolitical speech ultimately advances the search for political truth as well.[362] That sounds like pragmatism to me. When it comes to the First Amendment, one finds pragmatism even in the most unexpected places.

---

361. One observer characterized Judge Bork as "the leading contemporary advocate of originalist strict construction." Glenn H. Reynolds, *Penumbral Reasoning on the Right*, 140 U. PA. L. REV. 1333, 1338 (1992).

362. *See* BORK, *supra* note 128, at 333.