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Burt Neuborne

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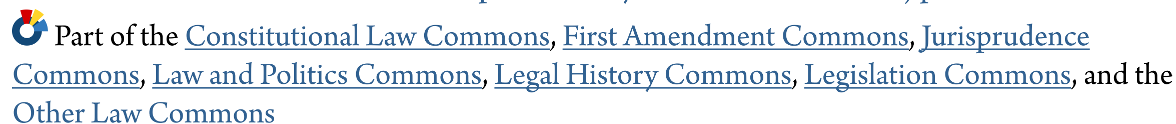
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WHERE'S THE FIRE?

*Burt Neuborne**

INTRODUCTION

Freedom of speech is priceless, but distressingly fragile. Life—and law—would be much simpler if we could react to free speech's importance and fragility by granting it absolute legal protection. Since, however, absolute protection of speech is not—and should not be—a serious option, we face the legal realist challenge of erecting a First Amendment legal structure capable of providing real-world protection to highly controversial speech, often by weak speakers, without closing the door to government regulation—even prohibition—of seriously harmful speech.

Developing elegant definitions of protected and unprotected speech, while important, would not be enough to assure widespread, real-world enjoyment of a right to speak freely. Given the uncertainty and expense that necessarily exists in applying fact-dependent complex rules in protean factual settings, many potential speakers would avoid being drawn into unpredictable and expensive legal waters; many government officials would be tempted to invoke the complex, fact-dependent rules for the wrong reasons; and many judges might get the facts and the law wrong. To be effective in protecting speech, I believe that any system of speech regulation must provide breathing space between the rule itself, and the rule's application. That is why the emergence of modern First Amendment "strict scrutiny" in *Brandenburg v. Ohio*, *Cohen v. California*, and *Texas v. Johnson* was such a welcome development.[1] When the legal

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*Norman Dorsen Professor in Civil Liberties, New York University School of Law.

[1] I use the term "strict scrutiny" in this article as an amalgam of three historic First Amendment tests: (a) incitement to imminent unlawful action; (b) speech causing a clear and present danger of serious harm; and (c) a ban on resorting to

dust clears, modern First Amendment strict scrutiny forces the government to justify an act of censorship by persuading a reviewing judge that regulation of speech is the least drastic means of advancing a compelling governmental interest in dealing effectively with an imminent threat of serious harm. If the government cannot carry its persuasion burden on each of: (1) the compelling nature of the government's interest; (2) the absence of less drastic means to protect the interest; (3) the effectiveness of censorship in dealing with the problem; (4) the imminence, indeed virtual certainty of the threatened harm; (5) a close causal link between speech and feared harm; and (6) the seriousness of the harm, the speech is deemed protected. Such a formula, with at least six trap doors through which the government can fall, relies less on precise definition, than on deflection of error. Strict scrutiny operates to radically deflect regulatory error on all six issues in favor of free speech; just as the due process requirement of "proof beyond a reasonable doubt" in a criminal case radically deflects prosecutorial error in favor of liberty.[2] Just as we profess ourselves willing under a reasonable doubt standard to see many guilty persons acquitted in order to minimize the likelihood that an innocent defendant will suffer an unjust conviction, under First Amendment strict scrutiny we are willing to accept a considerable degree of potentially harmful, unprotected speech in order to assure that no protected speech is suppressed.

Not surprisingly given the doctrine's intensely speech-protective nature, since the emergence of modern strict scrutiny in *Texas v. Johnson*, only two government-imposed speech

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censorship unnecessarily. The three tests merged during the twenty years from *Brandenburg* to *Texas v. Johnson*, emerging as the strict scrutiny standard of review described *infra*. *See* Texas v. Johnson, 491 U.S. 397, 399, 404 (1989) (invalidating flag burning conviction); Cohen v. California, 403 U.S. 15, 26 (1971) (invalidating conviction for wearing a jacket emblazoned with the words "Fuck the Draft" in a courthouse); Brandenburg v. Ohio, 395 U.S. 444, 447–48 (1969) (per curiam) (striking down criminal syndicalism conviction). The operation of First Amendment strict scrutiny doctrine is described briefly *infra* at note 12.

[2] The error deflection role of the guilt beyond a reasonable doubt standard was articulated by Justice Brennan in his opinion for the Court in *In re Winship*, 397 U.S. 358, 363–64 (1970), and reiterated in Justice Harlan's influential concurrence. *In re* Winship, 397 U.S. 358, 372–74 (1970) (Harlan, J. concurring).

restrictions—a ban on electioneering too close to the polls and a ban on personal campaign fundraising by sitting judges—have survived modern "strict scrutiny."[3]

Moreover, in free speech settings where traditional "as applied" application of strict scrutiny risks being ineffective in protecting vulnerable, out-of-court speakers who may lack the resources and/or sophistication to seek judicial free speech protection on their own, the Court has expanded its speech-protective reach by enunciating five First Amendment procedural doctrines—the ban on prior restraints, overbreadth, vagueness, due process, and strict equality—that focus, not on the protect nature of the speech before the Court, but on the procedures used by the government to regulate the speech.[4] In my experience, the First Amendment procedural corollaries have operated over the years to make vibrant free speech protection a reality for many vulnerable speakers who otherwise might well have fallen through the system's substantive cracks.[5] That is all to the good.

I believe, however, that the First Amendment procedural corollaries—especially overbreadth, vagueness, and equality—are being invoked reflexively today in cases like *R.A.V. v. City of St. Paul*, *United States v. Stevens*, and *Reed v. Gilbert*, discussed in Parts I and III,[6] in cases and settings where the application of strict

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[3] Williams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1662 (2015) (finding the statute prohibiting judges and judicial candidates from personal solicitation of campaign funds constitutional); Burson v. Freeman, 504 U.S. 191, 193, 195 (1992) (finding the statute prohibiting electioneering—solicitation of votes and displaying or distributing campaign materials within 100 feet of polling places—constitutional). It is possible to characterize *Hill v. Colorado*, 530 U.S. 703 (2000) (upholding ban on "knowingly approaching" persons for purposes of leafletting or speaking in vicinity of abortion clinic) as a third example. I do not, however, read Justice Steven's majority opinion as applying strict scrutiny.

[4] The genesis and operation of the five First Amendment procedural corollaries are briefly described *infra* in Parts II and III.

[5] *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 567–68, 582 (1974) (invalidating flag desecration statute on its face); Police Dep't of Chicago v. Mosely, 408 U.S. 92, 92–94 (1972) (invalidating anti-picketing statute on its face); Thornhill v. Alabama, 310 U.S. 88, 91–92, 101 (1940) (invalidating anti-picketing statute on its face).

[6] Reed v. Gilbert, 135 S. Ct. 2218, 2224 (2015) (invalidating restrictions on size and placement of signs); United States v. Stevens, 559 U.S. 460, 464–67, 482

scrutiny to the speech before the Court would be fully capable of providing effective free speech protection to all concerned. In the absence of a showing that vulnerable out-of-court speakers or hearers exist who would be unlikely to be able to assert their own free speech rights effectively, I believe that it is both unnecessary and unwise to resort to facial procedural review at the cost of: (1) impeding the case-by-case development of substantive First Amendment doctrine; and (2) providing potentially unprotected speakers with an unjust windfall.

Part I of this article provides a snapshot of the current state of free speech protection, briefly noting the seminal cases, and summarizing free speech jurisprudence since the emergence of modern strict scrutiny in *Brandenburg*, *Cohen v. California*, and *Texas v. Johnson.* Part II reviews the speech-protective rules—both facial and as applied—that First Amendment lawyers like me routinely invoke in modern free speech cases. Part III briefly describes the five First Amendment procedural corollaries and the seminal cases in which the Court first recognized them. I argue that, given the purpose for which they were created, the procedural corollaries, especially First Amendment overbreadth, vagueness, and equality, should be deployed facially only in settings where the free speech rights of vulnerable, out-of-court speakers or hearers are endangered by the very existence of flawed First Amendment regulatory procedures. In the absence of a need to protect vulnerable out-of-court speakers, I believe the Court should be reluctant to provide a procedural windfall to marginal speakers who's own speech might well be subject to lawful regulation under strict scrutiny. Speakers like the cross burners in *R.A.V. v. City of St. Paul*, and the purveyors of cruelty to animals in *United States v. Stevens*, should, I believe, rise and fall on their own strict scrutiny free speech merits. Why give them a procedural windfall?

(2010) (overturning conviction for display of material depicting torture of small animals); R.A.V. v. City of St. Paul, 505 U.S. 377, 379, 381 (1992) (overturning conviction for cross burning on sidewalk abutting black family's residence). I discuss *R.A.V.* briefly in *infra* Part I, and discuss *Stevens* and *Reed* briefly in *infra* Part III.

I. THE CURRENT STATE OF FREE SPEECH PROTECTION

The provocative, and to my mind, somewhat alarmist title of this symposium, "Free Speech Under Fire: The Future of the First Amendment," implies that freedom of speech is currently under siege in the United States. I believe, to the contrary, that, despite the election of Donald Trump as President, legal protection of our First Amendment freedoms has never been more secure. We live, today, in a kaleidoscopic political, cultural, religious, information, and entertainment bazaar unmatched in human history. Public support for the idea of free speech has never been higher.[7] Anchored by Justice Anthony Kennedy,[8] we have never had a more speech-protective Supreme Court.[9] In the quarter-century since the iconic

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[7] The annual 2015 Newseum poll of attitudes affecting the First Amendment reports strong support for free speech by over 75% of the population. *See* NEWSEUM INST., THE 2015 STATE OF THE FIRST AMENDMENT 14–15 (2015), http://www.newseuminstitute.org/wp-content/uploads/2015/07/FAC_SOFA15_report.pdf.

[8] *See* Ashutosh Bhagwat & Matthew Struhar, Symposium, *Justice Kennedy's Free Speech Jurisprudence: A Quantitative and Qualitative Analysis*, 44 MCGEORGE L. REV. 167, 168–69 (2013) (demonstrating Justice Kennedy's strong commitment to the protection of free speech). Despite Justice Kennedy's very distinguished free speech record, he has: (1) restricted the ability of public employees to criticize their bosses. Garcetti v. Ceballos, 547 U.S. 410, 413, 421 (2006) (denying free speech protection to assistant prosecutor who publicly questioned the accuracy of facts in an application for a search warrant); and (2) acquiesced in cases severely restricting the free speech rights of high school students, prisoners, and labor unions. *See* Knox v. Serv. Emps., 132 S. Ct. 2277, 2284, 2296 (2012) (invalidating special assessment for political uses imposed by public employee union); Morse v. Frederick*,* 551 U.S. 393, 397–98 (2007) (upholding ten-day suspension of student for displaying sign at school-supervised off campus event)); Beard v. Banks, 548 U.S. 521, 524–25 (2006) (upholding policy of denying newspapers and magazines to "worst behaving" prisoners); *see also* Holder v. Humanitarian Law Project, 561 U.S. 1, 7–8 (2010) (banning peaceful association with foreign groups labelled as terrorist); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260 (1988) (treating principal as publisher of high school newspaper).

[9] The authors of the McGeorge Law Review article, Ashutosh Bhagwat and Matthew Struhar, discussed at *supra* note 8, calculate that the Supreme Court decided 147 First Amendment issues between 1988-2013; ruling in favor of the First Amendment more than fifty percent of the time. *See* Bhagwat & Struhar, *supra* note 8, at 168–69.

five-four decisions in the flag burning cases,[10] both the liberal and conservative wings of the Court[11] have enthusiastically applied First Amendment "strict scrutiny" to forge a potent free speech jurisprudence.[12]

What is—and should be—under fire, though, is the misuse of a potent free speech clause and its five procedural corollaries as modern substitutes for the discredited doctrine of substantive due

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[10] *See* United States v. Eichman, 496 U.S. 310, 312 (1990) (invalidating federal flag desecration statute); Texas v. Johnson, 491 U.S. 397, 399 (1989) (invalidating Texas flag desecration statute).

[11] I characterize five of the Justices who were appointed by Republican Presidents (Chief Justice Roberts and Justices Scalia, Thomas, Alito, and Kennedy) as "conservatives;" and the four appointed by Democratic Presidents (Justices Ginsburg, Breyer, Sotomayor, and Kagan) as "liberals." The Republican = conservative; Democrat = liberal label is, of course, subject to important exceptions. Earl Warren, John Paul Stevens, Harry Blackmun, and David Souter were appointed by Republican Presidents, but evolved into liberal Justices, Lawrence Baum & Neal Devins, *Ideological Imbalance*, SLATE (Mar. 17, 2016), http://www.slate.com/articles/news_and_politics/jurisprudence/2016/03/democrats_always_pick_moderates_like_merrick_garland.html. Byron White was appointed by President Kennedy, but occasionally cast conservative votes. Lyle Denniston, *The Mystery of Justice Byron White*, NAT'L CONST. CTR. (May 3, 2012), http://blog.constitutioncenter.org/2012/05/the-mystery-of-justice-byron-white/. Despite the mavericks, Political party affiliation, especially in today's polarized climate, often signals something important about a Justice's likely voting pattern in hard constitutional cases. *See* Burt Neuborne, Lecture, The Cooper Union, *Three Constitutions: Republican; Democratic; and Consensus*, YOUTUBE (Jan. 11, 2013), https://www.youtube.com/watch?v=9PhiyuMEU-I.

[12] For recent examples of First Amendment strict scrutiny in action, see *McCutcheon v. Fed. Election Comm'n*, 134 S. Ct. 1434 (2014) (invalidating aggregate ceiling on campaign contributions in single year); and *United States v. Alvarez*, 132 S. Ct. 2537 (2012) (invalidating criminal conviction for having falsely claimed to have been awarded the Congressional Medal of Honor). The seminal modern applications of strict scrutiny took place in *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam) (striking down criminal syndicalism conviction), *Cohen v. California*, 403 U.S. 15 (1971) (invalidating conviction for wearing a jacket emblazoned with the words "Fuck the Draft" in a courthouse); and *Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating flag burning conviction). In cases like *Hazelwood School District*, *Morse*, *Garcettii*, and *Beard*, discussed in *supra* note 8, speakers at the bottom of a hierarchy, like high school students, prisoners, and public employees, appear to enjoy diminished First Amendment protection. Their speech does not appear to qualify for strict scrutiny.

process.[13] Until 1937, a majority of the Supreme Court repeatedly invoked the concept of substantive due process as an all-purpose judge-made deregulatory device, repeatedly blocking efforts by Congress and state legislatures to enact economic legislation protecting the weak against the powerful.[14] While the bulk of substantive due process cases arose in an economic context, two of the Court's earliest efforts to protect what we would, today, see as First Amendment freedoms—the right to educate your child in a religious school, and the right to study and teach the German language—were decided during the 1920s as a matter of substantive due process.[15]

As early as 1925, however, in *Gitlow v. New York*, Justices Holmes and Brandeis, concerned over the open-ended nature of substantive due process, persuaded the Court that the free speech clause of the First Amendment applied both to the states (through the Fourteenth Amendment) and to the federal government, providing the Court with a textually based alternative to the amorphous idea of substantive due process protection.[16] Once

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[13] In a nutshell, the concept of substantive due process ascribes a judicially-defined substantive component to the protection of "liberty" in the Due Process Clauses of the Fifth and Fourteenth Amendments, preventing government from interfering with anything falling within a judge's understanding of "liberty," even when the government uses scrupulously fair procedures. For a classic description of the evolution of substantive due process, see generally EDWARD S. CORWIN, LIBERTY AGAINST GOVERNMENT: THE RISE, FLOWERING AND DECLINE OF A FAMOUS JUDICIAL CONCEPT (1948).

[14] For well-known applications of substantive due process in economic contexts, see *Lochner v. New York*, 198 U.S. 45, 64 (1905) (invalidating 60-hour maximum on baker's workweek); *Adair v. United States*, 208 U.S. 161, 180 (1908) (invalidating federal statute banning "yellow dog" contracts promising not to join union); *Coppage v. Kansas*, 236 U.S. 1, 26 (1915) (invalidating state ban on "yellow dog" contracts); and *Adkins v. Children's Hospital*, 261 U.S. 525, 562 (1923) (invalidating minimum wage statute).

[15] Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925) (invalidating ban on educating children in religious schools); Meyer v. Nebraska, 262 U.S. 390, 402 (1923) (invalidating restriction on study of German).

[16] Gitlow v. New York, 268 U.S. 652, 667 (1925) (upholding constitutionality of New York's criminal syndicalism statute under the First Amendment); *see also id.* at 672 (Holmes, J., dissenting) (noting that First Amendment applies to New York State through the Due Process Clause of the Fourteenth Amendment). Prior to the enactment of the Fourteenth Amendment,

Supreme Court protection of religious and intellectual freedom became anchored in the text of the First Amendment, it became unnecessary in most noneconomic settings to resort to substantive due process.[17] Instead, in noneconomic settings, the Court concentrated on enforcing "fundamental" provisions of the Bill of Rights[18] deemed binding on the states through "selective incorporation" by virtue of the Fourteenth Amendment's Due Process Clause.[19] In 1937, beginning with *NLRB v. Jones & Laughlin Steel Co.*,[20] the Supreme Court dramatically restricted the deregulatory reach of substantive due process in an economic context, ending its use as a wide-ranging device blocking regulation of the market to protect weak participants.

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the Court had ruled that the Bill of Rights binds the federal government, but not the states. Barron v. City of Baltimore, 32 U.S. 243, 250–51 (1833) (holding that the First Amendment does not bind state or local government).

[17] *See generally Gitlow*, 268 U.S. at 667 (1925) (subjecting New York Criminal Syndicalism Statute to First Amendment scrutiny); McDonald v. City of Chicago, 561 U.S. 742, 743 (2010) (holding Second Amendment fully applicable to states).

[18] *See* United States v. Carolene Prods., 304 U.S. 144, 147, 152 n. 4 (1938) (promising vigorous Supreme Court protection of "enumerated rights," and the rights of "discrete and insular minorities").

[19] For the origins of "selective incorporation," see *Twining v. New Jersey*, 211 U.S. 78 (1908); *Palko v. Connecticut,* 302 U.S. 319 (1937); *Adamson v. California*, 332 U.S. 46 (1947). For the history of "selective incorporation," see *McDonald v. City of Chicago*, 561 U.S. 742, 791 (2010), applying the Second Amendment to the states. The process of selective incorporation substitutes those "fundamental" textual protections of the Bill of Rights deemed necessary for a free society for an amorphous, judge-made idea of liberty. As Justice Thomas' perceptive separate opinion in *McDonald* demonstrates, both substantive due process and selective incorporation ultimately rest on highly subjective judicial decision-making. *McDonald*, 561 U.S. at 811 (Thomas, J., concurring in the judgment). Justice Thomas argued for overruling the *Slaughter-House Cases,* 83 U.S. 36 (1872), making possible a renaissance of the Fourteenth Amendment's "privileges and immunities" clause as the source of constitutional limits on state behavior. *Id.* at 851–52 (Thomas, J., concurring in the judgment). It's hard to see, though, why the judicial process of giving meaning to the words "privileges and immunities" would be less subjective than giving meaning to the word "liberty" in enforcing substantive due process, or deciding what is "fundamental" enough to qualify for selective incorporation.

[20] Nat'l Labor Relations Bd. v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (upholding constitutionality of National Labor Relations Act).

While the modern Court has sporadically invoked substantive due process in a noneconomic context to protect a vulnerable individual against majority oppression,[21] and while the Court's privacy jurisprudence may be nothing more than substantive due process in disguise,[22] the modern Court has been extremely reluctant to embrace the judge-made, open-ended nature of substantive due process.[23] In recent years, though, I fear that five Supreme Court Justices—Chief Justice Roberts, and Justices Scalia, Kennedy, Thomas and Alito—have misread seven of the ten words that comprise the First Amendment's free speech clause [24] as a twenty-first century version of pre-1937 economic substantive due process, repeatedly construing the First Amendment as a broad deregulatory device protecting powerful speakers, with little or no concern for the consequences of deregulation on the weak.[25]

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[21] *See, e.g.*, Moore v. City of East Cleveland, 431 U.S. 494 (1977) (invoking substantive due process to protect the right of close family members to live together is protected by substantive due process).

[22] *See* Robert G. Dixon, Jr., *The "New" Substantive Due Process and the Democratic Ethic: A Prolegomenon*, 1976 BYU L. REV. 43, 45 (1976); Louis Henkin, *Privacy and Autonomy,* 74 COLUM. L. REV. 1410, 1410 (1974); Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 994 (1979).

[23] *See* Washington v. Glucksberg, 521 U.S. 702, 720 (1997) (rejecting right of assisted suicide); Michael H. v. Gerald D., 491 U.S. 110, 111 (1989) (rejecting substantive due process claim by biological father).

[24] The free speech clause of the First Amendment states: "Congress shall make no law . . . abridging the freedom of speech." U.S. CONST. amend. I. The current Court tends to ignore the three words "the freedom of," a legal abstraction requiring judgment about what falls inside or outside the "freedom of speech," in favor of the more absolute "Congress shall make no law abridging . . . speech." BURT NEUBORNE, MADISON'S MUSIC ch. 3 (2015).

[25] *See, e.g.*, McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1461–62 (2014) (invalidating the generous ceiling on the sums an individual can contribute to federal candidates in a single year); Ariz. Free Enter. Club v. Bennett, 564 U.S. 721 (2011) (invalidating campaign subsidies designed to match the spending of a well-funded candidate); Davis v. Fed. Election Comm'n, 554 U.S. 724 (2008) (invalidating efforts to allow ordinary candidates to keep pace with the spending of hugely wealthy opponents); Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (striking down efforts to wall-off vast corporate wealth from political campaigns); R.A.V. v. City of St. Paul, 505 U.S. 377 (1992) (complicating efforts to shield vulnerable hearers from face-to-face hate speech); McCullen v. Coakley, 134 S. Ct. 2518, 2540–41 (2014) (striking down a law

The era of substantive due process should have taught us that excessive deregulation of important activities—even speech—risks a Hobbesean world where the strong do what they will, and everyone else suffers what they must. Speech is no exception. As with any excessive commitment to deregulation, the elimination of government as a regulatory force creates a regulatory power vacuum, enabling extremely powerful speakers to leverage their words into disproportionate and, occasionally, destructive power.

Justices Ginsburg, Breyer, Sotomayor and Kagan have, on the other hand, rejected the purely deregulatory approach to free speech.[26] Instead, as the dissents in *McCutcheon*; *Arizona Free Enterprise*, and *Citizens United* demonstrate, they have read the First Amendment as codifying an aspirational ideal that permits—indeed, sometimes encourages—carefully limited government regulation of extremely powerful speakers in aid of the Founders' First Amendment vision of a "city on the hill:" a polity of free thought and respect for conscience; robust and vigorous political discussion; egalitarian self-government; individual self-realization; imaginative artistic endeavor; reciprocal toleration; and mutual respect.

In short, unlike the five deregulatory Justices, the four aspirational Justices worry about the consequences of a wholly

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aimed at shielding vulnerable women entering an abortion clinic from being forced to engage in face-to-face confrontations with opponents of abortion); Brown v. Entm't Merchs. Ass'n, 564 U.S. 786 (2011) (invaliding bans on marketing violent, misogynistic video games to children); United States v. Stevens, 559 U.S. 460 (2010) (striking down the ban on movies depicting the torture and death of small animals); Elonis v. United States, 135 S. Ct. 2001, 2013 (2015) (complicating the imposition of criminal punishment for publishing thinly-veiled threats on the Internet aimed at an ex-spouse); United States v. Alvarez, 132 S. Ct. 2537 (2012) (blocking efforts to punish willful lying about receiving the Congressional Medal of Honor); Snyder v. Phelps, 562 U.S. 443 (2011) (eliminating common law limits on virulent anti-gay demonstrations carefully timed to enhance the grief of families burying young servicemen killed in Afghanistan).

[26] *See, e.g.*, *McCutcheon*, 134 S. Ct. at 1465 (Breyer, J., dissenting) (defending constitutionality of aggregate contribution limits as needed to prevent corruption and undue influence); *Ariz. Free Enter.*, 564 U.S. at 755 (Kagan, J., dissenting) (defending constitutionality of matching fund subsidy program)); *Citizens United*, 558 U.S. at 393–94 (Stevens, J., dissenting) (defending constitutionality of ban on for-profit corporate electoral spending).

deregulated speech process for American democracy and the society it serves.[27] Most of the time, the aspirational and deregulatory Justices agree about the importance of protecting free speech. That is why both wings of the Court have repeatedly applied the speech-protective "strict scrutiny" formula in cases like *McCutcheon v. FEC*, *Arizona Free Enterprise Club v. Bennett*, *Davis v. FEC*, *Citizens United v. FEC*, *R.A.V. v. St. Paul*, *McCullen v. Coakley*, *Brown v. Entertainment Merchants' Association*, *United States v. Stevens*, *Elonis v. United States*, *United States v. Alvarez*, and *Snyder v. Phelps*. However, as the dissents in each of those cases demonstrate, applying strict scrutiny is not always a simple matter. It forces a Justice to decide, at a minimum, what constitutes a compelling governmental interest, whether less drastic means exist, and whether a speech restriction is necessary to avoid an imminent and highly likely harm. Despite the complexity of the task, though, First Amendment strict scrutiny enjoys broad, and well-deserved, support. One can agree or disagree with a given majority's definition of what constitutes a compelling governmental interest, whether less drastic means exist to advance that interest, or whether the feared harm is sufficiently imminent, without disagreeing with the speech-protective formula itself. No one wants to return to the "bad tendency" test that brought us *Schenck*, *Debs*, *Gitlow*, and *Dennis*.[28] Thus, despite my disagreement with aspects of its recent application, I come to praise First Amendment strict scrutiny; not to bury it.

Sometimes, though, the Justices, confronted by a government effort to regulate speech in certain disfavored contexts, have not gone down the strict scrutiny road. Burning flags may trigger strict scrutiny; but burning draft cards did not.[29] And, as we've seen, when dealing with speech at the bottom of a hierarchy in cases like

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[27] *See supra* note 26 and accompanying text.

[28] *See* Shenck v. United States, 249 U.S. 47 (1919) (upholding conviction for anti-war leafletting); Debs v. United States, 249 U.S. 211 (1919) (upholding conviction for anti-draft speech); Gitlow v. New York, 268 U.S. 652 (1925) (upholding conviction for membership in radical organization); Dennis v. United States, 341 U.S. 494 (1951) (upholding conviction for serving as official of Communist Party).

[29] *Compare* Texas v. Johnson, 491 U.S. 397 (1989) (striking down flag burning conviction), *with* O'Brien v. United States, 391 U.S. 367 (1968) (upholding conviction for burning draft card).

Garcetti, *Morse v. Frederick*, *Beard v. Banks*, and *Hazelwood School District v. Kuhlmeier*, the Court actually applies something troublingly close to the old "bad tendency" test.[30] I will leave to others the task of challenging such a two-tier First Amendment. In this brief essay, I focus on a second set of cases declining to invoke strict scrutiny, relying instead on procedural prophylaxis.

Occasionally, in cases like *R.A.V. v. City of St. Paul,* instead of conducting an "as applied" strict scrutiny inquiry into the constitutionally protected nature of the speech before it, the Court elects to review the legitimacy of the First Amendment regulatory process "on its face." If the Court finds that the regulatory process violates one of the five First Amendment procedural corollaries discussed above, it strikes down the procedure on its face, providing the speech before the Court with a form of *de facto* First Amendment protection without asking whether the speech would be entitled to substantive First Amendment protection under strict scrutiny.[31] While the speech before the Court in such a facial review case does not receive formal substantive legal protection, the speaker wins the case, and the speech itself escapes future regulation unless and until the government develops a procedurally acceptable way to do so.

The Court has never articulated principled First Amendment criteria for deciding when to carry out "as applied" strict scrutiny review of the constitutionally protected nature of speech before it, and when to unlimber the heavy artillery of procedural "facial"

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[30] *See supra* note 8 and accompanying text.

[31] For a discussion of the propriety of shifting the Court's attention from an "as applied" analysis of the speech before it, to a "facial" consideration of the process by which the speech is being regulated, see *Broadrick v. Oklahoma*, 413 U.S. 601 (1973) (declining to apply First Amendment overbreadth to state law regulating government employee participation in partisan politics). The Court's usual preference in non-First Amendment settings is for "as applied" review of the fact pattern before it. *See* United States v. Salerno, 481 U.S. 739 (1987) (upholding constitutionality of Bail Reform Act "as applied" to litigants before it; reversing Second Circuit's finding of "facial" invalidity). Controversy over when to invoke "facial" review, instead of "as applied" scrutiny, is not confined to First Amendment settings—it exists across the spectrum of the law. *See* Shaffer v. Heitner, 433 U.S. 186 (1977) (applying facial review to invalidate Delaware's practice of basing *quasi in rem* jurisdiction on fictive presence of shares of stock in Delaware corporation); Whole Woman's Health Ctr. v. Hellerstedt, 136 S. Ct. 2292 (2016) (discussing relationship between as applied and facial claims).

review.[32] I believe that such principled criteria exist. Based on my concededly subjective reading of the seminal Supreme Court cases, discussed *infra* in part III, in which the most important procedural corollaries were developed, I believe that the Court should eschew "as applied" review in favor of "facial" process-based review only when the First Amendment regulatory process before the Court poses a plausible threat to the ability of vulnerable out-of-court speakers to engage in clearly protected speech. I question whether powerful speakers, capable of effectively asserting their own free speech rights "as applied," and/or so-called low value speakers, engaged in marginal forms of speech that may well be unprotected, should be able to avoid subjecting their speech to "as applied" review by invoking "facial" First Amendment procedural doctrines like vagueness or overbreadth.

II. THE MODERN FIRST AMENDMENT LAWYER'S TOOL BOX

First Amendment lawyers like me[33] tend to deploy a predictable progression of legal arguments in resisting government efforts to regulate the process of communication. When retained by a client to challenge a regulation adversely affecting the transmission of information or ideas, I very often, as a first move, invoke the closely related First Amendment procedural doctrines of void-for-

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[32] In addition to *Broadrick*, the Court has episodically declined to apply facial review in a number of First Amendment settings, without developing principled criteria governing the choice between as applied and facial review. *Broadrick*, 413 U.S. at 632–33; *see* Renne v. Geary, 501 U.S. 312, 323–24 (1991); Bd. of Trs. of State Univ. v. Fox, 492 U.S. 469, 484–85 (1989); Brockett v. Spokane Arcades, Inc., 472 U.S. 491, 504–05 (1985). The Court's most dramatic refusal to apply procedural prophylaxis occurred in the context of child pornography. *See generally* New York v. Ferber, 458 U.S. 747 (1982) (declining to invoke overbreadth).

[33] I hope that my skepticism about the invocation of the First Amendment as a deregulatory device in the service of Ayn Rand's vision of society has not resulted in my expulsion from the First Amendment lawyers club. As a matter of long-term strategy, I continue to believe that the best way to preserve a robust First Amendment is to avoid deploying it as an ideological weapon in either the libertarian or egalitarian arsenal.

vagueness and overbreadth.[34] I do so strategically, in order to shift the reviewing court's focus from my client's often controversial, possibly unprotected speech, to potential future exercises of censorship that no one would support—like banning William Shakespeare's *Romeo and Juliet* because the play deals with teenage sex or teenage suicide. I parse the text of the statute, regulation, or policy at issue, note triumphantly that the text or rationale is broad enough, or vague enough, to be read by some overly aggressive future official to authorize the censorship of *Romeo and Juliet*, and argue that since the very existence of the regulation poses an unacceptable threat to clearly protected free speech, the regulation must be erased immediately on its face, without ever asking whether our client's speech would—or should—be subject to regulation under a narrower or more precisely drawn regulation.[35] I hesitate to admit to the number of times I have written the following sentence: "The speech regulation before the Court, read literally by a government official, is an invitation to suppress a wide variety of clearly protected exercises of free speech, including *Romeo and Juliet*."

Second, if a speech-regulatory statute, regulation, or policy escapes the Scylla and Charybdis of vagueness and overbreadth,[36] I scan the universe of similar speech and similarly situated speakers, and announce triumphantly that the regulation fails to treat all similarly situated speakers (or all similar speech) identically. I argue that such a speech-selective regulation is either evidence of improper intent, or an invitation to censorship of disfavored ideas or disfavored speakers, and insist that, unless the government can posit

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[34] *See generally* Richard H. Fallon, Jr., *Making Sense of Overbreadth*, 100 YALE L.J. 853, 903–04 (2001) (explaining the doctrines of vagueness and overbreadth).

[35] *See* Note, *Overbreadth and Listeners' Rights*, 123 HARV. L. REV. 1749, 1752 (2010).

[36] In my experience, efforts to avoid drafting unduly vague statutes using abstract language often lead drafters to the use of precise but overbroad language. Efforts to avoid overbreadth often cause drafters to use overly vague general language. The difficulty of drafting a campaign finance regulation that is both precise and not overbroad is a classic example of the Scylla/Charybdis problem in action. *See* Richard L. Hasen, *Measuring Overbreadth: Using Empirical Evidence to Determine the Constitutionality of Campaign Finance Laws Targeting Sham Issue Advocacy*, 85 MINN. L. REV. 1773, 1779 (2000).

an extremely powerful explanation for the differential treatment, the selective regulation should also be erased on its face as an unacceptable threat to free speech, once again without ever asking whether our client's speech might—or should—be subject to regulation under a more comprehensive statute.[37]

Only if I cannot find a First Amendment procedural hole within which to bury the regulation on its face[38] do I invoke relevant substantive First Amendment doctrine to test whether the speech in question is actually protected. Once upon a time, that was a thankless task. Under the test that has become known as the "bad tendency" test, applied by the Court in *Schenck*, *Debs*, and *Gitlow*, speech was unprotected if it had a mere "bad tendency" to induce hearers to engage in unlawful or harmful behavior.[39] Unfortunately, it's still a thankless task if you are representing students, government employees, labor picketers, demonstrators, or prisoners.[40] Since *Brandenburg v. Ohio*,[41] and *Cohen v. California*, however, in most other settings, I am able to invoke First

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[37] *See, e.g.*, Minneapolis Star Tribune v. Minn. Comm'r of Revenue, 460 U.S. 575 (1983) (invalidating a tax on large newspapers because smaller publications are not similarly taxed). I call such an attack on the differential reach of a speech regulation the "underbreadth" doctrine. For scholarly discussion of First Amendment equality, see Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20 (1975), and Geoffrey R. Stone, *Kenneth Karsts' Equality as a Central Principle in the First Amendment*, 75 U. CHI. L. REV. 45 (2008). A variant of the First Amendment equality doctrine uses differential treatment of speakers (or speech) to trigger strict scrutiny in settings where a lesser standard of review might otherwise apply. Justice Kennedy's unfortunate decision in *Citizens United*, citing differential treatment of individuals and corporations as a justification for invoking strict scrutiny, is an example of underbreadth reasoning in action. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364 (2010).

[38] Other well-known First Amendment procedural arguments include the virtually absolute ban on prior restraints, see *Near v. Minnesota ex rel. Olson*, 283 U.S. 697, 712–13 (1931), and a First Amendment due process requirement calling for the speedy and fair resolution of disputed factual and legal issues before censorship can be imposed, see *Lee Art Theater v. Virginia*, 392 U.S. 636, 637 (1968) (per curiam).

[39] Schenck v. United States, 249 U.S. 47, 51–52 (1919); Debs v. United States, 249 U.S. 211, 216 (1919); Gitlow v. New York, 268 U.S. 652, 671 (1925).

[40] *See supra* Part I.

[41] Brandenburg v. Ohio, 395 U.S. 444 (1969).

Amendment "strict scrutiny," forcing the government to bear a much heavier burden of justification.[42]

The speech-protective power of First Amendment strict scrutiny was on display in *United States v. Alvarez*,[43] where the government's inability to articulate a compelling interest for caring whether a speaker lied about being awarded a Congressional Medal of Honor turned appallingly low-value speech (conscious lying) into a protected form of dignitary self-realization.[44] Similarly, in *Brown v. Entertainment Merchants' Association*,[45] the power of strict scrutiny required the government to prove that violent video games replete with misogyny actually affect a child's psychological approach to violence and gender equity. Plausible concern was not enough.[46] That is a very hard evidentiary burden to carry. Indeed, as I have noted, since *Brandenburg*, only two government speech regulations have survived the formal invocation of Supreme Court strict scrutiny.[47]

Powerful as it is, however, the fatal impact of strict scrutiny may be overstated.[48] Much speech that might flunk strict scrutiny, like the cross burning in *R.A.V.*, the depiction of animal cruelty in *Stevens*, or the signage in *Reed*, never has to face strict scrutiny because it receives a *de facto* pass under one or another facial First Amendment procedural corollary. In the modern era, the Supreme Court has routinely deployed the five First Amendment procedural corollaries to create a deregulatory penumbra that facially

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[42] Cohen v. California, 403 U.S. 15, 26 (1971).

[43] United States v. Alvarez, 132 S. Ct. 2537, 2543 (2012).

[44] *Id.* at 2543, 2547–48.

[45] Brown v. Entm't Merchs. Ass'n, 564 U.S. 786, 799–800 (2011).

[46] *Id.*

[47] *See supra* note 3 and accompanying text.

[48] It is worth remembering that both *Dennis v. United States* and *Korematsu v. United States* both purported to apply strict scrutiny. *Dennis* duly recited the "clear and present danger" formula, but permitted the legislature, instead of the courts, to decide whether a sufficient risk of harm existed to justify the jailing of the leadership of the American Communist Party. Dennis v. United States, 341 U.S. 494, 517 (1951). *Korematsu* duly recited the Equal Protection strict scrutiny formula, but the military bluffed the Court away from the table by falsely claiming an overwhelming security need to confine American citizens of Japanese ancestry to concentration camps. Korematsu v. United States, 323 U.S. 214, 216, 223 (1944).

invalidates efforts at regulating potentially unprotected speech without asking (much less deciding) whether the speech before the Court would survive strict scrutiny.[49] I believe that harmful, possibly unprotected, speech would be better managed, vulnerable hearers better protected, and unjust windfalls avoided, if the Court were to think twice before inviting First Amendment lawyers like me to routinely invoke prophylactic procedural doctrines to avoid confronting hard, substantive First Amendment questions.

III. THE PROPER ROLE OF THE FIVE FIRST AMENDMENT PROCEDURAL COROLLARIES

A common theme runs through the five First Amendment procedural corollaries. Each is designed to assure that vulnerable speakers or hearers, who are unlikely to find their own way into court, actually enjoy substantive First Amendment protection. The ban on prior restraints prevents the suppression of speech before hearers have a chance to demand access to it.[50] The overbreadth doctrine prevents officials from being encouraged to censor the clearly protected speech of vulnerable speakers who may lack the resources or sophistication to protect their rights in court.[51] The void-for-vagueness doctrine prevents self-censorship by vulnerable speakers, who may refrain from potentially forbidden speech because they lack the resources to contest censorship in court.[52] The First Amendment equality doctrine protects vulnerable speakers

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[49] *See, e.g.*, Reed v. Gilbert, 135 S. Ct. 2218, 2224 (2015) (finding ordinance imposing differential signage facially invalid under First Amendment equality doctrine); United States v. Stevens, 559 U.S. 460, 482 (2010) (finding that a statute banning the so-called "crush" movies depicting cruelty to small animals facially vague); R.A.V. v. City of St. Paul, 505 U.S. 377, 381 (1992) (finding that a statute used to prosecute individuals burning crosses aimed at terrorizing black neighbors was facially overbroad).

[50] *See* N.Y. Times Co. v. United States, 403 U.S. 713, 726–27 (1971); Near v. Minnesota *ex rel.* Olson, 283 U.S. 697, 713–14 (1931).

[51] Bd. of Airport Comm'rs v. Jews for Jesus, 482 U.S. 569, 574 (1987); *see* Henry Monaghan, *Overbreadth*, 1981 SUP. CT. REV. 1, 1–2 (1981).

[52] *See* United States v. Stevens, 559 U.S. 460, 484–85 (2010); *see also* Anthony Amsterdam, *The "Void-for-Vagueness" Doctrine in the Supreme Court*, 109 U. PA. L. REV. 67, 75 (1960) (highlighting how vagueness can void a statute and implicate speech concerns of out-of-court speakers).

with limited resources against becoming the targets of improperly motivated censorship.[53] Finally, First Amendment due process assures careful judicial consideration before speech is removed from circulation.[54]

An important jurisprudential difference exists between substantive protection of free speech, which must be applied equally to all, and the five procedural corollaries, which are judge-made prophylactic rules designed to reinforce the enjoyment of substantive First Amendment protection by resource-poor speakers who might not be in a position to assert their First Amendment rights. As such, the procedural corollaries are jurisprudentially similar to the Fourth Amendment's exclusionary rule,[55] and the Fifth Amendment's prophylactic ban on interrogation in the absence of counsel.[56] In all three constitutional settings, the Court deploys a form of procedural prophylaxis designed to assure that weak participants enjoy important substantive constitutional protections that might not otherwise be enforceable in court.

In *Mapp v. Ohio*, the Court justified the Fourth Amendment exclusionary rule by noting that, in its absence, no effective method of enforcing criminal defendants' Fourth Amendment rights would exist.[57] A similar Fifth Amendment justification underlies the *Miranda* rule.[58] As judge-made exercises in pragmatic prophylaxis, both the Fourth and Fifth Amendment procedural rules have been subject to judicial fine-tuning to assure that, in the Justices' view,

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[53] *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972); *see also* Karst, *supra* note 37, at 24–25 (highlighting how equality theories protect all speakers from censorship).

[54] *See* Freedman v. Maryland, 380 U.S. 51, 59 (1965); Henry Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518, 520 (1970).

[55] *See generally* Mapp v. Ohio, 367 U.S. 643 (1961) (holding that the Fourth Amendment's exclusionary rule barring the use of evidence obtained through unconstitutional means is applicable to the States through the Fourteenth Amendment).

[56] *See generally* Miranda v. Arizona, 384 U.S. 436 (1966) (concluding that there must be safeguards during in-custody interrogations so that those accused of crimes are adequately apprised of their rights and the exercise of those rights are fully honored).

[57] *Mapp*, 367 U.S. at 655; *see* Weeks v. United States, 232 U.S. 383, 393 (1914).

[58] *Miranda*, 384 U.S. at 467.

they operate only when necessary, and do not confer unjustified legal windfalls on persons whose conduct is not constitutionally protected. The emergence of the good faith exception to the Fourth Amendment exclusionary rule is a classic, if controversial, example of such procedural tinkering in action.[59]

I believe the five First Amendment procedural corollaries grew out of a similar judicial recognition that, absent prophylactic facial review of First Amendment procedures, a combination of weak speakers, controversial forms of speech, vague, fact-dependent constitutional protections, and an intensely hostile regulatory climate would generate an unacceptably high level of risk that many resource-poor persons would be unable to enjoy and enforce their substantive free speech rights effectively.[60] Thus, the prior restraint doctrine is not really about protecting speakers; it protects vulnerable hearers. After defeating a prior restraint, the speaker must be prepared to establish the substantively protected nature of the speech, or suffer a subsequent sanction.[61] Similarly, the First Amendment due process doctrine protects vulnerable hearers by assuring that potentially protected speech is not physically taken out of circulation before a neutral judge has a chance to pass on the legal and factual issues raised by the effort to limit communication.[62] Once again, the doctrine's principal beneficiaries are hearers who would be denied access to the speech, almost always without judicial recourse, in the absence of careful prophylactic procedural protections that parallel the ban on prior restraints. The bans on prior restraints and First Amendment due process, while extremely valuable, are, in my experience, relatively rarely invoked these days. In today's world, given the extraordinary burden of justification imposed in *Near v. Minnesota* and the *New York Times v. United*

[59] *See generally* United States v. Leon, 468 U.S. 897 (1984) (concluding that the benefit of suppressing evidence obtained in good faith does not justify the costs of exclusion).

[60] I discuss the Warren Court's deployment of First Amendment doctrine to protect the civil rights movement in Burt Neuborne, *The Gravitational Pull of Race on the Warren Court*, 2010 SUP. CT. REV. 59, 77–82 (2011).

[61] *See* New York Times Co. v. United States, 403 U.S. 713, 733 (1971) (White, J., concurring).

[62] *See* A Quantity of Books v. Kansas, 378 U.S. 205, 213 (1964); Marcus v. Search Warrant, 367 U.S. 717, 732–33 (1961).

States (the Pentagon Papers case), the government rarely seeks a prior restraint. Similarly, the procedural requirement of fair, timely, speedy, and careful fact-finding and law declaration in connection with government censorship efforts, while important, is only rarely brought into play in a legal system that has internalized basic due process norms.

In my experience, though, the remaining three procedural corollaries—overbreadth, vagueness, and equal treatment—are routine staples of a modern First Amendment lawyer's toolbox. As I've confessed, I tend to invoke them first, before turning to the substantive issue of First Amendment protection. Should I be encouraged, or permitted to do so in every First Amendment case, or should the procedural corollaries be deployed in a narrower subset of First Amendment cases? It is, I believe, no coincidence that the seminal First Amendment overbreadth, vagueness, and equality cases protected the speech of religious zealots engaged in house-to-house speech,[63] labor organizers engaged in picketing,[64] civil rights demonstrators,[65] and opponents of the Vietnam War,[66] all of whom were seeking to utilize body rhetoric—such as picketing, parading, and mass meetings—to advance contested social goals in the teeth of intensely hostile police responses to both the message and the messenger. I believe that the Supreme Court understood that maintaining a robust First Amendment space for body rhetoric in hostile settings not only comports with the First

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[63] *See, e.g.*, Martin v. Struthers, 319 U.S. 141, 141–49 (1943) (holding that door to door distribution of religious literature is protected by the First Amendment); Schneider v. New Jersey, 308 U.S. 147, 157–65 (1939) (holding that an ordinance barring canvassing without a permit is void as applied to the distribution of religious booklets by a church member).

[64] *See, e.g.*, Thornhill v. Alabama, 310 U.S. 88, 93–102 (1940) (demonstrating that labor picketing protected by the First Amendment and is among the fundamental personal rights and liberties secured by the Fourteenth Amendment); Hague v. Comm. for Indus. Org., 307 U.S. 496, 512 (1939) (demonstrating that labor speech is protected by the U.S. Constitution).

[65] *See, e.g.*, Cox v. Louisiana, 379 U.S. 536 (1965) (reversing convictions of civil rights demonstrators).

[66] *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972) (reversing convictions of anti-Vietnam demonstrators); Coates v. Cincinnati, 402 U.S. 611 (1971) (holding that an ordinance making it a criminal offense for individuals to assemble on sidewalks and annoy passersby was unconstitutional on its face).

Amendment's free speech and free assembly clauses; it is crucially important to making free speech available to the poor and less educated. Most speech, including speech on the Internet and social media, depends on a level of verbal sophistication that varies directly with educational status. Persons at the bottom of the educational ladder often lack the verbal sophistication needed to couch their ideas in persuasive verbal form. Perhaps more importantly, even with the Internet, much effective speech is not free. Access to a wide audience usually costs money, but not everyone can afford to buy space or time in, or on, an organ of mass communication.

Sweat equity and body rhetoric can, however, substitute for hard cash in transmitting a message to the public. To me, at least, the moral integrity of the First Amendment requires generous rules assuring that such "poor persons' speech" receives effective First Amendment protection. The Supreme Court has struggled mightily for more than seventy years to develop a coherent First Amendment doctrine governing body rhetoric in a public forum.[67] The Court's effort to define precisely when an exercise of body rhetoric poses a sufficient threat to public order to warrant suppressing the speech inevitably collapses into a subjective balancing test requiring the weighing of a strong interest in free speech against strong interests in maintaining public order. Such a balance is necessarily deeply fact-dependent. Since it is up to the police in the first instance to make the delicate call as to whether the facts justify suppression of a mass march, a picket line, or a demonstration; and up to the trial court to develop the definitive factual record, the Supreme Court's

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[67] *See, e.g.*, Gregory v. Chicago, 394 U.S. 111 (1969) (reversing conviction); Cox v. Louisiana (*Cox II*), 379 U.S. 579 (1965) (reversing conviction); Cox v. Louisiana (*Cox I*), 379 U.S. 536 (1965) (reversing conviction); Edwards v. South Carolina, 372 U.S. 229 (1963) (reversing conviction); Feiner v. New York, 340 U.S. 315 (1951) (affirming conviction); Terminiello v. Chicago, 337 U.S. 1 (1949) (reversing conviction); Cox v. New Hampshire, 312 U.S. 569 (1941) (affirming conviction); Schneider v. New Jersey, 308 U.S. 147 (1939) (reversing conviction); Hague v. Comm. for Idus. Org., 307 U.S. 496 (1939) (granting relief). *See also* Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *aff'g*, 477 F. Supp. 676 (N.D. Ill. 1978), *stay denied*, 436 U.S. 953 (1978) (blocking effort to ban Nazi march through Skokie, Illinois). *But see* Boos v. Barry, 485 U.S. 312 (1988) (upholding ban on congregating; invalidating ban on signs); Clark v. Cmty. For Creative Non-Violence, 468 U.S. 288 (1982) (affirming restriction).

conceded lack of power to review facts [68] seriously complicates its ability to provide effective First Amendment protection to unpopular marchers or demonstrators.[69]

In the seminal labor, religious, civil rights, and Vietnam War demonstration cases before the Court, the Justices faced a major jurisprudential challenge. Given the fact-dependent nature of the First Amendment issues raised in the demonstration cases, the relative weakness of the speakers and hearers, the limited appellate power to review the facts, the Supreme Court's conceded lack of power to construe state statutes narrowly, and the intensely hostile state and local law enforcement climate, it was almost impossible for the Court to use the "as applied" substantive First Amendment to protect important but controversial free speech movements. I believe that the Court met the challenge by unleashing a stream of procedural First Amendment decisions imposing prophylactic limits on the process of speech regulation, including a ban on discretionary parade permits,[70] a requirement of equal access to public fora,[71] and the enunciation of the void-for-vagueness[72] and overbreadth doctrines[73] that provided protection to weak speakers, without asking whether the speech in question was actually protected.

It worked. Shielded under a procedural umbrella, civil rights marchers, labor picketers, anti-Vietnam demonstrators, and religious zealots engaged in intense bursts of First Amendment activity without having to defend the substantive First Amendment

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[68] The Supreme Court's limited capacity to challenge the facts as found below is discussed in *Thompson v. City of Louisville*, 362 U.S. 199 (1960) (reversing conviction only because no evidence in record to support it).

[69] See *Cox II*, 379 U.S. 559, for an example of the Court's effort to grapple with hostile fact-finding in a demonstration case.

[70] *See* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 158 (1969).

[71] *See* Police Dep't of Chicago v. Mosley, 408 U.S. 92, 95–96 (1972).

[72] The void-for-vagueness doctrine was initially derived from the due process notion of fair notice of any state prohibition. Connally v. Gen. Constr. Co., 269 U.S. 385, 391 (1926). The idea takes on greater intensity when the banned behavior involves communication. *See* Grayned v. City of Rockford, 408 U.S. 104, 108–09 (1972).

[73] *See* Gooding v. Wilson, 405 U.S. 518 (1972). Subsequent development of the doctrine requires "substantial overbreadth," a showing of a significant likelihood that protected speech will be deterred, before invoking overbreadth. *See id.* at 518–19; Broadrick v. Oklahoma, 413 U.S. 601, 615 (1973).

status of their speech. It was enough to show that the disorderly conduct statute was overbroad, the flag desecration statute was too vague, the anti-picketing statute was selective, or the permit statute vested too much discretion in the police. Such effective protection came, however, with an opportunity cost. A steady diet of decisions based on procedural corollaries impeded the development of substantive First Amendment doctrine. Seventy years of Supreme Court grappling with cases involving picketing, parading, and demonstrating has left us no closer to precise substantive free speech rules than when we started. Of course, given the undoubted success of the procedural "facial" approach in providing effective protection to the civil rights and anti-Vietnam movements, the opportunity cost of relying so heavily on First Amendment procedure may well have been worth it.

A second troubling byproduct of the Court's development of First Amendment overbreadth, vagueness, and equality procedural doctrines is, however, less defensible. The Supreme Court's repeated invocation of the procedural corollaries appears to have given them a life of their own, resulting in their reflexive application in settings far from the circumstances that gave rise to their adoption.[74] The three most widely invoked First Amendment procedural corollaries—vagueness, overbreadth, and equal treatment—emerged from seminal cases where weak speakers, confronted by hostile local law enforcement officials armed with virtually unreviewable fact-finding power, were unlikely to be in a position to launch substantive "as applied" challenges to protect their free speech rights effectively. Three seminal cases illustrate the genesis of the doctrines. In *Thornhill v. Alabama*, decided in 1940, the Court was confronted with the arrest of an Alabama labor union

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[74] I have discussed two examples earlier—*R.A.V. v. City of St. Paul* (discussing the constitutionality of banning cross burning aimed at black families), and *United States v. Stevens* (discussing the constitutionality of banning depictions of animal cruelty). *See supra* note 48 and accompanying text. *Citizens United* is a third notorious example. Instead of deciding the as applied question of whether non-profit corporate campaign spending was protected, Justice Kennedy's opinion notes that corporations are being treated differently than natural persons, thereby invalidating the restriction under the First Amendment equality doctrine. Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 364 (2010). The opinion never grapples with whether corporations are sufficiently different from people to warrant different First Amendment treatment.

official for engaging in peaceful picketing during a strike.[75] Confronted with the daunting prospect of articulating a fact-dependent substantive right to picket peacefully that would have been at the mercy of fact-finding by hostile local law enforcement authorities, the Court elected the facial procedural option, reasoning that the anti-picketing statute was unconstitutional on its face because, at a minimum, it purported to prohibit both protected and unprotected conduct.[76]

The *Thornhill* Court reasoned that since such an overbroad statute might invite law enforcement officials to move against protected activity, and might deter highly vulnerable protected speakers from risking arrest, the defendant should be permitted to challenge the statute on its face in order to protect the rights of future protected speakers, even if his own conduct was not protected.[77] And so, the First Amendment overbreadth doctrine was born.[78]

In *Smith v. Goguen*,[79] decided in 1974, fifteen years prior to the flag burning cases, a young man wearing an American flag patch on the seat of his pants was charged with "casting contempt" on the American flag in violation of the Massachusetts flag desecration statute.[80] Throughout the 1970s, the Supreme Court appeared highly reluctant to confront the substantive question of whether the First Amendment protected contemptuous treatment of the flag.[81] As an ACLU lawyer working on the flag desecration issue, I doubted that five substantive pro-free speech votes existed in *Smith*. Instead, the Court fixed on the inherent vagueness of the "casting contempt" standard, observing that hostile law enforcement officials might be moved to arrest controversial flag users in numerous contexts, many

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[75] Thornhill v. Alabama, 310 U.S. 88, 92–94 (1940).

[76] *Id.* at 96–98, 100–01, 104.

[77] *Id.* at 97–98, 100–01.

[78] I could also have used the facts of *Gooding v. Wilson*, 405 U.S. 518, 518–19 (1972).

[79] Smith v. Goguen, 415 U.S. 566 (1974).

[80] *Id.* at 568–69 (1974) (quoting MASS. GEN. LAWS ANN. ch. 264, § 5 (West 1971)).

[81] In *Street v. New York*, confronted with a flag burning conviction, a narrow majority strained to find that since words might have played a role in the finding of "desecration," the conviction must be reversed. *See* Street v. New York, 394 U.S. 576, 591 (1969).

of which would be clearly protected by the First Amendment.[82] The Court also mused that speakers wishing to use the flag in delivering a controversial but fully protected message might be deterred by the fear of violating such a vague statute.[83] Finally, the Court held that even if the "casting contempt" statute gave adequate notice that wearing an American flag on the seat of your pants was forbidden, the defendant should, nevertheless, be empowered to raise the First Amendment rights of possible future speakers who might be genuinely confused about the statute's coverage, as well as possible future speakers whose protected but controversial use of the flag would trigger arrest from intensely hostile local police.[84] The Court concluded that the only way to protect such future speakers, who were unlikely to be in a position to assert their own rights effectively, would be to invalidate the flag statute as unconstitutionally vague on its face, even though it was probably not vague "as applied."[85] And so, the First Amendment facial vagueness doctrine was born.

Finally, in *Chicago Police Dep't v. Mosley*, decided in 1972, Chicago banned picketing in the vicinity of a school, except when connected to a labor dispute involving the school.[86] Instead of asking the hard, fact-bound question of whether the particular picketing activity before the Court was or was not protected by the First Amendment, the Court focused on the fact that Chicago had failed to treat all picketing equally, favoring labor picketing over other possible subjects.[87] Such a content-discriminatory statute, reasoned the Court, invited officials to discriminate against unpopular speech, posing an unacceptably high risk of improper censorship in the future.[88] The Court concluded that the most effective way to stop future censorship aimed at vulnerable speakers was to invalidate the statute on its face, regardless of whether the

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[82] *Smith*, 415 U.S. at 572 –73, 575.

[83] *Id.* at 581.

[84] *Id.* at 572–73, 575.

[85] *Id.* at 572, 577.

[86] Police Dep't of Chicago v. Mosley, 408 U.S. 92 (1972).

[87] *Id.* at 94–95.

[88] *Id.* at 92.

speaker before the Court was engaged in protected activity.[89] And so, the First Amendment equality doctrine was born.[90]

The three seminal cases share the following characteristics: (1) significant difficulty in articulating and applying a substantive First Amendment standard; (2) substantial dependence on on-site fact-finding in separating protected from unprotected activity; (3) a local climate of police and judicial hostility to the speech in question; (4) the presence of large numbers of relatively powerless speakers likely to fall victim to unfair application of the law; and (5) an inability to narrow governing state law through statutory construction. Given such a constellation of characteristics, the Court quite properly treated the speaker before the Court as a surrogate for the numerous vulnerable out-of-court speakers who were unlikely to be in a position to protect their own rights in any court. The Court then permitted the in-court speaker to invoke the First Amendment rights of out-of-court speakers to invalidate the speech regulation on its face, whether or not the in-court speaker was engaged in protected activity. While such a *jus tertii* process may occasionally deliver a windfall to an unprotected speaker, and while a steady diet of procedurally based decisions may inhibit the articulation of substantive First Amendment standards, it enabled vulnerable out-of-court speakers to receive a significant degree of First Amendment protection that might otherwise have been beyond their reach.

The current Supreme Court appears to have forgotten why the Court invented the doctrines of facial overbreadth, facial vagueness, and strict equality. Compare the three seminal cases that generated the doctrines—*Thornhill, Goguen,* and *Mosely*—with four modern cases applying the three principal prophylactic procedural doctrines. In *United States v. Stevens*, the Court invalidated a federal statute banning so-called "animal snuff movies" depicting the brutal torture and killing of small animals.[91] Eight members of the Court noted

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[89] *Id.* at 101–02.

[90] Actually, it may have been born a few years earlier in an often overlooked case, *Schacht v. United States*. *See* Schacht v. United States, 398 U.S. 58 (1970) (invalidating a ban on wearing military uniforms in demonstrations opposing the Vietnam War, but permitting it in pro-war demonstrations). Deciding *Schacht* on equality grounds made it unnecessary for the Court to consider the difficult substantive issue of the scope of free speech protection in the military. *Id.* at 62–63.

[91] United States v. Stevens, 559 U.S. 460, 464–65, 482 (2010).

that while the speech actually before the Court involved arguably unprotected depictions of animal torture, the wording of the statute could be read aggressively by an official to ban documentaries about hunting.[92] Without considering whether any of the characteristics present in the seminal cases existed in *Stevens*, in a variant of the *Romeo and Juliet* gambit described *supra*, the Court reflexively permitted the arguably unprotected defendant to invoke the rights of potential future makers of hunting documentaries to invalidate the animal torture statute on its face.[93] In the absence of a showing that the *Romeo and Juliet* gambit was needed to protect identifiable out-of-court speakers, I believe that the speaker in *Stevens* should have been judged on the marginal, possibly unprotected speech before the Court—not on the clearly protected speech of some highly unlikely future speaker.

In *Federal Communications Commission v. Fox Television Stations* ("*Fox Broadcasting*"), the Court reviewed an Federal Communications Commission ("FCC") order imposing minor sanctions on Fox and ABC for broadcasting fleeting depictions of unclothed sensitive body parts in violation of a Congressional statute banning the broadcast of "obscene, indecent, or profane" material.[94] The Court ruled that the FCC's historic vacillation over whether to prosecute "fleeting expletives," deprived the broadcasters of fair notice of the scope of the statutory prohibition, requiring vacation of the violation on vagueness grounds, without regard to whether the speech in question was protected by the First Amendment.[95]

Unlike in the seminal cases discussed above, in *Fox Broadcasting*, the Supreme Court did not invoke the First Amendment vagueness doctrine to protect vulnerable out-of-court speakers against intensely hostile enforcement officials, in fact-dependent settings beyond the Court's control.[96] Rather, the Court invoked vagueness to duck a hard substantive First Amendment issue involving powerful speakers fully capable of protecting their

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[92] *Id.* at 481–82.

[93] *See id.*

[94] Fed. Commc'ns Comm'n v. Fox Television Stations, 132 S. Ct. 2307, 2312 (2012).

[95] *Id.* at 2320.

[96] *Id.*

own rights in court against a well-intentioned regulatory body. Since it is hard to argue with a straight face that the networks honestly believed that the display of uncovered sensitive body parts might be permitted, *Fox Broadcasting* was a "facial vagueness" case like *Smith v. Goguen*, but without any need to invoke the doctrine. Unlike *Smith*, there was no risk in *Fox Broadcasting* that a group of vulnerable speakers would run afoul of bad faith, unreviewable enforcement of the FCC regulations. The networks are perfectly capable of fighting their own First Amendment battles. Reflexively invoking facial vagueness in *Fox Broadcasting* came at the cost of clarifying broadcasters' and their audiences' First Amendment rights. After the expenditure of very substantial resources, we still do not know whether an isolated, apparently unintentional violation of the FCC regulations triggers First Amendment protection.

In *Reed v. Gilbert*, confronted with a local sign ordinance of almost comic complexity and bureaucratic self-importance providing widely varying rules governing different categories of signs,[97] the Court invoked the First Amendment equality principle to invalidate the entire sign ordinance on its face, without considering whether any violation of the First Amendment had actually taken place, and without providing substantive guidance in future signage cases.[98] Instead, Justice Thomas' opinion for five members of the *Reed* Court imposed a stringent facial equality requirement on any government regulation involving words that, taken seriously, would threaten a wide range of regulatory activities.[99] Justice Thomas' almost gleeful use of First Amendment equality in *Reed v. Gilbert* comes awfully close to turning the First Amendment into an all-purpose wrecking ball for economic regulation whenever communication is involved.

Finally, in *Citizens United v. Federal Election Commission*, the Court invalidated the century-old ban on the expenditure of corporate treasury funds in federal elections in large part because the statute treated corporations differently from natural persons in

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[97] Reed v. Gilbert, 135 S. Ct. 2218, 2224–26 (2015).

[98] *Id.* at 2227.

[99] *Id.* at 2224.

violation of the First Amendment equality doctrine.[100] Justice Kennedy's opinion never grapples directly with whether for-profit corporations should enjoy full First Amendment protection, or whether treating corporations and natural persons differently was justifiable.[101] Instead, he used the overbreadth and equality doctrines to jump to facial invalidity of the statute, despite the presence of numerous as applied options capable of protecting the litigants' free speech rights.[102]

None of the four modern facial procedural cases display the characteristics that led the Court to invent First Amendment overbreadth, vagueness, and equality in the first place. Articulation of a substantive First Amendment standard posed no particular difficulty. Fact-finding posed no special concerns. Neither the law enforcement agents nor trial judges involved were politically hostile to the speakers. In three of the cases, curative statutory construction was possible. Most important, the out-of-court woods were not full of vulnerable speakers unable to protect their rights in court. And yet, the Court declined to decide all four cases on the First Amendment merits, relying instead on facial procedural corollaries as a substitute for the hard work of as applied strict scrutiny.[103]

CONCLUSION

The four modern cases discussed above are not aberrations.[104] First Amendment procedural doctrines, originally designed to protect vulnerable speakers in settings where substantive review is not likely to be effective, have slowly evolved into the First Amendment bar's arguments of choice. In my opinion, First

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[100] Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 318–19, 341 (2010).

[101] *Id.* at 318–72.

[102] *Id.* The available as applied options are spelled out in Justice Stevens' dissent. *Id.* at 398–405 (Stevens, J., dissenting).

[103] *See supra* notes 91–102 and accompanying text.

[104] I could have added *R.A.V. v. City of St. Paul*, where the Court reversed a cross burning conviction because the statute was facially invalid under the First Amendment equality doctrine. *See* R.A.V. v. City of St. Paul, 505 U.S. 377 (1992).

Amendment jurisprudence would be wiser and more just if courts faced up to the task of applying substantive strict scrutiny to the speech before the Court, confining prophylactic procedural facial review to settings that genuinely require it.