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Brandenburg and Terrorism in the Digital Age

David S. Han[†]

INTRODUCTION

Fifty years after it was decided, *Brandenburg v. Ohio*¹ remains a cornerstone of modern First Amendment jurisprudence. *Brandenburg* represented the culmination of the Supreme Court's long struggle, dating back to the Espionage Act cases of the early twentieth century,² to articulate a constitutional standard governing the advocacy of lawless conduct. Perhaps more than any other single case, *Brandenburg* encapsulates the exceptional nature of American free speech culture—one marked by an extreme suspicion of any government regulation of public discourse and a correspondingly high tolerance for potential social harms caused by speech.³ Unlike the more balancing-oriented approaches to dangerous advocacy adopted by other Western democracies⁴ and the Court's own prior cases,⁵ *Brandenburg* established a blunt,

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¹ *Brandenburg v. Ohio*, 395 U.S. 444 (1969) (per curiam).

² See *Abrams v. United States*, 250 U.S. 616 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Schenck v. United States*, 249 U.S. 47 (1919).

³ See, e.g., *Snyder v. Phelps*, 562 U.S. 443, 460–61 (2011) (observing that although speech can "inflict great pain[.] . . . [a]s a Nation we have chosen . . . to protect even hurtful speech on public issues to ensure that we do not stifle public debate"); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end."); Dale Carpenter, *The Antipaternalism Principle in the First Amendment*, 37 CREIGHTON L. REV. 579, 586 (2004) ("The Court had long been a guardian against letting the state assume the role of guardian over the minds of the people.")

⁴ See, e.g., Daphne Barak-Erez & David Scharia, *Freedom of Speech, Support for Terrorism, and the Challenge of Global Constitutional Law*, 2 HARV. NAT'L SEC. J. 1, 5–19 (2011) (contrasting the European approach to dangerous advocacy with the American approach).

⁵ See, e.g., *Dennis v. United States*, 341 U.S. 494, 510 (1951) (adopting Judge Learned Hand's approach that "[i]n each case [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger" (alteration in original) (quoting *United States v. Dennis*, 183 F.2d 201, 212 (2d Cir. 1950))); *Schenck*, 249 U.S. at 52 (basing constitutional protection on "whether

highly protective standard that permits regulation only when “such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”⁶

But the world in which *Brandenburg* was decided is markedly different from the world of today. In recent years, terrorist advocacy—that is, broad advocacy of violent, terroristic conduct that falls short of the incitement standard—has contributed to a number of devastating terrorist attacks, such as the Orlando nightclub shooting, the Boston Marathon bombings, and the shootings in San Bernardino.⁷ And unlike in the world of 1969—in which dangerous advocacy was primarily disseminated via purely physical means, like public rallies or leaflets⁸—terrorist advocacy today is disseminated widely and cheaply via the internet and channeled through social media.⁹ As such, some scholars have argued that given these technological changes, the highly stringent *Brandenburg* standard is ripe for adjustment.¹⁰ While the standard might have made sense in a world of rallies and leafleting, perhaps it no longer fits a world where technological development has drastically amplified the harms associated with dangerous advocacy falling short of that standard.

Such arguments raise a fundamental question regarding the nature of *Brandenburg*. On the one hand, one might conceptualize the standard in purely instrumental terms—that is, as simply seeking to capture an optimal balance between free speech and state regulatory interests. Viewed in this manner, *Brandenburg* is ultimately a pragmatic standard that reflects the

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,” observing that “[i]t is a question of proximity and degree”).

⁶ *Brandenburg*, 395 U.S. at 447.

⁷ See *infra* notes 19–25.

⁸ *Brandenburg* itself dealt with dangerous advocacy uttered during a Ku Klux Klan rally. *Brandenburg*, 395 U.S. at 444–47; see also *Hess v. Indiana*, 414 U.S. 105, 106–07 (1973) (per curiam) (speech at an anti-war protest on a college campus); cf. *Greer v. Spock*, 424 U.S. 828, 830–34 (1976) (rally and distribution of leaflets at a military base).

⁹ To be sure, the audience-expanding potential of new technologies was already clear at the time of *Brandenburg*, as the rally in that case was recorded and portions of it were broadcast locally and nationally. See *Brandenburg*, 395 U.S. at 445. But the advent of the internet has both broadened the scope of speech dissemination and radically lowered the cost of such dissemination to a degree that would be utterly foreign in the world of 1969. See, e.g., Eugene Volokh, *Cheap Speech and What It Will Do*, 104 YALE L.J. 1805, 1806–07 (1995) (observing that in contrast to the pre-internet era, in which finding a publisher or “[g]etting access to nationwide radio and TV” was difficult for the poor or those with unorthodox views, the advent of the internet allows for “[c]heap speech [which] will mean that far more speakers—rich and poor, popular and not, banal and avant garde—will be able to make their work available to all”); Sonja R. West, *The “Press,” Then & Now*, 77 OHIO ST. L.J. 49, 90 (2016) (observing that “[i]n contrast to the world of early Americans, today almost ‘anything and everything’ truly can be published and widely distributed by basically anyone and with little cost” via “modern mass communication technology”).

¹⁰ See *infra* notes 101–102 and accompanying text.

prevailing technological and social conditions of its time—one that may grow obsolete as those conditions shift. On the other hand, one might conceptualize the standard in more deontological terms—as inextricably tied to foundational principles that are essential to any meaningful conception of free speech, regardless of any intervening technological or social changes.

These sorts of questions are not unique to First Amendment doctrine. Rather, they are the product of the natural tension that arises between longstanding constitutional rights doctrine and the advent of significant technological change. And while the Court has yet to address this tension in the *Brandenburg* context, it recently confronted a parallel issue in *Carpenter v. United States*,¹¹ a landmark Fourth Amendment decision that deemed the government's warrantless acquisition of a criminal suspect's cell-site location data unconstitutional.¹² A close examination of the scenario posed in *Carpenter* and the Court's approach to that case helps to frame the central theoretical debate underlying *Brandenburg's* continued viability and illuminates the various pivot points around which the debate rests.

This essay proceeds as follows. In Part I, I discuss the sort of online terrorist advocacy that has served as the impetus for many of the current proposals to modify the *Brandenburg* standard. In Part II, I analyze—through the lens of the Court's recent decision in *Carpenter*—the argument that significant intervening technological changes have effectively rendered the *Brandenburg* standard obsolete and ripe for reformulation. In Part III, I identify and discuss some of the normative and empirical pivot points upon which the debate rests.

I. TERRORIST ADVOCACY VIA ONLINE SPEECH¹³

The primary impetus for many of the recent proposals to overhaul the *Brandenburg* standard has been the increased incidence of violent attacks linked to online terrorist advocacy.¹⁴ The most notable example of this is the pervasive influence of the extremist cleric Anwar al-Awlaki. Before his death in 2011, Awlaki was directly or indirectly tied to a wide range of actual and

¹¹ *Carpenter v. United States*, 138 S. Ct. 2206 (2018).

¹² *Id.* at 2223.

¹³ Much of my discussion in this Part draws from my previous work. See David S. Han, *Terrorist Advocacy and Exceptional Circumstances*, 86 FORDHAM L. REV. 487, 489–93 (2017).

¹⁴ See, e.g., Eric Posner, *ISIS Gives Us No Choice but to Consider Limits on Speech*, SLATE: VIEW FROM CHI. (Dec. 15, 2015, 5:37 PM), http://www.slate.com/articles/news_and_politics/view_from_chicago/2015/12/isis_s_online_radicalization_efforts_present_an_unprecedented_danger.html [<https://perma.cc/GGY7-EUXE>].

attempted terrorist attacks, including the Fort Hood shootings,¹⁵ the stabbing of British MP Stephen Timms,¹⁶ a 2010 attempt to bomb Times Square,¹⁷ and a 2009 attempt to blow up a Northwest Airlines plane with plastic explosives.¹⁸ And after his death, Awlaki's influence seemed to expand rather than diminish;¹⁹ terrorist acts inspired by his teachings include the 2013 Boston Marathon bombing,²⁰ the 2015 shootings in San Bernardino,²¹ the 2015 killing of five soldiers at a military installation in Tennessee,²² the 2016 Orlando nightclub shootings,²³ the 2016 attack at Ohio State University,²⁴ and the 2016 bombings in New York and New Jersey.²⁵

In most of these cases, Awlaki did not play any active role in planning the attacks, nor did he specifically encourage the attackers to do what they did; indeed, many of the incidents occurred well after his death.²⁶ Rather, his influence came primarily through tracts and lectures posted online, in which he exhorted Muslims, in the

¹⁵ See David Johnston & Scott Shane, *U.S. Knew of Suspect's Tie to Radical Cleric*, N.Y. TIMES (Nov. 9, 2009), <http://www.nytimes.com/2009/11/10/us/10inquire.html> [https://perma.cc/5W4B-F2SZ].

¹⁶ See Vikram Dodd, *Roshonara Choudhry: Police Interview Extracts*, GUARDIAN (Nov. 3, 2010), <https://www.theguardian.com/uk/2010/nov/03/roshonara-choudhry-police-interview> [https://perma.cc/29UJ-PYJ9].

¹⁷ See Scott Shane & Mark Mazzetti, *Times Sq. Bomb Suspect Is Linked to Militant Cleric*, N.Y. TIMES (May 6, 2010), <http://www.nytimes.com/2010/05/07/world/middleeast/07awlaki.html> [https://perma.cc/KM84-V82J].

¹⁸ See Scott Shane, *Inside Al Qaeda's Plot to Blow Up an American Airliner*, N.Y. TIMES (Feb. 22, 2017), <https://www.nytimes.com/2017/02/22/us/politics/anwar-awlaki-underwear-bomber-abdulmutallab.html> [https://perma.cc/LAK6-MZNH].

¹⁹ See Scott Shane, *The Lessons of Anwar al-Awlaki*, N.Y. TIMES (Aug. 27, 2015), <https://www.nytimes.com/2015/08/30/magazine/the-lessons-of-anwar-al-awlaki.html> ?_r=0 [https://perma.cc/N666-SDXA] ("Awlaki's pronouncements seem to carry greater authority today than when he was living, because America killed him.").

²⁰ See *id.*

²¹ See Greg Miller, *Al-Qaeda Figure Seen as Key Inspiration for San Bernardino Attacker*, WASH. POST (Dec. 18, 2015), https://www.washingtonpost.com/world/national-security/al-qaeda-figure-seen-as-key-inspiration-for-san-bernardino-attacker/2015/12/18/f0e00d80-a5a0-11e5-9c4e-be37f66848bb_story.html?utm_term=.fe303970d953 [https://perma.cc/2LZU-XDDJ].

²² See Devlin Barrett & Arian Campo-Flores, *Investigators See Radicalization in Chattanooga Shooter*, WALL STREET J. (July 21, 2015), <https://www.wsj.com/articles/investigators-see-radicalization-in-chattanooga-gunman-1437510290> [https://perma.cc/4UHS-PK7T].

²³ See Adam Goldman et al., *FBI Had Closely Scrutinized the Orlando Shooter Before Dropping Investigation*, WASH. POST (June 13, 2016), https://www.washingtonpost.com/world/national-security/fbi-had-closely-scrutinized-the-orlando-shooter-before-dropping-investigation/2016/06/13/838e9054-3177-11e6-8ff7-7b6c1998b7a0_story.html [https://perma.cc/57YH-M4LZ].

²⁴ See Mitch Smith & Richard Pérez-Peña, *Ohio State Attacker May Have Been Inspired by Al Qaeda, F.B.I. Says*, N.Y. TIMES (Nov. 30, 2016), <https://www.nytimes.com/2016/11/30/us/ohio-state-university-attack-abdul-razak-ali-artan.html> [https://perma.cc/XRA7-RRBB].

²⁵ See Ellen Nakashima et al., *Ahmad Rahami, Suspected New York Bomber, Cited al-Qaeda and ISIS, Officials Say*, WASH. POST (Sept. 21, 2016), https://www.washingtonpost.com/news/post-nation/wp/2016/09/20/new-york-bombing-suspect-charged-with-using-weapons-of-mass-destruction/?utm_term=.60abb66c36d9 [https://perma.cc/R8VT-4BUF].

²⁶ See *e.g.*, Shane, *supra* note 19.

abstract, to go to war with perceived enemies of Islam.²⁷ For example, in one video, Awlaki stated: “Don’t consult with anyone in the killing of Americans. Fighting the devil doesn’t require consultation or prayers seeking divine guidance. They are the party of the devils. Fighting them is what is called for at this time. We have reached a point where it is either us or them.”²⁸ In other videos, Awlaki “explain[ed] why you should never trust a non-Muslim; how the United States is at war with Islam; [and] why Nidal Hasan, who fatally shot 13 people at Fort Hood, and Umar Farouk Abdulmutallab, who tried to blow up an airliner over Detroit, were heroes.”²⁹ As Alexander Tsesis observed, “al-Awlaki’s videos typically do not call for specific or immediate violence but speak of the perceived enemies of Islam in dehumanizing terms and justify killing them whenever necessary.”³⁰

Many of these videos quickly found their way to popular streaming sites. In August 2017, a search for “Anwar al-Awlaki” on YouTube yielded over seventy thousand results,³¹ and as the New York Times reported, “[t]he number of videos on YouTube presenting or celebrating his work more than doubled from 2014 to 2017, even as investigators found his decisive influence in most of the major terrorist attacks in the United States and some in Europe.”³² Indeed, up until 2016, Awlaki’s “Call to Jihad”—a talk that explicitly “call[ed] on Western Muslims to join the jihad in the Middle East or carry out attacks at home”—was easily accessible on YouTube.³³

Through these online materials, Awlaki served as a driving force in the now familiar radicalization narrative. In the aftermath of radical Islamist terrorist attacks or attempts, it has become nearly inevitable that investigation would ultimately reveal the substantial role that Awlaki’s teachings played in the attacker’s path to radicalization. This was the case with respect to, for example, Roshonara Choudhry (who stabbed British MP

²⁷ See Robert Mackey, *Anwar al-Awlaki in His Own Words*, GUARDIAN (Sept. 30, 2011), <https://www.theguardian.com/world/2011/sep/30/anwar-al-awlaki-video-blogs> [<https://perma.cc/7V2W-TJWE>].

²⁸ *Obama Hails al-Awlaki Death as ‘Significant Milestone’ in al-Qaida Fight*, PBS NEWS HOUR (Sept. 30, 2011), <https://www.pbs.org/newshour/show/obama-hails-al-awlaki-death-as-significant-milestone-in-al-qaida-fight> [<https://perma.cc/QB8P-QGG7>].

²⁹ See Shane, *supra* note 19.

³⁰ Alexander Tsesis, *Inflammatory Speech: Offense Versus Incitement*, 97 MINN. L. REV. 1145, 1169–70 (2013).

³¹ *Fast Facts: Anwar al-Awlaki on YouTube*, COUNTER EXTREMISM PROJECT, <https://www.counterextremism.com/anwar-al-awlaki-youtube> [<https://perma.cc/S28F-E7XS>].

³² Scott Shane, *In ‘Watershed Moment,’ YouTube Blocks Extremist Cleric’s Message*, N.Y. TIMES (Nov. 12, 2017), <https://www.nytimes.com/2017/11/12/us/politics/youtube-terrorism-anwar-al-awlaki.html> [<https://perma.cc/KUS6-CH2D>].

³³ *Id.*

Stephen Timms);³⁴ Dzhokhar Tsarnaev (the Boston Marathon bomber),³⁵ Omar Mateen (the Orlando nightclub shooter),³⁶ and Rizwan Farook (one of the San Bernardino shooters).³⁷ According to a United States counterterrorism official, “If you were to look at people who had committed acts of terrorism or had been arrested and you took a poll, you’d find that the majority of them had some kind of exposure to Awlaki.”³⁸

The efficacy of this sort of broad terrorist advocacy is strongly tied to the use of social media. Extremists of all stripes, ranging from ISIS to alt-right extremists, have relied heavily on social media platforms such as Facebook and Twitter to disseminate terrorist advocacy and recruit people to their causes. An ISIS recruit, for example, described his initial involvement with the organization as interactions through Tumblr, Facebook, and Instagram,³⁹ and some Twitter accounts linked to ISIS “half-jokingly put the location on their profile as ‘Wilayat Twitter,’ or ‘the province of Twitter.’”⁴⁰ And such online radicalization need not occur under the direct management of a discrete organization. An examination of the social media history of Cesar Sayoc Jr.—who was charged with sending pipe bombs to a number of President Trump’s critics in 2018—revealed a rapid transition from typical and unremarkable activity up to 2016 to increasingly obsessive and frequent posts and links regarding right-wing conspiracy theories leading up to the attacks.⁴¹ Indeed, the prominent role of social media in breeding dangerous

³⁴ In a police interrogation, Choudhry stated that she downloaded and watched “[m]ore than a hundred hours” of Awlaki’s lectures, that she learned from his lectures that Muslims “shouldn’t allow the people who oppress us to get away with it,” and that this caused her to carry out her attack. See Dodd, *supra* note 16.

³⁵ See Shane, *supra* note 19.

³⁶ See Goldman et al., *supra* note 23.

³⁷ See Greg Miller, *Al-Qaeda Figure Seen as Key Inspiration for San Bernardino Attacker*, WASH. POST (Dec. 18, 2015), https://www.washingtonpost.com/world/national-security/al-qaeda-figure-seen-as-key-inspiration-for-san-bernardino-attacker/2015/12/18/f0e00d80-a5a0-11e5-9c4e-be37f66848bb_story.html?utm_term=.fe303970d953 [<https://perma.cc/8W97-BMBK>] (describing how Farook “immersed [himself] in Awlaki’s teachings for years”).

³⁸ Josh Meyer, *Anwar al-Awlaki: The Radical Cleric Inspiring Terror from Beyond the Grave*, NBC NEWS (Sept. 21, 2016, 7:01 AM), <http://www.nbcnews.com/news/us-news/anwar-al-awlaki-radical-cleric-inspiring-terror-beyond-grave-n651296> [<https://perma.cc/PD2B-T2SN>]; see also Shane, *supra* note 19 (reporting that discoveries of Awlaki’s influence “have become routine,” holding true “in dozens of cases”).

³⁹ *Chapter 2: Recruitment*, N.Y. TIMES: CALIPHATE (Sept. 20, 2018), <https://nyti.ms/2NsfkHl> [<https://perma.cc/98SZ-GMG3>].

⁴⁰ Mike Isaac, *Twitter Steps Up Efforts to Thwart Terrorists’ Tweets*, N.Y. TIMES (Feb. 5, 2016), <https://nyti.ms/1miAODK> [<https://perma.cc/E7UT-N9P8>].

⁴¹ See Kevin Roose, *Cesar Sayoc’s Path on Social Media: From Food Photos to Partisan Fury*, N.Y. TIMES (Oct. 27, 2018), <https://nyti.ms/2JjgXSr> [<https://perma.cc/JB6M-4XE3>].

extremism has led to a major crackdown on terrorist advocacy by Twitter, Facebook, and YouTube over the past few years.⁴²

Despite the violence that has resulted from such advocacy, however, current First Amendment doctrine significantly limits the government's ability to regulate it. The government has substantial freedom to regulate speech based on its content only when that speech falls within one of the designated categories of low-value speech,⁴³ and under *Brandenburg*,⁴⁴ the government can regulate dangerous advocacy only when it is "directed to inciting or producing imminent lawless action and is likely to incite or produce such action."⁴⁵

Most terrorist advocacy, however, would not fall within the stringent *Brandenburg* standard. Take, for example, Awlaki's abstract exhortation regarding the "killing of Americans" quoted above. Even if one were to assume that the speech would likely produce lawless action in the abstract, any such action is highly unlikely to be "imminent" under the Court's strict reading of that

⁴² See, e.g., *Twitter Suspended 166,153 Accounts for Terrorism Content in Second Half 2018*, REUTERS (May 9, 2019, 9:41 AM), <https://www.reuters.com/article/us-twitter-security/twitter-suspended-166153-accounts-for-terrorism-content-in-second-half-2018-idUSKCN1SF1LN> [<https://perma.cc/VH9Q-ARSC>] (describing Twitter's efforts to remove extremist content from its platform); Mike Isaac & Kevin Roose, *Facebook Bars Alex Jones, Louis Farrakhan, and Others From Its Services*, N.Y. TIMES (May 2, 2019), <https://www.nytimes.com/2019/05/02/technology/facebook-alex-jones-louis-farrakhan-ban.html> [<https://perma.cc/4ENH-3YZT>] (describing Facebook's decision to bar a number of extremists from its platform); Shane, *supra* note 32 (describing YouTube's decision to "drastically reduce[] its video archive" of Anwar al-Awlaki).

⁴³ See, e.g., *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem.").

⁴⁴ Other potentially relevant categories of low-value speech may include true threats, which the Court has defined as "statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals," *Virginia v. Black*, 538 U.S. 343, 359 (2003), and speech integral to criminal conduct, such as aiding and abetting a crime. See *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949).

⁴⁵ *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (per curiam). *Brandenburg* is generally read as a categorical rejection of the Court's previous approach to dangerous advocacy, replacing that more deferential approach with a highly speech-protective blanket rule. See, e.g., HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA 232 (1988) (calling *Brandenburg* "the perfect ending to a long story"); Thomas Healy, *Brandenburg in a Time of Terror*, 84 NOTRE DAME L. REV. 655, 657 (2009) ("[T]he *Brandenburg* test has provided the governing standard in this area for four decades and is often hailed as the final word on the government's power to restrict criminal advocacy."). As scholars have noted, however, the Court never technically overruled many of those earlier, more deferential cases, thus potentially leaving courts some room to depart from *Brandenburg* in certain cases. See, e.g., Ronald K.L. Collins & David M. Skover, *What is War?: Reflections on Free Speech in "Wartime,"* 36 RUTGERS L.J. 833, 849 (2005) (observing that "*Schenck* and its offspring remain binding law" and that "*Brandenburg* is readily distinguishable" because "it did not involve a prosecution for speech that interfered with war efforts"); Healy, *supra*, at 660 (observing that *Brandenburg* does not make clear "whether it applies during war as well as peace, or whether it overrules the Cold War case of *Dennis v. United States*").

requirement. Rather, the statement is, at worst, “advocacy of illegal action at some indefinite future time.”⁴⁶ And the Court has made clear that this sort of abstract advocacy of lawless action⁴⁷ is entitled to full protection under the First Amendment,⁴⁸ such that any content-based restrictions on the speech are evaluated under strict scrutiny—an onerous standard of review that, at least in the free speech context, effectively preordains a finding of unconstitutionality.⁴⁹ Thus, in practical terms, the First Amendment broadly prohibits the government from regulating online terrorist advocacy based on its content.

II. *CARPENTER V. UNITED STATES* AND THE QUESTION OF DOCTRINAL OBSOLESCENCE

The increase of terrorist attacks rooted in online terrorist advocacy, however, has led a number of scholars in recent years to propose adjustments to the highly stringent *Brandenburg* standard. Many of these arguments revolve around the same fundamental premise: that the *Brandenburg* standard is a relic of a bygone era, one that is ill-suited for our present world of the internet and social media.⁵⁰ In other words, they contend that

⁴⁶ *Hess v. Indiana*, 414 U.S. 105, 107–09 (1973) (per curiam) (finding no imminence when defendant, at an anti-war protest, stated, “We’ll take the fucking street later,” or “We’ll take the fucking street again,” since “at worst, [the speech] amounted to nothing more than advocacy of illegal action at some indefinite future time”); see also Alexander Tsesis, *Terrorist Speech on Social Media*, 70 VAND. L. REV. 651, 667 (2017) (“The incitement doctrine applies only to imminently dangerous statements and is hence of limited value to combat internet terrorist incitement.”). The statement also would not likely qualify as a true threat, as the speaker is not directly threatening a specific person or group, but merely calling for others to take up violent action in the abstract. See Lyrissa Barnett Lidsky, *Incendiary Speech and Social Media*, 44 TEX. TECH. L. REV. 147, 158 (2011). Nor would it be sufficiently specific to constitute speech integral to criminal conduct, like aiding and abetting a crime. Cf. *Rice v. Paladin Enters., Inc.*, 128 F.3d 233, 248–50 (4th Cir. 1997) (deeming the defendant’s book unprotected speech because it “aided and abetted the murders at issue through the quintessential speech act of providing step-by-step instructions for murder (replete with photographs, diagrams, and narration) so comprehensive and detailed that it is as if the instructor were literally present with the would-be murderer”).

⁴⁷ As the *Brandenburg* Court itself stated, “[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.” *Brandenburg*, 395 U.S. at 448 (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961)).

⁴⁸ See, e.g., *Texas v. Johnson*, 491 U.S. 397, 419 (1989); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring).

⁴⁹ See Richard H. Fallon, Jr., *Strict Judicial Scrutiny*, 54 UCLA L. REV. 1267, 1313 (2007) (“In free speech cases, the Supreme Court most commonly applies a version of strict scrutiny that is ‘strict’ in theory and fatal in fact.” (internal quotation marks omitted)).

⁵⁰ To be sure, this is not the only basis upon which scholars have challenged the viability of *Brandenburg* as applied to online terrorist advocacy. Many have also based their arguments on national security exceptionalism—the idea that “courts show more deference to the state, and are correspondingly less protective of civil liberties, during times of war or other national security crises.” Alan K. Chen, *Free Speech and the Confluence of*

the broad *Brandenburg* standard has been rendered obsolete by intervening technological changes, and some sort of doctrinal adjustment is necessary to give the government the appropriate flexibility to regulate under these changed conditions.⁵¹

In this Part, I will delve into these arguments in detail. But before doing so, I will take a brief detour to discuss the Court's recent landmark decision in *Carpenter v. United States*—a Fourth Amendment case that similarly dealt with the potential conflict between longstanding constitutional rights doctrine and technological change. A close examination of *Carpenter* helps to frame the central theoretical debate underlying *Brandenburg's* continued viability, and it illuminates the various pivot points around which the debate rests.

A. *The Court's Decision in Carpenter*

In *Carpenter*, the Court confronted a Fourth Amendment challenge to the government's use of cell-site location information (CSLI)—in essence, location data produced by modern cell phones constantly pinging nearby cell towers.⁵² As the Court noted, cell phones “tap into the wireless network several times a minute whenever their signal is on, even if the owner is not using one of the phone's features.”⁵³ Furthermore, “[w]ireless carriers collect and store CSLI for their own business purposes,” and they also sell aggregated CSLI data to data brokers.⁵⁴ The Court observed that given the current density of cell sites, CSLI data may be capable of “pinpoint[ing] a phone's location within 50 meters.”⁵⁵ In *Carpenter*, the government had obtained historical CSLI records of Timothy Carpenter's cell phone without a warrant, and using these records, it established at trial that Carpenter was at the scene of four separate robberies at the time they occurred, leading to his conviction.⁵⁶

As the Court observed, the background law revolved around two different sets of cases. First, in *United States v.*

National Security and Internet Exceptionalism, 86 FORDHAM L. REV. 379, 386 (2017); see also *id.* at 386-91 (describing different scholarly arguments based on this premise).

⁵¹ Although my focus here is on arguments made specifically in response to the recent rise of high-profile terrorist attacks, versions of these arguments have been made dating back to the early days of the internet. See generally Alexander Tsesis, *Prohibiting Incitement on the Internet*, 7 VA. J.L. & TECH. 5 (2002); Scott Hammack, Note, *The Internet Loophole: Why Threatening Speech On-Line Requires a Modification of the Courts' Approach to True Threats and Incitement*, 36 COLUM. J.L. & SOC. PROBS. 65 (2002).

⁵² *Carpenter v. United States*, 138 S. Ct. 2206, 2211 (2018).

⁵³ *Id.*

⁵⁴ *Id.* at 2212.

⁵⁵ *Id.* at 2219.

⁵⁶ *Id.* at 2212-13.

*Knotts*⁵⁷—a case dealing with tracking “beepers” used to help police follow vehicles through traffic⁵⁸—the Court held that “[a] person traveling in an automobile on public thoroughfares has no reasonable expectation of privacy in his movements from one place to another.”⁵⁹ The Court reasoned that any person traveling on public thoroughfares could be observed and followed by any member of the public; as such, she has “voluntarily conveyed” her location and movement “to anyone who wanted to look.”⁶⁰

Second, the Court had long adhered to the principle that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties.”⁶¹ The Court had applied this third-party doctrine in finding no Fourth Amendment violations with respect to warrantless acquisitions of a defendant’s bank records (in *United States v. Miller*)⁶² or a log of his outgoing phone calls made from his home phone (in *Smith v. Maryland*).⁶³ In both cases, the Court held that the defendant—having voluntarily conveyed the information to a third party (the bank and the phone company, respectively)—assumed the risk that the business records retained by the companies would be shared with the police.⁶⁴

Setting aside longstanding debates regarding the wisdom of these doctrinal principles,⁶⁵ both of them—at least on their face—clearly apply to CSLI records. Just as a person making a bank transaction is voluntarily conveying the information to bank employees, any person using a cell phone is voluntarily conveying CSLI information to the wireless provider.⁶⁶ And just

⁵⁷ *United States v. Knotts*, 460 U.S. 276 (1983).

⁵⁸ *Id.* at 277. The “beeper” in question was a “radio transmitter . . . which emit[ted] periodic signals that [could] be picked up by a radio receiver.” *Id.* The facts of *Knotts* made clear that the transmitter had a limited geographic range, as the pursuing officers at one point lost its signal before picking it up again an hour later. *See id.* at 278.

⁵⁹ *Id.* at 281.

⁶⁰ *Id.* at 281–82.

⁶¹ *Carpenter*, 138 S. Ct. at 2216 (quoting *Smith v. Maryland*, 442 U.S. 735, 743–44 (1979)).

⁶² *United States v. Miller*, 425 U.S. 435 (1976).

⁶³ *Smith v. Maryland*, 442 U.S. 735 (1979).

⁶⁴ *Miller*, 425 U.S. at 442–43; *Smith*, 442 U.S. at 745–46.

⁶⁵ As Orin Kerr observed, “The third-party doctrine is the Fourth Amendment rule scholars love to hate. It is the *Lochner* of search and seizure law, widely criticized as profoundly misguided.” Orin S. Kerr, *The Case for the Third-Party Doctrine*, 107 MICH. L. REV. 561, 563 (2009) (footnotes omitted); *see also id.* at 563 n.5 (“A list of every article or book that has criticized the doctrine would make this the world’s longest law review footnote.”).

⁶⁶ The *Carpenter* Court distinguished the sort of “voluntary exposure” involved in CSLI data collection. It argued that phone users do not voluntarily assume the risk of exposing comprehensive CSLI data in any “meaningful sense,” given that the use of cell phone services “is indispensable to participation in modern society” and that “a cell phone logs a cell-site record by dint of its operation, without any affirmative act on the part of the user beyond powering up.” *Carpenter*, 138 S. Ct. at 2220 (citation omitted). But in doing so, the Court effectively signaled a shift in the doctrine rather than apply the existing doctrine

as a person has no privacy interest in the bank's own business records logging such transactions, neither does she have a privacy interest in the CSLI records kept for business purposes by cell phone providers. Furthermore—at least to the extent that the CSLI data is used to track the suspect's movements on public thoroughfares—she cannot be deemed to have a reasonable expectation of privacy, as she can be freely observed and followed by anyone on such thoroughfares.

But the technological gap between the relatively crude beeper in *Knotts* and the CSLI-based tracking in *Carpenter* (or the GPS tracking in *United States v. Jones*⁶⁷) is substantial. The beeper used in *Knotts* ultimately provided the police with only incremental benefits in physically tracking a vehicle on public thoroughfares, as it still required the police to physically follow the vehicle in order to stay within range of the beeper's signal.⁶⁸ Thus, *Knotts* still largely left intact what Justice Alito described as the “greatest protection[] of privacy” in this circumstance: the practical cost of constant physical monitoring of a vehicle (through police stakeouts, helicopters, and so forth).⁶⁹

By contrast, GPS trackers and CSLI data “make long-term monitoring relatively easy and cheap,” eliminating the primary practical barrier to extensive and long-running location tracking.⁷⁰ Police need not follow a vehicle equipped with a GPS tracker, or physically observe where the suspect is carrying his phone; rather, GPS and CSLI tracking are relatively costless, fully automated, and exhaustive in nature.

Furthermore, the sheer breadth of the information available from CSLI records or GPS tracking goes well beyond that available from bank records or pen registers. Each can potentially provide a detailed and exhaustive log of a person's physical location over a span of years, and as the *Carpenter* Court noted, “There is a world of difference between the limited

in a straightforward manner; as Kerr observed, the Court framed its voluntariness analysis as a normative judgment premised on whether the voluntariness in question was “meaningful” rather than as a simple question of fact. Orin S. Kerr, *Implementing Carpenter*, in *THE DIGITAL FOURTH AMENDMENT* (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3301257.

⁶⁷ In *Jones*, which was decided before *Carpenter*, the Court deemed unconstitutional the police's use of a GPS tracking device to monitor the location of the defendant's vehicle over a 28-day span. *United States v. Jones*, 565 U.S. 400, 403 (2012). The Court premised its holding specifically on the government's physical trespass on Jones's car, sidestepping the question of whether the tracking itself violated his reasonable expectation of privacy. *Id.* at 410–13. In separate opinions, however, five Justices appeared to agree that long-term GPS tracking does violate a person's reasonable expectation of privacy. *See id.* at 415 (Sotomayor, J., concurring); *id.* at 430–31 (Alito, J., concurring).

⁶⁸ *See United States v. Knotts*, 460 U.S. 276, 278 (1983).

⁶⁹ *Jones*, 565 U.S. at 429 (Alito, J., concurring).

⁷⁰ *Id.*

types of personal information addressed in *Smith* and *Miller* and the exhaustive chronicle of location information casually collected by wireless carriers today.”⁷¹

Carpenter therefore centered on the disconnect between significant technological change on the one hand and longstanding constitutional rights doctrine on the other. The third-party doctrine was developed in a world of crude tracking beepers, bank records, and pen registers. But the emergence of GPS and CSLI tracking technology radically altered the preexisting balance between individual rights and the government’s freedom to act, as it allowed the government to obtain incredibly accurate, exhaustive, and detailed location data—data containing far more intimate information than mere bank records or pen registers—over a long period of time, at minimal cost. In this manner, technology radically enhanced the government’s capacity to intrude into individuals’ private lives to a degree that was unthinkable when the preexisting doctrinal framework was developed.

So what is a court to do under these circumstances? This scenario ultimately forces courts to confront and clarify the fundamental nature of the right in question. On the one hand, the right—as reflected in constitutional doctrine—may be conceptualized as capturing a particular preestablished, instrumental equilibrium between individual interests and state interests. On this view, if technological change were to throw off this equilibrium in some significant way, the court is free to adopt doctrinal adjustments to recapture the “correct” instrumental balance. On the other hand, the right—and the doctrine reflecting the right—may be conceptualized as resting on a set of fundamental principles that continue to apply regardless of any radical changes to this balance (whether technologically based or otherwise).

The former view reflects a dynamic that Orin Kerr, in the Fourth Amendment context, has called the “equilibrium-adjustment” approach to social and technological change.⁷² As Kerr describes this approach, “When new tools and new practices threaten to expand or contract police power in a significant way, courts adjust the level of Fourth Amendment protection to try to restore the prior equilibrium.”⁷³ In other words, courts continuously modify constitutional rights doctrine as a “correction mechanism” to account for fundamental changes to the existing balance between government power and

⁷¹ *Carpenter*, 138 S. Ct. at 2219.

⁷² See Orin S. Kerr, *An Equilibrium-Adjustment Theory of the Fourth Amendment*, 125 HARV. L. REV. 476, 480 (2011).

⁷³ *Id.*

individual rights.⁷⁴ Technological change may render the existing doctrinal framework obsolete, and it is up to the courts to update it accordingly.

The *Carpenter* Court clearly adopted this equilibrium-adjustment approach to technological change. In outlining the contours of the Fourth Amendment right, the Court highlighted the “historical understandings of what was deemed an unreasonable search and seizure when [the Fourth Amendment] was adopted,” indicating that “a central aim of the Framers was to place obstacles in the way of a too permeating police surveillance.”⁷⁵ Thus, “[a]s technology has enhanced the Government’s capacity to encroach upon areas normally guarded from inquisitive eyes, this Court has sought to assure[] preservation of that degree of privacy against government that existed when the Fourth Amendment was adopted.”⁷⁶

As such—despite the fact that the government’s acquisition of CSLI data quite comfortably fit within the principles set forth in *Knotts* and the third-party doctrine as developed in *Miller* and *Smith*—the Court deemed it a search for Fourth Amendment purposes, stating:

[W]hile the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person’s movements.

We decline to extend *Smith* and *Miller* to cover these novel circumstances.⁷⁷

The Court therefore made clear that despite appearances to the contrary, the third-party doctrine—that “a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties”⁷⁸—is not, in fact, a fundamental statement of principle. Rather, it is merely shorthand for a balancing judgment calibrated for a particular set of technological and social conditions—a world of beepers and pen registers rather than GPS tracking and CSLI data.

⁷⁴ *Id.*

⁷⁵ *Carpenter*, 138 S. Ct. at 2214 (alteration in original) (internal quotation marks omitted) (first quoting *Carroll v. United States*, 276 U.S. 132, 149 (1925); and then quoting *United States v. Di Re*, 332 U.S. 581, 598 (1948)).

⁷⁶ *Id.* (alteration in original) (internal quotation marks omitted) (quoting *Kyllo v. United States*, 533 U.S. 27, 34 (2001)).

⁷⁷ *Id.* at 2216–17.

⁷⁸ *Id.* at 2216.

Thus, at least in the context of CSLI, the Court viewed the preexisting doctrine as capturing a particular equilibrium between individual privacy and the state's freedom to act. When technological change undermines the empirical premises and assumptions underlying the existing doctrinal framework, the doctrine is rendered obsolete and must be adjusted to account for that change. In other words, the Fourth Amendment envisions a particular equilibrium between government intrusion and individual privacy, leaving courts free to adjust even longstanding doctrinal principles and frameworks to account for any alterations of the balance caused by technological change.⁷⁹

Courts, however, need not take this instrumental, equilibrium-based approach when confronted with the challenges posed by technological change on constitutional rights. They could instead conceptualize the doctrinal framework as reflecting broad, concrete principles that are fundamentally tied to the underlying right itself: principles that—given the very nature of the right—must continue to apply regardless of any changed conditions wrought by technology.

Justice Kennedy advocated this approach in his *Carpenter* dissent.⁸⁰ In his view, the Court should have construed the third-party doctrine as a broadly applicable principle—inherent to the nature of privacy itself—that defendants simply do not retain any reasonable expectation of privacy in information shared with third parties (and specifically, in any business records developed and owned by third parties).⁸¹ In other words, the third-party doctrine must fundamentally follow from *any* meaningful conception of privacy: it is simply nonsensical to state that someone could have a reasonable expectation of privacy in information voluntarily turned over to third parties. Thus, the significant technological changes in question are of no import, and there is no instrumental balance to recalibrate, because to contradict the third-party principle is to contradict any reasonable conception of privacy itself.

To be clear, the dynamic at play in cases like *Carpenter* is not a simple binary question of whether courts have adopted an equilibrium-adjustment view versus an absolute-principle view of constitutional rights doctrine when faced with technological change. Rather, the pure equilibrium-adjustment view and the

⁷⁹ See Kerr, *supra* note 72, at 481–82 (“Equilibrium-adjustment maintains fidelity to the Fourth Amendment in the face of rapid change by allowing judges to maintain the balance struck by the Fourth Amendment.”).

⁸⁰ Justice Kennedy's dissent was joined by Justice Thomas and Justice Alito. *Carpenter*, 138 S. Ct. at 2223 (Kennedy J., dissenting).

⁸¹ See *id.* at 2228–30.

pure absolute-principle view of the doctrine represent extremes on either end of a spectrum, and the more precise question is where courts fall (or should fall) along that spectrum.

To say that established doctrinal principles must be viewed instrumentally to account for technological changes is not to say that doctrine must *always* be modified in the face of every such change. There is substantial cost associated with unsettling broad doctrinal principles like the third-party doctrine: it injects complexity and open-endedness into the doctrine, which produces uncertainty amongst state and private actors, reduces administrability, and opens the door to potentially worrisome judicial discretion.⁸² So to the extent that the equilibrium alteration produced by technological development is not sufficiently severe to justify these associated costs, courts are better off adhering to existing doctrinal principles, even if this leads to a somewhat altered balance between individual and governmental interests.

Similarly, even the most fundamental principles within constitutional rights jurisprudence have their practical limits. The clearest example of this is the Court's use of strict scrutiny in its constitutional rights doctrine, which effectively acts as a safety valve to account for highly exceptional circumstances within which even core constitutional rights must yield.⁸³ At a certain point, changed technological conditions may alter the balance between individual and state interests to such an extent that existing doctrinal principles are rendered effectively meaningless.

B. *A New Incitement Standard for the Digital Age?*

With this framework in mind, what exactly is the fundamental nature of the *Brandenburg* test? It might be conceptualized in instrumental terms, similar to the *Carpenter* Court's treatment of the third-party doctrine. Perhaps *Brandenburg* simply captures the desired balance between the value of unfettered speech on the one hand and the potential harms associated with such speech on the other. As such, it ultimately represents a simple judgment that the actual and potential harm of dangerous advocacy short of the *Brandenburg* standard is insufficient to outweigh the broad value of such speech. To be sure, speech falling short of the standard might still cause riots, vandalism, or other illegal acts—but the Court has made the judgment that when the standard is not

⁸² See David S. Han, *Transparency in First Amendment Doctrine*, 65 EMORY L.J. 359, 367–70 (2015) (describing the rules-versus-standards dynamic in First Amendment doctrine).

⁸³ See Ashutosh Bhagwat, *Hard Cases and the (D)Evolution of Constitutional Doctrine*, 30 CONN. L. REV. 961, 961–62 (1998).

met, the probability and magnitude of this harm is broadly insufficient to trump the benefits associated with individuals' freedom to speak freely.

If viewed in this manner, one might reasonably argue that the *Brandenburg* standard is ripe for equilibrium adjustment. When *Brandenburg* was decided in 1969, the paradigmatic instances of dangerous advocacy the Court likely had in mind were public rallies or the physical distribution of leaflets.⁸⁴ Under these conditions, the Court might have simply made the pragmatic judgment that given the potential reach of dangerous advocacy through such means—which are, by nature, constrained by physical limitations—the likelihood of significant harm resulting from such advocacy is sufficiently low, and the value associated with protecting speech sufficiently high, that constitutional protection is justified.⁸⁵

Today's world, however, is fundamentally different from the world of 1969. Most significantly, the advent of the internet and social media⁸⁶ means that speakers currently have the ability to communicate dangerous advocacy cheaply to countless listeners around the world over an indefinite span of time, as opposed to the limited number of people who happen to be within the speaker's physical proximity at that specific moment in time.⁸⁷ According to YouTube, "Over 2 billion logged-in users visit [the site] each month[,] and every day people watch over a billion hours of video and

⁸⁴ See *supra* text accompanying note 8.

⁸⁵ Or, perhaps, the *Brandenburg* Court did not consider these sorts of instrumental questions at all, since in the world of 1969, the degree of expected harm caused by advocacy short of incitement was sufficiently low that the Court had no real need to distinguish between instrumental and principle-based justifications for the doctrinal test.

⁸⁶ Some scholars have framed these arguments in terms of "internet exceptionalism," which Alan Chen describes as "the idea that courts may create new First Amendment rules to reflect the 'newness' of digital communication platforms because of concerns that the internet has fundamentally transformed human communication in ways that previous generations of doctrine do not adequately accommodate." Chen, *supra* note 50, at 385–86; see also Mark Tushnet, *Internet Exceptionalism: An Overview from General Constitutional Law*, 56 WM. & MARY L. REV. 1637, 1638 (2015) (describing "First Amendment Internet exceptionalism" as a "way to refer to the question of whether the technological characteristics of the Internet . . . justify treating regulation of information dissemination through the Internet differently from regulation of such dissemination through nineteenth- and twentieth-century media, such as print, radio, and television").

⁸⁷ See Tushnet, *supra* note 86, at 1651–58; Hammack, *supra* note 51, at 81 ("Before the Internet, it was difficult for a speaker's message to spread throughout a small community, much less to the rest of the world. Now, the same message posted on a web page is available twenty-four hours a day, seven days a week in almost any country in the world."). As discussed above, while the audience-expanding potential of technologies like broadcast television was understood in 1969, such technologies are a far cry from the expansive reach and minimal cost associated with speech disseminated over the internet. See *supra* text accompanying note 9.

generate billions of views.”⁸⁸ Furthermore, one estimate of worldwide social media users places the number at 2.8 billion,⁸⁹ and according to the Pew Research Center, seventy-two percent of adults in the United States use at least one social media site.⁹⁰ Thus, as Cass Sunstein observed, the internet and social media “can dramatically amplify the capacity of speech in one place to cause violence elsewhere at some uncertain time.”⁹¹ In purely instrumental terms, if we assume that dangerous advocacy will generally produce an X% chance that a listener will undertake harmful action, then the capacity to disseminate such advocacy to millions rather than hundreds of people would mean that the likelihood of such resultant harmful action is multiplied accordingly.⁹²

The internet and social media may alter the preexisting equilibrium in another way: through the establishment of echo chamber effects that magnify the power of dangerous advocacy to produce harmful action.⁹³ As many have observed, the internet in general—and particularly social media platforms like Facebook and Twitter—have enabled people to insulate themselves within a cocoon of like-minded online users, news sources, and commentary that share and reinforce their ideological views, at a scope and to a degree far beyond what could have been contemplated in 1969.⁹⁴

⁸⁸ *YouTube for Press*, YOUTUBE, <https://www.youtube.com/yt/about/press/> [<https://perma.cc/KFN2-88W8>].

⁸⁹ eMarketer, *Number of Social Network Users Worldwide from 2010 to 2021 (in Billions)*, STATISTA, <https://www.statista.com/statistics/278414/number-of-worldwide-social-network-users/> [<https://perma.cc/3K8U-PBBF>].

⁹⁰ *Social Media Fact Sheet*, PEW RES. CTR. (June 12, 2019), <https://www.pewinternet.org/fact-sheet/social-media/> [<https://perma.cc/6RSH-FT6M>]. This number increases to eighty-two percent for adults aged 30-49 and ninety percent for those aged 18-29. *Id.*

⁹¹ Cass R. Sunstein, *Islamic State’s Challenge to Free Speech*, BLOOMBERG (Nov. 23, 2015, 12:38 PM), <https://www.bloomberg.com/view/articles/2015-11-23/islamic-state-s-challenge-to-free-speech> [<https://perma.cc/HV6A-PM6F>].

⁹² See Cass R. Sunstein, *Constitutional Caution*, 1996 U. CHI. LEGAL F. 361, 370 (observing that “[w]hen messages advocating murderous violence are sent to large numbers of people, it is possible to think that the *Brandenburg* calculus changes”); Tushnet, *supra* note 86, at 1653 (“Internet exceptionalism would allow legislatures to make the judgment that the substantially larger audience available for communications over the Internet increases otherwise acceptable levels of risk beyond a tolerable threshold.”). As Tushnet notes, however, the increased size and accessibility of the audience can cut both ways in the calculus, as it might also increase the social harm produced by suppressing the material in question. *Id.* at 1654.

⁹³ See, e.g., Posner, *supra* note 14 (“Today, the Internet makes possible the constant circulation of captivating videos, vivid images, and extremist text, creating a ‘radicalization echo chamber.’”).

⁹⁴ See, e.g., CASS R. SUNSTEIN, #REPUBLIC: DIVIDED DEMOCRACY IN THE AGE OF SOCIAL MEDIA 2–5 (2017); Hammack, *supra* note 51, at 82–83 (observing that “the Internet . . . facilitates the creation of networks of like-minded persons to help carry out threats” and that it can provide “social structure” that encourages people “to perform violent actions, mostly by making their beliefs seem more socially acceptable”).

And this echo chamber effect is not solely a function of purposeful personal curation. Automated recommendation tools on YouTube, for example, connect users to additional videos similar to what they have been watching, and YouTube will autoplay those videos immediately after the current video ends.⁹⁵ In the past, these tools have recommended lectures from Awlaki following “video[s] as innocuous as CNN[.]” news reports regarding the cleric,⁹⁶ and they “often suggested [Awlaki’s] more sinister recordings to people who watched material on Islam or sampled his history talks.”⁹⁷ Furthermore, the algorithm-based nature of social networking sites can drive users into increasingly extremist views, often unwittingly. Facebook’s automated news feed, for example, promotes content based on engagement,⁹⁸ and this conception of engagement is strongly driven by negative emotions such as tribalism, fear, and anger.⁹⁹ And both Twitter and Facebook are designed to reward users for links and posts that draw the most engagement, as each “like” and comment “delivers a little dopamine boost, training [the user] to repeat whatever behavior wins the most engagement,” regardless of whether that behavior is extremist in nature.¹⁰⁰

As such, the probability that dangerous advocacy will be neutralized by counterspeech may be substantially reduced within these echo chambers, while the probability that dangerous advocacy will blossom into harmful action (by, for example, reinforcing other dangerous advocacy within the echo chamber) may be substantially heightened. In other words, if in 1969 the likelihood that harmful action would result from dangerous advocacy was X%, that likelihood may now be 5X% given the operation of online echo chambers and the particular ways in which people today receive their news and commentary.

⁹⁵ *Autoplay Videos*, GOOGLE: YOUTUBE HELP, <https://support.google.com/youtube/answer/6327615?hl=en> [<https://perma.cc/4ZAU-5X5P>].

⁹⁶ See COUNTER EXTREMISM PROJECT, *supra* note 31.

⁹⁷ See Shane, *supra* note 32.

⁹⁸ In this context, “engagement” means “the number of interactions people have with [the] content (i.e. likes, comments, shares, retweets, etc.).” Kimberlee Morrison, *Cutting Through the Social Media Jargon: What Are Reach, Impressions and Engagement?*, ADWEEK (Sept. 17, 2015) (emphasis omitted), <https://www.adweek.com/digital/cutting-through-the-social-media-jargon-what-are-reach-impressions-and-engagement/> [<https://perma.cc/JU3V-NACD>].

⁹⁹ Max Fisher & Amanda Taub, *How Everyday Social Media Users Become Real-World Extremists*, N.Y. TIMES (Apr. 25, 2018), <https://www.nytimes.com/2018/04/25/world/asia/facebook-extremism.html> [<https://perma.cc/4SFM-8NEG>] (“Studies find that negative, primal emotions — fear, anger — draw the most engagement. So posts that provoke those emotions rise naturally. Tribalism — a universal human tendency — also draws heavy engagement.”).

¹⁰⁰ *Id.*

As a result, perhaps some wholesale rebalancing of the onerous *Brandenburg* standard is in order given the changes wrought by modern technology. Perhaps *Brandenburg* is simply obsolete doctrine that does not sensibly fit the world we currently inhabit—a standard calibrated for a world of rallies and leafletting rather than today’s world of the internet and social media. And indeed, scholars in recent years have argued for this sort of equilibrium adjustment to the doctrine. Sunstein, for example, has argued that the government should have free rein to regulate dangerous advocacy when “people are explicitly inciting violence” and “it produces a genuine risk to public safety, whether imminent or not.”¹⁰¹ Furthermore, Eric Posner has called for a law that would, among other things, criminalize “access[ing] websites that glorify, express support for, or provide encouragement for ISIS”—a law that, as Posner notes, would require significant modification of existing First Amendment doctrine to be constitutional.¹⁰²

But conceptualizing the *Brandenburg* standard in this purely instrumental manner might produce some discomfort—a discomfort rooted in the strong connection between the contours of the *Brandenburg* test and principles that are fundamental to the very concept of free speech. As the *Brandenburg* Court noted, its test reflected the cornerstone principle that advocacy—speech that produces action by *persuading* the listener—must be fully protected, while incitement—speech that produces action by short-circuiting any sort of meaningful deliberation—need not be protected.¹⁰³ And as David Strauss observed, the Court has consistently adhered to the principle that absent “extraordinary circumstances, the government may not restrict speech because it fears, however justifiably, that the speech will persuade those who hear it to do something of which the government disapproves.”¹⁰⁴

¹⁰¹ Sunstein, *supra* note 91; *see also* Lidsky, *supra* note 46, at 164 (proposing a modification to *Brandenburg*’s imminence requirement “so that it does not preclude liability for social-media incitement”).

¹⁰² Posner, *supra* note 14.

¹⁰³ *See* *Brandenburg v. Ohio*, 395 U.S. 444, 448 (1969) (per curiam) (“[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.” (quoting *Noto v. United States*, 367 U.S. 290, 297–98 (1961))); *see also* David A. Strauss, *Persuasion, Autonomy, and Freedom of Expression*, 91 COLUM. L. REV. 334, 339 (1991) (“The persuasion principle, as I have defined it, directly justifies the requirement of imminence: the risk of law violation can justify suppression of speech only if the speech brings about the violation by bypassing the rational processes of deliberation.”).

¹⁰⁴ Strauss, *supra* note 103, at 334.

This persuasion principle, as Strauss calls it,¹⁰⁵ follows naturally from the primary theoretical justifications surrounding the protection of free speech: democratic self-governance, the pursuit of truth, and individual autonomy. Democratic self-governance relies upon the open discussion and consideration of *all* ideas, whether they be deemed good or bad, dangerous or not; thus, democracy cannot flourish without the unfettered opportunity to persuade other citizens regarding issues of public concern.¹⁰⁶ Similarly, the marketplace of ideas cannot operate to identify truth unless “dangerous” ideas can be tested alongside all other ideas; persuasion is the ultimate mechanism by which the truth is identified and falsehoods discarded.¹⁰⁷ Finally, individual autonomy cannot be fully realized unless each person has the opportunity to persuade—and to be persuaded—with respect to all ideas in formulating her own personal identity and views. As Strauss argued, violations of the persuasion principle are wrong because they “involve a denial of autonomy in the sense that they interfere with a person’s control over her own reasoning processes.”¹⁰⁸

Viewed in this manner, the narrowness of the *Brandenburg* test reflects the Court’s recognition of the persuasion principle as a fundamental aspect of free speech. Its requirements reflect the Court’s attempt to identify speech that produces harm through a mechanism other than persuasion: speech that is directed and intended to incite *imminent* lawless action, and is *likely* to bring about such imminent action. Its concern is with the speaker who works a hostile crowd into a frenzy, then immediately exhorts it to burn down the building across the street—the sort of harmful speech that relies upon short-circuiting persuasion and deliberation with emotion and instinct. Thus, under this view, any attempt to institute equilibrium adjustment to extend the reach of government regulation to dangerous advocacy operating via persuasion—even if technological change has drastically amplified the social harms caused by such advocacy—is an attempt to cross a chasm that simply cannot be crossed, at least under any meaningful conception of free speech.

¹⁰⁵ *Id.*

¹⁰⁶ See ALEXANDER MEIKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 16–17, 26 (1948).

¹⁰⁷ See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) (“[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market.”); JOHN STUART MILL, ON LIBERTY 87 (David Bromwich & George Kateb eds., 2003) (1859) (arguing that the free exchange of ideas provides society with “the opportunity of exchanging error for truth”).

¹⁰⁸ Strauss, *supra* note 103, at 354.

III. SOME OBSERVATIONS REGARDING THE NATURE OF *BRANDENBURG*

So how should we conceptualize the *Brandenburg* standard? As an initial matter, neither approach appears to be formally foreclosed by the *Brandenburg* decision itself. Although the *Brandenburg* Court appeared to frame the test as a matter of fundamental principle rather than as an instrumental balance, it of course never confronted the very different technological context of today—one in which the potential harms caused by dangerous advocacy may be substantially greater than those present in the rally-and-leaflet world of 1969. Perhaps the *Brandenburg* Court would have crafted a very different doctrinal standard that better reflects these very different conditions. Or, on the other hand, perhaps the Court would have crafted the exact same standard, under the rationale that fundamental First Amendment principles require us to absorb even this significantly greater degree of harm caused by dangerous advocacy. Thus—as is typical within the realm of constitutional rights jurisprudence—how one answers this question is ultimately based on an intuitional judgment premised on a wide variety of potential factors, such as, for example, one’s general predilection for conceptualizing the First Amendment in instrumental terms rather than deontological terms (or vice-versa).

My guess, however, is that for most courts, applying this sort of instrumental, “equilibrium-adjustment” framework to the *Brandenburg* standard would bring significantly more discomfort than the *Carpenter* Court’s application of such an approach to the third-party doctrine. As such, my sense is that courts would be more likely to conceptualize the persuasion principle—as encapsulated in the *Brandenburg* standard—as fundamental to the concept of the freedom of speech in a way that the third-party doctrine is not with respect to personal privacy.¹⁰⁹

One reason for this distinction might be an overarching sense that First Amendment rights and Fourth Amendment rights are inherently different, in a manner that makes courts far more likely and willing to embrace equilibrium adjustment in the latter rather than the former. At least on its face, the First Amendment right to free speech appears absolute: “Congress shall make no law . . . abridging the freedom of speech.”¹¹⁰ By contrast, the Fourth

¹⁰⁹ As noted above, however, at least three Justices in *Carpenter* highlighted what they perceived to be the absurdity of adhering to any conception of the Fourth Amendment that would recognize a reasonable expectation of privacy in a third party’s business records. See *supra* text accompanying notes 80–81.

¹¹⁰ U.S. CONST. amend. I.

Amendment establishes constitutional protection against “*unreasonable* searches and seizures.”¹¹¹ By reference to a reasonableness standard, the Fourth Amendment’s text suggests a more pragmatic and context-sensitive approach to delineating the boundaries of the right,¹¹² as compared to the First Amendment’s blunt, unqualified delineation of the free speech right. And indeed, the Court’s rhetoric surrounding these two rights reflects this different feel to each right: discussions of free speech will often include lofty rhetoric regarding absolute principles,¹¹³ whereas in the Fourth Amendment context, the Court has tended to describe the right in terms of a pragmatic balance.¹¹⁴

Another reason might be a tendency for courts to adhere to a one-way ratchet approach, in which they may be more willing to institute equilibrium adjustments to the doctrine when technological change *expands* the scope of government intrusion upon the individual right in question, as compared to when such change *limits* the scope of such intrusion. In other words, courts might simply have an easier time ratcheting constitutional protections *up* in response to technological change rather than bringing them down. Thus, for example, the *Carpenter* Court might be far more comfortable instituting an equilibrium adjustment bolstering individuals’ privacy rights where technology (CSLI tracking) has greatly increased the government’s capacity to intrude on such privacy. But courts may be far less willing to do so in the *Brandenburg* scenario, as there is simply greater discomfort in *reducing* the protection afforded to the individual right in question to account for technological change, even if such change

¹¹¹ U.S. CONST. amend. IV (emphasis added).

¹¹² See Orin S. Kerr, *The Fourth Amendment and New Technologies: Constitutional Myths and the Case for Caution*, 102 MICH. L. REV. 801, 861 (2004) (“It is generally agreed that the general pragmatic goal of both constitutional and statutory law governing search and seizure is to create a workable and sensible balance between law enforcement needs and privacy interests.”).

¹¹³ See, e.g., *United States v. Alvarez*, 567 U.S. 709, 727 (2012) (plurality opinion) (“The remedy for speech that is false is speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straight-out lie, the simple truth.”); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (“If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.”); see also Frederick Schauer, *The First Amendment as Ideology*, 33 WM. & MARY L. REV. 853, 866 (1992) (“With numbing frequency, the same platitudes and slogans substitute for argument whenever the subject of free speech arises within those institutions dependent on free speech for their existence.”).

¹¹⁴ See, e.g., *Carroll v. United States*, 267 U.S. 132, 149 (1925) (“The Fourth Amendment is to be construed in the light of what was deemed an unreasonable search and seizure when it was adopted, and in a manner which will conserve public interests as well as the interests and rights of individual citizens.”).

has resulted in a fundamentally altered balance between individual and government interests.

That being said, even if courts were to conceptualize the persuasion principle—operationalized in the *Brandenburg* standard—as intrinsic to free speech doctrine, the practical reality is that even the most fundamental principles may yield in the face of extreme conditions. For example, if technological and social conditions were such that fifty thousand lives were being lost each year due to violent acts directly caused by dangerous online advocacy, even the most speech-friendly courts would be hard-pressed to deny the government the ability to regulate such speech directly. What a court may do in a given case, therefore, may be premised largely on its determination of whether these sorts of highly extenuating circumstances have been met, such that a broad reconsideration of even core First Amendment principles is in order.

Thus, pragmatically speaking, courts' willingness to depart from the *Brandenburg* standard will rest to a significant extent on their broad judgments regarding various difficult-to-prove empirical questions. For example, to what extent does access to a larger audience over the internet actually translate to a greater likelihood of harmful actions? One might argue that although the internet allows dangerous advocacy to reach far larger audiences than would be possible in a world of rallies and leafleting, the sheer volume of speech available over the internet also works to dilute the effect of that speech on viewers who are constantly bombarded by a multitude of varied messages (including counterspeech seeking to neutralize the advocacy in question).¹¹⁵

Other questions might include the extent to which echo chambers actually work to magnify dangerous advocacy,¹¹⁶ the extent to which a meaningful causal connection can be drawn between the abstract advocacy in question and the ultimate harmful act, and the extent to which any harms caused by broad dissemination of dangerous advocacy are outweighed by its social benefits.¹¹⁷ And necessarily tied up in these difficult judgments are broad questions of deference: how onerous should the government's

¹¹⁵ See Lynn Adelman & Jon Deitrich, *Extremist Speech and the Internet: The Continuing Importance of Brandenburg*, 4 HARV. L. & POL'Y REV. 361, 371 (2010) (“[J]ust as the internet allows a reader to access troubling content quickly and easily, he or she may obtain contrary information just as readily.”); Chen, *supra* note 50, at 394 (observing that with the advent of the internet, “[h]ateful speech is cheap and easy, but so is counterspeech”).

¹¹⁶ See Margot E. Kaminski, *Incitement to Riot in the Age of Flash Mobs*, 81 U. CIN. L. REV. 1, 78–79 (2012) (describing the academic debate surrounding the echo chamber effect of online communications).

¹¹⁷ See Tushnet, *supra* note 86, at 1654.

burden be to establish these sorts of empirical premises?¹¹⁸ Although the Court's institutional role in the First Amendment context is to check government abuse and manipulation of the marketplace of ideas,¹¹⁹ it is also poorly equipped to independently evaluate, for example, the persuasiveness of conflicting sociological studies.¹²⁰

Courts' willingness to depart from *Brandenburg* under various circumstances will also rest on broad normative judgments regarding fundamental questions of First Amendment theory and doctrine. What exactly is the value of speech under these circumstances, and how should that measure up against the substantial social harm caused by it? Under what conditions should even the strongest constitutional principles—like the extreme suspicion of any direct government regulation of public discourse—give way to pragmatic considerations? Courts' differing intuitions regarding these sorts of fundamental questions will of course greatly influence their willingness to recognize extenuating circumstances justifying a departure from the *Brandenburg* standard.

It is worth noting, however, that even if the Supreme Court were to deem such extenuating circumstances to be present in a particular case, this need not translate to wholesale adjustment of the *Brandenburg* standard. Rather, the Court might decide to carve out a case-specific exception to *Brandenburg* under a narrow application of the strict scrutiny standard.¹²¹ While this sort of narrow carve-out would still work to undermine the categorical nature of the standard, it would also telegraph the Court's intention to adhere to the *Brandenburg* standard as the broadly governing test, even within the very different technological world of today.

CONCLUSION

Evaluating the fifty-year-old *Brandenburg* standard within the present-day context yields two contradictory impulses. On the one hand, there is a natural desire to view constitutional rights doctrine as immutable and absolute—a view consistent with the broad conception of rights as rigid protections largely immune from

¹¹⁸ Cf. Chen, *supra* note 50, at 392 (questioning whether “courts may feel the need to defer to government regulation of terrorist incitement made more possible because of rapid advances in digital technologies” based on “fear generated by legal decision-makers’ lack of familiarity with such technologies”); Tushnet, *supra* note 86, at 1646–48.

¹¹⁹ See Vincent Blasi, *The Checking Value in First Amendment Theory*, 1977 AM. BAR FOUND. RES. J. 521, 527–28.

¹²⁰ See, e.g., *Brown v. Entm’t Merchs. Ass’n*, 564 U.S. 786, 855 (2011) (Breyer, J., dissenting) (“This Court has always thought it owed an elected legislature some degree of deference in respect to legislative facts . . . , particularly when they involve technical matters that are beyond our competence, and even in First Amendment cases.”).

¹²¹ See Han, *supra* note 13, at 496–98.

the vicissitudes of changing times and circumstances. On the other hand, *Brandenburg*—like all constitutional rights doctrine—is inescapably the product of its particular time and context. Thus, to ignore the broad differences between the technological conditions under which that rule originated and the internet-and social media-connected world of today might, in the end, be perpetuating an obsolete doctrinal standard that grows increasingly divorced from the actual world in which we live.

There is no easy or obvious answer to this question. As described above, one's position necessarily rests on a broad range of normative preferences and empirical judgments—matters upon which reasonable minds will certainly differ. Thus, in practical terms, perhaps the central imperative is that courts confront these sorts of questions in a deep, open, candid, and transparent manner, directly articulating, evaluating, and debating the various intuitional judgments upon which these questions rest.¹²² Whether or not we ever reach consensus as to how First Amendment doctrine should adapt in the face of significant technological change, clearly identifying and debating the fundamental bases upon which we disagree—in a deep and forthright manner—will ultimately be vital in preserving the capacity of First Amendment doctrine to evolve in a healthy manner.

¹²² See Han, *supra* note 82, at 371–79 (describing the value of analytical transparency in First Amendment doctrine).